

Office of Adjudications

IN THE MATTER OF

***:SUSPENSION OF SAFE BOATING
CERTIFICATE
DEEP # 14-003***

DAVID MULLANE

:SEPTEMBER 3, 2013

FINAL DECISION

A hearing was held on August 28, 2013 at the DEEP Headquarters in Hartford regarding the suspension of the Safe Boating Certificate of David Mullane. General Statutes §15-140q. Present were: Mr. Mullane; his attorney Edward J. Gavin; Environmental Conservation Officers Blackwell, Chickos and Williams and Timothy Delgado of the DEEP Boating Division. Testimony was offered by Officers Blackwell and Chickos and Mr. Mullane. The following exhibits were entered into the record:

DEEP-1 – Incident Report prepared by Officers Blackwell and Chickos
DEEP-3 – BUI 24 Hour License Revocation & Interim Certificate
DEEP-4 – Officer's BUI Arrest and Alcohol Test Form
DEEP-5 – Notice of Rights Form
DEEP-6 – Vehicle Registration – Vessel No. CT 7063AW

RESP-A1-10 – Photographs of Candlewood Lake
RESP-B – Annotated Google Maps Printout

PROCEDURAL HISTORY

On June 29, 2013, Mr. Mullane's vessel was stopped on Candlewood Lake by Candlewood Lake Authority Officers following a fireworks display. Officers Chickos and Dwyer responded to a call for assistance. Mr. Mullane was subsequently arrested for boating while intoxicated. §15-140q. A Notice of Suspension was mailed to Mullane on July 8, 2013, advising him of the effective date of the suspension of his Safe Boating Certificate and his right to a hearing prior to that date to determine probable cause for said suspension. §15-140q(g).

FINDINGS OF FACT

After a probable cause hearing limited to those factors set forth in General Statutes § 15-140q, I find the following facts:

1. Mr. Mullane was stopped by the Candlewood Lake Authority while operating a vessel he owns, travelling from Southeast to Northwest on Candlewood Lake near the Southern tip of Candlewood Isle. When asked to present his registration and license, Mr. Mullane could not locate his safe boating certificate on the vessel and indicated that it was on his personal watercraft. (Exs. DEEP-1, 6; test. D. Mullane, 8/28/13.)

2. Officers Dwyer and Chickos responded to a radio call from the Candlewood Lake Authority requesting assistance. After pulling alongside Mr. Mullane's vessel, Officer Chickos observed Mr. Mullane at the helm. Officer Chickos asked Mr. Mullane if he had "had anything to drink tonight?" Mr. Mullane responded that he had consumed three or four bud light beers. (Exs. DEEP-1; test. 8/28/13, J. Chickos, D. Mullane.)
3. Officer Dwyer conducted a "pre-exit screening" during which Mr. Mullane had difficulty following directions regarding counting backwards from sixty-nine to fifty-nine and performing the "divided attention finger dexterity screening." (Ex. DEEP-1.)
4. Mr. Mullane boarded the vessel operated by Officers Dwyer and Chickos and was taken to shore at the Echo Bay Marina. Mr. Mullane was seated on a park bench. Officer Chickos observed Mr. Mullane seated on the bench for a period of 15 minutes. (Ex. DEEP-1; test. J. Chickos, 8/28/13).
5. Officer Blackwell detected "the strong distinct odor of an alcoholic beverage emanating from Mr. Mullane's breath." Officer Blackwell had Mr. Mullane perform four standard field sobriety tests: horizontal gaze nystagmus (HGN); walk-turn; one leg stand; and vertical gaze nysagmus. Officer Blackwell determined that Mr. Mullane did not complete the HGN, walk-turn and one leg stand test to standard. (Ex. DEEP-1; test. A. Blackwell, 8/28/13.)
6. Mr. Mullane was transported to the Brookfield Police Department by the Brookfield Police. Once there, he signed a "Notice of Rights" form. A breath test was the selected chemical alcohol test. Mr. Mullane refused the breath test. (Exs. DEEP-1, 4; test. A. Blackwell, 8/28/13.)

CONCLUSIONS AND ORDER

To suspend Mr. Mullane's safe boating certificate pursuant to General Statutes § 15-140q, I must determine: (1) whether the officer had probable cause to arrest Mr. Mullane for operating a vessel while under the influence of intoxicating liquor or drugs, or both, or while having an elevated blood alcohol content; (2) whether Mr. Mullane was placed under arrest; (3) whether Mr. Mullane (A) refused to submit to a blood, breath, or urine test or analysis at the request of the peace officer, or (B) submitted to such test or analysis, and the results of such test or analysis indicated that at the time of the alleged offense there was an elevated blood alcohol content; and (4) whether Mr. Mullane was operating the vessel. If I find in the affirmative on each of these four questions, I must suspend Mr. Mullane's certificate.

It is not disputed that Mr. Mullane was placed under arrest. In his testimony, Mr. Mullane admitted to operating the vessel, describing at length the course he was travelling and his speed. It is also not disputed that Mr. Mullane refused to submit to a breath test. The only issue in dispute is whether probable cause existed to arrest Mr. Mullane.

Mr. Mullane contends that the initial stop of his vehicle was merely pretext, that he was not speeding or travelling too close to shore and that therefore the Candlewood Lake Authority officers lacked probable cause to stop his vessel. If there was no probable cause to stop the vessel, Mr. Mullane argues, then there was no lawful basis to conduct the field sobriety test which, in part, constituted probable cause to arrest Mr. Mullane. However, the “probable cause to arrest” element in §15-140q does not prescribe the *initial* investigative stop of the vessel. The statutory language of §15-140q narrowly limits the license suspension hearing to the following issues I have previously enumerated: 1) whether the officer had *probable cause to arrest* the operator; 2) whether he was placed under arrest; 3) whether he submitted to a blood alcohol test that showed an elevated blood alcohol content; and 4) he was operating the vessel. The question of whether there were legal grounds for the initial stop is not part of this determination. See *Fishbein v. Kozlowski*, 252 Conn. 38, 48 (1999) (questions as to compliance with procedures by the police do not preclude the suspension of a license when the elements for an administrative decision regarding the suspension of that license have been demonstrated).

The primary purpose of this administrative proceeding, the suspension of a boating certificate, is to promote public safety by removing those operators who have demonstrated disregard for the safety of others. This is distinguished from a criminal proceeding, the primary purpose of which is punishment. Therefore, the subject of such an administrative hearing is not entitled to all of the procedural protections that would be available in a criminal proceeding. *Id.* See also *State v. Hickam*, 235 Conn. 614, 624 (1995), cert. denied, 517 U.S. 1221 (1996) (principal purpose of the statute providing for the suspension of drivers’ licenses is to protect the public by removing potentially dangerous drivers from the state’s roadways).

The basis of my decision is therefore, whether, subsequent to the stop of the vessel being operated by Mr. Mullane, probable cause to arrest existed to arrest him for operating that vessel while under the influence of intoxicating liquor or drugs, or both. Probable cause is an objective standard, and comprises such facts as would reasonably persuade an impartial and reasonable mind not merely to suspect or conjecture, but to believe an activity actually occurred. See, e.g., *State v. Spencer*, 268 Conn. 575 (2004).

By the time he was arrested, Mr. Mullane had improperly performed a “pre-exit screening,” admitted to consuming alcohol, had breath which smelled of alcoholic beverage and failed three of four standard field sobriety tests that were administered. These circumstances constitute such facts as would reasonably persuade an impartial and reasonable mind that Mr. Mullane was illegally operating his vessel under the influence of alcohol. Therefore, the arresting officer had probable cause to arrest Mr. Mullane.

In questioning Officer Blackwell, Mr. Mullane’s counsel claimed Mr. Mullane suffered from certain medical conditions including an astigmatism and testicular cancer for which he was undergoing chemotherapy. Through his questioning, Mr. Mullane’s counsel alluded to an argument that Mr. Mullane may have failed the standard field sobriety tests because of these medical conditions. However, neither testimony nor documentary evidence to support such claims was placed into the record. Mr. Mullane did not testify as to the nature of his vision problems or that he suffers from cancer. The record contains no evidence regarding the nature or course of his treatment or the possible effects of that treatment on his ability to perform field sobriety tests. My decision can only be based on facts in the administrative record.

Questions asked by Mr. Mullane's counsel do not constitute facts in the record and cannot form the basis of my decision. Therefore my determination of probable cause is not altered by these claims. It is also important to note that other factors existed independent of the standard field sobriety tests which may constitute probable cause, such as the odor of alcohol on Mr. Mullane's breath and his admission that he consumed alcoholic beverages that night.

Mr. Mullane was operating the vessel in question. He was arrested and there was probable cause for his arrest. Once arrested, he refused a chemical alcohol breath test. Therefore, there is probable cause to suspend the Connecticut Safe Boating Certificate of David Mullane and it is hereby ORDERED suspended for a period of not more than *six (6) months, effective September 3, 2013 through March 3, 2013*. If it is still in his possession, **David Mullane is hereby ordered to surrender his safe boating certificate**, by personal delivery or first class mail, to the Division of Boating, Department of Environmental Protection, 333 Ferry Road, Old Lyme, CT 06371-0280, *within 2 days of receipt of this decision*.

Entered as a final order of the Commissioner of Environmental Protection by:



Brendan Schain, Hearing Officer

PARTY LIST

Final Decision in the matter of David Mullane, Ref. #13-004
(Suspension of Safe Boating Certificate)

PARTY

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