STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1641

State of Minnesota,
Respondent,

vs.

Roger Leroy Cloud,
Appellant.

Filed August 14, 2017
Affirmed
Kirk, Judge

Pennington County District Court
File No. 57-CR-15-915

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Alan G. Rogalla, Pennington County Attorney, Thief River Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Smith, John, Judge.

U N P U B L I S H E D O P I N I O N

KIRK, Judge

Appellant challenges his conviction for second-degree test refusal. Because reasonable and sufficient evidence supports the district court's finding and conclusion that

appellant was placed under arrest for driving while impaired (DWI) prior to law enforcement requesting chemical testing, we affirm.

FACTS

On November 5, 2015, an off-duty county sheriff reported a truck in a ditch off the highway. The sheriff stopped to help and saw appellant Roger Leroy Cloud exit the driver's side door of the truck. The sheriff spoke to appellant and believed that he appeared intoxicated or under the influence of alcohol due to the odor of alcohol coming from him and his poor balance. The sheriff left the scene and did not know if appellant returned to the driver's seat of the truck. After leaving the scene, the sheriff saw the truck's brake lights come on, and it appeared that someone was trying to rock the truck out of the ditch. The sheriff watched from a distance while directing law enforcement to the scene and noticed later that there were two individuals in the truck. An on-duty law enforcement officer, who ultimately arrested appellant, responded.

The arresting officer observed appellant in the driver's seat of the truck with the engine running and a passenger in the other seat. The officer believed that appellant was highly intoxicated and under the influence of alcohol. In speaking with the officer, appellant admitted that he was drunk and that he had been driving.[1] The officer removed appellant from the truck and placed him in the squad car. Due to inclement weather, the officer did not conduct field sobriety testing or a preliminary screening test (PBT) on appellant at the scene.

[1] Appellant's driver's license was canceled inimical to public safety at the time, a fact which is not disputed.

Appellant was placed under arrest for driving after cancellation (DAC) and DWI. The arresting officer transported appellant to the law enforcement center for preliminary testing, where appellant refused to perform field sobriety testing. The officer read appellant the Minnesota implied-consent advisory, and appellant refused to take a chemical breath test. Appellant was charged with and convicted of second-degree test refusal in violation of Minn. Stat. § 169A.20, subd. 2 (2014). This appeal follows.

D E C I S I O N

Appellant asks this court to reverse his conviction for second-degree test refusal and argues that: (1) the arresting officer lacked probable cause to arrest him for DAC, and (2) he was never lawfully placed under arrest for DWI by the officer. On appeal, appellant does not claim that the arresting officer lacked probable cause to arrest him for DWI.[2] Rather, appellant contends that he was only placed under arrest for DAC (unlawfully), and that the state failed to prove beyond a reasonable doubt that the officer also placed him under arrest for DWI, which was required before law enforcement could request chemical testing under Minn. Stat. § 169A.51 (2014), Minnesota's implied-consent law.

[2] At the district court, appellant argued that the arresting officer failed to conduct field sobriety testing or to request a preliminary breath test at the scene (although he had reason to do so) and that the officer did not have probable cause to arrest him for DWI. The district court thoroughly considered and rejected this claim in its May 4, 2016 omnibus order and again at appellant's court trial. Appellant did not raise the issue on appeal.

It is a crime in Minnesota "to refuse to submit to a chemical test of . . . blood, breath, or urine under section 169A.51 (chemical tests for intoxication)."[3] Minn. Stat. § 169A.20, subd. 2. A chemical test may be required when an officer has "probable cause to believe [a] person was driving, operating, or in physical control of a motor vehicle" while impaired in violation of Minn. Stat. § 169A.20 (2014), and one of the statutory enumerated conditions exist. Minn. Stat. § 169A.51, subd. 1(b). Here, the only condition presented was that appellant was lawfully placed under arrest for DWI. *Id.* at subd. 1(b)(1).

Appellant was not charged with DAC, but was charged with second-degree test refusal. And the district court never ruled that appellant was arrested for DAC or that there was probable cause to arrest him for DAC, nor was the court required to do so. The only element of test refusal that appellant challenges on appeal is that the state failed to prove beyond a reasonable doubt that he was lawfully placed under arrest for DWI.

"On appeal, this court will accept the district court's findings of fact unless those findings are clearly erroneous. Findings of fact are not clearly erroneous if there is reasonable evidence to support them." *State v. Colvin*, 645 N.W.2d 449, 453 (Minn. 2002) (citations omitted). In considering the sufficiency of the evidence for a criminal conviction, the reviewing court will not disturb the verdict if the court, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could

[3] Minn. Stat. § 169A.51, subd. 1(a) (2014) provides that, "Any person who drives, operates, or is in physical control of a motor vehicle within this state . . . consents, subject to the provisions of" the implied-consent law and DWI statute, "to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol . . . at the direction of a peace officer."

reasonably conclude that the defendant was guilty of the charged offense. *State v. Palmer*, 803 N.W.2d 727, 733 (Minn. 2011).

The transcripts from the omnibus hearing and court trial show some inconsistency in the arresting officer's testimony about why he arrested appellant. At the omnibus hearing, the officer testified that he placed appellant under arrest for DAC. However, the officer also testified that he developed probable cause to arrest appellant for DWI because he smelled strongly of alcohol, had watery eyes, could not communicate clearly or maintain his train of thought, and had slurred speech and poor balance. The officer further testified that he read appellant the implied-consent advisory and followed the implied-consent procedure with appellant, as he does "[f]or a driving issue such as DWI. . . ." In its May 4, 2016 order issued following the hearing, the district court concluded, in connection with appellant's DWI arrest, that the arresting officer "had probable cause to believe that [he] was operating a motor vehicle while under the influence of alcohol," and that the officer lawfully arrested appellant for DWI.

At the court trial, the arresting officer testified that he transported appellant to the law enforcement center to process him for DWI due to his level of intoxication, and to place him under arrest for DAC. The officer said that he generated an implied-consent certificate for appellant and that one is generated in every DWI case. The officer described it as "a written record of what I read to [appellant] or any DWI suspect . . . ." He also acknowledged that in his squad video he may have said he was arresting appellant for DWI.

In the squad video, the arresting officer is heard asking appellant, "Do you understand how intoxicated you are?" After placing appellant in his squad car, the officer

returns to the passenger still in the truck and tells him that appellant is "going to jail for DWI." The arresting officer was questioned at trial about the discrepancy in his statements. After additional questioning, he affirmed that he placed appellant under arrest for both DAC and DWI.

> Q. Deputy . . . you stated that you arrested [appellant] at the scene for the driving after cancelation inimical to public safety and you also arrested him for suspicion of DWI at that time?
> A. Correct.

The district court specifically acknowledged and addressed the discrepancy in the arresting officer's testimony at the conclusion of the trial, but nonetheless found and concluded that appellant was lawfully placed under arrest for DWI, as required to convict appellant of second-degree test refusal. Minn. Stat. §§ 169A.20, subd. 2, 169A.51, subd. 1(a), (b)(1). Based on our review of the record, there was reasonable support for the district court's determination, and it was not clearly erroneous. There was sufficient evidence in the record for the district court to reasonably conclude, beyond a reasonable doubt, that appellant was lawfully placed under arrest for DWI in order to convict appellant of second-degree test refusal.

Affirmed.