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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1806**

Andrew Joseph Schmitz, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed July 18, 2011
Affirmed
Ross, Judge**

Washington County District Court
File No. 82-CV-10-111

Christopher A. Grove, The Grove Law Firm, P.L.L.C., Burnsville, Minnesota (for appellant)

Lori Swanson, Attorney General, Nathaniel A. Dahl, Assistant Attorney General, David S. Voigt, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Appellant Andrew Schmitz challenges the district court's decision sustaining the state's revocation of his driver's license. He argues that the evidence was insufficient to

establish that he was in physical control of his motor vehicle while having an alcohol concentration of .08 or more. We affirm.

FACTS

At approximately 1:30 a.m. on October 21, 2009, Washington County Sheriff's Department Deputy Ty Jacobson was dispatched to check the welfare of a man sitting in the driver's seat of a Chevy Tahoe in the parking lot of the Borderline Bar in Lakeland. Deputy Jacobson found the Tahoe with its engine running and headlights on. And he found Andrew Schmitz "sleeping or hunched over the steering wheel." The deputy knocked on the window, waking Schmitz.

Deputy Jacobson could not see the keys on Schmitz's key ring, but he saw Schmitz "put his hand where the keys are in the ignition and remove the keys from the ignition," and at that moment the engine shut off. Schmitz told Deputy Jacobson that he had been on his way home to Woodbury from Wisconsin when he stopped at the Borderline Bar. The deputy directed Schmitz to perform various field sobriety tests, after which he arrested him for driving while intoxicated.

The Commissioner of Public Safety revoked Schmitz's driver's license under Minnesota Statute section 169A.52, subdivision 4 (2008), and Schmitz petitioned for an implied-consent hearing. There he argued that he was not in physical control of his Tahoe at the time of his arrest because he did not then possess an ignition key. He maintained that he had started the car using a remote-control device that starts the engine but that shuts it off as soon as the brake pedal is pressed. Because he could not operate

the vehicle, he contended, he was not in physical control as the term is used under the statute.

Deputy Jacobson testified that from his position at the driver's-side window, he saw Schmitz place his hand where the keys were in the ignition and remove a key from the ignition, at which point the engine shut off. He also testified that Schmitz never said anything to him about a remote starter.

Kevin Wall, Schmitz's friend, testified that he and Schmitz had driven together in Schmitz's Tahoe to a bar in Wisconsin, where Schmitz drank alcohol. Wall then drove the two in the Tahoe back to the Borderline Bar, where Wall had left his own car. Wall testified that he then removed the Tahoe ignition key from Schmitz's key ring (to prevent Schmitz from driving) and left in his own vehicle. Wall stated that the key he removed was, to his knowledge, the only key on the ring that could operate the Tahoe. He left Schmitz in the passenger seat of the Tahoe, which was not running. Schmitz testified that in the time between Wall's departure and Deputy Jacobson's arrival, he did not have the ignition key to the Tahoe, but that he did have the ignition keys to other vehicles he owns.

Schmitz testified that he used the remote-control device to start the Tahoe at about 1:00 in the early morning of the arrest because he was cold and wanted to use the car's heater. He said that he had inserted a key in the ignition but he stated that it was a key to one of his other vehicles and could not start the Tahoe. He explained that when Deputy Jacobson woke him up, he shut off the engine by tapping on the brake. He admitted that he simultaneously pulled a key out of the ignition when the engine shut off, but he

insisted that the reason the engine stopped at that moment “had nothing to do with [his] pulling the key out of the vehicle.”

Schmitz agreed that he “made some effort to try to drive the vehicle that night, but [was] unable to start the ignition.” And despite his prior repeated assertions that he had moved to the driver’s seat so he could recline, he did not dispute Deputy Jacobson’s testimony that he was slumped over the steering wheel.

The district court found by a preponderance of the evidence that the key in the ignition was the key that operated the Tahoe, concluded that Schmitz was in physical control of the vehicle, and sustained the revocation of the license. It expressly disbelieved Schmitz’s testimony that the key in the ignition did not operate the vehicle and rejected his argument that the deputy had the burden to test every key on the key ring to prove that one would operate the ignition. Schmitz appeals.

D E C I S I O N

Schmitz argues that his license revocation was in error because he was not in “physical control” of his vehicle. The state must revoke a person’s license if he was in physical control of a vehicle and had an alcohol concentration of .08 or higher. Minn. Stat. § 169A.52, subd. 4 (2008). If a driver asserts at the implied-consent hearing that he was not actually driving or in physical control of the motor vehicle, the Commissioner of Public Safety must prove he was driving or in control by a fair preponderance of the evidence. *Llona v. Comm’r of Pub. Safety*, 389 N.W.2d 210, 212 (Minn. App. 1986).

Whether a person is in physical control of a motor vehicle for purposes of the implied-consent law is a mixed question of law and fact. *Snyder v. Comm’r of Pub.*

Safety, 496 N.W.2d 858, 860 (Minn. App. 1993). On review, we give due regard to the district court's opportunity to judge the credibility of witnesses, and we will rely on the findings of fact unless they are clearly erroneous. *Snyder v. Comm'r of Pub. Safety*, 744 N.W.2d 19, 22 (Minn. App. 2008). Findings of fact are clearly erroneous when they are "manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Schulz v. Comm'r of Pub. Safety*, 760 N.W.2d 331, 333 (Minn. App. 2009) (quotation omitted). Once the facts are established, whether they demonstrate physical control is a question of law, which we review de novo. *Snyder*, 744 N.W.2d at 22. We will overturn conclusions of law "only upon a determination that the [district] court has erroneously construed and applied the law to the facts of the case." *Dehn v. Comm'r of Pub. Safety*, 394 N.W.2d 272, 273 (Minn. App. 1986).

"The term 'physical control' is more comprehensive than either 'drive' or 'operate.'" *State v. Starfield*, 481 N.W.2d 834, 836 (Minn. 1992). It includes even situations in which an intoxicated person sits in a parked car under circumstances in which he cannot easily start and drive the car. *Id.* at 837. A person is therefore in physical control of the car if he has the means to initiate its movement and is in close proximity to its operating controls. *Id.*

The district court found that the key Schmitz removed from the Tahoe's ignition in Deputy Jacobson's presence was the key that operated the vehicle. When the evidence supporting the district court's finding is entirely oral testimony, we do not disturb that finding except in extraordinary circumstances. *Hunt v. Comm'r of Pub. Safety*, 356 N.W.2d 801, 803 (Minn. App. 1984).

Schmitz implicitly asks us to adopt a specific version of events. Under that version, he put a key he knew would not start the car into the ignition, then he used the remote device to start the car, and then he stopped the engine by tapping the brake pedal the same instant he removed the key from the ignition. The district court's determination that Schmitz's testimony was incredible was almost inevitable. Schmitz could not remember when he had used the starter or where he was seated when he did. He gave no reasonable explanation why he inserted in the ignition a key that he knew would not start the car or allow him to operate it. And he did not expound on why he could not recall where he was when he allegedly used the remote device to start the car but could recall precisely that the instant he removed the key, he also applied the brake. Schmitz advanced the exculpatory theory of his actions for the first time at his implied-consent hearing, when he also acknowledged that he had made no effort at the time of the arrest to explain to Deputy Jacobson that he did not have an ignition key, that he had used the remote starter, or that he had been left there by a friend.

Schmitz contends that no evidence supports the finding that the key in the ignition could operate the car. But the deputy stated in testimony specifically credited by the district court that he saw Schmitz pull a key from the ignition and that the engine then immediately stopped running. This testimony in the context of all other evidence is sufficient to support the court's finding by a preponderance of the evidence.

Schmitz does not dispute that possession of the ignition key while he was seated in the driver's seat constitutes physical control of the vehicle. Because there is substantial evidence to support the district court's finding concerning the key, it properly concluded

that Schmitz was in physical control while having an alcohol concentration of 0.08 or more and properly sustained the license revocation.

Affirmed.