STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1110

Sudjai Harrison, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed March 12, 2012
Affirmed
Hudson, Judge

Dakota County District Court
File No. 19AV-CV-11-25

Jeffrey S. Sheridan, Erika Burkhart Booth, Strandemo, Sheridan & Dulas, P.A., Eagan, Minnesota (for appellant)

Lori Swanson, Attorney General, David Voigt, Paul R. Kempainen, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Collins, Judge.*

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

HUDSON, Judge

Appellant challenges the district court's order sustaining the revocation of her driver's license under the implied-consent law, arguing that the district court erred by

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

concluding that a police officer following her into her attached garage did not amount to an illegal warrantless seizure. She also argues that her limited right to counsel pursuant to the implied-consent law was not vindicated. We conclude that even though appellant retained a reasonable expectation of privacy when she entered the garage, her warrantless seizure inside of the garage is justified under the hot-pursuit exception to the warrant requirement. We also conclude that appellant's limited right to counsel was vindicated. Accordingly, we affirm.

FACTS

At about 11:10 p.m. on November 23, 2010, a Farmington police officer received a report that an identified citizen was following a driver, later identified as appellant Sudjai Harrison, who was weaving in and out of lanes and alternately slowing and speeding up in traffic; the citizen reported that the driver "is going to kill somebody." The officer investigated and observed appellant make a complete stop at an intersection without a stop sign or traffic signal. Appellant then turned left, drove down the wrong lane of traffic, and stopped in the middle of the road, whereupon she signaled a turn into a driveway. The officer activated his emergency lights. Appellant did not turn, but pulled forward further, stopped again, and pulled into another driveway, at her residence. She then drove into the garage.

When the officer followed appellant's car into the driveway, he turned off his emergency lights. He got out of his squad, entered the garage on foot, and approached the vehicle. He did not ask permission to cross the threshold of the garage and did not have a warrant. Unable to get close to the driver's side of the car because it was parked

next to another vehicle, he spoke to appellant through the car window and asked her to exit the car. Appellant sat in the car for one or two minutes, yelling at him, but eventually complied. When she exited the car, the officer explained the reason for the stop, and she became very upset. She then attempted to enter the house through the garage service door, and the officer grabbed her arm to stop her. Appellant's husband came out of the house through the service door to investigate the commotion. The officer detected an odor of alcohol coming from appellant and slurred speech, and appellant stated that she had been drinking. The officer then asked appellant to perform field sobriety tests, which indicated to him that appellant had been consuming alcoholic beverages, and he arrested her on suspicion of driving while impaired (DWI).

After the arrest, the officer transported appellant to the Farmington Police Department. Appellant asked the officer several times who had reported her driving conduct to police. The officer read appellant the implied-consent advisory, including her right to consult with an attorney before deciding whether to submit to chemical testing. When he asked if she wished to consult an attorney, she said, "yes, I need [an] attorney, but I am not refus[ing] anything." During an approximately two-minute conversation, appellant stated, "I want to talk to my husband first," and "I want [an] attorney but I don't know anyone." The officer directed appellant several times to a telephone and a telephone directory, but she did not move toward the phone or the directory. The officer stated, "It looks to me like you're not [going to] make an attempt to contact an attorney." She responded, "Why am [I] here anyway?" Appellant then agreed to take a urine test,

which showed an alcohol concentration of .20, and the Minnesota Commissioner of Public Safety revoked appellant's driving privileges.

Appellant petitioned for judicial review of the revocation and moved to suppress evidence resulting from the seizure, arguing that the officer's warrantless entry into the garage violated her Fourth Amendment rights and that police failed to vindicate her limited right to counsel under the implied-consent law. After an evidentiary hearing, the district court sustained the revocation. The district court concluded that, although appellant was seized when the officer approached her after she parked in the garage, the seizure was reasonable, and appellant lacked a reasonable expectation of privacy in the garage with its overhead door open. The district court also concluded that appellant's limited right to counsel was vindicated because the officer provided her with an adequate opportunity to contact an attorney before submitting to testing. This appeal from the district court order sustaining the revocation of appellant's driver's license follows.

D E C I S I O N

I

Appellant asserts that the district court erred by sustaining her license revocation based on implied-consent proceedings held pursuant to Minn. Stat. §§ 169A.51-.53 (2010). She first argues that evidence of her alcohol concentration was illegally obtained as a result of a warrantless search in violation of the United States and Minnesota Constitutions. If the facts are not in dispute, the validity of a search presents an issue of law subject to de novo review. *Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004). In reviewing a district court's order sustaining an implied-consent

revocation, this court will not set aside conclusions of law unless the district court "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 Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures in a person's home and its curtilage. *United States v. Dunn*, 480 U.S. 294, 300, 107 S. Ct. 1134, 1139 (1987). "A dwelling's curtilage is generally the area so immediately and intimately connected to the home that within it, a resident's reasonable expectation of privacy should be respected." *Garza v. State*, 632 N.W.2d 633, 639 (Minn. 2001). Minnesota appellate courts have held that a home's curtilage includes the garage. *State v. Crea*, 305 Minn. 342, 345, 233 N.W.2d 736, 739 (1975); *Haase*, 679 N.W.2d at 746; *Tracht v. Comm'r of Pub. Safety*, 592 N.W.2d 863, 865 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

Whether a person has a reasonable expectation of privacy depends on whether the person has "an actual subjective expectation of privacy . . . and . . . whether that expectation is reasonable." *In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003). In *Crea*, the Minnesota Supreme Court concluded that police did not violate the Fourth Amendment when they walked onto the defendant's driveway and viewed snowmobile trailers in plain sight, stating that "police with legitimate business may enter the areas of the curtilage which are impliedly open to use by the public." *Crea*, 305 Minn. at 346, 233 N.W.2d at 739; *see also Tracht*, 592 N.W.2d at 865 (concluding that police did not violate defendant's Fourth Amendment rights by entering attached-garage door, when door was standing open to the public, and knocking on inside service door to speak with

defendant to investigate accident). On the other hand, we have concluded that police violated Fourth Amendment rights when, after receiving a tip about erratic driving and learning that the involved vehicle was registered to the defendant, an officer went to the defendant's home, watched the defendant pull into the garage, and interrupted the garage-door closing by placing his leg underneath the door to reverse the door-closing mechanism. *Haase*, 679 N.W.2d at 747. We stated in *Haase* that "no basis [exists] to conclude that a person forfeits a reasonable expectation of privacy merely because that person briefly opens a door to enter the home." *Id.*

We conclude that here, as in *Haase*, appellant retained a reasonable expectation of privacy in her garage when an officer followed her to her home and she drove into her garage with the express purpose of entering the home. Unlike the situation in *Tracht*, appellant's garage door had not been opened to provide access to the home by the inside service door. *See Tracht*, 592 N.W.2d at 865 (concluding that when inside service door to home was exposed to public, no basis existed to distinguish officers' entry into garage from entry on porch for purpose of accessing home). Here, the officer did not enter the garage in order to access a door to the home, but to investigate illegal driving conduct. *Haase*, 679 N.W.2d at 747 (stating that "the officer did not enter the garage to access a door to the home, but to investigate whether Haase was driving while impaired"). And appellant was returning home at a late hour. These actions support our conclusion that appellant had not forfeited a reasonable expectation of privacy. Likewise, her action of remaining in the car and then attempting to enter her home through the service door is

also consistent with an expectation of privacy. We conclude that, under these circumstances, appellant retained a reasonable expectation of privacy in her garage.

But this conclusion does not end our inquiry. The hot-pursuit doctrine permits police to "enter a dwelling, without a warrant, to make a felony arrest if they have probable cause and exigent circumstances." *State v. Othoudt*, 482 N.W.2d 218, 223 (Minn. 1992). Under Minnesota law, "an officer in hot pursuit of a person suspected of the serious offense of driving under the influence of alcohol may make a warrantless entry into the suspect's home in order to effectuate an arrest." *State v. Paul*, 548 N.W.2d 260, 268 (Minn. 1996); *see also State v. Baumann*, 616 N.W.2d 771, 774–75 (Minn. App. 2000) (concluding that warrantless search of driver who entered garage was valid under hot-pursuit doctrine when officer had received information that defendant's driver's license had been revoked as inimical to public safety), *review denied* (Minn. Nov. 15, 2000); *cf. Haase*, 679 N.W.2d at 747 (concluding that defendant's conduct of crossing center line did not by itself supply exigent circumstances justifying warrantless entry into garage). The doctrine applies whether police actually conduct "a high-speed chase of the suspect . . . or merely approach a suspect who immediately retreats into a house." *Paul*, 548 N.W.2d at 265; *State v. Morin*, 736 N.W.2d 691, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

Appellant argues that the hot-pursuit doctrine is inapplicable because police lacked probable cause to arrest her for DWI before she entered the garage. We disagree. Probable cause exists when all the facts and circumstances would lead a prudent and cautious officer to believe that the driver drove while impaired in violation of Minn. Stat.

§ 169A.20 (2010). *See State v. Harris*, 265 Minn. 260, 264, 121 N.W.2d 327, 331 (1963) (setting forth probable-cause standard). The district court must evaluate probable cause from the officer's point of view at the time of the arrest, *id.*, and must consider the "totality of the circumstances." *Eggersgluss v. Comm'r of Pub. Safety*, 393 N.W.2d 183, 185 (Minn. 1986).

Here, a citizen reported appellant's late-evening driving conduct of weaving from lane to lane, driving down the middle of the road, and alternately slowing down and speeding up in traffic. The officer then personally observed appellant: (1) make a complete stop before making a left-hand turn, even though there was no stop sign or traffic approaching from the opposite lane; (2) drive down the left side of the road instead of the right side; and (3) come to a stop in the middle of the road, signal a turn, and then pull forward to the next driveway, where she turned in. When viewed together, these behaviors provide objective circumstances by which a prudent officer would have strongly suspected that appellant was driving while impaired. *See State v. Wynne*, 552 N.W.2d 218, 221 (Minn. 1996) (stating that probable cause to arrest exists when objective facts and circumstances would lead "a person of ordinary care and prudence" to "entertain an honest and strong suspicion that a crime has been committed" (quotation omitted)). And because the officer had probable cause to arrest appellant for DWI, the hot-pursuit exception to the warrant requirement applies, and no warrant was necessary to enter the garage and effect her arrest. *See, e.g., State v. Baumann*, 616 N.W.2d at 775 (upholding warrantless search of driver who entered garage under hot-pursuit exception).

II

Appellant also argues that the district court erred by denying her motion to suppress on the ground that circumstances surrounding the reading of the implied-consent advisory show that police failed to vindicate her limited right to counsel. The Minnesota Constitution provides drivers with a limited right to counsel before deciding whether to submit to chemical testing. Minn. Const. art. I, § 6; *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). That right is vindicated if the driver "is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Id.* (quotation omitted). Police officers must assist in the exercise of the right to counsel. *Id.* But the driver must make a good-faith effort to contact an attorney. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 842 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

The court considers the totality of the circumstances in determining if a driver's right to counsel has been vindicated. *Id*. at 842. We review the factual issue of whether a driver made a good-faith effort to contact an attorney for clear error. *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). Once the facts are established, their significance constitutes a question of law reviewed de novo. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 501 (Minn. App. 1992).

The district court concluded that appellant's right to contact an attorney was vindicated, finding that she did not make a good-faith effort to contact an attorney. Appellant maintains that because she requested to talk to her husband immediately after

she asked to speak to an attorney, the police officer should have assumed that she wished to contact her husband in order to reach an attorney. But although police "must permit drivers to contact a family member to obtain an attorney's name and telephone number," they "need not permit a driver" to contact a family member "merely to obtain advice." *State v. Christiansen*, 515 N.W.2d 110, 113 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). Thus, a driver must tell police that he or she wishes to obtain the name of an attorney from the family member. *Id.*; *see also* 31 Douglas Hazelton, *Minnesota Practice* § 6.7 (2011) (citing *Christiansen* and stating that "[p]olice are not required to intuit the intentions of the driver in the reasons for contacting a nonattorney and the burden is on the driver to communicate that the purpose of contacting a nonlawyer is related to contacting a lawyer"). The record shows that appellant told the officer that she wanted to speak with her husband, but did not tell him that the purpose of that call related to contacting an attorney. Under these circumstances, the officer was not required to allow appellant to contact her husband to obtain advice, and the district court did not clearly err by finding that she failed to make a good-faith attempt to contact an attorney.

Appellant maintains that the officer failed to give her a reasonable time in which to contact an attorney. In considering this issue, we "balance the efforts made by the driver against the efforts made by the officer" and focus "'both on the police officer's duties in vindicating the right to counsel and the defendant's diligent exercise of the right.'" *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 713 (Minn. App. 2008) (quotation omitted). The time of day may also be relevant, with a driver given more time

in the early morning when it may be more difficult to obtain an attorney. *Kuhn*, 488 N.W.2d at 842.

Appellant maintains that the short length of time elapsing between the time the officer read her the implied-consent advisory and her agreement to take a urine test—approximately two minutes—conclusively shows that she was not given a reasonable time to contact an attorney. She also argues that because the conversation occurred around midnight, she should have been given more time to contact an attorney. But what constitutes "[a] reasonable time is not a fixed amount of time, and it cannot be based on elapsed minutes alone." *Mell*, 757 N.W.2d at 713. The record shows that after the officer read appellant the implied-consent advisory, which included her right to an attorney, he told her twice that it was her time to talk with an attorney and directed her three times to a telephone and a telephone directory. Although appellant stated that she "need[ed] an attorney," and did "not have any names," she never moved toward the phone or the directory, but instead continued to ask the officer for the name of the person who had reported her. The officer finally stated, "It looks to me like you're not [going to] make an attempt to contact an attorney." Appellant did not then attempt to contact an attorney, but merely asked the officer, "Why am [I] here anyway?" and then agreed to take a urine test.

In analyzing whether a driver's right to counsel has been vindicated, a "threshold matter" is whether the driver made "a good faith and sincere effort to reach an attorney." *Kuhn*, 488 N.W.2d at 842. If not, a court need not engage in further analysis. *See id.* We have carefully reviewed the videotaped record of appellant's conversation with the

officer who administered the implied-consent advisory. The record shows that the officer repeatedly offered appellant a phone and directory, but she did not take advantage of the opportunity to contact an attorney. We conclude that, under these circumstances, even though appellant had a short time in which to contact an attorney, the record adequately supports the district court's conclusion that appellant's limited right to counsel was vindicated.

Affirmed.