STATE OF MINNESOTA
IN COURT OF APPEALS
A11-171

State of Minnesota,
Respondent,

vs.

Steve Amund Melgard,
Appellant.

Filed December 27, 2011
Affirmed
Stauber, Judge

Otter Tail County District Court
File No. 56CR10906

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

Dennis W. Happel, Perham City Attorney, Perham, Minnesota (for respondent)

Jamison W. Cichosz, Kardela, Hunt, Cichosz & Jensen, P.L.L.P., Fergus Falls, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Schellhas, Judge; and Stauber, Judge.

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

STAUBER, Judge

Appellant challenges the denial of his motion to suppress evidence, arguing that Officer Smith lacked reasonable, articulable suspicion for the seizure and lacked

reasonable suspicion to require appellant to submit to a preliminary breath test. We affirm.

FACTS

At approximately 4:30 a.m. on April 8, 2010, Officer Ron Smith of the Perham Police Department observed a truck parked with its headlights on and the engine running in an alley behind a local business. Because the business was not open at the time and there was no other activity occurring in the area, Officer Smith turned into the parking lot to investigate the truck. The truck was parked next to a dumpster. After learning that the truck was licensed to a local sanitation company, Officer Smith parked his squad car behind the truck and got out to locate the driver. The record does not disclose how closely Officer Smith parked behind the truck. Officer Smith testified that he did not see anyone in the truck when he first pulled up.

Officer Smith found appellant Steve Amund Melgard slumped over and asleep in the driver's seat of the truck. Officer Smith knocked on the driver-side window to wake appellant, who opened the door and informed Officer Smith that he had been sleeping in the truck after leaving a local bar. While speaking with appellant, Officer Smith detected an odor of alcohol coming from the vehicle and noted that appellant's speech was slurred and his eyes were bloodshot and watery. Appellant admitted that he had been drinking.

Based on these observations, Officer Smith administered a preliminary breath test (PBT). The PBT indicated that appellant's alcohol concentration was .128, whereupon Officer Smith placed appellant under arrest. A subsequent urinalysis test confirmed an alcohol concentration of .12.

Appellant was charged with two counts of second-degree driving while impaired (DWI), based on two prior DWI convictions within the previous ten years, and one count of driving after revocation. Appellant moved to suppress the evidence, arguing that Officer Smith's actions violated his Fourth Amendment right to be free from unreasonable searches and seizures and that Officer Smith did not have sufficient suspicion to justify the administration of a PBT. The district court denied appellant's motion, and appellant submitted to a stipulated-facts trial. The district court found appellant guilty on both DWI charges, but not guilty on the driving-after-revocation charge. This appeal follows.

D E C I S I O N

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's findings of fact under a clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

I.

The district court found that Officer Smith seized appellant when he pulled up closely behind the truck. On appeal, the state posits that the district court erred by so concluding, arguing that a person generally is not seized when an officer approaches him

in a public place or parked vehicle and asks questions.[1] In determining whether a seizure occurred, "the court determines whether a police officer's actions would lead a reasonable person under the same circumstances to believe that [he] was not free to leave." *State v. Lopez*, 698 N.W.2d 18, 21 (Minn. App. 2005). "Whether a seizure has occurred depends on the totality of the circumstances, as applied to a reasonable person." *Id.* at 21-22.

There is nothing in the record that indicates that Officer Smith intended to seize appellant when he parked his squad car behind appellant's truck. The record indicates that Officer Smith was unaware that anyone was in the truck until he approached it and saw appellant sleeping in the front seat, and appellant was unaware that the squad car had pulled in behind him until Officer Smith awakened him. And while appellant testified that Officer Smith parked the squad car behind appellant's vehicle and that appellant could not back up, there is no indication as to how close the squad car was to appellant's vehicle. On these facts, we conclude that Officer Smith's initial act of parking behind

[1] Ordinarily, an issue that has been decided adversely to the respondent is not properly before this court if no notice of related appeal is filed. *See City of Ramsey v. Holmberg*, 548 N.W.2d 302, 305 (Minn. App. 1996) (discussing predecessor notice of review), *review denied* (Minn. Aug. 6, 1996). But a party, without filing a notice of related appeal, may "raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted." *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003) (citing Minn. R. Crim. P. 29.04, subd. 6, and concluding that this court erred by failing to apply the rule). Because the record is sufficient and the state's alternative theory would not result in an expansion of the relief granted by the district court, we first address the state's argument regarding the existence of a seizure.

and approaching appellant's truck did not constitute a seizure under the Fourth Amendment.

II.

Appellant also argues that Officer Smith impermissibly expanded the scope of the initial seizure by administering the PBT. "[T]he scope and duration of a traffic stop investigation must be limited to the justification for the stop." *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003). Expansion of the scope or duration of an investigative stop is only proper when an officer has a reasonable, articulable suspicion of other criminal activity. *Id.* at 419.

Appellant asserts that Officer Smith impermissibly expanded the scope of the stop because "none of the common indicia of intoxication were noted prior to the administration of the PBT." He relies primarily on Officer Smith's testimony on cross examination, which focused on alleged inconsistencies between Officer Smith's testimony on direct examination and his police report. But the district court specifically rejected this argument and found Officer Smith's testimony to be credible, and we will not overturn a district court's credibility determination. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (stating that weight and believability of witness testimony is an issue within the province of the district court), *review denied* (Minn. July 15, 2003).

The district court found that, prior to the administration of the PBT, Officer Smith found appellant slumped over in the driver's seat, detected the odor of alcohol coming from appellant's vehicle, noticed that appellant's eyes were bloodshot and watery, and noticed that appellant's speech was slurred. Furthermore, appellant admitted to Officer

Smith that he had been drinking. These findings are supported by the record. Officer Smith therefore had a reasonable basis to believe that appellant was either operating or in physical control of a motor vehicle while under the influence of alcohol, and he was therefore justified in administering the PBT. The district court did not err by concluding that the expansion of the stop was reasonable and denying appellant's suppression motion.

III.

Because we conclude that the district court did not err by denying appellant's motion to suppress the evidence, we need not discuss appellant's final issue—that in the absence of the challenged evidence, there is not probable cause to support the charges against him.

Affirmed.