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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2018**

Patrick Harold Colville, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed September 16, 2008
Affirmed
Shumaker, Judge**

Stearns County District Court
File No. 73-CV-07-4196

Richard C. Kenly, P.O. Box 31, Backus, MN 56435 (for appellant)

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Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Patrick Harold Colville appeals the order sustaining the revocation of his driver's license, arguing that his arrest was unlawful because the arresting officer impermissibly expanded the scope of the traffic stop and lacked a legally sufficient basis to request a

preliminary breath test (PBT), without which there was no probable cause for his arrest. Because we conclude that there was a legally sufficient basis to expand the scope of the traffic stop and to administer the PBT, we affirm.

FACTS

On the evening of May 6, 2007, Stearns County Deputy Sheriff John Niemi pulled over Colville's car for speeding. While the deputy talked with Colville, he noticed that Colville had bloodshot and watery eyes and slurred speech, and that there was a faint odor of alcohol coming from the car. In addition, the deputy saw Colville fumble with his driver's license until it fell on the car's floorboards. Shortly thereafter, the deputy ordered Colville out of the car and conducted field sobriety tests.

The first test was the horizontal gaze nystagmus (HGN). According to the deputy, Colville failed this test. Furthermore, as Colville performed this test, the deputy noticed that an odor of alcohol was coming from him. Next, Colville performed the walk-and-turn test (WTT). The squad car video showed Colville swaying back and forth during this test. The deputy concluded that Colville failed this test. Lastly, Colville performed the one-leg-stand test (OLST). As to this test, the squad car video showed that Colville had some difficulty maintaining his balance, a sign of possible intoxication. At the conclusion of these tests, the deputy administered a PBT, and Colville blew a failing result. The deputy arrested Colville for driving while impaired (DWI), and his license was revoked under the implied consent law.

At an implied-consent hearing on August 14, 2007, Colville admitted that the stop of his car was valid, but challenged the deputy's basis for requesting field sobriety tests

and the PBT, and the validity of his arrest. The deputy testified, and the district court found him to be a credible witness. Following the hearing, the court sustained the revocation of Colville's driving privileges, concluding that, based on the deputy's observations and Colville's inability to successfully perform the field sobriety tests, his arrest was lawful. This appeal followed.

D E C I S I O N

Colville argues that Deputy Niemi impermissibly expanded the scope of the traffic stop by ordering him out of his car to conduct a DWI investigation. Article I, Section 10, of the Minnesota Constitution requires that a stop's scope and duration be limited to the underlying justifications for the stop, absent additional facts. *State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003). Any expansion of either the scope or the duration of the stop requires additional reasonable, articulable suspicion to justify the expansion. Articulable suspicion is an objective standard that must be "determined under the totality of the circumstances." *Paulson v. Comm'r of Pub. Safety*, 384 N.W.2d 244, 246 (Minn. App. 1986) (citing *State v. Lande*, 350 N.W.2d 355, 357-58 (Minn. 1984)). We review de novo a district court's determination concerning whether the officer impermissibly expanded the scope of the stop. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

Deputy Niemi articulated four factors that led him to expand the scope of the traffic stop into a DWI investigation: (1) Colville had watery and bloodshot eyes; (2) Colville had slurred speech; (3) there was a faint odor of alcohol coming from the car; and (4) Colville fumbled with his driver's license until it fell on the car's floorboards. The district court found Deputy Niemi's testimony credible. Minn. R. Civ. P. 52.01

(credibility determinations are for the district court in “all actions tried upon the facts without a jury”). These objective facts are indicative of possible impairment from alcohol and they provide ample support for expansion beyond the initial scope of the stop.

Colville also argues that the district court erred in determining that his speech was slurred. Both the deputy’s testimony and the squad car video, which captured Colville’s voice after he was ordered out of his car, support the court’s conclusion. Aside from Colville’s speech, the odor of alcohol in a vehicle, alone, raises reasonable suspicion of criminal activity sufficient to expand the scope of an initially unrelated traffic stop. *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001).

Next, Colville argues that Deputy Niemi did not have a legally sufficient basis to request a PBT, without which the deputy did not have probable cause to arrest him. A law enforcement officer may request a PBT when he has reason to believe that the person was driving under the influence of alcohol. Minn. Stat. § 169A.41, subd. 1 (2006). “[The] officer need not possess probable cause to believe that a DWI violation has occurred in order to administer a [PBT].” *State v. Vievering*, 383 N.W.2d 729, 730 (Minn. App. 1986), *review denied* (Minn. May 16, 1986). Rather, the officer may request a PBT if he can point to specific, articulable facts that form his belief. *State, Dep’t of Pub. Safety v. Junczewski*, 308 N.W.2d 316, 320-21 (Minn. 1981). This is the same standard required for an investigatory seizure.

Here, before Deputy Niemi ordered the PBT, he observed that Colville had bloodshot and watery eyes, slurred speech, and that there was a faint odor of alcohol

coming from the car. In addition, the deputy, properly following procedure, ordered Colville to perform three field sobriety tests: HGN, WTT, and OLST. According to the deputy, Colville showed signs of intoxication on all three tests. Furthermore, as Colville was performing the HGN, the deputy noticed that an odor of alcohol was coming from him. Because the district court found Deputy Niemi's testimony to be credible, we conclude that these specific, articulable facts were legally sufficient for the deputy to suspect that Colville was impaired by alcohol and to administer the PBT.

Colville contends that the field sobriety tests should not be used to support the PBT because: (1) the commissioner failed to produce an expert witness on HGN results; (2) the district court failed to consider that the "windy" conditions might have affected Colville's performance on the WTT and OLST; and (3) that Colville did not technically fail the OLST.

Colville's arguments lack merit. As to the HGN, it is not necessary that the officer know the physiology involved in order to testify as to its results. Deputy Niemi's training on the HGN was sufficient for him to testify as to that test and for the district court to conclude that Colville demonstrated the signs of impairment to which the deputy testified. As to the WTT and the OLST, we know of no requirement that the deputy had to rule out other possibilities (*e.g.*, wind) for inadequate performance, nor do all the tests have to result in a "fail." The field sobriety tests are indicators; they are not, in and of themselves, dispositive. There are a variety of reasons why an individual may perform poorly on any of these tests; nevertheless, impairment from alcohol is one. Furthermore, bloodshot and watery eyes coupled with an odor of alcohol coming from the driver,

alone, would be enough to sustain a request for a PBT. *See, e.g., Comm'r of Pub. Safety v. Hager*, 382 N.W.2d 907, 911 (Minn. App. 1986). Therefore, the record shows that, under the totality of the circumstances, the deputy had reasonable, articulable suspicion to administer the PBT.

Affirmed.