STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0296

Lori Jean Londo, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 9, 2008
Affirmed
Hudson, Judge

Wright County District Court
File No. 86-CV-07-2226

David L. Valentini, John Lucas, Valentini & Associates, P.A., 247 Third Avenue South, Minneapolis, Minnesota 55415 (for appellant)

Lori Swanson, Attorney General, Martin A. Carlson, Joel Watne, Assistant Attorneys General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134 (for respondent)

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

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

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

HUDSON, Judge

On appeal from an order sustaining the revocation of her driver's license, appellant argues that she was seized without a reasonable suspicion of criminal activity and that she did not refuse to take a breath test. Because appellant was not seized, and because the record supports the district court's conclusion that appellant refused to take a breath test, we affirm.

FACTS

At approximately 9:40 p.m. on March 5, 2007, Wright County Sheriff's Deputy Matthew Sturm noticed a car parked in a driving lane of a two-lane gravel road with no shoulders. All of the car's lights were off except for the interior dome light. Deputy Sturm pulled his vehicle behind the car and activated his emergency lights. He then directed his spotlight toward the car and observed a lone occupant in the driver's seat.

When Deputy Sturm approached the car, the driver, appellant Lori Jean Londo, rolled her window down. The deputy asked appellant why she was parked in the road, and appellant said that she was looking for her boyfriend's house. While appellant was talking, Deputy Sturm smelled the odor of alcohol and observed that appellant's eyes were bloodshot and glossy. Deputy Sturm asked appellant to perform a field sobriety test, and appellant's performance indicated that she was under the influence of alcohol.

Because the road was covered in ice, Deputy Sturm did not conduct any more field sobriety tests and instead placed appellant in the backseat of his squad car and asked her to take a preliminary breath test (PBT). Appellant agreed to take the test, but instead of

blowing into the PBT device, appellant blew air through the side of her lips. Deputy Sturm tried to administer the PBT test four times, and each time appellant blew out of the side of her mouth rather than into the PBT device. After the fourth attempt, Deputy Sturm placed appellant under arrest for driving under the influence.

Appellant was taken to the Wright County jail where Deputy Sturm read appellant the Minnesota Motor Vehicle Implied Consent Advisory. After contacting an attorney, appellant agreed to take another breath test. Corrections Officer Samuel Hoover conducted the Intoxilyzer test on appellant. Appellant placed her mouth on the Intoxilyzer device's mouthpiece and puffed her cheeks as if she was blowing, but Officer Hoover could see through the clear mouthpiece that appellant was covering the airway in the mouthpiece with her tongue.

Officer Hoover told appellant that he could tell she was not blowing into the machine. Appellant responded that she was blowing as hard as she could and that she would try again, but she continued to place her tongue over the airway in the mouthpiece. Officer Hoover warned appellant several times that if she did not blow into the machine she would be deemed to have refused the test. Appellant complained that the mouthpiece was clogged, so Officer Hoover replaced the mouthpiece. When appellant resumed the test, she would blow just enough air into the mouthpiece to register airflow with the Intoxilyzer device, but as soon as the device would signal it was receiving airflow, appellant would quit blowing into the mouthpiece.

After four attempts to get appellant to blow into the Intoxilyzer, the device timed out without an adequate breath sample. Deputy Sturm, who was present during the

Intoxilyzer test, informed appellant that because she did not blow into the machine, she was deemed to have refused the test. Appellant was then taken to booking. After a couple of minutes, Deputy Sturm initiated the revocation of appellant's driver's license and again told appellant that she was being deemed to have refused the breath test.

Appellant became upset and argumentative, urging that she had not refused the test and that she would cooperate if given another test. She also offered to take a blood or urine test. Deputy Sturm advised appellant that he was not required to give her a second test.[1] Appellant's driver's license was revoked and on March 21, 2007, appellant petitioned the district court to review her license revocation. Appellant argued that Deputy Sturm's initial stop was not supported by reasonable suspicion and she did not refuse to take the breath test. The district court sustained the revocation of appellant's driver's license. Appellant moved the district court to reconsider, but the district court denied appellant's motion. This appeal follows.

D E C I S I O N

I

Appellant first argues that her initial encounter with Deputy Sturm was an illegal seizure, unsupported by a reasonable suspicion of criminal activity. The district court held that Deputy Sturm had reasonable articulable suspicion to stop appellant to determine whether appellant was in need of assistance. We review a district court's determination of the legality of a limited investigatory stop de novo and "determine

[1] Appellant subsequently took an independent blood test on the next day, March 6, 2007, that indicated appellant's alcohol concentration was likely below the legal limit at the time she was arrested.

whether the police articulated an adequate basis for the search or seizure at issue." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quoting *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007)); *see also Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985).

"In the proper performance of his duties, an officer has not only the right but a duty to make a reasonable investigation of vehicles parked along roadways to offer such assistance as might be needed and to inquire into the physical condition of persons in vehicles." *Kozak v. Comm'r of Pub. Safety*, 359 N.W.2d 625, 628 (Minn. App. 1984). "[C]ourts generally have held that it does not by itself constitute a seizure for an officer to simply walk up and talk to a person standing in a public place or to a driver sitting in an already stopped car." *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980) (citation omitted); *see also State v. Alesso*, 328 N.W.2d 685, 687 (Minn. 1982); *Overvig v. Comm'r of Pub. Safety*, 730 N.W.2d 789, 792 (Minn. App. 2007), *review denied* (Minn. Aug. 7, 2007); *Crawford v. Comm'r of Pub. Safety*, 441 N.W.2d 837, 839 (Minn. App. 1989).

When Deputy Sturm approached appellant's car, the car had all of its lights off except the interior dome light and was stopped in a driving lane of a gravel road. Deputy Sturm testified that he approached appellant's car because he was concerned about the welfare of the vehicle's occupants, mechanical problems with the car, and possible criminal activity. Deputy Sturm's initial encounter with appellant was within the scope of his duty to make a reasonable investigation of a vehicle parked along a roadway to offer such assistance as might be needed and to inquire into the physical condition of

persons in the vehicle. Therefore, Deputy Sturm's initial encounter with appellant was not a seizure.

Appellant contends that *Kozak* does not apply because Deputy Sturm activated his emergency lights and used his spotlight, which appellant asserts was a show of authority that turned the initial encounter into a seizure. We disagree. As with all inquiries into whether a seizure has in fact occurred, the threshold question here "is whether, looking at all of the facts, the conduct of the police would communicate to a reasonable person in the defendant's physical circumstances an attempt by the police to capture or seize or otherwise to significantly intrude on the person's freedom of movement." *State v. Hanson*, 504 N.W.2d 219, 220 (Minn. 1993) (citing *Michigan v. Chesternut*, 486 U.S. 567, 572–75, 108 S. Ct. 1975, 1978–80 (1988)).

An officer's use of emergency lights may, under certain circumstances, evince the kind of authority that indicates to a reasonable motorist that he is not free to leave. *Hanson*, 504 N.W.2d at 220. But where an officer approaches a car parked on the side or in the middle of a road at night because he believes that the situation poses a traffic hazard and activates his emergency lights in order to signal caution to oncoming motorists, "[a] reasonable person [would assume] that the officer was not doing anything other than checking to see what was going on and to offer help if needed." *Id.*

Although Deputy Sturm did use his emergency lights and spotlight, his testimony indicates he did so only to make the scene safe and to make their vehicles visible to oncoming traffic. As the supreme court recognized in *Hanson*, "[a] reasonable person would know that while flashing lights may be used as a show of authority, they also serve

other purposes, including warning oncoming motorists in such a situation to be careful." *Id*. Accordingly, Deputy Sturm's use of emergency lights and his spotlight did not render his initial encounter with appellant a seizure.[2]

II

Appellant also asserts that her conduct did not constitute a refusal to take a breath test. Under the implied consent law, an officer may require a driver to take a chemical test to determine the presence of alcohol. Minn. Stat. § 169A.51, subd. 1(b) (2006). When the officer requests a breath test, failure to provide two separate, adequate breath samples constitutes a refusal. Minn. Stat. § 169A.51, subd. 5(c) (2006). A driver may prove as an affirmative defense that the refusal was reasonable. Minn. Stat. § 169A.53, subd. 3(c) (2006). Whether a driver refused a test and whether that refusal was reasonable under the implied consent law is a question of fact that will not be set aside unless clearly erroneous. *State, Dep't of Highways v. Beckey*, 291 Minn. 483, 486–87, 192 N.W.2d 441, 444–45 (1971).

Beyond the duty to make the initial decision of whether to submit to a test, courts have recognized that the implied consent law imposes on a driver a requirement to act in a manner so as not to frustrate the testing process. *Busch v. Comm'r of Pub. Safety*, 614

[2] Appellant further contends that Deputy Sturm admitted appellant was not free to leave from the time Sturm pulled behind appellant's vehicle. The record does not support this contention. Deputy Sturm testified that it was not until after he approached appellant's car and made contact with appellant—the point at which Deputy Sturm smelled the odor of alcohol and observed that appellant's eyes were bloodshot and glossy—that he determined appellant was not free to leave.

N.W.2d 256, 259 (Minn. App. 2000). "If a driver does frustrate the process, his conduct will amount to a refusal to test." *Id.*

Appellant first claims that she was cooperative throughout the test, repeatedly denied that she was refusing to take the test, and expressly indicated her willingness to take the breath test. Thus, according to appellant, she did not refuse to take the breath test. Appellant also suggests that a machine malfunction could have been responsible for the inadequate breath sample.

But the district court specifically found that appellant was not making a good faith attempt to breathe into the machine. Officer Hoover testified that appellant was only acting as if she were blowing into the Intoxilyzer machine, covering the airway in the mouthpiece with her tongue. He also stated that when appellant did breathe into the device, she would breathe just enough to register airflow with the machine but would quit breathing as soon as the machine signaled it was receiving airflow. Officer Hoover also switched the mouthpiece on the machine to ensure the machine was working properly. The record supports the district court's finding, and, as a result, the district court's determination was not clear error. *See Connolly v. Comm'r of Pub. Safety*, 373 N.W.2d 352, 354 (Minn. App. 1985) (upholding district court finding of test refusal when testimony indicated that driver blew around mouthpiece and not into Intoxilyzer and failed to provide adequate breath sample).

Next, appellant avers that once she was informed that she was deemed to have refused the breath test, she should have been allowed to cure the refusal. In support of her claim, appellant relies on *Schultz v. Comm'r of Pub. Safety*, 447 N.W.2d 17 (Minn.

App. 1989), in which this court held that there is no refusal to submit to a breath test where an initial refusal was followed by an almost immediate change of mind.

But here, as the district court found, appellant's change of mind was not immediate or almost immediate. During the Intoxilyzer test, Officer Hoover told appellant that unless she began to cooperate, she would be deemed to have refused the test. Appellant said that she was cooperating and that she would try again, but she continued to cover the airway in the mouthpiece with her tongue and would quit breathing as soon as the machine signaled it was receiving airflow. This was not an immediate or almost immediate change of mind.

Further, directly after the Intoxilyzer machine timed out, Deputy Sturm told appellant she was deemed to have refused the test, but appellant did not express a change of mind or willingness to cooperate. It was not until Deputy Sturm took appellant to booking and again told appellant that she was deemed to have refused the test that appellant agreed to cooperate and offered to take alternative tests. "This court has consistently held that a subsequent change of heart does not revoke an initial refusal, even when a relatively short period of time has elapsed . . . except for an almost immediate change of mind." *Lewis v. Comm'r of Pub. Safety*, 737 N.W.2d 591, 593 (Minn. App. 2007) (quotation omitted). Thus, it was not clear error for the district court to find that appellant did not immediately change her mind after refusing to take the breath test.

Appellant also argues that due process requires Deputy Sturm to have given her a chance to cure her refusal. In support of her assertion, appellant directs this court to *State*

v. Netland, 742 N.W.2d 207 (Minn. App. 2007), *review granted* (Minn. Feb. 27, 2008). In *Netland*, we held that in the criminal context, due process requires a testing officer to provide an alternative method of chemical testing where a driver is deemed to refuse a chemical test because of an inadequate breath sample but seeks additional time to provide an adequate sample and an alternate mode of chemical testing. *Id*. at 223.

The district court found *Netland* similarly unavailing to appellant's argument. We agree with the district court. Appellant's license revocation is a civil matter, whereas *Netland* was a criminal case. As we stated in *Netland*, "[t]he minimum level of fairness that our system of law requires to deprive a driver of driving privileges is not the same as that required to impose a criminal sanction." *Id*. at 219. We have previously held that "[i]n the civil implied-consent context, '[i]f a person fails to provide an adequate breath sample, the officer, absent a determination of physical inability, is not required to offer the driver an additional test.'" *Id.* (citing *Smith v. Comm'r of Pub. Safety*, 401 N.W.2d 414, 416 (Minn. App. 1987), *review denied* (Minn. Apr. 29, 1987)). Therefore, Deputy Sturm was not required to provide appellant with an alternative test after appellant was deemed to have refused the breath test.

Affirmed.