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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0944

In the Matter of the Welfare of: T. D. B., Juvenile

Filed April 3, 2017
Affirmed in part, reversed in part, and remanded
Peterson, Judge

Chisago County District Court
File No. 13-JV-15-142

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Considered and decided by Peterson, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

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

PETERSON, Judge

In this appeal from an adjudication of underage consumption of alcohol, appellant T.D.B. argues that (1) the result of a preliminary breath test (PBT) was not admissible (a) under Minn. Stat. § 169A.41 (2014) and (b) because no search warrant was obtained before the PBT was administered, (2) his statement to police should have been suppressed because he was not given a *Miranda* warning, and (3) Minn. Stat. § 340A.503 (2014) does

not apply when the alcohol was consumed in another state. We affirm in part, reverse in part, and remand.

FACTS

A teacher at the high school that T.D.B. attended told a staff member that T.D.B. smelled like alcohol. The staff member went to T.D.B.'s classroom and, while talking to T.D.B., smelled the odor of alcohol coming from him. The staff member took T.D.B. into the hallway, told him that he smelled like alcohol, and brought him to the school office. In the office, T.D.B. denied that he drank alcohol that morning but admitted to consuming alcohol during the weekend. T.D.B. claimed that the smell of alcohol must be coming from his clothes, which he said were the same clothes that he wore during the weekend. The assistant principal came to the office, and T.D.B. again admitted that he had been drinking over the weekend.

The staff member contacted the school resource officer, Police Officer Timothy Olson, who came to the school office 15 to 20 minutes later. Olson also smelled the odor of alcohol coming from T.D.B. When asked by Olson, T.D.B. again stated that he had consumed alcohol over the weekend, and he also stated that the consumption occurred in Wisconsin. Olson testified that he brought T.D.B. to his office at the school. T.D.B. stood near the open doorway to Olson's office. Olson was wearing plain clothes but had on his gun and badge. No other law-enforcement officers were present.

Olson asked T.D.B. to submit to a PBT, and T.D.B. again stated that he had been drinking over the weekend. T.D.B. submitted to a PBT without ever indicating that he was unwilling to do so, and the test result showed an alcohol concentration of .034. T.D.B. was

17 years old, he never refused to answer any of Olson's questions, and he did not request the presence of a parent or an attorney. Olson did not tell T.D.B. that he was not free to leave or that he was under arrest. T.D.B. was in Olson's office for less than five minutes, and the entire interaction between Olson and T.D.B. lasted between five and seven minutes.

T.D.B. was charged with underage consumption of alcohol. The rulings T.D.B. is challenging in this appeal were made in a pretrial order filed November 20, 2015. The case was then tried to the court. The trial court declined to reconsider the issues decided in the pretrial order and based its finding of guilt on the evidence presented at the April 4, 2016 trial. That evidence included the PBT result, and the trial court specifically cited the PBT result as evidence supporting its finding that T.D.B. committed underage consumption. The district court adjudicated T.D.B. a petty offender and stayed the disposition pending this appeal.

D E C I S I O N

I.

Statutory Interpretation

An appellate court reviews a question of statutory interpretation de novo. *State v. Rick*, 835 N.W.2d 478, 482 (Minn. 2013). If statutory language is clear and unambiguous, we interpret the statute according to its plain meaning without resorting to statutory construction. *Id.* We apply the canons of statutory construction only when a statute is susceptible to more than one reasonable interpretation. *Id.*

The Minnesota Impaired Driving Code states:

> Subdivision 1. When a peace officer has reason to believe from the manner in which a person is driving, operating, controlling, or acting upon departure from a motor vehicle, or has driven, operated, or controlled a motor vehicle, that the driver may be violating or has violated section 169A.20 (driving while impaired), 169A.31 (alcohol-related school bus or Head Start bus driving), or 169A.33 (underage drinking and driving), the officer may require the driver to provide a sample of the driver's breath for a preliminary screening test using a device approved by the commissioner for this purpose.[1]
>
> Subd. 2. The results of this preliminary screening test must be used for the purpose of deciding whether an arrest should be made and whether to require the tests authorized in section 169A.51 (chemical tests for intoxication), but must not be used in any court action except the following: . . .
>
> (5) in a prosecution or juvenile court proceeding concerning a violation of section 169A.33 (underage drinking and driving), or 340A.503, subdivision 1, paragraph (a), clause (2) (underage alcohol consumption)[.]

Minn. Stat. § 169A.41, subds. 1, 2.

Olson testified that he had no reason to believe that T.D.B. had been driving a motor vehicle. T.D.B. argues that Olson, therefore, was not authorized to request a PBT under section 169A.41, subdivision 1, and the PBT result was not admissible under section 169A.41, subdivision 2. The district court ruled pretrial that the PBT result was admissible under Minn. Stat. § 169A.41, subd. 2(5), for use in a juvenile court proceeding for underage alcohol consumption. We disagree.

[1] The pretrial court used the term "PBT," rather than "preliminary screening test." Both terms refer to a breath test administered using a hand-held device.

The impaired-driving code provides that, "[u]nless otherwise indicated, the provisions of [chapter 169A] apply to any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state." Minn. Stat. § 169A.01, subd. 2 (2014). There is no record evidence that T.D.B. drove, operated, or was in physical control of a motor vehicle. Therefore, unless otherwise indicated, the provisions of chapter 169A do not apply to T.D.B. in this proceeding.

Nothing in section 169A.41, subdivision 2(5), indicates that that provision applies to the result of a PBT administered under circumstances that are not described in section 169A.41, subdivision 1. When subdivision 2 addresses "[t]he results of this preliminary screening test," the test that it is referring to is the preliminary screening test described in subdivision 1. Because Olson did not have reason to believe that T.D.B. drove, operated, or controlled a motor vehicle, the PBT that Olson administered was not a preliminary screening test described in subdivision 1. Consequently, the provisions of chapter 169A do not apply to T.D.B.'s test result, and the district court erred in determining that the test result was admissible under subdivision 2(5). But this does not necessarily mean that the PBT result was inadmissible.

Lack of Search Warrant

Based on its determination that the PBT result was admissible under section 169A.41, subdivision 2(5), the pretrial court declined to address T.D.B.'s argument that the PBT result should have been suppressed because the PBT was a search under the Fourth Amendment and there were no exigent circumstances that excused the lack of a search warrant. *See State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016) (stating that an

unreasonable search is constitutionally prohibited and that a search conducted without a warrant is presumptively unreasonable). The state argues that a search warrant was not required because (1) only a reasonable, articulable suspicion of alcohol consumption was required to support Olson's administration of the PBT, and the odor of alcohol coming from T.D.B. satisfied that requirement; and (2) if the PBT was a search for which a warrant was required, consent is an exception to the warrant requirement, and T.D.B. consented to the search.

"All evidence obtained during an unlawful search is inadmissible to support a conviction unless an exception to the exclusionary rule applies." *State v. Barajas*, 817 N.W.2d 204, 217 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012). The state does not claim that an exception to the exclusionary rule applies. Therefore, if T.D.B. is correct that administration of the PBT was an illegal search, the PBT result was inadmissible. Because the trial court relied in part on the PBT result to support its finding that T.D.B. consumed alcohol, the search-warrant issues must be addressed.

When reviewing a constitutional issue that involves mixed questions of law and fact, this court reviews the ultimate constitutional determination de novo but reviews the underlying factual findings for clear error. *State v. Chavarria-Cruz*, 784 N.W.2d 355, 363-64 (Minn. 2010); *see also State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007) (stating that an appellate court "review[s] de novo a district court's ruling on constitutional questions involving searches and seizures"). "[A]t a pretrial suppression hearing the [district] court acts as finder of facts, deciding for purposes of admissibility which evidence

to believe and whether the state has met its burden of proof." *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983 (quotation omitted).

Because neither the pretrial court nor the trial court made the factual findings necessary for this court to review the search-warrant issues raised by the parties, we remand the case to the district court to determine whether the PBT was a search and, if it was, whether a search warrant was required. If the court determines that the PBT result was inadmissible, T.D.B. is entitled to a new trial because the district court specifically cited the PBT result as evidence that supported its finding that T.D.B. consumed alcohol. *See State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009) ("When the [erroneous admission of evidence] implicates a constitutional right, a new trial is required unless the State can show beyond a reasonable doubt that error was harmless. An error is harmless beyond a reasonable doubt if the jury's verdict was surely unattributable to the error." (citation omitted)); *see also* Minn. Stat § 340A.503, subd. 1 (elements of underage consumption). If the court determines that the PBT result was admissible, it should make findings under Minn. R. Juv. Delinq. P. 13.09 and conduct further proceedings in accordance with the findings.

II.

T.D.B. argues that he was in custody and subjected to interrogation when he made his statement to Olson and, therefore, the statement should have been suppressed because he was not given a *Miranda* warning.

> The Fifth Amendment to the United States Constitution provides that an accused has the right to be free from compelled self-incrimination. As a safeguard for this right, the

> United States Supreme Court has held that statements made by a suspect during a "custodial interrogation" are admissible only if the police provided a *Miranda* warning before the statements were made.

State v. Sterling, 834 N.W.2d 162, 168 (Minn. 2013); *see* U.S. Const. amend. V.; *Miranda v. Arizona*, 384 U.S. 436, 444-45, 86 S. Ct. 1602, 1612 (1966). "Thus, a *Miranda* warning is required if a suspect is both in custody and subject to interrogation." *State v. Thompson*, 788 N.W.2d 485, 491 (Minn. 2010).

A person is in custody if there has been a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Minnesota v. Murphy*, 465 U.S. 420, 430, 104 S. Ct. 1136, 1144 (1984) (quotation omitted). An appellate court applies an objective standard to the question whether, "based on all the surrounding circumstances, a reasonable person under the circumstances would believe that he or she was in police custody of the degree associated with formal arrest." *Thompson*, 788 N.W.2d at 491 (quotation omitted). We apply a clear-error standard of review to a district court's findings of fact and a de novo standard of review to a district court's determination whether, based on given facts, a person was in custody. *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998).

Circumstances indicating that a suspect is in custody include that the police interviewed the suspect at the police station, that the officer told the suspect that he or she was the prime suspect, that the officer restrained the suspect's freedom, that the suspect made a significantly incriminating statement, and that several officers were present. *State v. Staats*, 658 N.W.2d 207, 211 (Minn. 2003). If the suspect is a juvenile, and if "the child's age was known to the officer at the time of police questioning," a court should include the

suspect's young age as a factor in the totality of the circumstances. *J.D.B. v. North Carolina*, 564 U.S. 261, 277, 131 S. Ct. 2394, 2406 (2011). Circumstances to consider "include the child's age, intelligence, education, experience with the law, the warning given, and the presence or absence of the child's parents." *In re Welfare of M.A.K.*, 667 N.W.2d 467, 471 (Minn. App. 2003).

T.D.B. argues that the circumstances in this case are similar to those in *M.A.K.*, in which this court concluded that the juvenile was in custody. *See id.* at 472. There are similarities between this case and *M.A.K.* in that T.D.B. had not previously been in legal trouble, he was questioned without a parent present, and he was not told that he was free to leave or that he did not have to answer questions. *See id.* But there are also significant differences. In *M.A.K.*, on two occasions, the 14-year-old juvenile was escorted from class by a uniformed officer and questioned about a theft and burglary, and he was "allowed to return to class only after police were satisfied with his statements." *Id.* at 470, 472. T.D.B. was three years older than the *M.A.K.* juvenile, and T.D.B. was subjected to only brief questioning, with the entire encounter between him and Olson lasting from five to seven minutes. Other facts indicating that T.D.B. was not in custody are (1) T.D.B.'s admission to Olson that he had been drinking over the weekend was information that he had already provided to the school staff member and assistant principal; and (2) the admission was not significantly incriminating because it did not prove that when T.D.B. was in school on Monday morning, he was in "the physical condition of having ingested an alcoholic beverage." *See* Minn. Stat. § 340A.503, subd. 1 (elements of underage consumption).

Under the totality of the circumstances, the district court made a proper pretrial ruling that T.D.B. was not in custody when he was questioned by Olson and properly denied T.D.B.'s motion to suppress his statement to Olson.

III.

The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right to . . . a public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. Minn. Stat. § 609.025 (2014) confers prosecutorial jurisdiction when a person "[c]ommits an offense in whole or in part within this state." The underage-consumption statute provides that "[i]t is unlawful for any person under the age of 21 years to consume any alcoholic beverages." Minn. Stat. § 340A.503, subd. 1(a)(2). "'Consume' includes the ingestion of an alcoholic beverage, and the physical condition of having ingested an alcoholic beverage." *Id.*, subd. 1(c). An underage-consumption offense may be prosecuted "in the jurisdiction where consumption occurs or the jurisdiction where evidence of consumption is observed." *Id.*, subd. 1(b).

T.D.B. argues that section 340A.503 should not be construed to confer jurisdiction on Minnesota because he consumed alcohol in Wisconsin, and the legislative history shows that the intent of the statute was to govern jurisdiction among counties within Minnesota. But canons of statutory construction do not apply when statutory language is clear and unambiguous, and this court must interpret clear and unambiguous statutory language according to its plain meaning. *Rick*, 835 N.W.2d at 482. Under the plain meaning of the statutory definition of "consume," Minnesota had jurisdiction to prosecute T.D.B. based

on evidence that when he was in school on Monday morning, he was in the physical condition of having ingested alcohol.

Affirmed in part, reversed in part, and remanded.