STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1423

State of Minnesota,
Respondent,

v.

Mai Tria Xiong,
Appellant.

Filed October 30, 2017
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-15-1160

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

Samuel J. Clark, St. Paul City Attorney, Maria A. DeWolf, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Robert M. Christensen, Robert M. Christensen, P.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Johnson, Judge.

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

LARKIN, Judge

Appellant challenges her conviction of third-degree driving while impaired, arguing that the evidence against her should have been suppressed because it was obtained in violation of her rights under the United States and Minnesota Constitutions. We affirm.

FACTS

Respondent State of Minnesota charged appellant Mai Tria Xiong with two counts of third-degree DWI. Xiong moved to suppress the evidence supporting the charge, arguing that she was "unlawfully seized without reasonable, articulable suspicion of criminal activity, and her seizure was expanded without lawful justification."[1] The district court held a hearing on Xiong's suppression motion, heard testimony from Trooper Jill Krause of the Minnesota State Patrol, and found the relevant facts to be as follows.

At approximately 1:53 a.m. on June 2, 2014, Trooper Krause was driving west on Highway 94 near Snelling Avenue in St. Paul. Trooper Krause noticed a vehicle in the right adjacent lane, about 40 feet away. Trooper Krause observed the vehicle swerve into its right adjacent lane, and both of its driver's side tires crossed over the dotted lane line. Trooper Krause slowed her squad car to continue to monitor the vehicle's operation and manually turned on her in-car camera.

[1] Xiong also argued that she "was subjected to a warrantless search in violation of the state and federal constitutions" and that her "right to due process was violated when she was misinformed that the failure to agree to warrantless chemical testing is always a crime." Xiong does not raise these issues on appeal.

Between a quarter and half mile from where Trooper Krause originally saw the vehicle swerve, Trooper Krause again observed the vehicle swerve over the dotted lane line. Trooper Krause did not observe the vehicle use a turn signal to indicate an intent to change lanes. Trooper Krause changed lanes so her squad car was behind the vehicle, which continued to travel westbound on Highway 94.

Trooper Krause activated her emergency lights and initiated a traffic stop. After the vehicle pulled over, Trooper Krause exited her squad car, and approached the vehicle. The trooper asked the driver for her driver's license and proof of insurance, and identified the driver as Xiong. Trooper Krause asked Xiong whether she knew why she was pulled over. Xiong indicated that she did not know, laughed, and said something about being on her cellphone. While speaking with Xiong, Trooper Krause smelled a moderate odor of alcohol coming from inside the vehicle and observed that Xiong's eyes were bloodshot and watery. Trooper Krause asked Xiong how many drinks she had consumed. Xiong "stuttered a little" and, after additional questioning, indicated that she had had two drinks. Trooper Krause asked Xiong to get out of the vehicle so Trooper Krause could determine whether it was safe for Xiong to drive. Trooper Krause administered field sobriety tests, and Xiong performed poorly on the tests. Xiong submitted to a preliminary breath test, which registered a 0.134 alcohol concentration.

Trooper Krause took Xiong into custody and transported her to the Ramsey County Law Enforcement Center, where Trooper Krause read her an implied-consent advisory and asked her to submit to a breath test. Xiong agreed to take the test, which registered a 0.12 alcohol concentration.

The district court denied Xiong's motion to suppress. Xiong then stipulated to "the facts found in the Minnesota State Patrol Supplement Arrest Report, Implied Consent Advisory, Squad Video, and Implied Consent Advisory/Miranda Recording," and the district court found her guilty of operating a motor vehicle with an alcohol concentration of 0.08 or more. This appeal follows.

D E C I S I O N

Xiong contends that Trooper Krause "subjected [her] to an illegal, unjustified traffic stop in violation of [her] rights" under the United States and Minnesota Constitutions. Xiong offers three arguments in support of this contention. We address each in turn.

I.

Xiong first argues that "[t]he state presented no evidence that [Trooper Krause] was a licensed peace officer, and so she had no power to conduct a traffic stop or a DWI investigation." Xiong relies on *State v. Horner*, 617 N.W.2d 789, 793-94 (Minn. 2000). In that case, two unlicensed volunteer special deputies who were working for the Hennepin County Sheriff's Department stopped a boat after observing a possible boating violation, and, upon noticing indicia of intoxication, administered field sobriety tests to the driver. *Horner*, 617 N.W.2d at 791. After the driver failed a preliminary breath test, the volunteer deputies arrested him and transported him to the shore where an officer read him an implied-consent advisory and administered a breath test. *Id.* The supreme court held that the volunteer deputies were not peace officers and therefore were not authorized to administer the preliminary breath and field sobriety tests. *Id.* at 794.

After the hearing on Xiong's motion to suppress, she submitted a memorandum arguing, in part, that the state did not present evidence that Trooper Krause was a licensed peace officer and therefore did not establish that she was authorized to conduct the traffic stop and DWI investigation in this case. The district court refused to consider this issue, concluding that it was waived because it was "not clearly presented or litigated at the motion hearing." The district court noted that at the beginning of the hearing, Xiong identified the issues to be addressed as "the basis for the stop, the expansion of the stop into a DWI investigation, the necessity of a warrant for alcohol concentration testing, and the violation of [her] due process rights." The district court further noted that Xiong did not argue that Trooper Krause was not a licensed peace officer until after the motion hearing, when Xiong submitted her supporting memorandum.

On appeal, Xiong does not acknowledge, much less challenge, the district court's conclusion that she waived the licensing issue. Thus, Xiong does not discuss the relevant legal authorities, including Minn. R. Crim. P. 10.01, subd. 2 (stating that the failure to include any "defenses, objections, issues, and requests then available" in a pretrial motion constitutes waiver), *State v. Balduc*, 514 N.W.2d 607, 609-10 (Minn. App. 1994) (holding that a suppression issue first raised after an omnibus hearing is not waived if no prejudice is shown), and *State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985) (holding that defendant's claim regarding the propriety of an unannounced, nighttime search was waived because defendant first raised the issue in memorandum after an omnibus hearing).

Xiong also does not acknowledge the relief that would be appropriate if this court were to conclude that the district court erroneously determined that the licensing issue was

waived: reversal and remand for the district court to consider the issue in the first instance. Instead, Xiong invites this court to consider the merits of her argument for the first time on appeal and to hold that the stop was invalid because the record evidence does not establish that Trooper Krause was a licensed peace officer.

This court generally does not decide issues that were not determined in the district court, *State v. Smith*, 876 N.W.2d 310, 335 (Minn. 2016), and we will not do so here. Moreover, issues that are not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Because Xiong does not argue that the district court erroneously concluded that the licensing issue was waived, we do not consider reversing and remanding for the district court to decide this issue.

We nonetheless note that the record before us indicates that the circumstances here are nothing like those in *Horner*. Trooper Krause testified that she is a "sworn officer" with the Minnesota State Patrol and has made over 150 DWI arrests. In fact, Xiong does not claim that Trooper Krause was unlicensed; Xiong merely complains that the state failed to present evidence regarding the trooper's licensing status. There is little reason to believe that the state would not have been able to prove that Trooper Krause was a licensed peace officer had the issue been raised at the motion hearing.

II.

Xiong argues that in the alternative, "even if [Trooper Krause] were a licensed officer, the evidence was not sufficient to give rise to a reasonable, articulable suspicion of criminal activity that would be enough to justify a stop by a licensed officer."

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. However, a police officer may initiate a limited, investigative stop without a warrant if the officer has reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968). In determining whether reasonable suspicion exists, Minnesota courts "consider the totality of the circumstances and acknowledge that trained law enforcement officers are permitted to make inferences and deductions that would be beyond the competence of an untrained person." *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001). This court reviews a district court's determination of reasonable suspicion of illegal activity de novo, but accepts the district court's factual findings unless they are clearly erroneous. *Id.* In reviewing the district court's factual findings for clear error, this court defers to the district court's credibility determinations. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003).

Any traffic violation—however slight—provides a basis for a traffic stop. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997). Crossing over traffic lanes without signaling, weaving or swerving in a lane, and failing to stay within a lane provide a reasonable, articulable suspicion of a traffic violation justifying a stop. *See* Minn. Stat. § 169.18, subd. 7(a) (Supp. 2013) ("A vehicle shall be driven as nearly as practicable entirely within a single lane and should not be moved from such lane until the driver has first ascertained that such movement can be made with safety."); *see, e.g.*, *Richardson*, 622 N.W.2d at 825-26 (upholding traffic stop where police received report that vehicle had been driving "all over the road" and observed vehicle crossing over fog line); *State v. Kvam*, 336 N.W.2d

525, 528 (Minn. 1983) (stating that an officer is justified in stopping a driver where the officer observes the driver "weaving within [her] lane in an erratic manner"); *State v. Jones*, 649 N.W.2d 481, 484 (Minn. App. 2002) (upholding traffic stop where police observed driver changing lanes without signaling).

Trooper Krause testified that she observed Xiong's vehicle "swerve into the adjacent lane on the right," with "[b]oth tires [going] over the dotted skip stripe." Trooper Krause testified that she saw the vehicle again "swerve over the right skip stripe with both tires [going] into the right lane of traffic." Trooper Krause also testified that although there was "a light mist" at the time, there were many overhead road lights and "visibility was fine." Defense counsel cross-examined Trooper Krause regarding the contents of the squad video, and the district court was therefore invited to assess the trooper's credibility in light of the video. The district court credited the trooper's testimony, finding that Xiong twice swerved into her right adjacent lane, the area was well-lit, and the weather conditions at the time caused "little obstruction in visibility." This court defers to that credibility determination. *See Miller*, 659 N.W.2d at 279.

Xiong argues that the in-car video of the incident demonstrates that Trooper Krause "was not in a position to see whether [she] crossed a lane divider, and no swerve appears on the video." Xiong further contends that "[i]t was dark, it was raining, and the trooper had her windshield wipers on" and that "[e]ven if there was contact with the lane divider, it was minimal and not enough to constitute leaving her lane."

The video indicates that the area where Trooper Krause observed Xiong's vehicle was well-lit by overhead lights and that weather conditions only minimally obstructed

visibility. And although the squad video does not show Xiong's vehicle swerving into its right adjacent lane to a large degree, it provides sufficient support for the district court's finding that Trooper Krause twice observed the vehicle swerving. We therefore do not consider that finding clearly erroneous.

In sum, we defer to the district court's credibility determination and conclude that Trooper Krause had reasonable, articulable suspicion of criminal activity that justified the traffic stop.

III.

Lastly, Xiong argues that Trooper Krause unlawfully expanded the traffic stop into a DWI investigation. "[E]ach incremental intrusion during a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quoting *Terry*, 392 U.S. at 19, 88 S. Ct. at 1868) (quotation marks omitted). Under the Minnesota Constitution, "an intrusion not strictly tied to the circumstances that rendered the initiation of the stop permissible must be supported by at least a reasonable suspicion of additional illegal activity." *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012). The extension of a traffic stop does not violate the Minnesota Constitution "so long as each incremental intrusion during the stop is tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as defined in *Terry v. Ohio*." *Id.* (quotation omitted).

Xiong contends that Trooper Krause unlawfully expanded the traffic stop when she asked Xiong to step out of her vehicle and began a DWI investigation. However, "once a

motor vehicle has been lawfully detained for a traffic violation, [a] police officer[] may order the driver to get out of the vehicle without violating the Fourth Amendment's proscription of unreasonable searches and seizures." *Pennsylvania v. Mimms*, 434 U.S. 106, 111 n.6, 98 S. Ct. 330, 333 n.6 (1977); *Askerooth*, 681 N.W.2d at 367. Thus, Trooper Krause did not need reasonable suspicion to ask Xiong to get out of her vehicle.

As to whether there was reasonable suspicion for Trooper Krause to conduct a DWI investigation, this court has held that an odor of alcohol, observation of a driver's bloodshot and watery eyes, and a driver's admission of drinking establish reasonable suspicion justifying an officer's expansion of a traffic stop to a DWI investigation. *See, e.g.*, *State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012) (odor of alcohol and bloodshot and watery eyes); *State v. Vonderharr*, 733 N.W.2d 847, 854 (Minn. App. 2007) (odor of alcohol and admission of drinking); *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001) (odor of alcohol), *review denied* (Minn. Sept. 25, 2001). Here, the district court found that Trooper Krause "smelled a moderate odor of alcohol from inside the vehicle, and observed that [Xiong's] eyes were bloodshot and watery" before asking Xiong to leave her vehicle. The district court also found that Xiong admitted that she had consumed two drinks. Under the totality of the circumstances, these indicia of intoxication were sufficient to justify the expansion of the traffic stop into a DWI investigation.

Affirmed.