STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1470

James Donald Johnson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed May 15, 2017
Affirmed
Peterson, Judge

Pine County District Court
File No. 58-CV-16-8

Mark G. Giancola, Rory P. Durkin, Giancola-Durkin, P.A., Anoka, Minnesota (for appellant)

Lori Swanson, Attorney General, Joan Marie Eichhorst, Cory Beth Monnens, Assistant Attorney Generals, St. Paul, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Peterson, Judge; and Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

PETERSON, Judge

This appeal is from the district court's order sustaining the revocation of appellant's driver's license based on his refusal to submit to a breath test. Appellant challenges the district court's determinations that (1) the initial seizure of appellant's person was supported by a reasonable, articulable suspicion of criminal activity; (2) the request that appellant take a preliminary breath test (PBT) was supported by a reasonable, articulable suspicion that he had been driving while impaired (DWI); (3) law enforcement correctly informed appellant of the rights and consequences of taking or refusing a chemical test, and his refusal to test was unreasonable under all the circumstances; and (4) appellant's equal-protection rights were not violated. We affirm.

FACTS

At 1:06 a.m. on January 3, 2016, Pine County Sheriff's Deputy Vagenes was notified by dispatch that a possible intoxicated driver had left the Grand Casino Hinckley, and was traveling west. The dispatcher had received this information from a casino security officer who also stated that the driver was "extremely disorderly, intoxicated, and trying to cause a scene." The dispatcher provided the car's license-plate number, and, less than four minutes later, another officer saw the car, a silver Ford Focus, at a convenience store located one or two miles west of the casino. When Vagenes arrived there, the car was parked at a gas pump in front of the store, and it was not occupied.

Vagenes went inside the store and approached the only customer, whom he identified as appellant James Donald Johnson, and told Johnson that he wanted to talk to

him outside. Johnson declined to go outside, so Vagenes talked to him inside the store. Johnson admitted to driving the Focus that was parked outside. When Vagenes told Johnson about the complaint from the casino, Johnson became very upset.

Vagenes smelled alcohol on Johnson's breath, and Johnson admitted to having had two drinks at the casino. Vagenes asked Johnson to perform field sobriety testing, and Johnson refused. Vagenes then asked Johnson to submit to a PBT, and Johnson refused. Johnson yelled at Vagenes, saying that Vagenes had no reason to be talking to him. Believing that Johnson had driven while impaired, Vagenes arrested him for DWI.

Vagenes brought Johnson to the Pine County Sheriff's Office and read him the implied-consent advisory. Johnson stated that he understood the advisory and that he wanted to consult with an attorney. A telephone and directories were made available to Johnson from 1:52 a.m. until 2:08 a.m. Johnson called his wife to get his attorney's phone number. While talking to his wife, Johnson asked Vagenes if he was going to be held in jail overnight. Vagenes replied: "Yes. The jail will give you another phone call based on what happens here, and you'll most likely have a bail amount. But I don't know what that will be. The jail will go through that with you and give you another phone call." Johnson called his attorney's phone number and left a message for the attorney to call him at the jail. Vagenes allowed Johnson to wait five minutes for a return call from the attorney, but the attorney did not call.

Vagenes then asked Johnson to take a breath test, and Johnson refused. Johnson stated that there was no reason for him to take the test because he was not impaired. Vagenes asked Johnson if he understood that it is a crime to refuse to test. Johnson replied,

"Well, of course. I'm not impaired and you can't prove that I was. . . . This thing is going to be laughed out of court. But I'll have my day in court." Vagenes asked Johnson a final time if he would take a breath test, and Johnson again refused.

Respondent commissioner of public safety revoked Johnson's driver's license under Minn. Stat. § 169A.52, subd. 3(a) (2014) (providing for license revocation upon certification by peace officer that there is probable cause to believe driver was impaired and that driver refused to submit to chemical test). Johnson petitioned the district court to rescind the revocation.

At the implied-consent hearing, Vagenes testified on cross-examination about the jail's policy for holding persons arrested for DWI, as follows:

> Q: [A DWI arrestee is] going to stay in the jail no matter what?
> A: No. The policy is if you are intoxicated you have – you cannot get released unless you're a .02 or less, which they test everybody before they leave. And if you come in on a DWI you cannot be tested for at least six hours, so if you had a $500 bail you would not be able to bail out within ten minutes of entering the jail, because they will not be able [to] test him for six hours, so he's guaranteed to be there six hours.
> Q: What if he tested at a .01, would he be able to leave the jail?
> A: Yes.
> Q: And then he would not have to stay overnight, correct?
> A: That's correct.

Vagenes conceded that Johnson was "doing fine" while Vagenes was talking to him, that Johnson was able to use the telephone and talk to his wife and leave a message for his attorney, that he was not slurring his speech or falling down, and that it was possible that Johnson's alcohol concentration could have been below 0.02. Vagenes also testified that

at the convenience store, he had not noticed indicia of intoxication beyond an odor of alcohol, such as stumbling, bloodshot or watery eyes, or slurred speech.

On redirect, Vagenes testified that he believed that Johnson's alcohol concentration was over 0.08 "[b]ecause of his attitude with me, his admitting to drinking that night," and because Vagenes "could smell it on his breath." Vagenes testified that Johnson had not been compliant with him at any point during the process.

The district court determined that Johnson was lawfully seized, that Vagenes properly requested a PBT, that Johnson's refusal to submit to a chemical test for alcohol concentration was not reasonable, and that Johnson's equal-protection rights were not violated. Accordingly, the court sustained the revocation of Johnson's license. This appeal follows.

D E C I S I O N

I.

The United States and Minnesota Constitutions guarantee individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A seizure occurs when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." *State v. Harris*¸ 590 N.W.2d 90, 98 (Minn. 1999) (quotation omitted). When reviewing the legality of an investigatory seizure, this court will accept the district court's factual findings unless they are clearly erroneous. *State v. Hunter*, 857 N.W.2d 537, 543 (Minn. App. 2014). "But legal determinations, such

as whether there was a seizure and, if so, whether that seizure was unreasonable, are reviewed de novo." *State v. Eichers*, 853 N.W.2d 114, 118 (Minn. 2014) (citation omitted).

Johnson argues that he was seized when he declined to go outside and Vagenes continued talking to him inside the convenience store, before Vagenes smelled the odor of alcohol. In *State v. Cripps*, the Minnesota Supreme Court held that a bar patron was seized when a uniformed and armed police officer approached her and asked her for identification to prove that she was of legal age to consume alcohol. 533 N.W.2d 388, 391 (Minn. 1995). In concluding that a reasonable person would not feel free to disregard the officer's request or terminate the encounter, the supreme court emphasized that the officer had asked the bar patron to prove her innocence of the crime of underage consumption of alcohol. *Id.*

Here, the district court determined that "[t]he seizure occurred when Deputy Vagenes asked [Johnson] to submit to a field sobriety test – a reasonable person would not believe they were free to terminate the encounter at that point." The district court's determination that Johnson was seized when Vagenes asked him to submit to a field sobriety test is consistent with *Cripps*. There is no evidence that before asking Johnson to perform field sobriety testing, Vagenes did anything that would have caused a reasonable person to believe that he was not free to leave. *See In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (listing examples of evidence, including "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled" (quotation omitted)). Absent such evidence,

a person is not seized when an officer approaches him in a public place and asks questions. *Id.* at 781-83.

Johnson also argues that a report of a possible impaired driver is insufficient to support a reasonable, articulable suspicion of criminal activity. "Before conducting an investigatory seizure of a person, [a] police officer[] must have a reasonable, articulable suspicion of criminal activity," which "must be present at the moment a person is seized." *Hunter*, 857 N.W.2d at 543. Once the facts are established, the existence of a reasonable suspicion to support a seizure is a question of law, which we review de novo. *Id*.

"[T]he standard for reasonable suspicion is not high, requiring only something more than an unarticulated hunch, that the officer must be able to point to something that objectively supports the suspicion at issue." *Hunter*, 857 N.W.2d at 543 (quotations omitted). When determining whether the standard has been met, we consider "the totality of the circumstances from an objectively reasonable officer's perspective." *State v. Wiggins*, 788 N.W.2d 509, 513 (Minn. App. 2010), *review denied* (Minn. Nov. 23, 2010). Under the collective-knowledge doctrine, an officer who makes a warrantless seizure "is imputed with knowledge of all facts known by other officers involved in the investigation, as long as the officers have some degree of communication between them." *See State v. Lemieux*, 726 N.W.2d 783, 789 (Minn. 2007) (warrantless search).

In *City of Minnetonka v. Shepherd*, a dispatcher received a call from a person who identified himself as an employee of "the Q Petroleum Station in Minnetonka," reported that he had seen "an intoxicated driver leave the gas station heading north on Williston Road," and provided the car's color, make, and license-plate number. 420 N.W.2d 887,

888 (Minn. 1988). Two to three minutes later, an officer located the car and stopped it after following it for a short time. *Id.* at 888-89. The supreme court held "that the call gave the police sufficient information to reasonably suspect that the driver of the car in question was intoxicated." *Id.* at 891 (emphasis omitted). The court explained:

> [T]he caller, although apparently not identifying himself by name, identified himself as a station attendant at the Q Petroleum Station in Minnetonka. If the caller was being truthful in so identifying himself, then the information gave the authorities a way to locate the caller and hold him accountable if he was knowingly providing false information. We believe that, at least for the purpose of making a limited investigatory stop, the officer was justified in assuming that the caller was being truthful in so describing himself. By so describing himself, the caller knowingly gave the police a way of verifying that the caller was who he said he was. Presumably, if the police had had time and had planned on using the information for something involving a greater intrusion than that occasioned by a stop, the police would have called the station back and verified that the call had been made by an attendant. The fact that that apparently was not done here does not mean that the officer was unjustified in assuming that the caller was who he said he was[.] . . .
>
> This case is . . . distinguishable from *Olson* [*v. Comm'r of Pub. Safety*, 371 N.W.2d 552 (Minn. 1985),] in that the information given here indicated that there was a valid basis in fact for the statement that the driver of the car was intoxicated. In *Olson* the caller apparently simply said that the driver was "possibly a drunken driver" and gave no indication as to how that conclusion was reached. Here the caller said that an intoxicated driver (not a possibly intoxicated driver) had just left the station. This information suggested that the driver had been in the station and that the caller's information was based on personal observation of the driver himself . . . .

Id. at 889-91 (footnote omitted).

As in *Shepherd*, the casino security officer knowingly gave the dispatcher a way of verifying his and his supervisor's identities. The security officer described the driver as "extremely disorderly, intoxicated, [and] trying to cause a scene." This information was based on the security officer's supervisor's personal observations. In addition, as the district court found, "[b]y the time [Johnson] was actually seized, he had admitted to Deputy Vagenes that he had driven the silver Ford Focus after having consumed alcohol, and Deputy Vagenes could smell alcohol on [Johnson]." The district court properly concluded that the seizure of Johnson, which occurred when Vagenes asked him to perform field sobriety testing, was supported by a reasonable, articulable suspicion of criminal activity.

II.

An officer needs a reasonable, articulable suspicion of a DWI violation to support a PBT request. Minn. Stat. § 169A.41, subd. 1 (2016); *State, Dep't of Pub. Safety v. Juncewski*, 308 N.W.2d 316, 321 (Minn. 1981).

The casino security officer described the driver as intoxicated and extremely disorderly. The description was based on the security officer's supervisor's personal observations. The security officer provided the vehicle's description and license-plate number. Vagenes found the car a few minutes later, and Johnson admitted to driving the car after drinking alcohol. Vagenes smelled the odor of alcohol on Johnson's breath, and Johnson became very upset when Vagenes told him about the complaint from the casino.

Johnson's argument that the PBT request was not authorized under Minn. Stat. § 169A.41 because Vagenes did not see Johnson drive, operate, control, or depart from his

car has been rejected by the supreme court. *See, e.g.*, *Juncewski*, 308 N.W.2d at 321 (stating that statute's "use of past tense can only refer to situations where the officer did not witness the actual driving, but nevertheless had a specific and articulable suspicion of a violation"). The district court properly concluded that the PBT request was supported by a reasonable, articulable suspicion of DWI.

III.

It is an affirmative defense for a driver to prove that his refusal to permit a test was based on reasonable grounds. Minn. Stat. § 169A.53, subd. 3(c) (2014). Whether a driver had reasonable grounds to refuse testing is generally a fact question, and the district court's finding will not be reversed unless clearly erroneous. *State, Dep't of Highways v. Beckey*, 291 Minn. 483, 486-87, 192 N.W.2d 441, 444-45 (1971).

Johnson argues that he was confused because Vagenes stated that he would have to stay in jail overnight and did not explain that he might not be held overnight depending on the test results. The district court found:

> The only evidence submitted by [Johnson] regarding this claim was [a video recording of the reading of the implied-consent advisory]. When viewing [the recording], it is clear Deputy Vagenes did not mislead [Johnson] by telling him he would be held in jail overnight. Deputy Vagenes told [Johnson] he would be held unless bail was set and that would be handled by the jail. [Johnson] can be heard telling his wife he might have to post bail. There is no connection between [Johnson's] questioning Deputy Vagenes about staying the night and [Johnson's] ultimate refusal. [Johnson] asked about spending the night so he could provide information to his wife regarding his whereabouts. It was never intimated by Deputy Vagenes that [Johnson] would only spend the night if he failed the test. There was nothing in their conversation that could even remotely support a claim that [Johnson] refused the test

> *because* he was told he was going to stay in jail overnight. His behavior during the Implied Consent process clearly supports a determination that he refused the test because he was angry and belligerent not because he was misled.

These findings are supported by the record evidence and are not clearly erroneous, and they show that Johnson's refusal to permit a test was not based on reasonable grounds.

IV.

This court reviews the constitutionality of a statute as a question of law subject to de novo review. *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 722 (Minn. App. 2014). Statutes are presumed to be constitutional; a person challenging the constitutionality of a statute has the burden of proof. *State v. Benniefield*, 678 N.W.2d 42, 45 (Minn. 2004).

The equal-protection clauses of the United States and Minnesota Constitutions "mandate that all similarly situated individuals shall be treated alike." *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. June 19, 2007); *see* U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 2. "A party may raise an equal protection challenge to a statute based on the statute's express terms, a facial challenge, or based on the statute's application, that is, an as-applied challenge." *Richmond*, 730 N.W.2d at 71 (quotation marks omitted).

Johnson is making an as-applied challenge to the implied-consent and test-refusal statutes. Johnson argues that all drivers suspected of DWI are similarly situated because they are under arrest, at a police station, informed of the implied-consent law, and asked to take a chemical test. Johnson acknowledges that "the implied consent and refusal statutes

are facially neutral," but he contends that, given recent developments in Minnesota's DWI case law, drivers accused of DWI receive very different treatment depending on the type of chemical test they are offered in that drivers offered a breath test receive less protection than drivers offered a blood or urine test.

Under the case law that Johnson cites, a driver offered a warrantless blood test cannot be charged with the crime of refusing a test, but a driver offered a warrantless breath test who refuses the test can be charged with test refusal. *See State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *aff'd sub nom. Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). In *Birchfield*, the United States Supreme Court concluded that "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." 136 S. Ct. at 2184. The Court reasoned that "[b]ecause breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, . . . a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id.* at 2185. Consequently, "[a]s in all cases involving reasonable searches incident to arrest, a warrant is not needed" when a breath test is required. *Id.*

Following *Birchfield*, the Minnesota Supreme Court held that a driver cannot be prosecuted under the test-refusal statute for refusing to submit to a warrantless blood test because an individual has a right to be free from unreasonable searches, and a warrantless blood test is an unreasonable search. *State v. Trahan*, 886 N.W.2d 216, 221 (Minn. 2016). The supreme court also held that a driver cannot be prosecuted under the test-refusal statute for refusing to submit to a warrantless urine test. *State v. Thompson*, 886 N.W.2d 224, 234 (Minn. 2016).

The implied-consent law permits a peace officer to choose which test to offer a suspect. Minn. Stat. § 169A.51, subd. 3 (2014) (stating that "peace officer who requires a test pursuant to this section may direct whether the test is of blood, breath or urine"). Johnson argues that the equal-protection problem in this case is that a driver arrested for DWI who is offered a breath test cannot legally refuse to submit to the test while a similarly situated driver arrested for DWI who is offered a blood or urine test can legally refuse to submit to the test. Thus, a driver's fundamental Fourth Amendment right to be free from an unreasonable search may be overcome by an officer's choice to offer a breath test, instead of a blood or urine test, which, Johnson contends, creates intentional and purposeful discrimination.

This court addressed a similar equal-protection argument in *Hayes v. Comm'r of Pub. Safety*, 773 N.W.2d 134 (Minn. App. 2009). In *Hayes*, the commissioner of public safety revoked Hayes's driver's license after Hayes was arrested for DWI and submitted to a urine test that revealed an alcohol concentration of 0.13. *Id*. at 135. Hayes petitioned the district court to rescind the revocation and "argued that the revocation of his driver's license violated his constitutional right to equal protection because, unlike breath tests and blood tests administered to other drivers, his urine test did not measure his alcohol concentration at the time he provided the urine sample." *Id*. at 135-36. Hayes argued further that "'it is the choice of each law enforcement officer which test will be provided and that this choice is arbitrary, depending only on the fancy of the arresting officer or the local jurisdiction.'" *Id*. at 139.

This court rejected Hayes's arguments based on the principle that unequal application of a statute is not a violation of the right to equal protection unless intentional or purposeful discrimination is shown, noting that "'equal protection is not violated every time public officials apply facially neutral state laws differently.'" *Id*. at 139-40 (quoting *Sheehan v. Franken (In re Contest of Gen. Election Held on Nov. 4, 2008)*, 767 N.W.2d 453, 463 (Minn. 2009)). Hayes did not argue that the officer's choice of a urine test was the result of intentional or purposeful discrimination, and he did not offer any evidence that it was; he argued only that he was "the victim of an arbitrary decision by the [officer] to select a urine test." *Id*. at 140.

Johnson attempts to distinguish this case from *Hayes* by arguing that "because the choice of a breath test over blood or urine is a choice that wholly and necessarily obviates the warrant requirement[,]. . . the officer can circumvent the Fourth Amendment by his or her choice of testing, which creates intentional and purposeful discrimination." But "discrimination" is "a failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored." *Black's Law Dictionary* 534 (9th ed. 2009) (defining "discrimination"). Johnson offered no evidence that Vagenes failed to treat all drivers equally or that he treated any driver differently than he treated Johnson. Therefore, even if Vagenes's choice of a breath test was an intentional or purposeful choice, Johnson has not shown that Vagenes's choice was the result of intentional or purposeful discrimination.

Affirmed.