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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1637

Eric Michael Deroos, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 27, 2018
Affirmed
Reilly, Judge

Chisago County District Court
File No. 13-CV-17-330

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

Lori Swanson, Attorney General, Joan M. Eichhorst, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

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

REILLY, Judge

Appellant Eric Michael Deroos challenges the district court's order sustaining the revocation of his driving privileges under Minnesota's implied-consent law, arguing that the district court erred in determining his seizure was supported by reasonable articulable

suspicion, there was probable cause to believe appellant was driving while under the influence of alcohol, and he refused to submit to chemical testing. We affirm.

FACTS

Around 3:00 a.m. on May 14, 2017, a Chisago County deputy sheriff responded to a report of a man lying on the shoulder of I-35 and a woman walking on the freeway. The report described the man as bald and wearing a blue shirt and the woman with dark hair and dark clothing. When the deputy arrived at the location, he discovered a vehicle registered to appellant on the side of the freeway, but no one in the immediate vicinity. A different police officer located a man and woman, believed to be the two people seen along I-35, two miles away at a gas station. The man, who was bald and wearing a blue shirt, and the woman, who had dark hair and clothing, were in a pickup truck driven by a third person.

The bald man, later identified as appellant, was seated in the rear passenger seat of the truck. As the deputy spoke with the driver about a marijuana pipe lying on the center console, and the driver acknowledged the possible presence of marijuana in the truck, the deputy saw appellant shoving his hands behind and down in front of himself, as if he were trying to conceal something. After appellant failed to comply with multiple commands to show his hands, he was removed from the truck and placed in a squad car.

When appellant exited the truck, the deputy noticed that appellant's eyes were bloodshot and watery and he emitted an odor of alcohol. The deputy spoke with the driver of the truck, who stated that he and his two passengers had been at a casino together and that he left separately from the other two. After appellant's car ran out of gas on I-35, they

called for a ride. The woman recounted the same sequence of events, adding that appellant drank two beers at the casino, drove his car until it ran out of gas, and asked her to stay down after they got out of the car to avoid being seen by police.

The deputy led appellant through a series of field sobriety tests, including horizontal gaze nystagmus, walk-and-turn, and one-leg-stand, and concluded appellant showed signs of impairment on two of them. Appellant refused to take a preliminary breath test. The deputy placed appellant under arrest and brought him to the jail. Shortly after 4:00 a.m., the deputy twice read appellant the breath-test advisory. While the deputy was reading the advisory, appellant interrupted him and was generally uncooperative. He removed wood ticks from his clothing and threw them at the deputy. Appellant stated that he would take a breath test, but never approached the DataMaster instrument to provide a sample and never blew into it. Subsequently, appellant's driver's license was revoked for test refusal.

Appellant filed a petition to reinstate his driving privileges. The district court held an evidentiary hearing to consider (1) whether reasonable articulable suspicion supported appellant's seizure, (2) whether there was probable cause to believe appellant was driving while under the influence of alcohol, and (3) whether appellant refused to submit to a breath test. The district court heard testimony from appellant and the deputy and received into evidence a transcript of the breath-test advisory and a DataMaster report. The district court concluded that reasonable articulable suspicion supported appellant's seizure, there was probable cause to believe appellant was driving while under the influence of alcohol, and appellant refused to submit to breath testing. The district court therefore denied appellant's

petition and sustained the commissioner of public safety's order revoking appellant's driving privileges. This appeal followed.

D E C I S I O N

I. Appellant's continuing seizure was supported by reasonable articulable suspicion.

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. An officer may conduct a limited investigatory stop if the officer has reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). The reasonable, articulable suspicion standard is met when the officer "observes unusual conduct that leads the officer to reasonably conclude in light of his or her experience that criminal activity may be afoot." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quoting *In re Welfare of G.M.*, 560 N.W.2d 687, 691 (Minn. 1997)).

Appellant concedes there was reasonable articulable suspicion to support removing him from the truck to check for weapons and to prevent an attempt to hide evidence, but argues the scope of the seizure was illegally expanded to undertake an impaired-driving investigation. We are not persuaded.

The deputy noticed that appellant's eyes were bloodshot and watery and there was an odor of alcohol emanating from him. A man matching appellant's description had been seen lying next to the interstate freeway in a location where his car was later found abandoned. Appellant's passenger told the deputy appellant drank alcohol at the casino,

drove the car until it ran out of gas, and urged her to duck to avoid police as they walked away from the car.

An officer's "observation of two indicia of intoxication . . . reasonably justif[ies] further intrusions in the form of field sobriety and preliminary breath testing." *See State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012) (concluding officer's observation of odor of alcohol emanating from driver and driver's bloodshot and watery eyes justified expansion of stop). On this record, the district court properly concluded that the continuing seizure of appellant to investigate whether he was driving while impaired was supported by reasonable articulable suspicion.

II. There was probable cause to believe appellant was operating a motor vehicle while under the influence of alcohol.

Before requiring an individual to take a chemical test, a police officer must have probable cause to believe that the individual has been driving, operating, or in physical control of a vehicle while impaired. Minn. Stat. § 169A.51, subd. 1(b) (2016). In the context of the test-refusal statute, probable cause "exists whenever there are facts and circumstances known to the officer which would warrant a prudent man in believing that the individual was driving . . . while impaired." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) (quotations omitted). "[T]he probable cause standard asks whether the totality of the facts and circumstances known would lead a reasonable officer to entertain an honest and strong suspicion that the suspect has committed a crime." *Id.* at 363 (quotation omitted). This court does not review probable cause de novo; "instead, we determine if the police officer had a substantial basis for concluding that probable cause

existed at the time of invoking the implied consent law." *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 840 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 13, 2000); *see also Delong v. Comm'r of Pub. Safety*, 386 N.W.2d 296, 298 (Minn. App. 1986) (stating that we evaluate the existence of probable cause from the point of view of the officer, giving deference to the officer's experience and judgment), *review denied* (Minn. June 13, 1986).

Appellant argues that even if there was probable cause to believe he was impaired *and* that he had been driving, there was not probable cause to believe that he was impaired *while* he was driving. A "temporal connection" between the driving conduct and the officer's observation of intoxication must exist in order to establish probable cause to believe a person was driving a motor vehicle under the influence of alcohol. *Dietrich v. Comm'r of Pub. Safety*, 363 N.W.2d 801, 803 (Minn. App. 1985). "Where there is no evidence whatsoever connecting the time of driving with the time of an officer's observations, the officer's proof of probable cause is inadequate." *Hedstrom v. Comm'r of Pub. Safety*, 410 N.W.2d 47, 49 (Minn. App. 1987). But there is no requirement that police "establish the exact time the driver was driving." *Weldon v. Comm'r of Pub. Safety*, 400 N.W.2d 816, 818 (Minn. App. 1987) (affirming revocation where driver had been at a bar earlier, drove home, was in an accident at an undetermined time, and showed signs of intoxication later). On this issue, the supreme court's *Eggersgluss* opinion is instructive. Where a passenger stated that a driver consumed alcohol before missing a turn and flipping his car in the middle of the night, the driver was not forthcoming about drinking, and the officer observed indicia of intoxication, the supreme court concluded that this court placed

"too much importance on the commissioner's inability to prove a negative, specifically, that defendant did not drink after the accident." *Eggersgluss v. Comm'r of Pub. Safety*, 393 N.W.2d 183, 185 (Minn. 1986) (reversing this court's decision and sustaining revocation).

Here, appellant's passenger told the deputy appellant drank beer at the casino then drove until his car ran out of gas. When they got out of the car on the freeway, appellant wanted her to avoid being seen by the police. And the deputy observed indicia of intoxication. The deputy had no reason to think that appellant had become drunk *after* abandoning his car on the side of I-35—that account was offered for the first time in district court. From the deputy's perspective, appellant drank beer at the casino, drove until he ran out of gas within the last hour, was uncooperative, and appeared to be intoxicated.

Based on the totality of the circumstances, the officer had a substantial basis for concluding that there was probable cause to believe appellant had driven a vehicle while impaired.

III. The evidence is sufficient to find that appellant refused to submit to a chemical test.

To determine whether a driver's failure to provide a sample constitutes test refusal, courts look to the driver's words and actions. *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 722 (Minn. App. 2014). "The question whether a driver has refused to submit to chemical testing is a question of fact, to which this court applies a clear-error standard of review." *Id.* Appellant argues that the district court erred in finding a refusal because (1) he verbally consented to the test requested by the deputy; and (2) the purported refusal

occurred after the deputy turned off the voice recorder and was not captured by the recorder. Appellant offers no legal authority to support either argument.

The transcript of the breath-test advisory shows that appellant spoke the words "I'll take any test you want me to take." But there is no evidence that appellant actually supplied breath samples. "If a driver expresses verbal agreement to submit to chemical testing but does not provide an adequate sample, his or her conduct may be deemed a refusal to submit to chemical testing." *Id.* at 721. The deputy testified that although appellant said he would submit to a breath test, he did not approach the instrument or blow into it. The deputy's testimony is direct evidence of refusal. *See State v. Brazil*, 906 N.W.2d 274, 278 (Minn. App. 2017) ("Testimony provided by a witness, concerning what the witness saw or heard, is considered direct evidence.").

The rest of the transcript and the DataMaster report, which were also admitted into evidence, support the district court's finding. The transcript shows appellant interrupting, insulting, and badgering the deputy; using vulgar language; failing to follow instructions; and repeatedly stating that he did not understand the advisory. It does not suggest that appellant intended to submit to a test. And the DataMaster report is blank and bears the notation, "subject refused to test."

The evidence is sufficient to support the district court's finding that appellant refused to submit to chemical testing.[1] The district court did not clearly err in making this finding.

Affirmed.

[1] Appellant does not explain how an audio recording of an individual *not* blowing into a testing instrument is necessary to our analysis. He does not claim that he provided breath samples.