STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1825

State of Minnesota,
Respondent,

vs.

Scott Lawrance Ziegler,
Appellant.

Filed September 3, 2019
Affirmed
Florey, Judge

Beltrami County District Court
File No. 04-CR-17-2056

Keith Ellison, Attorney General, St. Paul, Minnesota; and

David L. Hanson, Beltrami County Attorney, David P. Frank, Chief Assistant County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Reyes, Judge; and Florey, Judge.

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

FLOREY, Judge

Appellant argues that he was arrested by Red Lake police officers and, because Red Lake police officers are not "peace officers" under Minnesota law, the district court erred

by failing to conclude that his arrest was unlawful. He maintains that, because his arrest was unlawful, the evidence must be suppressed and his conviction vacated. We affirm.

FACTS

In the early morning hours of July 16, 2017, Red Lake Tribal Police Officer Matt Smith (Officer Smith) received a report of a reckless driver within the Red Lake Reservation. Officer Smith responded to the reported location and found a vehicle that had driven off the road into a ditch near Ponemah. Officer Smith observed tracks showing where the vehicle had driven off the road. The tracks indicated that, prior to landing in the ditch, the vehicle had driven through several residential front yards.

Officer Smith approached the vehicle and made contact with the driver, appellant Scott Lawrance Ziegler. A passenger, H.R., was in the vehicle with appellant. Upon making contact with appellant, Officer Smith observed indicia of impairment. He could smell alcohol coming from appellant's breath, he observed that appellant's pupils were dilated and did not respond to light, and that appellant was having difficulty answering Officer Smith's questions. Appellant was unable to provide Officer Smith with a driver's license or other form of identification. At approximately 1:00 a.m., after appellant provided Officer Smith with inconsistencies concerning his identity, the officer contacted the Beltrami County Police Department.

Officer Smith spoke with Beltrami County Sheriff's Deputy Kyle Nohre (Deputy Nohre). Officer Smith reported that two non-band members had been involved in a vehicle accident, that the vehicle was in a ditch near Ponemah, and that he was having trouble identifying the driver. Deputy Nohre conducted an electronic search of the driver based

on the information Officer Smith gave to him, and eventually identified the driver as appellant. Deputy Nohre observed, based on photographs of appellant from an online social media account, that "over time it appeared he had lost a large amount of weight and his checks [sic] were sunken in his more recent photos." Officer Smith advised Deputy Nohre that appellant had denied usage of any controlled substances, that appellant had a revoked driver's license, and that he would be contacting Deputy Nohre again once he determined how he was going to retrieve appellant's vehicle from the ditch.

Appellant informed Officer Smith that he was unable to locate anyone to come assist with retrieving his vehicle from the ditch and told the officer that he could not afford the services of a towing company. Officer Smith contacted an on-call conservation officer who had a four-wheel-drive truck and a tow strap to come help pull appellant's vehicle from the ditch. Approximately 30 minutes later, the conservation officer arrived at their location. During the process of pulling appellant's vehicle from the ditch, Officer Smith observed alcohol in plain view in the vehicle. Officer Smith advised appellant that alcohol was not permitted on the reservation.

Officer Smith contacted Deputy Nohre again. He informed Deputy Nohre that appellant's vehicle was pulled out of the ditch and that appellant admitted to using methamphetamine. Because, as he later testified, he felt that "[appellant] was a direct threat to the safety of other people due to his impairment," Officer Smith stated to Deputy Nohre that he would escort appellant and the passenger to the reservation border.

H.R., who provided Officer Smith with a valid driver's license, drove appellant's vehicle while appellant rode in the car as a passenger. They drove behind Officer Smith.

Before reaching the reservation line, however, appellant's vehicle ran out of gas. Officer Smith called for another officer to assist him, parked his car behind appellant's vehicle, and activated the patrol car's emergency lights while waiting for a tow truck to assist. Officer Smith contacted Deputy Nohre again. He was advised by the deputy to transport appellant and H.R. to the reservation line where Deputy Nohre could conduct a DWI investigation.

Red Lake Tribal Police Officer Josh Wicker (Officer Wicker) responded to Officer Smith's call for assistance. With appellant in his squad car's backseat, Officer Wicker escorted him and H.R. to the reservation line. Appellant was informed that Beltrami County Sheriff's Department would be meeting him at the border. Deputy Nohre met Officer Wicker at the reservation line and informed appellant that he wanted appellant to perform field sobriety testing.

Appellant consented to the tests. After completion of the tests, and suspecting that appellant had been driving while impaired, Deputy Nohre arrested appellant and transported him to the Beltrami County Jail where appellant was held pending charges and retrieval of a blood-draw search warrant. The blood sample, taken pursuant to a judicially authorized warrant and submitted to the Bureau of Criminal Apprehension, confirmed that appellant had methamphetamine in his system. The Beltrami County Attorney's Office charged appellant with two criminal counts: (1) third-degree driving while impaired (DWI) and (2) driving after revocation.

Appellant filed a suppression motion. He alleged that his arrest "was unlawful because the Red Lake arresting peace officer was not a peace officer as defined" by statute.

He, thereafter, filed an amended suppression motion, adding an additional allegation: that Officer Smith "unlawfully expanded the duration and scope of the stop without independent reasonable, articulable suspicion of illegal activity."

A contested omnibus hearing was held on appellant's motion. Officer Smith, Deputy Nohre, and appellant all testified at the hearing. Officer Smith denied that his actions amounted to an arrest. He testified that appellant "was being detained during [his] investigation," but that "[a]t no time did [he] place [appellant] in handcuffs or place him into a car." Officer Smith testified that, after appellant's vehicle ran out of gas while driving toward the reservation line, appellant and H.R. "were then put into the back of a squad car of their own free will because . . . they had no way to get a ride, they were not placed under arrest and they were escorted to the line and given a ride by Officer Wicker." He testified, "They were, also, told they would have to deal with Beltrami County when they got to the line because [of] their safety, we cannot just drop them at the line at 3:00 in the morning."

Deputy Nohre testified to his involvement in the incident. He testified that the social-media photos he viewed of appellant while assisting Officer Smith in identifying the suspect driver were "indicative of [a] person who uses methamphetamine." He testified that appellant admitted to using, two days prior to the incident, methamphetamine, that he conducted field sobriety tests as part of his DWI investigation, and that he, ultimately, arrested appellant on suspicion of driving while impaired.

Appellant testified that, upon being placed in the Red Lake tribal officer's patrol car, he did not feel free to leave. He testified that, after his "car ran out of gas on a dirt

road," Officer Smith instructed him "to get in the back of the [squad] car." Appellant explained, "[H]e was bringing me to the line. He was escorting me to the line. I wasn't allowed to get out. I don't know." He testified that, once they arrived at the reservation line, he waited in the vehicle for a "couple of minutes . . . just until the other officer showed up." He affirmed that Red Lake officers had not placed him in handcuffs and conceded to having, at the time of the incident, methamphetamine in his system. The district court denied appellant's motion in its entirety, finding that "there was not an arrest here by Red Lake Officers."

Appellant waived his right to a jury trial, stipulated to the state's evidence, and agreed that his right to appeal would be limited to the district court's ruling on the pretrial suppression motion and that the pretrial motion was dispositive of the case. *See* Minn. R. Crim. P. 26.01, subd. 4. The district court found appellant guilty of driving while impaired and driving after revocation. This appeal follows.[1]

D E C I S I O N

Appellant argues that, because the conduct of the Red Lake tribal police officers amounted to an unlawful arrest, it was error for the district court to deny his suppression motion.

[1] Pending this appeal, we issued a published decision in a case with a similar issue, holding that the Red Lake tribal police officer did not unlawfully detain or arrest the defendant. *See State v. Thompson*, 929 N.W.2d 21, 34 (Minn. App. 2019), *reviewed granted* (Minn. Aug. 6, 2019). Generally, we follow the rule of law articulated in a published opinion, even one subject to further review, until the Minnesota Supreme Court announces a different rule of law.

"When reviewing pretrial orders on motions to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007). Because appellant stipulated to the prosecution's evidence pursuant to rule 26.01, subdivision 4, "our review is further limited to the pretrial order that denied [appellant's] motion to suppress." *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

Under section 169A.40 of Minnesota's impaired-driving code, a "peace officer" may arrest a person if there is probable cause that the person has committed a DWI offense. Minn. Stat. § 169A.40, subd. 1 (2018). "Peace officer" is defined as:

> (1) a State Patrol officer;
> (2) University of Minnesota peace officer;
> (3) police officer of any municipality, including towns having powers under section 368.01, or county; and
> (4) for purposes of violations of this chapter in or on an off-road recreational vehicle or motorboat, or for violations of section 97B.065 or 97B.066, a state conservation officer.

Minn. Stat. § 169A.03, subd. 18 (2018).

Generally, tribal governments "lack criminal jurisdiction over non-Indians who commit crimes in Indian country." *United State v. Bryant*, 136 S. Ct. 1954, 1960 n.4 (2016). "Thus, Indian tribes may not prosecute a non-Indian for a violation of the tribe's criminal code that is committed on the tribe's reservation if the victim of the crime is a non-Indian or if the crime is a victimless crime." *Thompson*, 929 N.W.2d at 30-31.

The state does not suggest that the Red Lake tribal police officers are "peace officers" for purposes of the impaired-driving code. Nor does the state suggest that the

Red Lake tribal police officers had any other authority to arrest appellant. Rather, the state maintains that the interactions between the tribal police officers and appellant did not amount to an arrest.

Not all interactions between police officers and citizens constitute an arrest. *See State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). "A law-enforcement officer typically makes an arrest by expressly informing a person that he or she is being arrested." *Thompson*, 929 N.W.2d at 27 n.1. But, Minnesota caselaw recognizes that a "de facto arrest" may have occurred in circumstances where, despite not being formally arrested, a reasonable person would not have felt free to leave. *Id.*; *see also State v. Blacksten*, 507 N.W.2d 842, 847 (Minn. 1993) ("Respondent was de facto under arrest from the time he was ordered to the ground at gunpoint, handcuffed, and placed in the squad car.").

However, a temporary detainment wherein a person is not free to leave during the period of detention "does not convert the detention into an arrest." *State v. Moffatt*, 450 N.W.2d 116, 120 (Minn. 1990). Indeed, the two-part de facto arrest test "recognizes that, in some situations, a suspect who is not under arrest may not be free to leave because he is in investigative detention, in which case an officer may continue to detain him for a reasonable period of time." *Thompson*, 929 N.W.2d at 27 n.1.

As we have explained before, the United States Supreme Court has "recognized a tribal police officer's authority to detain a person suspected of violating a state criminal law and to deliver the person to state law-enforcement authorities." *Id.* at 32. In *Duro v. Reina*, 495 U.S. 676, 697, 110 S. Ct. 2053, 2065-66 (1990), the Supreme Court articulated:

> Tribal law enforcement authorities have the power to restrain those who disturb public order on the reservation, and if necessary, to eject them. Where jurisdiction to try and punish an offender rests outside the tribe, tribal officers may exercise their power to detain the offender and transport him to the proper authorities.

Citing to *Duro*, we explained in *Thompson* that "Indian tribes have inherent authority to expel a non-member who is suspected of criminal activity from the tribe's reservation by detaining and delivering the non-member to a non-Indian law-enforcement agency." 929 N.W.2d at 23-24.

In the case before us, the district court found in its pretrial order denying appellant's suppression motion that "[n]either Officer Smith nor Officer Wicker arrested [appellant] at any time." On appeal, appellant argues that the district court's finding was error "because the conduct of Officers Smith and Wicker constitute[d] a constructive—or *de facto*—arrest." He contends that the following circumstances demonstrated that the Red Lake tribal officers placed him under arrest: he "was locked inside Officer Wicker's patrol car so that he could not get out"; he was detained in Officer Wicker's "patrol car until Deputy Nohre arrived"; his testimony at the motion hearing established "that he did not feel free to leave"; and "Officers Smith and Wicker did not simply detain [a]ppellant and hand him over to the proper authorities. Rather, they conducted an investigation at Deputy Nohre's direction, independently determined that [a]ppellant drove while impaired, took [a]ppellant into custody, and then held him in custody until Deputy Nohre arrived."

The district court did not err by finding that the tribal officers' interaction with appellant did not amount to an arrest. The evidence establishes that the Red Lake officers

never placed appellant into handcuffs, they never administered field sobriety tests or preliminary breath tests (PBTs), appellant was placed in the back of Officer Wicker's squad car for the sole purpose of transporting him to the reservation border (after his own vehicle ran out of gas while he was riding in it), appellant was briefly detained in Officer Wicker's squad car to ensure his safety and the safety of the tribal community until Deputy Nohre arrived, and during this brief detention, there is no evidence that the officers interrogated, or even questioned, appellant. Appellant's contention that the officers "independently determined that [a]ppellant drove while impaired" is a misstatement of the evidence. The evidence demonstrates that, other than observing that appellant's eyes were watery, and asking whether appellant had consumed any alcohol or controlled substances, the officers never "determined" that he was impaired. Appellant does not dispute that it was, in fact, Deputy Nohre who administered the field sobriety tests and the PBT.

The conduct of Officers Smith and Wicker amounted to nothing more than a brief, temporary detention of appellant. The detainment was based on Officer Smith's observation that appellant was disturbing public order on the reservation and his reasonable belief that appellant "was a direct threat to the safety of other people due to his impairment." Pursuant to *Duro* and *Thompson*, the officers were permitted to temporarily detain appellant and deliver him to the proper agency with jurisdiction over his actions. *See Duro*, 495 U.S. at 697, 110 S. Ct. at 2065-66; *Thompson*, 929 N.W.2d at 23-24. The officers' conduct was reasonable and did not amount to an arrest. *See, e.g.*, *Moffatt*, 450

N.W.2d at 120; *Thompson*, 929 N.W.2d at 27 n.1. The district court properly dismissed in its entirety appellant's suppression motion.

Affirmed.