STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0079

State of Minnesota,
Respondent,

vs.

Brian John Abrahamson,
Appellant.

Filed November 12, 2019
Affirmed
Cleary, Chief Judge

Dakota County District Court
File No. 19HA-CR-17-4361

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

Korine Land, West St. Paul City Attorney, Cassandra C. Wolfgram, Assistant City Attorney, LeVander, Gillen & Miller, P.A., South St. Paul, Minnesota (for respondent)

Rodd Tschida, Minneapolis, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Larkin, Judge.

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

CLEARY, Chief Judge

In this direct appeal from convictions for driving while impaired (DWI) and violation of a driver's license restriction, appellant argues that (1) a state trooper

misinformed him that he could not refuse a preliminary breath test (PBT) and field-sobriety testing, thereby violating his due-process rights and requiring the suppression of those tests; (2) he did not voluntarily consent to a PBT; (3) the breath-test advisory violated his due-process rights because it was inaccurate; (4) the evidence did not establish his guilt for the restricted license offense; and (5) the district court erred in granting the state's motion for a continuance. We affirm.

FACTS

Around 1:00 a.m., a state trooper stopped a vehicle for speeding. Upon approaching, the trooper smelled alcohol and saw that the driver and sole occupant, appellant Brian John Abrahamson, had bloodshot and glassy eyes. The trooper asked appellant when he last consumed alcohol, and appellant replied that he was coming from a concert but did not drink.

The trooper went to his squad car, ran appellant's driver's license, and discovered that it had a restriction prohibiting the use of alcohol. He returned to appellant's vehicle and asked him to perform "a couple of quick checks." Appellant exited his vehicle but refused to submit to the checks, stating that he was "not going to do this" and that he "d[id] not have to do this."

The trooper then told appellant that he smelled alcohol coming from his vehicle and again asked whether he had imbibed. Appellant changed his story and said, "[N]ot since like 5:00." The trooper told appellant that he would perform "a quick check to make sure [he was] safe to drive." Appellant told the trooper that he did not "legally have to do this,"

and the trooper responded several times "yes, you do." Appellant stated that he did not have to do a field-sobriety test. The trooper asked him if he would submit to a PBT, and appellant refused. Appellant said that he had not drunk since 5:00 p.m., and when the trooper asked what he drank, he replied "a shot of Jameson." The trooper again asked appellant to submit to a PBT and stated that he should be "at zero." Appellant refused. The trooper stated that he wanted to check appellant's eyes, and appellant complied.

The trooper administered the horizontal-gaze nystagmus (HGN) test and observed indicia of impairment. He again requested a PBT. Appellant refused, and the trooper stated that he was arresting him for DWI; appellant then agreed to a PBT, which indicated an alcohol concentration of 0.149.

Appellant was arrested and transported to the police station. He was read the breath-test advisory and told, "Minnesota law requires you to take a test to determine the presence of alcohol," and "[r]efusal to take a test is a crime." He stated that he understood his rights. He elected not to speak with an attorney and agreed to submit to a DataMaster breath test, which indicated an alcohol concentration of 0.13.

The state charged appellant with three gross-misdemeanor counts: (1) DWI—0.08 or more, (2) DWI—under the influence of alcohol, and (3) violating a driver's license restriction on the consumption of alcohol.

Appellant moved to suppress the results of the PBT and DataMaster breath test. The day prior to the hearing, the state moved for a continuance because the trooper was

unavailable. Appellant's counsel objected, but acknowledged that "the officer would have to testify." The district court heard arguments from the parties and granted the continuance.

Appellant testified at the continued hearing. He stated that he felt pressured to take the PBT because he was asked several times and was told it was illegal to refuse field-sobriety tests. He was concerned about violating his license restriction, and it was late at night following a "very long day." He stated that he took the PBT after being told he was being placed under arrest because he "thought it was illegal not to do it." Appellant also testified about being read the breath-test advisory. He stated that he relied on the advisory. He could not "say for sure" whether he would have tested had he been informed that the test was to determine if he was *under the influence* of alcohol, rather than to determine the *presence* of alcohol.

The district court denied appellant's suppression motion. The court concluded that appellant's due-process rights were not violated by the trooper informing him that he was required to submit to field-sobriety tests and a PBT, and that appellant had voluntarily consented to those tests. The court concluded that the breath-test advisory was not misleading or coercive.

The parties agreed to submit the determination of appellant's guilt to the district court in a stipulated-evidence trial. *See* Minn. R. Crim. P. 26.01, subd 3. The evidence included the breath-test advisory, a recording of appellant's statements, the squad car video, a police incident report, the DataMaster results, and an uncertified copy of

appellant's driving record. Appellant also stipulated to having two prior impaired-driving incidents within the ten years preceding the charged offenses.

The district court returned guilty verdicts on count one, DWI—0.08 or more, and count three, violation of appellant's license restriction, but returned a not-guilty verdict on count two, DWI—under the influence. This appeal followed.

D E C I S I O N

I. Appellant's due-process claim seeks to extend existing law, which is not a task for this court.

Appellant argues that his due-process rights were violated, and the district court erred by denying his suppression motion, because he was misled about his obligation to undergo the PBT and HGN test.[1]

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review factual findings under the clearly erroneous standard and review legal determinations de novo. *State v. Onyelobi*, 879 N.W.2d 334, 343 n.4 (Minn. 2016). We review de novo whether a due-process violation has occurred. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012).

[1] The trooper told appellant that he was obligated to perform "a quick check." It is unclear if the trooper was referring to field-sobriety tests, PBTs, or both. The district court analyzed both, and the state appears to concede that the trooper was referring to both. We therefore accept that the trooper was referring to both.

Appellant seeks to suppress the results of the HGN test and PBT. Field-sobriety tests, like the HGN test, involve visual observations and are not searches under the Fourth Amendment, while PBTs are limited searches and require reasonable, articulable suspicion. *State, Dep't of Pub. Safety v. Juncewski*, 308 N.W.2d 316, 321 (Minn. 1981); *Vondrachek v. Comm'r of Pub. Safety*, 906 N.W.2d 262, 268 (Minn. App. 2017), *review denied* (Minn. Feb. 28, 2018); *State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012).

By statute, an officer may "require" a PBT if the officer has "reason to believe" that the driver is impaired. Minn. Stat. § 169A.41, subd. 1 (2018). Despite this language, a driver may refuse both field-sobriety testing and a PBT without direct criminal penalty. *See Vondrachek*, 906 N.W.2d at 269, 271 ("A driver can refuse a PBT; many drivers do."); *State v. Stoskopf*, 644 N.W.2d 842, 846 (Minn. App. 2002) ("There is no criminal penalty for refusing a PBT, as there is for refusing a chemical test."); *see also Otto v. Comm'r of Pub. Safety*, 924 N.W.2d 658, 659 (Minn. App. 2019) ("There is no constitutional or statutory requirement for police officers to inform vehicle drivers that they may refuse to perform field sobriety tests.").[2]

Due process is an amorphous concept denoting a number of substantive and procedural protections. *See State v. Rey*, 905 N.W.2d 490, 494-95 (Minn. 2018) (analyzing substantive and procedural due-process claims). We therefore focus on the specific

[2] While PBT results *cannot* be used as evidence of intoxication in a DWI prosecution, the results may be used in prosecuting a driver for violating a restriction on his or her license. *See* Minn. Stat. § 169A.41, subd. 2(7) (2018). Refusal of a PBT may also be used as a basis for requesting a chemical test for intoxication if there is also probable cause that the driver was driving while impaired. *See* Minn. Stat. § 169A.51, subd. 1(b)(3) (2018).

argument set forth by appellant. He primarily relies on *Raley v. Ohio*, which concerned "an indefensible sort of entrapment by the [s]tate." 360 U.S. 423, 426, 79 S. Ct. 1257, 1260 (1959). In *Raley*, the Supreme Court recognized that the government violates a person's due-process rights when representatives of the state mislead the person as to his or her legal obligations, and the person is thereby convicted. *Id.* at 439, 79 S. Ct. at 1267. The *Raley* case has been deemed a precursor to the defense of entrapment by estoppel. *United States v. Austin*, 915 F.2d 363, 366 (8th Cir. 1990). We fail to see how *Raley* is applicable. The state did not induce appellant to commit a crime.

Appellant also relies on *McDonnell v. Comm'r of Pub. Safety*, in which the supreme court concluded that an implied-consent advisory violated a driver's due-process rights because it misinformed her that she could be charged with the crime of test refusal when such a charge was impossible. 473 N.W.2d 848, 855 (Minn. 1991). The supreme court subsequently clarified its holding in *McDonnell*, and set forth a three-factor test for determining whether a license revocation should be rescinded because a driver was misled. *Morehouse v. Comm'r of Pub. Safety*, 911 N.W.2d 503, 505 (Minn. 2018). Under the three-factor test, a license revocation should be rescinded when: "(1) the person whose license was revoked submitted to a breath, blood, or urine test; (2) the person prejudicially relied on the implied consent advisory" in choosing to test; and "(3) the implied consent advisory did not accurately inform the person of the legal consequences of refusing . . . testing." *Id.* (quotation omitted).

The supreme court limited its holding in *McDonnell* to "any case raising an identical due process claim." 473 N.W.2d at 855. Here, the trooper did not state legal consequences for refusal, and appellant's challenge does not concern the advisory. This case is not "identical." Appellant, in effect, asks this court to extend the law, but "[t]he task of extending existing law falls to the supreme court or the legislature[;] . . . it does not fall to this court." *State v. Rodriguez*, 738 N.W.2d 422, 432 (Minn. App. 2007), *aff'd*, 754 N.W.2d 672 (Minn. 2008). Appellant has failed to set forth a viable due-process claim.

II. The district court's finding that appellant voluntarily consented to the PBT is supported by the record and is not clearly erroneous, and even if appellant did not consent, his breath was subject to a search incident to arrest.

Appellant argues that he was coerced into taking a PBT. The state contends that appellant waived this argument by failing to sufficiently raise it before the district court. The argument was raised before, and addressed by, the district court, and we therefore consider it.

As a threshold matter, the state argues that PBTs are "not searches invoking Fourth Amendment protection, and thus consent is not necessary." We disagree. The Fourth Amendment protects against unreasonable searches. U.S. Const. amend. IV. A breath test is a search under the Fourth Amendment. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413 (1989). A PBT is a unique type of breath test, preliminary in nature and used primarily for investigatory purposes. *Stoskopf*, 644 N.W.2d at 844. An officer must have reasonable, articulable suspicion before requiring a PBT. *Juncewski*, 308 N.W.2d at 321. While no warrant is required, the Fourth Amendment's

reasonableness standard is still applicable. *See Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 1879, 1884-85 (1968) (concluding that limited search was reasonable under the Fourth Amendment if supported by reasonable, articulable suspicion). Accordingly, PBTs are searches subject to Fourth Amendment protection. That protection may be waived by consent. *See Harris*, 590 N.W.2d at 102 (stating that police do not need reasonable articulable suspicion to search if a person voluntarily consents).

The state must show by a preponderance of the evidence that the defendant freely and voluntarily consented. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). Whether consent is voluntary is determined by examining the "totality of the circumstances." *Harris*, 590 N.W.2d at 102. The issue of whether consent was voluntary, or the product of coercion, is a question of fact subject to a clearly erroneous standard of review. *Diede*, 795 N.W.2d at 846.

The district court's finding that appellant voluntarily consented is supported by the record and is not clearly erroneous. Following a traffic stop, appellant was confronted by a single trooper during a relatively brief encounter. He had an alcohol restriction on his license and appeared familiar with DWI procedures, stating that he had "been through this before." While the trooper told appellant that he was obligated to perform a quick check, the trooper did not threaten appellant with consequences, raise his voice, or otherwise force compliance. Following the trooper's purportedly coercive statement, appellant refused to perform a PBT, and he did not agree to take one until after he was informed that he was

being placed under arrest for DWI. Appellant was not coerced by the trooper's statement that he had to perform a quick check.

Appellant cites a Kansas case, *State v. Edgar*, for the proposition that the trooper's statement "constitutes per se coercion." 294 P.3d 251 (Kan. 2013). In *Edgar*, a Kansas statute required an officer to give "oral notice that refusal to take a PBT is a traffic infraction." *Id.* at 254. The officer told the driver that a PBT was required, and the Kansas Supreme Court concluded that the officer's statement coerced the driver's consent and rendered it involuntary. *Id.* at 262. This case is distinguishable because the driver in *Edgar* agreed to a PBT after being misinformed by the officer. *Id.* at 255. Here, appellant continued to refuse a PBT after the officer's statement, and he did not agree to one until after the officer informed him that he was being placed under arrest for DWI. Further, unlike Kansas drivers, Minnesota drivers need not be told that PBT refusal is a traffic infraction. In Minnesota, an officer may "require" a PBT if the officer has reasonable, articulable suspicion that the driver is impaired. Minn. Stat. § 169A.41, subd. 1.

Lastly, appellant does not challenge the district court's conclusion that the trooper developed probable cause to arrest him for violation of his license restriction, and we agree that probable cause was clearly present. *See State v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000) (conducting a de novo review of whether probable cause to arrest existed). A warrantless breath test may be administered as a search incident to arrest. *State v. Bernard*, 859 N.W.2d 762, 767 (Minn. 2015). Even if appellant did not consent to the PBT, his "breath was subject to seizure incident to arrest." *Vondrachek*, 906 N.W.2d at 272.

III. The breath-test advisory did not violate appellant's due-process rights.

Appellant argues that the advisory was inaccurate because it required a test to determine the *presence* of alcohol, rather than to determine if he was "under the *influence* of alcohol." Minn. Stat. § 169A.51, subd. 2 (2018) (emphasis added). He asserts that this inaccuracy violated his due-process rights. The district court acknowledged the inconsistency between the advisory, as read, and the language of section 169A.51, subdivision 2, but concluded that the advisory was not misleading and did not misstate the law, and therefore "it was not coercive."

A breath test obtained in violation of due process under *McDonnell* is subject to "total exclusion." *State v. Stumpf*, 481 N.W.2d 887, 890 (Minn. App. 1992). As previously discussed, three elements are required for a viable *McDonnell* claim: (1) submission to testing of blood, breath, or urine; (2) prejudicial reliance on the advisory in deciding to test; and (3) an advisory that "did not accurately inform the person of the legal consequences of refusing to submit to the testing." *Morehouse*, 911 N.W.2d at 505 (quotation omitted).

The district court primarily addressed the accuracy of the advisory, and we begin with that element. Appellant's claim fails on that front in two ways. First, in *Morehouse*, the supreme court held that the inaccuracy must concern the legal consequences for refusal. *Id.* Here, the advisory did not contain inaccuracies regarding legal consequences. Appellant was told that refusal was a crime, and indeed refusal was a crime. Accordingly, the advisory was not inaccurate for purposes of a *McDonnell* claim.

Second, section 169A.51, subdivision 2, requires that the person be "informed" that the test is "to determine if the person is under the influence of alcohol." Appellant was told that the test was to determine the presence of alcohol, but he was also told, at the beginning of the advisory, that he was suspected of driving in violation of Minnesota's DWI laws and that he had been arrested for that offense. Accordingly, he was effectively informed that the test was to determine if he was under the influence or impaired.

As for prejudicial reliance, the second element, appellant testified at the contested omnibus hearing that he relied on the advisory and could not "say for sure" whether he would have tested had he been read the specific statutory language. He did not testify, however, as to how his choice to test was impacted. We fail to see how he was deprived of a "meaningful choice," or as the district court framed it, how the advisory was coercive. *See Morehouse*, 911 N.W.2d at 505 (quotation omitted).

Appellant argues that—given his restricted license, the technical inaccuracy "would be misleading." There is some merit to this argument. Based on the advisory that was read, a driver with a restricted license might submit to testing thinking that it pertained only to a restricted license offense, and not a DWI offense. However, appellant failed to offer any testimony or evidence to that effect, and as previously discussed, he was told that he was suspected of and arrested for DWI. Given the dearth of evidence indicating that appellant was deprived of a meaningful choice on whether to test, his claim fails for lack of prejudicial reliance. *See Windsor v. Comm'r of Pub. Safety*, 921 N.W.2d 71, 74 (Minn.

App. 2018) (concluding that relief was not warranted because driver failed to establish that he prejudicially relied on the advisory).

IV. The evidence was sufficient to satisfy the willfulness element of appellant's restricted license offense.

Appellant challenges the sufficiency of the evidence for his restricted license offense. He claims a lack of evidence supporting the willfulness element of that crime. He argues that his uncertified driving record, which showed the alcohol restriction, was insufficient because there was no evidence that he saw that record.

Appellant was convicted of violating Minn. Stat. § 171.09, subd. 1(f)(1) (2016), which imposes gross-misdemeanor criminal liability if a person drives a motor vehicle in breach of a driver's license restriction on the consumption of alcohol. Willfulness is a required element. *State v. Rhode*, 628 N.W.2d 617, 620 (Minn. App. 2001); *see also* Minn. Stat. § 171.241 (2018) ("It is a misdemeanor for any person to willfully violate any of the provisions of this chapter unless the violation is declared by any law to be a felony or gross misdemeanor, or the violation is declared by a section of this chapter to be a misdemeanor.").[3]

[3] The state concedes that willfulness is an element. The language of section 171.09 has changed since *Rhode*. Previously, the statute did not reference gross misdemeanors. *Compare* Minn. Stat. § 171.09 (2000) *with* Minn. Stat. § 171.09 (2016). In *Rhode*, this court relied upon that fact, in conjunction with the language of section 171.241, in concluding that willfulness was a required element. *Rhode*, 628 N.W.2d at 619. After the amendments to section 171.09 creating a gross-misdemeanor offense, this court has held in unpublished opinions that willfulness remains an element. *See, e.g.*, *State v. Watters*, No. A11-174, 2011 WL 6757427, at *3 (Minn. App. Dec. 27, 2011).

In considering a claim of insufficient evidence, this court's review is limited to a thorough analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to allow the factfinder to reach the guilty verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume the factfinder "believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989).

In *Rhode*, this court concluded that the evidence was insufficient because, although the state produced evidence of the defendant's driving record, it produced no evidence that the defendant saw the record. 628 N.W.2d at 619-20. This case is distinguishable. In the squad-car video, appellant tells the trooper that he was aware of the no-use restriction on his license. Appellant argues that the squad-car video should not be considered because the district court's order indicates that it relied on the uncertified copy of appellant's driving record. Appellant's argument is unavailing for two reasons.

First, a reviewing court independently examines the record to determine whether the evidence was sufficient to support the conviction. *See State v. Tscheu*, 758 N.W.2d 849, 857 (Minn. 2008) ("When we review whether the evidence is sufficient to sustain a conviction, we determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude that the defendant was guilty of the offense charged." (quotation omitted)). Second, although the district court cited the uncertified copy of appellant's driving record in concluding that the

willfulness element was satisfied, the court did not indicate that it *solely* relied on that record. The evidence was sufficient to sustain the conviction.

V. The district court did not abuse its discretion by granting a continuance.

Appellant challenges the district court's grant of a continuance. We review that ruling for a clear abuse of discretion. *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987). Appellant must show prejudice to justify reversal. *Id*. He must show that the district court's decision materially affected the outcome of the case. *See State v. Turnipseed*, 297 N.W.2d 308, 311 (Minn. 1980).

After hearing arguments from both parties, the district court granted the continuance based on the unavailability of the trooper and the lack of any prior continuances. We see no abuse of discretion in that ruling. Further, appellant has failed to show the requisite prejudice. He points to a three and a half month delay, but the record indicates that a vast majority of that time resulted from a second continuance, agreed upon by both parties. Appellant does not claim that his defense was impaired, and he conceded that the trooper's testimony was necessary. There is no basis for reversal.

Affirmed.