STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1168

Garrett Thomas Cekalla, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed April 6, 2020
Affirmed
Segal, Judge

Crow Wing County District Court
File No. 18-CV-18-3140

Rich Kenly, Kenly Law Office, Backus, Minnesota (for appellant)

Keith Ellison, Attorney General, Charles Roehrdanz, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Cochran, Judge; and Segal, Judge.

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

SEGAL, Judge

Appellant challenges the revocation of his driver's license. Appellant argues that the district court's order affirming the revocation of his driver's license must be reversed based on his claim that he was unlawfully seized and his constitutional rights were violated

when he was questioned by law enforcement and asked to submit to field sobriety and preliminary breath tests. We affirm.

FACTS

On July 17, 2018, police officers received a 911 call about an abandoned BMW vehicle located at an intersection in Brainerd. The caller reported that a BMW was being towed by a Ford Explorer using a tow strap. The caller said the tow strap broke and the BMW was left stranded in the middle of the intersection. The caller noted that a man wearing a red t-shirt stepped out of the BMW after the tow strap broke.

Sergeant John Davis responded to the incident five to seven minutes after he heard the dispatch report about the 911 call. Sergeant Davis saw the abandoned BMW in the intersection and, as he approached the vehicle, he heard "aggressive" male voices nearby. He headed in that direction to break up the argument and recognized one of the males, appellant Garrett Cekalla, who Sergeant Davis knew from previous encounters. Cekalla and a male in a red t-shirt, later identified as T.J., were yelling across the street to a male in the backyard of a house.

Sergeant Davis was aware that the 911 caller had identified the person in the towed BMW as a male wearing a red t-shirt and he approached Cekalla and T.J. and asked them who had been towing the abandoned BMW. Neither party responded and Sergeant Davis testified that they both seemed hesitant and unwilling to cooperate. Sergeant Davis told T.J. that he knew T.J. was in the towed BMW based on the 911 call and asked T.J. who was driving the towing vehicle. T.J. motioned toward Cekalla and said, "Who do you

think?" When asked by Sergeant Davis where the BMW was being towed, T.J. stated that they were going to tow the BMW to wherever Cekalla wanted.

Sergeant Davis asked Cekalla how he had towed the BMW. Cekalla motioned to the Ford Explorer parked in Cekalla's driveway, a couple of hundred feet away from the intersection with the abandoned BMW. Cekalla also told Sergeant Davis that the BMW belonged to his ex-girlfriend, had been in his driveway for a long time and he wanted to move it on the road, off his property.

While speaking with Cekalla and T.J., Sergeant Davis testified that he noticed Cekalla's speech was significantly slurred and he had poor balance. Sergeant Davis testified that, during prior encounters, Cekalla had spoken clearly and had not slurred words. The sergeant also saw Cekalla sway back and forth and stumble backwards, needing to take several steps in order to catch himself and avoid falling. As a consequence of these observations, Sergeant Davis asked Cekalla whether or not he had been drinking. Cekalla responded that he had some brandy, a Bloody Mary and two beers, but did so only after he and T.J. attempted to tow the BMW. Cekalla told Sergeant Davis that approximately an hour or so had passed since he had tried to tow the vehicle. T.J., however, told Sergeant Davis that only 20 to 25 minutes had elapsed since the attempted tow.

A second officer arrived on the scene while Sergeant Davis was speaking with Cekalla and T.J. The officer had spoken with the witness who observed the attempted tow. The witness confirmed the time the tow occurred as 9:15 p.m. This information confirmed Sergeant Davis's belief that less than 15 minutes had elapsed between the time the tow strap broke and Sergeant Davis's arrival at the scene. Sergeant Davis thus concluded that

it was likely Cekalla had ingested the alcohol before he got into the Ford Explorer and attempted to tow the BMW.

Sergeant Davis testified that, based on Cekalla's admissions about driving the Ford Explorer and consuming alcohol and Sergeant Davis's understanding of the time frame and his observations of Cekalla slurring words and stumbling, he asked Cekalla to perform field sobriety tests. Cekalla completed three different sobriety tests and failed each one. Cekalla then underwent a preliminary breath test (PBT). Instead of exhaling into the machine, Cekalla inhaled. Sergeant Davis explained to Cekalla that, if he failed to exhale into the machine and provide a breath-test sample, he would be taken into custody. Cekalla again failed to provide a breath-test sample and Sergeant Davis placed him under arrest for operating a motor vehicle while impaired. Cekalla then agreed to provide a PBT sample, which indicated a 0.19 result.

Cekalla was taken to the Crow Wing County jail and was read the breath-test advisory by Sergeant Davis. The breath-test advisory informed Cekalla that he was required by law to take a test to determine if he was under the influence of alcohol and that refusal was a crime. He was also informed that he had the right to speak to an attorney. After being given that opportunity, Cekalla informed Sergeant Davis that he was refusing a breath test based on his attorney's advice.

Cekalla's license was revoked pursuant to Minn. Stat. § 169A.52, subd. 3(a) (2018). Cekalla filed a petition asking the district court to rescind the revocation. The district court affirmed the revocation. Cekalla appeals.

D E C I S I O N

Cekalla challenges the district court's order affirming the revocation of his driver's license. He argues that the order was in error because he claims he was illegally seized from the moment he was first approached by Sergeant Davis and that the subsequent questioning, field sobriety tests and PBT violated his constitutional rights.[1]

We review questions of law raised in an implied-consent hearing de novo. *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 920 (Minn. App. 2010). Findings of fact are reviewed for clear error and will not be reversed unless this court is "left with a definite and firm conviction that a mistake has been committed." *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002) (quotation omitted).

Individuals are protected from unreasonable seizures under the United States and Minnesota Constitutions. U.S. Const. amend. IV; Minn. Const. art. I, § 10. When an officer restrains an individual's liberty by physical force or show of authority, the individual has been seized. *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993). A seizure occurs if "a reasonable person would have believed that he or she was neither

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[1] Cekalla makes limited reference in his brief to the fact that no *Miranda* warning was provided until after he was placed in handcuffs. We decline to address this argument because it was not considered by the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("[Appellate courts] will not consider the applicability of [a legal theory] on appeal, even though the question was raised below, if it was not [considered] by the [district] court." (quotation omitted)). Moreover, even if this issue had been preserved for appeal, the result would not be different. Because we find that the sergeant had reasonable, articulable suspicion to question Cekalla about whether he had consumed alcohol and to seek to administer the field sobriety tests and PBT, it constituted a lawful investigative stop that did not require a *Miranda* warning. *State v. Vonderharr*, 733 N.W.2d 847, 854–55 (Minn. App. 2007) (concluding that requesting a PBT and general on-site questioning during an investigative stop does not require a *Miranda* warning).

free to disregard the police questions nor free to terminate the encounter." *Kranz v. Comm'r of Pub. Safety*, 539 N.W.2d 420, 422 (Minn. App. 1995) (quotation omitted). A district court evaluates whether a defendant was seized in light of the totality of the circumstances, including "the officer's general knowledge and experience, the officer's personal observations, information the officer has received from other sources, the nature of the offense suspected, the time, the location, and anything else that is relevant." *Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987).

Circumstances that might indicate a seizure include the threatening presence of several officers, an officer's display of a weapon, an officer's physical touching of the person, or an officer's use of language or tone of voice indicating that compliance is compelled. *E.D.J.*, 502 N.W.2d at 781. But a seizure does not occur when an officer merely walks up to and speaks with an individual standing in a public place or sitting in an already-stopped vehicle. *State v. Vohnoutka*, 292 N.W.2d 756, 757 (Minn. 1980); *Klotz v. Comm'r of Pub. Safety*, 437 N.W.2d 663, 665 (Minn. App. 1989), *review denied* (Minn. May 24, 1989); *see also E.D.J.*, 502 N.W.2d at 781 (finding no seizure when two officers only approached three men standing on a street corner, but noting that a seizure did occur when the three men "actually submitted to the authority of the police" by obeying an order to stop running). Nor does a seizure occur "simply because a person feels some moral or instinctive pressure to cooperate" with an officer. *Illi v. Comm'r of Pub. Safety*, 873 N.W.2d 149, 152 (Minn. App. 2015) (quotation omitted).

Cekalla argues that he was immediately seized when Sergeant Davis approached him to discuss the abandoned BMW and, had he tried to end the encounter with Sergeant

Davis, "he would have been arrested [pursuant to] a violation of Minn. Stat. § 609.487, subd. 6 (2018)." The district court determined that no seizure occurred at this initial stage. We agree with the district court. The record before us demonstrates that Sergeant Davis approached two individuals standing in a public place and began asking them questions regarding the abandoned BMW because Cekalla and T.J. were near the scene and T.J. matched the witness's description of the man seen steering the BMW. *See Illi*, 873 N.W.2d at 152 (stating that an "officer's approach [is] not itself a seizure"). Sergeant Davis did not stop Cekalla nor did Sergeant Davis prevent him from ending the encounter. There is also no support that Cekalla had "submitted to the authority of police" by merely answering Sergeant Davis's questions about the towing incident. *E.D.J.*, 502 N.W.2d at 781. The district court correctly concluded that this, by itself, is insufficient to rise to the level of a seizure.

The district court went on to determine that at some point the interaction turned into a seizure, but that the questions by Sergeant Davis about drinking and the request to take the field sobriety tests and PBT did not violate Cekalla's Fourth Amendment rights. A preliminary investigation of the type conducted by Sergeant Davis, including requests to take field sobriety tests and a PBT, constitutes a constitutional "investigatory stop" if it is supported by reasonable, articulable suspicion. *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996); *Vondrachek v. Comm'r of Pub. Safety*, 906 N.W.2d 262, 268 (Minn. 2017) (requests to undertake field sobriety tests must be supported by reasonable, articulable suspicion, not probable cause), *review denied* (Minn. Feb. 28, 2018).

We review de novo a district court's ruling on whether an officer had reasonable, articulable suspicion for an investigatory stop. *Hoekstra v. Comm'r of Pub. Safety*, 839 N.W.2d 536, 539 (Minn. App. 2013). "[A] district court's findings of fact will not be set aside unless clearly erroneous . . . ." *Kramer v. Comm'r of Pub. Safety*, 706 N.W.2d 231, 235 (Minn. App. 2005). A district court determines whether reasonable suspicion exists by examining whether at the time of the stop, under the totality of the circumstances, the officer "had a particular and objective basis for suspecting the person stopped of criminal activity." *Lewis v. Comm'r of Pub. Safety*, 737 N.W.2d 591, 594 (Minn. App. 2007).

Reasonable suspicion is a lower standard than probable cause, but it still "requires at least a minimal level of objective justification." *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted); *see also Hoekstra*, 839 N.W.2d at 538-39. "The officer need not be absolutely certain of the possibility of criminal activity, but he cannot satisfy the test of reasonableness by relying on an inchoate and unparticularized suspicion or hunch." *State v. Schrupp*, 625 N.W.2d 844, 847 (Minn. App. 2001), *review denied* (Minn. July 24, 2001) (quotation omitted); *see also State v. Harris*, 590 N.W.2d 90, 101 (Minn. 1999) ("A hunch, without additional objectively articulable facts, cannot provide the basis for an investigatory stop.").

A driver may be required to undergo field sobriety tests and a PBT if an officer has reason to believe, based on the person's conduct, that the person has been driving while impaired. Minn. Stat. § 169A.41, subd. 1 (2018); *Otto v. Comm'r of Pub. Safety*, 924 N.W.2d 658, 661 (Minn. 2019). "[O]ne objective indication of intoxication [can] constitute reasonable and probable grounds to believe a person is under the influence." *Holtz v.*

Comm'r of Pub. Safety, 340 N.W.2d 363, 365 (Minn. App. 1983). Common indicators of intoxication include an odor of alcohol, bloodshot and watery eyes, slurred speech, and an uncooperative attitude. *Id.*; *see also State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012) (holding that two indicia of intoxication were sufficient for reasonable suspicion).

Based on his experience and previous interactions with Cekalla, Sergeant Davis testified that he suspected Cekalla was under the influence of alcohol while driving the Ford Explorer. He indicated that Cekalla's speech was slurred and his balance was poor, and that Cekalla confirmed he had been drinking. While Cekalla claimed that he only consumed alcohol after driving the Ford Explorer, the district court found, and we agree, that Sergeant Davis had sufficient basis to suspect otherwise.[2] Sergeant Davis also testified that Cekalla admitted to driving the Ford Explorer and drinking some brandy, a Bloody Mary, and two beers. The district court had ample evidence in the record for its determination that the request for Cekalla to take the field sobriety tests and PBT was supported by reasonable suspicion and was thus constitutional. *See Rohlik v. Comm'r of Pub. Safety*, 400 N.W.2d 791, 794 (Minn. App. 1987) (holding that if a defendant admits to driving a car and the officer observes the indicia of intoxication, there is sufficient basis to request field sobriety tests), *review denied* (Minn. Apr. 17, 1987).

[2] In crediting the testimony of Sergeant Davis that less than 15 minutes had elapsed between the time of the towing incident and his arrival on the scene, the district court reasoned that it was "highly unlikely that there was either a one hour delay between the witness's observation of the towing incident and their 911 call to report it or a one hour delay in dispatch passing on the report to officers." *See Lewis*, 737 N.W.2d at 594 (noting that a district court's credibility determinations must be given deference).

We, therefore, conclude that the district court did not err in its determinations and affirm the order.

Affirmed.