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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0344**

Kevin David Jante, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed November 16, 2020
Affirmed
Connolly, Judge**

Douglas County District Court
File No. 21-CV-19-1902

Kent D. Marshall, Barrett, Minnesota (for appellant)

Keith Ellison, Attorney General, Nicholas R. Moen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Worke, Judge; and Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant was arrested for driving while impaired (DWI) and subsequently had his license revoked under the Implied Consent Law (Minn. Stat. § 169A.20) (2018). Appellant

challenges his license revocation, arguing that the district court erred by finding that he was in physical control of a motor vehicle on the date of the offense. We affirm.

FACTS

On September 8, 2018, at 2:39 a.m., Douglas County Deputy Herzberg was on routine patrol when he saw a pickup truck stopped in a turn lane with its emergency lights on. Deputy Herzberg stopped and approached the vehicle on the passenger side. Appellant was standing outside of the vehicle next to the front passenger door. The door was open. At appellant's feet were empty beer bottles and the truck's ignition keys.

As Deputy Herzberg greeted appellant, appellant immediately stated: "I wasn't driving." Deputy Herzberg then noticed there was a passenger in the back seat of the truck, later identified as Kylie Uselman (Uselman). Uselman also denied driving the truck. Another officer, Deputy Giese, arrived to assist Deputy Herzberg. As Deputy Herzberg spoke with appellant, Deputy Giese spoke with Uselman.

Appellant told Deputy Herzberg that the truck ran out of gas while Uselman was giving appellant a ride home.¹ According to appellant's recollection of events, he had spent the day "consum[ing] several beers and became intoxicated." He had spent the day at his friend's house, Derik Burmeister (Burmeister), "as well as some local bars." Appellant

¹ While not relevant to the district court's decision, this court has found physical control where the vehicle was inoperable at the time police arrived; "[t]he State stressed the disabilities in these three cases were all temporary...." *State v. Starfield*, 481 N.W.2d 834, 837 (Minn. 1992). See *State v. Woodward*, 408 N.W.2d 927 (Minn. App. 1987) (a flat tire); *Abeln v. Comm'r of Public Safety*, 413 N.W.2d 546 (Minn. App. 1987) (a dead battery); *State v. Duemke*, 352 N.W.2d 427 (Minn. App. 1984) (car stuck in snow-filled ditch).

“knew that he was intoxicated,” so he had Uselman, who had “consumed two or three beers,” give him a ride home in his truck. Appellant lived ten minutes from Burmeister’s residence, in Brandon, Minnesota. According to appellant, on the drive home, he fell asleep, and Uselman drove past his home. The vehicle then ran out of gas in the next city, Evansville, Minnesota, and this is where the truck was parked until Deputy Herzberg arrived on the scene.

Uselman told Deputy Giese a different story at the scene. Specifically, she stated that she was not driving the vehicle, and that “they had just dropped off her boyfriend, implying that’s why she was in the backseat.” But Uselman had previously told the deputy that there were only two people in the truck since the time she had entered the vehicle. “Deputy Giese . . . believed that Ms. Uselman wasn’t being honest with him” and “found it odd that she was in the back of the vehicle.”

While talking to appellant, “Deputy Herzberg saw that appellant was impaired.” While talking to Uselman, “Deputy Giese noticed indicia of impairment and formed the opinion that she was under the influence of alcohol.” Both appellant and Uselman continued to deny that they were driving the vehicle. Appellant told Deputy Herzberg that Uselman was driving, and Uselman used physical gestures to tell Deputy Giese that appellant was driving. The officers “were presented with a confusing situation” where both parties were not being truthful and they “assessed objective elements in making a preliminary determination as to who was driving.” Deputy Herzberg placed appellant under arrest based on the location of the keys, the truck being registered to appellant, and the statements made by appellant and Uselman.

Implied Consent Hearing

The primary issue before the district court was “whether there [was] probable cause [that] petitioner was in physical control of the vehicle.” Appellant testified on his own behalf at the hearing. He testified to the sequence of events above and continued to deny driving the vehicle. When asked why he would give his expensive truck to a woman he barely knew, he said he did not want to lose his commercial driver’s license and “cuz I do it all over the country, getting rides from taxi[s]...Ubers...and Lyfts.”

Uselman testified “that she had lied to the deputy when she said she had not been driving appellant’s vehicle.” Uselman also testified that she was on probation and that an alcohol-related incident would interfere with her probation. She testified that she “moved to the back seat” after the truck ran out of gas “out of concern over the open containers.” Burmeister also testified at the hearing. He said that “around 2:00 am he heard appellant’s vehicle start up, then observed Ms. Uselman in the driver’s seat and [a]ppellant in the passenger seat...” Another witness, Gavin Brendefur, testified that he had observed appellant’s vehicle leave Burmeister’s residence “with Uselman in the driver’s seat and [a]ppellant in the passenger seat.”

The district court sustained appellant’s driver’s license revocation. In its memorandum, the court concluded that “there is an objective factual basis which supports a probable cause determination in favor of the Commissioner” and accordingly, “the Commissioner has met the burden of proof sufficient to sustain the license revocation.” The court based this conclusion “upon [appellant’s] close proximity to the vehicle, location of the keys, and ownership of the vehicle,” stating “the Court finds it was more likely than

not [appellant] was in physical control of the vehicle.” The district court did not consider any witness testimony: “None of the proffered information was known to law enforcement . . . [a]s such, the testimony is irrelevant to the Court’s present determination.” The district court also “agree[d] with the officers’ objective approach” and therefore “largely disregard[ed] any statements made by the vehicle occupants at the scene.”

D E C I S I O N

Appellant challenges the lawfulness of his arrest. The question of whether appellant was in physical control of a motor vehicle for purposes of the implied consent law is a mixed question of law and fact. *Snyder v. Comm’r of Pub. Safety*, 496 N.W.2d 858, 860 (Minn. App. 1993). To sustain a license revocation, the commissioner “must show by a fair preponderance of the evidence” that the intoxicated person had physical control of the vehicle. *Roberts v. Comm’r of Pub. Safety*, 371 N.W.2d 605, 607 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). Under the preponderance of the evidence standard, a fact is established if it is “more probable that the fact exists than that the contrary exists.” *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004).

Findings of fact cannot be reversed “unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” Minn. R. Civ. P. 52.01; *Frost v. Comm’r of Pub. Safety*, 348 N.W.2d 803, 804 (Minn. App. 1984). Once the facts are established, the issue of physical control is a question of law, which this court reviews de novo. *Snyder*, 496 N.W.2d at 860.

Minnesota law provides that it is unlawful for “any person to drive, operate, or be in physical control of a motor vehicle’ while under the influence of alcohol.” *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010) (quoting Minn. Stat. § 169A.20, subd. 1(1)). The term “physical control” has not been defined. However, the supreme court has held that the term is intended to cover the “broadest range of conduct” and must be given the “broadest possible effect.” *State v. Junczewski*, 308 N.W.2d 316, 319 (Minn. 1981). The term “physical control” is more comprehensive than either “drive” or “operate” and “a person [is] in physical control of a vehicle if he has the means to initiate any movement of that vehicle and he is in close proximity to the operating controls of the vehicle.” *State v. Duemke*, 352 N.W.2d 427, 432 (Minn. App. 1984).

Whether someone is in “physical control” of a motor vehicle depends on a variety of factors:

[appellants] *location in or by the vehicle*, the *location of the ignition keys*, whether the [appellant] had been a passenger in the vehicle before it came to rest, *who owned the vehicle*, the extent to which the vehicle was inoperable, and whether the vehicle if inoperable might have been rendered operable so as to be a danger to persons or property.

Starfield, 481 N.W.2d at 839 (emphasis added).

In determining that probable cause existed to find that appellant was in physical control of the vehicle, the district court relied on three factors: (1) the location of the truck’s ignition keys, (2) appellant’s ownership of the vehicle, and (3) the proximity of the appellant to the driver’s seat.

The district court disregarded the testimony from all witnesses.² Appellant argues that this court should consider the testimony that he provided at the district court. But “it is not the province of this court to reconcile conflicting evidence.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999). Unless the testimony is uncontroverted, the district court is free to disregard testimony as it chooses.

Location of the Keys

While location of the keys alone is not determinative, it is an important factor considered in a physical control analysis. *Ledin v. Comm’r of Pub. Safety*, 393 N.W.2d 433, 435 (Minn. App. 1986). It is undisputed that Deputy Herzberg found the keys at appellant’s feet. “Based upon the location of the keys, [Deputy Herzberg] considered this factor an objective indicator [appellant] was the more likely individual in physical control than Ms. Uselman.” There was no testimony to the contrary. The district court did not err when it made this factual finding.

The caselaw makes it clear that the location of the keys is an important factor in the analysis. *Starfield*, 481 N.W.2d at 839. Because appellant could readily access the keys, he was in a position where he could have easily started the vehicle. Therefore, the fact that

² The district court order states: “Petitioner contends he was not the driver of the vehicle based upon the testimony of Ms. Uselman, and other witnesses, presented at the hearing. However, none of the proffered information was known to law enforcement at the time of their encounter with Petitioner. As such, the testimony is irrelevant to the Court’s present determination.” While the district court’s refusal to evaluate the testimony at the hearing and make credibility determinations is problematic, we must base our decision on a review of the district court’s findings and conclusions of law.

the keys were at appellant's feet weighs in favor of finding that appellant was in physical control of the vehicle on September 8, 2018.

Ownership of the Vehicle

As with the location of keys, ownership of the vehicle is a factor to be considered in determining physical control. *Fleck*, 777 N.W.2d at 236. Ownership is more indicative of control when accompanied by other circumstances, such as finding the keys in the ignition. *State v. Woodward*, 408 N.W.2d 927, 928 (Minn. App. 1987). However, it is still a relevant consideration when, as here, the owner of the car is present, intoxicated, and capable of driving the vehicle. The district court therefore correctly concluded that “ownership was more of a corroborative, as opposed to indicative, factor that [appellant] was in physical control.”

Proximity to Operating Controls

Physical control is manifested if the individual has the means to initiate any movement of the vehicle and is in close proximity to the operating controls of the vehicle. *See Starfield*, 481 N.W.2d at 836-37. Here, appellant was found standing outside of the truck on the passenger side, the door was open and the keys were at his feet. The officers determined, and the district court concluded, that “[appellant] was in a position to enter into the vehicle, with the keys, and operate it, when law enforcement arrived at the scene.” This factual finding is not clearly erroneous.

Physical control is meant to cover situations “when an intoxicated person is found in a parked vehicle under circumstances in which the [vehicle], without too much difficulty, might again be started and become a source of danger to the operator, to others, or to

property.” *Fleck*, 777 N.W.2d at 236 (quotations omitted). Given the proximity of the appellant to the operating controls, and his readily access to the keys, it is a reasonable conclusion that appellant was capable of operating the vehicle without too much difficulty and was therefore in physical control. Appellant admitted to the officers at the stop that he was intoxicated, and that statement is not disputed. Indeed, that is the reason that appellant gives for not being the driver. He said he was too drunk to drive and that is why Uselman drove the car. Appellant focuses on who was driving, but an arrest may be permitted based on physical control, and that is what the district court focused on. The issue in this case is not who was driving the car before it ran out of gas. The issue is who was in physical control of the vehicle when the police arrived at the scene.

Appellant relies heavily on *Snyder*, however this case is distinguishable. In *Snyder*, the district court made a factual determination that appellant “had given the keys to the other person in the car with the understanding that this person would do any further driving that evening.” *Snyder*, 496 N.W.2d at 859. In the instant case, the keys to the vehicle were found at appellant’s feet, not with the passenger, and this fact was not contested by appellant. Therefore, *Snyder* is not helpful in the present analysis.

Because the district court’s factual findings were not clearly erroneous, and the factors present are consistent with caselaw, there is a sufficient factual basis to conclude that there was probable cause to find that appellant was in physical control of the vehicle.

Affirmed.