STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1579

State of Minnesota,
Appellant,

vs.

Isaiah Kerry Toussaint,
Respondent.

Filed June 28, 2021
Affirmed
Frisch, Judge

Hennepin County District Court
File No. 27-CR-20-1198

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

James R. Rowader, Jr., Minneapolis City Attorney, David S. Bernstein, Assistant City Attorney, Minneapolis, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Tayler J. Rahm, Rahm Law, PLLC, Minnetonka, Minnesota (for respondent)

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

NONPRECEDENTIAL OPINION

FRISCH, Judge

The state appeals the district court's pretrial order granting respondent's motion to suppress evidence obtained after officers expanded a traffic stop. We affirm.

FACTS

At approximately 1:50 a.m. on January 13, 2020, Officer Rachel Batinich and Field Training Officer David Nerling stopped respondent Isaiah Toussaint for minor traffic violations.[1] Officer Batinich approached the driver's side of Toussaint's vehicle and Officer Nerling approached the passenger side. Toussaint was coherent, responsive, compliant, and respectful with officers. He answered all questions asked, followed all directions from the officers, and provided his driver's license and proof of insurance. While Toussaint retrieved his proof of insurance, Officer Nerling made a hand gesture directed toward Officer Batinich, after which Officer Batinich asked Toussaint if he had been drinking. Toussaint replied that he had not.

Officer Nerling then walked toward the back of Toussaint's car and spoke with two other officers for approximately 30 seconds. Officer Nerling then instructed Officer Batinich to "tell him to get out." Toussaint responded, "No problem, sir." As Toussaint exited the car with his hands in the air, another officer grabbed Toussaint and pulled him out of his vehicle. Officers Batinich and Nerling both pat searched Toussaint.

Officer Nerling then instructed Toussaint to stand behind his vehicle, and Toussaint complied. Officer Nerling asked Toussaint, "So you haven't had anything to drink all

[1] The officers described the alleged traffic violations in different ways. At the initiation of the traffic stop, Officer Batinich told Toussaint that he was "going fast and blew through [a] stop sign." After removing Toussaint from the vehicle, Officer Nerling told Toussaint he was "all over the road, . . . speeding, and also . . . went through a stop sign." At the pretrial hearing, Officer Batinich testified the initial stop occurred because Toussaint was driving too fast for the road conditions and that Toussaint "rolled through two stop signs." Officer Nerling also testified that Toussaint was driving too fast given the road conditions and failed to make a complete stop at two stop signs.

night?" Toussaint responded that he had not. Officer Nerling then informed Toussaint that Officer Batinich was going to do a couple of tests "mainly because of [Toussaint's] driving conduct." Officer Nerling said, "I don't know if you are on the phone or whatever the deal is, but . . . what was it because you're all over the road, you're speeding, and also you went through a stop sign?" Toussaint stated, "I was following my GPS."

Although several additional events occurred thereafter, the district court limited its consideration of the suppression motion to the foregoing events.

On January 14, 2020, the state charged Toussaint with one count of second-degree gross misdemeanor driving while impaired (DWI)-refusal to submit to a breath test, pursuant to Minn. Stat. § 169A.20, subd. 2(1) (2020), and one count of third-degree gross misdemeanor DWI-operation of a motor vehicle under the influence of alcohol, pursuant to Minn. Stat. § 169A.20, subd. 1(1) (2020). Toussaint moved to suppress all evidence obtained after the traffic stop expanded into a DWI investigation. The district court held an evidentiary hearing where Officers Batinich and Nerling testified.

In determining the propriety of the expansion of the stop, the district court considered Officer Batinich's body-camera footage up to the point where field sobriety tests began. Officer Nerling testified that the initial stop occurred because Toussaint was driving too fast given the road conditions, he estimated Toussaint to be driving five miles over the speed limit, and Toussaint failed to make a complete stop at two stop signs. Officer Nerling testified that he ordered Toussaint to be removed from the vehicle because he "could smell the odor of an alcoholic beverage coming from the vehicle." Officer

Batinich testified that she observed Toussaint to have bloodshot and glossy eyes, slurred speech, and slow responses.

The district court granted Toussaint's motion to suppress evidence, finding Officer Nerling and Officer Batinich's testimony about their reasons for expanding the stop not credible and concluding the officers did not have the requisite reasonable, articulable suspicion to expand the traffic stop. This appeal follows.

DECISION

In an appeal by the state of a pretrial order of the district court, an appellate court will only reverse if the state can "clearly and unequivocally show both that the trial court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quotations omitted). "We view critical impact as a threshold issue and will not review a pretrial order absent such a showing." *State v. Osorio*, 891 N.W.2d 620, 627 (Minn. 2017) (quotations omitted). "Critical impact has been shown not only in those cases where the lack of the suppressed evidence completely destroys the state's case, but also in those cases where the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987).

"When reviewing a district court's pretrial order on a motion 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. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted).

I. The district court did not clearly err in discrediting Officer Nerling's testimony.

We begin by emphasizing that the district court "is in the best position to evaluate witness credibility," and we will not disturb those findings so long as they are supported by "reasonable evidence." *Bobo v. State*, 860 N.W.2d 681, 684-85 (Minn. 2015). We review such credibility determinations for clear error. *Id.* at 684. Clear error is a "high threshold," and "[w]e will not disturb the [district] court's findings of fact if reasonable evidence supports those findings." *Id.* at 684-85 (quotation omitted). We are in no position as an appellate court to dissect all reasonable inferences that might have been drawn from the record and second guess the district court's judgment as to the credibility of witness testimony. *See id.* Rather, it is our duty to affirm reasonable findings and credibility determinations made by the district court, which is in a superior position to make such determinations, unless clearly against the weight of the evidence. *See id.* (explaining the high deference given to the district court's findings of fact and credibility determinations because it is in best position to make those findings); *see also State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (stating "great deference" is given to a district court's findings of fact and they will not be set aside "unless clearly erroneous").

We review a district court's factual findings with respect to its determination of the legality of an officer's expansion of a traffic stop for clear error. *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012). "The clearly erroneous standard requires that we be left with the definite and firm conviction that a mistake has been made." *Evans*, 756 N.W.2d at 870 (quotation omitted). Clear error is a "high threshold," and "[w]e will not disturb the

[district] court's findings of fact if reasonable evidence supports those findings." *Bobo*, 860 N.W.2d at 684-85 (quotation omitted).

The district court found the testimony from Officers Nerling and Batinich regarding their reasons for expanding the stop not credible and that "[b]ecause there was no reasonable basis for expanding the stop, the stop became invalid when the officers grabbed Mr. Toussaint and pulled him out of the vehicle." The district court specifically found that Officer Nerling's testimony that he smelled alcohol was not credible because Officer Nerling did not mention this observation (1) to any of the five other officers present, (2) to Toussaint, or (3) as a basis for administering field sobriety tests.

The state argues that the district court clearly erred because it found all other portions of Officer Nerling's testimony to be credible, it did not specifically weigh witness credibility factors set forth in a model jury instruction, no conflicting testimony was given at the evidentiary hearing, and "there is substantial and unchallenged evidence that directly contradicts the district court's findings." Notably, the state does *not* argue that the district court erred in discrediting Officer Batinich's testimony about her claimed observations of Toussaint having bloodshot and glossy eyes, slurred speech, and slow responses.

As a threshold matter, the state cites no authority in support of its contention that a district court is required to find the entirety or none of a witness's testimony credible, that a district court is required to find a witness credible if conflicting testimony is not offered, or that a district court commits clear error when it does not analyze certain witness credibility factors set forth in a model jury instruction. Fact-finders are not required to check a box naming a witness credible or not credible, either accepting all statements as

true or none as true. Additionally, the district court did not and was not required to make findings that all of Officer Nerling's testimony was credible except for his testimony about the perceived odor of alcohol. That the district court focused only on evidence relevant to the suppression motion—at the state's request, no less—does not mean that the district court may not have had other reasons for discrediting testimony. Indeed, the state does not allege that the district court committed clear error when it discredited that portion of Officer Batinich's testimony regarding her alleged observations of signs of intoxication.[2]

The record supports the district court's finding that Officer Nerling did not credibly testify that he smelled alcohol. The district court considered testimony from both officers together with the footage from Officer Batinich's body-worn camera in making its determination. At the evidentiary hearing, Officer Nerling testified that when Toussaint rolled down his passenger window, Officer Nerling "could smell the odor of an alcoholic beverage coming from the vehicle." Officer Nerling testified that he was positioned above the window and would have had to bend down to see Toussaint's face. Officer Batinich testified that, although she stood closer to Toussaint than Officer Nerling, she did not smell alcohol, but noted that her "nose was very stuffed" from a cold. Officer Nerling testified

[2] The state suggests that because the district court only considered the exhibit containing footage from Officer Batinich's body-worn camera through the initiation of field sobriety testing that the remainder of the footage in the exhibit is not "evidence." This argument is unavailing. Our rules provide that the record on appeal consists of "the documents filed in the trial court, the exhibits, and the transcript of the proceedings." Minn. R. Civ. App. P. 110.01. In other words, the *entirety* of an exhibit received into evidence is part of the record on appeal. In any event, we need not consider the camera footage beyond the initiation of field sobriety testing because the district court's credibility determinations are supported by limited camera footage considered by the district court and the remainder of the record considered by the district court.

that the hand gesture he made was intended to indicate to Officer Batinich that Officer Nerling "thought [Toussaint] may have been drinking" and to prompt Officer Batinich to "get [Toussaint] out of the car."

Yet after Toussaint denied drinking, rather than removing Toussaint from the car or stating that he smelled alcohol, Officer Nerling asked Toussaint several questions about what he was doing in the area and then walked toward the back of the vehicle to converse with other officers. And on cross-examination, Officer Nerling professed that he could not recall, despite having been shown body-worn camera footage, whether he mentioned the odor of alcohol to the other officers. There is no evidence in the record showing that he mentioned an odor of alcohol to them. It was not until Officer Nerling had stood near the rear of Toussaint's car for approximately 30 seconds, nearly two minutes after Officer Nerling made the hand gesture toward Officer Batinich, that Officer Nerling suddenly, and without explanation, instructed Officer Batinich to direct Toussaint to exit his vehicle.

Based on these facts, the testimony of Officer Nerling on both direct and cross-examination, and the district court's conclusion that Officer Batinich's testimony was not credible (which the state does not dispute on appeal), we see no clear error by the district court in discrediting Officer Nerling's testimony. The record supports the finding that Officer Nerling did not mention his observation to Toussaint. The credited record evidence supports the finding that Officer Nerling did not mention smelling alcohol to other officers at the scene. And although the district court also discredited Officer Nerling's testimony because he did not mention smelling alcohol before administering the preliminary breath test well after the expansion of the traffic stop, the district court's findings necessarily

discredited Officer Nerling's testimony that he had Toussaint removed from his vehicle because he "could smell the odor of an alcoholic beverage coming from the vehicle." We cannot say that any of these specific findings are clearly erroneous.

The district court made other findings in support of the conclusion that the officers were acting on a mere hunch that they would find *something* to support the expansion of the stop after the fact. *See State v. Diede*, 795 N.W.2d 836, 843-44 (Minn. 2011) (concluding reasonable, articulable suspicion must exist *prior* to a search and seizure). The district court specifically found Officer Nerling's "observation" of the odor of alcohol not credible. Additionally, the district court specifically found that other indicia of impairment, including bloodshot and glossy eyes, slurred speech, and slow responses, were not supported by the body-worn camera footage. The district court also noted that neither officer could corroborate the other officer's alleged observations of indications of impairment.

These findings, too, are supported by the record. The district court could have reasonably found suspect Officer Nerling's certainty that he smelled alcohol compared with his inability to recall other events occurring within seconds of the time he allegedly detected an odor of alcohol, even after watching footage multiple times in the presence of the fact-finder in an effort to refresh his memory. Although Officer Batinich testified that she had a bad cold at the time that interfered with her ability to smell, the district court may have reasonably considered her position in closer proximity to Toussaint and that an odor that was not strong enough to penetrate through Officer Batinich's "stuffed up" nostrils may not have been strong enough to carry over to the passenger-side window where Officer

Nerling stood. The state argues that Officer Nerling's hand gesture was an indication that he smelled alcohol, but the district court did not find this explanation credible. And we see no clear error by the district court in questioning the credibility of Officer Nerling when he failed to state to anyone that he smelled alcohol and his statements and actions at the scene were not consistent with his testimony.

Based on the record, including the limited body-worn camera footage, and the high deference we give to a district court's credibility findings, we cannot find with a "definite and firm conviction that a mistake has been made" by the district court in discrediting the testimony of Officer Nerling. *See Evans*, 756 N.W.2d at 870.

II. The district court did not err in concluding that the officers did not have reasonable, articulable suspicion to expand the scope of the traffic stop.

"We undertake a de novo review to determine whether a search or seizure is justified by reasonable suspicion or by probable cause." *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005). The United States and Minnesota Constitutions protect individuals against "unreasonable searches and seizures" by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches and seizures are presumptively unreasonable. *State v. Lugo*, 887 N.W.2d 476, 486 (Minn. 2016). If officers seize a person or evidence in violation of the constitution, that evidence must be suppressed. *Diede*, 795 N.W.2d at 842. An officer may initiate a limited, warrantless investigatory stop if the officer can articulate specific facts supporting a reasonable, articulable suspicion of criminal activity. *Id.* at 842-43. "[A]ny expansion of the scope or duration of a traffic stop must be justified by a reasonable articulable suspicion of other criminal activity." *State v. Fort*, 660 N.W.2d

415, 419 (Minn. 2003). When expanding a traffic stop, an officer must be able to "point to specific and articulable facts which, together with reasonable inferences from those facts, reasonably warrant the intrusion." *Paulson v. Comm'r of Pub. Safety*, 384 N.W.2d 244, 246 (Minn. App. 1986).

> Police must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity. They must articulate a particularized and objective basis for suspecting the particular person stopped of criminal activity. That standard is met when an 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) (quotations omitted). An officer who detects the odor of alcohol during a traffic stop may have "reasonable suspicion of criminal activity" sufficient to expand the stop for further investigation. *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001), *review denied* (Minn. 2001).

After discrediting the testimony from Officers Nerling and Batinich regarding their observations about the smell of alcohol and signs of impairment, the district court concluded that "[t]he [s]tate offered no credible evidence of other circumstances that warranted the expansion" from a traffic stop to a DWI investigation and "[b]ecause there was no reasonable basis for expanding the stop, the stop became invalid when the officers grabbed Mr. Toussaint and pulled him out of the vehicle." The state argues the district court erred in reaching this conclusion because "[w]hen considering the totality of the circumstances—the driving conduct at that time of day in addition to the odor of an alcoholic beverage—the officers objectively had reasonable, articulable suspicion to expand the scope of the stop and conduct a driving while impaired investigation."

In the absence of the discredited testimony from Officers Batinich and Nerling, we are left to consider whether minor driving offenses occurring early in the morning provided officers with a "reasonable, articulable suspicion" that Toussaint was driving under the influence of alcohol. *See Fort*, 660 N.W.2d at 419. At the evidentiary hearing, Officer Nerling testified that Toussaint was not swerving and slowed down at each stop sign. Officer Batinich admitted that coming to a complete stop would have been difficult given the road conditions and testified that the claimed minor offenses by Toussaint were often committed by sober people. Indeed, immediately before conducting field sobriety tests, Officer Nerling asked Toussaint whether his phone use caused the traffic infractions. And Officer Nerling testified that Toussaint pulled his vehicle over when prompted by flashing lights and parked in a reasonable location. During the stop, Toussaint denied drinking, was respectful and cooperative, and answered all questions directly, appropriately, and coherently. The state cites no additional facts in support of an expansion of the traffic stop and cites no authority that minor traffic offenses occurring early in the morning are sufficient to meet the standard of objectively reasonable suspicion required to expand a traffic stop into a DWI investigation. The cited minor traffic infractions occurring in the early morning hours are not the type that would ordinarily indicate impaired driving, and therefore, the officers had no reasonable, articulable suspicion to expand the traffic stop to conduct a DWI investigation.

Affirmed.