STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0578

Robert Daniel Mesenburg, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 27, 2021
Affirmed
Connolly, Judge

Olmsted County District Court
File No. 55-CV-20-6877

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Keith Ellison, Attorney General, William Young, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Frisch, Judge; and Smith, John, Judge.*

SYLLABUS

1. The United States Supreme Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), does not compel reversal of *State, Dep't of Pub. Safety v. Juncewski*, 308 N.W.2d 316 (Minn. 1981). *Juncewski* remains controlling on the question

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

of when an officer can request that a driver take a preliminary breath test (PBT), and an officer can request that a driver take a PBT pursuant to Minn. Stat. § 169A.41, subd. 1 (2020), if the officer has reasonable suspicion the driver was driving while impaired.

OPINION

CONNOLLY, Judge

We affirm the district court's decision to sustain the respondent's revocation of appellant's driver's license because he refused a chemical breath test after arrest. We conclude that *Juncewski* remains controlling here, so an officer can request that a driver take a PBT pursuant to Minn. Stat. § 169A.41, subd. 1, if the officer has reasonable suspicion that the driver was driving while impaired. In this case, the trooper had a reasonable suspicion that appellant was driving while impaired when he made the PBT request.

FACTS

A Minnesota State Trooper stopped appellant Robert Daniel Mesenburg's vehicle because Mesenburg was driving over the speed limit. The trooper testified that, upon approaching the vehicle and interacting with Mesenburg, he detected the odor of alcohol coming from Mesenburg, that Mesenburg's speech was slurred, and that Mesenburg's eyes were watery, glassy, and bloodshot. The trooper believed Mesenburg may have been impaired by alcohol based on his observations. The trooper asked Mesenburg whether he had consumed any alcoholic beverages, and Mesenburg replied that he had not. The trooper then asked Mesenburg to exit the vehicle to perform standardized field sobriety tests. The trooper observed several indicators of impairment during the field sobriety tests.

The trooper then requested that Mesenburg take a PBT and Mesenburg refused. The trooper interpreted Mesenburg's refusal to take the PBT as Mesenburg trying to hide something, concluded that Mesenburg was impaired, and placed Mesenburg under arrest.

Respondent commissioner of public safety (the commissioner) revoked Mesenburg's driver's license under Minn. Stat. § 169A.52, subd. 3 (2020).[1] Mesenburg requested judicial review of the revocation, challenging his arrest by arguing that Minn. Stat. § 169A.41, subd. 1, unconstitutionally authorizes a police officer to request a PBT based on reasonable suspicion and not probable cause. The district court sustained the revocation. The district court determined much of the trooper's testimony at the hearing to not be credible, concluding that it did "not find the trooper's testimony sufficiently reliable to give it significant weight." Specifically, the district court rejected the trooper's observations that Mesenburg's eyes were bloodshot and watery, that Mesenburg slurred his speech, and that field sobriety testing indicated Mesenburg was impaired. The district court found, instead, that the trooper administered one test improperly and Mesenburg performed the other two tests "flawlessly" and "next-to-perfect," respectively. Despite this, the district court concluded that the trooper had reason to believe that Mesenburg was

[1] Minn. Stat. § 169A.52, subd. 3, allows the commissioner to revoke an individual's driver's license for failing or refusing to take a *chemical* breath test after arrest. The order revoking Mesenburg's license is not part of the record. But the parties agree in their briefing that Mesenburg's license was revoked under Minn. Stat. § 169A.52, subd. 3, so we assume that his license was revoked under that section for refusing to take a chemical test after his arrest. Regardless, Mesenburg does not challenge the mechanism through which the commissioner revoked his driver's license. Instead, Mesenburg challenges the revocation of his driver's license on the grounds that his arrest was unconstitutional because the trooper did not have probable cause to request that he take a PBT, which he argues violates the Fourth Amendment.

impaired for three reasons: (1) he had observed Mesenburg speeding; (2) he detected the odor of alcohol coming from Mesenburg; and (3) Mesenburg had denied drinking, which the district court agreed could be interpreted as a lie indicative of hiding something when coupled with the odor of alcohol. Thus, the district court determined that the trooper properly requested Mesenburg take a PBT based on reasonable suspicion of driving while impaired because it was "bound by decades of Minnesota precedent clearly stating that a mere reasonable, articulable suspicion (not probable cause) is necessary to support a PBT request." This appeal follows.

ISSUES

I. Does Minn. Stat. § 169A.41, subd. 1, currently violate the Fourth Amendment by allowing a police officer to request a PBT based on reasonable suspicion and not probable cause?

II. Did the trooper have the required reasonable suspicion to request that Mesenburg take the PBT?

ANALYSIS

I. Minnesota Statutes section 169A.41, subdivision 1, constitutionally allows a police officer to request a PBT based on reasonable suspicion and not probable cause.

The parties agree that law enforcement officers have historically been required to have reasonable suspicion, not probable cause, of impaired driving to administer or request a PBT. *See Juncewski*, 308 N.W.2d at 321 (holding a PBT can be administered pursuant Minn. Stat. § 169.121, subd. 6 (1980), when a police officer has reasonable suspicion of impaired driving). However, the parties disagree about whether recent developments in

Fourth Amendment jurisprudence have changed this principle. Mesenburg argues the United States Supreme Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), makes clear that a PBT is a search that implicates the Fourth Amendment and, therefore, the request for a PBT must be premised on a warrant supported by probable cause or an exception to the warrant requirement. The commissioner argues that longstanding Minnesota caselaw has established the reasonable suspicion standard as the proper standard for requesting a PBT. On appeal from an implied-consent hearing, questions involving the Fourth Amendment are reviewed de novo. *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 920 (Minn. App. 2010).

Nothing in *Birchfield* causes us to doubt our supreme court's decision in *Juncewski*, nor the constitutionality of Minn. Stat. § 169A.41, subd. 1, as it exists today.[2] In *Birchfield*, the United States Supreme Court consolidated three challenges to state implied-consent laws. 136 S. Ct. at 2172. One of those cases was our state supreme court's decision in *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *aff'd sub nom. Birchfield*, 136 S. Ct. 2160. There, our state supreme court held that Bernard was properly charged for refusing to take a chemical breath test under Minn. Stat. § 169A.20, subd. 2 (2014), because a warrantless

[2] We acknowledge that our previous cases appear to conflict over whether *Juncewski* based its holding on constitutional grounds. *Compare Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 709 (Minn. App. 2008) (citing *Juncewski* for the proposition that "[w]hen the state asks or requires an individual to submit to a PBT, the test is an intrusion—albeit limited—that requires at least some limited constitutional justification"), *with Vondrachek v. Comm'r of Pub. Safety*, 906 N.W.2d 262, 268 (Minn. App. 2017) ("*Juncewski* was a statutory-construction case and did not address the constitutional arguments advanced by appellant here."). We decline to reach this issue because we conclude that *Birchfield* does not provide any reason to doubt the constitutionality of allowing a PBT request based on reasonable suspicion.

search of Bernard's breath would have been constitutional as a search incident to a valid arrest.[3] *Id.* at 767. In *Birchfield*, the United States Supreme Court held that "a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving" and affirmed Bernard's conviction for violating Minnesota's chemical-test-refusal statute. 136 S. Ct. at 2185-86.

We start from the basic premise that a chemical breath test is not the same as a preliminary screening test (or PBT).[4] On the one hand, Minnesota's implied-consent law states:

> Any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 169A.20 (driving while impaired), to *a chemical test* of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or an intoxicating substance.

Minn. Stat. § 169A.51, subd. 1(a) (2020) (emphasis added). A person's chemical test failure or refusal can result in various civil and criminal consequences, including the commissioner revoking the person's driver's license, as happened to Mesenburg, or the state bringing criminal charges against the person under the test-refusal statute, as happened with the defendant in *Bernard*. *See* Minn. Stat. § 169A.51, subd. 1 (2020); *Bernard*, 859 N.W.2d at 767. The use of a chemical breath test failure or refusal is not

---

[3] The other state law at issue in *Birchfield*, N.D. Cent. Code Ann. § 39-20-01(3)(a), similarly criminalized the refusal of a chemical breath test.

[4] Preliminary screening tests are colloquially known as preliminary breath tests, or PBTs. A preliminary screening test is the same thing as a PBT. *E.g.*, *In re T. D. B.*, No. A16-0944, 2017 WL 1208755, at *2 n.1 (Minn. App. Apr. 3, 2017).

subject to any evidentiary limitations by the implied-consent law. *See generally* Minn. Stat. §§ 169A.50-.63 (2020). Moreover, a chemical breath test can only be required when an officer has probable cause to believe the person was driving while impaired. Minn. Stat. § 169A.51, subd. 1(b).

On the other hand, the procedural provisions of Minnesota's impaired driving laws authorize an officer to obtain a "preliminary screening test," the results of which "must be used for the purpose of deciding whether an arrest should be made and whether to require the tests authorized in section 169A.51 (chemical tests for intoxication)." Minn. Stat. § 169A.41, subd. 2 (2020). Our state supreme court recognizes that PBTs are "intended to be utilized in situations where the officer, after observing the driver, is unsure whether the driver is under the influence of alcohol." *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 700 (Minn. 1980). By statute, PBT results cannot be used in any court action, with limited exceptions. *See* Minn. Stat. § 169A.41, subd. 2.[5] And we have previously acknowledged that "[n]o penalty directly results from a driver's exercise of his or her right to decline [a PBT]. A driver can refuse a PBT; many drivers do." *Vondrachek*, 906 N.W.2d at 271 (compiling cases where Minnesota drivers have refused PBT requests).

Birchfield and *Bernard* discussed breath tests in the context of chemical breath tests. Neither case said anything about PBTs. In fact, in *Birchfield*, the United States Supreme

[5] We recognize that Minn. Stat. § 169A.41, subd. 2(4), permits the result of a PBT test to be used in the prosecution for a violation of section 169A.20, subdivision 2 (driving while impaired; test refusal). However, that is because one element of that crime is whether there was probable cause to arrest for driving while impaired. *See* Minn. Stat. § 169A.51, subd. 1(b)(1). Refusing a PBT merely goes to whether there was probable cause for a lawful arrest.

Court expressly stated that its "prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply" and that "nothing" in *Birchfield* "should be read to cast doubt on them." 136 S. Ct. at 2185. A PBT request may not be used to establish any element of a crime and refusing to take a PBT is not a crime. The purpose of a PBT and the consequences for refusing a PBT request are far different than the purpose of a chemical breath test and the consequences for refusing a chemical breath test, so it makes sense that different standards of law apply to them. Thus, because we are an error correcting court that does not change the law, *see Minn. State Patrol Troopers Ass'n ex rel. Pince v. State, Dep't of Pub. Safety*, 437 N.W.2d 670, 676 (Minn. App. 1989), *rev. denied* (Minn. May 24, 1989), we hold that *Juncewski* sets the applicable standard for a PBT request in Minnesota, and Minn. Stat. § 169A.41, subd. 1, constitutionally allows a police officer to request that a driver take a PBT when the officer has a reasonable suspicion that the driver was driving while impaired.

II. The district court did not err in concluding reasonable suspicion existed for the PBT request here.

We must next decide whether the reasonable-suspicion requirement contained in Minn. Stat. 169A.41, subd. 1, is satisfied here. Neither party challenges the district court's findings of fact. Instead, the parties disagree about the legal import of those facts. Thus, we need only review the district court's legal conclusion that the trooper had reasonable suspicion to request Mesenburg take the PBT. *See Harrison*, 781 N.W.2d at 920 (stating

that the question of whether a driver's Fourth Amendment rights were violated is a question of law).

The district court concluded that the trooper had reasonable suspicion to expand the traffic stop with the PBT request because: (1) he had observed Mesenburg speeding, (2) he detected the odor of alcohol coming from Mesenburg, and (3) Mesenburg had denied drinking. Mesenburg argues that the district court erred in concluding that those three factors supported the trooper's reasonable suspicion justifying the PBT request because Mesenburg's good performance on the field sobriety tests dispelled any suspicion of intoxication necessary to expand the traffic stop. We review questions of reasonable suspicion de novo. *Wilkes v. Comm'r of Pub. Safety*, 777 N.W.2d 239, 242-43 (Minn. App. 2010). We consider this question "from the perspective of a trained police officer, who may make inferences and deductions that might well elude an untrained person," and looks to the totality of the circumstances to determine whether reasonable suspicion exists. *State v. Lemert*, 843 N.W.2d 227, 230 (Minn. 2014) (quotation omitted); *State v. Flowers*, 734 N.W.2d 239, 251-52 (Minn. 2007).

A police officer may conduct a traffic stop if (1) "the stop was justified at its inception" by a reasonable suspicion of criminal activity, and (2) the police officer's actions were "reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004). Reasonable suspicion must be based on specific facts, and the police officer must have a particularized an objective basis for suspecting the detained individual of criminal activity. *State v. Diede*, 795 N.W.2d 836, 842-43 (Minn. 2011). This standard is "not high," but it must be

based on more than a hunch. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008) (quotation omitted). Reasonable suspicion can arise when there is evidence of sufficient indicia of intoxication. *See State v. Driscoll*, 427 N.W.2d 263, 265-66 (Minn. App. 1988). An odor of alcohol is an indicator of intoxication. *State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012). And a traffic violation coupled with indicia of intoxication can provide reasonable suspicion. *See State v. Vievering*, 383 N.W.2d 729, 730 (Minn. App. 1986) (holding that an officer had sufficient reason to request a breath test where he observed a speeding violation and other objective indicia were present), *rev. denied* (Minn. May 16, 1986).

Mesenburg does not dispute the basis for the traffic stop, nor does he dispute the validity of the initial expansion of the stop to request field sobriety testing. We have consistently concluded that expansion of a traffic stop is valid based on indicia of intoxication like those in this case. In *Klamar*, we held that an odor of alcohol and bloodshot and watery eyes justified the expansion of a traffic stop to investigate suspicions of impaired driving. 823 N.W.2d at 696. And in *State v. Lopez*, we concluded that the odor of alcohol alone provided an officer with reasonable suspicion of criminal activity to expand a traffic investigation. 631 N.W.2d 810, 814 (Minn. App. 2001), *rev. denied* (Minn. Sept. 25, 2001). Here, the trooper observed Mesenburg speeding, detected the odor of alcohol on his breath, and thought he was lying when he denied drinking alcohol that night. These observations support an expansion of the traffic stop to request Mesenburg perform field sobriety tests.

But Mesenburg challenges the expansion of the stop beyond the field sobriety testing. Generally, the scope and duration of a traffic stop must be limited to the reason for the stop's inception. *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). Each incremental intrusion must be reasonably justified. *See Askerooth*, 681 N.W.2d at 364. To justify expanding the scope or duration of a traffic stop, the officer's reasonable suspicion must be based on facts in existence at the time of the expansion. *Diede*, 795 N.W.2d at 843-44; *see State v. Burbach*, 706 N.W.2d 484, 488 (Minn. 2005) ("[T]o be reasonable, any intrusion in a routine traffic stop must be supported by an objective and fair balancing of the government's need to search or seize and the individual's right to personal security free from arbitrary interference by law officers.") (quotations omitted).

Mesenburg argues that the trooper's observations do not provide reasonable suspicion to further expand the stop by requesting a PBT after Mesenburg had performed the field sobriety tests "next-to-perfect[ly]." This argument begs two questions: (1) whether a PBT request is an additional "incremental intrusion" that must be justified per *Askerooth*; and (2) if so, whether there was reasonable suspicion for the PBT request after Mesenburg's successful field sobriety tests here. *See Askerooth*, 681 N.W.2d at 364. Because we answer the second question in the affirmative, we do not reach the first question.

Mesenburg does not provide any caselaw examples of good performance on field sobriety testing undermining an officer's reasonable suspicion for requesting a PBT. Our supreme court recognizes that "the successful passing of dexterity tests" is not in and of itself conclusive of an individual not being under the influence; nor are they sufficient to

raise a reasonable doubt of guilt, even in the absence of any strong contradictory evidence of intoxication. *State v. Elmourabit*, 373 N.W.2d 290, 292-93 (Minn. 1985); *see State v. Graham*, 222 N.W. 909, 911 (Minn. 1929) (acknowledging that, "although he can walk straight, although he may attend to his business, and may not give any outward and visible signs to the casual observer that he is drunk," a person may still be under the influence of alcohol). We previously decided a case where the defendant "passed all three sobriety tests conducted at the station" but had an alcohol concentration of 0.13, ultimately holding the police officer had probable cause to request a chemical test because of other indicia of intoxication. *Swapinski v. Comm'r Pub. Safety*, 368 N.W.2d 322, 323-24 (Minn. App. 1985), *rev. denied* (Minn. July 26, 1985); *see also State v. Krinke*, No. A08-1670, 2009 WL 2447821, at *3 (Minn. App. Aug. 11, 2009) (holding that an individual's subsequent satisfactory performance of another field sobriety test did not negate the officer's reasonable suspicion that the individual was impaired based on the individual admitting to consuming "a couple" of drinks and being involved in a serious accident); *cf. State v. Haman*, No. A19-1617, 2021 WL 21498, at *2 (Minn. App. Jan. 4, 2021) (holding, in challenge to dog sniff of car, that successful completion of field sobriety tests diminished an officer's suspicion that the driver was impaired but did nothing to diminish the suspicion that the driver had drugs in his car, which was the specific suspicion that led to the challenged dog sniff), *rev. denied* (Minn. Oct. 19, 2021). Therefore, though Mesenburg's successful completion of the field sobriety tests may have diminished the suspicion that he was impaired, it did not completely remove that suspicion. *See Elmourabit*, 373 N.W.2d at 292 ("It is not uncommon for a person under the influence of liquor, where judgment or

reflexes have been impaired, to nevertheless be able to perform [field sobriety] tests satisfactorily."). Thus, regardless of whether the PBT request was a separate intrusion from the field sobriety tests, the trooper maintained reasonable suspicion that Mesenburg was under the influence after he successfully completed the field sobriety tests and, accordingly, had the proper basis for requesting Mesenburg take the PBT.

DECISION

We affirm the district court's decision to sustain the commissioner's revocation of Mesenburg's driver's license because he refused a chemical breath test after arrest. The United States Supreme Court's decision in *Birchfield* does not compel reversal of *Juncewski*. Therefore, *Juncewski* remains controlling here, and a police officer can request that a driver to take a PBT under Minn. Stat. § 169A.41, subd. 1, when the officer has a reasonable suspicion that the driver was driving while impaired. In this case, the trooper had a reasonable suspicion that Mesenburg was driving while impaired when he requested Mesenburg take the PBT.

Affirmed.