STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0716

Chad Henry Lee Jackson,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed March 14, 2022
Affirmed
Gaïtas, Judge

Ramsey County District Court
File No. 62-CV-20-4656

Kirk M. Anderson, Anderson Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

Keith Ellison, Attorney General, Sarah A. Mezera, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Slieter, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant Chad Henry Lee Jackson appeals the district court's order sustaining the revocation of his driving privileges. We affirm.

FACTS

Jackson was arrested for suspected driving while impaired (DWI). After his arrest, an officer attempted to administer a breath test at the police station, but Jackson did not provide a sufficient breath sample. His inability to complete the test was deemed a refusal to submit to chemical testing. Based on his refusal, the commissioner of public safety revoked his driving privileges.

Jackson challenged the commissioner's order of revocation in the district court, alleging that he was physically incapable of performing the breathalyzer test, and the district court held an evidentiary hearing. The evidence introduced at that hearing was as follows.

On September 4, 2020, Jackson drove to pick up his children in Shoreview. After having brief contact with Jackson, the children refused to go with him because they believed he was drunk. The children's mother reported to the police that Jackson was possibly driving while impaired. Jackson drove to his own home in New Brighton, and when he arrived, he contacted police to report that the children's mother had infringed on his parenting time.

Officers went to Jackson's home in response to the calls. They noted that the hood of his car was still warm. After speaking with Jackson, they suspected that he had been driving under the influence of alcohol. Their suspicions were further confirmed by his poor performance on field sobriety tests and his 0.21 reading on a portable breath test (PBT). Notably, Jackson did not have difficulty providing a breath sample for the PBT. The officers arrested Jackson for suspected DWI.

Following his arrest, Jackson agreed to take the Datamaster (DMT) breath test. An officer who is a certified DMT operator attempted to administer the test three times in the presence of another officer. During the first attempt, Jackson started and then stopped blowing into the machine, broke a mouthpiece, coughed into the mouthpiece, removed the mouthpiece from his mouth and stared at the officers, dropped the mouthpiece, and chatted with the officers. On the second attempt, Jackson stopped the breath sample to talk, coughed, ignored instructions, puffed his cheeks, and started and stopped blowing. And during the third attempt, Jackson repeated his earlier behaviors. Despite three attempts, Jackson did not provide a sufficient breath sample for testing.

The three attempts occurred over a nine-minute period. According to the DMT operator, Jackson was "deliberately attempting to beat the test" by "doing as little as he possib[ly could] to try and do the test without actually doing the test." The second officer present did not believe that Jackson was "deliberately trying to not take the test," but he saw no indication that Jackson was having difficulty breathing into the machine. Both officers recalled that Jackson remarked about smoking cigars. But Jackson never claimed to the officers that he was physically unable to complete the tests.

During the district court hearing, Jackson provided numerous explanations for his failure to provide a sufficient breath sample, including seasonal allergies, nervousness and anxiety around law enforcement, cigar smoking, and inadequate instructions from the officers. He testified that he did not know what would happen if the test showed he was above the legal limit for alcohol. Following the attorneys' direct and cross-examination of

Jackson, the district court asked him about his prior DWI offenses. Jackson acknowledged that he had two prior DWIs, including a refusal.

The district court found that Jackson's testimony was not credible and was "self-serving." And the district court rejected his claim that he was physically unable to provide a breath sample because he failed to present any evidence supporting it. The district court sustained the revocation of Jackson's driving privileges.

Jackson appeals.

DECISION

I. The district court did not commit reversible error by inquiring about Jackson's prior DWI charges during the implied-consent hearing.

After the attorneys had completed their questioning of Jackson, the district court followed up with several questions:

> Q: All right. I have a couple questions for you, Mr. Jackson, since you opened the door to these questions, that you're not sure what the outcome would be and that you have limited experience.
>
> Sir, isn't this the third time you've been charged with a DWI?
>
> A: Yes, sir.
>
> Q: And in your previous—and this is public record—your previous one was in 2011—your first one; is that correct?
>
> A: Yes, sir.
>
> Q: And did you have to blow into the DMT at that time?
>
> A: I did not in 2011, no, sir.
>
> Q: All right. Well, your second one then was what? 2017?
>
> A: Yes, sir.
>
> Q: Did you have to blow into the DMT at that time?
>
> A: No, sir, I did not.
>
> Q: And can you tell me why you didn't?
>
> A: In 2017, I did refuse.
>
> Q: All right.

A: I don't—I wanted to speak to a lawyer. And I chose to refuse, yes, sir.
Q: All right. So you are actually very familiar with what the consequences are of testing on a DMT, aren't you?
A: I've never—not—yes, sir. But never tested on a DMT. I've never tested on a DMT.

Jackson argues that the district court erred by asking questions. And he contends that the questions were improper because they concerned evidence outside of the record created by the parties. The commissioner responds that Jackson failed to object to the district court's questioning and therefore waived the issue for the purpose of this appeal. Additionally, the commissioner argues that the questions were not improper and did not influence the district court's ultimate decision.

As an initial matter, we note that a district court has authority to question witnesses. Minn. R. Evid. 614(b) (allowing a district court to question witnesses called by a party); *see also Olson v. Blue Cross & Blue Shield*, 269 N.W.2d 697, 702 (Minn. 1978) ("It is within the discretion of the trial court to question a witness called by a party."). Questioning a witness to clarify testimony is "a proper exercise of the power granted by Rule 614." *Teachout v. Wilson*, 376 N.W.2d 460, 465 (Minn. App. 1985), *rev. denied* (Minn. Dec. 30, 1985). A district court also has a duty to "search for justice," and questioning a witness may assist the district court in performing this function. *Olson*, 296 N.W.2d at 702. But in certain circumstances, a district court's questioning of a witness can amount to reversible error. *See, e.g.*, *State ex rel. Hastings v. Denny*, 296 N.W.2d 378, 379 (Minn. 1980) (holding that a district court's questioning of a witness in front of the

jury was reversible error when resolution of the case depended largely on witness credibility).

Jackson argues that the district court's questions improperly introduced evidence that was outside of the record, which suggested that the district court had performed outside research and was not impartial. But Jackson did not object to the district court's questions. Generally, a party must object to the district court's questioning to preserve the issue for appeal. *State v. Olisa*, 290 N.W.2d 439, 440 (Minn. 1980) ("[W]e do not reach the issue of whether the trial court erred in interrogating defendant, because defendant, by his failure to object, must be deemed to have forfeited his right to have this court consider the issue on appeal and because plain error is not apparent."); Minn. R. Evid. 614(c) ("Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present."); Minn. R. Evid. 614 1977 comm. cmt. ("A specific objection is required to preserve the issue for appeal."); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that the reviewing court generally only considers issues that were presented and considered by the lower court).

Notwithstanding Jackson's failure to object, based on our review of the record, we are satisfied that the district court's questions did not constitute reversible error. This was a court hearing and not a jury trial. *See Hastings*, 296 N.W.2d at 379 (admonishing district courts to exercise caution in questioning witnesses in a jury trial to avoid influencing the jury's decision). Although neither party had formally presented evidence of Jackson's prior convictions, during the same proceeding, the district court was asked to rule on the impoundment of Jackson's license plates, which required consideration of his prior record

of DWIs. *See* Minn. Stat. § 169A.60, subds. 1(d)(1), 2(a)(1) (2020) (providing that plate impoundment is required for a DWI violation that results in revocation of driving privileges "within ten years of a qualified prior impaired driving incident"). The district court used the information to impeach Jackson's credibility after he "opened the door" by testifying that he did not understand the purpose of the DMT breath test. *See Olson*, 296 N.W.2d at 702 (holding that district court did not abuse its discretion by questioning a witness, and noting that counsel's questioning had "partially covered the same ground"). And the district court's findings show that it relied on other aspects of Jackson's testimony to conclude that he was not a credible witness. *See id.* (noting that the district court's findings were independently supported by other evidence). We therefore reject Jackson's argument that the district court committed reversible error by questioning him about his prior DWI charges.

II. The district court did not clearly err in finding that Jackson failed to sustain his burden of proving the affirmative defense of physical inability.

In reviewing a district court's order sustaining an implied-consent revocation, findings of fact will not be set aside unless they are clearly erroneous, and "due regard" must be given to credibility determinations. Minn. R. Civ. P. 52.01; *Ellingson v. Comm'r of Pub. Safety*, 800 N.W.2d 805, 806 (Minn. App. 2011), *rev. denied* (Minn. Aug. 24, 2011). Under clear-error review, an appellate court's duty is not to reweigh the evidence or to reengage in fact-finding, but rather to "fairly consider[] all the evidence and . . . determine[] that the evidence reasonably supports the decision." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 222 (Minn. 2021).

Failure to provide two adequate breath samples constitutes a refusal under Minnesota's implied-consent law. Minn. Stat. § 169A.51, subd. 5(a), (c) (2020). But a driver may prove as an affirmative defense that the refusal to submit to a chemical test "was based on reasonable grounds." Minn. Stat. § 169A.53, subd. 3(c) (2020). A driver's inability to provide a breath sample is one such ground that may be raised at an implied-consent hearing. *Wolle v. Comm'r of Pub. Safety*, 413 N.W.2d 258, 260 (Minn. App. 1987). To rely on this affirmative defense, a driver must prove by a preponderance of the evidence that he was unable to provide adequate breath samples due to physical inability. *Bale v. Comm'r of Pub. Safety*, 385 N.W.2d 870, 873 (Minn. App. 1986). Whether a person is physically unable to provide a breath sample is a question of fact for the district court that we review for clear error. *Burke v. Comm'r of Pub. Safety*, 381 N.W.2d 903, 904 (Minn. App. 1986).

Jackson contends that he satisfied his burden of proof by presenting sufficient evidence of his physical inability to test. Because the district court did not clearly err in finding otherwise, we disagree.

Although Jackson testified that he was unable to provide a sufficient breath sample for various reasons—including allergies, anxiety, and cigar smoking—the district court found that his testimony was not credible. Moreover, the district court noted that Jackson failed to introduce any independent evidence to support his claim that he was unable to take the DMT breath test. These findings are not clearly erroneous. Jackson's testimony was the sole evidence provided in support of his affirmative defense. And we defer to the district court's credibility determinations. *See Engebretson v. Comm'r of Pub. Safety*, 395

N.W.2d 98, 100 (Minn. App. 1986) (declining to "substitute our judgment of credibility for the [district] court's" when the record reasonably supported the district court's credibility determinations); *see also* Minn. R. Civ. P. 52.01 ("[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."). Because the record supports the district court's finding that Jackson did not have a physical inability to take the DMT breath test, it did not err in sustaining the revocation of his driving privileges.

Affirmed.