

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0947**

Jerrold Malachy Feist,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed April 4, 2022
Affirmed
Halbrooks, Judge***

Hennepin County District Court
File No. 27-CV-21-629

Ryan J. Grove, Rogosheske, Rogosheske & Atkins, PLLC, South St. Paul, Minnesota (for appellant)

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

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Halbrooks, Judge.

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

NONPRECEDENTIAL OPINION

HALBROOKS, Judge

Appellant challenges the district court's order sustaining the revocation of his driver's license, arguing that the police lacked sufficient probable cause to arrest him for driving while impaired (DWI) and invoke the Minnesota Implied Consent Law, Minn. Stat. §§ 169A.50-.53 (2020), and that the district court erred in finding that he was in physical control of a motor vehicle. We affirm.

FACTS

On January 11, 2021, appellant Jerrod Malachy Feist consumed alcohol at a bar. His friend, C.K., offered to drive Feist from the bar to C.K.'s house for the night. Feist agreed and C.K. drove his truck and Feist rode in the passenger seat. C.K.'s girlfriend followed behind in her vehicle. As they were nearing C.K.'s residence, Feist punched C.K. in the face, causing his nose to bleed. C.K. immediately stopped and got out of the truck. At that point, the truck's doors were closed, the keys were in the ignition, and the engine was running. Feist then slid into the driver's seat of the truck and remained there for "several seconds."

C.K.'s girlfriend observed the incident from her vehicle and alerted C.K. to the fact that Feist was in the driver's seat of the truck. C.K. then opened the driver-side door and pulled Feist out of the truck. Feist and C.K. physically fought on the road next to the driver's side of the truck. While the two were fighting, C.K.'s girlfriend got out of her vehicle and moved the truck forward, removed the keys, and called the police. As the group waited for the police to arrive, C.K. drove the truck back to his residence because

his girlfriend was concerned that Feist would try to drive. Officers drove C.K. back to the scene after finding him returning on foot.

When one of the officers arrived, he observed that Feist was disheveled, beat up, and bloody. Feist smelled of alcohol, and his speech was slurred. The officer first spoke to C.K.'s girlfriend, who told him that Feist initiated the fight and tried to drive the truck and that she took the keys out of the truck because she was concerned that Feist would try to drive. The officer asked Feist why he would try to drive if he was so drunk, and Feist responded, "Because I'm stupid." The officer then spoke to C.K., who told him that Feist was in the driver's seat of the running truck after he punched C.K. in the face. The officer examined the scene and observed blood on the ground where the truck had been and a disturbance in the snow. The officer arrested Feist for DWI, and respondent subsequently revoked his driver's license.

Upon Feist's petition, the district court sustained the revocation of his driver's license. The district court determined that there was sufficient probable cause to arrest Feist for being in physical control of a motor vehicle while intoxicated and that there was a preponderance of the evidence that Feist was in physical control of the vehicle.

This appeal follows.

DECISION

Feist challenges the district court's order sustaining the revocation of his driver's license, arguing that there was insufficient probable cause to arrest him for being in physical control of a motor vehicle while intoxicated and that he was not in physical control of the vehicle as a matter of law. This court reviews the district court's findings supporting

an order sustaining a license revocation for clear error. *Jasper v. Comm’r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002). Findings of fact are not clearly erroneous if there is reasonable evidence to support them. *Schulz v. Comm’r of Pub. Safety*, 760 N.W.2d 331, 333 (Minn. App. 2009), *rev. denied* (Minn. Apr. 21, 2009). Once the facts are established, the issues of probable cause and physical control are questions of law, which we review de novo. *State v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000); *Snyder v. Comm’r of Pub. Safety*, 744 N.W.2d 19, 22 (Minn. App. 2008).

Minn. Stat. § 169A.51, subdivision 1(a) provides:

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 . . . 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.

To invoke the Minnesota Implied Consent Law, a police officer must have “probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired).” *Id.*, subd. 1(b). Of the three terms, “physical control” encompasses the broadest range of conduct. *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). The supreme court has explained that “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.” *Id.*

If a person refuses or fails the test when the police have probable cause to arrest, the commissioner must revoke the person’s driver’s license. *See* Minn. Stat. § 169A.52, subds. 3 (test refusal), 4 (test failure). A person who has his license revoked may petition

for a review hearing before a district court judge. Minn. Stat. § 169A.53, subd. 2(a). To sustain the license revocation, the commissioner “must show not only that the arresting police officer had probable cause to believe the driver was in physical control of [the] vehicle, but also that the driver was in such physical control.” *Roberts v. Comm’r of Pub. Safety*, 371 N.W.2d 605, 607 (Minn. App. 1985), *rev. denied* (Minn. Oct. 11, 1985).

I. There was sufficient probable cause to arrest Feist for DWI and to invoke the implied-consent law.

Feist argues that the district court erred in determining that the officer had sufficient probable cause to arrest Feist because he believed that Feist was in physical control of the truck. Feist contends that the incident was a roadside fight, not an attempt on his part to drive while intoxicated.

A police officer has probable cause to believe a person is in physical control of a vehicle when, “based on the totality of the circumstances, there is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious [person] in believing that the person was in physical control.” *Shane v. Comm’r of Pub. Safety*, 587 N.W.2d 639, 641 (Minn. 1998) (quotation omitted). We evaluate probable cause under the totality of the circumstances, from the arresting officer’s point of view, giving deference to the officer’s experience and judgment. *Delong v. Comm’r of Pub. Safety*, 386 N.W.2d 296, 298 (Minn. App. 1986), *rev. denied* (Minn. June 13, 1986).

The record shows that at the time of the arrest, the officer learned from C.K. and his girlfriend that Feist was in the driver’s seat of the truck for several seconds with the doors closed while the keys were in the ignition and the engine was running. C.K.’s girlfriend

also told the officer that C.K. drove the truck to his house because she was concerned that Feist would drive away. The officer testified that he asked Feist why he would try to drive if he was so drunk, and Feist responded, “Because I’m stupid.” The officer stated that he understood Feist’s response as meaning “[t]hat it was a stupid attempt to drive.” Feist did not testify at the hearing.

The district court found that Feist’s answer to the officer was consistent with the officer’s inference that Feist was in physical control of the vehicle and made factual findings consistent with the officer’s testimony. Based on its findings of fact, the district court determined that the officer had a “substantial basis for concluding that probable cause existed at the time of invoking the implied consent law” and that sufficient probable cause existed to arrest Feist for DWI. *Groe v. Comm’r of Pub. Safety*, 615 N.W.2d 837, 840 (Minn. App. 2000) (quotation omitted), *rev. denied* (Minn. Sept. 13, 2000).

Because the district court’s factual findings are not clearly erroneous and because the totality of the circumstances would have warranted a prudent and cautious officer to believe that Feist was in physical control of the truck, we conclude that there was sufficient probable cause to arrest Feist for DWI and to invoke the implied-consent law.

II. The district court properly sustained the revocation of Feist’s driver’s license.

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*, 371 N.W.2d at 607. “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 (quotation omitted).

While “physical control” is more comprehensive than “drive” or “operate,” it does not include situations where a person has “relinquished control of the vehicle to a designated driver.” *Id.* Presence in the vehicle, in and of itself, is insufficient to show physical control; instead, courts examine the overall circumstances to make the determination. *Id.* Courts consider several factors to discern whether physical control has been proven, including: “the person’s location in proximity to the vehicle; the location of the keys; whether the person was a passenger in the vehicle; who owned the vehicle; and the vehicle’s operability.” *Id.*

Feist does not challenge the district court’s findings. But he asserts that the facts of this case, when properly considered in light of the entire situation, demonstrate that he was not in physical control of the truck. Relying on *Shane*, Feist argues that he did not relinquish his passenger status because he was in the driver’s seat for mere seconds and did not touch or attempt to touch any of the truck’s controls. *See Shane*, 587 N.W.2d at 642 (concluding the passenger did not renounce his passenger status because he “did not move to the driver’s seat, touch the steering wheel, or put the [vehicle] in gear”). However, the undisputed facts of this case demonstrate that Feist had the means to initiate movement of the truck and that he was in close proximity to the truck’s operating controls because he moved from the passenger seat to the driver’s seat while the doors were closed, the keys were in the ignition, and the engine was running. Accordingly, the commissioner

established by a preponderance of the evidence that Feist was in physical control of the truck.

Feist's reliance on *Shane* to challenge this conclusion is misplaced. *Shane* dealt with an unusual situation where the passenger was left alone in a running vehicle because the police officer ordered the driver out of the car to perform field sobriety tests. *Id.* at 640. The passenger, while remaining in the passenger seat, reached down and pushed the accelerator. *Id.* The *Shane* court rejected the commissioner's argument that the passenger renounced his passenger status by "actively manipulating the vehicle's controls" because he did not, nor was he about to, act in a way that would make the vehicle a source of danger. *Id.* at 641.

Here, Feist's own actions of punching C.K. in the face placed him alone in the truck with its engine running. *Cf. id.* (stating the problem was that "an inebriated passenger, ordered by the police to remain in a vehicle that has its engine running, is always going to be in a position without too much difficulty, to become a source of danger" (quotation omitted)). By sliding into the driver's seat, Feist put himself in a position to move the truck and make it a source of danger. Under the circumstances of this case, the fact that Feist started out as a passenger does not mean that he maintained his passenger status.

The term "physical control" is "given the broadest possible effect" in order to "deter inebriated persons from getting into vehicles except as passengers." *State v. Starfield*, 481 N.W.2d 834, 836 (Minn. 1992) (quotation omitted). This court has concluded that an individual was in physical control of a vehicle when the vehicle had a flat tire, *State v. Woodward*, 408 N.W.2d 927, 928 (Minn. App. 1987); a dead battery, *Abeln v. Comm'r of*

Pub. Safety, 413 N.W.2d 546, 548 (Minn. App. 1987); and when the vehicle was stuck in a snow-filled ditch, *State v. Duemke*, 352 N.W.2d 427, 430 (Minn. App. 1984). We also have concluded that an intoxicated person was in physical control of a vehicle when he was found awake and sitting behind the wheel of a parked car, but the ignition key was not accessible. *Dufrane v. Comm'r of Pub. Safety*, 353 N.W.2d 705, 707-08 (Minn. App. 1984). On this record, the district court properly determined that the commissioner established by a preponderance of the evidence that Feist was in physical control of the vehicle. Therefore, the revocation of his driver's license was correctly sustained by the district court.

Affirmed.