STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1200

Jesse M. Gregorich,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed October 31, 2022
Affirmed
Worke, Judge

St. Louis County District Court
File No. 69VI-CV-20-83

Jesse M. Gregorich, Eveleth, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Ryan Pesch, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Gaïtas, Presiding Judge; Worke, Judge; and Jesson, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant challenges the district court's order sustaining the revocation of his driving privileges. We affirm.

FACTS

During the early morning hours of December 4, 2019, appellant Jesse M. Gregorich was arrested for suspected driving while impaired (DWI). Around 1:00 a.m., a concerned citizen reported to a Minnesota State Patrol trooper that she had seen somebody slumped over the steering wheel of a car parked across the street from a bar in an empty parking lot. Based on this report, the trooper believed there was a possible DWI or a "medical episode."

The trooper responded to the report and saw a car idling, facing a snowbank, with its headlights on and the driver's door open. The only occupant—later identified as Gregorich—was asleep in the driver's seat and "leaning over the driver's . . . door, drooling over himself." The trooper woke Gregorich and asked how he arrived at the parking lot that night. Gregorich answered, "I drove." He also stated that he was drinking but did not say how much. The trooper testified that he "could smell an overwhelming odor of alcohol coming from the vehicle" that indicated impairment.

Gregorich performed several field sobriety tests. Based on the results of these tests, the trooper administered a preliminary breath test which showed that Gregorich's blood-alcohol concentration was 0.16.

The trooper transported Gregorich to the St. Louis County jail and read him the breath-test advisory. When asked if he understood the advisory, Gregorich responded, "[N]o." The trooper then provided Gregorich—who wanted to contact an attorney—with a telephone and multiple telephone books. Gregorich began calling attorneys at 1:35 a.m. Gregorich made two calls but did not reach an attorney or leave a voice message. The

trooper testified that Gregorich "gave up, crossed his arms, sat in a chair and . . . stared at [the trooper]." The trooper ended Gregorich's attorney time at 1:58 a.m.

Gregorich refused to take a breath test without consulting an attorney. As a result, Gregorich was charged with refusing to submit to testing. The trooper escorted Gregorich to jail for an intake procedure and read him a *Miranda* warning.

The commissioner revoked Gregorich's driver's license. Gregorich petitioned the district court to reinstate his driver's license. In July 2021, the district court denied the petition. This appeal followed.

DECISION

In reviewing a district court's order sustaining an implied-consent revocation, we will not set aside findings of fact unless they are clearly erroneous. 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). "Findings of fact are clearly erroneous if, on the entire evidence, we are left with the definite and firm conviction that a mistake occurred." *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010) (citation omitted). We review the district court's application of law to fact de novo. *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016).

Stop and seizure

Gregorich argues that the trooper did not have the necessary reasonable, articulable suspicion when approaching his vehicle to stop and seize him. This is a question of law reviewed de novo. *State v. Munson*, 594 N.W.2d 128, 135 (Minn. 1999).

The United States and Minnesota Constitutions prohibit unreasonable seizures by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10; *see Knapp v. Comm'r of Pub. Safety*, 610 N.W.2d 625, 628 (Minn. 2000) (applying constitutional seizure principles to a license-revocation proceeding). A seizure occurs "when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Matter of Welfare of E.D.J.*, 502 N.W.2d 779, 781 (Minn. 1993) (quotation omitted). "A person generally is not seized merely because a police officer approaches him in a public place or in a parked car and begins to ask questions." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999); *see also State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012) (concluding "that the trooper's approach to Klamar's [parked] vehicle to check on the welfare of its occupants was not a seizure").

Police officers may initiate a limited, investigatory stop without a warrant if the officer has a reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 22 (1968); *Harris*, 590 N.W.2d at 998. Whether an officer has the necessary suspicion to conduct a limited, investigatory stop depends on the totality of the circumstances. *Klamar*, 823 N.W.2d at 691.

The district court determined that the trooper justifiably believed Gregorich was having a medical episode and had reasonable, articulable suspicion that he was committing a DWI[1] under the totality of the circumstances, and that any seizure occurring when the

[1] Under the Minnesota Impaired Driving Code, a person is guilty of DWI if he or she is driving, operating, or in physical control of a motor vehicle while under the influence of alcohol. Minn. Stat. § 169A.20, subd. 1(1) (2020).

trooper approached Gregorich's vehicle was therefore lawful. The circumstances here included a passerby reporting a person slumped over the steering wheel of a car in an empty parking lot across the street from a bar.[2] When the trooper arrived on scene, he saw a car parked in an otherwise empty parking lot, idling with its headlights on, and facing into a snowbank. The trooper also observed that the car's driver's side door was open and that Gregorich was slumped over the driver's side door asleep and drooling. Based on the trooper's training and experience, he reasonably believed Gregorich was having a medical episode or was committing or had committed a DWI. *See Klamar*, 823 N.W.2d at 691 (stating that district courts "may consider the officer's experience, general knowledge, and observations; background information, including the nature of the offense suspected and the time and location of the seizure; and anything else that is relevant").

We agree that the initial seizure was lawful and did not violate Gregorich's constitutional rights.

Right to counsel

Gregorich argues that the trooper did not give him sufficient time to vindicate his right to counsel. Whether this right was vindicated is a mixed question of law and fact. *Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001), *rev. denied* (Minn. Dec. 11, 2001).

[2] Included in the trooper's report was the first and last names of the person who reported Gregorich's parked car. *See State v. Davis*, 393 N.W.2d 179, 181 (Minn. 1986) (stating that face-to-face tips are more reliable than those called in because the informant can be held accountable for giving false information).

The United States and Minnesota Constitutions guarantee criminal defendants the right to counsel. U.S. Const. amend VI; Minn. Const. art. I, § 6. In Minnesota, "A driver who has been stopped for a possible DWI violation and has been asked to submit to a chemical test" has a limited right to counsel under the Minnesota Constitution. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 833, 837 (Minn. 1991). Generally, this limited right is vindicated if the driver "is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Id.* at 835 (quotation omitted).

Law enforcement may require a person to take a breath test when law enforcement has arrested the person upon probable cause to believe that the person committed a DWI. Minn. Stat. § 169A.51, subd. 1(b), (1) (2020). At the time of a breath test, the driver must be informed that (1) they are required by Minnesota law to submit to the test, (2) refusing to submit to testing is a crime, and (3) they have "the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the [breath] test." *Id.*, subd. 2; *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 712 (Minn. App. 2008). "A reasonable time is not a fixed amount of time, and it cannot be based on elapsed minutes alone." *Mell*, 757 N.W.2d at 713. When considering this issue, the court "must balance the efforts made by the driver against the efforts made by the officer." *Id.* Other factors to consider may include, but are not limited to, the time of day and the length of the delay since the driver's arrest. *Id.*

The district court determined that, based on the totality of the circumstances, the trooper "vindicated [Gregorich]'s limited right to counsel." The district court noted that the trooper "facilitated [Gregorich]'s right to counsel" by providing Gregorich a telephone,

telephone books, and a reasonable amount of time to attempt to contact an attorney. The trooper testified that he ended Gregorich's attorney time 23 minutes after it began because Gregorich was not "actively consulting with an attorney, [Gregorich] was just asking questions not relevant to the DWI," and he "was not actively trying to reach an attorney." When a driver does not make a "good-faith and sincere effort" to contact an attorney, police may end the driver's attorney time. *Id.* The record shows that Gregorich was not making a good-faith and sincere effort to contact an attorney. We conclude that the trooper gave Gregorich a reasonable amount of time to contact an attorney and that his limited right to counsel was vindicated.

Test refusal

Gregorich argues that the trooper "coerced" him into "test refusal without counsel" by forcing him to decide whether to take the breath test when he was confused and had not spoken to an attorney. "Whether an implied-consent advisory violates a driver's due-process rights is a question of law, which this court reviews de novo." *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 561 (Minn. App. 2005) (quotation omitted). Whether a driver has refused to submit to testing is a question of fact reviewed for clear error. *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 722 (Minn. App. 2014).

If a person refuses a breath test when police have probable cause to believe the person committed a DWI, the commissioner must revoke the person's driver's license. *See* Minn. Stat. § 169A.52, subd. 3 (2020). But the person may prove as an affirmative defense that the refusal "was based on reasonable grounds." Minn. Stat. § 169A.53, subd. 3(c) (2020). "[C]onfusion regarding the testing obligation" can only satisfy the affirmative

defense if police misled the driver into believing that refusing was acceptable or did not attempt to explain the confused driver's obligations. *Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 810 (Minn. App. 1998), *rev. denied* (Minn. Dec. 15, 1998).

Additionally, the supreme court has recognized a three-part test for determining whether an inaccurate implied-consent advisory violated a driver's due-process rights. *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506, 508-09 (Minn. 2018).

> A license revocation violates due process when: (1) the person whose license was revoked submitted to a breath, blood, or urine test; (2) the person prejudicially relied on the implied consent advisory in deciding to undergo testing; and (3) the implied consent advisory did not accurately inform the person of the legal consequences of refusing to submit to the testing.

Id. A driver must satisfy all three elements to establish a due-process violation. *Id.* The prong at issue here requires that Gregorich show that the implied-consent advisory did not accurately inform him of the legal consequences for refusing to submit to testing. *Id.* at 909.

The district court determined that the trooper did not violate Gregorich's due-process rights and that Gregorich's test refusal was unreasonable. The record supports these conclusions. Gregorich was arrested on probable cause to believe he was in physical control of a motor vehicle while impaired. *See* Minn. Stat. § 169A.51, subd. 1 (b)(4). Gregorich testified that the trooper read him the breath-test advisory. *See id.*, subd. 2 (2020). As the statute requires, the trooper informed Gregorich that state law required him to take the test, that refusing was a crime, that he had a limited right to consult an attorney, and that he would be deemed to have refused if he unreasonably delayed or refused to

decide whether he would submit to testing. *See id.* The trooper followed the correct procedure and correctly informed Gregorich of the consequences for refusing the breath test. Thus, the trooper did not violate Gregorich's due-process rights.

Miranda warning

Gregorich argues that the trooper violated his *Miranda* rights by failing to issue a *Miranda* warning before reading him the breath-test advisory. A district court's determination regarding custody and necessity of a *Miranda* warning are issues of law that we review de novo. *State v. Mellett*, 642 N.W.2d 779, 787-88 (Minn. App. 2002), *rev. denied* (Minn. July 16, 2020).

"In the context of an arrest for [DWI], a police inquiry of whether the suspect will take a blood-alcohol test in not an interrogation within the meaning of *Miranda*." *South Dakota v. Neville*, 459 U.S. 553, 564 n. 15, 103 S. Ct. 916, 923 n. 15 (1983); *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855-56 (Minn. 1991). This court has previously stated that "giving a *Miranda* warning in an implied consent situation can be confusing to the driver" because the warning implies that there are no penalties for refusing to cooperate when there are "substantial penalties." *State v. Kline*, 351 N.W.2d 388, 390 (Minn. App. 1984); *Butler v. Comm'r of Pub. Safety*, 348 N.W.2d 827, 828 (Minn. App. 1984).

The record shows that the trooper issued Gregorich a *Miranda* warning after reading the breath-test advisory and after Gregorich refused the test. The trooper did not violate Gregorich's *Miranda* rights.

Notice and hearing

Gregorich claims that he was (1) not properly served a notice and order of revocation, and (2) denied procedural due process based on the delay before the implied-consent hearing.

Notice and order of revocation

Under Minn. Stat. § 169A.52, subd. 7(a) (2020), "a peace officer requiring a test or directing the administration of a chemical test shall serve immediate notice of intention to revoke and of revocation on a person who refuses to permit a test." Here, the district court determined that Gregorich received the notice and order of revocation "on the date of his arrest for DWI." The trooper testified that he followed the breath-test-advisory procedure the morning of Gregorich's arrest. And during Gregorich's processing at the jail, his personal belongings were inventoried in accordance with jail procedure. Listed on this inventory was an item described as "police paperwork." Also, the trooper marked the box "[s]ubject refused to sign" in lieu of Gregorich's signature on the notice and order of revocation. The record shows that Gregorich received the notice and order of revocation.

Procedural due process

Gregorich argues that the 394-day delay before the implied consent hearing violated his procedural due-process rights. This presents a question of law reviewed de novo. *Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869, 877 (Minn. App. 2008), *rev. denied* (Minn. May 20, 2008).

A person has a protected property interest in their driver's license that the state may not deprive without procedural due process. *Heddan v. Dirkswager*, 336 N.W.2d 54, 58-

59 (Minn. 1983). Generally, procedural due process requires adequate notice and a meaningful opportunity to be heard. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976); *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 304 (Minn. App. 2007).

A person whose driver's license is revoked under the Minnesota Implied Consent Law may petition for judicial review of the revocation. Minn. Stat. § 169A.53, subd. 2(a) (2020). The judicial review hearing "must be held at the earliest practicable date, and in any event no later than 60 days" after the petition is filed. *Id.*, subd. 3(a). But the statute recognizes that a hearing may not be held within 60 days. *See id.*, subd. 2(c). Delaying the hearing past 60 days from filing may violate due process based on the following factors: (1) the private interest affected, (2) the risk of erroneously depriving the interest through the procedures used, and (3) the government's interests. *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 415-16 (Minn. 2007). Under these factors, the party asserting the violation must show prejudice from the delay. *Riehm*, 745 N.W.2d at 877.

The district court determined that Gregorich "failed to demonstrate that his procedural due process rights were violated when the [district court] failed to hold the implied consent hearing within 60 days." The district court noted that "while the hearing was continued beyond the 60 days due to the pandemic, [Gregorich] requested continuances . . . due to discovery issues, as well as one subsequent continuance request . . . due to illness."

Here, Gregorich experienced a delay over 60 days from filing an implied consent petition. The district court determined that Gregorich "failed to show that he suffered any prejudice as a result of any delay in the implied consent hearing." We agree. Even if the

delay were unreasonable, Gregorich has not shown that the delay caused him prejudice. The delay did not violate Gregorich's right to procedural due process.

Affirmed.