STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2239
A13-0655

Mark Raymond Wagener, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent (A12-2239),

and

State of Minnesota,
Respondent (A13-0655),

vs.

Mark Raymond Wagener,
Appellant.

Filed August 12, 2013
Affirmed
Rodenberg, Judge

McLeod County District Court
File Nos. 43-CV-12-1605, 43-CR-12-1405

Richard L. Swanson, Chaska, Minnesota (for appellant)

Lori Swanson, Minnesota Attorney General, St. Paul, Minnesota (for respondents); and

Kristi A. Nielsen, James A. Van Buskirk, Assistant Attorneys General, St. Paul, Minnesota (for respondent Commissioner of Public Safety);

Jason M. Thiemann, Gavin, Winters, Twiss, Thiemann & Long, Ltd., Glencoe, Minnesota (for respondent State of Minnesota)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

In these consolidated appeals, appellant challenges the district court's order sustaining the revocation of his driver's license in a civil implied-consent proceeding, and the denial of his motion to suppress evidence in the criminal driving while impaired (DWI) proceeding, arguing that the arresting officer did not have reasonable suspicion to request a preliminary breath test (PBT). We affirm.

FACTS

At 1:55 a.m. on September 6, 2012, Officer Todd Rohloff of the Glencoe Police Department was dispatched to appellant Mark Raymond Wagener's address in Glencoe in response to a report of a domestic assault in progress. Officer Rohloff was familiar with appellant and appellant's vehicle based on prior interactions with him. While en route to appellant's apartment, Officer Rohloff was informed by dispatch that appellant had reportedly left the location of the alleged assault in a red Chevrolet Lumina. He located and followed a vehicle that looked similar to that described, in an effort to determine whether it was appellant's vehicle. He was able to confirm that it was appellant's vehicle by the vehicle's license plate number, but did not know who was driving the vehicle.

As he followed the vehicle, Officer Rohloff observed it cross over the fog line and then move fully back into the driving lane, and he observed it weave in its lane "a couple

other times." Officer Rohloff activated his squad car's emergency lights and initiated a traffic stop after the vehicle signaled a turn onto an intersecting street.

The vehicle stopped and Officer Rohloff approached it on foot. Based on prior interactions, Officer Rohloff identified the driver as appellant. There was no one else in the car. Officer Rohloff noted an odor of alcohol emanating from the vehicle and observed that appellant's eyes were bloodshot, watery, and glassy. Appellant's face was flushed.

Officer Rohloff asked appellant if he had consumed alcohol, and appellant responded that he had "a couple" after arriving home from work. Officer Rohloff asked appellant to count backward from 89 to 67. Appellant attempted to comply, but skipped 77 and did not stop at 67. Instead, appellant continued counting backward to 60, stopping only after Officer Rohloff finally instructed him to do so. Officer Rohloff decided, based on appellant's appearance and his performance on the counting assignment, to ask appellant to perform more field sobriety tests. But when Officer Rohloff asked appellant if he would be willing to perform some physical field sobriety tests outside of the vehicle, appellant declined and asked Officer Rohloff to "cut to the chase."

Officer Rohloff then administered a PBT, which reported an alcohol concentration of .108. Officer Rohloff arrested appellant for DWI based on his driving conduct, physical indicia of intoxication, performance on the counting exercise, and the results of the PBT.

Based on appellant's DWI arrest, the department of public safety issued an order revoking appellant's driver's license and an order impounding the license plates that were

registered to the vehicle. Appellant filed a petition with the district court seeking rescission of the two orders and suppression of the evidence resulting from his arrest in the criminal proceeding. The two cases were heard together in a combined implied-consent/omnibus hearing. In his argument at the close of testimony, appellant argued that Officer Rohloff did not have a sufficient basis for requesting the PBT. Appellant conceded that, if the PBT was lawful, then Officer Rohloff had developed probable cause to arrest appellant.

The district court ruled from the bench sustaining the license revocation and denying appellant's omnibus challenge, and later issued a written order to like effect. Appellant later agreed to a trial on the criminal charges under the procedures set forth in Minn. R. Crim. P. 26.01, subd. 4, and was convicted of DWI.

Appellant now appeals both the revocation of his driver's license and his conviction for DWI. We consolidated the two cases in an order issued on May 16, 2013.

D E C I S I O N

On appeal, appellant argues that his arrest was unlawful because Officer Rohloff did not have a sufficient basis for requesting the PBT. In the district court, appellant conceded that, if the PBT was lawful, then there was probable cause to arrest him for DWI.

When reviewing a traffic stop, we review the district court's findings of fact for clear error and the legality of Officer Rohloff's actions de novo. *Sarber v. Comm'r of Pub. Safety*, 819 N.W.2d 465, 468 (Minn. 2012). The United States and Minnesota Constitutions prohibit unreasonable governmental searches and seizures. U.S. Const.

amends. IV, XIV; Minn. Const. art. I, § 10; *Mapp v. Ohio*, 367 U.S. 643, 650, 81 S. Ct. 1684, 1689 (1961) (stating that the Fourth Amendment applies to the states under the Due Process Clause of the Fourteenth Amendment). Evidence obtained in violation of this constitutional protection is inadmissible at trial under the exclusionary rule. *Mapp*, 367 U.S. at 654–55, 81 S. Ct. at 1691.

An officer, acting upon a reasonable suspicion that a driver is impaired, may request the driver to perform field sobriety tests or to submit to a preliminary screening test or PBT. *See State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012) (stating that the odor of alcohol emanating from the driver and the driver's bloodshot, watery eyes provided the officer with an independent reasonable basis to suspect that the driver was impaired and that therefore the officer's PBT request was lawful); *see also* Minn. Stat. § 169A.41, subd. 1 (2012) (authorized requiring a driver to provide a PBT breath sample when the officer has "reason to believe . . . that the driver may be [impaired]"). Reasonable suspicion means that the officer has "a particularized and objective legal basis for suspecting the person of violating the law." *Sarber*, 819 N.W.2d at 468. The officer need only show that his request for a PBT was not a product of mere whim, caprice, or idle curiosity, but was instead based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). The intrusion is permissible "if the officer is able to articulate that he had a particularized and objective basis" for the request based on the officer's training, experience, and assessment of all the

circumstances. *State v. Riley*, 667 N.W.2d 153, 156 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003).

Based on his training and experience, Officer Rohloff requested the PBT because he had observed appellant weave in his lane and, on multiple occasions, touch or cross the fog line. Appellant admitted consuming at least "a couple" of alcoholic beverages. Officer Rohloff detected the odor of alcohol emanating from appellant's vehicle, and appellant was the only person in the car. Officer Rohloff observed that appellant's eyes were bloodshot, watery, and glassy. He observed that appellant's face was flushed. He administered a counting test that appellant did not complete satisfactorily.[1] Finally, Officer Rohloff was unable to conduct other field sobriety tests because appellant refused to cooperate with such tests, instead requesting Officer Rohloff to "cut to the chase."

Appellant also argues that Officer Rohloff did not specifically identify the odor of alcohol as coming from appellant's breath and that Officer Rohloff testified to having observed appellant's face to be flushed in his prior interactions with appellant. These isolated facts are true, but the context of Officer Rohloff's observations included much more than these two facts. Officer Rohloff testified that he detected the odor of alcohol coming from within appellant's vehicle. He testified that, at a distance of three feet, he did not specifically discern the odor of alcohol as being on appellant's breath. But the fact is that there was nobody else in the vehicle, which had just recently left the residence

[1] Appellant argues that this counting exercise is not one of the standardized field sobriety tests generally recognized and used by law enforcement officers, but provides no authority for the notion that the nonstandardized nature of this exercise renders the officer's consideration of appellant's performance on the exercise unlawful or inappropriate.

at which a domestic assault had been reported. It is also true that Officer Rohloff agreed that appellant's face had appeared flushed during some prior interactions with Officer Rohloff. But when asked if appellant had appeared to have consumed alcohol prior to those contacts, Officer Rohloff testified that, "I think pretty much every contact I've had with [appellant], he probably was, yes." Therefore, Officer Rohloff had prior knowledge that appellant's flushed face correlated with his use of alcohol.

Appellant also argues that Officer Rohloff observed numerous innocent facts, such as appellant's ability to provide a driver's license and vehicle registration at the same time, and that appellant's speech was not slurred. However, these facts do not negate the multiple indicia of intoxication that were observed by Officer Rohloff and which supported Officer Rohloff's reasonable suspicion.

Finally, appellant appears to argue that, because Officer Rohloff had already decided to initiate a traffic stop to investigate the reported domestic assault, he was required to disregard his observations of appellant's driving conduct as justification for the stop. Appellant offers no authority in support of this argument, and to the extent that it is a legal argument, it is waived. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (indicating that assignments of error that are raised as "mere assertions" unsupported by adequate argument or authority are waived). Even if not waived, we find no support for the notion that an officer in this situation and in the face of the observed driving conduct must or should disregard that observed driving conduct. The question is not whether Officer Rohloff would have stopped appellant in the absence of the driving conduct. Rather, the question is whether Officer Rohloff's request for the

PBT was based on a reasonable belief that appellant was impaired. Minn. Stat. § 169A.41, subd. 1. We conclude that it was.

In sum, the district court appropriately determined that the circumstances observed by Officer Rohloff support Officer Rohloff's reasonable suspicion that appellant was impaired and thus Officer Rohloff's PBT request was lawful. The arrest of appellant was therefore also lawful. We affirm the conviction and the order sustaining the revocation of appellant's driver's license.

Affirmed.