STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2344

State of Minnesota,
Respondent,

vs.

Arthur A. Anderson,
Appellant.

Filed April 29, 2008
Affirmed
Stoneburner, Judge

Redwood County District Court
File No. CR06444

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michelle A. Dietrich, Redwood County Attorney, Patrick R. Rohland, Assistant County Attorney, 250 South Jefferson, Box 130, Redwood Falls, MN 56283 (for respondent)

Charles A. Ramsay, Sharon R. Osborn, Ramsay, Devore & Bennerotte, P.A., 450 Rosedale Towers, 1700 West Highway 36, Roseville, MN 55113 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Wright, Judge.

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

STONEBURNER, Judge

Appellant challenges his convictions of fourth-degree driving while impaired (DWI) and a violation of a restricted license. He also challenges the denial of his petition for postconviction relief without an evidentiary hearing. We affirm.

FACTS

Appellant Arthur Anderson was towing a trailer without working lights at 11:16 p.m. on a July evening. He was stopped by Redwood County Sheriff's Deputy Jason Jacobson. Jacobson observed that Anderson's eyes were bloodshot, there were empty beer cans in the bed of Anderson's truck, Anderson avoided breathing toward Jacobson, and Anderson was smoking a cigarette in a manner that Jacobson has observed in drivers who are trying to mask the smell of alcohol. Anderson's speech was not slurred, and he was able to connect the trailer lights without any problem. Jacobson called in Anderson's license and learned that Anderson's license is restricted to no use of alcohol. Jacobson asked Anderson if he would mind submitting to a preliminary breath test (PBT), and Anderson responded "I guess not." Jacobson testified that it is his practice to request a PBT of any driver he stops whose license is restricted to no use of alcohol. The PBT registered an alcohol concentration of .132. Jacobson had Anderson perform some field sobriety tests and arrested him for DWI and violation of a restricted license. A subsequent Intoxilyzer test showed a blood alcohol concentration of .13.

Anderson was charged with driving in violation of a restricted license and fourth-degree DWI. Anderson moved to suppress the evidence of alcohol concentration,

arguing that Jacobson lacked articulable suspicion to request the PBT and that the test violated his Fourth Amendment rights. The district court denied the motion. Anderson was convicted of both charges after a jury trial. Anderson sought post-conviction relief based on a claim of ineffective assistance of counsel. The post-conviction court denied the petition without an evidentiary hearing. This appeal followed.

D E C I S I O N

Anderson first argues that the district court erred in denying his motion to suppress the evidence against him because Jacobson lacked articulable suspicion to administer the PBT. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

> When a peace officer has reason to believe from the manner in which a person is driving . . . or acting upon departure from a motor vehicle . . . that the driver may be [driving while impaired] the officer may require the driver to provide a sample of the driver's breath for a preliminary screening test using a device approved by the commissioner for this purpose.

Minn. Stat. § 169A.41, subd. 1 (2004). An investigating "officer need not possess probable cause to believe that a DWI violation has occurred in order to administer a [PBT]." *State v. Vievering*, 383 N.W.2d 729, 730 (Minn. App. 1986), *review denied* (Minn. May 16, 1986). Rather, an officer may request a PBT if the officer can point to specific, articulable facts that form the basis to believe that a person is or has been driving a vehicle while under the influence of alcohol. *State Dept. of Pub. Safety v.*

Juncewski, 308 N.W.2d 316, 317 (Minn. 1981). Articulable suspicion is an objective standard and is determined from the totality of the circumstances. *Paulson v. Comm'r of Pub. Safety*, 384 N.W.2d 244, 246 (Minn. App. 1986). Appellate courts "acknowledge that trained law enforcement officers are permitted to make inferences and deductions that would be beyond the competence of an untrained person." *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001).

In this case, Jacobson articulated four factors that led him to request a PBT: (1) Anderson's eyes were bloodshot; (2) Anderson avoided turning his head in Jacobson's direction and was smoking a cigarette in a manner that Jacobson considered to be an attempt to mask the odor of alcohol; (3) there were several empty beer cans in the bed of Anderson's truck; and (4) Jacobson learned from dispatch that Anderson's license barred any use of alcohol or drugs. The district court concluded that bloodshot eyes and evasive use of cigarette smoke was sufficient to justify administration of the PBT. The district court noted that Anderson's restricted license, while not justifying a PBT, made Jacobson's conclusion that Anderson was using smoke to mask the smell of alcohol more credible.

Anderson argues that bloodshot eyes, beer cans in the truck bed, and driving with a restricted license are not driving conduct or "acting" as required by the statute in order for an officer to require a PBT. But in this case, Jacobson requested the PBT, and Anderson consented to the test. There is no evidence in the record that Jacobson required the PBT. Furthermore, the case law makes it clear that an officer can evaluate how a driver is acting based on the totality of the circumstances. *See, e.g.*, *Richardson*, 622

N.W.2d at 825-26. Here, even if Jacobson had required the PBT, the totality of the circumstances gave Jacobson the required articulable suspicion. The district court did not err in denying Anderson's motion to suppress the PBT and other evidence gathered as a result of that test.

On appeal, Anderson also challenges the constitutionality of Minn. Stat. § 169A.41, subd. 1, arguing that the statute violates his Fourth Amendment rights by setting a standard lower than probable cause for a search. This issue was not raised in the district court. This court will generally not consider matters not argued or considered in the district court including constitutional challenges. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). We decline to reach the issue in this case except to note that the Fourth Amendment protects against unreasonable searches, and searches are not per se unreasonable under the Fourth Amendment simply because the intrusion is based on articulable suspicion rather than probable cause. *See* U.S. Const. amend. IV (protecting against unreasonable searches); *see Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1879-80 (1968) (upholding the reasonableness of "stop and frisk" searches based on "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion").

Anderson also challenges the denial of his petition for post-conviction relief without an evidentiary hearing. To warrant an evidentiary hearing on a post-conviction petition, a petitioner must allege facts that, if proved, would entitle him to the requested relief. *State v. Kelly*, 535 N.W.2d 345, 347 (Minn. 1995); Minn. Stat. § 590.04, subd. 1

(2004) (stating that a hearing shall be held unless the petition and record show the petitioner is entitled to no relief).

A post-conviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of law and fact and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). A defendant asserting ineffective assistance of counsel "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). The defendant must rebut a "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). A court may address the prongs of the *Strickland* test in any order and may dispose of the claim on one prong without analyzing the other. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

On appeal, Anderson asserts that his counsel was ineffective because he failed to challenge the manner in which the PBT was administered and its reliability. Anderson contends that Jacobson failed to follow a U.S. Department of Transportation (DOT) training manual concerning administration of the PBT. But Anderson has no authority to support his assertion that the manual's recommendation was binding on the officer or that a derivation from it affected the reliability of his test. The manual states that "[s]ome types of [PBTs] might react to certain substances other than alcohol . . . [c]igarette smoke conceivably could produce a positive reaction on certain devices [so that] the test

would be contaminated and its result be would be higher than the true BAC." Nat'l Highway Safety Admin., U.S. Dep't. of Transp., *DWI Detection & Standardized Field Sobriety Testing: Student Manual* § VII (2004). Because there is no evidence to support an argument that the PBT in this case was unreliable, there is no merit to his argument that counsel was ineffective by failing to raise the issue of the manner in which the test was administered, and the district court did not abuse its discretion by denying Anderson's post-conviction petition without an evidentiary hearing.

Affirmed.