STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0713

Scott Ronald Kish, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed April 8, 2008
Affirmed
Stoneburner, Judge

Hennepin County District Court
File No. 27CV0612941

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Considered and decided by Stoneburner, Presiding Judge; Peterson, 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 the district court's decision affirming revocation of his driving privileges. Appellant argues that the district court erred by (1) holding that his due process rights were not violated by the district court's policy of scheduling implied-

consent hearings after resolution of related criminal matters and (2) concluding that the defense of temporary insanity by reason of involuntary intoxication is not available in an implied-consent proceeding. By notice of review, respondent challenges the sufficiency of the evidence to support the district court's finding that appellant proved involuntary intoxication. Because we affirm the district court's holdings that appellant's due process rights were not violated by scheduling practices and that the affirmative defense of temporary insanity by reason of involuntary intoxication is not available in an implied-consent proceeding, we do not reach the issue of the sufficiency of the evidence to support the district court's finding that Kish was involuntarily intoxicated.

FACTS

Appellant Scott Ronald Kish was arrested for DWI on June 13, 2006. He fully cooperated with the arresting officer. Testing established that his alcohol concentration was .11. Kish was charged with DWI and was given notice of revocation of his driving privileges under the implied-consent law effective in seven days. Kish requested and received a stay of revocation of his driving privileges pending the conclusion of his implied-consent hearing. Pursuant to Hennepin County's "Fast-Track" program, the implied-consent hearing could not be scheduled until the criminal case was resolved. The implied-consent hearing was postponed twice: once at Kish's request and once at the request of respondent Commissioner of Public Safety. Kish's implied-consent hearing ultimately took place 177 days after he petitioned for judicial review.

In the criminal proceeding, Kish was found not guilty of DWI based on his asserted defense of involuntary intoxication.[1] Records from Kish's criminal case were not made part of the record in Kish's implied-consent proceeding. Kish testified at the implied-consent hearing that in the early evening hours of June 13, 2006, he took a prescribed dose of the sleep aid Lunesta, a product that he had not used before. He went to bed at 7:00 p.m., intending to get up at 2:00 a.m. He did not consume alcohol before he took Lunesta. His next recollection is of waking up at 9:30 a.m. the next morning. He has no recollection of the events that occurred after he went to bed or before he woke up. He presumes that he consumed four beers from his refrigerator and then drove.

Based on Kish's testimony and the finding in the criminal matter that Kish had proved involuntary intoxication as an affirmative defense to DWI, the district court in the implied-consent proceeding found "that [Kish] was involuntarily intoxicated on the night of June 13, 2006." The district court concluded, however, that "the affirmative defense of involuntary intoxication is inapplicable in civil implied consent proceedings." The district court also concluded that because Kish's driving privileges were reinstated pending resolution of the implied-consent hearing, Kish's due process rights were not violated despite the scheduling practice that resulted in his implied-consent hearing being scheduled until more than 60 days after he petitioned for judicial review. The district court sustained the revocation, and this appeal followed.

[1] Respondent asserts that Kish was found guilty of an added charge of careless driving pursuant to an agreement that he would not assert the defense of involuntary intoxication to that charge.

D E C I S I O N

I. Due process challenge to revocation

Kish argues that the Hennepin County district court's practice of postponing implied-consent hearings until associated criminal charges are resolved is "in blatant disregard for [Kish's] statutory and constitutional rights" to prompt judicial review, violated his due process rights, and requires rescission of revocation of his driver's license. Recently, this court rejected an identical challenge to the scheduling process in Ramsey County. *See Riehm v. Comm'r of Pub. Safety*, ___N.W.2d ___ (Minn. App. Mar. 11, 2008) (holding that a similar Ramsey County scheduling policy does not violate Minn. Stat. §169A.53 (3)(a) (2006), and availability of stay of revocation prevented due process violation from delay). Because under *Riehm* the scheduling policy does not violate the implied-consent statute and Kish's due process rights were vindicated by the stay of revocation pending the implied-consent hearing, Kish's challenge to the policy is without merit.

II. The defense of involuntary intoxication is not available in an implied-consent hearing.

The supreme court first recognized the affirmative defense of temporary insanity due to involuntary intoxication in criminal proceedings in *City of Minneapolis v. Altimus*, 306 Minn. 462, 472, 238 N.W.2d 851, 858 (1976) (reversing convictions of careless driving and hit-and-run for the district court's failure to instruct the jury on involuntary intoxication).

Altimus identified four different kinds of involuntary intoxication: coerced intoxication, pathological intoxication, intoxication by innocent mistake, and unexpected intoxication resulting from the ingestion of a medically prescribed drug. *Id.* at 468, 238 N.W.2d at 856. *Altimus* involved a claim that ingestion of Valium, which was prescribed for severe back pain, caused Altimus to become unexpectedly intoxicated to the point of unconsciousness and inability to control his actions, relieving Altimus of criminal responsibility for his actions. *Id.* at 470, 238 N.W.2d at 857.

The supreme court identified the circumstances in which a defense of involuntary intoxication due to ingestion of a prescribed drug is properly available:

> The first requirement is that the defendant must not know, or have reason to know, that the prescribed drug is likely to have an intoxicating effect. . . .
>
> The second requirement is that the prescribed drug, and not some other intoxicant, is in fact the cause of defendant's intoxication at the time of his alleged criminal conduct.
>
> The third requirement is that the defendant, due to involuntary intoxication, is temporarily insane. . . . as defined in Minn. Stat. § 611.026.

Id. at 470-71, 238 N.W.2d at 857. The defendant must establish the defense by a fair preponderance of the evidence. *Id.* at 472, 238 N.W.2d at 858.

Subsequently, this court held that "[m]ental impairment due to involuntary intoxication is not a valid defense under the implied consent statute." *Casci v. Comm'r of Pub. Safety*, 360 N.W.2d 443, 445 (Minn. App. 1985). Casci's driver's license was revoked under the implied-consent law after he was arrested for DWI and refused to take a breath test. *Id.* at 444. At his implied-consent hearing, Casci testified that he could not

recall anything that occurred after his car was stopped, and his physician testified that Casci could have been mentally impaired at the time he refused testing because of the unexpected effects of alcohol mixed with an overdose of Lomotil, a drug that Casci had been taking to stop diarrhea caused by surgery for an obstructed bowel. *Id.* at 444-45. Casci contended that "the mixture induced 'pathological intoxication' to the level of temporary insanity, so that he did not know what he was doing when he refused [testing]." *Id.* at 445.

At the time *Casci* was decided, the implied-consent statute was codified at Minn. Stat. § 169.123 (Supp. 1983). The statute provided that "in an implied consent hearing '[i]t shall be an affirmative defense for the petitioner to prove that, at the time of the refusal, his refusal to permit the test was based upon reasonable grounds.'" *Casci*, 360 N.W.2d at 445 (quoting Minn. Stat § 169.123, subd. 6). Reiterating and expanding a rule announced in *Rude v. Comm'r of Pub. Safety*, 347 N.W.2d 77 (Minn. App. 1984), to apply to the defense of mental impairment caused by involuntary intoxication, this court said: "'Under the implied consent statute, *any inquiry into* the driver's *capacity* to make a knowing, voluntary *or* intelligent *choice* is *immaterial*.'" *Casci*, 360 N.W.2d at 445 (quoting *Rude*, 347 N.W.2d at 80) (other quotation omitted). This court stated that allowing the defense of involuntary intoxication under the implied-consent statute "is inconsistent with a primary purpose of the statute, that is, to promote public safety on the highway." *Id.* Rejecting Casci's argument that *Altimus* supported his position, we said that "[c]riminal defenses such as those relating to capacity are not relevant because

license revocation is not a punishment but is rather an exercise of the police power for the protection of the public." *Id.* (quotation omitted).

Kish argues that because he took an alcohol-concentration test he is able to assert affirmative defenses not available to those who refuse testing. Kish relies on *Flamang v. Comm'r of Pub. Safety*, 516 N.W.2d 577, 580 (Minn. App. 1994) (stating that the question of whether Flamang was actually in physical control of his vehicle was outside the permissible scope of review because revocation was based on test refusal, not test failure), *review denied* (Minn. July 27, 1994). But *Flamang* actually stands for the proposition that the only defenses available in an implied-consent hearing are those enumerated in the implied-consent statute and therefore supports the commissioner's position. *See id.* The implied-consent statute, Minn. Stat. § 169A.53, subd. 3(b) (2006), provides that "[t]he scope of the hearing is limited to the issues in clauses (1) to (10)," none of which includes the defense of involuntary intoxication.[2]

[2] Issues within the scope of the hearing can be summarized as: (1) did the officer have probable cause to suspect DWI; (2) was arrest lawful; (3) was there an accident or collision resulting in property damage, personal injury, or death; (4) did the person refuse to take a screening test; (5) if a screening test was administered, did the test indicate an alcohol concentration of .08 or more; (6) did the officer give the implied-consent advisory; (7) did the person refuse a test; (8) did a test indicate an alcohol concentration of .08 or more or the presence of a listed controlled substance; (9) if the person was driving, operating, or in control of a commercial vehicle, did the test indicate an alcohol concentration of .04 or more; and (10) was the testing method valid and reliable and were the results accurately evaluated? Minn. Stat. § 169A.53, subd. 3(b)(1)-(10). The only affirmative defense in the statute is that if revocation is based on test refusal, "[i]t is an affirmative defense for the petitioner to prove that, at the time of the refusal, the petitioner's refusal to permit the test was based upon reasonable grounds." Minn. Stat. § 169A.53, subd. 3(c) (2006).

Further, the supreme court reached the same holding as that in *Casci* when it rejected the argument of a driver, whose alcohol-concentration test showed an alcohol concentration of .11, that the "accident and ensuing medical treatment had rendered him incapable of understanding his rights or knowingly exercising them." *State, Dep't of Pub. Safety v. Hauge*, 286 N.W.2d 727, 728 (Minn. 1979). The supreme court held that "under the implied consent statute, any inquiry into the driver's capacity to make a knowing, voluntary, or intelligent choice is immaterial." *Id.* Both *Casci* and *Hauge* involved post-driving choices; the rationale applies equally to the choice to drive involved in this case.

Kish argues that because this court has permitted the affirmative defense of post-driving alcohol consumption, which is not listed in the statute, we should permit the affirmative defense of involuntary intoxication. *See Dutcher v. Comm'r of Pub. Safety*, 406 N.W.2d 333, 336 (Minn. App. 1987) (rejecting the commissioner's argument that post-driving alcohol consumption is not available under the implied-consent law on the policy ground that not to allow such a defense could revoke the license of an entirely sober driver who imbibed after driving). But the policy concerns raised in *Dutcher* do not exist in this case. This case involves the policy concerns articulated in *Casci*: to promote public safety on the highways. *Casci*, 360 N.W.2d at 445.

We also reject Kish's argument that the implied-consent process is actually a criminal proceeding such that he is entitled to assert an affirmative defense recognized in criminal law. This court has previously rejected the argument that the implied-consent process is criminal. *See Davis v. Comm'r of Pub. Safety*, 509 N.W.2d 380, 392 (Minn.

App. 1993) (holding that changes in the implied-consent statute do not undermine the civil nature of implied-consent proceedings), *aff'd*, 517 N.W.2d 901 (Minn. 1994).

III. Sufficiency of evidence to support finding of involuntary intoxication

Because we conclude that *Casci* is controlling and that the defense of temporary insanity due to involuntary intoxication is not available in an implied-consent proceeding, we do not reach the commissioner's challenge to the sufficiency of the evidence to support a finding that Kish was temporarily insane due to involuntary intoxication.

Affirmed.