STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0984

Nicholas David Doerfler, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed June 24, 2008
Affirmed in part, reversed in part, and remanded
Peterson, Judge

St. Louis County District Court
File No. 69DU-CV-06-3216

Thomas C. Plunkett, 950 USB Plaza, 444 Cedar Street, St. Paul, MN 55101 (for appellant)

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Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Poritsky, Judge.*

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

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

PETERSON, Judge

In this appeal from an order sustaining the revocation of appellant Nicholas David Doerfler's driver's license, appellant argues that the district court (1) erred in considering (a) identification evidence obtained by using an impermissible show-up procedure, and (b) statements that appellant made after an equivocal assertion of his right to counsel; and (2) applied an incorrect legal standard when it concluded that appellant was driving. We affirm in part, reverse in part, and remand.

FACTS

Shortly before midnight on December 19, 2006, Brian Jackson stopped at the Island Lake Inn to visit his friend Nicole Swanstrom, who was bartending. After visiting for about 30 minutes, Jackson was getting ready to leave when he heard the sound of screeching tires and saw a vehicle crash into the front of the building. Jackson went outside and came within ten feet of the car before the driver backed away from the building. Jackson testified that from this distance, he saw a male driver wearing a tan or white sweatshirt or windbreaker and saw no passengers.

Jackson went back inside and, from a window, he saw the vehicle travel about one block before it turned onto a side street and stopped. When the vehicle's headlights went off, Jackson went to the parking lot behind the inn to lock his truck. Upon his return, Swanstrom told Jackson that while he was outside, someone wearing a tan or white sweatshirt or windbreaker had run past the front of the building.

Three minutes later, while Swanstrom was speaking with the 911 dispatcher, Jackson saw the headlights of the vehicle come on, and it traveled another block before the lights went out again. Jackson walked toward the front entryway and saw an individual with dark hair and wearing a white or tan sweatshirt run past the building away from the vehicle.

At approximately 12:09 a.m., Deputy Timothy Rasch of the St. Louis County Sheriff's Department heard a 911 dispatch report concerning a property-damage accident at the Island Lake Inn and responded. Fifteen minutes later, he arrived at the scene and spoke with Jackson and Swanstrom, who told him what they had seen and described the person that they saw running past the building.

A short time later, a fire-department official notified Rasch that firefighters had located a lone male walking along the road approximately one mile south of the Island Lake Inn. Rasch went to the scene and saw that the male was wearing a gray hooded sweatshirt. Rasch asked the man how he got there, and the man said that he was out walking. Rasch asked for identification, and the man was identified as appellant Nicholas David Doerfler.

Rasch testified that he did not believe appellant's claim that he was out walking because he showed signs of intoxication, including glossed-over eyes and an odor of alcohol, he was not appropriately dressed for a late evening walk in December, and his responses to questions were evasive. After concluding that the on-site interview was futile, Rasch asked appellant to accompany him to the scene of an accident, and they drove to the vehicle that had crashed into the inn.

Appellant acknowledged several times that the vehicle belonged to him and said that he did not know how the damage occurred. Rasch asked why the vehicle was parked at that location, and appellant said that he did not know. Rasch asked what he had been doing that evening, and appellant said that he had driven to the Runway Bar in Hermantown at 11:45 p.m. and that the last time he saw his vehicle was at midnight. When pressed about how he had arrived at the location where firefighters found him, appellant remained evasive but finally said that a friend, whose name he would not divulge, had dropped him off there. At one point, appellant told Rasch that if Rasch believed that appellant was guilty of driving under the influence, appellant had "plenty of lawyers."

Rasch arrested appellant for driving while impaired and drove him back to the Island Lake Inn. Rasch asked Swanstrom if she could identify the person in his squad car, and she identified appellant as the male who had run past the building following the crash. Rasch asked for Jackson, who had already gone home. Swanstrom called Jackson and told him that he should come back to the inn because the police thought that they might have a suspect. When Jackson arrived, Rasch opened the rear door of his squad car, where appellant was seated, and asked Jackson to identify the man. Jackson said that "as far as what I saw, that looks like the individual."

Appellant was taken to the Hermantown Police Department, where he was read the implied-consent advisory. When asked whether he wished to consult with an attorney, appellant indicated that he did not. Appellant submitted to a chemical test, and, based on the test results, his driver's license was revoked. Appellant sought judicial

review of the revocation pursuant to Minn. Stat. §169A.53, subd. 2 (2006), and the district court sustained the revocation. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court erred when it relied, in part, on witness identifications based on impermissible show-up identification procedures. Appellant contends that the district court erred when it denied "his motion to suppress witness identifications from the show-up executed by Deputy Rasch."

The rules of criminal procedure permit a defendant to challenge the admissibility of evidence before trial. *See* Minn. R. Crim. P. 7.01(4) (requiring that defendant be notified of identification procedures), 8.03 (stating that defendant shall either waive or demand hearing on admissibility of identification evidence), 11.02 (governing hearing on evidentiary issues). But these rules of criminal procedure do not apply in a civil implied-consent proceeding. *See* Minn. R. Crim. P. 1.01 (stating that rules of criminal procedure "govern the procedure in prosecutions for felonies, gross misdemeanors, misdemeanors, and petty misdemeanors"); *see also Warner v. Comm'r of Pub. Safety*, 498 N.W.2d 285, 288 (Minn. App. 1993) (concluding that statute entitling hearing-impaired criminal defendant to interpreter did not apply to implied-consent proceeding, which is civil in nature), *review denied* (Minn. May 28, 1993).

Furthermore, the record does not show that appellant made a motion to suppress evidence. Instead, when respondent's counsel began to question Jackson about his identification of appellant in the back seat of Rasch's squad car, appellant's counsel

objected, stating: "I'm going to object. That's now going into the area of the impermissible show up." The district court overruled the objection and allowed Jackson to answer the question.

Citing *State v. Taylor*, 594 N.W.2d 158, 161-62 (Minn. 1999), *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995), and *State v. Anderson*, 657 N.W.2d 846, 851 (Minn. App. 2002), appellant argues that any use by the district court of the identification evidence that Rasch obtained by using an unnecessarily suggestive show-up procedure was not appropriate. But the opinions that appellant cites all involve criminal prosecutions, and appellant cites no authority for applying the principles set forth in these criminal proceedings to a civil implied-consent proceeding.

The United States Supreme Court has held in criminal proceedings that due process protects the accused against the introduction of evidence of, or tainted by, unreliable pretrial identifications obtained through unnecessarily suggestive procedures. *Neil v. Biggers*, 409 U.S. 188, 198, 93 S. Ct. 375, 381-82 (1972); *Kirby v. Illinois*, 406 U.S. 682, 690-91, 92 S. Ct. 1877, 1883 (1972); *Stovall v. Denno*, 388 U.S. 293, 301-02, 87 S. Ct. 1967, 1972 (1967), *overruled in part on other grounds by Griffith v. Kentucky*, 479 U.S. 314, 321-22, 107 S. Ct. 708, 712 (1987). The Minnesota Supreme Court and this court applied this principle in the opinions that appellant cites. But this court and the supreme court have also held "that an implied consent hearing is *not* a *de facto* criminal proceeding and that due process rights associated with criminal trials do not apply." *Ruffenach v. Comm'r of Pub. Safety*, 528 N.W.2d 254, 256 (Minn. App. 1995) (citing *Davis v. Comm'r of Pub. Safety*, 517 N.W.2d 901, 905 (Minn. 1994)); *see also Maietta v.*

Comm'r of Pub. Safety, 663 N.W.2d 595, 600 (Minn. App. 2003) (holding that a claim of ineffective assistance of counsel under the Sixth Amendment may not be advanced in an implied-consent hearing due to its civil nature); *Brooks v. Comm'r of Pub. Safety*, 584 N.W.2d 15, 20 (Minn. App. 1998) (holding that the right to exculpatory evidence under the Due Process Clause of the Fourteenth Amendment applies only to criminal proceedings, not civil proceedings such as implied-consent hearings), *review denied* (Minn. Nov. 24, 1998); *Steinberg v. State Dep't. of Pub. Safety*, 357 N.W.2d 413, 415 (Minn. App. 1984) (holding that the exclusionary rule of *Miranda* does not apply to implied-consent hearings because no Fifth Amendment right attaches to a civil proceeding where the purpose of the proceeding is remedial).

This does not mean, however, that due-process principles do not apply to a civil implied-consent proceeding. The supreme court has explained in the context of a civil proceeding:

> The due process of law clauses of our state and federal constitutions are standing guarantees of substantial justice, and prevent such caprice or arbitrary action as would prevent a litigant from having a substantially fair trial. The requirement of due process means opportunity for a hearing, i.e., opportunity to be present during the taking of testimony or evidence, to know the nature and contents of all evidence adduced in the matter, and to present any relevant contentions and evidence the party may have. In other words, that the party have his day in court. While a statute may confer upon an administrative board exemption from rules of evidence or procedure, it cannot authorize exemption from the due process clause . . . ."

Juster Bros. v. Christgau, 214 Minn. 108, 118-19, 7 N.W.2d 501, 507 (1943) (quotation omitted).

The supreme court has also stated:

> The words "due process of law" when applied to judicial proceedings mean a course of legal conduct consonant with rules and principles established in our system of jurisprudence for the protection and enforcement of private rights. Due process requires notice before judgment and an opportunity to be heard in an orderly proceeding adapted to the nature of the case, and the right of appeal from or review of a decision regarded by a litigant as unjust.

Hunter v. Zenith Dredge Co., 220 Minn. 318, 326, 19 N.W.2d 795, 799 (1945).

Appellant had an opportunity for a hearing at which he was represented by counsel, he knew the nature of the evidence presented, and he was permitted to challenge the evidence presented and to present evidence of his own. With respect to the show-up identification, appellant was free to argue that the circumstances of the identification made it unreliable, and the district court specifically found that "[t]he weight to be given to the identification evidence is limited because the witness could not observe details and the circumstances of such a show-up identification tend to encourage confirmation." Appellant has not shown that admitting the show-up identification evidence violated his right to due process or that the district court erred by relying on the evidence.

II.

Appellant argues that he made an equivocal assertion of his right to counsel when he told Rasch that if Rasch believed that appellant was guilty of driving under the influence, he had "plenty of lawyers." Appellant contends that because it is clear that when he made this statement, he had been seized according to Fourth Amendment principles, Rasch was obligated to read him his *Miranda* rights and to take steps to clarify

the meaning of appellant's statement before conducting any further interrogation. As a remedy for this alleged violation of his right to counsel, appellant argues that his statement to Rasch that he had driven to the Runway Bar in Hermantown at 11:45 p.m. should have been suppressed.

But in making this argument appellant again cites opinions that address the right to counsel in criminal proceedings and attempts to apply these opinions in this civil proceeding. *See, e.g.*, *State v. Risk*, 598 N.W.2d 642, 648-49 (Minn. 1999); *State v. Staats*, 658 N.W.2d 207 (Minn. 2003). In *Steinberg*, this court held:

> *Miranda's* exclusionary rule does not apply in implied consent proceedings. . . . *Miranda's* exclusionary rule applies only where the defendant makes custodial statements and the government offers the statements in criminal proceedings against the defendant. Exclusion of evidence is not a proper remedy unless the proceeding is essentially punitive, rather than remedial.

357 N.W.2d at 415. Consequently, appellant's equivocal assertion of his right to counsel did not require the suppression of his later statement to Rasch.

III.

"Conclusions of law will be overturned only upon a determination that the trial court has erroneously construed and applied the law to the facts of the case." *Dehn v. Comm'r of Pub. Safety*, 394 N.W.2d 272, 273 (Minn. App. 1986) (citing *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977)). Appellant argues that in concluding that "[t]he evidence was adequate to provide a basis for probable cause that [appellant] was the driver of and was in physical control of the motor vehicle that

smashed into the Island Lake Inn and that he was intoxicated at the time," the district court applied the wrong standard of proof.

The implied-consent statute provides:

> Upon certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the person submitted to a test and the test results indicate an alcohol concentration of 0.08 or more . . . then the commissioner shall revoke the person's license or permit to drive. . . .

Minn. Stat. § 169A.52, subd. 4(a) (2008).

But appellant did not challenge whether Rasch had probable cause to believe that appellant had been driving; he challenged whether he was actually the driver of the motor vehicle. When a petitioner raises the issue of actual driving, the commissioner must prove by a fair preponderance of the evidence that the petitioner was driving or in physical control. *Llona v. Comm'r of Pub. Safety*, 389 N.W.2d 210, 212 (Minn. App. 1986).

The district court's conclusion of law indicates that the district court applied the probable-cause standard for invoking the implied-consent law, rather than determining whether respondent proved by a fair preponderance of the evidence that appellant was actually driving or in physical control of the vehicle. Therefore, we reverse the order sustaining the revocation of appellant's driver's license and remand to the district court

so that it can determine whether a fair preponderance of the evidence shows that appellant was driving or in physical control of the motor vehicle.

Affirmed in part, reversed in part, and remanded.