**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-0987 A07-1184**

State of Minnesota,
Respondent,

vs.

Jerome Edward Branson,
Appellant (A07-987),

John James Molick,
Appellant. (A07-1184).

**Filed July 22, 2008**
**Affirmed**
**Wright, Judge**

Hennepin County District Court
File No. 07-006157

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

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

**WRIGHT,** Judge

In this consolidated appeal, appellants challenge the district court's denial of their motions to suppress evidence obtained during the joint stop of appellants for operating their snowmobiles in excess of the legal speed limit. Appellant John Molick argues that the district court's findings are clearly erroneous; both appellants argue that they were stopped without a legal justification; and appellant Jerome Branson argues that there was not probable cause to support his arrest. Branson also argues that enforcement of the speed limit deprived him of due process. In a pro se supplemental brief, Molick argues that the district court erred by excluding some of his testimony and crediting the testimony of the investigating officer. We affirm.

## FACTS

On January 26, 2007, Deputy Patrick Chelmo was patrolling Lake Minnetonka by snowmobile. At approximately 11:10 p.m., Deputy Chelmo and three special deputies were on that part of Lake Minnetonka known as Cook's Bay, near the mouth of the channel from Lost Lake. The four peace officers were traveling west within 150 feet of the shore at approximately 10 to 15 miles per hour when they observed two snowmobiles traveling south through the channel toward Cook's Bay. Earlier that day, Deputy Chelmo had observed what appeared to be open water in the channel, near the entrance to Cook's Bay. Deputy Chelmo and the special deputies slowed down and stopped a short distance west of the channel to observe the snowmobiles.

The snowmobiles sounded like they were accelerating in the channel. As the snowmobiles passed through the mouth of the channel into Cook's Bay, Deputy Chelmo observed that the snowmobiles "pushed water . . . up and away from them" as they appeared to be "skipping across open water." Maintaining their speed, the snowmobiles passed approximately 20 feet in front of Deputy Chelmo and the special deputies.

Deputy Chelmo did not use a radar or laser device to determine the speed of the snowmobiles. But based on his experience visually estimating speeds and verifying those estimates with a radar or laser device, Deputy Chelmo estimated the snowmobiles' speed at between 30 and 40 miles per hour. As Deputy Chelmo was aware, the nighttime speed limit for snowmobiles in the Lake Minnetonka shore zone area is 15 miles per hour.[1] Since the entire 30-foot-wide channel and the portion of the lake where the snowmobiles passed the deputies is within the shore zone, Deputy Chelmo concluded that the drivers were violating the speed limit. He, therefore, activated his flashing lights and stopped the snowmobiles.

During the stop, Deputy Chelmo identified the snowmobile drivers as Branson and Molick. Based on his observations of them during the stop, Deputy Chelmo believed that Branson and Molick had been drinking. Deputy Chelmo administered several field sobriety tests, concluded that Branson and Molick were intoxicated, and arrested them.

Branson subsequently was charged with seven offenses, including two counts of third-degree driving while impaired (DWI), a violation Minn. Stat. §§ 169A.20, subd.

[1] Lake Minnetonka Conservation District Code § 3.11, subd. 4 (rev. 1999), sets the speed limit within the Lake Minnetonka shore zone area (150 feet or less from shore) at 15 miles per hour.

1(1), (5), 169A.26 (2006). Molick was charged with five offenses, including second-degree test refusal, a violation of Minn. Stat. §§ 169A.20, subd. 2, 169A.25, subd. 1(b) (2006); and second-degree DWI, a violation of Minn. Stat. §§ 169A.20, subd. 1(1), 169A.25 (2006).

Branson and Molick moved to suppress the evidence obtained pursuant to the stop, arguing that Deputy Chelmo did not have reasonable, articulable suspicion to stop them. After a joint *Rasmussen* hearing, the district court denied their motions. The district court concluded that Deputy Chelmo had "more than a reasonable suspicion that . . . Branson and Molick were traveling at speeds in excess of 15 miles per hour in the shorezone." The district court also concluded that there was probable cause to stop Branson and Molick for speeding.

Branson and Molick agreed to a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court found Branson guilty of two counts of DWI and dismissed the remaining charges. The district court found Molick guilty of the charged offenses but dismissed all except the second-degree test refusal and second-degree DWI counts. This appeal followed.

## D E C I S I O N

### I.

The United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. Amend. IV; Minn. Const. art. I, § 10. Whether a seizure violates these constitutional prohibitions presents a mixed question of fact and law. *State v. Lee*, 585 N.W.2d 378, 382-83 (Minn. 1998). We review the district court's findings of fact for

clear error and give due weight to inferences drawn from those facts by the district court. *Id.* at 383. In doing so, we defer to the district court's assessment of witness credibility. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003). But we review de novo whether, based on the facts, a seizure meets the constitutional standards. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005).

**A.**

Molick challenges two of the district court's findings of fact. Although the factual findings that Molick challenges are set forth in the district court's conclusions of law, we nevertheless review them for clear error. *See State v. Holliday*, 745 N.W.2d 556, 562 (Minn. 2008) (quotation omitted) ("A fact found by the [district] court, although expressed as a conclusion of law, will be treated upon appeal as a finding of fact.").

The district court concluded that the stop of Branson and Molick was justified, in part, by (1) Deputy Chelmo's "observation of flying ice skipping up from the snowmobiles," and (2) Deputy Chelmo's "pacing of the vehicles as they crossed the channel." There is no record evidence that Deputy Chelmo observed "flying ice" or that he was "pacing" Branson's and Molick's snowmobiles.[2] But Molick does not challenge the district court's finding that Deputy Chelmo had "visually gauged the speed of travel for both snowmobiles at approximately thirty (30) miles per hour." Since this finding is amply supported by the record and, as discussed below, legally sufficient to justify the stop, the district court's misstatements within its conclusions of law constitute harmless

[2] The state agrees that the term "pacing" in the context of assessing speed typically refers to determining a vehicle's speed by following it at a steady distance and matching its speed.

error and do not warrant reversal. *See* Minn. R. Crim. P. 31.01 (stating that error that does not affect party's substantial rights shall be disregarded).

**B.**

Branson and Molick also argue that Deputy Chelmo lacked sufficient legal justification to stop them. A law-enforcement officer need not observe a violation of the traffic laws to stop a vehicle. *State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996). "A brief investigatory stop requires only reasonable suspicion of criminal activity, rather than probable cause." *Id.* at 921 (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968)). In determining whether the reasonable-suspicion standard has been met, courts "should consider the totality of the circumstances and should remember that trained law-enforcement officers are permitted to make 'inferences and deductions that might well elude an untrained person.'" *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (quoting *United States v. Cortez*, 449 U.S. 411, 418, 101 S. Ct. 690, 695 (1981)).

Molick argues that a stop for speeding is not an "investigatory stop" and, therefore, the higher probable-cause standard applies.[3] But a traffic stop "is more analogous to an investigative stop . . . than to a formal arrest." *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004) (citing *Berkemer v. McCarty*, 468 U.S. 420, 439, 104

[3] Molick did not present this argument to the district court. Generally we will not consider matters, including constitutional challenges, that were not argued before or considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But because the constitutionality of a seizure presents a question of law, which we review de novo, *Burbach*, 706 N.W.2d at 487, we briefly address Molick's argument in the interests of justice. *See* Minn. R. Crim. P. 28.02, subd. 11 (permitting review in interests of justice).

S. Ct. 3138, 3150 (1984)). And the Minnesota Supreme Court has held that "the principles and framework of *Terry* [apply when] evaluating the reasonableness of seizures during traffic stops even when a minor law has been violated." *Id.* at 363. A traffic stop is valid, therefore, if the officer who executes the stop can articulate a particularized and objective basis for doing so. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008).

The district court concluded that there was "more than a reasonable suspicion" that Branson and Molick were speeding. This determination is supported by the record. Deputy Chelmo testified that he heard the snowmobiles moving through the channel and thought it sounded like they were accelerating. When Branson and Molick exited the channel and passed 20 feet in front of him, Deputy Chelmo visually estimated their speed to be approximately 30 or 40 miles per hour. Deputy Chelmo based his estimate on his several years of experience visually estimating the speed of moving vehicles, including snowmobiles, and verifying those estimates with a radar or laser device. *See State v. Uber*, 604 N.W.2d 799, 801 (Minn. App. 1999) (stating that we give "due regard to an officer's training and experience in law enforcement"). As Deputy Chelmo was aware, the speed limit in the Lake Minnetonka shore zone is 15 miles per hour. Lake Minnetonka Conservation District Code § 3.11, subd. 4 (rev. 1999). Thus, Deputy Chelmo had a reasonable, articulable suspicion that Branson and Molick were traveling well above the speed limit.

Branson and Molick argue that the stop was unconstitutional because Deputy Chelmo's estimate of their speed was not an objective basis for the stop. Molick suggests

that "such a guesstimate of another's speed is not an objective fact sufficient to support reasonable suspicion." This argument is unavailing. A law-enforcement officer's observation of a traffic violation, "however insignificant," gives the officer "an objective basis for stopping the vehicle." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997); *see also Sazenski v. Comm'r of Pub. Safety*, 368 N.W.2d 408, 409 (Minn. App. 1985) (holding that sufficient objective basis for stop exists when, based on officer's experience estimating traffic speed and pursuit of vehicle, officer believed defendant was speeding). Indeed, a police officer's observation of a traffic violation may establish the higher standard of probable cause to stop the vehicle. *Whren v. United States*, 517 U.S. 806, 810, 116 S. Ct. 1769, 1772 (1996). Therefore, Deputy Chelmo's belief that Branson and Molick were speeding, based on his experience visually gauging vehicular speed and his direct observation of Branson's and Molick's snowmobiles, was ample justification for the stop under either a reasonable-suspicion or a probable-cause standard.

**C.**

Branson argues that Deputy Chelmo lacked probable cause to arrest him. "The test of probable cause to arrest is whether the objective facts are such that under the circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Wynne*, 552 N.W.2d 218, 221 (Minn. 1996) (quotations omitted). Although probable cause to arrest requires more than mere suspicion, it requires less than the evidence necessary for conviction. *State v. Horner*, 617 N.W.2d 789, 796 (Minn. 2000). Only one objective indication of intoxication is necessary to constitute probable cause to believe a person is under the

influence of alcohol. *State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004). Common indicia of intoxication include the odor of an alcoholic beverage, bloodshot and watery eyes, slurred speech, and difficulty controlling motor functions. *State v. Paul*, 548 N.W.2d 260, 264 (Minn. 1996); *Kier*, 678 N.W.2d at 678.

Branson argues that Deputy Chelmo lacked probable cause to arrest him because he "did not fail preliminary breath tests and field sobriety tests." But "roadside sobriety tests are not required to support an officer's reasonable belief that a driver is intoxicated." *Holtz v. Comm'r of Pub. Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983). The district court acknowledged Deputy Chelmo's testimony that Branson had passed field sobriety tests but specifically found that Deputy Chelmo detected an odor of an alcoholic beverage on Branson's breath. The district court also found that Branson's speech was slurred when conversing with Deputy Chelmo. Branson does not challenge either of these findings, and they are both supported by the record. These facts are sufficient to establish probable cause that Branson was operating his snowmobile while intoxicated.[4]

**II.**

Branson argues that enforcement of the 15-miles-per-hour speed limit set by the Lake Minnetonka Conservation District Code deprives him of due process because the speed limit deviates from the 50-miles-per-hour speed limit established in Minn. R.

[4] Branson also challenges the district court's finding that Deputy Chelmo deemed Branson to have failed the preliminary breath test. But since the findings discussed above are supported by the record and sufficient to establish probable cause, any error with regard to this finding would not entitle Branson to the relief he seeks. *See* Minn. R. Crim. P. 31.01 (stating that error that does not affect party's substantial rights shall be disregarded). Therefore, we need not address this argument further.

6100.5200, subp. 4 (2005), without providing adequate notice of the deviation by posting the lower speed limit. Although Branson was not convicted of speeding, he argues that the remedy for this constitutional violation is suppression of the evidence obtained during the stop.

Whether a party's due-process rights were violated is a constitutional question, which we review de novo. *Zellman ex rel. M.Z. v. Indep. Sch. Dist. No. 2758*, 594 N.W.2d 216, 220 (Minn. App. 1999), *review denied* (Minn. July 28, 1999).

Due process bars prosecution for conduct undertaken in reliance on the government's official statement that the conduct is lawful. *Raley v. Ohio*, 360 U.S. 423, 437-39, 79 S. Ct. 1257, 1266-67 (1959); *State v. McKown*, 475 N.W.2d 63, 68 (Minn. 1991). Prosecution is barred, therefore, when action is taken in accordance with regulations issued by a government agency. *United States v. Pa. Indus. Chem. Corp.*, 411 U.S. 655, 674, 93 S. Ct. 1804, 1816-17 (1973). But the subsequent invalidation of a law that formed the basis for a stop does not undermine the validity of the stop when the stop was made in good-faith reliance on the law. *See Michigan v. DeFillippo*, 443 U.S. 31, 40, 99 S. Ct. 2627, 2633 (1979) (holding that "subsequently determined invalidity of . . . ordinance on vagueness grounds does not undermine the validity of the arrest made for violation of that ordinance"). Consequently, even assuming that prosecuting Branson for violating the lower speed limit by acting in reliance on the higher speed limit would deprive him of due process, such a bar to prosecution would not invalidate Deputy Chelmo's reasonable suspicion that Branson was violating the 15-miles-per-hour speed limit set by the Lake Minnetonka Conservation District, which in turn led to the evidence

supporting the DWI offenses. Thus, Branson's argument that he was deprived of due process does not warrant the relief he seeks, namely, suppression of the evidence that he was impaired by alcohol.

**III.**

In his pro se supplemental brief, Molick argues that the district court erred by excluding some of his testimony and crediting Deputy Chelmo's testimony. Because the district court, as fact-finder, is in the best position to assess witness credibility, we will not substitute our assessment for that of the district court. *Miller*, 659 N.W.2d at 279. Evidentiary rulings reside in the district court's discretion and will not be disturbed on appeal absent a clear abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

At the *Rasmussen* hearing, Molick challenged the credibility of Deputy Chelmo's testimony regarding Branson's and Molick's speed by suggesting that Deputy Chelmo's testimony was factually impossible. To that end, Molick attempted to testify regarding calculations that he had performed to compare the distances that he would have traveled at various speeds. The district court sustained the state's objection to Molick's testimony on the ground of relevancy because it was premised on a misrepresentation of Deputy Chelmo's testimony. The district court also sustained an objection to Molick's testimony that the numbers to which Deputy Chelmo had testified "don't make sense" on the ground that the testimony was argumentative. And the district court sustained a relevancy objection to Molick's testimony that it was unreasonable for an observer to have concluded that he was going 30 miles per hour.

Testimony premised on misrepresentation of another's testimony and testimony exclusively concerning the reasonableness of another's testimony are improper because such testimony does not tend to make any material fact more or less likely. *See* Minn. R. Evid. 401 (defining relevant evidence); *State v. Ferguson*, 581 N.W.2d 824, 835 (Minn. 1998) ("One witness cannot vouch for or against the credibility of another witness."). Accordingly, the district court's evidentiary rulings reflect a sound exercise of its discretion.

**Affirmed.**