STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1361
A08-0166

Charles Anthony Hess, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent (A07-1361),

and

State of Minnesota,
Respondent (A08-166),

vs.

Charles Anthony Hess,
Appellant.

Filed July 22, 2008
Affirmed
Muehlberg, Judge[*]

Lyon County District Court
File No. 42-CV-07-32, CR-07-16

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

Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and Muehlberg, Judge.

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

MUEHLBERG, Judge

In this consolidated appeal, Charles Hess challenges the revocation of his driver's license for refusal to submit to a chemical test and his subsequent conviction for second-degree driving while impaired (DWI). Hess argues that his refusal to submit to a test was reasonable because he intended to plead guilty to a DWI charge. Because Hess fails to prove that his refusal to submit to testing was reasonable, we affirm the revocation and conviction. Hess also challenges the DWI vehicle forfeiture statute, arguing that it is unconstitutional for law enforcement to profit from a test-refusal conviction. Because Hess fails to indicate which provision of the constitution the statute violates and because the statute has passed constitutional scrutiny, we uphold the statute's constitutionality.

FACTS

The facts in this case, arising from a driver's license revocation and DWI conviction, are not in dispute. On December 29, 2006, Officer Louis Dahlen of the Marshall Police Department stopped Charles Hess's vehicle for a traffic violation. Dahlen observed indicia of impairment and asked Hess to step out of his vehicle. Dahlen administered a preliminary breath test, which showed that Hess had an alcohol concentration of .139. Because the weather conditions were poor, Dahlen transported Hess to the police station for additional field sobriety testing, but Hess refused to submit to further field sobriety testing. Dahlen placed Hess under arrest for DWI and read Hess

the implied-consent advisory. Hess indicated that he was refusing testing "cuz I don't want to do it." Officer Dahlen gave Hess notices of driver's license revocation, license plate impoundment, and seizure and intent to forfeit Hess's vehicle.

Hess filed a petition for judicial review. At the implied-consent hearing, Hess argued that his refusal to submit to a test was reasonable because he intended to plead guilty to a DWI charge. But Officer Dahlen testified that at the time Hess refused to submit to a test, Hess did not explain why he refused. The district court found that Hess's refusal to submit to a test was not reasonable and it sustained the revocation of Hess's driver's license.

Hess has a previous DWI conviction from 2002. Because the prior conviction is an aggravating factor and because Hess refused to submit to a chemical test, the state charged Hess with second-degree DWI under Minn. Stat. § 169A.25, subd. 1(b) (2006). The state also charged Hess with third-degree DWI under Minn. Stat. § 169A.26, subd. 1(a) (2006). The parties agreed to submit the criminal case to the district court on stipulated facts, under the procedures set out in *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The district court found Hess guilty of both charges. Hess appealed from the implied consent order and from the criminal convictions. This court granted his motion to consolidate the appeals.

D E C I S I O N

I.

Charles Hess argues that he reasonably refused to submit to a chemical test because he intended to plead guilty to a DWI charge, and as a result his driver's license

revocation should be rescinded and his conviction for third-degree driving while impaired should be reversed. The Commissioner of Public Safety must revoke a person's driver's license for a period of one year upon certification by a peace officer that there was probable cause to believe the person was driving while impaired and the person refused to submit to a test. Minn. Stat. § 169A.52, subd. 3(a) (2006). The revocation under the implied consent law "becomes effective at the time the commissioner or a peace officer acting on behalf of the commissioner notifies the person of the intention to revoke . . . and of revocation." *Id.*, subd. 6 (2006). The driver may seek judicial review of the license revocation and present an affirmative defense that "at the time of refusal, the [driver's] refusal to permit the test was based upon reasonable grounds." Minn. Stat. § 169A.53, subd. 3(c) (2006).

Whether a person had reasonable grounds to refuse testing is a question of fact. *State, Dep't of Highways v. Beckey*, 291 Minn. 483, 486-87, 192 N.W.2d 441, 444-45 (1971). Findings of fact will not be set aside unless clearly erroneous and we give due regard to the district court's credibility determinations. Minn. R. Civ. P. 52.01. The driver has the burden of proving reasonableness by a preponderance of the evidence. *Winder v. Comm'r of Pub. Safety*, 392 N.W.2d 21, 24 (Minn. App. 1986), *review denied* (Minn. Oct. 22, 1986).

The district court found that Hess's refusal to submit to testing was not reasonable. Hess argues that his refusal was reasonable because he intended to plead guilty to a DWI charge. Hess cites *State, Dep't of Highways v. Schlief*, which held that test refusal is reasonable "if a person refuses to take the chemical test when he intends to plead guilty to

the charge of driving while intoxicated and does so plead." 289 Minn. 461, 463, 185 N.W.2d 274, 276 (1971).

Hess's argument fails for two reasons. First, he has not proven that he intended to plead guilty at the time he refused testing, and, second, he failed to enter a guilty plea at the first available opportunity. At the implied-consent hearing, Hess testified that when he refused testing he was "ashamed . . . and . . . locked up and said [he] didn't want to do any tests and that [he was] guilty." Hess told Officer Dahlen he would not take the test because he did not want to. Officer Dahlen testified that Hess did not offer a further explanation for his refusal, nor did Hess inform the officer that he intended to plead guilty. The only evidence suggesting Hess intended to plead guilty, at some point, was his testimony that his counsel advised him not to plead guilty in order to challenge the DWI forfeiture statute. Under *Schlief*, the intent to plead guilty must exist at the time the driver refuses to submit to a test. 289 Minn. at 463, 185 N.W.2d at 276. Hess therefore fails to meet this prong of the test.

Hess also fails to prove that he actually pleaded guilty at the first available opportunity. *See State, Dep't of Pub. Safety v. Mulvihill*, 303 Minn. 361, 367-68, 227 N.W.2d 813, 817 (1975) (requiring guilty plea at first available opportunity to comply with *Schlief*). Hess in fact pleaded not guilty.

We decline to address the commissioner's arguments questioning the continuing validity of *Schlief* and hold that the district court's findings are not clearly erroneous and the *Schlief* elements have not been met. We affirm the revocation and convictions for both second-degree DWI and third-degree DWI.

II.

Hess also argues that it is unconstitutional "for law enforcement to have a financial interest in a refusal to submit to testing conviction." In this apparent challenge to the DWI forfeiture statute, Hess fails to identify what provision of the Constitution the DWI forfeiture statute allegedly violates.

When a person has committed a designated offense, such as second-degree DWI, "[a]ll right, title, and interest in a vehicle subject to forfeiture . . . vests in the appropriate agency upon commission of the conduct resulting in the designated offense." Minn. Stat. § 169A.63, subds. 1(e), 3 (2006). When the vehicle is seized, or within a reasonable time after seizure, "the appropriate agency shall serve the driver or operator of the vehicle with a notice of the seizure and intent to forfeit the vehicle." *Id.*, subd. 8(b) (2006). The owner of the vehicle may seek judicial review. *Id.*, subd. 8(d) (2006). Hess was given notice of seizure and intent to forfeit his vehicle after he was arrested. He signed the notice. Hess indicates that he sought judicial review but the district court's determination in that matter is not before us.

In any event, the DWI forfeiture statute has already passed constitutional scrutiny. *See Lukkason v. 1993 Chevrolet Extended Cab Pickup*, 590 N.W.2d 803 (Minn. App. 1999) (holding that DWI forfeiture statute does not violate substantive due process, takings, double jeopardy, and excessive fines clauses of the United States and Minnesota Constitutions), *review denied* (Minn. May 18, 1999). Further, the record provided to this

court does not disclose whether Hess raised this issue below since he did not appeal any forfeiture decision.

Affirmed.