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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-373

State of Minnesota,
Respondent,

vs.

Christopher William Homstad,
Appellant.

Filed February 2, 2010
Affirmed
Larkin, Judge

Dakota County District Court
File No. 19-K7-08-000012

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Alina Schwartz, Campbell Knutson, P.A., Eagan, Minnesota (for respondent)

Kevin A. Sieben, Appelman & Olson, P.A., Bloomington, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and Schellhas, Judge.

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

LARKIN, Judge

Appellant challenges his convictions of second-degree driving while impaired (test refusal), third-degree operation of a motor vehicle under the influence of alcohol,

attempted fourth-degree assault, obstruction of legal process, and disorderly conduct. Appellant claims that the district court erred by concluding that the stop of his vehicle was lawful and that his limited pre-test right to counsel was vindicated. Appellant also claims that he was denied his Sixth Amendment right to effective assistance of counsel at trial. Because the record is inadequate, we decline to reach appellant's ineffective-assistance-of-counsel claim. But because the district court correctly concluded that the stop of appellant's vehicle was supported by reasonable articulable suspicion of criminal activity and that appellant did not make a good-faith effort to contact an attorney before deciding whether to submit to chemical testing, we affirm.

FACTS

At 1:24 a.m. on January 1, 2008, Officers Jai Hanson and Sandra Thoeny were on patrol in Lakeville. Officer Hanson observed a vehicle parked slightly diagonally on Kendrick Loop with its engine running. Kendrick Loop is in a commercial area and all of the businesses in the area were closed. There are no residences in the area. The officers knew that criminal activity had occurred in the area and believed that one of the businesses, Leo's South, had been burglarized in the past year.[1] The officers were unable to determine whether anyone was in the suspect vehicle due to the vehicle's dark window tint.

Officer Hanson turned his squad car around and proceeded onto Kendrick Loop. By this time, the suspect vehicle had been driven from its previous location. The squad

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[1] Officer Thoeny later clarified that the business that was burglarized was Sundance Spa and not Leo's South. The two businesses are located in close proximity to each other.

car and the suspect vehicle passed each other, and the officers were again unable to see into the vehicle due to the window tint. Officer Thoeny, a seven-year veteran of law enforcement who has previously cited individuals for illegally tinted windows, believed the suspect vehicle's windows were illegally tinted. The officers pursued the vehicle and initiated a traffic stop.

Officer Hanson approached the driver of the vehicle, later identified as appellant Christopher William Homstad. Homstad attempted to open the driver's door of the vehicle. Officer Hanson shut the door and advised Homstad to roll down his window. Homstad did not comply. Officer Hanson opened the driver's door and detected a strong odor of alcohol and observed that Homstad's eyes were bloodshot and watery. Homstad turned toward the officer and said: "I'm drunk, take my car."

After Homstad exited his vehicle, he refused to comply with multiple requests to remove his hands from his front pockets. The officers grabbed Homstad's arms in an effort to remove his hands from his pockets. Homstad freed his right arm and threw a punch at Officer Thoeny. The officers instructed Homstad to stop resisting as he and the officers struggled and fell to the ground. Homstad continued to fight with the officers. Two civilians ran to the scene to assist the officers, and the officers were eventually able to handcuff Homstad. Homstad refused to enter the squad car, even after the arrival of two additional officers. One of the officers pulled out his taser and directed Homstad to enter the squad car. Homstad did not comply, so the officer deployed his taser. The officers concluded that Homstad was under the influence of alcohol based on Homstad's

bloodshot and watery eyes, strong odor of alcohol, violent and irrational conduct, and his admission that he was drunk.

The officers transported Homstad to the Lakeville Police Station. At 1:43 a.m., while Homstad was in the squad car, Officer Hanson read Homstad the Implied Consent Advisory. Homstad indicated that he wished to consult with an attorney. At 2:14 a.m., Officer Hanson provided Homstad with a telephone and three or four Twin Cities area telephone directories. Officer Hanson told Homstad that this was his time to contact an attorney. Homstad stated that he wanted to retrieve his attorney's telephone number from his cellular phone. He was advised that his cellular phone was in his vehicle, which had been towed after his arrest. At some point, Homstad asked if he could dial long distance. Homstad was directed to dial 9, 1, and then the number to "see if it work[ed]." But Homstad did not dial any numbers. Instead, Homstad argued with the officers for approximately 15-20 minutes and then "just sat there" without using the telephone or looking through the telephone books.

At 2:51 a.m., 37 minutes after a telephone and telephone books were made available to Homstad, Officer Hanson informed Homstad that his time to contact an attorney had expired. At this point, Officer Hanson asked Homstad to submit to a blood test, and Homstad refused. Officer Hanson then asked Homstad to submit to a urine test. Homstad refused the urine test as well. When asked his reason for refusing, Homstad stated, "plead the fifth, I don't know."

Homstad was subsequently charged by complaint with (1) second-degree driving while impaired (DWI) (test refusal), (2) third-degree DWI, (3) fourth-degree attempted

assault, (4) obstruction of legal process, and (5) disorderly conduct. Homstad moved to dismiss the charges claiming that the traffic stop was illegal and that his limited pre-test right to counsel was not vindicated. The district court denied the motion in its entirety after an evidentiary hearing on the motion.

Prior to trial, Homstad moved for an order directing that all potential trial witnesses be sequestered or excluded from the courtroom prior to their appearance in court to testify. Homstad also filed a witness list, naming J.R.W. as a potential witness. The district court granted Homstad's sequestration motion. When Homstad called J.R.W. as a witness, the state objected, arguing that J.R.W. had been in the courtroom during the testimony of every one of the state's witnesses in direct violation of the sequestration order. The district court concluded that J.R.W.'s testimony was not vital and excluded it based on the violation of the sequestration order. The jury returned a verdict of guilty on all five counts. This appeal follows.

DECISION

Homstad claims that (1) the stop of his vehicle was not supported by reasonable articulable suspicion of criminal activity; (2) his limited pre-test right to counsel was not fully vindicated; and (3) he was denied his Sixth Amendment right to effective assistance of counsel at trial. We address each claim in turn.

I.

Both the United States and Minnesota Constitutions prohibit unreasonable search and seizure by the government. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A police officer may, however, initiate a limited investigative stop without a warrant if the

officer has reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *see also State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (noting that an investigative stop of a vehicle is lawful if the state can show that the officer had a "particularized and objective basis" for suspecting criminal activity (quotation omitted)). Whether police have reasonable suspicion to conduct an investigatory stop depends on the totality of the circumstances, and a stop is not justified if it is "the product of mere whim, caprice, or idle curiosity." *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005) (quotation omitted), *review denied* (Minn. June 28, 2005). The court may consider the officer's experience, general knowledge, and observations; background information, including the time and location of the stop; and anything else that is relevant. *Appelgate v. Comm'r of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987).

A traffic stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997) (quoting *United States v. Cortez*, 449 U.S. 411, 417, 101 S. Ct. 690, 695 (1981)). Although a mere hunch is not enough, any "violation of a traffic law, however insignificant" provides the police with an objective basis for a stop. *Id.*; *see also Holm v. Comm'r of Pub. Safety*, 416 N.W.2d 473, 475 (Minn. App. 1987) (recognizing that a driver's failure to dim his vehicle's headlights provided a sufficient basis for a traffic stop). An actual violation of the traffic laws need not be shown for such a stop to be valid. *See State v. Engholm*, 290 N.W.2d 780, 784 (Minn. 1980) (upholding stop as lawful even where no traffic violation was observed). We review a district court's

determination of reasonable suspicion as it relates to limited investigatory stops de novo. *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003).

We have previously found sufficient grounds for an investigatory stop when a vehicle was observed in the early morning hours in a commercial area with no residences, on a road that did not connect to another roadway, by an investigating officer who had knowledge of a previous theft in the area of the stop. *Olmscheid v. Comm'r of Pub. Safety*, 412 N.W.2d 41, 43 (Minn. App. 1987), *review denied* (Minn. Nov. 6, 1987). The facts of the present case are analogous to those in *Olmscheid*. The officers observed Homstad's vehicle parked on a street in a commercial area during the early morning hours of New Year's Day, when all of the businesses in the area were closed. The officers believed that one of the area businesses had been burglarized during the past year. While the officers were mistaken regarding which business had been burglarized, Sundance Spa rather than Leo's South, this mistake of fact was reasonable given the close proximity of the two businesses, and the mistake is not fatal to the officers' articulated reasonable suspicions. *See State v. Licari*, 659 N.W.2d 243, 254 (Minn. 2003) (stating, "honest, reasonable mistakes of fact are unobjectionable under the Fourth Amendment"); *State v. Sanders*, 339 N.W.2d 557, 560 (Minn. 1983) (upholding the stop of a vehicle that was based on a reasonable mistake of fact).

Moreover, the officers were unable to see into Homstad's vehicle due to the level of tint on its windows and believed that the tint level was in violation of Minn. Stat. § 169.71, subd. 4(a)(3) (2006), which prohibits a person from driving or operating a motor vehicle "when any side window or rear window is composed of or treated with any

material so as to obstruct or substantially reduce the driver's clear view through the window or has a light transmittance of less than 50 percent plus or minus three percent in the visible light range." An investigatory stop may be based on a suspected equipment violation. *See State v. Barber*, 308 Minn. 204, 207, 241 N.W.2d 476, 477 (1976) (upholding traffic stop based on officer's observation that vehicle's license plates "were affixed to the vehicle in an unusual, although apparently legal, way"); *State v. Beall*, 771 N.W.2d 41, 44-45 (Minn. App. 2009) (upholding traffic stop based on officer's observations that vehicle's center brake light was not functioning). Given the totality of the circumstances, the officers had reasonable suspicion of criminal activity.

Homstad makes several arguments in support of his claim that the traffic stop was not justified. None is persuasive. Homstad argues that his presence in a high-crime area was insufficient to justify a stop. But the caselaw cited by Homstad actually holds that mere presence in a high-crime area, *without more*, is insufficient justification for an investigative seizure. *See, e.g.*, *State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) ("[M]erely being in a high-crime area will not justify a stop."). In the present case, the record indicates several other factors which, taken as a whole, constitute reasonable suspicion: Homstad was parked in a commercial area in which all businesses were closed at 1:24 a.m. on New Year's Day and exhibited a suspected equipment violation. Homstad also argues the stop was unlawful because the officers did not observe him commit any moving violations. But observation of a moving violation is not necessary to justify an investigative stop. *See Engholm*, 290 N.W.2d at 784 (upholding a stop as lawful even where no traffic violation was observed).

Finally, Homstad argues that the stop was pretextual. In support of this argument, Homstad cites inconsistencies in the officers' testimony regarding which business had been burglarized and which of Homstad's windows they were unable to see into. These minor inconsistencies do not change the facts that the officers knew that a business in the area where Homstad had been parked had been burglarized and that the windows on Homstad's vehicle appeared to be tinted in violation of the law. The officers' lack of accuracy regarding details related to these facts does not lead us to conclude that the stop was pretextual; nor does the officers' failure to cite Homstad for illegally tinted windows. *See Holm*, 416 N.W.2d at 475 ("[F]ailure to issue a citation is not determinative of the validity of the stop."). The district court correctly concluded that the stop of Homstad's vehicle was supported by reasonable suspicion and therefore lawful.

II.

The determination of whether a driver's limited pre-test right to counsel has been vindicated is a mixed question of law and fact. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). Once the facts are established, this court makes an independent legal determination of whether the defendant "was accorded a reasonable opportunity to consult with counsel." *Id.*

In the present case, Homstad argues that his right to consult an attorney prior to deciding whether to submit to chemical testing was violated because (1) he was not given Wisconsin telephone books, which would have enabled him to locate his attorney's telephone number, (2) the officers did not allow him to access his cellular phone or wallet for the purpose of retrieving his attorney's telephone number, and (3) he was handcuffed

throughout the entire time that he was provided access to the telephone and telephone books. We are not persuaded.

The Minnesota Constitution provides a limited "right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing" to determine blood alcohol concentration. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991) (citing Minn. Const. art I, § 6). The right to contact counsel is limited to a reasonable amount of time due to the evanescent nature of the evidence in DWI cases. *Id*. The attorney consultation may not unreasonably delay administration of the test. *Id*. "The person must be informed of this right, and the police officers must assist in its vindication. The right to counsel will be considered vindicated if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Id*. (quotation omitted). But "[i]f counsel cannot be contacted within a reasonable time, the person may be required to make a decision regarding testing in the absence of counsel." *Id.* (quotation omitted). Whether a person's right to counsel has been vindicated is determined by the totality of the circumstances, including the evanescent nature of alcohol. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992).

In determining what constitutes a reasonable amount of time to contact an attorney, the focus is "both on the police officer's duties in vindicating the right to counsel and the defendant's diligent exercise of the right." *Kuhn*, 488 N.W.2d at 842. Within this framework, three nonexclusive factors are used to determine whether a reasonable amount of time has passed. *Id*. First, as a threshold matter, "the driver must

make a good faith and sincere effort to reach an attorney." *Id.* If the driver does not make a good-faith effort to contact an attorney, a claimed denial of the limited pre-test right to counsel fails. *See id.* (stating that the driver "must make a good faith and sincere effort to reach an attorney"). Second, the time of day is relevant, as more time is reasonable during the early morning hours when an attorney might not be easily reached. *Id.* Finally, "the length of time the driver has been under arrest" is relevant because the chemical test becomes less probative as more time passes. *Id.*

Regarding the threshold determination, the district court found that Homstad "simply failed to make a good faith effort to contact an attorney aside from requesting that the Officers retrieve his cell phone and wallet." Homstad argued with the officers for 15-20 minutes during the attorney consultation period and then "'just sat there' without using the phone or looking through the phone books." Whether Homstad made a "good faith effort to contact an attorney is a fact-specific inquiry, and [we] need only determine whether the district court's finding is clearly erroneous." *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). "A finding of fact is clearly erroneous only if, upon review of the entire evidence, a reviewing court is left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted). The district court's finding that Homstad failed to make a good-faith effort to contact an attorney is not erroneous.

Homstad does not claim that anyone at the Lakeville Police Department interfered with his use of the telephone or telephone books. Even though Homstad was handcuffed during the attorney-consultation period due to his earlier combative behavior, his hands

were cuffed in front of his body, and he does not claim that the cuffs prevented him from using the telephone or the telephone books. Homstad was instructed how to attempt a long-distance phone call. And Officer Hanson warned Homstad that his attorney-consultation time was limited.

Yet Homstad did not make a single call. Homstad did not call any friends or family in an attempt to reach his attorney, and Homstad did not attempt to call any other attorney. Homstad's decision to forgo use of the telephone does not equate with a good-faith effort to contact an attorney. *See Kuhn*, 488 N.W.2d at 841 (recognizing that "refusing to try to contact more than one attorney or giving up trying to contact an attorney is fundamentally different than making a continued good-faith effort to reach an attorney").

Homstad relies upon the unpublished case of *Larson v. Comm'r of Pub. Safety*, C5-94-1378, 1994 WL 714313 (Minn. App. Dec. 27, 1994). *Larson* is unpublished and not binding precedent. *See* Minn. Stat. § 480A.08, subd. 3(c) (2008) ("Unpublished opinions of the Court of Appeals are not precedential."). Moreover, it is distinguishable. In *Larson*, we found that a driver's limited pre-test right to counsel was not vindicated when he was specifically told that he was not allowed to make a long-distance call. 1994 WL 714313, at *2. No such restriction was placed on Homstad. While Homstad now complains that it is unknown whether long-distance service was available to him during the attorney-consultation period, his complaint rings hollow given his failure to attempt *any* calls—local or long distance.

The record supports the district court's finding that Homstad did not make a good-faith effort to contact an attorney. Absent such an effort, Homstad's claim that his limited pre-test right to counsel was violated fails as a matter of law.

III.

We review claims of ineffective assistance of counsel de novo. *Vance v. State*, 752 N.W.2d 509, 513 (Minn. 2008). Minnesota has adopted a two-part test in determining whether to grant a new trial based on ineffective assistance of counsel. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). First, an appellant must prove that counsel's representation fell below "an objective standard of reasonableness." *Scruggs v. State*, 484 N.W.2d 21, 25 (Minn. 1992) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)). Second, an appellant must prove that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Defense counsel's performance is presumed to be reasonably effective. *State v. Powell*, 578 N.W.2d 727, 731-32 (Minn. 1998). An attorney's performance is deemed reasonable if the attorney exercises "the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quoting *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993)).

Homstad contends that his trial counsel's performance was ineffective because counsel demanded that all witnesses be sequestered and then neglected to instruct an important defense witness, J.R.W., to leave the courtroom during the other witnesses' testimony, resulting in the exclusion of J.R.W.'s testimony. Homstad argues that the exclusion of J.R.W.'s testimony was prejudicial because if she had been allowed to testify, her testimony would have cast doubt on Homstad's guilt and bolstered his credibility.

The preferred method for raising an ineffective-assistance-of-counsel claim is to petition for postconviction relief in district court. *State v. Christian*, 657 N.W.2d 186, 194 (Minn. 2003). "[A]n appeal from a judgment of conviction is generally not the proper method of raising an issue concerning the effectiveness of defense counsel because of the difficulty an appellate court has in determining the facts regarding the representation." *Id.* Because the record is inadequate, we are unable to evaluate the merits of Homstad's ineffective-assistance-of-counsel claim. We therefore decline to consider the claim. But we preserve the claim for Homstad to pursue in a petition for postconviction relief, if he so chooses.

Affirmed.

Dated:

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Judge Michelle A. Larkin