STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0769

State of Minnesota,
Appellant,

vs.

Jorge Salazar,
Respondent.

Filed September 22, 2009
Reversed and remanded
Halbrooks, Judge

Ramsey County District Court
File No. 62-SU-CR-08-1622

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Thomas R. Hughes, Hughes & Costello, 1230 Landmark Towers, 345 St. Peter Street, St. Paul, MN 55102 (for appellant)

Charles F. Clippert, Caplan Law Firm, P.A., 525 Lumber Exchange Building, 10 South 5th Street, Minneapolis, MN 55402 (for respondent)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Larkin, Judge.

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

HALBROOKS, Judge

In this pretrial appeal, appellant State of Minnesota challenges the district court's order dismissing all charges because the officer did not have probable cause to arrest

respondent. Because we conclude that there was sufficient evidence to establish probable cause that respondent was driving under the influence of alcohol, we reverse and remand.

FACTS

Officer Trevor Hamdorf, who is trained to detect whether a person is under the influence of alcohol, was on patrol the night of March 21, 2008. Officer Hamdorf observed a vehicle without its headlights on leave the parking lot of an American Legion, and drive one-half block into the parking lot of an Eagles Club. Officer Hamdorf followed the vehicle into the Eagles Club parking lot, where he observed respondent Jorge Salazar get out of the vehicle and stumble slightly. Officer Hamdorf drove over to respondent and asked to speak to him. Respondent then walked to Officer Hamdorf's passenger window, which was about three or four feet away from Officer Hamdorf. While respondent was at the window, Officer Hamdorf smelled alcohol on respondent's breath and observed that respondent's eyes were watery. Officer Hamdorf asked respondent if he had been drinking. Respondent indicated that he had been drinking, but he did not state how much alcohol he had consumed. Officer Hamdorf then got out of his squad car and conducted a horizontal-gaze nystagmus (HGN) test on respondent. The test revealed the presence of all six possible indicators, which, based on Officer Hamdorf's training and experience, was evidence that respondent was under the influence of alcohol. According to Officer Hamdorf, the accuracy of the HGN test is 80 to 90 percent when four or more indicators are present.

Officer Hamdorf also performed a vertical-gaze nystagmus (VGN) test on respondent, which respondent passed. Officer Hamdorf did not disclose the results of the

VGN test in his police report. He testified at the omnibus hearing that he did not report the results because the VGN test is used for detecting large doses of alcohol and certain drugs. After Officer Hamdorf conducted the HGN and VGN tests, he arrested respondent.

Respondent was charged with third-degree test refusal, in violation of Minn. Stat. § 169A.20, subd. 2 (2008), and fourth-degree driving while under the influence of alcohol, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2008). Respondent moved for an order declaring that his arrest was not supported by probable cause.[1] Following the omnibus hearing, the district court determined that there was not probable cause to arrest respondent and dismissed all charges against him. This appeal follows.

D E C I S I O N

The state contends that the district court erred in concluding that there was not probable cause to arrest respondent. "[W]hen reviewing a pre-trial order suppressing evidence where the facts are not in dispute and the [district] court's decision is a question of law, the reviewing court may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). If the state appeals a pretrial suppression order, it "must clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted

[1] Respondent also moved for an order declaring that the officer did not possess sufficient articulable suspicion to support the HGN and VGN tests and the administration of a preliminary breath test. But at the omnibus hearing, respondent seemed to abandon this issue.

error." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted). Respondent does not contest the critical-impact aspect of this pretrial appeal.

An officer may arrest a felony suspect without an arrest warrant in any public place if the arrest is supported by probable cause. *State v. Walker*, 584 N.W.2d 763, 766 (Minn. 1998). "Probable cause exists where all the facts and circumstances would warrant a cautious person to believe that the suspect was driving or operating a vehicle while under the influence." *Johnson v. Comm'r of Pub. Safety*, 366 N.W.2d 347, 350 (Minn. App. 1985). "The test for probable cause is objective, viewed from the perspective of a prudent and cautious police officer." *State v. Schauer*, 501 N.W.2d 673, 674 (Minn. App. 1993) (quotation marks omitted). Depending on the circumstances, it is possible for a single objective indication of intoxication to constitute probable cause for an arrest. *Musgjerd v. Comm'r of Pub. Safety*, 384 N.W.2d 571, 573–74 (Minn. App. 1986).

Here, the district court concluded that there was not sufficient probable cause to arrest respondent. The record does not support this conclusion. Respondent drove without his headlights on, smelled of alcohol, and admitted to drinking. The district court concluded that "field sobriety testing of impairment was inconclusive." But respondent failed the HGN test, which Officer Hamdorf testified was 80 to 90 percent accurate.[2] While Officer Hamdorf did not disclose in his report that respondent passed the VGN test, the VGN test is designed for individuals who have consumed certain narcotics and

[2] The supreme court has approved the HGN test as an appropriate field sobriety test. *See State v. Klawitter*, 518 N.W.2d 577, 585-86 (Minn. 1994).

large amounts of alcohol. Respondent's ability to pass the VGN test did not disprove his impairment. Further, the probable-cause determination is an objective inquiry. *See State v. Hussong*, 739 N.W.2d 922, 926 (Minn. App. 2007). Thus, even if Officer Hamdorf purposefully concealed certain facts, the analysis of the underlying facts, which respondent has not challenged, does not change. Because a single indication of intoxication can be sufficient to establish probable cause, the district court erred in concluding that Officer Hamdorf did not have probable cause to arrest respondent.

Respondent cites this court's unpublished opinion in *State v. Graupmann* to support his contention that probable cause did not exist. No. C3-00-756, 2000 WL 1617835, at *2 (Minn. App. Oct. 31, 2000) (holding that there was no probable cause that defendant drove under the influence of alcohol where "[t]he only objective sign . . . was the smell of alcohol"). But unpublished opinions are of limited value in deciding an appeal. *See Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004) ("The danger of miscitation is great because unpublished decisions rarely contain a full recitation of the facts."). Further, the facts of this case are more similar to cases where this court has held that there was probable cause to arrest a defendant for driving under the influence of alcohol. *See Schauer*, 501 N.W.2d at 674–75; *State v. Driscoll*, 427 N.W.2d 263, 265 (Minn. App. 1988); *Poppenhagen v. Comm'r of Pub. Safety*, 400 N.W.2d 799, 801 (Minn. App. 1987). In *Schauer*, the following was sufficient to establish probable cause that appellant drove while under the influence of alcohol: the defendant's eyes were red and watery, the officer smelled alcohol on the defendant's breath, the defendant admitted to drinking, there was evidence that the

defendant was in an accident shortly after bar closing time, and there was evidence that the defendant had been speeding. 501 N.W.2d at 674–75. In *Driscoll*, this court held that the following facts were sufficient to establish probable cause: "[O]dor of alcohol; bloodshot, watery eyes; failure to drive vehicle in a straight line; failure to turn on lights immediately after restarting engine; inability to follow directions to perform HGN; and inability to recite the entire alphabet." 427 N.W.2d at 265. Finally, in *Poppenhagen*, this court held that the following circumstances were sufficient to establish probable cause: the defendant was in a one-vehicle accident in the afternoon, the defendant smelled of an alcoholic beverage, and the defendant's mother stated that appellant had been drinking and had consumed "a couple of beers" early in the afternoon. 400 N.W.2d at 801.

Respondent argues that there is significant evidence showing that he was not impaired. In support of this argument, respondent states: he committed no driving infractions during the one-half block distance other than driving without headlights; he stumbled as he got out of the vehicle because the parking lot was icy and snowy; he never disclosed to Officer Hamdorf how much alcohol he had consumed; Officer Hamdorf did not administer other field sobriety tests; and respondent did not exhibit numerous other indicia of intoxication, such as bloodshot eyes, slurred speech, or an inappropriate or unusual demeanor. The driver in *Poppenhagen* made a similar argument by pointing to innocent explanations for the indications of intoxication. 400 N.W.2d at 801. This court rejected those explanations, stating that "[a]n innocuous explanation does not negate [the officer]'s determination of probable cause." *Id.* at 801-02. Further, because it is possible for a single indication of intoxication to constitute probable cause,

and respondent exhibited the objective indicia of smelling of alcohol and failing the HGN test, other evidence supporting a finding of no intoxication does not negate probable cause. *See Musgjerd*, 384 N.W.2d at 573–74. Accordingly, the district court erred in concluding that probable cause to arrest did not exist and in dismissing respondent's charges.

Reversed and remanded.