STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2115

State of Minnesota,
Respondent,

vs.

Bradley Eric Harrington,
Appellant.

Filed August 24, 2010
Affirmed
Bjorkman, Judge

Mille Lacs County District Court
File No. 48-CR-06-2485

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota; and

Jan Jude, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

Eric J. Nelson, Halberg Criminal Defense, Bloomington, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant driver challenges his conviction of refusing a chemical test for intoxication, arguing that the evidence was obtained as a result of an illegal stop and that

the jury should have received an instruction on the defense of reasonable refusal. We affirm.

FACTS

On September 17, 2006, at 4:40 a.m., appellant Bradley Harrington was driving his all-terrain vehicle (ATV) southbound on Wigwam Bay beach on the shores of Lake Mille Lacs. Mille Lacs Tribal Police Officer Patrick Broberg was driving north on Highway 169, adjacent to the beach. Officer Broberg noticed headlights coming toward him on the beach. The officer considered this unusual, and he shined his spotlight on the ATV to investigate. When the spotlight hit the ATV, Officer Broberg observed that the ATV shut off its headlights. In his experience, extinguishing headlights is consistent with attempting to evade notice.

Officer Broberg activated his emergency lights, signaling the ATV to stop. The officer identified appellant based on prior contact and observed that appellant smelled of alcohol, had bloodshot, watery eyes, and slurred his speech. Officer Broberg administered field sobriety tests, which appellant failed. Mille Lacs Tribal Officer Timothy Kintop administered a preliminary breath test (PBT), which indicated an alcohol concentration of .179. The officers arrested appellant and transported him to the Tribal Police Department.

At the station, Officer Broberg read appellant the implied-consent advisory. Appellant refused to take the alcohol-concentration test, telling Officer Broberg that he was refusing "because you're an a--hole." Appellant admits making this statement, but

alleges that he first explained that he did not trust Officer Broberg because the officer assaulted him in the past.

Appellant was charged with driving while impaired (DWI), in violation of Minn. Stat. § 169A.20, subd. 1(1) (2006), and test refusal, in violation of Minn. Stat. § 169A.20, subd. 2 (2006). During the omnibus hearing, appellant moved to suppress all the evidence on the basis that the stop was unlawful. The district court denied the motion.

Before trial, appellant's attorney notified the court and prosecutor that he planned to present the affirmative defense of reasonable test refusal. This defense was premised on a July 2000 arrest during which Officer Broberg allegedly assaulted appellant. The district court ruled that appellant could present evidence of the 2000 incident because it was relevant to Officer Broberg's potential bias. But the district court reserved its decision on the reasonable-refusal defense, stating that a jury instruction would be permitted if appellant presented evidence that Officer Broberg did not administer the test fairly. At the close of the evidence, the district court concluded that the evidence did not warrant a reasonable-refusal instruction.

The jury found appellant guilty of test refusal but not guilty of DWI. This appeal follows.

D E C I S I O N

I.

Appellant first challenges the stop of his ATV, arguing that Officer Broberg did not have a reasonable articulable suspicion that appellant was engaged in criminal activity. *See State v. Beall*, 771 N.W.2d 41, 45 (Minn. App. 2009) (stating that an officer

must have reasonable articulable suspicion to lawfully stop a motorist). When reviewing a suppression order, this court independently reviews the facts and the law to determine whether the district court erred by suppressing or refusing to suppress the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

But effective judicial review requires a record and adequate findings. *Gerson v. Comm'r of Econ. Sec.*, 340 N.W.2d 353, 355 (Minn. App. 1983). Here, testimony and argument concerning the validity of the stop were presented during the omnibus hearing, and the district court made its ruling on the record. It was appellant's burden to provide a transcript of the hearing, but no transcript was provided to this court.[1] *See Bender v. Bender*, 671 N.W.2d 602, 605 (Minn. App. 2003) (placing the burden of providing a transcript on the party seeking review). Without a transcript, we are unable to independently review the facts and assess the district court's legal analysis. Accordingly, the district court's denial of the suppression motion must be affirmed. *See State v. Heithecker*, 395 N.W.2d 382, 383 (Minn. App. 1986) (affirming the district court decision because the issues could not be reviewed in the absence of a transcript).

II.

Appellant next argues that the district court abused its discretion in declining to instruct the jury that reasonable refusal is a defense to the test-refusal charge. The refusal to give a requested jury instruction lies within the district court's discretion, and we will not reverse absent an abuse of that discretion. *State v. Yang*, 644 N.W.2d 808, 818

[1] Respondent's brief contains several references to a transcript of the omnibus hearing, but neither party provided a transcript to this court.

(Minn. 2002). A defendant is entitled to a jury instruction on his theory of the case if there is evidence to support it. *State v. Vazquez*, 644 N.W.2d 97, 99 (Minn. App. 2002). But "[a]n instruction need not be given if it is not warranted either by the facts or the relevant case law." *State v. Holmberg*, 527 N.W.2d 100, 106 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995). Here, neither the law nor the facts warrant appellant's requested instruction.

First, there is no direct precedent establishing that the reasonable-refusal defense applies in a criminal case. The reasonable-refusal defense is statutorily permitted in implied-consent cases: "It is an affirmative defense for the petitioner to prove that, at the time of the refusal, the petitioner's refusal . . . was based upon reasonable grounds." Minn. Stat. § 169A.53, subd. 3(c) (2006). The criminal refusal statute references the implied-consent statute, providing that "[i]t is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)," Minn. Stat. § 169A.20, subd. 2, but the statute does not expressly incorporate the reasonable-refusal defense.

In 1992, this court recognized that the implied-consent statute and the criminal refusal statute overlap, but concluded, "[w]e need not decide here whether or how the issue of 'reasonable grounds for refusal' relates to the elements of the crime of refusal." *State v. Olmscheid*, 492 N.W.2d 263, 266 n.2 (Minn. App. 1992).

Appellant relies heavily on *State v. Johnson*, 672 N.W.2d 235 (Minn. App. 2003), *review denied* (Minn. Mar. 16, 2004), for the proposition that the reasonable-refusal

defense is available in criminal cases. In *Johnson*, the district court instructed the jury that it could consider the reasons for the criminal defendant's refusal to submit to testing. 672 N.W.2d at 242. We considered whether the district court abused its discretion by including in the instruction a potentially confusing example of when refusal might be reasonable. *Id.* The *Johnson* court reached the limited conclusion that because the jury instruction correctly stated the elements of reasonable refusal and prefaced the example with the phrase "for example," the district court did not abuse its discretion. *Id.* at 242-43. The *Johnson* court did not decide the broader issue of whether reasonable refusal is an available defense in a criminal case. Because *Johnson* did not expressly address the issue and there is no controlling precedent analyzing and applying the instruction in a criminal case, we discern no legal error in declining to give the requested instruction.

Second, the facts of this case do not warrant a reasonable-refusal instruction. Because reasonable refusal is an affirmative defense, appellant had the burden of production of evidence. *See State v. Cannady*, 727 N.W.2d 403, 407 (Minn. 2007) (stating that defendants bear the burden of production on affirmative defenses). The proffered evidentiary basis for the instruction is appellant's unsubstantiated claim that Officer Broberg assaulted him in connection with a previous arrest. The prior arrest took place more than six years earlier. Instead of taking appellant directly to the police station, appellant alleges that Officer Broberg drove him to a secluded cemetery and punched and choked him in front of other officers. There is no official report of the alleged assault, and appellant ultimately pleaded guilty to obstructing legal process with force based on the events of that day.

Furthermore, appellant's own behavior on the night of the stop, up to the point of the test refusal, is inconsistent with his claimed mistrust of Officer Broberg. Appellant was calm and compliant until asked to take the breath test: he stopped his ATV, moved from the beach to the road, performed field sobriety tests, and accompanied the officers to the station, all without protest or claims of distrust. In addition, unlike the circumstances of the 2000 arrest, appellant was at the police station when he refused the test and there is no evidence that Officer Broberg or any other officer threatened or assaulted appellant. Finally, Officer Kintop had administered the preliminary breath test earlier and transported appellant to the police station. Appellant did not claim any trust issues with Officer Kintop. Under these circumstances, appellant's stated reason for refusing the test is not reasonable. Even if the defense were legally available in a criminal case, on this record, the district court did not abuse its discretion in declining to instruct the jury on the reasonable-refusal defense.

Because the availability of the reasonable-refusal defense in criminal cases is unsettled and because the facts of this case do not warrant a reasonable-refusal instruction, the district court did not abuse its discretion in refusing to give appellant's requested jury instruction.

Affirmed.