STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1481

Jesse Bruce Jensen, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed July 22, 2024
Affirmed
Connolly, Judge

Cottonwood County District Court
File No. 17-CV-22-494

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Keith Ellison, Attorney General, Cory Marsolek, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Larson, Presiding Judge; Connolly, Judge; and Reilly, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant Jesse Bruce Jensen was arrested for driving while impaired and subsequently had his license revoked by respondent commissioner of public safety.

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

Appellant challenges his license revocation, arguing that the district court erred in determining that the deputy (1) had reasonable articulable suspicion to expand the scope of the traffic stop, (2) had probable cause to arrest him for driving while impaired by alcohol, and (3) vindicated his right to counsel. We affirm.

FACTS

At approximately 10:50 p.m. on September 23, 2022, a Cottonwood County deputy was on duty when he discovered appellant was driving with a suspended registration. The deputy activated his emergency lights and, after approximately 45 seconds, appellant came to a stop. When the deputy approached the vehicle he smelled alcohol coming from appellant. When he asked appellant if he had consumed alcohol, appellant admitted that he had. Based on his training and experience dealing with impaired drivers, the deputy believed that appellant was under the influence of alcohol.

The deputy performed three field sobriety tests. From those tests, he gathered additional indicia of intoxication and requested that appellant submit to a preliminary-breath test (PBT). When appellant twice failed to provide a sufficient breath sample, the deputy concluded that appellant refused the PBT based on his failure to cooperate. The deputy arrested appellant on suspicion of driving while impaired by alcohol and transported him to jail.

At approximately 12:15 a.m., the deputy read appellant the implied-consent advisory and informed him of his right to contact an attorney. Appellant stated that he understood his rights, including that, if he failed to reach an attorney, he would have to decide on his own whether to submit to a chemical-breath test. Appellant elected to contact

an attorney. The deputy gave appellant a telephone and two different attorney-telephone books, and helped appellant make several calls. Appellant also watched the deputy use a county computer to search for attorneys based on his precise requests.

After approximately 34 minutes of phone time, around the time when the two-hour alcohol-testing period would expire, the deputy told appellant that his time to contact an attorney was almost over. *See* Minn. Stat. § 169A.20, subd. 1(5) (2022) (providing that blood-alcohol content is measured at the time the driver was operating a motor vehicle or within two hours of the same). At approximately 12:50 a.m., the deputy helped appellant make another phone call before ending phone time. Appellant failed to contact an attorney and refused to take the chemical-breath test. Consequently, appellant's license was revoked. *See* Minn. Stat. § 169A.52, subd. 3(a) (2022) (authorizing license revocation for test refusal).

Appellant petitioned the district court to rescind the revocation of his driver's license, arguing, in part, that the deputy (1) lacked reasonable articulable suspicion to expand the scope of the traffic stop, (2) lacked probable cause to arrest him for driving while impaired, and (3) did not vindicate his right to counsel. At the contested omnibus hearing, the district court received six exhibits and heard testimony from two witnesses: the deputy and respondent's expert in standardized field sobriety testing. Based on the expert's testimony, the district court discounted the field sobriety tests because the deputy failed to follow established protocol. Still, based on the remaining evidence presented, the district court denied appellant's petition and sustained the license revocation.

This appeal follows.

DECISION

Under Minnesota's implied-consent law, when a police officer certifies that there was probable cause to believe a person was driving while impaired, and the person refused to submit to a chemical test, the commissioner must revoke the person's driver's license. Minn. Stat. § 169A.52, subd. 3(a). But the person may petition for judicial review of their license revocation. Minn. Stat. § 169A.53, subd. 2(a) (2022). Appellant challenges his license revocation, arguing that the district court erred by determining that the deputy (1) had reasonable articulable suspicion to expand the scope of the traffic stop, (2) had probable cause to arrest him for driving while impaired, and (3) vindicated his right to counsel. We address each argument in turn.

I. The district court did not err in determining that the deputy had reasonable articulable suspicion to expand the scope of the traffic stop.

The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures" by the government. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. The legality of a traffic stop is subject to a two-prong analysis: whether (1) "the stop was justified at its inception[,]" and (2) "the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (applying *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968)). Under the first prong, an officer must have a reasonable articulable suspicion of criminal activity based on specific, particularized, and objective facts. *State v. Diede*, 795 N.W.2d 836, 842-43 (Minn. 2011). While this is a "low hurdle," an officer's suspicion must be based on more than a hunch. *State v. Taylor*, 965 N.W.2d

747, 757 (Minn. 2021). Under the second prong, "each incremental intrusion during a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible." *Askerooth*, 681 N.W.2d at 364 (quotations omitted). Consequently, an initially justified stop may become invalid if an officer lacks independent probable cause or reasonableness to expand the scope of the stop. *Id.*

In Minnesota, indicia of intoxication can give rise to reasonable articulable suspicion to justify a field sobriety test. Minn. Stat. § 169A.41, subd. 1 (2022); *Mesenburg v. Comm'r of Pub. Safety*, 969 N.W.2d 642, 648 (Minn. App. 2021), *rev. denied* (Minn. Mar. 15, 2022). An officer needs only one objective indicia of intoxication to constitute reasonable suspicion. *Holtz v. Comm'r of Pub. Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983). In forming reasonable suspicion, an officer may rely on their experience and training to make deductions that might elude an untrained person. *State v. Richardson*, 622 N.W.2d 823, 825 (Minn. 2001).

The district court determined that the deputy had reasonable articulable suspicion to suspect appellant was impaired based on multiple accepted indicia of intoxication. First, the district court considered that appellant took 45 seconds to stop—after turning onto a side road—after 10:00 p.m. on a Friday night, when drinking is more prevalent. *See Otto v. Comm'r of Pub. Safety*, 924 N.W.2d 658, 661 (Minn. App. 2019) (explaining that a traffic violation committed at 1:20 a.m. on a Saturday morning, "a time of day when drinking is often found to be involved[,] can provide an objective basis" to suspect driver intoxication). Second, the deputy smelled the odor of alcohol coming from appellant, the vehicle's only occupant. *State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012)

(recognizing odor of alcohol as an objective fact that indicates intoxication); *Mesenburg*, 969 N.W.2d at 648 (holding that odor of alcohol justified field sobriety tests).

Third, appellant admitted consuming alcohol. *See Klamar*, 823 N.W.2d at 694 (identifying driver's admission to consuming "'one drink'" as supportive of reasonable suspicion to suspect impairment). Fourth, the deputy testified that he relied on his training and experience when he determined that the foregoing created reasonable suspicion that appellant was driving while intoxicated. *See Richardson*, 622 N.W.2d at 825 (explaining that officers may rely on their experience and training to draw inferences not obvious to an untrained person). Under the totality of the circumstances, the deputy relied on multiple specific and objective facts that created reasonable articulable suspicion of intoxication—which permitted him to request the field sobriety tests and the PBT. *See Holtz*, 340 N.W.2d at 365 (requiring only one objective indicia of intoxication to form reasonable suspicion).

Appellant argues that the district court erred in determining that the deputy had reasonable suspicion to expand the scope of the traffic stop by challenging each indicia of intoxication in isolation, rather than view each as part of the totality of the circumstances. We disagree with appellant's approach. Instead, we agree with respondent that the facts here are similar to those in *Mesenburg*, in which we affirmed the revocation of appellant's driver's license, and compel the same result.

In *Mesenburg*, the district court denied Mesenburg's petition to reinstate his license because reasonable suspicion supported the officer's request for a PBT. 969 N.W.2d at 645. The district court explained that the officer had reason to believe Mesenburg was impaired because he was speeding, smelled of alcohol, and denied drinking—which the

officer interpreted to be a lie meant to hide his intoxication. *Id.* Without reaching whether administering a PBT constitutes an additional intrusion beyond administering field sobriety tests, we held that the officer "maintained reasonable suspicion that Mesenburg was under the influence [even] after he successfully completed the field sobriety tests and, accordingly, had the proper basis for requesting Mesenburg take the PBT." *Id.* at 650.

Similar to *Mesenburg*, appellant smelled of alcohol and engaged in conduct that, paired with the odor of alcohol, created reasonable suspicion of intoxication. Although appellant was not stopped for speeding, unlike *Mesenburg*, but because his registration was suspended, appellant admitted having consumed alcohol. Those facts, along with the fact that appellant was slow to stop his vehicle—after turning onto a side road—and was driving at a time when drinking is more prevalent, support the district court's determination that the deputy had reasonable suspicion that appellant was impaired. The deputy was therefore entitled to request the field sobriety tests and the PBT. Again, like in *Mesenburg*, the deputy's reasonable suspicion remained intact even without considering the results of the field sobriety tests. *See Mesenburg*, 969 N.W.2d at 649-50 (explaining that although Mesenburg successfully completed field sobriety tests, the officer's suspicion was not diminished).

Even assuming that the only indicia of intoxication here was the odor of alcohol coming from appellant, this court has held that fact to be enough to provide an officer with reasonable suspicion of criminal activity to expand a traffic investigation. *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001), *rev. denied* (Minn. Sept. 25, 2001). Appellant seeks to distinguish *Lopez* by pointing out that *Lopez* involved the search of a vehicle for

alcohol containers, not impaired driving. *See id.* We are not persuaded, as we drew on *Lopez* in *Mesenburg* to explain that, within the context of driver impairment, a traffic stop may be expanded based on the odor of alcohol alone. *See Mesenburg*, 969 N.W.2d at 648.

Finally, appellant argues that the deputy's observations show only that he consumed alcohol, not that he was impaired. He relies on the expert's testimony that the odor of alcohol does not correlate with a person's impairment. We have previously rejected this argument. *See State v. Vievering*, 383 N.W.2d 729, 730 (Minn. App. 1986) (determining that an "officer need only possess 'articulable facts' to support [a PBT] request," and that those facts accomplish more than just showing that the driver had consumed alcohol).[1]

In sum, the district court did not err in determining that the deputy had reasonable articulable suspicion to believe that appellant was driving while impaired by alcohol, which justified expanding the traffic stop to include the field sobriety tests and the PBT.

II. The district court did not err in determining that the deputy had probable cause to arrest appellant for driving while impaired.

"Probable cause to arrest exists [when] the objective facts are such that under the [totality of the] circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Laducer*, 676 N.W.2d 693, 697 (Minn. App. 2004) (quotation omitted). The totality of the circumstances is a "common-sense, nontechnical concept that involves the factual and practical considerations of everyday life on which reasonable and prudent people, not legal

[1] Appellant challenges the district court's reasonable suspicion and probable cause determinations, in part, by asserting that the court discredited the deputy's testimony. But the district court only did so as to the field sobriety tests.

technicians, act." *State v. Lester*, 874 N.W.2d 768, 771 (Minn. 2016) (quotations omitted). Probable cause to arrest requires evidence greater than mere suspicion but less than that required to secure a conviction. *Id.* Generally, a driver's admission to consuming alcohol, along with other indicia of intoxication, is enough to establish probable cause to arrest for driving while impaired. *Laducer*, 676 N.W.2d at 697-98.

Whether probable cause exists is a mixed question of law and fact. *Clow v. Comm'r. of Pub. Safety*, 362 N.W.2d 360, 363 (Minn. App. 1985), *rev. denied* (Minn. Apr. 26, 1985). Factual determinations are reviewed for clear error while the ultimate probable cause determination is reviewed de novo. *State v. Wiernasz*, 584 N.W.2d 1, 3 n.1 (Minn. 1998).

The district court found that multiple indicia of intoxication supported the deputy's probable cause determination to arrest appellant for driving while impaired by alcohol. First, as described above, appellant was driving after 10:00 p.m. on a Friday night, he was slow to stop his vehicle, smelled of alcohol, was the vehicle's sole occupant, admitted consuming alcohol, and refused a PBT. *See State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004) (explaining that refusing a PBT—uncooperative behavior—serves as indicia of criminal activity).

Appellant challenges the district court's finding that he refused the PBT by failing to properly blow into the device because, on his first attempt, the device likely registered a sample. We are not persuaded. The district court found, based on the deputy's testimony—which is corroborated by the squad-camera footage—that the first PBT reflected an error message, likely because of radio interference. In making this finding, the court impliedly rejected expert testimony that, because the PBT device can be heard beeping three times

after appellant blew into it, the device had registered a result. And the district court credited the deputy's testimony that appellant's second and third PBTs were useless because appellant "failed to provide a sample by barely blowing into the device and at one point, suck[ed] his breath inward." It was within the district court's discretion to credit the deputy's testimony that appellant failed to blow into the device—which is also supported by the squad-camera footage—and consequently, determine that appellant refused the PBT. *See Klamar*, 823 N.W.2d at 691 (giving deference to the district court's credibility determinations).

Appellant next relies on *State, City of Eagan v. Elmourabit*, 373 N.W.2d 290, 293 (Minn. 1985), for the proposition that, while the odor of alcohol might indicate impairment, it does not resolve whether a person was drinking alcohol to establish probable cause. We disagree. Not only does appellant concede that the odor of alcohol is indicia of impairment, but *Elmourabit* concerned whether the state had presented evidence sufficient to sustain a driving-while-impaired *conviction*, a standard of certainty much higher than that required for probable cause. *See id.* at 292; *see also Lester*, 874 N.W.2d at 771.

Under the totality of the circumstances, the district court did not err in determining that the deputy had probable cause to arrest appellant for driving while impaired by alcohol.

III. The district court did not err in determining that the deputy vindicated appellant's right to counsel.

Persons arrested for driving while impaired have a limited right to counsel when deciding whether to submit to a chemical-breath test so long as the consultation does not unreasonably delay testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835

(Minn. 1991). In determining whether this limited right to counsel has been vindicated, courts consider the totality of the circumstances. *Kuhn v. Comm'r Pub. Safety*, 488 N.W.2d 838, 840-42 (Minn. App. 1992), *rev. denied* (Minn. Oct. 20, 1992). Generally, this right is vindicated when a driver is given a telephone and a reasonable amount of time to contact and speak with counsel. *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 841 (Minn. App. 2000), *rev. denied* (Minn. Sept. 13, 2000). A reasonable amount of time "is not a fixed amount of time, and it cannot be based on elapsed minutes alone." *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 713 (Minn. App. 2008).

Whether a driver's right to counsel was vindicated presents a mixed question of law and fact. *Groe*, 615 N.W.2d at 841. Findings of fact are reviewed for clear error. *Mell*, 757 N.W.2d at 708. When the facts are undisputed, we review de novo whether an individual was afforded a reasonable opportunity to consult an attorney. *Id.* at 712.

Appellant argues that he was not given (1) enough time to contact and receive a return call from counsel at 12:33 a.m., (2) personal internet access, (3) a cellphone, and (4) adequate assistance by law enforcement. To support his argument, appellant first seeks to distinguish this case from two cases that affirmed the determination that the drivers' right to counsel was vindicated when the drivers received even less phone time than he did. *See Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992); *Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995), *rev. denied* (Minn. Aug. 30, 1995). We are not persuaded, as both cases undermine, rather than support, appellant's argument.

Appellant was given a telephone, two different attorney-telephone books, and 34 minutes to contact an attorney. The deputy used a computer to search for specific attorneys at appellant's request, and appellant knew his time was limited. Finally, the deputy waited until the two-hour-testing limit was about to expire before ending phone time after giving appellant several warnings. Although here, phone time began at approximately 12:30 a.m., the *Parsons* court determined that 40 minutes was reasonable at 1:33 a.m. when the driver was (1) provided a telephone and directories, (2) allowed to call anyone she wanted, (3) able to speak with a non-lawyer friend, and (4) aware that her phone time was limited. *See Parsons*, 488 N.W.2d at 501-02. The facts here are not fundamentally different from those in *Parsons*, despite appellant's inability to contact anyone. And appellant points to no binding authority that requires officers to wait until a driver contacts an attorney before ending phone time.

Second, appellant implies that the facts here are unlike those in *Umphlett*, in which this court determined that the driver's right to counsel was vindicated when he was given a telephone and a phone book, understood his time was limited, and *chose* to make only two phone calls at 9:00 p.m. *See Umphlett*, 533 N.W.2d at 639. He argues that, unlike *Umphlett*, he never chose to stop calling attorneys and that his efforts were frustrated by the deputy's undue concern for obtaining a chemical-breath test. We are not persuaded. The deputy was allowed to balance the need for an accurate sample with the time he had given appellant to contact an attorney, and determine that, because the two-hour testing window was about to expire, he had provided appellant with reasonable time and resources. *See* Minn. Stat. § 169A.51, subd. 2(3) (2022) (stating that driver's right to consult counsel

"is limited to the extent that it cannot unreasonably delay administration of the test"); *see also Kuhn*, 488 N.W.2d at 842 (recognizing that time under arrest bears on probative value of test).

Appellant also argues that, because the deputy did not read the implied-consent advisory until an hour and twenty-seven minutes after stopping him, he should have been afforded extra time to contact an attorney. We disagree. We have previously stated that there is no "absolute timeline during which the implied-consent statute may be invoked" because doing so would be "impractical." *State v. Padilla*, No. A07-689, 2008 WL 1868064, at *2-3 (Minn. App. Apr. 29, 2008) (quotations omitted), *rev. denied* (Minn. June 18, 2008); *see* Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that nonprecedential authority may be cited for its persuasive value).

Under the totality of the circumstances, the district court did not err in determining that the deputy vindicated appellant's limited right to counsel.

Affirmed.