STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0265

State of Minnesota,
Respondent,

vs.

Devin C. Petersen,
Appellant.

Filed June 17, 2008
Affirmed
Johnson, Judge

Isanti County District Court
File No. CR-06-159

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Jeffrey Ray Edblad, Isanti County Attorney, 555 – 18th Avenue Southwest, Cambridge, MN 55008 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Lansing, Judge; and Ross, Judge.

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

JOHNSON, Judge

Devin C. Petersen was arrested for driving while impaired after law enforcement officers found his car at the scene of a one-car accident and obtained a preliminary breath test from him showing an alcohol concentration above the legal limit. Shortly after his arrest, Petersen refused a state trooper's request that he submit to a blood test. Later, however, during the booking process at the jail, Petersen changed his mind and told the trooper that he wished to submit to testing. The trooper said that it was too late and that Petersen was deemed to have refused testing.

At trial on the charge of criminal refusal to submit to a chemical test, the district court prevented Petersen from introducing evidence about his change of mind after arriving at the jail. The jury found him guilty. Petersen argues that the district court erred by excluding the proffered evidence. We conclude that the district court did not abuse its discretion and, therefore, affirm.

FACTS

On February 6, 2006, at approximately 10:30 p.m., law enforcement officers were dispatched to a single-car accident on Highway 95 east of Cambridge. They found a heavily damaged Pontiac Grand Am automobile that appeared to have rolled over but was resting upright in the front yard of a residence. When state highway trooper Rodney Trunzo checked the vehicle's registration, he discovered that it was registered to Damian Eric Petersen. No one was in the immediate area, but a witness reported that a man involved in the accident had left the area on foot.

Isanti County deputy sheriffs followed footprints in the snow for approximately two miles until they found Devin C. Petersen lying on the ground. One of the deputies smelled a strong odor of alcohol on Petersen. The deputies turned Petersen over to Trooper Trunzo, who had driven his squad car to the spot where Petersen was found.

Trooper Trunzo also noticed that Petersen smelled strongly of alcohol and that Petersen was unsteady on his feet, had watery, glossy eyes, and had slurred speech. Trooper Trunzo performed a horizontal-gaze nystagmus test, which suggested that Petersen was under the influence of alcohol. Trooper Trunzo administered a preliminary breath test, which revealed an alcohol concentration of .089. Trooper Trunzo placed Petersen under arrest and put him in the squad car. Petersen identified himself twice as Damian Eric Petersen, a brother who lives in Florida.

Trooper Trunzo read Petersen the implied-consent advisory. Petersen stated that he wished to speak with an attorney, so Trooper Trunzo began driving to the Cambridge Medical Center, where Petersen would have access to a telephone and telephone books and where Trooper Trunzo could administer a blood or urine test. As they were driving to Cambridge, Petersen stated that, contrary to his earlier statement, he no longer wished to speak with an attorney.

Trooper Trunzo then continued reading Petersen the implied-consent advisory and asked him whether he would submit to a blood test. Petersen answered in the negative. When Trooper Trunzo asked if he would take a breath or urine test, Petersen again refused, stating that he "didn't need to unless it was a felony charge." Trooper Trunzo told him "that it wasn't a felony." Trooper Trunzo deemed Petersen's response a refusal

to test and, accordingly, changed direction and transported Petersen to the Isanti County Jail.

After they arrived at the jail and began the booking process, Petersen told Trooper Trunzo that he now wanted to take a test. Trooper Trunzo responded that they were "already beyond that" and that "it was already a refusal and had been written up in that manner." Trooper Trunzo then did a driver's license records check using the state identification card he found in Petersen's backpack, learned Petersen's true identity, and determined that Petersen had falsely obtained a driver's license in his brother's name.

Petersen initially was charged with four offenses: first-degree driving while impaired (DWI), first-degree refusal to submit to chemical testing, giving a peace officer a false name, and driving after cancellation. Because Petersen had three prior DWI convictions within 10 years, the alcohol-related offenses are felonies. The state ultimately dropped the first-degree DWI charge and the driving-after-cancellation charge but continued to pursue the charges of refusal to submit to chemical testing and giving a police officer a false name.

At trial, in his opening statement, Petersen's attorney began to tell the jury that Petersen did not refuse to submit to chemical testing because he eventually changed his mind and consented to the test. The state objected, and the district court conducted a lengthy conference with the attorneys outside the presence of the jury. Petersen's attorney informed the district court of his intention to cross-examine Trooper Trunzo to elicit evidence of Petersen's change of mind. The district court resolved the issue by sustaining the state's objection and ruling that Petersen could not introduce evidence that

he consented to testing after he had refused. At a later point in the trial, before Trooper Trunzo took the witness stand, Petersen stipulated to two elements of the refusal charge, as described further below. Petersen did not testify.

The jury found Petersen guilty on both counts. At sentencing, the court granted Petersen's motion for a downward dispositional departure and sentenced him to 62 months of imprisonment but stayed execution of the sentence and placed him on probation, with orders to complete a drug and alcohol rehabilitation program. Petersen appeals.

D E C I S I O N

Petersen argues that the district court erred by preventing him from introducing evidence that he did not "refuse" to submit to a test of his blood-alcohol concentration because, after his initial refusal, he changed his mind and expressed a willingness to be tested. "Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). A defendant's contention that his constitutional rights were violated by evidentiary rulings also is reviewed for abuse of discretion. *State v. Profit*, 591 N.W.2d 451, 463 (Minn. 1999).

Petersen's arguments must be considered in the context of the offense with which he was charged. The statute making it a crime to refuse to submit to chemical testing provides: "It 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 (2004). Section 169A.51, which is specifically referenced in the criminal-refusal statute, defines the circumstances when a chemical test may be requested:

> The test may be required of a person when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and one of the following conditions exist:
>
> (1) the person has been lawfully placed under arrest for violation of section 169A.20 or an ordinance in conformity with it;
>
> (2) the person has been involved in a motor vehicle accident or collision resulting in property damage, personal injury, or death;
>
> (3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test); or
>
> (4) the screening test was administered and indicated an alcohol concentration of 0.08 or more.

Minn. Stat. § 169A.51, subd. 1(b) (2004).

At the conclusion of the trial, the district court gave the jury the following instruction with respect to the refusal charge (which tracks the 2006 version of pattern instruction number 29.28):

> The elements are: first, a peace officer had probable cause to believe that the defendant drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol. Probable cause means that it is more likely than not that the defendant drove, operated, or was in physical control of a motor vehicle while under the influence of alcohol. . . .

> The second element. The defendant was requested by a peace officer to submit to a chemical test of the defendant's blood, breath, or urine.
>
> The third element. The defendant refused to submit to the test.
>
> The fourth element. The defendant's act took place on or about February 6, 2006, in Isanti County.

During trial, Petersen stipulated to the second and third elements of the offense. In closing arguments, Petersen's attorney challenged only the first element by arguing to the jury that the state had not proved beyond a reasonable doubt that Petersen had driven the crashed vehicle, or any other vehicle, while he was impaired.

As an initial matter, we question whether Petersen's claim of error has been properly preserved in light of his stipulation to the element to which the proffered evidence would have been relevant. Although Petersen initially had hoped to convince the jury that he did not refuse a test, Petersen and his counsel later made a strategic decision to stipulate to that factual issue in an effort to avoid harm to another defensive argument—that the state did not carry its burden of proving that he was driving a vehicle while impaired. It seems illogical to allow Petersen to argue that the exclusion of his evidence of non-refusal was prejudicial error in light of his stipulation that he refused to submit to testing. *Cf. State v. Bailey*, 732 N.W.2d 612, 622-23 (Minn. 2007) (holding that evidence initially deemed inadmissible may become admissible if defendant later "opened the door" to its use, thus precluding claim of error by its admission). Nonetheless, the state has not argued that Petersen has waived the issue or otherwise is foreclosed from challenging the district court's evidentiary ruling.

Our analysis begins with familiar portions of the rules of evidence. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. With some exceptions, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." Minn. R. Evid. 402. Furthermore, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403.

Petersen contends that the evidence of his belated non-refusal to submit to a chemical test is relevant. The district court disagreed, reasoning that the evidence was irrelevant because Petersen's change of mind occurred too long after his refusal. Although the criminal statute, section 169A.20, subdivision 2, does not define "refusal," it expressly refers to other sections of that chapter that have been construed by the courts in a manner that effectively defines the term.

The applicable caselaw consistently reflects that an initial refusal to submit to chemical testing cannot be cured by a subsequent agreement to be tested. "In Minnesota, the general rule is that an officer is not required to honor a driver's consent to take the test after that driver's initial refusal unless the subsequent consent is immediate," *Palme v. Commissioner of Pub. Safety*, 541 N.W.2d 340, 342 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996), or "almost immediate," *Schultz v. Commissioner of Pub. Safety*, 447 N.W.2d 17, 19 (Minn. App. 1989). As this court stated recently, "[o]nce an officer

has given the relevant information on the consequences of refusing to take a chemical test for intoxication, a driver's clear refusal that is not immediately withdrawn constitutes a refusal and precludes a change of mind." *Lewis v. Commissioner of Pub. Safety*, 737 N.W.2d 591, 593 (Minn. App. 2007) (affirming revocation of license where driver consented approximately 10 minutes after refusal); *see also State v. Palmer*, 291 Minn. 302, 308, 191 N.W.2d 188, 191 (1971) (affirming revocation of license where driver consented more than one hour after refusal); *Mossak v. Commissioner of Pub. Safety*, 435 N.W.2d 578, 579-80 (Minn. App. 1989) (affirming revocation of license where driver consented five to 10 minutes after refusal, after officer completed paperwork and was leaving building), *review denied* (Minn. Apr. 10, 1989); *Anderson v. Commissioner of Pub. Safety*, 379 N.W.2d 678, 680-81 (Minn. App. 1986) (affirming revocation of license for refusal where driver consented 15 minutes after refusal, after officer had completed implied-consent paperwork).[1]

In this case, the record reflects that Petersen's change of mind occurred approximately ten to twenty minutes after Petersen refused Trooper Trunzo's request that he submit to a test. In a sidebar conference, the prosecutor estimated the elapsed time to

[1] It is appropriate to refer to this body of caselaw even though it arises from civil proceedings. The criminal refusal statute (section 169A.20, subdivision 2) expressly and specifically refers to statutes providing for civil consequences (sections 169A.51 and 169A.52). This court previously has noted that the criminal-refusal statute "incorporates to some degree the provisions of the implied consent statute into the crime of refusal." *State v. Olmscheid*, 492 N.W.2d 263, 265 (Minn. App. 1992); *see also State v. Lemmer*, 736 N.W.2d 650, 655 (Minn. 2007) ("Issues addressed in implied consent proceedings are sometimes identical to issues addressed in DWI prosecutions."); *State v. Ouellette*, 740 N.W.2d 355, 359 (Minn. App. 2007) (analyzing elements of criminal refusal and noting relationship to implied-consent statute), *review denied* (Minn. Dec. 19, 2007).

be ten to twenty minutes and invited the district court to take judicial notice of the distance between the Cambridge Medical Center, to which Trooper Trunzo and Petersen were en route when Petersen refused the test, and the jail. Petersen did not make a formal offer of proof on the issue and did not object to the prosecutor's estimate or to the suggestion of judicial notice, although the district court did not actually take judicial notice.

In light of the proffered evidence that Petersen changed his mind about testing between ten and twenty minutes after his refusal, after he and Trooper Trunzo had arrived at the Isanti County Jail and were in the middle of the booking process, the district court did not abuse its discretion by excluding the evidence. Petersen's change of mind was not "immediate" or "almost immediate." Petersen's change of mind is substantially different from the "almost immediate" change of mind that was recognized as valid consent in *Schultz*. There, the driver said, "Wait, I want to change that," as the officer was noting the driver's refusal on the implied-consent advisory form. *Schultz*, 447 N.W.2d at 18. This court held that the driver did not refuse to be tested because his change of mind was "almost immediate, and was not separated from his initial response by any substantial time, place, or a telephone call to counsel or a friend." *Id.* at 19.

Thus, the district court was within its discretion in ruling that the evidence would not "hav[e] any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. Although a jury has "the power of lenity—that is, the power to bring in a verdict of not guilty despite the law and the facts," *State v. Perkins*,

353 N.W.2d 557, 561 (Minn. 1984), it "do[es] not follow logically" that Petersen has a right to an opportunity for jury nullification, i.e., the right to put irrelevant evidence before the jury in the hopes of persuading the jury to return a verdict that is inconsistent with the facts and the law, *see id.* at 561-62.

Petersen also argues that the district court's exclusion of evidence violated his constitutional right to present a complete defense. *See Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038, 1045-46 (1973); *State v. Jones*, 678 N.W.2d 1, 15-16 (Minn. 2004). But "a defendant has no constitutional right to present irrelevant evidence." *State v. Woelfel*, 621 N.W.2d 767, 773 (Minn. App. 2001) (alteration in original) (quotation omitted), *review denied* (Mar. 27, 2001). As we have explained above, evidence of Petersen's belated change of mind was irrelevant under Minnesota law. Thus, the district court's evidentiary ruling did not infringe on Petersen's constitutional right to present a complete defense.

Finally, we pause to note what is *not* at issue in this case. First, Petersen did not assert the affirmative defense of a reasonable refusal to submit to chemical testing. *See* Minn. Stat. § 169A.53, subd. 3(c) (Supp. 2005); *State v. Johnson*, 672 N.W.2d 235, 241-43 (Minn. App. 2003), *review denied* (Mar. 16, 2004). Thus, Petersen did not challenge the district court's exclusion of evidence on the ground that the evidence is relevant to his thought process when he refused to submit to testing. Second, Petersen has not argued that Trooper Trunzo failed to abide by a duty to disabuse Petersen of the notion that he was not required to submit to a chemical test because he did not perceive it to be a felony charge. *See State v. Melde*, 725 N.W.2d 99, 106 (Minn. 2006) (holding that defendant

was not denied due process by officer's failure to inform him that refusal was gross misdemeanor that may result in harsher penalties than test failure). Such an argument would be difficult for Petersen to make in light of the limited information Petersen provided to Trooper Trunzo as well as the fact that Petersen had falsely identified himself. Third, Petersen suggests that the district court decided the issue of refusal "as a matter of law" and "effectively removed this element from the jury's consideration." *See United States v. Gaudin*, 515 U.S. 506, 509-11, 115 S. Ct. 2310, 2313-14 (1995) (emphasizing that criminal convictions must "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt"); *see also State v. Moore*, 699 N.W.2d 733, 737 (Minn. 2005). But Petersen and his counsel voluntarily stipulated to the second and third elements, and the district court instructed the jury on each element of the offense of refusal to test. The entire offense was submitted to the jury, which returned its verdict in light of the instructions and the evidence received. The relevant issue is, as discussed above, whether the district court abused its discretion when it sustained the state's objection to certain evidence that Petersen wished to offer.

In sum, we hold that the district court was within its discretion in precluding Petersen from cross-examining Trooper Trunzo concerning Petersen's belated decision to submit to a chemical test following his earlier refusal.

Affirmed.