STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2299

Garrett Paul Froehle, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed November 18, 2008
Affirmed
Stoneburner, Judge

Aitkin County District Court
File No. 01CV07309

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Considered and decided by Stoneburner, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

Appellant challenges the district court order sustaining revocation of his driver's license under the implied-consent law, arguing that (1) the officer lacked probable cause to believe that he was driving while impaired; (2) seizure of his blood for testing violated

his Fourth Amendment rights; (3) foundation for the blood test was inadequate; and (4) Minn. Stat. § 634.15 (2006), violates the separation of powers doctrine and his Sixth Amendment confrontation rights. We affirm.

FACTS

State Trooper Keith Benz arrived at the scene of appellant Garrett P. Froehle's single all-terrain vehicle (ATV) accident while paramedics were attending to Froehle, who was lying on a backboard near his overturned ATV. Benz observed Froehle to be "somewhat incoherent," having "slurred speech," "red, watery eyes," and an "odor of alcohol emitting from him." At the scene, Benz concluded that the accident was due to driver error and that Froehle may have consumed alcohol before the accident. Benz contacted Aitkin County Sheriff's Deputy Krueger who contacted Deputy Asmus to go to the hospital to speak with Froehle, read the implied-consent advisory to him, and obtain a blood sample.

Froehle was treated at the hospital for approximately one hour before Asmus saw him. Asmus observed Froehle to be moaning and in distress, tossing his head back and forth with his eyes closed. Asmus read the implied-consent advisory to Froehle, who did not respond other than to continue moaning and tossing his head. Asmus asked Froehle again if he would consent to a blood draw, and Froehle gave no indication that he had heard or understood the request. Asmus concluded that Froehle was incapable of responding and asked a hospital medical technologist to use a Bureau of Criminal Apprehension (BCA) kit to complete a blood draw. Froehle's blood sample was sent to

the BCA where testing revealed a blood alcohol concentration of 0.22 at the time of the draw.

Froehle's driver's license was revoked, and he petitioned for judicial review. Benz and Asmus were the only witnesses at the hearing. The district court sustained the revocation, and this appeal followed.

D E C I S I O N

I. Probable cause

The existence of probable cause is a mixed question of law and fact. *Johnson v. Comm'r of Pub. Safety*, 366 N.W.2d 347, 350 (Minn. App. 1985). But when the facts are undisputed, probable cause is a question of law reviewed de novo. *Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639, 641 (Minn. 1998).

Froehle acknowledges that, at the scene of the accident, Benz observed that Froehle had an odor of alcohol emanating from him, slurred speech, and red, watery eyes. Froehle argues that all of these conditions could have resulted from riding the ATV and being involved in an accident and therefore are insufficient to support probable cause that he was driving while intoxicated (DWI). We disagree.

Probable cause is found "where all the facts and circumstances would warrant a cautious person to believe that the suspect was driving . . . while under the influence." *Johnson*, 366 N.W.2d at 350 (citing *State v. Harris*, 295 Minn. 38, 42, 202 N.W.2d 878, 880 (1972)). And probable cause may be based on only one apparent objective indication of intoxication. *Martin v. Comm'r of Pub. Safety*, 353 N.W.2d 202, 204 (Minn. App. 1984). The commissioner argues that a one-vehicle accident in combination with the

indications of intoxication observed by Benz supports a finding of probable cause to suspect that Froehle was DWI and that potential exculpatory explanations made later do not negate the observations of the trained and experienced investigating officer made at the time of the probable cause determination. *See Stiles v. Comm'r of Pub. Safety*, 369 N.W.2d 347, 350–51 (Minn. App. 1985) (holding that odor of alcohol on driver's breath, disorientation, red eyes, and difficulty speaking after a serious single-motorcycle accident gave an officer probable cause to believe the driver was DWI). We agree.

II. The blood draw did not violate Froehle's Fourth Amendment rights

a. Froehle has standing to assert a Fourth Amendment violation

The Fourth Amendment protects people from unreasonable searches and seizures. Froehle asserts that his right to be free from unreasonable search and seizure was violated by the seizure of his blood without his consent, without a warrant, and in the absence of exigent circumstances. The commissioner, noting the harsher penalties for refusal to test than for failing the test,[1] argues that Froehle lacks standing to assert a violation of the Fourth Amendment because he was benefited rather than harmed by the blood draw.

To have standing to assert violation of a constitutional right, Froehle must, through specific and concrete facts, show a direct and personal harm resulting from the alleged violation. *Riehm v. Commissioner of Public Safety*, 745 N.W.2d 869, 873 (Minn. App. 2008), *Davis v. Comm'r of Pub. Safety*, 509 N.W.2d 380, 391 (Minn. App. 1993), *aff'd*

[1] *Compare* Minn. Stat. § 169A.52, subd. 3(a) (when probable cause exists, refusal to submit to test results in automatic license revocation for one year) *with* Minn. Stat. § 169A.52, subd. 4(a)(1) & (4) (test of .08 and above results in a 90-day license revocation, test of .20 and above results in double the length of revocation (generally 180 days)).

517 N.W.2d 901, 905 (Minn. 1994). Froehle asserts that he has demonstrated the requisite harm because his driver's license was revoked as a consequence of the blood draw and subsequent testing. We agree that the fact that test refusal would have resulted in a more severe penalty does not negate the fact that Froehle was harmed by the seizure. We conclude that he has standing to assert violation of his constitutional rights.

b. Minn. Stat. § 169A.51, subds. 1, 6 (2006), is constitutional, and was constitutionally applied

Minnesota law provides, in relevant part, that any person who drives a motor vehicle in the state consents, subject to conditions, to a chemical test of the person's blood, breath, or urine for the purpose of determining the presence of alcohol. Minn. Stat. § 169A.51, subd. 1(a) (2006). The law also provides that a person who is "in a condition rendering the person incapable of refusal is deemed not to have withdrawn the consent . . . and the test may be given." Minn. Stat. § 169A.51, subd. 6 (2006). Froehle argues that the statute is unconstitutional. We disagree.

The Minnesota Supreme Court held that under the implied consent law, warrantless blood draws were constitutional so long as there was an exigency to preserve evidence, probable cause to support formal arrest, and a highly unobtrusive search. *State v. Wiehle*, 287 N.W.2d 416, 418 (Minn. 1979) (extending the holding in *State v. Oevering*, 268 N.W.2d 68 (Minn. 1978) to implied-consent proceedings).[2] Under the implied consent law, a driver is deemed to have consented to testing. *Wiehle* addressed

[2] *Wiehle* addressed the earlier codification of implied consent in Minn. Stat. § 169.123, subd. 2 (1976). There, as under the current codification, an officer could request a test sample based on probable cause and compliance with the statutory requirements.

whether, when the driver's physical condition precluded him from refusing the test, his statutory consent to testing remained. *Id.* at 419. The court held it did, which permitted use of blood samples obtained from him in an implied-consent proceeding. *Id.* at 419. But the supreme court emphasized that the limitation and prerequisites of probable cause to arrest must be met, and an exigency that justifies the need to preserve evidence must exist before such evidence is admissible. *Id.*

In *State v. Shriner*, involving an appeal from convictions of DWI under Minn. Stat. § 169A.20, subd.1(5) (2004), and criminal vehicular operation under Minn. Stat. § 609.21, subd. 2b(4) (2004), this court reiterated that a warrantless, nonconsensual blood draw must be supported by both probable cause and exigent circumstances and held that exigent circumstances did not exist. 739 N.W.2d 432, 439 (Minn. App. 2007) (*Shriner I*), *rev'd*, 751 N.W.2d 538, 545 (Minn. 2008) (*Shriner II*) (holding that "[t]he rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw . . . provided that police have probable cause to believe that the [driver] committed criminal vehicular operation"). Shriner was not a driver who was incapable of refusal and we do not read *Shriner II* to be relevant to the constitutionality of Minn. Stat. § 169A.51, subd. 6. But, under *Wiehle*, we agree with Froehle that the statute must be read to encompass the prerequisites of probable cause to arrest and exigency to preserve evidence in order to be constitutional.[3]

[3] The unobtrusive character of blood testing was recognized by the supreme court in *Oevering*, 268 N.W.2d at 73 (citing the United States Supreme Court's recognition of the routing and unobtrusive character of blood testing in *Schmerber v. California*, 384 U.S. 757, 771, 86 S. Ct. 1826, 1836 (1966)).

We have already determined that probable cause existed in this case and now turn to the question of exigency.

In *Shriner II*, the supreme court analyzed the existence of exigent circumstances under the "single-factor exigent circumstances" test, described as "one in which 'the existence of one fact alone creates exigent circumstances.'" *State v. Shriner*, 751 N.W.2d 538, 542 (2008) (quoting *In re Welfare D.A.G.*, 484 N.W.2d 787, 791 (Minn. 1992)). The supreme court concluded that the evanescent nature of blood-alcohol content, coupled with probable cause to arrest for criminal vehicular operation, justified a warrantless, nonconsensual blood draw, but expressed "no opinion on whether the evanescent nature of blood-alcohol content is sufficient, in and of itself, to create single-factor exigent circumstances that would justify the police taking a warrantless blood draw when they have probable cause to believe that a defendant has committed any other crime where blood-alcohol content would be highly probative evidence." *Id.* at 545 n.7.

But the analysis in *Shriner II* of the evanescent nature of blood-alcohol content does not rely on what crime a driver is suspected of committing. *See Wiehle*, 287 N.W.2d at 418 (seeing no reason not to extend holding in *Oevering* as applied to criminal negligence proceeding to implied-consent proceeding and misdemeanor prosecutions). And nothing in the analysis suggests that the exigency created by the evanescent nature of blood-alcohol content is less when the suspected crime is less severe than criminal vehicular operation. *See id.*

Under *Shriner II*, it appears that single factor exigent circumstances existed in the instant case due to the evanescent nature of blood-alcohol coupled with probable cause to

arrest for DWI. But even if single-factor exigent circumstances do not exist where the crime charged is less serious than criminal-vehicular operation, we conclude that, in this case, sufficient exigency exists under the totality of circumstances test to warrant constitutional application of Minn. Stat. § 169A.51, subd. 6.[4]

"[I]n conducting [a totality of circumstances] exigent-circumstances analysis, Minnesota cases have emphasized factors such as the evanescent nature of alcohol in the blood, the passage of time, and the potential unavailability of the defendant once he or she is taken to the hospital for treatment." *Shriner I*, 739 N.W.2d at 437.

In this case, there is no information in the record about how much time had elapsed between Froehle's accident and Benz's arrival at the scene where paramedics were already attending to Froehle. Approximately one hour and fifteen minutes elapsed between the time Benz formed probable cause to believe that Froehle was DWI and the time that Asmus gained access to Froehle at the hospital. Asmus went to the hospital specifically to read the implied-consent advisory to Froehle. He read the advisory to Froehle when he was able to see him. There is no evidence in the record that Asmus should have anticipated that Froehle would be unable to respond to the implied-consent advisory or that once he determined that Froehle was unresponsive, he could have obtained a timely warrant. We conclude that in this case the totality of circumstances support the blood draw under the exigent-circumstances exception to the warrant requirement. Because exigent circumstances and probable cause to arrest existed, and the

[4] The totality of the circumstances test may be applied if one-factor exigent circumstances are not found. *Shriner II*, 751 N.W.2d at 546.

search was unobtrusive, Froehle's Fourth Amendment rights were not violated by the withdrawal of blood under Minn. Stat. § 169A.51, subd. 6.

c. Determination that Froehle was incapable of refusal

In his reply brief, Froehle, for the first time, asserts that there is not sufficient evidence in the record to support a conclusion that he was not capable of responding to the implied-consent advisory. Froehle suggests that his unresponsiveness should have been considered a refusal, absent medical confirmation that he was not capable of responding. Froehle also makes a new argument that the language "incapable of refusal" as used in Minn. Stat. § 169A.51, subd. 6, is unduly vague. Because these arguments are raised for the first time in Froehle's reply brief, were not considered at the implied-consent hearing, and the vagueness argument is not briefed, we decline to address these issues. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will generally not consider matters not argued to and considered by the district court); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that issues not briefed on appeal are waived).

III. The district court did not err in admitting the test results

a. Minn. Stat. § 634.15 does not violate the separation of powers doctrine

Questions of statutory constitutionality are reviewed de novo by this court. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). Minn. Stat. § 634.15 provides, in relevant part, that a report of a blood sample drawn under the implied-consent law is admissible in an implied-consent proceeding if conditions specified in the statute are met, and that a petitioner in an implied-consent proceeding

may subpoena the person who performed the laboratory analysis or the person who prepared the blood-sample report without paying witness fees in excess of $100. Minn. Stat. § 634.15, subds. 1(b), 2 (2006).

Froehle asserts that the statute violates the separation of powers doctrine and is therefore unconstitutional because it inappropriately creates a judicial presumption and unfairly burdens the petitioner by requiring a petitioner to subpoena the blood-draw test administrator. In *State v. Pearson*, we rejected this argument and concluded that Minn. Stat. § 634.15 does not violate the separation of powers principle, noting that (1) the statute does not unconstitutionally interfere with judicial functions and (2) the defendant has the opportunity to subpoena the test administrator. 633 N.W.2d 81, 85 (Minn. App. 2001). It appears that Froehle's real challenge is that the commissioner failed to establish the criteria for admissibility under the statute.

b. The foundation for the blood test was adequate

A decision on the sufficiency of the foundation for evidence is within the discretion of the district court. *McKay's Family Dodge v. Hardrives, Inc.*, 480 N.W.2d 141, 147 (Minn. App. 1992), *review denied* (Minn. Mar. 26, 1992). Here, the district court's finding that the Commissioner made a prima facie case that the test result was reliable is supported by evidence in the record that a medical technologist administered the blood draw, a BCA kit was used, and the sample was analyzed by the BCA. When a prima facie case of reliability is established, the burden shifts to the petitioner. Froehle's argument that the blood sample may have been contaminated is mere speculation

unsupported by any evidence. The district court did not abuse its discretion by finding that foundation for the test was adequate.

c. The Confrontation Clause does not apply

The Sixth Amendment right to confront witnesses applies only in criminal cases. "*In all criminal prosecutions*, the accused shall enjoy the right . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI (emphasis added). Froehle argues that implied-consent proceedings are "quasi criminal" in nature and that the Sixth Amendment right of confrontation should be extended to petitioners in implied-consent proceedings. We disagree. The Minnesota Supreme Court has determined that implied-consent hearings are neither criminal nor de facto criminal proceedings. *Davis v. Comm'r of Pub. Safety*, 517 N.W.2d 901, 905 (Minn. 1994). All of Froehle's arguments based on the confrontation clause are without merit.

For the first time on appeal, Froehle asserts that he did not receive the test report 20 days prior to trial as required by the statute. Froehle has waived this issue by failing to assert it at trial. *Thiele v. Stich*, 425 N.W.2d at 582.

Affirmed.