STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2460

State of Minnesota,
Respondent,

vs.

Noel David Collis,
Appellant.

Filed February 3, 2009
Affirmed
Stauber, Judge

Ramsey County District Court
File No. T406614448

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

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Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Stauber, Judge.

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

STAUBER, Judge

On appeal from his conviction of two counts of fourth-degree driving while impaired, appellant argues that (1) the police lacked probable cause to arrest him; (2) the evidence was insufficient to convict him of driving while impaired; (3) the district court erred by requiring him to prove temporary insanity as an element of the defense of involuntary intoxication; and (4) the district court was biased against him. We affirm.

FACTS

On October 8, 2006, at 3:39 a.m., Mounds View Police officer Steven Menard responded to a call from a tipster who was following a black Hummer that was driving "all over the road" and stopping at green lights. After locating the vehicle, Officer Menard observed the vehicle stopped at a green light for approximately 15 seconds. The vehicle eventually began to move, weaving and drifting across the fog line, travelling at 35 miles per hour in a 50 mile per hour zone. The vehicle continued to cross the fog line for about a quarter mile before Officer Menard pulled it over. The driver of the vehicle was appellant Noel David Collis.

Upon approaching the vehicle, Officer Menard detected the strong odor of alcohol emanating from the open driver's side window. Officer Menard requested appellant's driver's license. Confused, appellant removed four credit cards from his wallet and provided them "one after another" to Officer Menard. Officer Menard repeated his request, and appellant responded by removing some cash from his wallet. After a third request, appellant located his license. Officer Menard noticed the odor of alcohol on

appellant's breath and observed that his face was flushed and his eyes were bloodshot and watery. Appellant claimed that he had consumed only one drink and was returning home to Albany after spending some time in St. Paul. Although he believed he was close to home, appellant did not know the name of the city he was in or on which road he was travelling.

Officer Menard had appellant exit the vehicle to conduct field sobriety tests. As appellant walked toward the rear of the vehicle, he kept his hand on the side of the vehicle to keep his balance. Officer Menard asked appellant if he had any physical disabilities that would prevent him from performing field sobriety tests. Appellant stated that he had a brain tumor removed five years earlier. Officer Menard repeated his request to perform field sobriety tests, and appellant again responded that he had a brain tumor removed. Officer Menard demonstrated the one-leg-stand test for appellant, but appellant did not make an attempt to perform the test. Officer Menard then administered the horizontal-gaze nystagmus test. Appellant exhibited "a lack of smooth pursuit in both eyes and a distinct nystagmus prior to 45 degrees." During this time, appellant was also moving his feet to keep his balance. Officer Menard asked appellant to perform additional tests, but appellant did not respond. A preliminary breath test (PBT) was administered, which revealed an alcohol concentration of more than .08. Appellant was placed under arrest and transported to a hospital for blood draws. The first blood draw was voided because Officer Menard's blood kit had expired. The second draw, which occurred at 5:44 a.m., revealed a blood alcohol concentration (BAC) of .17.

Appellant was subsequently charged with two counts of driving while impaired (DWI) in violation of Minn. Stat. § 169A.20, subd. 1(1), (2), (5) (2006). Charges of failure to produce proof of insurance and improper lane change were also brought, but later dismissed.

At a *Rasmussen* hearing, appellant challenged the constitutionality of the stop of his vehicle and also argued that evidence of his physical impairment and inability to perform field sobriety tests at the time of the stop should be excluded under Minn. R. Evid. 403 because it was not probative of intoxication. Appellant claimed that the outward signs of impairment observed by Officer Menard actually arose from the residual effects of an operation to remove a brain tumor in 1999. The district court rejected appellant's constitutional challenge, concluding that the stop was justified by reasonable, articulable suspicion, and denied the rule 403 motion.

The following day, the parties met in chambers. During the meeting, defense counsel indicated that he was considering the affirmative defense of involuntary intoxication by medication because he believed that the interaction between the over-the-counter medication Tagamet and a modest amount of alcohol elevated appellant's BAC level. The district court informed defense counsel that, should he pursue such a defense, he would be required to prove temporary insanity as required under *City of Minneapolis v. Altimus*, 306 Minn. 462, 238 N.W.2d 851 (1976), and the model jury instructions. Due to the court's position on the involuntary intoxication defense and the strength of the state's case, appellant waived his right to a jury trial and agreed to a bench trial on stipulated evidence. Following the trial, appellant was found guilty of DWI under Minn.

Stat. § 169A.20, subd. 1(1) (driving under the influence of alcohol) and (5) (BAC of .08 or more within two hours of driving). Appellant moved for a new trial, alleging that the district court's "expressed position in chambers that proof of temporary insanity would be required . . . legally stripped [appellant] of his affirmative defense of involuntary intoxication." The district court denied the motion. This appeal followed.

D E C I S I O N

I.

Appellant contends that Officer Menard lacked probable cause to arrest him. "The test of probable cause to arrest is whether the objective facts are such that under the circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Wynne*, 552 N.W.2d 218, 221 (Minn. 1996) (quotations omitted). Although probable cause to arrest requires more than mere suspicion, it requires less than the evidence necessary for conviction. *State v. Horner*, 617 N.W.2d 789, 796 (Minn. 2000). Only one objective indication of intoxication is necessary to constitute probable cause to believe a person is under the influence of alcohol. *State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004). Common indicia of intoxication include the odor of an alcoholic beverage, bloodshot and watery eyes, slurred speech, and difficulty controlling motor functions. *State v. Paul*, 548 N.W.2d 260, 264 (Minn. 1996); *Kier*, 678 N.W.2d at 678. Courts must give "great deference" to an officer's probable-cause determination. *State v. Olson*, 342 N.W.2d 638, 640-41 (Minn. App. 1984).

Appellant claims that Officer Menard lacked probable cause because his impairment could be explained by a preexisting medical condition resulting from surgery to remove a brain tumor and his bloodshot eyes were caused by fatigue. We disagree. Before his arrest, appellant had been driving erratically, smelled of alcohol, admitted that he had been drinking, had bloodshot and watery eyes, had difficulty maintaining his balance, was unaware of his location, struggled to comply with a basic request for identification, and failed a field sobriety test and PBT. These multiple, objective signs of intoxication are sufficient to justify arrest. *See Kier*, 678 N.W.2d at 678. Moreover, "[t]he fact that there might have been an innocent explanation for [appellant's] conduct does not demonstrate that [an] officer[] could not reasonably believe that appellant had committed a crime." *State v. Hawkins*, 622 N.W.2d 576, 580 (Minn. App. 2001) (observing that an inquiry into whether there is "some hypothesis of innocence" is appropriate to challenge the beyond-a-reasonable-doubt standard, but not the probable-cause standard).

Appellant also argues that his driving conduct, though erratic, was not illegal. This assertion is arguably incorrect; appellant was charged with improper lane use. Regardless, appellant places too much emphasis on the technical legality of his driving. As a whole, his conduct of stopping at green lights, driving significantly slower than the posted speed limit, and crossing the fog line are unusual and raise the suspicion of driving under the influence of alcohol. *See Shull v. Comm'r of Pub. Safety*, 398 N.W.2d 11, 14 (Minn. App. 1986) (indicating that driving slower than necessary and crossing traffic

lanes raise a suspicion of DWI). Under the totality of the circumstances, we conclude that Officer Menard had probable cause to arrest appellant for suspicion of DWI.

II.

Appellant also challenges the sufficiency of the evidence for both counts of DWI. In considering a claim of insufficient evidence, our review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction," is sufficient to allow the fact-finder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). The credibility of witness testimony is the exclusive province of the fact-finder, *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990), and we must assume the fact-finder believed the state's witnesses and disbelieved any evidence to the contrary. *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). We will not disturb the verdict if the fact-finder, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

A. Minn. Stat. § 169A.20, subd. 1(1) (2006): DWI–Driving under the influence of alcohol

Appellant was convicted of violating Minn. Stat. § 169A.20, subd. 1(1) (2006), which provides that "[i]t is a crime for any person to drive, operate, or be in physical control of any motor vehicle within this state . . . when the person is under the influence of alcohol[.]" In order for a defendant to be convicted of driving under the influence of alcohol, the state is required to prove that the defendant "was so affected by intoxicating

liquor as not to possess that clearness of intellect and control of himself that he otherwise would have." *State v. Elmourabit*, 373 N.W.2d 290, 293 (Minn. 1985) (quotation omitted). No specific level of intoxication is required to support this charge of DWI; the state is only required to prove that the driver's "ability or capacity to drive was impaired in some way or to some degree." *State v. Shepard*, 481 N.W.2d 560, 562 (Minn. 1992). Outward manifestations of intoxication include erratic driving, slurred speech, odor of alcohol, watery and bloodshot eyes, inability to perform sobriety tests, chemical-test results, and admissions or observations of actual drinking. 9A Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 56.39 (3rd ed. 2001). This court has held that the presence of several factors can justify a conviction. *See State v. Teske*, 390 N.W.2d 388, 390 (Minn. App. 1986) (sustaining verdict when appellant's speech was slurred, his balance was affected, his eyes were glassy and bloodshot, he had an odor of alcohol, and two officers had seen him commit traffic violations).

Appellant does not dispute that he was operating a motor vehicle, but claims that the evidence was insufficient to support the conclusion that he was under the influence of alcohol. Specifically, appellant contends that the district court did not give due consideration to the testimony of a doctor who testified that the residual effects of appellant's brain surgery in 1999 caused appellant to exhibit symptoms that, "to an untrained and perhaps biased observer[,] . . . superficially resemble[] alcoholic intoxication." We disagree. Although some of the doctor's testimony supported appellant's theory, the district court discredited this explanation because the doctor could not attribute every indicia of intoxication to the surgery. *See Bliss*, 457 N.W.2d at 390

(noting that credibility determinations are the exclusive province of the fact-finder). Moreover, as discussed above, Officer Menard testified that appellant exhibited numerous indicia of intoxication at the time of arrest and subsequently failed a blood test. This evidence is sufficient for a fact-finder to reasonably conclude that appellant is guilty of DWI. *See Teske*, 390 N.W.2d at 390.

B. Minn. Stat. § 169A.20, subd. 1(5) (2006): DWI–BAC of .08 or more within two hours of operating a motor vehicle

In order to obtain a conviction for this offense, the state was required to prove that appellant had a BAC of .08 or more within two hours of operating a motor vehicle. Minn. Stat. § 169A.20, subd. 1(5) (2006). Appellant argues that his conviction is not supported by sufficient evidence because the blood sample offered by the state was taken more than two hours after his arrest. According to the police report and Officer Menard's testimony, Officer Menard received the dispatch call at approximately 3:39 a.m., then located and followed appellant's vehicle for a short distance before pulling him over. The blood sample offered by the state was collected at 5:44 a.m. Thus, the dispatch call and blood test are separated by two hours and five minutes. But in calculating the time span between these events, appellant fails to account for the time Officer Menard spent locating and following appellant's vehicle. Therefore, the district court could have reasonably concluded that the blood test was collected within two hours of the stop of appellant's vehicle.

Regardless, our conclusion does not change even if the blood test was administered slightly more than two hours after the stop. "[A]ny accurate proof that the

driver's alcohol concentration was above the legal limit within two hours of driving, including a test taken more than two hours after driving, can be used as evidence for Minn. Stat. § 169A.20, subd. 1(5)." *State v. Banken*, 690 N.W.2d 367, 372 (Minn. App. 2004), *review denied* (Minn. March 29, 2005). Appellant argues that the blood test is not reliable without retrograde extrapolation testimony from an expert witness. But such testimony is unnecessary here because the sample was collected within only a few minutes of the two-hour window. The test results indicated a .17 BAC, more than twice the legal limit. Under these circumstances, expert testimony would not be necessary. *See State v. Saldana*, 324 N.W.2d 227, 229 (Minn. 1982) ("If the [fact-finder] is in as good a position to reach a decision as the expert, expert testimony would be of little assistance . . . ."). Accordingly, we conclude that the evidence is sufficient to support the conviction.

III.

Appellant claims that the district court erred by ruling that temporary insanity is a necessary element of the affirmative defense of involuntary intoxication by medication. In *City of Minneapolis v. Altimus*, the supreme court held that a defendant may be excused from criminal responsibility under an involuntary intoxication defense only if the defendant, at the time of the offense, was temporarily insane as defined by Minn. Stat. § 611.026. 306 Minn. 462, 471-72, 238 N.W.2d 851, 857-58 (1976). Appellant acknowledges that *Altimus* requires proof of temporary insanity, but argues that this court should revisit *Altimus* and "carve out a narrow exception based upon the unique facts present in this case." Specifically, appellant claims that he should not be required to

prove temporary insanity because DWI is a strict liability crime that requires no proof of mens rea. However, we are bound to follow supreme court precedent, and *Altimus* unequivocally requires that a defendant prove temporary insanity. *See State v. Allinder*, 746 N.W.2d 923, 925 (Minn. App. 2008) (stating that the court of appeals is bound to follow supreme court precedent). Thus, we conclude that the district court did not err in this ruling.

IV.

Appellant argues that he is entitled to a new trial because the district court was biased in favor of the state. The United States Supreme Court has held that a criminal defendant has a constitutional right to a fair and impartial judge. *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797 (1997). In reviewing claims of judicial bias, this court presumes that a judge has discharged her duties properly. *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). To determine whether an appellant is entitled to a new trial on this basis, this court considers whether the trial judge considered arguments and motions made by both sides, ruled in favor of a complaining defendant on any issue, and took actions to minimize prejudice to the defendant. *Id.* Once a defendant submits to trial before a judge without objecting to the judge on the basis of bias, reversal of a defendant's conviction is warranted only if the defendant can show actual bias in the proceedings. *State v. Moss*, 269 N.W.2d 732, 734-35 (Minn. 1978).

In support of his argument, appellant cites several instances during the *Rasmussen* hearing where the district court allegedly made evidentiary rulings against him. But adverse rulings are not a basis for imputing bias, *Olson v. Olson*, 392 N.W.2d 338, 341

(Minn. App. 1986), and after thoroughly reviewing the record, we see nothing to suggest that the district court acted with bias against appellant.

Affirmed.