STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0727
A08-1130

Patrick Michael Stevens, petitioner,
Appellant

vs.

Commissioner of Public Safety,
Respondent,

and

State of Minnesota,
Respondent,

vs.

Patrick Michael Stevens,
Appellant.

Filed April 7, 2009
Affirmed
Stauber, Judge

McLeod County District Court
File Nos. 43CV071071; 43CR07974

Richard L. Swanson, Suite 235, 207 Chestnut Street, Box 117, Chaska, MN 55318 (for appellant)

Lori Swanson, Minnesota Attorney General, Martin A. Carlson, Mary R. McKinley, Assistant Attorneys General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent Commissioner)

Lori Swanson, Attorney General, Michael K. Junge, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent State)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and Randall, Judge.*

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

STAUBER, Judge

In this consolidated appeal, appellant challenges his implied-consent license revocation and conviction in the related gross-misdemeanor prosecution for driving while impaired. Appellant argues that (1) the police did not have probable cause to believe that he had been driving while impaired and (2) his implied-consent right to counsel was not vindicated. We affirm.

FACTS

On April 20, 2007, at approximately 6:00 p.m., McLeod County Sergeant Aaron Ward received a report of a motor scooter accident in the City of Plato. Upon arriving at the scene, Sergeant Ward observed appellant, Patrick Michael Stevens, lying in the middle of the road, receiving emergency medical attention from first responders. Stevens appeared to have injuries consistent with a scooter accident, but Sergeant Ward was unable to locate a scooter at the scene. Because he had experienced significant trauma and was receiving medical attention, Stevens was unable to discuss the cause of his injuries. Stevens was eventually transported by ambulance to a local hospital.

Sergeant Ward proceeded to talk to several bystanders at the scene. Although none had actually witnessed the accident, at least four people claimed that a red scooter

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

had been lying next to Stevens in the middle of the road until a man, later identified as Brad Flanagan, removed it from the scene. Shortly thereafter, Sergeant Ward and Deputy Mark Eischens visited Flanagan at his home to discuss the accident. Flanagan informed them that he was the owner of the scooter, and that, just prior to the accident, he had driven it to a local bar. While outside the bar, Stevens approached Flanagan and asked to look at the scooter. After a few moments of admiring it, Stevens started the scooter and drove away without Flanagan's permission. Flanagan retrieved the scooter after coming across the accident scene.

Later that evening, Deputy Eischens interviewed Stevens at the hospital. While discussing the accident with Stevens, Deputy Eischens noticed that his speech was slurred, and he seemed somewhat incoherent. Deputy Eischens also detected a strong odor of alcohol. When asked if he had been drinking, Stevens admitted that he had consumed between four and six glasses of straight whiskey. Stevens denied driving the scooter and claimed that the accident occurred when he attempted to prevent "a bad kid" from stealing it; however, he was unable to provide a description of this individual.

Suspecting that Stevens had been driving the scooter under the influence of alcohol, Deputy Eischens invoked the implied-consent procedures by reading the implied-consent advisory to Stevens. Stevens responded by asking to contact an attorney. Deputy Eischens then provided him with a telephone and telephone directories. Stevens paged through the directories until he found a number to call. Deputy Eischens helped Stevens dial the number and Stevens left a voicemail message for an unidentified individual. After finishing the message, Stevens handed the phone to Deputy Eischens

and told him to hang it up. Stevens again paged through the directories for a short time before returning them to Deputy Eischens. Deputy Eischens asked Stevens several more times if he wished to continue his efforts to contact an attorney, but he declined the opportunity. Deputy Eischens then requested that he consent to a blood test, but he refused.

Stevens was subsequently charged with one count of second-degree DWI for refusing to submit to a chemical test in violation of Minn. Stat. § 169A.20, subd. 2 (2006), and his driver's license was revoked pursuant to Minn. Stat. § 169A.52, subd. 4 (2006). Stevens petitioned the district court to reinstate his driving privileges on the basis that (1) Deputy Eischens did not have probable cause to invoke the implied-consent law and (2) his right to counsel was not vindicated before being asked to submit to a chemical test. After an evidentiary hearing, the district court sustained the license revocation. Stevens waived his right to a jury trial for the DWI charge and submitted the case to the court for decision on stipulated facts. After weighing the evidence, the court found Stevens guilty of second-degree DWI. Stevens filed separate notices of appeal challenging the revocation of his license and conviction of DWI. Because both appeals raise the same issues, they were consolidated for review by this court.

D E C I S I O N

I.

Stevens argues that his conviction must be reversed and his license reinstated because Deputy Eischens did not have probable cause to invoke the implied-consent law. Before requiring a person to submit to a blood, breath, or urine test, a police officer must

have "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)." Minn. Stat. § 169A.51, subd. 1 (2006). This standard applies to both criminal prosecutions and administrative license revocations for test refusal. *See State v. Ouellette*, 740 N.W.2d 355, 359 (Minn. App. 2007) (providing that probable cause to believe that a person was driving while impaired is an essential element of the offense of test refusal), *review denied* (Minn. Dec. 19, 2007); *Riehm v. Comm'r of Pub. Safety*, 745 N.W.2d 869, 874 (Minn. App. 2008) (indicating that a police officer must have had probable cause to suspect that a person was driving while impaired in order to invoke the implied-consent law and suspend a driver's license under Minn. Stat. § 169A.52), *review denied* (Minn. May 20, 2008).

"Probable cause exists where all the facts and circumstances would warrant a cautious person to believe that the suspect was driving or operating a vehicle while under the influence." *Johnson v. Comm'r of Pub. Safety*, 366 N.W.2d 347, 350 (Minn. App. 1985). Although a determination of probable cause is a finding of fact and law, this court does not review probable cause de novo; "instead, we determine if the police officer had a substantial basis for concluding that probable cause existed at the time of invoking the implied consent law." *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 840 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 13, 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). Courts should give "great deference" to an officer's probable-cause determination. *State v. Olson*, 342 N.W.2d 638, 640-41 (Minn. App. 1984).

Stevens contends that Deputy Eischens lacked probable cause to believe that he had been driving while impaired because the evidence did not support the conclusion that he had physical control of the scooter. To establish probable cause for driving while impaired, a police officer must have a reasonable belief that a person was in physical control of a motor vehicle. *Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639, 641 (Minn. 1998). Considering the totality of the circumstances, we conclude that Deputy Eischens had probable cause to suspect that Stevens had physical control of the scooter at the time of the accident. Although Stevens emphasizes that the scooter was not found at the scene, Flanagan told police that Stevens had driven away with his scooter a short time before the accident, and several bystanders noticed a scooter lying next to Stevens in the middle of the road before police arrived.

Stevens further claims that Deputy Eischens had no reason to believe that he was driving while under the influence of alcohol because no evidence of alcohol consumption was found at the scene and no timeframe for the accident was established. We disagree. In order to have probable cause to arrest a driver for driving while impaired, the officer must be able to establish a reasonable temporal connection between the driver's intoxication and the driver's operation of the vehicle. *Dietrich v. Comm'r of Pub. Safety*, 363 N.W.2d 801, 803 (Minn. App. 1985). Police are not required to know the exact time that the driving occurred. *See Delong v. Comm'r of Pub. Safety*, 386 N.W.2d 296, 298-99 (Minn. App. 1986) (concluding that a sufficient temporal connection existed when

police stopped to investigate vehicle stuck on highway median and owner demonstrated signs of intoxication and gave sequence of events), *review denied* (Minn. June 13, 1986). But they must establish, by direct or circumstantial evidence, a time frame demonstrating a connection between the alcohol consumption and the driving. *Id.* at 298; *see also Eggersgluss v. Comm'r of Pub. Safety*, 393 N.W.2d 183, 185 (Minn. 1986) (establishing sufficient temporal connection when driver's and passenger's statements regarding accident provided time frame).

According to testimony from police, the single-vehicle accident occurred at approximately 6:00 p.m. Stevens was found lying on the ground with significant injuries. Police responded to the scene within minutes of the accident, and after receiving medical attention from first responders, Stevens was transported by ambulance to a local hospital. Deputy Eischens interviewed Stevens approximately two hours later, and observed numerous indicia of intoxication, including slurred, incoherent speech, and a strong odor of alcohol. Stevens also admitted that he had consumed between four and six glasses of straight whiskey. It is unlikely that Stevens consumed any alcohol post-accident because he had sustained significant injuries, and from shortly after the accident until the interview with Deputy Eischens, he was strapped to a backboard and immobilized to the point that he was unable to dial a telephone by himself. Accordingly, the evidence reasonably supports the conclusion that Stevens was driving while impaired at the time of the accident.

II.

Stevens next argues that he was not afforded a reasonable opportunity in the implied-consent process to exercise his right to consult with counsel. A driver has a limited right to counsel before submitting to chemical testing for alcohol concentration, as long as the consultation does not unreasonably delay the testing. Minn. Stat. § 169A.51, subd. 2(4) (2006); *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). A police officer must inform the driver of the right to counsel and assist in vindicating this right. *Gergen v. Comm'r of Pub. Safety*, 548 N.W.2d 307, 309 (Minn. App. 1996), *review denied* (Minn. Aug. 6, 1996). The right to counsel is vindicated if the driver "is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Friedman*, 473 N.W.2d at 835 (quoting *Prideaux v. Dept. of Pub. Safety*, 310 Minn. 405, 421, 247 N.W.2d 385, 394 (1976)). The right to counsel applies to both criminal prosecutions for test refusal and administrative license revocations. *See id*. (license revocation); *see also State v. Collins*, 655 N.W.2d 652, 656 (Minn. App. 2003) (criminal prosecution), *review denied* (Minn. Mar. 26, 2003). A district court's conclusion as to whether the defendant "was accorded a reasonable opportunity to consult with counsel based on the given facts" is subject to de novo review. *Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

Stevens argues that he was not offered a reasonable opportunity to consult with an attorney because he was still attempting to contact an attorney when he was asked to submit to a chemical test. The district court found that Stevens voluntarily terminated his

efforts to contact an attorney. Whether Stevens voluntarily terminated his efforts is an issue of fact. A district court's factual findings will not be disturbed absent clear error. Minn. R. Civ. P. 52.01. A finding is "clearly erroneous" if, on review, we are "left with the definite and firm conviction that a mistake has been made." *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (quotation omitted).

After a painstaking review of the record, we conclude that this finding is not clearly erroneous. Immediately after leaving the voicemail message, Stevens asked Deputy Eischens, "What'ya gonna do next?" Deputy Eischens explained that once Stevens was done using the phone he would be asked to take a blood test. Stevens then began to lose focus on the conversation and asked Deputy Eischens if he was "done with [him]." Possibly interpreting Stevens's comments to mean that he no longer wished to consult with counsel, Deputy Eischens asked him several times if he was finished using the phone, to which Stevens replied "[Y]eah." Stevens did not ask for additional time to wait for his call to be returned, and nothing in the record suggests that Deputy Eischens limited Stevens's access to the phone or pressured him to waive his right to consult with an attorney. In fact, the transcript of the implied-consent advisory demonstrates that Deputy Eischens was patient with Stevens and obliged Stevens's request to read the implied-consent advisory a second time. Because the evidence reasonably supports the finding that Stevens voluntarily terminated his efforts, the district court's finding is not clearly erroneous.

Applying the facts as found by the district court, we conclude that Stevens was provided with a reasonable opportunity to consult with an attorney. By expressly stating

that he no longer wished to use the phone, Stevens waived any further opportunity to wait for his call to be returned. *See State v. Von Bank*, 341 N.W.2d 894, 895-96 (Minn. App. 1984) (holding that defendant's right to counsel was vindicated after she unequivocally indicated that she did not wish to contact an attorney).

Stevens also contends that under *Linde v. Comm'r of Pub. Safety*, 586 N.W.2d 807, 810 (Minn. App. 1998), *review denied* (Minn. Feb. 18, 1999), Deputy Eischens was required to warn him that his conduct appeared to constitute a waiver and should have offered him "one last chance" to call an attorney before asking him to submit to a chemical test. Stevens's reliance upon *Linde* is misplaced. *Linde* involved a situation where a police officer terminated a driver's efforts to contact an attorney without expressly informing the driver that his opportunity to contact an attorney had expired. 586 N.W.2d at 810. *Linde* is not applicable here because Deputy Eischens did not prevent Stevens from continuing his efforts to contact an attorney. Stevens, of his own volition, decided against conferring with counsel. Thus, Deputy Eischens was under no obligation to provide Stevens with a final warning or opportunity to contact counsel.

Finally, Stevens argues that Deputy Eischens misled him by indicating that he would be required to explain his reasons for declining a chemical test to the district court. Due process is violated if a law enforcement officer actively misleads an individual about his statutory obligation to submit to chemical testing. *See McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 853-54 (Minn. 1991). Here, Deputy Eischens's statement did not actively mislead Stevens. Deputy Eischens was merely responding to Stevens's questions about the consequences of test refusal.

Because the record supports the probable-cause determination and because Stevens's right to counsel was vindicated before he was asked to submit to chemical testing, we affirm.

Affirmed.