STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0770

State of Minnesota,
Respondent,

vs.

Jeffrey V. Brekke,
Appellant.

Filed April 14, 2009
Affirmed
Harten, Judge*

Polk County District Court
File No. 60-CR-07-1622

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

Gregory A. Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, 816 Marin Avenue, Suite 125, Crookston, MN 56716 (for respondent)

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

Considered and decided by Klaphake, Presiding Judge; Peterson, Judge; and Harten, Judge.

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

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

HARTEN, Judge

Appellant Jeffrey Brekke challenges his conviction of third-degree driving while impaired (DWI) on the ground that the district court erred in finding that a deputy sheriff credibly testified that he witnessed appellant run a stop sign and in not suppressing the results of appellant's Intoxilyzer test. Because we see no error in the finding or in the refusal to suppress, we affirm.

FACTS

Polk County Deputy Sheriff Jesse Haugen testified that, at 2:20 a.m. on 24 May 2007, in Polk County, he stopped appellant's pickup truck after seeing it go through an intersection without stopping at a stop sign. Haugen identified appellant as the driver, noticed the odor of alcoholic beverages, and asked appellant if he had been drinking. Appellant said he had been drinking earlier that evening. Haugen noted that appellant's eyes were bloodshot and watery and that his speech was slurred. Haugen then administered three field sobriety tests, all of which appellant failed, and a portable breath test that indicated an alcohol concentration of .103. Appellant was arrested and taken to a police station, where an Intoxilyzer test showed his blood alcohol concentration to be .08.

Appellant was charged with third-degree DWI (driving under influence of alcohol) and third-degree DWI (alcohol concentration of .08 or more within two hours of time of driving). He moved to dismiss the charges for lack of probable cause for the stop and to suppress the evidence derived from the stop. His motion was denied and, following a bench trial, the district court found him guilty on both counts.

Appellant challenges his conviction, arguing that the district court erred in believing Haugen's testimony that he saw appellant run a stop sign and in refusing to suppress the results of appellant's Intoxilyzer test, which was the only evidence of appellant's impairment.

D E C I S I O N

1. Credibility Determination

A district court's factual findings are reviewed under a clearly erroneous standard. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. 20 Nov. 1996). Appellant challenges the district court finding that Haugen saw appellant go through a stop sign because appellant produced "contrary evidence" at the hearing. The "contrary evidence" consisted of maps intended to support appellant's argument that Haugen could not have seen appellant run the stop sign.

Appellant testified that he (1) had been at a bar; (2) saw a deputy sheriff outside the bar when he left; (3) drove east on a gravel road that intersects a county road; (4) approached the intersection, stopped for the stop sign, looked in both directions, and did not see a vehicle or headlights; (5) turned north onto the county road; (6) saw flashing emergency lights behind him about three quarters of a mile north of the stop sign; and (7) was stopped by the deputy about a mile and a half north of the stop sign.

Haugen testified that he (1) did not see appellant leaving the bar; (2) first saw appellant's pickup truck when it turned east onto the gravel road; (3) drove to the intersection; (4) parked on the county road with his lights off to watch the stop sign for eastbound traffic on the gravel road; (5) observed appellant's eastbound pickup truck turn

north onto the county road without stopping at the stop sign; and (6) followed appellant's northbound pickup truck and stopped it by using his emergency lights.

Appellant argues that Haugen could not have arrived at the intersection in time to see appellant run the stop sign because Haugen was still in front of the bar when appellant left. The district court rejected this argument, reasoning that, if Haugen had not been parked close to the intersection when appellant turned north onto the county road, he would not have been able to undertake the traffic stop within three-quarters of a mile of the intersection.

In effect, appellant argues that the district court erred by believing Haugen's testimony instead of his own. But, absent some reason provided by the record, this court will not overturn a district court's credibility determination. *See, e.g., State v. Johnson,* 463 N.W.2d 527, 532 (Minn. 1990) (declining to reverse a district court's credibility determination). The district court's finding that the deputy credibly testified that he saw appellant go through a stop sign was not clearly erroneous.

2. Motion to Suppress

Appellant argues that the evidence to convict him was insufficient because the district court erroneously refused to suppress the result of the Intoxilyzer test and there was no other evidence of impairment.[1] "When reviewing pretrial orders on motions to

[1] The state argues that sufficiency of the evidence is not properly before this court because the matter was handled with a *Lothenbach* proceeding, which provides for appellate review of a dispositive pretrial issue but not of guilt or any other issue that could arise at trial. *See* Minn. R. Crim. P. 26.01, subd. 4, (superseding *State v. Lothenbach,* 296 N.W.2d 854 (Minn. 1980), and making the same provision). But appellant's counsel told the district court that he was submitting the matter "under *State*

suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Specifically, appellant argues that the Intoxilyzer result of a .08 blood alcohol concentration was unreliable because Haugen "failed to properly observe appellant for 15—20 minutes before administering the test." The test was administered at 3:09 a.m.; appellant testified that he was alone in a room contacting an attorney from 2:52 a.m. until 3:02 a.m. But Haugen testified that he could see appellant during this time: "I was standing in the doorway to the room where we have [defendants] use the phone" and "I saw [appellant] talking on the phone and I was watching him." The district court found that Haugen "followed proper procedure when administering the Intoxilyzer test" and this finding is not clearly erroneous. *See Critt*, 554 N.W.2d at 95 (district court's findings are reviewed under "clearly erroneous" standard). The district court did not err in refusing to suppress evidence of the Intoxilyzer test, and that evidence was sufficient to support the finding of appellant's guilt.

Affirmed.

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v. Lothenbach or I guess more properly under [Minn. R. Crim. P.] 26.01, subd. 3, which is a trial on stipulated facts." Minn. R. Crim. P. 26.01, subd. 3, provides for appellate review of issues in the same way "as from any trial to the court." Thus, this issue is properly before us.