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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0875**

Mark Anthony Osowski, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed May 19, 2009
Affirmed
Lansing, Judge**

Dakota County District Court
File No. 19-CX-07-016159

Richard A. Dahl, Plunkett & Associates, Inc., 107 West Oakland Avenue, P.O. Box 463,
Austin MN 55912 (for appellant)

Lori Swanson, Attorney General, Joan M. Eichhorst, Assistant Attorney General, 1800
Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Lansing, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

LANSING, Judge

In this appeal from the district court's order sustaining the revocation of his
driver's license, Mark Osowski argues that the officer who was dispatched to check on

his safety did not have reasonable suspicion for an investigative detention, an adequate basis to administer a preliminary breath test, probable cause for an arrest and invocation of the implied-consent law, or a legal basis for a warrantless blood draw. Osowski also alleges error in the district court's evidentiary rulings at the judicial-review hearing. Because we conclude that the investigating officer's conduct met the requisite legal standards and the district court acted within its discretion on each of the contested evidentiary rulings, we affirm.

F A C T S

A Lakeville police officer responded to a citizen's call expressing concern about the safety of an occupant of a car with its engine running. The call, which was received shortly after 8:00 a.m., reported that the caller had observed a man in the driver's seat of a car with a garden hose extending from the exhaust pipe to the partially closed passenger window. On arrival, the officer confirmed the caller's observations and notified the paramedics. The officer then went to the car to check on the driver, who was later identified as Mark Osowski. While trying to elicit a response from Osowski, the officer reached inside the car and turned off the ignition. When Osowski indicated that he was awake, the officer explained that he was there to check on Osowski's safety and asked him to step out of the car.

As Osowski was getting out of the car, the officer observed that Osowski's balance was unstable, his eyes were watery and bloodshot, he had an odor of alcohol, and, when he spoke, his speech was slurred. The officer asked Osowski if he had been consuming alcohol and Osowski "stated that he [had]." The officer asked Osowski to sit

in his squad car to wait for the paramedics. While in the squad car, the officer asked Osowski when he had arrived at the location and when he had his last drink. Osowski told the officer that he arrived at 3:30 a.m. and had his last drink at 4:00 a.m. In response to the officer's request, Osowski consented to a preliminary breath test (PBT), which registered Osowski's alcohol concentration as .201.

Before the paramedics took Osowski to the hospital, the officer arrested him for driving while impaired (DWI). The officer read Osowski the implied-consent advisory at the hospital. After contacting an attorney, Osowski agreed to a blood test. A registered nurse drew the blood using a Bureau of Criminal Apprehension (BCA) blood kit. The BCA's analysis reported an ethyl-alcohol concentration of .19.

Following revocation of his driver's license, Osowski petitioned for judicial review. At the hearing on the revocation, Osowski's attorney advised the court that his challenge to the revocation was limited to five issues: the lack of reasonable suspicion to expand the safety check to an investigative detention, the lack of reasonable suspicion to administer the PBT, the lack of probable cause for arrest and invocation of the implied-consent law, the state's failure to account for the presence of carbon monoxide in the PBT and blood test, and the state's failure to account for the effect of the Intoxilyzer's improper calibration. During the course of the hearing, the district court ruled against the admissibility of exhibits offered by Osowski.

The district court sustained the revocation, and Osowski appeals the determination on each of the submitted issues. Osowski also challenges the legal basis for the

warrantless blood draw and appeals five of the district court's adverse evidentiary rulings.

DECISION

I

We first address Osowski's arguments that the officer lacked an adequate basis to expand the safety check to an investigatory detention and to administer the PBT. A limited investigatory detention is proper if the officer possesses a particularized and objective basis to suspect the detained person of driving, operating, or being in control of a motor vehicle while impaired. *See Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985) (stating standard for investigatory stop); Minn. Stat. § 169A.20 (2006) (prohibiting driving, operating, or being in control of motor vehicle while impaired). The standard is nearly identical for administering a PBT. *See* Minn. Stat. § 169A.41, subd. 1 (2006) (authorizing PBT when officer has "reason to believe" person was in control of motor vehicle while impaired); *State, Dep't of Pub. Safety v. Junczewski*, 308 N.W.2d 316, 321 (Minn. 1981) (suggesting that "reason to believe" is equivalent to "specific and articulable suspicion").

Osowski does not dispute that the officer had an adequate basis to suspect that Osowski was in physical control of the motor vehicle. *See Junczewski*, 308 N.W.2d at 318-20 (holding that unresponsive man sitting in truck with key in ignition satisfied element of physical control). Thus the issue presented is whether the officer had a particularized and objective basis to suspect that Osowski was impaired.

The starting point for our analysis is the basic propriety of the officer's safety check. *See State v. Lopez*, 698 N.W.2d 18, 23 (Minn. App. 2005) (noting that officer responding to report of sleeping or unconscious person in vehicle is justified in investigating individual's welfare). On responding to a citizen's safety call, the officer observed Osowski in the driver's seat with the car's engine running and a garden hose extending from the exhaust pipe to the car's window. As part of the safety check, the officer had to communicate with Osowski to determine whether he needed medical assistance. *See id.* (stating that officer must be allowed to make contact with individual).

During the course of the safety check, the officer observed Osowski's bloodshot and watery eyes, his slurred speech, his unsteady balance, and an odor of alcohol. These indicia of alcohol consumption provided the officer with a particularized and objective basis for suspecting Osowski was impaired. *See Hager v. Comm'r of Pub. Safety*, 382 N.W.2d 907, 911 (Minn. App. 1986) (concluding that appellant's bloodshot, watery eyes and odor of alcohol were sufficient to request PBT); *Holtz v. Comm'r of Pub. Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983) (suggesting that one objective indication of impairment may provide reason for officer to believe person is under influence of alcohol and request PBT). Thus the officer had an adequate basis for detaining Osowski and requesting a PBT.

Osowski argues that the officer should have performed other field sobriety tests before administering the PBT. But field sobriety tests are not required under the statute or the caselaw. *See* Minn. Stat. § 169A.41, subd. 1 (authorizing PBT when officer "has reason to believe" person has driven, operated, or controlled vehicle while impaired);

Holtz, 340 N.W.2d at 365 (stating that “roadside sobriety tests are not required to support an officer’s reasonable belief that a driver is [under influence of alcohol]”).

II

We turn next to whether the officer had an adequate basis to arrest Osowski and to invoke the implied-consent law. An officer may arrest a DWI suspect if he has probable cause for the arrest. Minn. Stat. § 169A.40, subd. 1 (2006). Probable cause for a DWI arrest exists when all the facts and circumstances would lead a cautious person to believe that the defendant drove, operated, or was in physical control of a motor vehicle while impaired. *Groe v. Comm’r of Pub. Safety*, 615 N.W.2d 837, 840 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000).

The standard is nearly identical for invoking the implied-consent law and requesting a chemical test. *See State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007) (noting redundancy in implied-consent statute), *review denied* (Minn. Dec. 19, 2007). An officer may invoke the implied-consent law if he “has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle” while impaired and the person meets one of four statutory conditions, including a condition that “the person has been lawfully placed under arrest for [DWI]” and a condition that the PBT “was administered and indicated an alcohol concentration of 0.08 or more.” Minn. Stat. § 169A.51, subd. 1(b)(1), (4) (2006).

Again, Osowski does not dispute that the officer, who observed Osowski in his car with the engine running, had probable cause for believing he was in physical control of a motor vehicle. *See Junczewski*, 308 N.W.2d at 318-20 (holding that arrest was lawful

under similar circumstances). Thus we examine only whether the facts and circumstances would lead a cautious person to believe that Osowski was impaired at the time the officer made the arrest and at the time he requested a chemical test.

We conclude that the officer had probable cause for the arrest. Assuming for purposes of our analysis that the arrest occurred when the officer asked Osowski to sit in his squad car, the officer's bases for suspecting Osowski of impairment were the numerous physical signs of impairment and Osowski's admission that he had consumed alcohol. *Cf. State v. Herem*, 384 N.W.2d 880, 883 (Minn. 1986) (noting that questioning person for short time in police car is not necessarily equivalent of formal arrest). These facts were sufficient to satisfy the probable-cause standard. *See Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639, 641 (stating probable cause standard based on totality of circumstances to believe person in control of vehicle while under influence of alcohol).

The officer also had an adequate basis for subsequently invoking the implied-consent law and requesting a chemical test because he had probable cause for believing Osowski was in physical control of a motor vehicle while impaired and the officer had lawfully placed Osowski under arrest. Minn. Stat. § 169A.51, subd. 1(b)(1). The circumstances also satisfied a second statutory condition—the condition that a PBT has indicated an alcohol concentration of .08 or more. Minn. Stat. § 169A.51, subd. 1(b)(4). The result of Osowski's PBT was .201, which is nearly three times the .08 limit. Osowski argues that the PBT result was inaccurate because the machine was incorrectly calibrated, but the record establishes that the machine's deviation never exceeded .003 during the twelve months recorded on the log, and this is well under the .010 allowed

deviation. *See* Minn. R. 7501.0300 (2007) (requiring screening devices to retain their calibration for fourteen days with deviation of plus or minus .010).

The officer had an adequate basis to arrest Osowski and to invoke the implied-consent law.

III

On appeal, Osowski argues that a search warrant was necessary to draw blood for testing because his consent to the blood test was invalid. This issue was neither raised nor decided at the implied consent hearing. We will not consider issues that were not argued in the district court and on which the district court has not ruled. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We note, however, that this specific argument was rejected in the supreme court's recent decision in *State v. Netland*, 762 N.W.2d 202, 204 (Minn. 2009). *Netland* allows warrantless blood tests if probable cause exists "to suspect a crime in which chemical impairment is an element of the offense" because its rapid dissipation creates an exigent circumstance. *Id.* at 214. Exigent circumstances were present in this case, and the officer did not need Osowski's consent or a warrant to proceed with the blood test.

IV

Osowski raises five challenges to the district court's evidentiary rulings. He contends first that the district court abused its discretion in excluding four exhibits—the Intoxilyzer manual, the officer's police report, the PBT log, and articles on carbon monoxide. He contends next that the district court abused its discretion by allowing into evidence the results of the blood test. We conclude that none of these arguments

establishes an abuse of discretion. *See Barna v. Comm'r of Pub. Safety*, 508 N.W.2d 220, 221 (Minn. App. 1993) (discussing abuse-of-discretion standard for evidentiary issues).

The district court excluded the Intoxilyzer manual on the basis of hearsay and a lack of proper foundation. The record supports this determination. Osowski attempted to introduce the manual through the officer. The officer testified that, although the manual offered by Osowski was similar to the one used by the officer, the Intoxilyzer manual was frequently revised. In fact, Osowski sought to admit the outdated 2.0 version of the manual rather than the current 2.3.1 version.¹ The officer lacked the necessary knowledge to establish foundation for the manual. *See Kelzer v. Wachholz*, 381 N.W.2d 852, 854-55 (Minn. App. 1986) (noting that district court's exclusion of report on foundational grounds was within discretion when appellant had tried to admit report through someone with no knowledge or relationship to report). The manual also contains information from third parties that constitutes hearsay. The district court did not abuse its discretion by excluding the manual.

Osowski's second challenge is to the district court's exclusion of the officer's report from evidence. The district court determined that the report was inadmissible because it was only repetitive of the officer's testimony. Again the record supports the district court's ruling. The officer testified to his account of the safety check and the ensuing arrest, and Osowski used the report for cross-examination and for his impeachment attempts. The report was essentially repetitive, duplicative, and cumulative

¹ The manual's current version is described on the BCA website at <http://www.bca.state.mn.us/Lab/Documents/BreathTestingReportsandManuals.pdf>.

of the officer's testimony and could be excluded. *See* Minn. R. Evid. 403 (allowing otherwise relevant evidence to be excluded if probative value is substantially outweighed by needless presentation of cumulative evidence). Thus, the district court did not abuse its discretion by excluding the report from evidence.

Osowski's third challenge is to the exclusion of the PBT log from evidence. Osowski is mistaken about the district court's ruling on the PBT log. The district court received the PBT log into evidence but noted that it would be subject to weight and relevancy arguments. Because the district court admitted the PBT log, Osowski's challenge is unfounded.

Osowski's fourth challenge involves the exclusion of two written articles describing the effects of carbon-monoxide poisoning. The record demonstrates that the district court properly excluded the articles because they were not disclosed and lacked foundation and relevance. Osowski offered the articles during the officer's testimony. Although the officer had a premedical background, he lacked the necessary knowledge to testify about the articles' accuracy and establish foundation. *See Kelzer*, 381 N.W.2d at 854-55 (noting that district court's exclusion of report on foundation grounds was within discretion when appellant had attempted to admit report through someone with no knowledge or relationship to report). In addition the articles were irrelevant because they did not discuss the effects of carbon monoxide on blood tests or Intoxilyzer results—which was the purpose for which Osowski sought to admit them. *See* Minn. R. Evid. 401 (defining relevant evidence), 402 (stating that irrelevant evidence is inadmissible). Thus, the district court did not abuse its discretion by excluding these articles from evidence.

Osowski's final challenge to the evidentiary rulings involves the admission of the blood test into evidence. A proponent of a chemical test must establish by a preponderance of the evidence that the test is reliable and that the test's administration "conformed to the procedure necessary to ensure reliability." *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977); *see also Renner v. Comm'r of Pub. Safety*, 373 N.W.2d 628, 630 (Minn. App. 1985) (stating preponderance standard). Once reliability is established, the party opposing admission must present "a reason why the [] test was untrustworthy." *Dille*, 258 N.W.2d at 568.

The commissioner established the reliability of the blood test by demonstrating that the officer obtained a sealed BCA blood kit from his department's evidence room; that a registered nurse used the kit to draw the blood while the officer watched; that the BCA used gas chromatography to analyze Osowski's blood; and that the blood-kit number on the officer's signed certificate matched the number on Osowski's lab report. *See Minn. R. 7502.0700* (2007) (certifying gas chromatography as approved, valid, and reliable procedure to test blood and urine samples); *Dille*, 258 N.W.2d at 568 (stating that use of BCA test kit is prima facie evidence of test's reliability). And Osowski did not present a reason why the test was untrustworthy. His argument that carbon-monoxide exposure increased his alcohol concentration does not affect the test's admissibility. *See State v. Palmer*, 391 N.W.2d 857, 860 (Minn. App. 1986) (noting that evidence rebutting accuracy of test went to evidence's weight not admissibility). Thus, the district court did not abuse its discretion by admitting the blood test.

The district court did not abuse its discretion in its evidentiary rulings during the judicial-review hearing.

Affirmed.