STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1316

State of Minnesota,
Respondent,

vs.

Jeff Edward Urban,
Appellant.

Filed July 21, 2009
Affirmed
Worke, Judge

Hennepin County District Court
File Nos. 27-CR-07-131129, 27-CV-07-21819

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

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Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

WORKE, Judge

Appellant challenges his convictions of driving while under the influence of alcohol and controlled substances and test refusal, arguing that (1) the district court's ruling on the admissibility of *Spreigl* evidence prevented him from exercising his right to testify on his own behalf; (2) he was unlawfully charged with test refusal because he was not offered an alternative test; (3) the test-refusal statute is unconstitutional; and (4) his Fifth Amendment rights were violated. We affirm.

FACTS

On October 14, 2007, a police officer observed appellant Jeff Edward Urban driving erratically and initiated a traffic stop. Upon contact, the officer smelled alcohol and noticed that appellant's speech was slurred. The officer believed that appellant was under the influence of alcohol, and asked appellant to step out of the vehicle. After appellant failed several field sobriety tests, he voluntarily took two preliminary breath tests (PBTs), which registered alcohol levels of .06 and .057. The officer also learned that appellant had taken prescription drugs. The officer then transported appellant to the police station.

At the police station, appellant was read the Minnesota implied-consent advisory. Appellant agreed to submit to a urine test, but no urine kit was immediately available. A urine kit arrived an hour later, but appellant refused to take any test because he believed that it made no sense. The officer arrested appellant for test refusal and administered a *Miranda* warning.

Two months later, appellant was again stopped and arrested for driving while under the influence. A urine test revealed the presence of prescription and nonprescription drugs. The state notified appellant that it may use the evidence of the second arrest for any purpose allowed.

During the trial on the charges arising out of the first arrest, the parties sought a ruling on the admissibility of the evidence of the second arrest. The district court ruled that the evidence could be introduced only to rebut appellant's possible testimony regarding mistake or accident as to the effect the prescription drugs had on him. After the district court's ruling, the state rested. Appellant waived his right to testify, and a jury found him guilty of driving while under the influence of alcohol and controlled substances and test refusal. This appeal follows.

D E C I S I O N

Spreigl evidence

Appellant argues that the district court interfered with his right to testify on his behalf by ruling that the state could present *Spreigl* evidence to rebut appellant's testimony regarding mistake or accident. A person has a fundamental constitutional right to testify on his own behalf, and the final decision about whether to exercise this right lies solely with the accused. *Erickson v. State*, 725 N.W.2d 532, 536 (Minn. 2007). A defendant may waive a fundamental constitutional right. *State v. Roberts*, 651 N.W.2d 198, 201 (Minn. App. 2002), *review denied* (Minn. Dec. 17, 2002). The waiver of a fundamental right must be knowing, intelligent, and voluntary. *See State v. Ross*, 472 N.W.2d 651, 653-54 (Minn. 1991) (upholding waiver of right to a jury trial). "A

defendant has the burden of proving . . . that [he] did not voluntarily and knowingly waive [his] right to testify." *State v. Berkovitz*, 705 N.W.2d 399, 405 (Minn. 2005). The validity of a waiver of a fundamental right is a question of law, which we review de novo. *See State v. Hagen*, 690 N.W.2d 155, 157-58 (Minn. App. 2004) (stating that a waiver of constitutional right to a jury trial on sentencing factors is reviewed de novo).

Although appellant expressly waived his right to testify, he argues that his waiver was not voluntary because the district court abused its discretion in admitting *Spreigl* evidence of his second arrest. Evidence of past crimes or bad acts, known as *Spreigl* evidence, is not admissible to prove the character of a person or that the person acted in conformity with that character in committing an offense. Minn. R. Evid. 404(b). But *Spreigl* evidence may be admissible to prove "motive, intent, absence of mistake or accident, identity, or a common scheme or plan." *State v. Kennedy*, 585 N.W.2d 385, 389 (Minn. 1998). The admission of *Spreigl* evidence is reviewed for an abuse of discretion. *Id.*

"Rebuttal evidence is [that] which explains, contradicts, or refutes earlier evidence." *State v. Gore*, 451 N.W.2d 313, 316 (Minn. 1990). "[T]he determination of what constitutes proper rebuttal evidence rests almost wholly in the discretion of the [district] court." *State v. Eling*, 355 N.W.2d 286, 291 (Minn. 1984). "Generally the state may impeach a defendant's credibility by cross-examining him in relation to matters opened on direct even though such inquiry brings out collateral criminal conduct." *State v. Clark*, 296 N.W.2d 359, 367 (Minn. 1980). The pre-trial notice provisions are not required when the *Spreigl* evidence would also be admissible on cross-examination to

impeach the witness's credibility. *State v. Fulford*, 290 Minn. 236, 239, 187 N.W.2d 270, 273 (1971).

Appellant's argument is without merit because the district court ruled that the second-arrest evidence would be allowed only on rebuttal and for the limited purpose of impeaching any potential testimony regarding the mistaken belief that the prescription drugs had no effect on appellant's ability to drive. Evidence used to impeach a defendant's direct testimony is not *Spreigl* evidence regardless of how it is characterized by the parties. Appellant was free to testify in any manner he chose, and he knew that the second arrest would be allowed into evidence only if he opened the door on direct examination. Because the district court allowed the evidence of the second arrest for rebuttal purposes only, the district court did not abuse its discretion. As such, appellant's waiver of his right to testify was valid, and the district court did not interfere with appellant's constitutional right to testify on his own behalf.

Minn. Stat. § 169A.51, subd. 3 (2008)

Appellant also argues that he was unlawfully charged with test refusal because he was not given the option of an alternative test after he refused to submit to a urine test. "Application of a statute to the undisputed facts of a case involves a question of law, and the district court's decision is not binding on this court." *State v. Johnson*, 743 N.W.2d 622, 625 (Minn. App. 2008).

> The peace officer who requires a test pursuant to this section may direct whether the test is of blood, breath, or urine. Action may be taken against a person who refuses to take a blood test only if an alternative test was offered and

> action may be taken against a person who refuses to take a urine test only if an alternative test was offered.

Minn. Stat. § 169A.51, subd. 3 (2008).[1] "[U]nder this provision, no alternative test need be offered to a driver who . . . was administered a breath test." *State v. Netland*, 762 N.W.2d 202, 207 n.5 (Minn. 2009). This court has determined that the statutory requirement of an alternative-test offer is satisfied if a choice between a blood and a urine test is made available at the outset. *Mahanke v. Comm'r of Pub. Safety*, 395 N.W.2d 437, 438 (Minn. App. 1986) ("If an officer directs that the test be of blood or urine, a driver has three choices: a blood test, a urine test, or refusing to take a test.").

It is undisputed that the officer read the implied-consent advisory to appellant and that appellant admitted he understood his rights. The implied-consent advisory states "[w]ill you take the (Breath) (Blood or Urine) test?" Initially, appellant agreed to submit to a urine test. Thus, at that time an offer of an alternative test was not required because appellant agreed to take the chemical test. Approximately one hour later, appellant refused "all testing" because "it doesn't make any sense." There is no evidence that appellant was initially offered an alternative test or that a blood test was offered after appellant refused all testing. We note that refusal of "all" testing implies that appellant was aware that there were other tests available, and that he expressly refused the urine test and any other option that may have been available. Based on this record, we conclude that appellant's refusal of "all" testing preempts the requirement to offer an

[1] The language of subdivision 3 in the 2006 and the 2008 statutes is the same. We will cite to the 2008 statute.

alternative test. Because appellant refused all testing, his rights under the implied-consent laws were not violated, and he was lawfully charged with test refusal.

Constitutionality

Appellant next argues that the test-refusal statute is unconstitutional under the Fourth Amendment to the United States Constitution because there are no exigent circumstances when prescription drugs are involved. But appellant was convicted of driving under the influence of a combination of alcohol and controlled substances. Because alcohol was involved, *Netland* is dispositive. The supreme court held that

> the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense.

Netland, 762 N.W.2d at 214. Because the test-refusal statute does not violate the federal or state constitutions, appellant's argument fails.

Miranda rights

Finally, appellant argues that the district court should have suppressed appellant's statements about his prescription-drug use and dismissed the charges against him because the decision to arrest him was based on statements taken in violation of his Fifth Amendment rights. We review the district court's findings of fact "relating to the circumstances of the interrogation" for clear error. *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998). But we make "an independent review of the [district] court's determination regarding custody and the need for a *Miranda* warning." *Id.*

The federal and Minnesota constitutions protect individuals against compelled self-incrimination. U.S. Const. amend. V; Minn. Const. art. I, § 7. The right not to incriminate oneself requires that law-enforcement officers read *Miranda* rights to suspects who are "in custody" and subject to "custodial interrogation." *State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998).

If a suspect has not been arrested, then he is not in custody unless "a reasonable person in the suspect's position would have believed he was in custody to the degree associated with arrest." *Id.* Generally, "[o]n-the-scene" questioning, where officers are trying to gather information, does not present a custodial interrogation that requires a *Miranda* warning. *State v. Walsh*, 495 N.W.2d 602, 604-05 (Minn. 1993). "[R]oadside questioning of a motorist briefly detained pursuant to a routine traffic stop is not [a] 'custodial interrogation' and does not involve the type of situation to which *Miranda* was meant to apply." *State v. Herem*, 384 N.W.2d 880, 881 (Minn. 1986). In *Herem*, the supreme court held that a defendant stopped for speeding and questioned in the back seat of a patrol car on why he smelled of alcohol was not "in custody" for *Miranda* purposes. *Id.* at 881, 883.

Here, the officer had a particularized and objective basis for suspecting appellant of criminal activity. Appellant was stopped for driving erratically. The officer smelled alcohol and noticed that appellant's speech was slurred. As a result, appellant was asked to step out of his vehicle and perform field sobriety tests, which he failed. Because appellant did not have a driver's license with him, he was asked to sit in the back of the patrol car while his identity was verified. Appellant was not handcuffed or restrained in

any manner. He voluntarily took two PBTs, both of which were below the legal limit. The results of the PBTs did not match the officer's observations of appellant's level of impairment, so the officer further questioned appellant and discovered that appellant had also taken prescription drugs. Because the officer had a particularized and objective reason to stop appellant and question him on the scene to investigate the situation, there was no custodial interrogation implicating appellant's *Miranda* rights. The district court's finding, that appellant was not in custody when he was detained and questioned pursuant to a routine traffic stop, was not clearly erroneous. Because appellant's Fifth Amendment rights were not violated, the district court did not abuse its discretion in admitting appellant's statement.

Affirmed.