STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1891

Chad Prigge, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 25, 2009
Affirmed
Minge, Judge

Rice County District Court
File No. 66-CV-08-2114

Conor E. Tobin, Sawicki & Phelps, P.A., 5758 Blackshire Path, Inver Grove Heights, MN 55076 (for appellant)

Lori Swanson, Attorney General, James E. Haase, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

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

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

MINGE, Judge

Appellant challenges a district court order sustaining his license revocation by respondent, arguing that the officer (1) illegally expanded the scope of the speeding stop;

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

(2) lacked reasonable cause to request a preliminary breath test; and (3) lacked probable cause to arrest appellant and invoke the implied-consent law. We affirm.

FACTS

On May 3, 2008, at 1:40 a.m., a police officer observed appellant Chad Prigge driving at a speed substantially over the posted limit. As the officer initiated a traffic stop for speeding, appellant parked in his driveway, turned off the engine, and exited his vehicle.

The officer approached appellant and asked him for his driver's license. The officer's report indicates that, after making the request, the officer detected an odor of alcohol coming from appellant and observed that appellant's eyes were bloodshot and watery. The officer asked appellant whether he had been drinking. Appellant reported he had consumed approximately four alcoholic drinks throughout the evening.

The officer requested that appellant provide a breath sample for a preliminary breath test (PBT). Because the first PBT registered an insufficient sample, a second PBT was administered. Based on a reported alcohol concentration of .108, the officer then arrested appellant for driving while impaired. After being given the implied-consent advisory, appellant submitted a urine sample that indicated an alcohol concentration in excess of the legal limit.

Based on the test results, respondent Commissioner of Public Safety revoked appellant's driver's license. The district court sustained the revocation. This appeal follows.

D E C I S I O N

In reviewing a district court's order sustaining a license revocation "[d]ue regard is given to the district court's opportunity to judge the credibility of the witnesses, and findings of fact will not be set aside unless clearly erroneous." *Snyder v. Comm'r of Pub. Safety*, 744 N.W.2d 19, 22 (Minn. App. 2008). "Conclusions of law will be overturned only upon a determination that the trial court has erroneously construed and applied the law to the facts of the case." *Dehn v. Comm'r of Pub. Safety*, 394 N.W.2d 272, 273 (Minn. App. 1986).

I.

The first issue is whether the officer illegally expanded the scope of the speeding stop to inquire about alcohol consumption. The scope and duration of a traffic-stop investigation must be limited to the justification for the stop. *See State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). "[U]nder Article I, Section 10, of the Minnesota Constitution any expansion of the scope or duration of a traffic stop must be justified by a reasonable articulable suspicion of other criminal activity." *State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003). Articulable suspicion is an objective standard that must be "determined under the totality of the circumstances." *Paulson v. Comm'r of Pub. Safety*, 384 N.W.2d 244, 246 (Minn. App. 1986) (*citing State v. Lande*, 350 N.W.2d 355, 357-58 (Minn. 1984)). Therefore, in order for the DWI investigation to be lawful, the officer must have reasonably suspected that the appellant may have been violating the impaired-driving laws, and he must be able to sufficiently articulate the factual basis for his suspicion. *Id.* An odor of alcohol can provide reasonable suspicion of criminal activity

sufficient to expand the scope of a traffic stop. *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001).

On appeal, appellant argues that the officer impermissibly expanded the scope of the traffic stop by inquiring whether appellant had been drinking. Appellant testified that it was raining, windy, and dark at the time and location of the stop. He also stated that he was outside his car and downwind from the officer. Appellant argues that, under these circumstances, it was impossible for the officer to see his eyes or smell his breath. A passenger in the car supported appellant's testimony and stated that he (the passenger) had been drinking. The officer's testimony was that he saw appellant's eyes and smelled alcohol. The officer stated that he believed that the circumstances warranted asking appellant whether he had been drinking. The district court found that the officer observed an odor of alcohol coming from appellant and that appellant had bloodshot and watery eyes.

We defer to the district court's determinations of credibility and uphold the district court's findings unless clearly erroneous.[1] As an appellate court, we are not in a position to determine on this record what way the wind was blowing or what could be seen on a blustery night in a residential area that may have street lights. Based on the rule that we

[1] The district court did not make explicit credibility findings in this case. Failure of the district court to make explicit credibility findings does not require reversal when credibility findings are implicit in the district court's decision. *See Umphlett v. Comm't of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995) (holding that implicit findings may be derived from the district court's final resolution of the matter and affirming based on an implicit credibility determination), *review denied* (Minn. Aug. 30, 1995). However, we note that explicit findings facilitate appellate review and in some circumstances may avoid a reversal and remand for such findings.

defer to the district court on credibility determinations, we conclude that the district court's findings that the officer observed that appellant smelled of alcohol and had bloodshot eyes are not clearly erroneous. We further conclude that the officer had a reasonable and articulable basis to expand the scope of the traffic stop to a DWI investigation.

II.

The second issue is whether the officer possessed specific and articulable facts to support a request for a PBT.[2] A law enforcement officer may request a PBT when the officer has reason to believe that the person was driving under the influence of alcohol. Minn. Stat. § 169A.41, subd. 1 (2006). "An officer need not possess probable cause to believe that a DWI violation has occurred in order to administer a [PBT]." *State v. Vievering*, 383 N.W.2d 729, 730 (Minn. App. 1986), *review denied* (Minn. May 16, 1986). Rather, "an officer may request a [PBT] if [the officer] possesses specific and articulable facts that form a basis to believe that a person is or has been driving, operating or controlling a motor vehicle while under the influence of an intoxicating beverage." *Id*.

Appellant argues that, because there was no observation of slurred speech or difficulty with balance and because the horizontal gaze nystagmus test was determined to be flawed by the district court, the officer lacked reasonable suspicion to support the

[2] Appellant challenged separately the expansion of the traffic stop to inquire about alcohol consumption and the administration of the PBT. Because appellant raised these as two separate and distinct issues and the respondent does not claim that issues are the same, we address them individually. In doing so, we do not decide whether the standard for expanding the stop to inquire about alcohol consumption and the standard for administering a PBT are distinct.

administration of a PBT. The district court concluded that there were sufficient facts to support the PBT including: (1) the observation of an odor of alcohol coming from appellant; (2) appellant's bloodshot and watery eyes; and (3) the fact that appellant was speeding at 1:40 a.m., which was after the bar stopped serving alcohol. Further, the record contains the officer's testimony that, before the PBT was administered, appellant admitted to consuming four alcoholic beverages that evening.

On this record, the district court did not err in concluding that there were specific and articulable facts that formed a basis to believe that appellant was driving a motor vehicle while under the influence of alcohol and that this basis was sufficient to support the administration of a PBT.

III.

The third issue is whether the district court erred in concluding that there was probable cause to arrest appellant and invoke the implied-consent law. Specifically, appellant argues that the PBT was unreliable and should not have been considered, and without the PBT, the officer lacked probable cause to arrest appellant.

A PBT, administered pursuant to section 169A.41, is not used for the ultimate determination of a driver's alcohol concentration. *See Windschitl v. Comm'r of Pub. Safety*, 355 N.W.2d 146, 149 (Minn. 1984) (discussing the predecessor statute Minn. Stat. § 169.121 (1982)). Generally, the result of a PBT is prohibited from being used as evidence of intoxication in any court action. Minn. Stat. § 169A.41, subd. 2 (2006). Instead, the PBT is used to support a determination that further testing is required under the implied-consent law. *Id.*

First, appellant asserts that the PBT should not have been considered when evaluating probable cause to arrest because the PBT was administered after appellant had been chewing gum and after appellant had smoked cigarettes. A driver cannot undermine the results of the test by "identifying a substance without showing that it raises the results of the test." *Melin v. Comm'r of Pub. Safety*, 384 N.W.2d 474, 477 (Minn. App. 1986) (citing *Pasek v. Comm'r of Pub. Safety*, 383 N.W.2d 1 (Minn. App. 1986) (remnant of a pinch of chewing tobacco); *Hager v. Comm'r of Pub. Safety*, 382 N.W.2d 907 (Minn. App. 1986) (chewing gum)); *see also Noren v. Comm'r of Pub. Safety*, 363 N.W.2d 315, 318 (Minn. App. 1985) (driver failed to show that low simulator reading "would unduly exaggerate the subject's test results"). Appellant provided testimony that gum may, in certain circumstances, cause an artificially high test result. Appellant, however, presented no evidence to support his argument that the gum he was chewing or cigarettes he was smoking actually caused an artificially high result. Because the PBT is merely a tool used by law enforcement to determine if a test is required under the implied-consent law, we will not hold the PBT result unreliable based on pure speculation.

Appellant argues that the PBT results should not have been considered because the officer failed to observe appellant for 15 minutes before administering the PBT and the calibration of the PBT equipment was not submitted into evidence. Appellant's companion on the evening he was arrested had previously worked as a public-safety officer for Augsburg College and testified that PBT results may be affected by a suspect's eating and other activities, and therefore an observation protocol should be followed. However, appellant has cited no authority for his assertion that the required 15 minutes of

observation before the administration of the Intoxilyzer test is also required before the administration of a PBT.

Finally, it is important to recognize that the license revocation is based on the urine test, and not the PBT. The commissioner is generally not required to prove the reliability of a PBT or produce the PBT calibration logs. *See Steele v. Comm'r of Pub. Safety*, 439 N.W.2d 427, 430 (Minn. App. 1989); *Lunquist v. Comm'r of Pub. Safety*, 411 N.W.2d 608, 610 (Minn. App. 1987). On this record, the district court did not erroneously consider the PBT in making the determination that there was probable cause to give the implied-consent advisory and administer the urine test.

Affirmed.

Dated: