STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0143

Kristen Carmina Lovato, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed September 15, 2009
Affirmed
Muehlberg, Judge[*]

Dakota County District Court
File No. 19WS-CV-08-1584

John Arechigo, Arechigo & Stokka, LLP, 454 Temperance Street, St. Paul, MN 55101 (for appellant)

Lori Swanson, Attorney General, Kristi Nielsen, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Stauber, Judge; and Muehlberg, Judge.

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

MUEHLBERG, Judge

On appeal of the revocation of her driving privileges pursuant to Minn. Stat. § 169A.52, subd. 3(a) (2006), appellant argues (1) that the district court erred in finding

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

that there was probable cause to believe that appellant was in physical control of her vehicle; and (2) that the district court erred in finding that there was sufficient temporal connection between the time of the alleged drinking and physical control. We affirm.

FACTS

Just after midnight on September 5, 2008, Officer Thomas Nelson received a report of a woman pounding on an apartment door. As Officer Nelson pulled into the building's parking lot, he observed an unoccupied green Chevrolet Cavalier that was double-parked and in an improper parking space. The vehicle's lights were on and its engine was running, window was rolled down about halfway, and keys were in the ignition.

Officer Nelson entered the apartment building and observed appellant, Kristen Carmina Lovato, on the hallway floor. He could smell a very strong odor of alcohol coming from her breath. Appellant's speech was very slurred and difficult to understand. Appellant told Officer Nelson that she worked at the Mall of America. She said that she had been "there" for about ten to fifteen minutes. Officer Nelson testified that he understood the term "there" as referring to the apartment complex, but conceded that appellant may have been referring to the specific location in front of her apartment. Appellant also told Officer Nelson that she had been drinking in the parking lot after work. Officer Nelson testified that he understood the "parking lot" as referring to the one outside the Mall of America. But he again conceded that appellant may have been referring to the parking lot outside her of apartment.

Appellant then told Officer Nelson that she had left work at about 9:30 p.m., and had driven home approximately 15 minutes prior to the officer's arrival. She did not tell Officer Nelson what she was doing between approximately 9:30 p.m. and 12:30 a.m. Appellant stated that she should not be driving, but that she just drove home from work. Officer Nelson testified that he understood her statement related to her concern about her consumption of alcohol. When Officer Nelson asked her if she had been drinking in or at the apartment complex, she said no. She then changed her story and claimed she had not been drinking at all that night. Officer Nelson did not find any alcoholic beverages in appellant's car and purse. Appellant admitted that she owned the vehicle in question. Officer Nelson offered appellant a preliminary breath test which indicated an alcohol concentration of .26. He then arrested appellant for DWI. The district court took judicial notice that one person could not reach a .26 alcohol concentration within 15 minutes of drinking.

The district court sustained the revocation. This appeal follows.

D E C I S I O N

Appellant contends that the officer lacked probable cause to believe that she was in physical control of her vehicle while under the influence of alcohol. Although a determination of probable cause is a mixed question 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). Probable cause is

evaluated from the point of view of a prudent and cautious police officer, considering the totality of the circumstances known to the officer. *See Johnson v. Comm'r of Pub. Safety*, 366 N.W.2d 347, 349 (Minn. App. 1985). Courts should give "great deference" to an officer's probable-cause determination. *Id*.

I.

The first issue is whether the district court erred in finding probable cause to believe that appellant was in physical control of her vehicle. When the officer has "probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the person refused to submit to a test, the commissioner shall revoke the person's license." Minn. Stat. § 169A.52, subd. 3(a). An officer does not need to personally observe a person in the act of driving, or the vehicle to establish probable cause. *See State v. Harris*, 295 Minn. 38, 42, 202 N.W.2d 878, 880-81 (1972). A police officer has probable cause to believe an individual is in physical control of a vehicle when, based on the totality of the circumstances, there is "a reasonable ground of suspicion" to warrant a belief that the person was in physical control of his or her vehicle. *Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639, 641 (Minn. 1998). "The term 'physical control' is more comprehensive than either 'drive' or 'operate.'" *State v. Starfield*, 481 N.W.2d 834, 836 (Minn. 1992).

"[P]hysical control is meant to cover situations where an inebriated person is found in a parked vehicle under circumstances where the car, that, without too much difficulty, might again be started and become a source of danger to the operator, to

others, or to property." *Id*. 837. However, evidence that merely establishes that an individual is in a position where he or she could start the car "without too much difficulty" is not enough to establish that an individual is in physical control. *Snyder v. Comm'r of Pub. Safety*, 744 N.W.2d 19, 23 (Minn. App. 2008).

Appellant argues that there was no probable cause to believe that she was in physical control of her vehicle because she was not in close proximity to her vehicle at the time of Officer Nelson's arrival, and there was no evidence that she had driven or was about to drive her vehicle. However, the fact that an individual is not in or about their vehicle may not negate an officer's probable cause to believe physical control. *Johnson*, 366 N.W.2d at 350. For example, in *Johnson*, Johnson's car was parked outside a trailer, with its headlights on, engine running, and door open. *Id.* at 349. Johnson was inside the trailer. *Id*. He admitted that he had been driving. *Id*. Although he was not in or about his car, this court held that the facts and circumstances supported a finding of probable cause to believe that Johnson was in physical control of his car. *Id*. at 350.

Here, like in *Johnson*, appellant's car was parked with its headlights on, engine running, keys in the ignition, and window rolled down about halfway. From the condition of the vehicle, Officer Nelson could reasonably believe that the vehicle had recently been or was about to be driven. Additionally, appellant admitted that she had driven home about 15 minutes prior to the officer's arrival. There is no evidence that anyone else had been driving.

We conclude that the district court did not err in concluding that there was probable cause to believe that appellant was in physical control of her vehicle.

II.

The second issue is whether there was a sufficient temporal connection between the time of the drinking and physical control. 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 operation of the vehicle. *See Delong v. Comm'r of Pub. Safety*, 386 N.W.2d 296, 298 (Minn. App. 1986), *review denied* (Minn. June 13, 1986). Police are not required to know the exact time that the driving occurred. *Id.* But they must establish, by direct or circumstantial evidence, a timeframe demonstrating a connection between the alcohol consumption and the driving. *Id*. at 298.

In *Eggersgluss v. Comm'r of Pub. Safety*, a police officer responded to a car rollover, which was obviously caused by the failure to make a simple turn. 393 N.W.2d 183, 184 (Minn. 1986). Although the driver showed signs of intoxication, he told the officer that he did not drink alcohol. *Id*. at 184-185. However, the passenger admitted that they had been drinking alcohol before the accident. *Id*. at 184. The supreme court held that there was probable cause to believe that the driver was driving while intoxicated because the passenger admitted that they had been drinking before the accident, the driver failed to negotiate a simple turn at 4:30 a.m., and the driver lied about his consumption of alcohol. *Id*. at 185.

In our case, like the driver in *Eggersgluss*, appellant failed to park her car properly, left her keys in the ignition, and left her car running. This suggested that she was driving while intoxicated. Moreover, appellant admitted that she had been drinking

before she drove back home. She told Officer Nelson that she had been drinking after work and that she had just driven home about 15 minutes prior to his arrival. She also stated she should not be driving. Therefore, we conclude that there was sufficient evidence to support the finding of a temporal connection between appellant's driving and intoxication.

Appellant challenges the finding of temporal connection arguing that there is an innocent interpretation of the circumstantial evidence in this case. Appellant told Officer Nelson that she had been drinking in the parking lot after work. Appellant also said that she had been "there" for about ten to fifteen minutes when Officer Nelson found her in the hallway of her apartment building. Based on these statements, appellant argues Officer Nelson could have also believed that appellant had been drinking in the parking lot outside her apartment building after she drove back home.

This argument is without merit. "The fact that there might have been an innocent explanation for [a defendant's] conduct does not demonstrate that [an officer] could not reasonably believe that [the defendant] had committed a crime." *State v. Hawkins*, 622 N.W.2d 576, 580 (Minn. App. 2001). Further, there is evidence suggesting that appellant did not drink after she arrived at her apartment. When Officer Nelson asked her if she had been drinking in or at the apartment complex, she said no. Officer Nelson did not find any alcohol in appellant's car and purse, nor did he find any alcohol within her apartment complex.

In conclusion, we hold that the district court did not err in finding that there was probable cause to believe that appellant had been in physical control of her vehicle while under the influence of alcohol.

Affirmed.