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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-464

Steven John DeVaan, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed January 19, 2010
Affirmed
Shumaker, Judge

Swift County District Court
File No. 76-CV-08-834

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Lori Swanson, Attorney General, James E. Haase, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Shumaker, Judge; and Connolly, Judge.

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

SHUMAKER, Judge

Appellant challenges the revocation of his driver's license for driving while impaired, arguing that a law-enforcement officer impermissibly expanded the scope of the traffic stop. We affirm.

FACTS

Appellant Steven John DeVaan contends that his driver's license was improperly revoked for driving while impaired because the arresting officer impermissibly expanded the scope of the initial traffic stop.

Swift County deputy sheriff Judd Latham used radar to determine that DeVaan was traveling at 89 miles an hour on his motorcycle in a 55-mile-per-hour zone at about 6:00 p.m. on October 29, 2008. Latham stopped DeVaan and asked to see his driver's license. DeVaan admitted that he had been speeding and Latham noted that his speech was a "little slurred," but Latham detected no other indicia of alcohol consumption at that point.

In preparing to issue a speeding citation to DeVaan, Latham checked his driving and vehicle registration records. Those records showed a large gap in the motorcycle's registration and DeVaan's prior conviction of driving while impaired. This process took 12 to 14 minutes.

When Latham returned to the site of the stop, he detected an odor of alcohol that he had not smelled earlier. DeVaan stated that he had consumed one drink within the previous half hour. Latham required DeVaan to perform three field sobriety tests, two of which he failed, and a preliminary breath test (PBT) that registered .14 alcohol concentration. DeVaan then admitted to having consumed three or four alcoholic drinks.

An Intoxilyzer test administered to DeVaan at 8:13 p.m. showed an alcohol concentration of .09, and his driver's license was revoked under the implied-consent law. The state then charged DeVaan with driving while impaired and driving while impaired

within two hours of testing, and the court held a joint omnibus- implied-consent hearing at which Deputy Latham testified.

DeVaan argued that Latham had impermissibly expanded the scope of the initial stop for speeding after he learned of DeVaan's prior driving-while-impaired offense. The district court denied DeVaan's petition to rescind the revocation of his driver's license and to dismiss the criminal charges. This appeal followed.

D E C I S I O N

The district court's findings of fact will not be set aside unless they are 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).

DeVaan does not challenge the propriety or the duration of the initial traffic stop. Rather, he contends that the deputy had no credible basis for expanding the scope of the stop into an investigation of possible alcohol impairment. "An initially valid stop may become invalid if it becomes 'intolerable' in its intensity or scope." *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) (quoting *Terry v. Ohio*, 392 U.S. 1, 17-18, 88 S. Ct. 1868, 1878 (1968)). "[E]ach incremental intrusion during a stop must be strictly tied to and justified by the circumstances which rendered the initiation of the stop permissible." *Askerooth*, 681 N.W.2d at 364 (quotations omitted). "[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) (citation omitted). 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) (citation omitted).

DeVaan concedes that the duration of the stop was permissible, but he argues that there was no basis for the expansion of a stop for a speeding violation into an investigation for possible driving while impaired. Deputy Latham testified that he had not initially noticed an odor of alcohol when DeVaan first spoke but that on his second encounter, after learning of DeVaan's prior alcohol-related offense, he "could smell a stronger odor of alcohol . . . ." He explained that the wind must have shifted so as to enable the detection of the odor of alcohol, and the district court credited that explanation, stating, "Unfortunately for DeVaan, a shift in the wind gave Deputy Latham a reasonable, articulable basis to expand the scope of the stop when he smelled the odor of an alcoholic beverage coming from Mr. DeVaan." DeVaan assails Latham's explanation as "hogwash" which "strains credibility."

The credibility of a witness is uniquely within the trier of fact's ability and opportunity to assess. *Snyder*, 744 N.W.2d at 22. But when "the testimony of a witness is 'so improbable or contains so many contradictions as to furnish substantial reasons for believing it to be false, such testimony may be disregarded . . . .'" *First Trust Co. of St. Paul v. McLean*, 254 Minn. 75, 78-79, 93 N.W.2d 517, 520 (1958) (quoting *Campbell v. Nelson*, 175 Minn. 51, 54, 200 N.W. 401, 403 (1928)). It is the exceptional case, when the question of a witness's incredibility is "free from doubt," that we may deem it so

inherently lacking in truthfulness that it would be clear error for the district court to credit and rely on it. *Id.* at 79, 93 N.W.2d at 520.

DeVaan argues that Latham's observations were conflicting: he did not smell alcohol initially, but did on the second encounter. We see no inherent conflict here. The mere fact that Latham failed to smell the odor of alcohol at first does not mean there was no such odor. And whether the odor became noticeable because of a wind shift, as Latham speculated, or merely because Latham simply overlooked it at first, is not critical because the law does not require officers to account for such omissions at their peril. The real issue is whether an investigating officer might honestly miss a sign of alcohol consumption upon an initial encounter and yet catch the sign several minutes later. We think that can often be the case, and that scenario merely sets the stage for the trier of fact, who is able to observe the officer's demeanor under the test of cross-examination, to determine ultimate credibility. The district court did so here, and we find no clear error in its determination that Latham's testimony was credible.

We also note that, by the time Latham detected the odor of alcohol from DeVaan, he had also observed a very excessive speed and Latham's slurred speech, two other possible indicia of impaired driving. Thus, we hold that Latham did not impermissibly expand the scope of his investigation.

DeVaan also asserts that his Intoxilyzer test was not taken within the two-hour time limit required by Minnesota Statutes section 169A.20, subdivision 1(5) (2008), which criminalizes driving under the influence. DeVaan does not explain how the timing of this test affects a civil license revocation under the implied-consent laws. The

commissioner argues that this issue was not previously raised in the context of DeVaan's license revocation, and the record supports the commissioner's position. However, even if raised appropriately, this issue is irrelevant to the implied-consent proceeding. *See* Minn. Stat. § 169A.52, subd. 4(a) (2008) (stating that a driver's license may be revoked when a driver "submitted to a test and the tests results indicate an alcohol concentration of 0.08 or more").

Affirmed.