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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-863

State of Minnesota,
Respondent,

vs.

James Henry Smith,
Appellant

Filed May 18, 2010
Affirmed
Stauber, Judge

Anoka County District Court
File No. 02CR089233

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

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

STAUBER , Judge

On appeal from his driving while impaired (DWI) conviction, appellant argues that the district court (1) committed reversible error by inadvertently informing the jury

that appellant was being tried for a felony and (2) violated appellant's due process rights by allowing the state to use a prior administrative license revocation to enhance the DWI charges to felonies and to prove the driving-after-revocation charge without any evidence that appellant had a meaningful opportunity for judicial review of the revocation. We affirm.

FACTS

On the evening of July 19, 2008, a cashier at a convenience store in Fridley observed an African-American man pull up to the store in a tan Cadillac. He was driving with the driver's door partially open and his foot hanging out. The cashier noted that the man was dressed in a cream or tan leisure suit and a fedora. Upon entering the store with a female passenger, the man began behaving erratically. His balance was unsteady, his speech was slurred, and he seemed confused. He tried to haggle over the price of a pack of gum. The cashier concluded that he was intoxicated. The man filled the vehicle with gas and drove away with the female passenger. Moments later, the cashier observed the vehicle cross the street and become stuck on a concrete divider that separated adjacent parking lots. The vehicle's rear wheels were off of the ground. The cashier contacted the police.

Officer Christopher McClish reported to the scene and observed the vehicle parked in front of a laundromat across the street from the convenience store. Officer McClish soon observed an African-American man, later identified as appellant James Henry Smith, walking out of a liquor store toward the vehicle. Appellant was accompanied by a woman who appeared intoxicated. According to Officer McClish,

appellant was wearing a brown suit with red stripes and a black hat. Appellant and his female companion were stopped by police, and Officer McClish returned to the convenience store to ask the cashier if he recognized appellant. The cashier walked outside and looked across the street to where appellant was being held. He was approximately 300 feet from where appellant was standing, but it was still light out and Officer McClish testified that he could see appellant's face from that distance. The cashier identified appellant as the driver of the vehicle based on his distinctive clothing. Appellant was the registered owner of the vehicle and its keys were in appellant's pocket.

Officer Terry Nightingale noted that appellant was wearing "flamboyant clothing" and a hat. Officer Nightingale also smelled the odor of an alcoholic beverage on appellant's breath and observed that his eyes were watery and he was talking fast. Appellant failed one field sobriety test and refused to perform two others. Appellant was driven to the police station where he took two Intoxilyzer tests. He registered blood alcohol concentrations of .172 and .165.

Appellant was charged with two counts of felony first-degree driving while impaired (DWI) in violation of Minn. Stat. §§ 169A.20, subd. 1(1), (5), .276, subd. 1(a) (2006), and one count of gross misdemeanor driving after cancellation in violation of Minn. Stat. § 171.24, subd. 5 (2006). The felony charges stemmed from three prior impaired-driving incidents, including a 2007 administrative license revocation. *See* Minn. Stat. § 169A.24, subd. 1(1) (2006) (defining felony first-degree DWI as violating a DWI statute within ten years of first of three or more qualified prior impaired-driving incidents); *see also* Minn. Stat. § 169A.03, subd. 21(a)(1) (2006) (stating that a qualified

prior impaired-driving incident includes license revocation under the implied-consent law).

Before trial, appellant moved to dismiss the felony charges on the basis that his 2007 implied-consent license revocation could not be a prior impaired-driving incident for enhancement purposes because he did not have a meaningful opportunity for judicial review of the revocation. He claimed that he lacked a meaningful opportunity because he was incarcerated during the filing period for judicial review and could not afford an attorney to represent him. The district court denied the motion, concluding that appellant's receipt of a notice of revocation, informing him of the availability of judicial review, vindicated his due process rights. Appellant then stipulated to having the three prior impaired-driving incidents.

The case proceeded to trial and appellant was found guilty of all three counts. This appeal followed.

D E C I S I O N

I.

Appellant contends that he is entitled to a new trial because the district court informed the jury that he was on trial for a felony. Before jury deliberations, the district court dismissed an alternate juror. The district court explained to the jury that an alternate is always selected as a precaution in "felony cases." After this explanation, the court conducted a conference outside the jury's presence. The parties and the district court agreed that the statement was made in error, and the district court offered to provide a curative instruction. Defense counsel indicated that a curative instruction was

unnecessary because the statement was an "accident[]." Defense counsel was also concerned that a curative instruction would draw further attention to the statement.

Appellant argues that the district court prejudiced his defense by mentioning that he was being tried for a felony because the jury, which included three members who had previously been convicted of DWI offenses, could infer that he had prior impaired-driving incidents that enhanced the charges to felonies. Appellant also asserts that the statement violated the terms of the pretrial stipulation, which prohibited any mention of his prior impaired-driving incidents. *See State v. Berkelman*, 355 N.W.2d 394, 397 (Minn. 1984) (stating that defendants have the right to stipulate to prior impaired-driving incidents because there is a considerable risk that a jury might impermissibly use its knowledge of the prior incidents to decide whether a defendant is guilty of the current DWI charge).

Appellant did not object to the statement and declined a curative instruction. Thus, both parties agree that the plain-error test applies. *See State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998) (stating that unobjected-to trial errors may be reviewed for plain error affecting substantial rights). Under the plain-error test, this court may not grant appellate relief on an issue to which there was no objection unless (1) there is an error, (2) the error is plain, and (3) the error affects the defendant's substantial rights. *Id.*

The state concedes that the district court's statement constituted plain error but contends that the error did not affect appellant's substantial rights. "[A]n error affects substantial rights where there is a 'reasonable likelihood' that the absence of the error

would have had a 'significant effect' on the jury's verdict." *State v. Reed*, 737 N.W.2d 572, 583 (Minn. 2007).

We agree that the error did not affect appellant's substantial rights. Whether the district court's brief reference to felony charges may have alerted the jurors to appellant's prior impaired-driving incidents is a matter of conjecture. The district court mentioned only that appellant's case involved a felony. There was no discussion of which of the three current charges constituted felonies, nor was there any specific reference to the prior impaired-driving incidents. Even if the jury suspected the prior incidents because of the district court's statement, appellant cannot demonstrate that the error had a significant effect on the jury's verdict because the evidence against him was strong. The only issue at trial was appellant's identity as the driver of the Cadillac that stopped at the convenience store. Appellant, his female companion, and his Cadillac were all found in close proximity to the convenience store and the parking lot with the concrete divider, and the cashier positively identified appellant and his Cadillac at the scene. The cashier and Officer McClish testified that appellant was distinctly dressed in a flamboyant suit and hat that were like nothing they had ever seen before.

Appellant disputes that the evidence was overwhelming and focuses on discrepancies in the testimony regarding the color of his suit and the Cadillac that were provided by the cashier and Officer McClish at trial. Appellant also claims that the cashier's identification was "highly suggestive" because he was the only African American in sight at the time. However, the cashier testified that he was able to identify appellant from his distinctive clothing, not his race. The discrepancies in the witnesses'

testimony were minor, and appellant's claim that the cashier's identification was based on his race is not supported by the record.

Because appellant can only speculate that the jury suspected his prior impaired-driving incidents because of the district court's statement, and because the evidence of appellant's guilt is strong, appellant has failed to establish that the brief reference to a felony charge affected his substantial rights. Thus, we decline to grant him relief on this basis.

II.

Next, appellant argues that his due process rights were violated by the use of his 2007 administrative license revocation to enhance the DWI charges to felonies because he did not have a meaningful opportunity for judicial review of the revocation.

The United States Supreme Court has stated that

> where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceeding. This principle means at the very least that where the defects in an administrative proceeding foreclose judicial review of that proceeding, an alternative means of obtaining judicial review must be made available before the administrative order may be used to establish conclusively an element of a criminal offense.

United States v. Mendoza-Lopez, 481 U.S. 828, 837–38, 107 S. Ct. 2148, 2155 (1987) (citations omitted).

The state contends that appellant waived the right to judicial review by failing to exercise it within the statutory time period. *See* Minn. Stat. § 169A.53, subd. 2 (2006) (stating that a party must petition for judicial review within 30 days of receiving notice of

license revocation). This court has previously held that "[t]he availability of [judicial] review [of a license revocation], although unexercised, satisfies the due-process requirement of meaningful review." *State v. Goharbawang*, 705 N.W.2d 198, 202 (Minn. App. 2005), *review denied* (Minn. Jan. 17, 2006); *see also State v. Omwega*, 769 N.W.2d 291, 296 (Minn. App. 2009) (concluding that defendant's due process rights were not violated by the use of a prior license revocation that had not been judicially reviewed to enhance DWI charges to a felony because the defendant had waived the right to judicial review by failing to seek review within the applicable time period), *review denied* (Minn. Sept. 29, 2009); *State v. Coleman*, 661 N.W.2d 296, 301 (Minn. App. 2003) (stating that due process is satisfied if judicial review is made available to a defendant before a prior revocation is used for enhancement purposes), *review denied* (Minn. Aug. 5, 2003).

Appellant concedes that he did not exercise his right to judicial review within the statutory time period after receiving notice of the license revocation at the time of his arrest for DWI on July 7, 2007. But he appears to argue that he did not make a considered and intelligent waiver because the state failed to timely inform him of his right to judicial review. *See Mendoza-Lopez*, 481 U.S. at 840, 107 S. Ct. at 2156 (suggesting that a valid waiver of the right to meaningful judicial review must be "considered" and "intelligent"). Appellant alleges that his only notice of his right to judicial review was mailed to his home on July 17, 2007. He contends that he did not receive the notice until after the time period for seeking review had expired because he was incarcerated from the time of his arrest on July 7, 2007 until August 15, 2007.

Appellant is correct that he was entitled to notice of the right to review before the waiver became effective. *See* Minn. Stat. § 169A.52, subd. 6 (2006) (providing that the commissioner of public safety must serve a person whose driver's license has been revoked with notice of the right to obtain judicial review); *see also Omwega*, 769 N.W.2d at 296 (concluding that appellant had made a "considered" and "knowing" waiver of his right to judicial review of a license revocation because he "received timely notification of the revocation *and the process for challenging it*," but did not request review (emphasis added)). But he did not raise this argument below. Appellant's argument at the district-court level was that he was denied meaningful review of the revocation because he could not afford an attorney or the filing fee for review and did not have access to the petition for review. Appellant never alleged that he received untimely notice of the right to review. Thus, appellant's argument is waived because a party cannot obtain review of a legal theory that was not raised below. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that a party may not obtain review by raising the same issue under a different theory).

Moreover, even if we were to consider appellant's argument, it was his initial burden to come forward with some evidence to support his claim that he did not receive notice of the right to review. *See State v. Fussy*, 467 N.W.2d 601, 603 (Minn. 1991) (stating that a defendant must notify the state that an earlier conviction violated his constitutional rights and provide supporting evidence for each challenged conviction); *See also State v. Mellett*, 642 N.W.2d 779, 789–90 (Minn. App. 2002) (applying *Fussy* to a defendant's constitutional challenge to the admission of an administrative license

revocation used to enhance a test-refusal charge), *review denied* (Minn. July 16, 2002). Here, the only evidence appellant submitted was a short affidavit that contains no mention of a lack of timely notice. Appellant is not entitled to relief because he has failed to meet his initial burden.

Appellant also argues that he did not make a valid waiver of his right to judicial review because he could not afford an attorney to represent him or the filing fee to petition for review. But license revocation is a civil matter, and there is no requirement that a party be afforded an attorney or the costs of filing a petition before waiver of the right to judicial review may occur. Accordingly, the district court did not err in permitting the use of appellant's prior license revocation to enhance the DWI charges to felonies and to prove the driving-after-revocation charge.

Affirmed.