STATE OF MINNESOTA
IN COURT OF APPEALS
A10-11

State of Minnesota,
Appellant,

vs.

John Michael Gill,
Respondent.

Filed June 22, 2010
Reversed
Muehlberg, Judge*

Hennepin County District Court
File No. 27-CR-09-38792

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

Desyl L. Peterson, Minnetonka City Attorney, Rolf A. Sponheim, Associate City Attorney, Anna Krause Crabb, Assistant City Attorney, Minnetonka, Minnesota (for appellant)

Richard F. Koch, Andrew S. Garvis, Koch & Garvis L.L.C., Minneapolis, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Connolly, Judge; and Muehlberg, 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

MUEHLBERG, Judge

Appellant State of Minnesota argues that the district court erred by ruling on the issue of whether probable cause existed to arrest respondent for driving while impaired (DWI), and by suppressing the results of the standard field sobriety tests (SFSTs) performed in custody by respondent. We reverse.

FACTS

On February 16, 2009, at approximately 3:40 p.m., a Minnetonka police officer observed respondent John Gill driving eastbound on Ridgedale Drive in Minnetonka. The officer testified that she observed respondent's vehicle straddling two lanes of traffic and noticed that respondent had messy hair, a blank stare, an open mouth, and "an unusual look to his face." The officer maneuvered her squad car behind respondent's vehicle and observed that the license plate had a 2009 tab sticker improperly affixed in the center of the license plate. The officer checked the vehicle registration and noticed that the 2009 tabs had not yet been issued for the vehicle. Though respondent was not speeding, the vehicle then came to an abrupt stop at a red light. Once the light turned green, the officer activated her overhead emergency light to initiate a traffic stop. The officer testified that respondent pulled over and his vehicle came to an abrupt stop.

As the officer approached the car, respondent flicked a cigarette out of the window. According to the officer, respondent became agitated and argued with the officer about why he was stopped. The officer also asked respondent to exit his vehicle to pick up the cigarette butt that he had flicked out of the window. Respondent complied

but did not immediately get back into his vehicle despite the officer's commands and instead argued with the officer about the reason for the stop. The officer informed respondent that he was being stopped because of a discrepancy with his license-plate tabs. The officer did not smell any odor of alcohol and respondent denied that he had been drinking. The officer called for backup because she believed he was under the influence of something based on her initial observation of a blank stare while driving, his driving conduct of applying the brakes abruptly and straddling two lanes, and his behavior during the traffic stop. The officer testified that respondent's hands were shaking, he had glassy eyes, and "his overall demeanor and driving conduct was not consistent with somebody who was a sober driver."

The officer testified that respondent became more reasonable when another officer arrived. Respondent spoke in a more moderate tone of voice, while still insisting that there was a misunderstanding regarding the tabs. The officer looked up the serial number of the tabs and discovered that they were registered to another car owned by respondent. The officer then placed respondent under arrest for attempt to evade motor vehicle tax. She handcuffed respondent, took him into custody, and drove him to the Minnetonka police station.

The officer testified that at that point, respondent was in custody only for attempt to evade motor vehicle tax. While respondent was in custody, the officer began another investigation for a potential DWI charge. No *Miranda* warning was given to respondent before this investigation began. The officer asked whether respondent had any physical limitations that may impair his performance of standard field sobriety tests. Respondent

replied that he had sciatic nerve problems. The officer commented that some people who have that condition take pain medication, and respondent replied that he takes Vicodin. The officer then asked: "Just Vicodin, right?" Respondent then stated that he also took Wellbutrin and sleeping pills for which he had valid prescriptions. The officer knew that it is illegal for a person to operate a motor vehicle with any amount of certain schedule II or III drugs in his or her body. The officer testified that she then had respondent perform physical SFSTs, including the walk and turn, and one-legged stand. Based on his performance of the SFSTs, the officer placed respondent under arrest for DWI. A drug recognition officer was called, and respondent was then read the implied consent advisory and informed of his *Miranda* rights. Respondent then invoked his right to remain silent. A blood test was administered pursuant to the implied consent law subsequent to the DWI arrest.

Appellant was charged with attempt to evade motor vehicle tax and DWI-drugs on July 28, 2009. A *Rasmussen* hearing was held on November 19, 2009. Prior to the hearing, respondent made a very broad and general motion to suppress any statements or other evidence as being obtained in violation of respondent's constitutional rights and for lack of probable cause. At the outset of the hearing, however, the prosecutor listed only three specific issues to be covered during the hearing: (1) whether there was a basis for the initial traffic stop; (2) whether there was probable cause to support the charge of "intent to escape tax"; and (3) whether the field sobriety tests should be suppressed because a *Miranda* warning did not precede them. Respondent's attorney agreed that those were the issues to be covered. The arresting officer testified about the entire traffic

stop and arrest, including what happened while at the police station, the tests, and the later DWI charge. A videotape documenting the events taking place at the police station while respondent was in custody was also entered into evidence.

The district court concluded that there was a reasonable and articulable suspicion for the traffic stop and that there was probable cause for the motor vehicle tax evasion charge. But the district court also concluded that the statements made about respondent's use of Vicodin and other drugs were obtained in violation of *Miranda* and required suppression. The district court also ordered suppression of the SFSTs regardless of whether they could be characterized as interrogation for *Miranda* purposes because "the content of the [suppressed] statements negate the legitimacy of the SFSTs as a valid or independent measure of potential impairment." Given respondent's admission to prescription drug use, the district court reasoned that no level of "good" performance on the SFSTs would dispel the officer's suspicion of impairment or violation of the "any amount" crime for which respondent was charged. The district court then determined that without the statements and performance on the SFSTs, there was not adequate probable cause to support respondent's arrest for DWI and the requirement that respondent submit to a blood test. The district court went on to state that even if the SFSTs were considered, they did not support probable cause because the officer did not have enough experience identifying impairment based on drug use, and the record did not explain how the performance on the tests, without the prior admission to drug use, would support probable cause for DWI. The district court also noted that the lengthy videotape of respondent while at the station showed respondent to be calm and compliant, further

dispelling any suspicion of DWI. The district court granted respondent's motion to suppress testimonial statements and evidence acquired as a direct result of the testimonial statements made while in custody without a Miranda warning. This appeal by the state follows.

D E C I S I O N

The state may appeal "from any pretrial order of the trial court, including probable cause dismissal orders based on questions of law." Minn. R. Crim. P. 28.04, subd. 1(1). To prevail, the state must clearly and unequivocally show that the district court "erred in its judgment and . . . the error will have a critical impact on the outcome of the trial." *State v. Hanson*, 583 N.W.2d 4, 5 (Minn. App. 1998), *review denied* (Minn. Oct. 29, 1998). Critical impact exists where the district court dismisses a complaint for lack of probable cause. *Id.* at 5-6.

I.

The state argues that the district court erred in suppressing the blood test results after finding a lack of probable cause to arrest for DWI because the issue of probable cause was waived by respondent, and that issue was not argued or briefed by the state.

A pretrial "motion shall include all defenses, objections, issues and requests then available to the moving party. Failure to include any of them in the motion constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver." Minn. R. Crim. P. 10.03. "This is necessary to give the state the opportunity to present evidence to refute [a defendant's] claims." *State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985). "In practice, the defense counsel at the

outset of an omnibus hearing often makes a rather general statement of the issues" in order to ensure that testimony may be focused on the contested issues. *State v. Needham*, 488 N.W.2d 294, 296 (Minn. 1992). This court has stated that "[w]e do not believe the supreme court intended to require a detailed defense omnibus hearing motion in all circumstances, nor to require a finding of waiver where no prejudice is shown." *State v. Balduc*, 514 N.W.2d 607, 609-10 (Minn. App. 1994). But issues first raised in a memorandum submitted after the omnibus hearing may be deemed waived. *See Brunes*, 373 N.W.2d at 386.

Here, the issue of probable cause to arrest for DWI was very generally raised in a boilerplate prehearing motion listing numerous objections to evidence obtained as a result of the stop. Respondent's motion demanded a hearing on the issue of probable cause and moved to dismiss the complaint "on the grounds that there does not exist probable cause to believe that [respondent] committed the offenses charge[d] in the Complaint." The probable cause issue was also raised more specifically in the defendant's post-hearing memorandum. But during the *Rasmussen* hearing, the issues were narrowed and made explicit. At the outset of the hearing, the state indicated that only three specific issues would be covered during the hearing: (1) the basis for the traffic stop; (2) probable cause for the motor vehicle tax charge; and (3) whether the SFSTs should be suppressed. Defense counsel agreed that these were the only issues to be argued. During the hearing, the state made objections to defense questions regarding probable cause which were sustained by the district court as irrelevant to the issues being discussed at the hearing. In fact, when the district court asked whether probable cause for the DWI arrest was being

contested, due to a line of questioning by defense counsel, the prosecutor stated that probable cause for DWI "was not articulated as an issue," and defense counsel agreed that the issues were earlier defined and did not include whether probable cause to arrest for DWI existed. Defense counsel also stated in response to an objection that the challenges to evidence were "stopping at the field sobriety tests."

We conclude that respondent waived the issue of whether probable cause existed for the DWI arrest. Respondent told the district court at the evidentiary hearing that probable cause was not contested; based on these statements, the state did not fully develop testimony relating to that issue. Because the issues were narrowed specifically to exclude probable cause, and the state was prejudiced by its inability to develop evidence on this issue, respondent was precluded from arguing before the district court that his arrest for DWI was not supported by probable cause. *See Brunes*, 373 N.W.2d at 386.

II.

The state also argues that the district court erred in suppressing the results of the SFSTs because the evidence was not testimonial in nature and was therefore unaffected by the lack of a *Miranda* warning. The state apparently does not contest the suppression of respondent's admission to drug use as obtained in violation of *Miranda*.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). But we accept the district court's findings of fact regarding

a motion to suppress unless they are clearly erroneous. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

A person subject to custodial interrogation is entitled to a *Miranda* warning "regardless of the nature or severity of the offense of which he is suspected or for which he was arrested." *Berkemer v. McCarty*, 468 U.S. 420, 434, 104 S. Ct. 3138, 3147 (1984); *State v. Breeden*, 374 N.W.2d 560, 562 (Minn. App. 1985). Whether a person is "in custody" for *Miranda* purposes is an objective inquiry. *State v. Hince*, 540 N.W.2d 820, 823 (Minn. 1995). The district court must decide whether a reasonable person in the suspect's situation would have understood that he was in custody. *Id.* Interrogation is described as actions or words on the part of police that are reasonably likely to elicit an incriminating response from the suspect. *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90 (1980). A *Miranda* warning is required when police officers elicit incriminating responses from a suspect. *State v. Tibiatowski*, 590 N.W.2d 305, 308 (Minn. 1999). But the gathering of real evidence does not violate a defendant's Fifth Amendment rights if such evidence is not testimonial or communicative in nature. *Breeden*, 374 N.W.2d at 562 (citing *Schmerber v. California*, 384 U.S. 757, 761, 86 S. Ct. 1826, 1830 (1966)). Minnesota courts have not directly addressed whether demanding performance of SFSTs without a *Miranda* warning after a person is in custody is considered a *Miranda* violation. *See, e.g., State v. Mellett*, 642 N.W.2d 779, 787-88 (Minn. App. 2002) (avoiding issue by finding that suspect was not in custody when tests administered).

Here, respondent was in custody. He was inside the police station and under arrest for the motor vehicle tax charge when he performed the SFSTs. But his performance of the tests without a prophylactic warning does not violate *Miranda* because his performance on the tests was not testimonial in nature. *See Breeden*, 374 N.W.2d at 562 (holding that the district court erred in suppressing a videotape of a suspect performing field sobriety tests because "[t]he gathering of real evidence such as blood samples, fingerprints, or photographs does not violate a defendant's fifth amendment rights"). Because the tests are not considered interrogation and produce physical rather than testimonial responses, a *Miranda* warning was not necessary to allow admission of the evidence.

The district court also gave an alternative ground to suppress the SFSTs. The district court stated that "the content of the [suppressed] statements negate the legitimacy of the SFSTs as a valid or independent measure of potential impairment." Given respondent's admitted drug use, the district court reasoned that "it is hard to imagine what level of 'good' performance on the field sobriety tests could possibly 'dispel' [the officer's] suspicion of impairment or violation of the 'any amount' crime for which [respondent] was charged." The district court determined that the SFSTs were "not valid and cannot be used to support probable cause for [respondent's] arrest."

But this ground for suppression was not raised during the hearing. No evidence was presented with respect to how any statement made, might have called the results of the SFSTs into question. Thus, the record does not contain facts to support the district court's assertion that the SFSTs are invalid evidence of impairment.

Evidence obtained by exploiting statements obtained in violation of *Miranda* must also be suppressed as fruit of the poisonous tree unless the evidence was obtained by a sufficiently distinguishable means so that the primary taint of the illegality has been purged. *See State v. Dakota*, 300 Minn. 12, 15, 217 N.W.2d 748, 751 (1974); *State v. Hendrickson*, 584 N.W.2d 774, 779 (Minn. App. 1998). Here, the district court's reasoning could be interpreted as suppressing the SFSTs as fruit of the poisonous tree. But the officer had already decided to administer the SFSTs before the suppressed statements were made. Thus, respondent would have performed the SFSTs regardless of the statements. The test results were therefore obtained by a means sufficiently distinguishable from the statements. The weight to be given to the SFSTs is a question better left to the jury. *See Breeden*, 374 N.W.2d at 562 (stating that the district court erred in suppressing a video of a suspect who claimed to have a balance problem performing sobriety tests on the ground that the video was unfairly prejudicial because "the jury is capable of viewing the real evidence of intoxication together with any proof of a balance problem and reaching their own conclusion as to the facts"). Furthermore, an officer may use her objective observations and experience to determine whether probable cause to arrest exists based on the totality of circumstances. *Reeves v. Comm'r of Pub. Safety*, 751 N.W.2d 117, 120-21 (Minn. App. 2008). Therefore, the district court erred in suppressing the SFSTs.

Reversed.