STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1784

State of Minnesota,
Respondent,

vs.

Brian Noel Hester,
Appellant.

Filed August 3, 2010
Affirmed
Lansing, Judge

Redwood County District Court
File No. 64-CR-08-829

Lori Swanson, Attorney General, Emerald Gratz, Assistant Attorney General, St. Paul, Minnesota; and

Patrick R. Rohland, Redwood County Attorney, Redwood Falls, Minnesota (for respondent)

Allen P. Eskens, Eskens, Gibson & Behm Law Firm, Chtd., Mankato, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Lansing, Judge; and Shumaker, Judge.

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

LANSING, Judge

A jury found Brian Hester guilty of test refusal under the Minnesota Impaired Driving Code, Minn. Stat. §§ 169A.01-.78 (2008). Following conviction he moved for a new trial on the grounds that the arresting peace officer from the Lower Sioux Indian Community Police Department lacked the authority to administer a preliminary breath test or request additional chemical testing. Because the Lower Sioux Indian Community substantially complied with the statutory requirements to appoint peace officers and the appointed peace officers are authorized to enforce the impaired-driving code's testing requirements, the district court did not abuse its discretion by denying Hester's motion for a new trial.

F A C T S

Brian Hester drove his truck into a ditch near Jackpot Junction Casino in December 2008. A peace officer of the Lower Sioux Indian Community Police Department responded to a motorist-assistance call and, following a brief investigation, administered a preliminary breath test. The results indicated that Hester's blood alcohol content was .13. The officer took Hester to the Redwood County Law Enforcement Center and administered three field sobriety tests. Based on Hester's performance, the officer read Hester the implied-consent advisory and asked Hester to take a urine or blood test. Hester refused and was charged with felony driving while impaired (DWI) and felony test refusal.

The felony test-refusal charge proceeded to a jury trial. Hester did not challenge the arresting officer's qualifications as a peace officer before or during trial. But two weeks after the jury returned its guilty verdict, Hester moved to vacate the judgment or for a new trial, arguing that the Lower Sioux peace officers were not authorized to administer a preliminary breath test or invoke the implied-consent advisory.

Hester submitted additional argument in support of his motion, and the state submitted argument and evidence in opposition. Hester's challenge was two-fold. First, Hester argued that Lower Sioux peace officers were not authorized by the DWI code to administer a preliminary breath test or request the additional chemical test. Second, he claimed that even if the DWI code could include Lower Sioux peace officers, the Lower Sioux Indian Community failed to comply with the statutory requirements to qualify as a law-enforcement agency and therefore lacked authority to appoint peace officers.

The district court noted that the Lower Sioux Indian Community did not strictly comply with all of the statutory requirements to appoint peace officers, but it concluded that the Lower Sioux Indian Community substantially complied with the requirements. The district court denied Hester's new-trial motion, reasoning that the Minnesota statutes granted the Lower Sioux peace officers the same powers as the Redwood County Sheriff's Department and that these powers include enforcing the DWI statutes.

Hester appeals, renewing his statutory claims and arguing that the district court erred in applying the doctrine of substantial compliance to the statutes governing the Lower Sioux Indian Community's authority to appoint peace officers. The state argues that Hester waived his challenges to the Lower Sioux peace officers' authority by not

raising the issue before trial and that the district court did not abuse its discretion by denying Hester's new-trial motion.

D E C I S I O N

I

The state argues that Hester's posttrial challenge to the authority of the Lower Sioux peace officers was waived by his failure to raise the issue before trial. At the time Hester was charged and tried, rule 10.01 of the Minnesota Rules of Criminal Procedure stated that "[d]efenses, objections, issues, or requests which are capable of determination without trial on the merits shall be asserted or made before trial by a motion to dismiss or to grant appropriate relief." Minn. R. Crim. P. 10.01 (2008). Rule 10.03 provided that "[f]ailure to include [all defenses, objections, issues and requests available before trial] in the motion constitutes waiver thereof, but the court for good cause shown may grant relief from the waiver." Minn. R. Crim. P. 10.03 (2008).

In his posttrial motion, Hester did not provide a reason for his failure to raise his claims before trial. Hester's challenge is directed to the validity of the arrest and complaint, which would be best addressed before, rather than after, a jury trial in which the state successfully proved that the test-administering officer was a peace officer, that the officer had probable cause to believe Hester was driving his truck while impaired, and that Hester refused to submit to a chemical test after being advised of his rights under Minn. Stat. § 169A.20, subd. 2 (defining driving while impaired, test refusal) and § .51, subd. 2 (governing chemical tests for intoxication) (2008).

But the state also failed to raise its waiver argument when Hester made his posttrial motion and therefore the state did not properly preserve the issue for appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that appellate courts will not consider issues or theories that were not presented to and decided by district court). Because the district court did not consider the state's waiver claim and the case raises fundamental questions related to the Lower Sioux Indian Community Police Department's authority, we will review the merits of Hester's challenges in the interest of justice. *See* Minn. R. Crim. P. 28.02, subd. 11 (stating that appellate courts may review issues in "interests of justice").

II

Hester appealed from the district court's denial of his motion for a new trial. This form of relief, however, does not readily fit Hester's claims. Hester is arguing that the charge is invalid because he did not refuse a test administered by a *peace officer*. This is not a trial error, and a new trial would not provide a remedy. Consequently, we review Hester's challenge as an appeal from his judgment of conviction that essentially raises an issue of statutory interpretation. Minn. R. Crim. P. 28.02, subd. 3 (allowing review of orders in interests of justice).

Statutory interpretation is a question of law that we review de novo. *Reider v. Anoka-Hennepin Sch. Dist. No. 11*, 728 N.W.2d 246, 249 (Minn. 2007). If the language of the statute is unambiguous, we apply its plain meaning. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). We must consider sections of a statute

together to determine meaning. *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 339 (Minn. 1984).

The DWI test-refusal statute requires that a defendant's refusal must be in response to the testing request of a peace officer. Minn. Stat. §§ 169A.20, subd. 2, .51, subd. 1 (2008); 10A *Minnesota Practice*, CRIMJIG 29.28 (2006). If the test-administering officer was not a peace officer for the purposes of the DWI-testing statutes, Hester's refusal would not constitute a crime.

Hester argues first, that the Lower Sioux peace officers cannot enforce the DWI-testing laws because they are not included in the statutory definition of a "peace officer" in the DWI chapter. Minn. Stat. § 169A.03, subd. 1 (2008), states that "unless the context clearly indicates otherwise, the terms defined in this section have the meanings given." The term "peace officer" means "(1) a [s]tate [p]atrol officer; (2) University of Minnesota peace officer; (3) police officer of any municipality, including towns having powers under section 368.01, or county; and (4) for purposes of violations of this chapter in or on an off-road recreational vehicle or motorboat, or for violations of section 97B.065 or 97B.066, a state conservation officer." Minn. Stat. § 169A.03, subd. 18 (2008).

To make his argument, Hester relies heavily on *State Dep't of Highways v. O'Connor*, which held that a police officer of Eagan Township was not a peace officer as defined in the DWI chapter because the term "municipality" excludes townships in other statutes and in its general usage. 289 Minn. 243, 245-46, 183 N.W.2d 574, 576 (1971). Hester contends that the decision in *O'Connor* means that the list of individuals

considered peace officers in the DWI statute is exclusive. But the *O'Connor* court did not decide this question and Hester's interpretation ignores significant changes in the statutes since *O'Connor* was decided.

A definition of "peace officer" has been added to the chapter covering training and licensing of law-enforcement officials that specifically includes "a peace officer who is employed by a law enforcement agency of a federally recognized tribe . . . and who is licensed by the [Board of Peace Officer Standards and Training]." Minn. Stat. § 626.84, subd. 1(c)(2) (2008). The Minnesota legislature has also adopted provisions which allow federally recognized tribes to appoint peace officers and enforce state criminal laws within the boundaries of its reservation. *See, e.g.*, Minn. Stat. §§ 626.90 (granting peace officers of Mille Lacs Band of Chippewa Indians "same powers" as local law enforcement units in Mille Lacs county), .93 (granting peace officers of any federally recognized tribe power to enforce state criminal law) (2008). The legislature specifically provided that if the Lower Sioux Indian Community meets certain requirements, it "is authorized to appoint peace officers, as defined in section 626.84, subdivision 1, paragraph (c), who have the same powers as peace officers employed by the Redwood County [S]heriff," within the boundaries of the Lower Sioux Indian Community's land. Minn. Stat. § 626.91, subd. 4 (2008).

Interpreting the definition of "peace officer" in the DWI statutes to provide an exclusive list of individuals authorized to enforce DWI-testing laws would mean that no tribal peace officer could arrest people for DWI offenses on their lands. This interpretation would also conflict with the statutory language that grants tribal peace

officers the "same powers" as local law enforcement officers or the power "to enforce state criminal law" and would ignore other provisions defining peace officers. As the district court noted, the "purpose of giving officers of the Lower Sioux 'the same powers' as [the Redwood County Sheriff] deputies is to include officers of the Lower Sioux Indian Community by reference, without amending every statute that discusses peace officers." Consequently, we do not construe the definition in section 169A.03 to exclude all tribal peace officers. *See* Minn. Stat. §§ 645.16(5) (intention of legislature may be ascertained by considering laws upon same or similar subjects), .17(1), (2) (legislature does not intend absurd or unreasonable results and intends entire statute to be effective and certain) (2008).

Hester's second argument is that the Lower Sioux Indian Community did not comply with the statutory requirements to become a law-enforcement agency and therefore even if Lower Sioux peace officers could theoretically enforce the DWI-testing laws, the Lower Sioux Indian Community is not authorized to appoint these officers. Minn. Stat. § 626.91, subd. 2 (2008), states that the Lower Sioux Indian Community "has the powers of a law enforcement agency . . . if all of the requirements of clauses (1) to (4) are met." The requirements include waiving sovereign immunity in tort claims; agreeing to specified data-practices provisions; filing with the Board of Peace Officer Standards and Training (POST) a certificate of insurance for liability of officers, employees, and agents; and filing with POST a bond or certificate of liability insurance with the maximum single occurrence amount of $1,200,000 for the period between January 2008 and January 2009 and an annual cap for all occurrences of $3,600,000 for the same

period. Minn. Stat. § 626.91, subd. 2(a)(1)-(4) (referring to Minn. Stat. § 466.04, subd. 1 (2008), for insurance amounts). The statute also states that the Lower Sioux Indian Community shall enter a mutual-aid-and-cooperation agreement with the Redwood County Sheriff. *Id.*, subd. 2(b).

The only issue on appeal is compliance with the certificate-of-insurance requirements. The state provided proof that the Lower Sioux Indian Community filed with POST a certificate of insurance coverage for August 1997-August 1998, covering the period when it became a law-enforcement agency. It also provided proof that the Lower Sioux Indian Community had insurance coverage of $3,000,000 for a single occurrence and an annual cap of $3,000,000 for February 2008-February 2009, the period in which Hester's arrest took place. The state submitted a June 2009 e-mail from the standards coordinator at POST, confirming that the Lower Sioux Indian Community Police Department "is a recognized law enforcement agency, employing duly licensed peace officers under the authority of [POST]."

The district court noted the letter from POST and concluded that the Lower Sioux Indian Community substantially complied with the statutory requirements. Hester argues on appeal that strict compliance with section 626.91, subdivision 2, is required and that the Lower Sioux Indian Community's failure to update its liability-coverage filing with POST and the inadequate amount of total annual insurance coverage preclude it from appointing peace officers.

The doctrine of substantial compliance takes into account that "[t]echnical defects in compliance which do not reflect bad faith, undermine the purpose of the procedures, or

prejudice the rights of those intended to be protected by the procedures will not suffice to overturn governmental action." *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 391 (Minn. 1980). We conclude that the district court was correct in applying this doctrine.

Foremost, the record indicates that the Lower Sioux Indian Community attempted to comply with the statutory requirements in good faith. It maintained its liability insurance coverage and increased its limits over the years. And POST recognized the Lower Sioux Indian Community's agreement to meet the statutory requirements. The Lower Sioux Indian Community had liability insurance at the time Hester was arrested for more than double the maximum amount that could be recovered by claimants involved in any single incident with the Lower Sioux Indian Community Police Department. The purpose of ensuring that the Lower Sioux Indian Community Police Department can be held accountable for its actions is met. And prejudice to some individuals intended to be protected by this requirement would only occur in the unlikely event of three incidents in one year in which the Lower Sioux Indian Community Police Department was liable for over $1,000,000 in each incident. Also, the Lower Sioux Indian Community has maintained a police department recognized by POST, the Redwood County Sheriff, the county attorney, and the courts for more than ten years. We hesitate to call into question the authority of this department based on this shortcoming. *See generally id.* (stating that court would be less reluctant to demand more stringent compliance with statute if less time had passed before challenge was raised).

The statute's requirements create many ways the Lower Sioux Indian Community, and other Indian communities that have met these requirements and entered agreements

with local law enforcement agencies, could inadvertently fall out of compliance. A mutual-aid-and-cooperation agreement might expire without either side realizing it; a problem could arise with the insuring company that is not recognized immediately by POST or the tribe; or a change in insurers might not be immediately conveyed to POST. Requiring strict compliance with the statute would mean that the Lower Sioux Indian Community, and other Indian communities, could lose their authority to enforce criminal laws and protect peace and safety on their lands based on technicalities that could occur at any time and with little notice.

It is also significant that the legislature explicitly included roles for POST and the Redwood County Sheriff to administer the statutory requirements and deference is required as a result. POST is responsible for receiving verification of liability coverage and verification of the amount of coverage or receiving a bond instead. Minn. Stat. § 626.91, subd. 2(a)(2), (3). The Redwood County Sheriff is responsible for negotiating a mutual-aid-and-cooperation agreement with the Lower Sioux Indian Community, which includes agreements on data practices and waiving sovereign immunity as required by the statute. Minn. Stat. § 626.91, subd. 2(a)(1), (a)(4), (b). POST must also license the Lower Sioux peace officers if they provide services off their land under the mutual-aid-and-cooperation agreement with the county sheriff. Minn. Stat. § 471.59, subd. 12 (2008).

By delegating these responsibilities, the legislature indicated its intent to set the standards for what is required but to allow agencies with expertise to administer these requirements. POST recognizes the Lower Sioux Indian Community Police Department

as a law-enforcement agency with licensed peace officers. In doing so, it has interpreted the statute's filing requirements and decided that they have been adequately met. If the court decided strict compliance with the statute were required, the agencies to which the legislature delegated responsibility would not have room to act. *See generally* Minn. Stat. § 645.16(8) (stating that administrative interpretations of statute can be used to ascertain legislative intent); *Brayton v. Pawlenty*, 781 N.W.2d 357, 366 n.4 (Minn. 2010) (stating that deference to administrative interpretation may be appropriate when agency's expertise is implicated and agency's interpretation is long-standing, and citing *Resident v. Noot*, 305 N.W.2d 311, 312 (Minn. 1981)).

We conclude that strict compliance with section 626.91, subdivision 2 is not required and that the district court was correct in determining that the Lower Sioux Indian Community substantially complied with the statutory requirements to appoint peace officers. Thus, the test-administering officer had the "same powers" as peace officers from the Redwood County Sheriff's Department on Lower Sioux Indian Community land, and, he was therefore authorized to administer the preliminary breath test and invoke the implied-consent advisory.

Affirmed.