STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1177

State of Minnesota,
Respondent,

vs.

Rogelio Santillana, Jr.,
Appellant.

Filed June 2, 2014
Affirmed
Johnson, Judge
Concurring specially, Randall, Judge*

McLeod County District Court
File No. 43-CR-12-1758

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

Michael K. Junge, McLeod County Attorney, Elizabeth Rae Smith, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leslie J. Rosenberg, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Johnson, Judge; and Randall, Judge.

*Retired judge of the Minnesota Court of Appeals, serving 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

JOHNSON, Judge

Rogelio Santillana, Jr., was convicted of refusal to submit to a chemical test after he was arrested for driving while impaired (DWI). We conclude that the district court did not err by denying Santillana's pre-trial motions. We also conclude that Santillana has not demonstrated that the test-refusal statute is unconstitutional. Therefore, we affirm.

FACTS

On the afternoon of November 2, 2012, Trooper Shawn Matthews was on duty in McLeod County near U.S. Highway 212. He observed a vehicle traveling faster than the speed limit and initiated a traffic stop. After Trooper Matthews approached the car, he detected that the driver, Santillana, had bloodshot eyes, that there was "an overwhelming smell of cologne coming from inside the vehicle," and that a case of beer was in the backseat of the car. Trooper Matthews returned to his squad car to check Santillana's driving status and discovered that he had a "no-use of alcohol restriction."

Trooper Matthews returned to Santillana's vehicle and asked him to take a preliminary breath test (PBT), which indicated an alcohol concentration of .076. When Trooper Matthews administered field sobriety tests, Santillana failed the horizontal-gaze-nystagmus (HGN) test but passed the one-legged-stand test and the walk-and-turn test. Trooper Matthews then administered a second PBT, which indicated an alcohol concentration of .104. Trooper Matthews arrested Santillana and transported him to the McLeod County Jail. Trooper Matthews read Santillana the implied-consent advisory.

After attempting unsuccessfully to contact an attorney, Santillana refused to submit to a chemical test.

The state charged Santillana with one count of refusal to submit to a chemical test, in violation of Minn. Stat. § 169A.24 (2012). In January 2013, the district court conducted an omnibus hearing. In February 2013, Santillana submitted a memorandum to the district court in which he sought to suppress evidence gathered during the stop, to challenge the trooper's determination of probable cause, and to dismiss the complaint. The district court denied the motion. In March 2013, the district court held a court trial and found Santillana guilty. The district court stayed execution of a 48-month prison sentence for seven years and placed Santillana on probation. Santillana appeals.

D E C I S I O N

I.

Santillana first argues that the district court erred by denying his pre-trial motion. Santillana's brief concisely states his argument as follows:

> Before requiring a driver to submit to chemical testing even after stopping the driver for speeding, an officer must have reason to believe the driver is intoxicated. Here, it is undisputed that the officer merely noticed that [Santillana's] eyes were red, the car smelled of cologne and there was a package of beer cans and appellant had a history of intoxication. Under these circumstances, the officer had no basis to believe appellant was driving drunk.

Santillana does not elaborate on this argument other than to attach a copy of the memorandum that he submitted to the district court. *Cf.* Minn. R. Civ. App. P. 128.01, subd. 2 (permitting appellate counsel "to rely upon memoranda submitted to the trial

court supplemented by a short letter argument"). In the district court, Santillana argued that Trooper Matthews did not have a reasonable belief that he was intoxicated before administering the first PBT, did not have a reasonable belief that he was intoxicated before administering the second PBT, and did not have probable cause to arrest him for DWI.

Santillana's arguments are without merit. Trooper Matthews had the requisite reasonable belief to administer both the first PBT and the second PBT. An officer may administer a PBT if he has "reason to believe" a driver is intoxicated. Minn. Stat. § 169A.41, subd 1 (2012). An officer has such a belief if he identifies "specific and articulable facts as a basis to believe that [a person] had been driving . . . while under the influence of an intoxicating beverage." *State, Dept. of Pub. Safety v. Juncewski*, 308 N.W.2d 316, 321 (Minn. 1981). Trooper Matthews had the requisite reasonable belief to administer the first PBT because of Santillana's bloodshot eyes, which indicated that he was intoxicated; the intense odor of cologne, which indicated that Santillana was attempting to mask an odor; the case of beer in Santillana's back seat; and the no-alcohol-use restriction on Santillana's driver's license. Trooper Matthews had the requisite reasonable belief to administer the second PBT for all of the above-stated reasons as well as the fact that Santillana's first PBT result was close to the prohibited level of .08 and the fact that Santillana failed a field sobriety test.

Trooper Matthews also had probable cause to arrest Santillana for DWI. "[T]he probable cause standard asks whether the totality of the facts and circumstances known would lead a reasonable officer to entertain an honest and strong suspicion that the

suspect has committed a crime." *State v. Koppi*, 798 N.W.2d 358, 363 (Minn. 2011) (quotation omitted). For all the aforementioned reasons as well as the result of the second PBT, which indicated an alcohol concentration above the prohibited level, the facts and circumstances known to Trooper Matthews were sufficient to allow him to believe that Santillana had committed the offense of DWI.

Thus, the district court did not err by denying Santillana's pre-trial motion.

II.

Santillana also argues that the statute criminalizing refusal to submit to a chemical test, section 169A.20, subdivision 2, of the Minnesota Statutes, violates his constitutional right to due process.

The courts presume that a statute is constitutional. *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997). The "power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary." *Id.* (quotation omitted). A party challenging the constitutionality of a statute bears a "very heavy burden" on appeal and must demonstrate that the statute is unconstitutional beyond a reasonable doubt. *State v. Johnson*, 813 N.W.2d 1, 11 (Minn. 2012) (quotation omitted). This court applies a *de novo* standard of review to a district court's ruling on the constitutionality of a statute. *Id.* at 4.

The basis and rationale of Santillana's due-process argument is unclear. He acknowledges that his argument is contrary to this court's decision in *State v. Wiseman*, 816 N.W.2d 689 (Minn. App. 2012), *review denied* (Minn. Sept. 25, 2012), *cert. denied*, 133. S. Ct. 1585 (2013). But he contends that *Wiseman* was overruled by the United

States Supreme Court in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). He describes the *McNeely* opinion as holding that "the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." He does not explain how *McNeely*, a Fourth Amendment case, overrules *Wiseman*, a substantive due process case. He also does not explain why the district court should have found a Fourth Amendment violation despite the fact that Trooper Matthews never conducted a search.

In *Wiseman*, this court held that the test-refusal statute does not violate a criminal defendant's right to substantive due process. 816 N.W.2d at 696. We recently held that *Wiseman* was not overruled by *McNeely*. *State v. Bernard*, 844 N.W.2d 41, 45 (Minn. App. 2014), *review granted* (Minn. May 20, 2014). Both *Wiseman* and *Bernard* are published opinions and, thus, precedential. It is axiomatic that we are bound by our precedential opinions. *See, e.g.*, *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010).

Thus, Santillana has not satisfied the "very heavy burden" of demonstrating that the test-refusal statute is unconstitutional. *See Johnson*, 813 N.W.2d at 11 (quotation omitted).

Affirmed.

RANDALL, Judge (concurring specially)

I concur in the result.