STATE OF MINNESOTA | DISTRICT COURT
CIVIL DIVISION
COUNTY OF RICE | THIRD JUDICIAL DISTRICT

[redacted] Scott [redacted]
Petitioner,

v.

Commissioner of Public Safety,
Respondent.

Court File [redacted]

IMPLIED CONSENT ORDER

The above-entitled matter came before the undersigned Judge of District Court for an Implied Consent Hearing on January 28, 2016. Petitioner was represented by Attorney Alex DeMarco. Respondent was represented by Assistant Attorney General Amy Tripp-Steiner.

At the hearing, Respondent called one witness, Deputy Jason [redacted] In addition, Respondent offered two exhibits which were received into evidence: (1) the completed implied consent advisory, and (2) a video of the implied consent advisory being read to Mr. [redacted] also offered two exhibits which were received into evidence: (1) video footage from Deputy Witt's squad car of the arrest, and (2) a facsimile from Attorney DeMarco to Deputy [redacted] from the morning of September 12, 2015. The court took the matter under advisement on March 3, 2016.

Based on the files and record herein the Court now makes the following:

ORDER

1. The Petitioner's request to reinstate his driving privileges is hereby GRANTED.

2. The attached Memorandum is incorporated herein.

BY THE COURT:

_____
Christine A. Long
Judge of District Court

MEMORANDUM

Facts

On September 12, 2015, Rice County Sheriff's Deputy Jason [redacted] was on patrol when he saw a pickup truck driving in front of him that was hugging the center line. As he continued to follow the truck it appeared to cross the center line on more than one occasion. Deputy [redacted] also heard the truck hit the rumble strips located in the middle of the road, indicating the driver was driving over the center line. He initiated a traffic stop of the vehicle.

The driver of the vehicle was determined to be the Petitioner, [redacted] Scott [redacted] Mr. [redacted] indicated he knew why he had been stopped and explained there was a female in the vehicle that was being a "smart ass" which caused his driving to be erratic. At that time, Deputy [redacted] smelled alcohol coming from the vehicle and observed Mr. [redacted] had bloodshot watery eyes. The other passengers in the car indicated they had been drinking, but Mr. [redacted] reported he had not. Deputy [redacted] requested Mr. [redacted] exit the vehicle. Mr. [redacted] initially refused, but complied once Deputy [redacted] opened his door. Deputy [redacted] then attempted to conduct field sobriety tests and asked Mr. [redacted] to stand on the beam of his flashlight, which Mr. [redacted] refused to do. At this time, Deputy [redacted] was able to smell alcohol coming from Mr. [redacted] alone. Mr. [redacted] indicated he would not do any field sobriety tests, so Deputy [redacted] did not pursue any further testing. Based on the indicia of impairment he observed, Deputy [redacted] placed Mr. [redacted] under arrest for driving while impaired.

Mr. [redacted] was transported to the Rice County Law Enforcement Center and the Minnesota Implied Consent Advisory was read to him. Deputy [redacted] offered Mr. [redacted] a blood or urine test, and Mr. [redacted] responded that he was not refusing a test, and would take either test once the officer obtained a warrant. Deputy [redacted] stepped out of the room and had a conversation with an investigator, after which he believed he did not need to obtain a warrant. Deputy [redacted] again offered Mr. [redacted] a blood or urine test, and Mr. [redacted] reiterated he would take either test with a warrant. Deputy [redacted] deemed this answer to be a conduct-based refusal, and Mr. [redacted] license was subsequently revoked pursuant to Minn. Stat. 169A.52, subd. 3(1) for refusing to take a test.

Issues

Petitioner raised the following issues: (1) whether there was a reasonable articulable suspicion to stop his vehicle; (2) Whether there was a reasonable articulable suspicion to support the expansion of the stop; (3) whether there was probable cause for his arrest; and (4) whether he was subjected to an unreasonable warrantless search.

Analysis

I. There Was Reasonable Articulable Suspicion For The Traffic Stop

A traffic stop must be based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrants" the stop. *State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). This standard is less than probable cause. *State v. Wagner*, 637 N.W.2d 330, 335 (Minn. App. 2001). Ordinarily, if an officer observes a violation of a traffic law, however insignificant, the officer has an objective basis for stopping the vehicle. *State v. George*, 557 N.W.2d 575, 578 (Minn. 1997).

Pursuant to Minn. Stat. § 169.18, subd. 1, vehicles are required to drive upon the right half of the roadway. Pursuant to Minn. Stat. § 169.18, subd. 7(a), vehicles are to be driven as nearly as practicable entirely within a single lane. Additionally, in *State v. Wagner*, the Minnesota Court of Appeals stated, "When there is credible testimony that the driver actually crossed the center line, this court and the Supreme Court have uniformly found investigatory stops valid. . . Crossing the center line is a violation of the traffic laws and will usually provide the officer with an objective, reasonable suspicion to conduct an investigatory stop. *Wagner*, 637 N.W.2d at 335-36.

In this case, Deputy [redacted] observed Mr. [redacted] hit the rumble strips and also cross the center line of the highway, in violation of Minnesota traffic law § 169.18, subd. 1. Because a violation of a traffic law, however insignificant, is an objective basis for stopping a vehicle, Deputy Witt's stop was justified by his observations of Mr. [redacted] crossing the center line. Deputy [redacted] formed a reasonable articulable suspicion Mr. [redacted] had committed a traffic violation, creating a valid basis to conduct a traffic stop.

II. There Was Reasonable Articulable Suspicion To Expand The Stop

The parties next raise whether Deputy [redacted] had a reasonable suspicion to expand the scope of the stop to investigate whether Mr. [redacted] was driving while impaired. Fourth Amendment jurisprudence requires the scope of a stop to be strictly tied to and justified by the circumstances that rendered the initiation of stop. *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002). A valid stop may become invalid if it expands beyond the circumstances that justified the initial stop. *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004). Expansion of the scope of the stop to include investigation of other suspected illegal activity is permissible under the Fourth Amendment only if the officer has reasonable, articulable suspicion of such other illegal activity. *Wiegand*, 645 N.W.2d at 135. Thus, the legal test for continuing the stop is the same as that for the initial stop—it requires only reasonable suspicion of criminal activity. *State. v. Lopez*, 631

N.W.2d 810, 814 (Minn. App. 2001). The odor of alcohol may provide reasonable suspicion of criminal activity to justify expanding the scope of a traffic stop. *Id.*

In this case, upon approaching the truck, Deputy [redacted] testified he detected an odor of alcohol in the vehicle and observed Mr. [redacted] had bloodshot watery eyes. Deputy [redacted] had also stopped the vehicle due to its abnormal driving conduct, including hugging and crossing the center line on more than one occasion. Given Mr. [redacted] driving conduct, his physical appearance, and the odor of alcohol in the truck, Deputy [redacted] had a reasonable articulable suspicion that Mr. [redacted] was under the influence. This justified expansion of the stop into an investigation of whether Mr. [redacted] was driving while impaired.

III. There Was Probable Cause to Arrest Mr. [redacted]

Next, Petitioner alleges Deputy [redacted] did not have probable cause to arrest him for driving while impaired. An arrest for driving while impaired requires probable cause to believe the defendant was driving, operating, or in actual physical control of a motor vehicle while under the influence of alcohol. *State v. Olson*, 342 N.W.2d 638, 640 (Minn. App. 1984). Probable cause exists when "the objective facts are such that under the circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Wynne*, 552 N.W.2d 218, 221 (Minn. 1996). An officer only needs one indicator of impairment to establish probable cause that the person arrested is under the influence. *State v. Carver,* 577 N.W.2d 245, 248 (Minn. App. 1998). Common indicia of intoxication include an odor of alcohol, bloodshot and watery eyes, slurred speech, and an uncooperative attitude. *State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004). Each case must be decided by its own facts and circumstances without consideration of any formula for reasonableness. *Olson,* 342 N.W.2d at 640.

In this case, Deputy [redacted] had probable cause to arrest Mr. [redacted] Deputy [redacted] observed the vehicle driven by Mr. [redacted] hugging the center line of the highway, and at times crossing it, while alternatingly coming into contact with the rumble strip. Once Deputy [redacted] stopped the vehicle, he observed Mr. [redacted] had bloodshot, watery eyes and smelled an odor of alcohol coming from his vehicle. Officer [redacted] could still smell alcohol coming from Mr. [redacted] once he was out of the vehicle and away from the other passengers. Finally, Mr. [redacted] displayed an uncooperative attitude, refusing to get out of the vehicle, and then further refusing to follow any of the officer's requests to take any field sobriety tests. Based on these observations, a person of ordinary care and prudence would entertain an honest and strong suspicion that the crime of driving while impaired had been committed, and Deputy [redacted] had ample probable cause to arrest Mr. [redacted]

IV. Mr. [redacted] Did Not Refuse A Test Under The Implied Consent Statute

Finally, Petitioner argues Mr. [redacted] was subjected to an unreasonable warrantless search. Contained within this argument the court finds Petitioner's more persuasive assertion: Mr. [redacted] did not refuse to take a blood or urine test because he stated he would take a test once a warrant was obtained. In response to this argument, Respondent asserts that although Mr. [redacted] did not verbally refuse, his conduct in requesting a warrant amounted to a conduct-based refusal.

When determining whether an individual has refused a test for purposes of Minnesota's implied consent law, actual unwillingness to submit to a test must be proven. *State v. Ferrier*, 792 N.W.2d 98, 101 (Minn. App. 2010). Refusal to submit to chemical testing includes any indication of actual unwillingness to participate in the testing process, as determined from the driver's words and actions in light of the totality of the circumstances. *Id.* A driver may refuse to submit to chemical testing by words or conduct. *Id*.

In this case, Respondent asserts Mr. [redacted] refused the test based on his conduct. Minnesota courts have recognized refusal by conduct in situations where an individual indicated they would consent to a test, but then purposefully failed to produce a sample, or interfered with the taking of the sample. *See Stevens v. Commissioner of Public Safety*, 850 N.W.2d 717 (Minn. App. 2014) (driver refused testing when, after agreeing to take a test, driver failed to actually provide a urine sample when officer gave the driver three opportunities to produce the sample over nearly two hours and arresting officer did not believe the driver was making a good faith effort to provide a sample); *State v. Ferrier*, 792 N.W.2d 98 (Minn. App. 2010) (defendant's failure to produce urine sample constituted refusal to submit to implied-consent testing where defendant elected urine test but did not provide sample, police officer then provided defendant between 6 and 15 glasses of water and permitted her three opportunities to urinate over course of more than one hour, and defendant never indicated she was incapable of urinating or requested an alternative test); *Fisher v. Commissioner of Public Safety*, 389 N.W.2d 771 (Minn. App. 1986) (driver refused testing where the nurse was unable to obtain a blood sample from him on her first attempt and he declined to allow her to try the other arm); *Sigfrinius v. Commissioner of Public Safety*, 378 N.W.2d 124 (Minn. App. 1985) (driver refused to provide an adequate breath sample by keeping a breath mint in his mouth after being previously warned that if he smoked or put anything in his mouth his actions would be considered to be a refusal).

However, this case is factually different from the Minnesota court cases which have recognized conduct-based refusals. Mr. [redacted] did not consent to a test and then fail to provide an actual sample or fail to cooperate with the taking of the sample. Instead, when asked if he would take a test, he repeatedly asserted that he was not refusing and consistently maintained he would take a test if Deputy [redacted] obtained a warrant. Nothing in Mr. [redacted] words or conduct would indicate he did not actually intend to comply with a test if a warrant was obtained. In

other words, the facts before the court do not demonstrate an indication of actual unwillingness to participate in the testing process. Based on the facts before the court, the only impediment to Deputy [redacted] obtaining a blood or urine test from Mr. [redacted] was the failure to obtain a warrant.

Respondent goes on to argue that Deputy [redacted] could not have obtained a warrant per Mr. [redacted] request because this would be "compelling" a test of Mr. [redacted] blood or urine in violation of § 169A.52, subd. 1 of the implied consent statute. However Respondent misconstrues the facts in this case. Minn. Stat. § 169A.52, subd. 1 states, "If a person refuses to permit a test, then a test must not be given." This portion of the implied consent statute protects an individual who has refused a test from having a sample forcibly taken from him or her. Even if a warrant is subsequently obtained, once an individual has refused, a sample of his blood or urine cannot be taken. *See Montonye v. Commissioner of Public Safety,* 2015 WL 7201256 (Minn. App. Nov. 16, 2015) (unpublished) (Obtaining warrant and taking blood sample after driver refused testing violates Minn. Stat. § 169A.52, subd. 1). However, as discussed previously, if a warrant had been obtained, this would not have been "compelling" a test over Mr. [redacted] objection because Mr. [redacted] never refused testing. The facts of this case do not demonstrate that Mr. [redacted] made any refusal which would preclude the taking of his blood or urine pursuant to a warrant, which Mr. [redacted] in fact, requested.

In recent years, implied consent law in Minnesota has been in a state of flux. In one of the most recent decisions the Minnesota Court of Appeals held that a warrantless urine test following an arrest for suspicion of driving while intoxicated cannot be justified under the search-incident to arrest exception. State v. Thompson, __ N.W.2d __, 2015 WL 9437538 (Dec. 28, 2015). Previously, the U.S. Supreme Court held that a warrantless test cannot be justified by a per se exigency exception. Missouri v. McNeely, 133 S. Ct. 1552 (2013). These cases in effect eliminated the two applicable exceptions to the Fourth Amendment's warrant requirement, leaving consent as the only available justification for a warrantless search in this context. They also give a basis for a driver, such as Mr. [redacted] to request a warrant be obtained prior to consensually providing a sample.

In this case, Mr. [redacted] license was revoked based on his "refusing" a test pursuant to Minn. Stat. § 169A.52, subd. 3. However, because Mr. [redacted] did not actually refuse the test, his license may not be revoked pursuant to this statute. Mr. [redacted] agreed to provide a sample, if a warrant was first obtained. A blood or urine test could have been obtained had the Deputy obtained the requested warrant. Because law enforcement did not obtain a warrant does not make Mr. [redacted] legal request a refusal. The revocation of Mr. [redacted] license based his "refusal" to take a test must therefore be rescinded.

Conclusion

In this case, Deputy [redacted] observed Mr. [redacted] driving over the center line of the highway, and therefore had a reasonable articulable suspicion that Mr. [redacted] was violating a traffic law, creating a valid basis to conduct the traffic stop. Once Deputy [redacted] initiated the stop, he observed Mr. [redacted] bloodshot watery eyes and the smell of alcohol emanating from the vehicle. This, in conjunction with Mr. [redacted] driving conduct, allowed Deputy [redacted] to develop a reasonable articulable suspicion to expand the stop to an investigation of driving while impaired. Deputy [redacted] subsequently observed an odor of alcohol coming from Mr. [redacted] person and noted Mr. [redacted] uncooperative attitude in response to the Deputy's requests. This, in conjunction with his other observations provided Deputy [redacted] with an honest and strong suspicion that the crime of driving while intoxicated had been committed, creating probable cause to arrest Mr. [redacted] Once under arrest, Mr. [redacted] was read the implied consent advisory, and agreed to submit to a test if a warrant was obtained. This was clearly not a verbal refusal, and did also not constitute a refusal by conduct under current Minnesota law. As a result, Mr. [redacted] did not refuse a test in violation of Minn. Stat. 169A.52, subd. 3, and the revocation of Mr. [redacted] driver's license under that statute is herby rescinded.

C.A.L.