STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1258

State of Minnesota,
Respondent,

vs.

Wade Jarod Walvatne,
Appellant.

Filed April 30, 2012
Affirmed
Connolly, Judge

Isanti County District Court
File No. 30-CR-10-280

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

Jeffrey R. Edblad, Isanti County Attorney, Eric Laidlaw, (certified student attorney), Cambridge, Minnesota (for respondent)

Rodd Tschida, Minneapolis, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

CONNOLLY, Judge

Appellant challenges the denial of his motion to prevent the state from using a 2005 impaired-driving incident based on criminal charges that were later withdrawn to

enhance his convictions on two 2010 driving-while-impaired (DWI) offenses to gross misdemeanors. Because an unchallenged implied-consent license revocation may be used for enhancement even if the criminal charges on which it is based are later withdrawn, we affirm.

FACTS

In September 2005, appellant Wade Jarod Walvatne was stopped and arrested for DWI and for having an open bottle in his vehicle. His license was revoked; he did not challenge the revocation. In December 2005, after appellant's counsel demanded a contested hearing to challenge the constitutionality of the stop, the criminal charges against appellant were dropped.

In May 2010, appellant was arrested for DWI. He agreed to an Intoxilyzer test, which showed an alcohol concentration of 0.17. He was charged with driving with an alcohol concentration of more than .08 and with DWI. Because of his 2005 license revocation, both offenses were enhanced to gross misdemeanors.

Appellant moved to prevent the state's use of his 2005 license revocation for enhancement. After a hearing, his motion was denied. He challenges that decision.

D E C I S I O N

Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

A driver's license revocation under the implied consent law, Minn. Stat. §§ 169A.50-169A.53 (2010), is a "prior impaired driving-related loss of license." Minn. Stat. § 169A.03, subd. 21(a)(1) (2010). A "prior impaired driving-related loss of license"

within ten years prior to the current offense is a qualified aggravating factor. Minn. Stat. § 169A.03, subd. 3(1) (2010). If a qualified aggravating factor is present when a driver violates Minn. Stat. § 169A.20, subds. 1, 1a, 1b, or 1c (2010) (driving-while-impaired crime), the driver is guilty of third-degree driving while impaired, a gross misdemeanor. Minn. Stat. § 169A.26, subds. 1(a), 2 (2010). Thus, appellant, who had an implied-consent license revocation in 2005 and violated Minn. Stat. § 169A.20, subd. 1(1) and (5) in 2010, was charged with two gross misdemeanors.

Appellant argues that his charges should have been dismissed because the stop on which the 2005 revocation was based was unconstitutional. *See State v. Dumas*, 587 N.W.2d 299, 302 (Minn. App. 1998) (reading *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983) as prohibiting the use of a prior *unconstitutionally* obtained conviction to enhance a subsequent charge), *review denied* (Minn. Feb. 24, 1999). But

> [t]o properly raise the constitutionality of a prior license revocation and shift the burden of proof [of its constitutionality] to the state, an appellant must (1) promptly notify the state that [his] constitutional rights were violated during a prior license revocation; and (2) produce evidence in support of that contention with respect to each challenged revocation.

State v. Mellett, 642 N.W.2d 779, 789 (Minn. App. 2002) (quotation omitted).

Appellant does not meet either of these two criteria. First, judicial review of a license revocation must be sought within 30 days of receiving the notice of the revocation. Minn. Stat. § 169A.53, subd. 2 (2010). Appellant did not challenge the revocation for five years. Second, the only "evidence" appellant produced was his own affidavit saying that: (1) the (unidentified) attorney hired in 2005 to represent appellant

on the criminal charges was hired too late to represent him on the implied consent case; (2) this attorney told appellant the state agreed with her that the stop leading to his 2005 arrest was unconstitutional; and (3) the stop was "essentially a checkpoint in which multiple cars were being stopped." None of these statements is independently verifiable, and appellant offers no proof of any of them. As in *Mellett*, 642 N.W.2d at 790, "[a]ppellant did not produce any evidence that would shift the burden to the state to prove that [his] prior license revocations were constitutionally obtained." Thus, appellant did not meet the requirements for challenging the constitutionality of the 2005 revocation of his license.

Contrary to appellant's argument, the driver's failure to seek judicial review of a license revocation does not prevent that revocation's future use as an enhancement. *See State v. Omwega*, 769 N.W.2d 291, 294 (Minn. App. 2009) (holding that appellant who "had the opportunity for meaningful judicial review of his license revocations, but . . . did not seek that review" and who "provide[d] no compelling reason for this court to overrule its established precedent" could not successfully oppose the use of his prior implied-consent license revocations to enhance a driving-while-impaired charge), *review denied* (Minn. Sept. 29, 2009); *State v. Goharbawang*, 705 N.W.2d 198, 202 (Minn. App. 2005) (holding that when review of a revocation is available, even if unexercised, the due-process requirement of meaningful review is satisfied), *review denied* (Minn. Jan. 17, 2006); *State v. Coleman*, 661 N.W.2d 296, 301 (Minn. App. 2003) (when the defendant "had the opportunity for meaningful judicial review of the . . . revocation of his driving privileges, use of the revocation as an aggravating factor did not violate his due-process

rights"), *review denied* (Minn. Aug. 5, 2003); *see also State v. McLellan*, 655 N.W.2d 669, 671 (Minn. App. 2003) (holding that unchallenged license revocation based on Wisconsin conviction resulting from an uncounseled guilty plea could be used for enhancement of subsequent Minnesota charges because "the charges . . . were enhanced because of the prior license revocation, not the Wisconsin conviction"), *review denied* (Minn. Apr. 15, 2003).

Moreover, the constitutionality of the stop is irrelevant to an enhancement based on a license revocation. Even if appellant's constitutional rights were violated by the 2005 stop, any violation would be irrelevant to the subsequent use of the revocation to enhance criminal charges.

> [T]he revocation of a driver's license under the implied consent law [] is a civil penalty imposed administratively regardless of the outcome of any criminal proceeding under section 169.121 arising from the same incident. Two things follow from this. First, the fact that [the driver] was acquitted of the criminal charge arising from the 1979 incident does not render the prior implied consent revocation based on the same incident invalid. Second, the fact that the trial court dismissed the criminal charge based on the . . . 1982 incident—whether or not the court was correct in doing so—does not render the implied consent revocation based on the 1982 incident invalid.

State v. Hanson, 356 N.W.2d 689, 692 (Minn. 1984) (citation omitted).

Affirmed.