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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1177**

Thomas Lee Peterson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed May 11, 2010
Affirmed
Collins, Judge***

Itasca County District Court
File No. 31-CV-08-3740

Anne M. Marcotte, Hill City, Minnesota (for appellant)

Lori Swanson, Attorney General, Kristi A. Nielsen, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Collins,
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.

UNPUBLISHED OPINION

COLLINS, Judge

Appellant challenges the district court order sustaining his driver's license revocation under the implied-consent law. Because the arresting officer justifiably expanded the scope of the initial investigation to investigate suspected driving while impaired (DWI) and the district court did not err in admitting the blood-test evidence, we affirm.

FACTS

On September 1, 2008, sheriff's deputies responded to a report of suspected out-of-season deer hunting at a gravel pit in Itasca County. While questioning appellant Thomas Peterson before clearing him and his wife of poaching, both deputies detected an odor of an alcohol beverage coming from Peterson who was in the driver's seat of his open-air Jeep. When Deputy A. J. Morse was speaking with Peterson he noticed that Peterson's eyes were bloodshot and watery, learned that Peterson had driven to the scene, and saw an open beer can in the vehicle. Peterson denied drinking and stated that the beer can was being used only as an ashtray. Deputy Morse testified that he did not have a reason to doubt Peterson's explanation of the beer can, but he had Peterson submit to a preliminary breath test (PBT) on the belief that he may have been impaired. Deputy Morse did not administer field sobriety tests because of the loose-gravel surface of the ground. The PBT result was .109, following which Peterson admitted drinking a couple of bourbons and a few beers prior to leaving his home.

Deputy Morse arrested Peterson for DWI. Peterson requested a blood test and was transported to an area hospital. After Peterson was read the implied-consent advisory, a member of the hospital staff drew two vials of blood sample using a Bureau of Criminal Apprehension (BCA) blood-test kit. Peterson informed Deputy Morse that the test kit was expired; it bore an expiration date of August 30, 2008. Nevertheless, Deputy Morse mailed the kit to the BCA. Analysis of Peterson's blood showed a .09 alcohol concentration without any indication of a problem affecting the integrity of the samples or the test results.

Peterson served for a number of years in the army as an accredited medical technologist, had worked in that capacity until 1985, and was allowed to testify as an expert witness at the implied-consent hearing. He testified that in the early 1980s, in the course of his military duties, he supervised the disposal of 17,000 blood specimens because expired testing supplies were being used and the expiration date was the latest date the manufacturer could guarantee the quality of the vacuum seal. In his testimony, Peterson cited to the Code of Federal Regulations for the United States Department of Transportation's Drug and Alcohol Policy which indicates that, in the context of workplace alcohol-testing programs, tests should be canceled if the blood-test kit has expired. He also testified to his belief that in this case the test kits were not stored properly and that improper storage could affect the chemical preservatives in the blood-collection tubes. But he could only "guess" at what high or low temperature the preservative would have to reach in order to affect the chemicals' stability.

A BCA forensic scientist, Jody Nelson, testified as an expert witness for respondent commissioner of public safety. Nelson testified that when she received the blood-test kit on September 4, 2008, the vacuum seal was intact, both tubes contained a sufficient amount of blood for testing, and the anti-coagulant and preservative substances used in the tubes, potassium oxalate and sodium fluoride, are very stable chemicals. While examining the blood sample, Nelson did not observe any clotting or odor that would indicate that fermentation or inadequate mixing of the contents of the vials had occurred. The gas chromatograph used to analyze the sample did not indicate the presence of isopropyl alcohol in the tubes. Nelson testified that there were no indications supporting any of the concerns raised by Peterson, and it was her opinion that the test results were accurate and reliable.¹

The district court ruled that Deputy Morse had ample justification to progress from the original investigation to investigate suspected DWI. The court also credited the testimony of the commissioner's witnesses and concluded that there was a prima facie showing of trustworthiness as to the blood-test result which was not successfully rebutted by Peterson's speculative challenges. The district court sustained Peterson's driver's license revocation, and this appeal followed.

¹ Beyond Nelson's physical examination of the blood sample, Nelson cited a BCA study that examined the statistical difference in the results from BCA blood-test-kit tubes expired between eight and seventy-two months, and unexpired tubes. The BCA took blood samples in both the expired and unexpired tubes, stored them for a week, and then tested the tubes for their alcohol content. According to the BCA study there was no statistical difference between the test results yielded from the expired and unexpired tubes.

DECISION

This court reviews a district court's findings of fact in an implied-consent case for clear error. *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002). Due regard is given to the district court's opportunity to judge the credibility of the witnesses. *Snyder v. Comm'r of Pub. Safety*, 744 N.W.2d 19, 22 (Minn. App. 2008). But this court reviews the district court's legal determinations de novo. *Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639, 641 (Minn. 1998).

I.

Peterson contends that the district court erred in concluding that the deputies had a sufficient basis to expand the scope of the poaching investigation to a DWI investigation. “[A]ny expansion of the scope or duration of a traffic stop must be justified by a reasonable articulable suspicion of other criminal activity.” *State v. Fort*, 660 N.W.2d 415, 419 (Minn. 2003). Reasonable suspicion is an objective standard that must be “determined under the totality of the circumstances.” *Paulson v. Comm'r of Pub. Safety*, 384 N.W.2d 244, 246 (Minn. App. 1986) (citing *State v. Lande*, 350 N.W.2d 355, 357-58 (Minn. 1984)). An odor of alcohol can provide reasonable suspicion of criminal activity sufficient to expand the scope of a traffic stop. *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001).

The district court found that Deputy Morse's observation of Peterson's bloodshot and watery eyes and the detection of the odor of alcohol coming from his person occurred while the deputy was still investigating the possible poaching violation and concluded that these factors provided a sufficient basis to request the PBT. Because the record

shows that the observation of Peterson's position in the driver's seat of the vehicle, his admission of driving to the gravel pit, the detection of the odor of an alcohol beverage, and the observation of Peterson's bloodshot and watery eyes all occurred during the reasonable time that Deputy Morse was investigating the poaching report, clearly the district court did not err by determining that the deputy had reasonable suspicion supporting the expansion of the stop to investigate suspected DWI.

Peterson also argues that Deputy Morse's purported basis to request the PBT was insufficient because there was no allegation that the odor of alcohol was coming from Peterson's *breath*. In order to support the request for a PBT, the officer must "possess[] specific and articulable facts that form a basis to believe that a person is or has been driving, operating or controlling a motor vehicle while under the influence of an intoxicating beverage." *State v. Vievering*, 383 N.W.2d 729, 730 (Minn. App. 1986), *review denied* (Minn. May 16, 1986); *see also* Minn. Stat. § 169A.41, subd. 1 (2008). Here, the deputy relied not only on the odor of an alcohol beverage emanating from Peterson generally but also on the observation of his bloodshot and watery eyes. "An officer needs only one objective indication of intoxication to constitute probable cause to believe a person is under the influence." *State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004) (quotation omitted). An odor of alcohol and bloodshot and watery eyes are considered common indicia of intoxication. *Id.* Given that Peterson occupied the driver's seat of his vehicle and admitted to driving to the scene, and because Deputy Morse observed Peterson's bloodshot and watery eyes as well as the odor of an alcohol

beverage coming from his person, we agree with the district court's conclusion and hold that the deputy had sufficient basis to request a PBT.

We further hold that, following the administration of the PBT and Peterson's subsequent admission that he had been drinking before leaving home, Deputy Morse had the requisite probable cause to effect the arrest for DWI. *See State v. Wynne*, 552 N.W.2d 218, 221 (Minn. 1996) ("The test of probable cause to arrest is whether 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." (alteration in original) (quotations omitted)).

II.

The second issue is whether the district court clearly erred in admitting the blood-test evidence. A district court's determination that a blood test is admissible as reliable will be upheld "unless clearly erroneous, either upon a clear demonstration that it is without substantial evidentiary support or that it was induced by an erroneous view of the law." *Ortendahl v. Bergmann*, 343 N.W.2d 309, 311 (Minn. App. 1984). The fact that a test kit has expired does not in itself make the test unreliable. *State v. Palmer*, 391 N.W.2d 857, 859 (Minn. App. 1986). Generally, the use of BCA blood-test kit and the BCA analysis methods is sufficient to establish reliability. *Pearson v. Comm'r of Pub. Safety*, 633 N.W.2d 81, 85-86 (Minn. App. 2001). This court has held, however, that if the commissioner moves to admit test results derived from an expired test kit into evidence, the commissioner has the initial burden to present prima facie evidence that the test is reliable and that its administration conformed to the procedure necessary to ensure

reliability. *Palmer*, 391 N.W.2d at 859. Once this burden is met, the burden shifts to the objector to present evidence showing why the test is untrustworthy. *Id.* The mere possibility that a test *may* be untrustworthy does not make the test inadmissible, but only goes to the weight of the test evidence. *Id.* at 859-60.

Here, the commissioner presented evidence that (1) a standard BCA blood-test kit was used; (2) the blood was drawn by a medical technician; (3) Deputy Morse retained custody of the kit until it was mailed to the BCA for testing, and following delivery the blood-collection tubes were examined by BCA forensic scientist Nelson; (4) Nelson observed that the vacuum seal was intact; (5) Nelson did not observe any indication of contamination or loss of vacuum such as foul odor, coagulation, or an insufficient sample; (6) Nelson analyzed the sample using a gas chromatographic procedure that did not indicate the telltale presence of isopropyl alcohol; and (7) in Nelson's opinion, the results were accurate and reliable. These indicia of reliability are sufficient under *Palmer* to meet the commissioner's burden of establishing prima facie reliability despite the test kit's expiration date.

Peterson relies primarily on the facts that the sample was unrefrigerated, that he did not observe the required mixing of the blood with the chemicals in the tubes, and that the aging of the test kit beyond the expiration date could affect the tubes' vacuum seal leading to contamination of the sample. However, these assertions raise only the possibility that the test results may be unreliable, and Peterson failed to show that anything undermining the reliability of the test results actually occurred. As discussed above, there were multiple indications that the passage of the test kit's expiration date did

not impair the vacuum seal, and there was no evidence of coagulation indicating that the blood and preservative substances had not been adequately mixed. Finally, there was no evidence of a requirement for refrigeration.

Because the commissioner presented prima facie evidence establishing the reliability of the test and that its administration was sufficient to ensure reliability, and because Peterson's bare assertions raise only mere possibilities that the test could be untrustworthy, the district court did not err in admitting the blood-test evidence.

Affirmed.