STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1545

Gary Leo O'Fallon, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 19, 2008
Affirmed
Kalitowski, Judge

McLeod County District Court
File No. 43-CV-07-480

Richard L. Swanson, 207 Chestnut Street, Suite 235, P.O. Box 117, Chaska, MN 55318 (for appellant)

Lori Swanson, Attorney General, Melissa Eberhart, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Toussaint, Chief Judge; Kalitowski, Judge; and Muehlberg, Judge.*

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

KALITOWSKI, Judge

Appellant Gary Leo O'Fallon challenges his driver's license revocation, arguing that the stop of his vehicle was unlawful and the officer did not have a valid basis for

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

conducting a preliminary breath test. Appellant also challenges the district court's denial of his discovery request. We affirm.

D E C I S I O N

I.

We review de novo the district court's determination that a traffic stop was lawful. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000). Appellant argues that the officer's stop of his vehicle was not justified because his driving conduct observed by the officer could be explained by the inclement weather. We disagree.

The United States and Minnesota Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. An investigative stop of a vehicle must be justified by reasonable and articulable suspicion that the driver is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1879-80 (1968). Suspicion is reasonable if the stop was "not the product of mere whim, caprice or idle curiosity." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). Although the officer must have a "particularized and objective basis for suspecting [a driver] of criminal activity," law enforcement officials are permitted to make deductions that "might well elude an untrained person." *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981). And even an "insignificant" violation of a traffic law can provide the objective legal basis for a stop. *State v. Kilmer*, 741 N.W.2d 607, 609 (Minn. App. 2007).

Here, the officer testified that over a distance of approximately a mile and a half he observed appellant's vehicle cross the fog lines eight times and the center line once.

See Minn. Stat. § 169.18, subd. 7(a) (2006) (stating drivers should keep their vehicle "entirely within a single lane"). Appellant testified that he could not see either the fog or center lines, but the officer testified that they were visible. The district court specifically found that the officer was credible. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (stating that appellate courts defer to district court credibility determinations), *review denied* (Minn. July 15, 2003).

Appellant cites *Warrick v. Comm'r of Pub. Safety*, 374 N.W.2d 585 (Minn. App. 1985), to support his argument that "[w]hen existing weather conditions can account for a vehicle movement a traffic stop is unlawful." But *Warrick* is distinguishable from the facts here. In *Warrick*, the officer testified that the defendant's vehicle weaved "within its lane in a manner he described as 'subtle' and involving inches; it did not cross over either the fog line or the center line." *Id.* at 585. This court concluded "[i]n view of the wind and the impaired visibility," these driving behaviors did not warrant a stop. *Id.* at 586. Thus, appellant's driving conduct was not similar to the conduct in *Warrick*.

Moreover, it is not enough that the alleged improper driving behavior could be explained by the weather. *See Shull v. Comm'r of Pub. Safety*, 398 N.W.2d 11, 14 (Minn. App. 1986) (stating that driving at an excessively slow speed and weaving over the center line on a snowpacked, slippery, and winding road supported a stop). "The fact that another inference might have been drawn, that [the defendant] was driving properly for the conditions, does not negate the fact that . . . a trained officer [] observed objective facts which made him suspect [the defendant] of criminal driving." *Id.* Here, the officer's testimony indicated that he considered the effect of the weather conditions on

appellant's driving, but still concluded based on his nine years' experience that such driving conduct often indicated intoxication.

We conclude that the district court's determination that the officer's investigatory stop of appellant was lawful is supported by the law and the facts.

II.

We review the district court's legal determinations de novo but will not disturb its factual findings unless clearly erroneous. *Busch v. Comm'r of Pub. Safety*, 614 N.W.2d 256, 258 (Minn. App. 2000). Appellant argues that the officer did not have a valid basis for expanding the scope of the stop to conduct a preliminary breath test (PBT). We disagree.

An officer may request a PBT when the officer has reason to believe the person was driving while under the influence. Minn. Stat. § 169A.41, subd. 1 (2006). This belief must be based upon "specific and articulable facts," the same standard required for an investigatory seizure. *State, Dep't of Pub. Safety v. Juncewski*, 308 N.W.2d 316, 321 (Minn. App. 1981). The results of a PBT must be used to determine if an arrest should be made. Minn. Stat. § 169A.41, subd. 2 (2006).

The district court found the officer "credibly" testified that appellant smelled of alcohol and had bloodshot eyes. Although appellant asks this court to "question the ability of an officer to detect an odor of alcohol in face of winds gusting up to at least 20 miles per hour," we defer to the district court's credibility determination. *See Miller*, 659 N.W.2d at 279. Similarly, although a bartender testified that appellant did not appear

intoxicated when he left the bar just prior to the stop, the district court credited the officer's testimony to the contrary.

Appellant argues that the PBT was not warranted because not all of his behaviors indicated he was intoxicated. But it is not required that every possible indicia of intoxication be present for an officer to form a sufficient articulable suspicion. *See Holtz v. Comm'r of Pub. Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983) ("All signs [of intoxication] need not be exhibited in every case. In fact, an officer need only have one objective indication of intoxication to constitute reasonable and probable grounds to believe a person is under the influence.") Here, the officer observed numerous indicia of intoxication sufficient to support the PBT request. The record indicates that in addition to the driving conduct, bloodshot eyes, and odor of alcohol, appellant had difficulty producing his driver's license and proof of insurance. And finally, the officer testified that he had seen appellant approximately 20 minutes prior to the stop at a bar, where he noted behavior indicating that appellant was intoxicated.

We conclude that the district court's determination that the officer "possessed articulable suspicion that [appellant] had violated the DWI laws and was therefore justified in requiring a PBT" is supported by the law and the facts.

III.

Appellant argues that the district court erred in denying his discovery request regarding the source code for the Intoxilyzer 5000. We disagree.

A district court's denial of a discovery request will generally be affirmed, absent a clear abuse of its wide discretion. *State v. Willis*, 559 N.W.2d 693, 698 (Minn. 1997).

Discovery under the implied-consent statute is limited, and a party may seek discovery not enumerated in the statute only by court order. Minn. Stat. § 169A.53, subd. 2(d) (2006). Because appellant stipulated that respondent could make a prima facie showing of the Intoxilyzer's trustworthy administration, appellant bore the burden of "present[ing] some evidence beyond mere speculation that questions the trustworthiness of the Intoxilyzer report." *See Kramer v. Comm'r of Pub. Safety*, 706 N.W.2d 231, 236 (Minn. App. 2005).

As an initial matter, as explained in *State v. Underdahl* (*Underdahl II*), appellant's reliance on *In re Comm'r of Pub. Safety*, 735 N.W.2d 706 (Minn. 2007) (*Underdahl I*), to support his argument that the source code is discoverable is misplaced:

> The supreme court in *Underdahl I*, reviewing only the denial of a petition for prohibition, and thus examining whether the district court could act on challenges to the Intoxilyzer, did not reach the question of what showing of relevancy might be necessary to entitle a driver . . . to discovery of the source code.

749 N.W.2d 117, 121 (Minn. App. 2008), *review granted* (Minn. Aug. 5, 2008).

Moreover, in *Underdahl II*, we held that to determine that the source code "is relevant to a defendant's guilt or innocence [, that determination] must be premised on a showing that an examination of the instrument's software would show defects in its operation or at least would be necessary to determine whether defects exist." *Id.* at 119. In that case, we found that respondents had failed to establish this premise because they did not show

> what an Intoxilyzer "source code" is, how it bears on the operation of the Intoxilyzer, or what precise role it has in

> regulating the accuracy of the machine. Accordingly, there is no showing as to what possible deficiencies could be found in a source code, how significant any deficiencies might be to the accuracy of the machine's results, or that testing of the machine, which defendants are permitted to do, would not reveal potential inaccuracies without access to the source code.

Id. at 122.

Similarly, appellant's request fails here. Appellant requested "[t]he complete computer source code for the 'Minnesota model' of the Intoxilyzer 5000 currently in use in the State of Minnesota" pursuant to Minn. Stat. § 169A.53, subd. 2(d). Appellant argued that "the testing method . . . was not valid and/or reliable and/or the test result obtained was not accurately evaluated." But appellant failed to demonstrate he has a good faith basis to believe that material facts will be discovered. Rather, his discovery request was premised on speculation that he might be able to locate admissible evidence if he is given the opportunity to conduct additional discovery. Appellant did not submit any evidence in an attempt to establish relevance, asserting only: "Unless the driver can see how the source code software 'runs' the instrument, it remains nothing more than a mystical machine used to establish [the driver's] guilt." Thus, appellant did not carry his burden to establish the source code's relevance.

We conclude that the district court's determination that appellant's discovery request failed "to demonstrate a good faith belief that material facts will be uncovered" was within its wide discretion.

Affirmed.