STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1696

Angela Lynn Porter, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed July 2, 2012
Reversed
Cleary, Judge

Yellow Medicine County District Court
File No. 87-CV-11-337

Ronald R. Frauenshuh, Jr., Ortonville, Minnesota (for appellant)

Lori Swanson, Attorney General, David S. Voigt, Tibor S. Gallo, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Stauber, Judge; and Rodenberg, Judge.

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

CLEARY, Judge

In this implied-consent license-revocation appeal, appellant challenges the district court order sustaining the revocation of her driver's license. Because the facts do not establish probable cause to believe appellant was in physical control of the car, we reverse.

FACTS

In the early morning hours of June 18, 2011, an Upper Sioux Community Police Department police officer was on patrol near the Prairie's Edge Casino in Yellow Medicine County. The officer came upon a car parked on the side of the road with the driver-side wheels on the road and the passenger-side wheels in the grass. The car's parking lights were on. The officer pulled up behind the car and saw appellant, Angela Lynn Porter, sitting in the driver's seat. A male, Robert Hausauer, was sitting in the front-passenger seat. The officer approached the car and noticed that appellant was crying. The officer believed he had encountered a domestic situation, asked appellant to exit the car, and escorted her toward the squad car in order to separate her from Hausauer.

When the officer asked appellant what was happening, she responded that she was having an argument with her boyfriend, Hausauer. While the officer was speaking with appellant about the domestic situation, he noted "an order of alcoholic beverage emitting from [appellant's] breath." The officer then inquired how the car arrived at its current location. Appellant responded only that she was drunk so she could not drive—a statement that lends itself to several interpretations. Apparently, there was no follow-up questioning of appellant or Hausauer as to who had been driving the vehicle. Appellant was given a field sobriety test, arrested for driving while intoxicated, and taken to the police station. At the station, appellant was read the implied consent advisory and agreed to take a breath test. As an officer was preparing the machine for the breath test, appellant changed her mind and said she no longer wanted to take the breath test.

Appellant's driver's license was revoked for refusing to submit to an alcohol-screening test. Appellant sought judicial review of the revocation, and an implied consent hearing was conducted on August 16, 2011. At the hearing, the arresting officer, appellant, and Hausauer each testified.

The parties do not dispute the district court's findings of fact, which included, in part, the following: (1) when the couple left the casino, "Hausauer drove a short distance and then pulled over to the side and stated that he should not be driving because he too had been drinking"; (2) appellant never had the keys to the car and did not intend to drive; (3) appellant had tried to get Hausauer to walk back to the casino with her, but when she started walking toward the casino, he went and sat in the passenger seat with the keys in his pocket; (4) appellant returned to the car, and it was at that time that she got in the driver's seat; (5) when the officer spoke with Hausauer at the scene, he "did not ask Hausauer who had been driving the vehicle and did not see the keys to the vehicle in the car"; (6) the officer did not see the keys to the car until he went to inventory the vehicle in the sheriff's impound lot after processing appellant's arrest; (7) appellant's testimony was credible; and (8) the officer's only basis for believing that appellant was in physical control of the car at the time he arrived was that she was sitting in the driver's seat.

The district court concluded that the officer had "probable cause to believe that [appellant] was in physical control of a motor vehicle while under the influence of alcohol," and that appellant refused chemical testing for intoxication. The district court sustained the revocation of appellant's license. This appeal followed.

D E C I S I O N

Minnesota law provides that a test for intoxication can be required only when an officer has probable cause to believe the person was driving, operating, or in physical control of a vehicle while under the influence and when one of four statutory preconditions exists. The statute provides, in relevant part:

> (a) Any person who drives, operates, or is in physical control of a motor vehicle within this state . . . consents . . . to a chemical test . . . for the purpose of determining the presence of alcohol . . . .
>
> (b) The test may be required of a person when an officer has probable cause to believe the person was . . . in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and one of the following conditions exist:
>
> . . . .
>
> (3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test) . . . .

Minn. Stat. § 169A.51, subd. 1 (2010).

If a person refuses a screening test, then a test must not be given. Minn. Stat. § 169A.52, subd. 1 (2010). However, upon certification that there existed probable cause to believe that the person had been driving, operating, or in physical control of a vehicle while under the influence of alcohol, and when that person refused to submit to a test, the person's license will be revoked. *Id*., subd. 3 (2010).

The scope of judicial review for rescinding a driver's license revocation is different depending on whether the person submitted to the alcohol-screening test. On

one hand, if a person submits to testing and shows an alcohol concentration above the legal limit, the subsequent license revocation can be rescinded if a court determines that the person was not actually driving, operating, or in physical control of the vehicle. *Flamang v. Comm'r of Pub. Safety*, 516 N.W.2d 577, 579 (Minn. App. 1994), *review denied* (Minn. July 27, 1994). On the other hand,

> where a driver refuses to submit to testing in the face of probable cause that the driver was in physical control of a motor vehicle while intoxicated, revocation is based on the refusal to act on the lawful request of a peace officer. . . . [T]he question whether [the driver] actually was in physical control of his vehicle [is] irrelevant and outside the permissible scope of judicial review.

Id. at 580.

There is no dispute that appellant was intoxicated or that she refused to submit to the screening test. Because appellant did not submit to the screening test, whether she was in *actual* physical control of the vehicle has no impact on the outcome of her appeal. Instead, the sole issue on appeal is whether, at the time of appellant's arrest, the officer had *probable cause* to believe that appellant was in physical control of the motor vehicle. *See Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639, 640–41 (Minn. 1998); *Flamang*, 516 N.W.2d at 580.

"A determination of probable cause is a mixed question of fact and of law." *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 840 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). Where, as here, the facts of a case are undisputed, probable cause is a question of law to be reviewed de novo. *See Shane*, 587 N.W.2d at 641.

Whether probable cause exists is an objective inquiry that must be evaluated from the point of view of a "prudent and cautious police officer on the scene at the time of the arrest." *Johnson v. Comm'r of Pub. Safety*, 366 N.W.2d 347, 350 (Minn. App. 1985) (quoting *State v. Harris*, 265 Minn. 260, 264, 121 N.W.2d 327, 331 (1963), *cert. denied*, 735 U.S. 867, 84 S. Ct. 141 (1963)).

> Police have probable cause to believe a person is in physical control of a vehicle while under the influence of alcohol when, based on the totality of the circumstances, there is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing [that the person was in physical control].

Shane, 587 N.W.2d at 641 (alternation in original) (quotation omitted).

"The term 'physical control' is more comprehensive than either 'drive' or 'operate.'" *State v. Starfield*, 481 N.W.2d 834, 836 (Minn. 1992). The term covers situations where an intoxicated person is found in a parked vehicle that, "without too much difficulty, might again be started" and become a source of danger. *Flamang*, 516 N.W.2d at 581. However,

> [p]hysical control is not shown by evidence merely establishing that an individual is in a position where they could start the car "without too much difficulty." An officer in such a case has insufficient cause to believe the individual is in physical control without additional evidence that the person "has or is about to take some action that makes the motor vehicle a source of danger to themselves, to others, or to property."

Snyder v. Comm'r of Pub. Safety, 744 N.W.2d 19, 23 (Minn. App. 2008) (citations omitted).

Numerous factors may inform whether, at the time of arrest, there is sufficient evidence to support a finding of probable cause to believe someone is in physical control of a vehicle. Here, the district court found that the officer's only basis for believing that appellant was in physical control of the vehicle at the time he arrived was that she was sitting in the driver's seat. "Mere presence in or about the vehicle is not enough for physical control; it is the overall situation that is determinative." *Starfield*, 481 N.W.2d at 838. "Physical control does not depend solely on the location of the keys; instead, the location of the keys is one factor among others to consider." *Ledin v. Comm'r of Pub. Safety*, 393 N.W.2d 433, 435 (Minn. App. 1986).[1]

At the time of the arrest, it was apparent that (1) appellant was sitting in the driver's seat with Hausauer in the front-passenger seat; (2) the car was on the side of the road with its parking lights on; (3) the couple was having a fight; (4) there had been no inquiry regarding the keys; and (5) the driver of the car to that point was not established. This evidence alone is not sufficient to establish probable cause that appellant was in physical control of the vehicle.

Appellant was in close proximity to the operating controls of the car, but there was no evidence she had the means to initiate any movement of the car. The couple was obviously engaged in a dispute, but there was no evidence that appellant was about to take any action that would have made the car a source of danger. Because the encounter began as a domestic situation, it would appear that the officer's primary focus, rightfully,

[1] In both *Starfield* and *Ledin*, the motor vehicles contained only one occupant, making an inquiry as to the location of the keys less critical than in this case, where there were two potential drivers in the front seat.

was to ensure that the couple was separated and safe from each other. Once it became clear that the situation also potentially involved driving while intoxicated, further investigation of both occupants of the vehicle should have ensued. Questions regarding who had been driving, and where the keys were located, would have provided important information relevant to a finding of probable cause to believe who in the car, if anyone, was in violation of the law. We conclude that, based on the totality of the circumstances, there was insufficient evidence at the time of appellant's arrest for the officer to conclude that he had probable cause to believe that appellant was in physical control of a motor vehicle while under the influence of alcohol.

Reversed.