**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-0171**

Jeffrey Allan Braun, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 10, 2012**
**Affirmed**
**Johnson, Chief Judge**

Stearns County District Court
File No. 73-CR-07-11062

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Laura L. Gray Maternus, Matthew A. Staehling, St. Cloud City Attorney's Office, St. Cloud, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Willis, Judge.*

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

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

**JOHNSON**, Chief Judge

In 2009, Jeffrey Allan Braun was found guilty of second-degree DWI test refusal. In 2011, Braun petitioned for postconviction relief, which was denied. The primary issue on appeal is whether the state trooper who stopped Braun had probable cause to believe that he was impaired based on the officer's observations of him and his failure of several field sobriety tests. Both the district court and the postconviction court concluded that the trooper had probable cause to arrest Braun. We affirm.

## FACTS

In the early evening of August 31, 2007, Braun drove his Chevrolet Suburban on state highway 15 in the vicinity of the city of St. Cloud. An off-duty police officer reported that a vehicle was traveling in the northbound lanes in an erratic manner. State Trooper James Kotten investigated. Trooper Kotten identified Braun's Suburban as the subject of the report, followed the vehicle, noticed that the vehicle jerked about within its lane, and saw the vehicle abruptly change multiple lanes before turning at a major intersection in the city of Sartell. Trooper Kotten stopped Braun's vehicle and approached the driver's window. The conversation between the trooper and Braun was recorded by a dashboard camera, and the recording later was introduced into evidence.

Trooper Kotten believed that Braun was disoriented because he said that he was travelling to Fergus Falls but was mistaken as to the location of interstate highway 94. Trooper Kotten also observed that Braun's eyes were bloodshot and that he was perspiring profusely even though the temperature was not hot. Trooper Kotten also

noticed that Braun was speaking rapidly and was gesturing wildly with his hands and fingers. Trooper Kotten suspected that Braun was driving while under the influence of a controlled substance. At the time, Trooper Kotten had 11 years of experience as a state trooper, had received training as a drug-recognition expert, and typically arrested 30 to 50 persons each year for impaired driving.

Trooper Kotten asked Braun to step out of the vehicle and to perform a series of field sobriety tests. The horizontal-gaze nystagmus test indicated that Braun was not under the influence of depressants, inhalants, or PCP. A preliminary breath test indicated that Braun had an alcohol concentration of zero. But Braun failed the one-legged stand test, failed the walk-and-turn test, and twice failed the finger-count test. Trooper Kotten felt Braun's wrist and determined that his pulse was 110 beats per minute. Trooper Kotten arrested Braun on suspicion of driving while impaired based on his observations of Braun and Braun's performance on the field sobriety tests. Trooper Kotten took Braun to a hospital, where he administered the implied-consent advisory. Braun refused to submit to a urine test or a blood test.

In October 2007, the state charged Braun with one count of second-degree DWI test refusal, a violation of Minn. Stat. §§ 169A.20, subd. 2, .25, subd. 1(b) (2006). The charge was enhanced from the fourth degree to the second degree because Braun had a previous DWI conviction in 1999 and because Braun's 13-year-old son was in his vehicle.

In February 2008, Braun moved to dismiss the charge on the ground that Trooper Kotten did not have probable cause to arrest him. Trooper Kotten and Braun testified at an omnibus hearing. In May 2008, the district court denied Braun's motion.

In February 2009, the parties agreed to submit the case to the district court in a so-called *Lothenbach* proceeding, which now is governed by rule 26.01, subdivision 4, of the Minnesota Rules of Criminal Procedure. The parties agreed that Braun would "preserve his right to appeal the finding that Judge Scherer made earlier in this case," which refers to the district court's previous denial of Braun's motion to dismiss the charge for lack of probable cause. The district court found Braun guilty. In July 2009, the district court imposed a sentence of 365 days in jail but stayed 335 days and placed Braun on probation for six years.

In August 2010, more than a year after he was sentenced, Braun filed a *pro se* notice of appeal. This court dismissed the appeal as untimely.

In July 2011, Braun filed a *pro se* petition for postconviction relief. Braun then obtained the assistance of the Office of the State Public Defender, which filed a supplemental postconviction petition in November 2011. Braun's supplemental petition raised two issues. He argued that Trooper Kotten lacked probable cause to arrest him, as he had argued in his pretrial motion, and he argued that Trooper Kotten did not have reasonable suspicion to detain him and perform field sobriety tests. He did not present any new evidence to the postconviction court. The district court denied Braun's postconviction petitions in December 2011 without an evidentiary hearing. Braun appeals.

## D E C I S I O N

A person may file a postconviction petition to challenge his or her criminal conviction. Minn. Stat. § 590.01, subd. 1 (2010). A postconviction petition "shall contain . . . a statement of the facts and the grounds upon which the petition is based and the relief desired." Minn. Stat. § 590.02, subd. 1(1) (2010). "All grounds for relief must be stated in the petition or any amendment thereof unless they could not reasonably have been set forth therein." *Id.* "[T]he burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2010). A postconviction court, in its discretion, "may receive evidence in the form of affidavit, deposition, or oral testimony." *Id.* A district court may deny a petition for postconviction relief without an evidentiary hearing if "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Id.*, subd. 1; *see also Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008). As a general rule, we apply an abuse-of-discretion standard of review to a postconviction court's denial of relief. *State v. Miller*, 754 N.W.2d 686, 707 (Minn. 2008). But we review questions of law on a *de novo* basis, and we review questions of fact to determine whether the postconviction court's findings are supported by sufficient evidence. *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846 (Minn. 2008).

### I. Probable Cause for Arrest

Braun argues that the postconviction court erred by denying his supplemental petition because Trooper Kotten did not have probable cause to arrest him. The postconviction court rejected this claim based on Braun's failure of several field sobriety

tests and his fast pulse. The postconviction court's conclusion is consistent with the district court's pre-trial ruling on Braun's motion to dismiss. The district court concluded that "[t]he totality of the circumstances, including the Defendant's erratic driving conduct, the Defendant's demeanor and physical appearance and his failure of some of the standardized field sobriety tests are sufficient to establish probable cause to arrest."

Braun was convicted of refusing to submit to a chemical test of his blood or urine. *See* Minn. Stat. § 169A.20, subd. 2. A person may be convicted of this offense only if an officer requests that the person submit to a chemical test, which requires that the officer have "probable cause to believe the person was driving, operating, or in physical control of a motor vehicle" while impaired. Minn. Stat. § 169A.51, subd. 1(b) (2006). Accordingly, "[r]efusing a chemical test is not a crime . . . unless it can be proven beyond a reasonable doubt that an officer had 'probable cause to believe the person was driving, operating, or in physical control of a motor vehicle' while impaired." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) (quoting Minn. Stat. § 169A.51, subd. 1(b)).

Probable cause to arrest a person for a DWI offense exists when the facts and circumstances available at the time of arrest reasonably allow a prudent and cautious officer to believe that an individual was driving while impaired. *State v. Olson*, 342 N.W.2d 638, 640 (Minn. App. 1984). "The officer's task is to make a practical, common-sense decision in light of all the circumstances, including innocent behavior or behavior which may later be shown to have exculpatory explanations." *Id.* "The existence of probable cause depends on "'the particular circumstances, conditioned by [officers'] own observations and information and guided by the whole of their police

experience.'" *Koppi*, 798 N.W.2d at 362 (alteration in original) (quoting *State v. Olson*, 436 N.W.2d 92, 94 (Minn. 1989), *aff'd sub nom. Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684 (1990)). When reviewing a district court's finding that a police officer had probable cause to make an arrest, this court makes "an independent review of the facts to determine the reasonableness of the police officer's actions." *Olson*, 436 N.W.2d at 94. We apply a clearly erroneous standard of review to such a finding. *State v. Camp*, 590 N.W.2d 115, 118 (Minn. 1999).

The evidence before the district court and the postconviction court, including the video-recording of Trooper Kotten's interactions with Braun, supports the conclusion that the trooper had probable cause to arrest Braun. Braun failed several field sobriety tests. He failed the one-legged stand test, failed the walk-and-turn test, twice failed the finger-count test, and had an unusually fast pulse. Although Braun passed the horizontal-gaze nystagmus test, that test detects only depressants (such as alcohol), inhalants, and PCP, but it does not detect other controlled substances, including stimulants (such as methamphetamine). Based on the information available to him, Trooper Kotten could reasonably conclude that there was probable cause that Braun was committing the offense of DWI. *See State v. Prax*, 686 N.W.2d 45, 47, 49 (Minn. App. 2004) (affirming finding of probable cause based in part on field sobriety tests and elevated pulse rates), *review denied* (Minn. Dec. 14, 2004).

Braun contends that Trooper Kotten's determination was unreasonable because a previous injury prevented him from taking and passing the one-legged stand test and the walk-and-turn test. But the dashboard video shows that Braun was able to walk without

his cane and that he began to have difficulty only when Trooper Kotten administered the tests. Braun also argues that he was confused about his location because he is diabetic and had not eaten for more than seven hours and because of fatigue and anxiety. Trooper Kotten rejected these explanations, and the district court upheld the trooper's assessment of the situation. Braun did not offer any additional evidence during postconviction proceedings to overcome the district court's conclusion.

Thus, the postconviction court did not err by denying relief on Braun's claim that Trooper Kotten did not have probable cause to arrest him.

**II. Reasonable Suspicion for Field Sobriety Tests**

Braun also argues that the postconviction court erred by denying his supplemental petition because Trooper Kotten did not have reasonable suspicion to detain him and administer field sobriety tests.

Braun did not make this argument in his pre-trial motion to dismiss. He raised the issue for the first time in his supplemental postconviction petition. A defendant may be tried in a stipulated-evidence trial conducted pursuant to rule 26.01, subdivision 4, if, among other things, "the parties agree that the court's ruling on a specified pretrial issue is dispositive of the case, or that the ruling makes a contested trial unnecessary," and the parties wish to allow the defendant "to preserve the [pretrial] issue for appellate review." Minn. R. Crim. P. 26.01, subd. 4(a). After a stipulated-evidence trial, "appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial." Minn. R. Crim. P. 26.01, subd. 4(f). But a defendant may not obtain appellate review of an issue other than the pretrial issue that was specified at the

time of the stipulated-evidence trial. *See State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009) (holding that appellate review was "limited to the pretrial order that denied [appellant's] motion to suppress"); *State v. Busse*, 644 N.W.2d 79, 88-89 (Minn. 2002) (stating that *Lothenbach* procedure is "for submitting a case to the court for decision while reserving *pretrial* issues for appeal" (quotation omitted)); *see also State v. Rasmussen*, 749 N.W.2d 423, 427-28 (Minn. App. 2008) (refusing to review Fourth Amendment issue because of invalid waiver of jury trial).

In this case, the parties specified one issue that was preserved for appellate review, namely, "the finding that Judge Scherer made earlier in this case." The parties were referring to the district court's previous denial of Braun's motion to dismiss the charge for lack of probable cause. The district court did not make, and was not asked to make, a pre-trial ruling on the issue whether Trooper Kotten had reasonable suspicion to perform field sobriety tests. Thus, Braun did not preserve the reasonable-suspicion issue for direct appeal. *See Busse*, 644 N.W.2d at 88-89; *Rasmussen*, 749 N.W.2d at 427-28. A person may not raise an issue in a postconviction proceeding that was not preserved for direct appeal. Therefore, Braun is not entitled to postconviction review of his argument that Trooper Kotten did not have reasonable suspicion to detain him and administer field sobriety tests.

## III. Braun's *Pro Se* Arguments

In his *pro se* supplemental brief, Braun makes several additional arguments, which can be summarized as follows: (1) Trooper Kotten's supplemental arrest report contained "arbitrary and capricious false statements." (2) The district court erred by not crediting

his claim that his heavy perspiration was due to his use of a steroid to control his chronic hives. (3) His trial counsel was ineffective because he did not investigate or cross-examine the off-duty police officer who made the initial report of erratic driving. (4) His trial counsel failed "to handle Police Officers testimony or investigate witnesses and impeach, and failure to call other officer." (5) Trooper Kotten discriminated against him by requiring him to perform the one-legged stand test and the walk-and-turn test despite his disability. (6) Trooper Kotten's field sobriety tests violated due process of law. (7) An agreement concerning sentencing was breached because he "was given a totally different sentence of which he agreed to."

These arguments do not relate to the one pre-trial issue that was preserved during Braun's stipulated-evidence trial pursuant to rule 26.01, subdivision 4. As stated above, "appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial." Minn. R. Crim. P. 26.01, subd. 4(f). Thus, Braun is not entitled to postconviction review of his *pro se* arguments, none of which was preserved for appellate review during his stipulated-evidence trial. *See Ortega*, 770 N.W.2d at 149; *Busse*, 644 N.W.2d at 88-89; *Rasmussen*, 749 N.W.2d at 427-28.

In addition, the fourth, fifth, sixth, and seventh claims identified above were not pleaded in Braun's initial postconviction petition or his supplemental postconviction petition. Those claims are being raised for the first time on appeal from the denial of postconviction relief. Thus, the claims have been forfeited. *See Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007) (declining to consider arguments not pleaded in

postconviction petition); *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006) (same); *Azure v. State*, 700 N.W.2d 443, 446-47 (Minn. 2005) (same).

In sum, we affirm the district court's denial of postconviction relief.

**Affirmed.**