STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0257

Dorane Alfred Pogatchnik, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed September 4, 2012
Affirmed; motion granted
Kalitowski, Judge

Lyon County District Court
File Nos. 42-CV-11-986, 42-CV-11-1262

Bradford S. Delapena, Bradford Delapena, Ltd., St. Paul, Minnesota; and

Kent D. Marshall, Marshall Law Offices, Barrett, Minnesota (for appellant)

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

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

KALITOWSKI, Judge

Appellant Dorane Alfred Pogatchnik challenges the district court order sustaining his driver's license revocation, arguing that he was unlawfully seized because law enforcement unreasonably expanded the duration and intrusiveness of an investigatory

detention. Respondent Minnesota Commissioner of Public Safety argues that the seizure was supported by probable cause and that portions of appellant's brief should be stricken. We affirm the district court's order and grant respondent's motion to strike.

D E C I S I O N

I.

In a civil action relating to revocation of driving privileges under the implied-consent law, the commissioner has the burden to demonstrate that revocation was appropriate by a preponderance of the evidence. *Ellingson v. Comm'r of Pub. Safety*, 800 N.W.2d 805, 806 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). We review a district court's findings of fact sustaining an implied-consent revocation for clear error and will "overturn conclusions of law only if the district court erroneously construed and applied the law to the facts of the case." *Id*. (quotation omitted). Fourth Amendment principles in criminal cases apply equally in the context of license-revocation proceedings. *See Knapp v. Comm'r of Pub. Safety*, 610 N.W.2d 625, 628 (Minn. 2000) (relying on criminal cases in analyzing the legality of a traffic stop in a civil case).

Both the United States and Minnesota Constitutions protect against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. A traffic stop is a seizure to which constitutional protections apply. *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004). Under Minn. Const. art. I, § 10, each incremental intrusion during a traffic stop must be strictly tied to and justified by one of the following: (1) the original legitimate purpose of the stop, (2) independent probable cause, or (3) reasonableness, as

defined in *Terry v. Ohio*. *State v. Smith*, 814 N.W.2d 346, 350 (Minn. 2012) (citing *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1879-80 (1968)).

To be reasonable under *Terry*, the basis for intrusion "must satisfy an objective test: 'would the facts available to the officer at the moment of the seizure . . . warrant a [person] of reasonable caution in the belief that the action taken was appropriate.'" *Askerooth*, 681 N.W.2d at 364 (quoting *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880) (other quotations omitted). If an investigatory detention is unreasonably intrusive, it becomes a de facto arrest that must be supported by probable cause. *State v. Blacksten*, 507 N.W.2d 842, 846-47 (Minn. 1993); *see State v. Balenger*, 667 N.W.2d 133, 139-40 (Minn. App. 2003) (discussing when the conduct of law enforcement may transform an investigatory detention into a de facto arrest), *review denied* (Minn. Oct. 21, 2003).

Appellant was stopped by a deputy for driving in dark and rainy conditions without illuminated headlights. The deputy noticed a strong odor of alcohol coming from appellant's vehicle and appellant admitted to having consumed three mixed drinks. Due to the weather, the deputy requested that appellant accompany him to the garage of a nearby law-enforcement center to conduct sobriety testing, and appellant agreed.

Appellant concedes that the traffic stop was justified at its inception. He also concedes that the deputy's expansion of the scope of the stop to investigate whether appellant was driving while impaired (DWI) was lawful. But appellant argues that the deputy's transportation of appellant in his squad car to the law-enforcement center was an unlawful seizure because it "unreasonably escalated the intrusive nature of the seizure

and impermissibly expanded its duration." And appellant argues that the district court's implicit finding that he voluntarily consented to the seizure is clearly erroneous.

Respondent argues that regardless of whether the seizure was a valid investigatory detention, the deputy had probable cause to arrest appellant prior to transporting him to the law-enforcement center. The district court did not decide whether the seizure was supported by probable cause and we generally will not consider issues not decided by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But

> [a] respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted.

State v. Grunig, 660 N.W.2d 134, 137 (Minn. 2003).

We conclude that there is legal support for respondent's argument, and that the undisputed facts in the record are sufficient to permit our review. And because the determination of whether undisputed facts establish probable cause is a question of law, we address whether the seizure was supported by probable cause. *See Shane v. Comm'r of Pub. Safety*, 587 N.W.2d 639, 641 (Minn. 1998) (holding that whether undisputed facts establish probable cause is a question of law).

A peace officer may lawfully arrest a person for a violation of Minn. Stat. § 169A.20 (2010), driving while impaired, without a warrant upon probable cause. Minn. Stat. § 169A.40, subd. 1 (2010); *see State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011) (stating that warrantless arrest is permitted under the federal and state constitutions

if supported by probable cause). Probable cause exists when the objective facts and circumstances would lead a person of ordinary care and prudence to "entertain an honest and strong suspicion that a crime has been committed." *State v. Wynne*, 552 N.W.2d 218, 221 (Minn. 1996) (quotation omitted).

When evaluating whether probable cause exists to arrest a driver on suspicion of DWI, we consider the totality of the circumstances. *Eggersgluss v. Comm'r of Pub. Safety*, 393 N.W.2d 183, 185 (Minn. 1986). "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). Common indicia of intoxication include an odor of alcohol, bloodshot and watery eyes, and slurred speech. *Holtz v. Comm'r of Pub. Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983). Driving conduct is also relevant. *See Musgjerd v. Comm'r of Pub. Safety*, 384 N.W.2d 571, 574 (Minn. App. 1986) (stating that the occurrence of an accident may establish probable cause in some cases). And a driver's admission that he has consumed alcohol, when combined with other indicia of intoxication, is sufficient to establish probable cause. *State v. Laducer*, 676 N.W.2d 693, 698 (Minn. App. 2004), *review denied* (Minn. June 15, 2004).

Here, respondent argues that the following undisputed facts establish probable cause: (1) the deputy observed appellant driving in dark and rainy conditions without illuminated headlights; (2) the deputy detected a "very strong" odor of alcohol inside appellant's vehicle; and (3) appellant admitted that he had consumed three mixed drinks. We agree. Appellant's failure to use his headlights tends to indicate impairment, and the

"very strong" odor of alcohol coupled with appellant's admission that he had consumed three drinks is sufficient to establish probable cause. *See id.* (holding that officer had probable cause to arrest based on driver's admission that he had been drinking and the odor of alcohol).

Appellant argues that the deputy did not believe that probable cause existed at the site of the stop. But because the relevant issue is whether objective probable cause existed, it is immaterial whether the deputy "subjectively felt that [he] had probable cause." *Costillo v. Comm'r of Pub. Safety*, 416 N.W.2d 730, 733 (Minn. 1987).

We conclude that, because probable cause existed, the deputy's transportation of appellant to the law-enforcement center in a squad car was not an unlawful seizure. Therefore, although we agree that transporting appellant to the law-enforcement center was an incremental intrusion on appellant's liberty, we need not decide whether it was reasonable or whether appellant voluntarily consented to the seizure.

II.

Respondent moves to strike references in appellant's brief to the National Highway Traffic Safety Administration website, a Wikipedia webpage regarding field sobriety testing, and a police report, asserting that the website information and police report were not filed or received into evidence in the district court.

Because the website information and the police report were not filed or offered and received into evidence in the district court, they are outside the record on appeal. *See* Minn. R. Civ. App. P. 110.01 (stating that the papers filed in the district court, the exhibits, and any transcript of the proceedings shall constitute the record on appeal in all

cases). An appellate court may not base its decision on matters outside the record on appeal and may not consider matters not produced and received in evidence below. *Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1977). Accordingly, we do not consider this information and we grant respondent's motion to strike references to the websites and the police report in appellant's brief.

Affirmed; motion granted.