STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1290

Michael James Thompson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent

Filed April 21, 2014
Affirmed
Worke, Judge

Clay County District Court
File No. 14-CV-13-25

Daniel A. Hopper, Aaland Law Office, Ltd., Fargo, North Dakota (for appellant)

Lori Swanson, Attorney General, Jacob C. Fischmann, Assistant Attorney General, St. Paul, Minnesota (for respondent)

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

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

WORKE, Judge

Appellant challenges the order sustaining the revocation of his driver's license, arguing that (1) he was unlawfully seized when officers asked him to leave his house to perform field sobriety tests; (2) officers did not have probable cause to suspect him of operating a motor vehicle or consuming alcohol outside of the house; and (3) the

commissioner failed to prove by a preponderance of the evidence that he had been operating a vehicle. We affirm.

FACTS

On December 1, 2012, a witness saw a vehicle hit two unattended vehicles as it left the parking lot of a bar. Officer Michael Fildes was dispatched to the bar. The witness described the vehicle, provided its license-plate number, and identified the driver as a male, in his mid-fifties, and possibly bald. The witness stated that the driver appeared to be intoxicated based on his driving conduct. The vehicles had slight damage, and one of the bumpers had an imprinted horizontal pattern made of moisture and dirt.

Officer Fildes met Officers Raul Lopez and Daniel Birmingham at the residence of appellant Michael James Thompson, the suspect vehicle's registered owner. Officers observed a vehicle that matched the description of the suspect vehicle, and a mug from the bar was inside the vehicle. The vehicle appeared to have been recently driven because the hood was warm and the engine was making a ticking noise. The vehicle's front bumper was damaged, and there was a pattern of moisture and dirt on the rear bumper similar to the imprint on the bumper of the vehicle at the bar.

Thompson invited the officers into his home. Thompson stated that there was nobody else there and allowed Officer Birmingham to search the home. Thompson reported that he was the only person with keys to the vehicle, nobody had recently driven the vehicle, and the vehicle had not recently been in an accident. Thompson initially denied being out of the home that night or drinking alcoholic beverages. He later

admitted to being at the bar, claiming that "Jane" had driven him home. But he then stated that he had been at a friend's home and had taken a taxi home.

The officers noticed that Thompson appeared "extremely intoxicated." Thompson's eyes were bloodshot and watery, his speech was slurred and mumbled, and his breath emitted a strong odor of an alcoholic beverage. Thompson also stumbled, swayed, and had difficulty maintaining his balance. Thompson agreed to perform field sobriety tests outside and asked Officer Birmingham to grab his coat for him. Thompson told the officer which coat he wanted and indicated that he had recently worn the coat. Officer Birmingham found the vehicle's keys in a coat pocket.

Thompson failed the tests and was arrested for driving while intoxicated (DWI). He later petitioned for judicial review of the revocation of his driving privileges. The district court sustained the revocation and this appeal followed.

D E C I S I O N

Investigatory seizure

Thompson argues that he is entitled to reinstatement of his driving privileges because he was unlawfully seized. Whether a seizure is constitutional is a question of law reviewed de novo. *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003).

In reviewing a district court's order sustaining an implied-consent revocation, we will not set aside conclusions of law unless the district court "erroneously construed and applied the law to the facts of the case." *Dehn v. Comm'r of Pub. Safety*, 394 N.W.2d 272, 273 (Minn. App. 1986). When there is no factual dispute, "a reviewing court must

determine . . . if the officer articulated an adequate basis for the seizure." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

A police officer may initiate a limited investigative seizure without a warrant if the officer has reasonable, articulable suspicion of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968); *see also State v. Pike*, 551 N.W.2d 919, 921-22 (Minn. 1996) (stating that an investigative stop is lawful if the state can show that the officer had a particularized and objective basis for suspecting criminal activity). Whether the police have reasonable suspicion to support an investigatory seizure depends on the totality of the circumstances. *In re Welfare of M.D.R.*, 693 N.W.2d 444, 448 (Minn. App. 2005), *review denied* (Minn. June 28, 2005). The totality of the circumstances may include the officer's experience, general knowledge, and observations; background information, including information from other sources, time, and location; and anything else that is relevant. *Appelgate v. Comm't of Pub. Safety*, 402 N.W.2d 106, 108 (Minn. 1987). While the factual basis necessary to justify an investigatory seizure is minimal, *Magnuson v. Comm't of Pub. Safety*, 703 N.W.2d 557, 560 (Minn. App. 2005), it may not be based on "mere whim, caprice, or idle curiosity." *M.D.R.*, 693 N.W.2d at 448.

The parties agree that Thompson was seized when he was asked to exit his home to perform field sobriety tests. There are several facts that support a determination of reasonable suspicion of criminal activity making the seizure lawful. First, hitting a vehicle and leaving the scene is a crime. *See* Minn. Stat. § 169.09, subd. 4 (2012) (stating that the driver of a vehicle that collides with and damages an unattended vehicle must stop and notify the driver/owner, report the incident to police, or leave a note with

identifying information). And a witness reported that a vehicle bearing appellant's vehicle's license plate hit two vehicles before leaving a parking lot. *See Magnuson*, 703 N.W.2d at 560 (stating that an informant's tip may be adequate to support an investigative stop if the tip has sufficient indicia of reliability, and that identified citizens are presumed reliable); *Jobe v. Comm'r of Pub. Safety*, 609 N.W.2d 919, 920-21 (Minn. App. 2000) (upholding stop when unidentified citizen reported a "drunk" "swerving around on the road" and provided the vehicle's description and license-plate number).

Second, the officers investigating the incident went to Thompson's home because he is the suspect vehicle's registered owner. Officers noticed that his vehicle had been driven recently and was damaged. Although Thompson denied driving, he admitted that nobody else had keys. And his story about his night's activities changed—he claimed that he was not at the bar, then he stated that he was at the bar but "Jane" drove him home, and finally that he was at a friend's home and took a taxi home. The officers had reasonable suspicion that Thompson hit two unattended vehicles. While investigating this alleged crime, officers observed that Thompson was intoxicated, which provided suspicion that he was driving while intoxicated.

Thompson argues that officers were aware only of the driver's physical description given by the witness, and he does not fit that description. But the officers were aware of much more: the vehicle's description and license-plate number, that the vehicle had been in a hit-and-run incident, that Thompson was the vehicle's registered owner, that the vehicle appeared to have been recently driven and was damaged, that Thompson was the only person in the home, and that Thompson stated that nobody else

had keys to the vehicle or had driven it. Thompson relies heavily on the fact that he is not bald. But the witness stated that the driver "might" have been bald. Therefore, the district court did not err in determining that the officers had reasonable suspicion of criminal activity justifying the seizure.

Probable cause to arrest

Thompson argues that the officers did not have probable cause to arrest him. When reviewing an implied-consent matter, an appellate court should not set aside a district court's findings of fact unless they are clearly erroneous. *Ellingson v. Comm'r of Pub. Safety*, 800 N.W.2d 805, 806 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). Findings of fact are clearly erroneous when the appellate court is "left with a definite and firm conviction that a mistake has been committed." *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002) (quotation omitted). Due regard is given to the district court's opportunity to judge the credibility of witnesses. *Snyder v. Comm'r of Pub. Safety*, 744 N.W.2d 19, 22 (Minn. App. 2008). When the facts are not significantly in dispute, this court reviews the issue of whether an officer had probable cause as a matter of law. *See Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985).

Probable cause to make an arrest and to require a chemical test exists when "there are facts and circumstances known to the officer which would warrant a prudent man in believing that the individual was driving or was operating or was in physical control of a motor vehicle while impaired." *State v. Koppi*, 798 N.W.2d 358, 362 (Minn. 2011) (quotation omitted). We evaluate probable cause under the totality of the circumstances,

from the arresting officer's point of view, giving deference to the officer's experience and judgment. *Delong v. Comm'r of Pub. Safety*, 386 N.W.2d 296, 298 (Minn. App. 1986), *review denied* (Minn. June 13, 1986).

At the time of Thompson's arrest, the officers had received information from a witness regarding the driving conduct of someone driving Thompson's vehicle, and the officers observed Thompson's signs of intoxication. *See O'Neill v. Comm'r of Pub. Safety*, 361 N.W.2d 471, 473 (Minn. App. 1985) (holding that a strong odor of alcohol, slurred speech, and bloodshot eyes gave an officer probable cause to arrest a motorist for DWI and invoke the implied-consent law).

Thompson claims that nobody saw him driving the vehicle, he does not match the witness's description of the driver, and he denied consuming alcohol outside of his home. But somebody drove Thompson's vehicle to Thompson's home, and he was the only person in the home and in possession of the keys, which were found in his recently worn coat. Additionally, the witness described a male in his mid-fifties. Thompson is steadfast in claiming that the witness described a bald male. But, again, the witness stated that the driver "could have been bald."

Finally, Thompson denied drinking outside of his home, but his version of the night's events was inconsistent, and at one point he admitted to being at the bar. The district court found the officers to be credible. Based on the totality of the circumstances, from the officers' perspectives, and giving deference to their experience and judgment, we agree with the district court's determination that the officers had probable cause to believe that Thompson had been driving while under the influence of alcohol.

Evidence of driving

Thompson argues that there was no direct evidence that he was driving the vehicle. In order to sustain the revocation of a person's driver's license under the implied-consent laws, the commissioner must prove by a preponderance of the evidence that (1) the person was driving, operating, or in physical control of the vehicle, and (2) the officer had probable cause to believe the person was driving, operating, or in physical control of the vehicle. *Roberts v. Comm'r of Pub. Safety*, 371 N.W.2d 605, 607 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985); *see Llona v. Comm'r of Pub. Safety*, 389 N.W.2d 210, 211 (Minn. App. 1986) (stating that in an implied-consent matter, the commissioner must prove by a fair preponderance of the evidence that the alleged driver was the driver).

The district court based its finding that the commissioner proved by a preponderance of the evidence that Thompson was the driver of the vehicle on "strong circumstantial evidence." The district court's findings of fact will not be set aside unless they are clearly erroneous. *Thorud v. Comm'r of Pub. Safety*, 349 N.W.2d 343, 344 (Minn. App. 1984).

The circumstantial evidence that Thompson was the driver was based on the officers' testimonies, which the district court determined to be credible. *See Hunt v. Comm'r of Pub. Safety*, 356 N.W.2d 801, 803 (Minn. App. 1984) (determining that "strong circumstantial evidence" supported finding that the suspect driver was the driver); *see also Snyder*, 744 N.W.2d at 22 (stating that due regard is given to the district court's opportunity to judge the credibility of witnesses).

Circumstantial evidence that Thompson was the driver included: a witness saw a vehicle move erratically in a bar parking lot and hit two vehicles, the witness reported the vehicle's license-plate number, the vehicle was registered to Thompson, the vehicle was located at Thompson's home, the vehicle had been driven recently, Thompson was the only person in the home, Thompson appeared very intoxicated, Thompson was the only person with keys to the vehicle, there was a mug from the bar in the vehicle, and the keys to the vehicle were in Thompson's coat that he had recently worn. Additionally, the vehicle was damaged, and there was an imprint of moisture and dirt on the vehicle's bumper that matched an imprint left on one of the hit vehicles. The district court did not err in determining that a preponderance of the evidence showed that Thompson was the driver.

Affirmed.