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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1543**

Ralph Ian Richardson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed April 17, 2017
Affirmed
Connolly, Judge**

Ramsey County District Court
File No. 62-CV-15-7661

Peter H. Dahlquist, Dahlquist Law, L.L.C., Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Cory Beth Monnens, Assistant Attorney General,
St. Paul, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the order sustaining the revocation of his driving privileges,
arguing (1) the evidence does not support the district court's finding that he was driving;

(2) his counsel provided ineffective assistance at the implied-consent hearing; and (3) the district court erred when it rejected his post-driving consumption defense. Because the evidence supports an inference that appellant was driving his vehicle while he was intoxicated and because appellant has no Sixth Amendment right to counsel at an implied-consent hearing, we affirm.

FACTS

Appellant Ralph Ian Richardson was arrested for driving while impaired (DWI) on December 9, 2015. The arrest occurred in connection with an investigation of a vehicle crashing into a St. Paul resident's garage door. The garage door was a light tan color. At approximately 5:00 p.m., a caller gave the officers conducting the investigation the license plate number of the vehicle involved in the incident. The license plate number was registered to appellant's vehicle.

An officer first arrived at appellant's apartment at approximately 6:00 p.m. The officer felt the hood of appellant's vehicle which was still warm, despite it being cool outside. The officer also discovered unopened alcoholic beverages on the passenger seat and found fresh damage to the vehicle's front grill and bumper, including light tan paint scratches that he believed had been recently transferred onto the hood. Another officer proceeded to appellant's apartment door where contact was made. Appellant was the only person in the apartment.

During their conversation, the visibly intoxicated appellant told the officer he had been drinking throughout the day, that he had consumed ten beers, and that his last was around an hour-and-a-half to two hours ago. The officer also saw the keys to the vehicle

on a table next to where appellant was sitting. Appellant denied driving and agreed to a preliminary breath test. That test indicated appellant's alcohol concentration was 0.23.

Appellant was transported to the Ramsey County Law Enforcement Center and read the Implied-Consent Advisory. The results of the alcohol-concentration test that followed indicated an alcohol concentration of 0.20 in appellant. Appellant was charged with DWI and his driver's license was revoked under the Implied-Consent Law. Appellant timely challenged the revocation of his driver's license by filing an Implied-Consent Petition through counsel.

At the implied-consent hearing, appellant argued that he was not driving and that there was no temporal connection between any alleged driving and the alcohol-concentration test. Appellant also offered post-driving consumption as an affirmative defense. The district court concluded that appellant was driving and rejected the post-driving consumption defense. The court affirmed the revocation of appellant's driver's license.

D E C I S I O N

I. Did the district court clearly err when it determined that appellant drove his vehicle?

Appellant argues that the district court erred when it determined that he drove on December 9, 2015. Additionally, appellant argues that it was clearly erroneous for the district court to rely on the license plate tip as proof of driving, for to do so would be an improper use of that evidence. However, appellant does not argue that the tip evidence could not be used to show probable cause.

“In a judicial review hearing for a driver's license revocation under the implied-consent statute, the commissioner must demonstrate by a preponderance of the evidence that license revocation is appropriate.” *Axelberg v. Comm’r of Pub. Safety*, 831 N.W.2d 682, 684 (Minn. App. 2013), *aff’d*, 848 N.W.2d 206 (Minn. 2014). “This court reviews the district court’s findings supporting an order sustaining a license revocation for clear error.” *Id.*

The Implied-Consent Law applies to “[a]ny person who drives, operates, or is in physical control of a motor vehicle.” Minn. Stat. § 169A.51, subd. 1(a) (2014). In general, the Implied-Consent Law is a remedial statute, to be liberally construed in favor of the public’s interest and against the private interests of the individual driver. *State, Dep’t of Pub. Safety v. Junczewski*, 308 N.W.2d 316, 319 (Minn. 1981); *Kramer v. Comm’r of Pub. Safety*, 706 N.W.2d 231, 235 (Minn. App. 2005).

Whether an individual was actually driving, operating, or in physical control of a car can be established through either direct or circumstantial evidence. *Hunt v. Comm’r of Pub. Safety*, 356 N.W.2d 801, 803 (Minn. App. 1984). There is no requirement that the officer actually see the suspect drive a car. *Llona v. Comm’r of Pub. Safety*, 389 N.W.2d 210, 212 (Minn. App. 1986). Additionally, implied-consent hearings are “civil in nature, and the standard of proof, therefore, is a preponderance of the evidence.” *Id.* at 211.

Appellant mistakenly argues that the district court relied on the license plate tip in its order to establish appellant was driving. In its order, the district court did not cite or address the tip in its analysis that appellant was driving. The court only cited the tip to

establish probable cause, or a reason why the officers went to appellant's apartment and looked at his vehicle.¹

Additionally, the fact that an individual apparently drove a car to where it came to rest is evidence of driving conduct, as well as physical control. *State v. Starfield*, 481 N.W.2d 834, 838 (Minn. 1992). In *Starfield*, the supreme court affirmed a DWI conviction even where direct evidence of driving was missing, holding:

[T]here still may be circumstantial evidence from which the [court] could find that [appellant] had driven the car to its resting place; and, because this driving is included within "physical control," the inebriated defendant may, with consistency, be found guilty of driving, operating, or being in control of the motor vehicle.

Id.

Here, the district court found by a preponderance of the evidence that appellant drove on December 9, 2015. The officers observed fresh damage on the front bumper of the vehicle registered to appellant. That damage reflected the color of the damaged garage door. The hood of appellant's vehicle was warm to the touch, despite the cool December

¹ The order stated that "[t]his information led the officers to [appellant] the vehicle's registered owner, and connected his vehicle to the incident scene." However, in the following paragraph the district court went on to state that

the [district] court finds it more likely than not that the hood was warm because [appellant] had driven the vehicle. It was already dark by the time [the officers] arrived on the scene. . . . [Appellant] was the only person in the apartment and the officers noticed the keys to the [vehicle] sitting on a table next to where he had been sitting. Moreover, he was "obviously intoxicated." A preponderance of the evidence shows that [appellant] drove his [vehicle].

The order does not support the argument that the district court relied on the tip to prove that appellant was driving.

weather, indicating that it had been recently driven. Furthermore, appellant was alone in his apartment, visibly intoxicated, with the keys to his vehicle lying on a table next to where he had been sitting. We conclude that the district court did not clearly err when it found that appellant drove his vehicle.

II. Did appellant have a Sixth Amendment right to counsel given the civil nature of the implied-consent hearing?

Appellant argues that his trial counsel provided ineffective assistance at his implied-consent hearing. Appellant contends that his neighbor could have been called to provide testimony concerning appellant's whereabouts on the day of his arrest, as well as whether appellant had left his apartment or driven his vehicle that day. Appellant states that his counsel failed to inform the witness to appear on the date of the hearing, which resulted in the witness's unintended absence. Therefore, because counsel failed to procure the witness, appellant asks this court to rule that his counsel's representation fell below an objective standard of reasonableness.

"Because claims of ineffective assistance of counsel are mixed questions of law and fact," our review is de novo. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013).

The Sixth Amendment guarantees the right to effective counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). This matter arises from the administrative revocation of appellant's driver license, which does not involve a criminal proceeding. *Ruffenach v. Comm'r of Pub. Safety*, 528 N.W.2d 254, 256 (Minn. App. 1995) (holding that an implied-consent hearing is not "a *de facto* criminal proceeding"). Additionally, this court has previously held that the Sixth

Amendment right to counsel does not apply in civil driver's-license proceedings. *Maietta v. Comm'r of Pub. Safety*, 663 N.W.2d 595, 600 (Minn. App. 2003) (stating that, "given the civil nature of the implied-consent proceeding, appellant may not bring a claim of ineffective assistance of counsel").

Appellant argues the rationale for refusing him Sixth Amendment rights is inconsistent and incorrect when applied to an implied-consent revocation proceeding stemming from a DWI charge. Appellant states that an implied-consent license revocation can be used to enhance a future DWI charge. In sum, appellant argues that because a license revocation can be used to enhance future criminal liability, Sixth Amendment rights should apply. However, appellant does not cite any authority for this proposition.

In *Maietta*, this court stated that, while there may be criminal consequences for refusing to submit to testing, they must be prosecuted in a separate action. *Id.* at 600. Moreover, that court stated "[i]n no case does incarceration result from the proceedings." *Id.* Similarly, although appellant's criminal liability may be enhanced by the license revocation, that enhancement would have to be the result of a separate proceeding independent from the implied-consent hearing currently on appeal.

Appellant further contends that, while this court, in *Maietta*, determined the appellant did not have a right to counsel, we nonetheless proceeded with a *Strickland* analysis. Appellant argues that this court should also conduct the *Strickland* analysis and determine that he received ineffective assistance of counsel.

Appellant is correct that, in *Maietta*, we conducted an ineffective-assistance-of-counsel analysis after determining that the Sixth Amendment right to counsel should not

apply. However, *Maietta* does not state such an analysis is required. *Id.* We conclude that appellant does not have a Sixth Amendment right to counsel in an implied-consent proceeding. Because we conclude that appellant does not have such a right, we decline to conduct any analysis on whether such assistance was in fact ineffective.

III. Did the district court clearly err when it denied appellant’s post-driving consumption defense?

Appellant argues that he presented sufficient facts to the district court demonstrating that his alcohol concentration of 0.20 was due to alcohol he consumed after driving.

A question of fact for the district court will be reversed only if clearly erroneous. *State, Dep’t of Highways v. Beckey*, 192 N.W.2d 441, 445 (Minn. 1971). Post-driving consumption of alcohol is an affirmative defense to a DWI charge. Minn. Stat. § 169A.46, subd. 1 (2016). In an implied-consent proceeding, for a license to be reinstated, a driver must establish by a preponderance of the evidence that (1) he consumed alcohol after the time of driving but before administration of the breath test, and (2) this post driving consumption caused his alcohol to meet or exceed 0.[16] at the time of testing. *Dutcher v. Comm’r of Pub. Safety*, 406 N.W.2d 333, 336 (Minn. App. 1987) (holding that post-consumption of alcohol is an affirmative defense to a license revocation under the implied-consent law). “The burden of establishing this defense should fall upon [appellant], because [he] is in the best position to know how much alcohol, if any, [he] consumed after [driving].” *Id.*

As we concluded above, the district court did not clearly err when it found that appellant drove on December 9, 2015. The district court reasonably concluded that the

temperature of the hood would not have been warm—it was cool outside—if the car had not been driven more than an hour-and-a-half before. Appellant also did not testify or present any other evidence at the hearing to prove that, but for any alcohol consumed after driving, his alcohol concentration would have been below the legal limit. He simply contends he did not drive. We conclude that the district court did not err in finding that appellant drove and that his alcohol level was not the result of any alcohol he consumed after driving.

Affirmed.