STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1968

Laurie Ann McIntyre, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 14, 2017
Affirmed
Jesson, Judge

Scott County District Court
File No. 70-CV-16-9627

Kirk M. Anderson, John Murray, Anderson Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Dominic J. Haik, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

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

JESSON, Judge

Appellant Laurie McIntyre challenges the district court's order sustaining the revocation of her driver's license, arguing that law enforcement lacked reasonable

suspicion to expand the scope of the stop of her vehicle and that the result of her breath test was not reliable. We affirm.

FACTS

The commissioner of public safety revoked McIntyre's driving privileges after her car was stopped by police and she failed a breath test. McIntyre moved to rescind the revocation. At a district court hearing, a Savage police officer testified that she initially stopped McIntyre's car for speeding. McIntyre, who was driving, admitted that she had been speeding and told the officer that she was on her way to a gas station, even though there was no gas station in the vicinity. The officer testified that she smelled the odor of an alcoholic beverage coming from inside the car and observed that McIntyre's eyes appeared "watery and glossy."

The officer asked McIntyre to exit the car and had her perform field sobriety tests, which McIntyre either failed or did not complete. At one point McIntyre grabbed her stomach, stated, "I can't do this," and told the officer that she had a stomach ulcer and was having problems with anxiety. The officer tried to administer a preliminary breath test, but McIntyre was unable to produce a breath sample because she bit down on the mouthpiece. In a second attempt, she still did not complete the test, but the officer was able to perform a manual capture; McIntyre failed that test.

The officer placed McIntyre under arrest, transported her to the police department, and read her the implied-consent advisory. McIntyre agreed to take a breath test, and she provided two breath samples that were accepted by the testing machine. The first sample reported 0.087 alcohol concentration, and the second sample reported 0.080. Because

under the testing procedure, the lower of the two samples, rounded down, is the final reported value, McIntyre's testing showed a final result of 0.08.

McIntyre testified that on that evening, she had consumed alcohol about three-and-one-half hours before she was stopped. She also testified that she had been diagnosed with anxiety attacks and acid reflux, both of which she experienced during the field sobriety testing. A friend of McIntyre's, who is a psychiatrist, testified that, although he had not examined her and had no training and experience with a testing machine, exacerbation of reflux disease during a panic attack would more likely than not introduce alcohol into the oral cavity.

An employee of the Bureau of Criminal Apprehension's breath lab testified for the defense that uncertainty ranges may be applied to the average of the two DataMaster testing results. She testified that with McIntyre's test results, there was an 81.92 percent possibility that her test result was over 0.08. But she also testified that no BCA rule required her to record the sample uncertainly with breath tests and that she believed McIntyre's results to be accurate and reliable.

At the hearing, defense counsel identified the issues as "whether or not the officer . . . had probable cause for impairment," "whether the test result in this case was actually a 0.08 or more," and "whether the test results are valid and reliable as required by statute. All other issues are waived." The district court issued a brief order sustaining the license revocation. The district court's order stated in part, "At the hearing, Petitioner challenged the reliability of [her] breath test results—all other issues were waived." The district court found that the implied consent statute did not require consideration of the margin of error

for breath test results; that McIntyre had supplied two breath tests, each with a blood alcohol content exceeding 0.08; and that the test was properly administered on a machine that had passed diagnostic and control tests. This appeal follows.

D E C I S I O N

I. Reasonable articulable suspicion existed to expand the scope of the traffic stop.

McIntyre argues that the officer lacked a legal basis to expand the original purpose of the stop—speeding—to investigate her possible impairment. The commissioner argues that this argument was not raised before the district court. Generally, this court addresses only issues that were presented to, and considered by, the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Here, the district court stated in its order that, apart from the reliability of the breath test results, "all other issues" were waived.

Nonetheless, an examination of the record indicates confusion over the scope of the issues presented. At the hearing, defense counsel initially informed the district court that "probable cause for impairment" was an issue. At the end of the hearing, when questioned by the district court, defense counsel replied, "There's no challenge to the actual observation, it's just the impairment issue and the accuracy of the test issue." Thus, the record is unclear as to whether the defense waived a challenge to the whole encounter, including the expansion of the stop. We note, however, that defense counsel questioned the officer extensively about the indicia of intoxication that she observed. And had the district court not implicitly determined that the expansion of the stop was lawful, it would not have had occasion to address the reliability of the breath test results. Implicit findings

may be derived from the district court's final resolution of a matter. *Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995). In this case, sustaining the legality of the expanded stop is a prerequisite to considering the breath-testing argument, and we may infer from the district court's order that it implicitly found that the stop was lawfully expanded. *See id*. Therefore, we may review the issue of the legality of the expansion of the stop.

Expansion of a traffic stop is unlawful absent a reasonable, articulable suspicion of criminal activity beyond the observed traffic violation. *State v. Fort*, 660 N.W.2d 415, 418-19 (Minn. 2003). A reasonable articulable suspicion requires an officer to have "a particularized and objective basis for suspecting the seized person of criminal activity." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995). This means more than a mere hunch. *State v. Diede*, 795 N.W.2d 836, 843 (Minn. 2011). Rather, it requires specific facts that, taken together with rational inferences from those facts, objectively support the officer's suspicion. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)). Reasonable suspicion is an objective standard that is evaluated under the totality of the circumstances. *Paulson v. Comm'r of Pub. Safety*, 384 N.W.2d 244, 246 (Minn. App. 1986). We review questions relating to reasonable suspicion de novo. *Wilkes v. Comm'r of Pub. Safety*, 777 N.W.2d 239, 242-43 (Minn. App. 2010).

McIntyre argues that the officer lacked reasonable, articulable suspicion to expand the scope of the traffic stop because the officer's observation that she smelled of alcohol did not rise to the level of reasonable suspicion. But the officer testified that not only did

she detect the odor of alcohol coming from McIntyre's person, but she also observed that McIntyre's eyes were "glossy and watery." We have concluded that an officer's observation of the odor of alcohol and bloodshot and watery eyes justified the expansion of a traffic stop to investigate a suspicion of impaired driving. *State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012); *see also State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001) (upholding the expansion of a stop based on the officer's noticing the odor of alcohol alone), *review denied* (Minn. Sept. 25, 2001). We agree with the district court's implicit finding that, based on observing indicia of intoxication, the officer had reasonable articulable suspicion to expand the traffic stop to include investigation of McIntyre's possible driving while impaired.

II. The district court did not clearly err by finding that the breath test results were reliable.

McIntyre also challenges the district court's ruling on the admissibility of the breath test results. We review the district court's rulings on the admissibility of evidence for an abuse of discretion. *Barna v. Comm'r of Pub. Safety*, 508 N.W.2d 220, 221-22 (Minn. App. 1993). In an implied-consent case, a person may raise the issue of whether the testing method used was reliable and whether the test results were accurately evaluated. Minn. Stat. § 169A.53, subd. 3(b)(10) (2016). The commissioner has the initial burden to show that "the test is reliable and 'that its administration in the particular instance conformed to the procedure necessary to ensure reliability.'" *Kramer v. Comm'r of Pub. Safety*, 706 N.W.2d 231, 235 (Minn. App. 2005) (quoting *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977)). To meet that burden, the commissioner must prove reliability by a preponderance

of the evidence. *Renner v. Comm'r of Pub. Safety*, 373 N.W.2d 628, 630 (Minn. App. 1985). Once the commissioner has established the prima facie validity of the test, the burden shifts to the petitioner to dispute the test's trustworthiness and validity. *Kramer*, 706 N.W.2d at 235. To do so, the petitioner may not rely solely on speculation, *Bielejeski v. Comm'r of Pub. Safety*, 351 N.W.2d 664, 666 (Minn. App. 1984), but must establish that the alleged defect actually affected the test results. *Noren v. Comm'r of Pub. Safety*, 363 N.W.2d 315, 318 (Minn. App. 1985). Whether the presumption of validity has been rebutted is generally a question of fact. *See Fritzke v. Comm'r of Pub. Safety*, 373 N.W.2d 649, 651 (Minn. App. 1985). If the petitioner has made a successful showing, the burden returns to the state to show that the defect did not affect the trustworthiness of the test. *See In re Source Code Evidentiary Hearings in Implied Consent Matters*, 816 N.W.2d 525, 537-38 (Minn. 2012) (recognizing three-part burden-shifting test for admitting breath test results).

Here, the district court found that McIntyre's breath testing was reliable. McIntyre argues that there was no showing of trustworthiness of the preliminary breath testing machine. But McIntyre's license was revoked not on the basis of preliminary breath testing, but on later breath testing on the DataMaster DMT-G with fuel-cell option, which is approved in Minnesota for the purpose of determining the alcohol concentration of a breath sample. *See* Minn. R. 7502.0425, subp. 2 (2015). The results of a breath-testing instrument approved by the commissioner are per se reliable under Minnesota Statutes section 634.16 (2016). *State v. Norgaard*, No. A16-1122, ___ N.W.2d ___, ___, 2017 WL 2414832, at *2 (Minn. App. June 5, 2017). The officer was a certified operator of the

machine, and it passed a diagnostic check just before McIntyre's testing, as well as air blank and control tests. Therefore, the commissioner established a prima facie case of reliability.

McIntyre argues that she rebutted the presumption of reliability in two ways. First, she argues that the testing was unreliable because of the uncertainty measurement calculations applied. Second, she argues that the testing procedure in her case produced results that were not trustworthy because they may have been affected by mouth alcohol due to her stomach problems. We reject both arguments.

McIntyre points out that the BCA expert testified that an uncertainty range was applied to the average of the two testing results, and the average of McIntyre's two samples was 0.0835, which would mean an actual range of 0.0736 to 0.0934. But McIntyre's argument based on the uncertainty range of testing is similar to alleging that alcohol concentration must be proved within a certain margin of error.[1] We have held, in assessing the results of an alcohol testing instrument, that "[t]he Commissioner of Public Safety is not required to prove an alcohol concentration . . . within some alleged margin of potential error." *Dixon v. Comm'r of Pub. Safety*, 372 N.W.2d 785, 786 (Minn. App. 1985) (as applied to breath testing); *see also Barna*, 508 N.W.2d at 222 (stating the same proposition as applied to blood testing). We agree with the district court that McIntyre's argument

[1] "Every measurement is 'uncertain,' in that no instrument is infinitely precise or accurate. The concept of measurement uncertainty is similar to the concept of margin of error and expresses the idea that a true value of a measurement can never be known. . . . Uncertainty indicates a range in which the true value of a measurement is likely to occur." *State v. King Cty. Dist. Court W. Div.*, 307 P.3d 765, 769 (Wash. App. 2013).

based on the uncertainty range fails. We also note that the BCA expert testified that a probability had been calculated for McIntyre's test results, and the possibility that her test result was over 0.08 was 81.92%. This is sufficient to meet the preponderance-of-the-evidence standard applicable in implied-consent hearings. *See Llona v. Comm'r of Pub. Safety*, 389 N.W.2d 210, 211 (Minn. App. 1986) (articulating that standard).

McIntyre also challenges the trustworthiness of the testing based on the doctor's testimony that her stomach problems could have caused issues with mouth alcohol and her testimony that she was suffering from reflux, which could have affected the test results. But the BCA expert testified that the testing procedure has three mouth alcohol safeguards, including the observation period, in which the subject is being observed for the introduction of alcohol, either internally or externally. The observation period precludes the possibility that the test result may be affected by mouth alcohol resulting from vomiting or burping. *Kooi v. Comm'r of Pub. Safety*, 363 N.W.2d 487, 489 (Minn. App. 1985). The BCA expert also testified that for reflux to actually affect the test result, there would need to be alcohol remaining in the stomach which would have reached all the way into the mouth.

The officer testified that she observed McIntyre for one hour before administering the breath tests, and during that period, McIntyre did not drink anything, burp, vomit, or place anything in her mouth. The district court relied on the officer's testimony in its findings that the testing was reliable. This court generally defers to the district court's credibility determinations. *Roettger v. Comm'r of Pub. Safety*, 633 N.W.2d 70, 73 (Minn. App. 2001). Under these circumstances, McIntyre failed to establish error in the test results based only on speculation that mouth alcohol was present and affected the test results. *See*

Bielejeski, 351 N.W.2d at 666 (stating that error cannot be established by mere speculation). The district court did not clearly err in finding that McIntyre failed to rebut the presumption of reliability in testing and did not err by sustaining her license revocation.

Affirmed.