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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1087**

Kevin Virgil Hedtke,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed February 26, 2018
Affirmed
Halbrooks, Judge**

Carver County District Court
File No. 10-CV-17-165

Jeffrey S. Sheridan, Sheridan & Dulas, P.A., Eagan, Minnesota (for appellant)

Lori Swanson, Attorney General, Stephen D. Melchionne, Assistant Attorney General,
St. Paul, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Halbrooks, Judge; and Schellhas,
Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's order sustaining the revocation of his
driver's license under Minnesota's implied-consent law. Minn. Stat. §§ 169A.50-.53
(2016). We affirm.

FACTS

Appellant Kevin Hedtke was arrested on suspicion of driving while impaired (DWI). He was brought to the Carver County jail, and an officer read him the implied-consent advisory as required by Minn. Stat. § 169A.51, subd. 2. After being given the opportunity to contact an attorney, appellant agreed to take a breath test. The breath test did not yield a valid result due to a deficient air sample and a “blank error.”¹ The arresting officer determined that appellant was intentionally being uncooperative and decided to forego a second test attempt. Appellant’s driver’s license was revoked for refusing to take a breath test under Minn. Stat. § 169A.52, subd. 3(a).

Appellant petitioned the district court to rescind his license revocation. At the hearing, the district court heard testimony from the arresting police officer, another officer who was present during the breath test, and the jail sergeant who administered the breath test. They testified to appellant’s actions around the time of the breath test and explained why they thought that he was uncooperative. The officers testified that appellant put his fingers in his mouth after the test in what appeared to be an attempt to induce vomiting, despite being instructed not to do so. It also appeared that appellant intentionally made himself belch while taking the breath test, which would make the test result unusable. Although appellant exhibited no difficulty breathing while being arrested, brought into the jail, or talking to the officers, appellant appeared to deliberately change his breathing

¹ There was testimony that appellant did not breathe enough air into the testing machine, resulting in a deficient sample. There was also testimony that a blank error can occur when there is too much alcohol in the ambient air, which prevents the testing machine from properly measuring the alcohol level in a test subject’s breath.

pattern to induce hyperventilation once the officers began preparing the breath test. And despite previously walking normally, appellant took an unusually long amount of time walking to the breath-test machine. The jail sergeant administering the breath test testified that he instructed appellant to form a tight seal around the mouthpiece but appellant failed to do so. The jail sergeant also testified that appellant did not provide long, consistent breaths into the test machine despite being instructed to do so. And when appellant did breathe into the machine, he did so at far below the intensity that people typically use when taking the test.

The district court found that appellant's conduct constituted a refusal to take the breath test and sustained the revocation of appellant's license. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred in sustaining his license revocation. "The question whether a driver has refused to submit to chemical testing is a question of fact, to which this court applies a clear-error standard of review." *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 722 (Minn. App. 2014).

Anyone who drives a motor vehicle within the State of Minnesota consents to a chemical test of his blood, breath, or urine in order to detect the presence of alcohol. Minn. Stat. § 169A.51, subd. 1(a). It is a crime to refuse a breath test, and such a refusal can lead to the revocation of a driver's license. Minn. Stat. §§ 169A.20, subd. 2, .51, subd. 2(a)(2), .52, subd. 3(a) (2016). Refusal, however, is not limited to an oral response and can be found through conduct. *Sigfrinius v. Comm'r of Pub. Safety*, 378 N.W.2d 124, 126 (Minn. App. 1985). Refusal is determined by looking at "the driver's words and actions in light

of the totality of the circumstances.” *State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). “Whether one has refused testing is a question of fact.” *Busch v. Comm’r of Pub. Safety*, 614 N.W.2d 256, 258 (Minn. App. 2000). Issues of fact are reviewed for clear error, and we give deference to the district court’s evaluations of witness credibility. *M & G Servs., Inc. v. Buffalo Lake Advanced Biofuels, LLC*, 895 N.W.2d 277, 281 (Minn. App. 2017), *review denied* (Minn. June 28, 2017).

Appellant argues that all of his behavior prior to the breath-test machine reporting a blank error is irrelevant, that he did not refuse to take the test because he orally agreed to take it, and that he was prevented from providing a sufficient breath sample after the blank error. We disagree.

We consider the totality of the circumstances. *Ferrier*, 792 N.W.2d at 102. Therefore, appellant’s conduct both before and after the test attempt is relevant. The testimony from the two police officers and the jail sergeant describes appellant as intentionally disregarding their instructions and acting in a way that frustrated their attempt to administer the breath test. Specifically, appellant changed his breathing pattern, belched, stuck his fingers down his throat, walked very slowly to the test machine, failed to form a proper seal around the mouthpiece, and did not provide a large enough breath sample for the test to work properly. In light of the evidence in the record, the district court did not clearly err in finding that appellant refused to take the breath test.

Affirmed.