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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1689**

State of Minnesota,
Appellant,

vs.

Deron Shandell Murphy,
Respondent.

**Filed April 30, 2018
Reversed and remanded
Kirk, Judge**

Hennepin County District Court
File No. 27-CR-15-2343

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Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

In this pretrial appeal in a driving while impaired (DWI) case, the state challenges
the district court's orders suppressing all evidence obtained as a result of a preliminary

breath test (PBT), arguing that the district court erred by finding that there was not sufficient reasonable articulable suspicion to support the PBT request. We reverse and remand.

FACTS

On January 26, 2015, respondent Deron Shandell Murphy was charged with third-degree DWI, third-degree DWI over 0.08, driving after revocation, and speeding for events alleged to have occurred on November 30, 2014. The district court found that the arresting officer stopped respondent's vehicle at approximately 12:15 a.m. on November 30 for speeding and for "failing to maintain a center position in the lane of traffic." The arresting officer approached the vehicle to speak with the driver, whom he identified as respondent. Respondent did not have a valid driver's license due to a prior DWI.

In speaking to the arresting officer, the district court found that respondent "admitted to consuming alcohol at a point earlier in the evening." The arresting officer's report also noted that respondent's speech was "somewhat slow," "that his eyes were bloodshot and watery," and that there was an "odor consistent with that of a consumed alcoholic beverage coming from the vehicle." The arresting officer asked respondent to get out of the vehicle to perform field sobriety tests, specifically the horizontal gaze nystagmus (HGN), the walk and turn, and the one-legged stand. After these tests were completed, the arresting officer also asked respondent to take a PBT. Respondent registered a blood alcohol concentration of 0.114 on the PBT, and he was placed under arrest for DWI.

Respondent moved to suppress all evidence obtained as a result of the PBT, arguing that the arresting officer did not have sufficient reasonable articulable suspicion of impaired driving to support the PBT request. Respondent appeared over two hours late for his scheduled omnibus hearing, and because the arresting officer had been excused, the parties agreed to proceed on a stipulated record that consisted of only the officer's squad video and police reports. The attorneys argued the matter in writing. On October 20 and 25, 2017, the district court filed orders granting respondent's motion to suppress, finding that the arresting officer lacked sufficient reasonable articulable suspicion for the PBT.

This pretrial appeal follows.

D E C I S I O N

When the state appeals a pretrial-suppression order, it “must ‘clearly and unequivocally’ show both that the [district] court’s order will have a ‘critical impact’ on the state’s ability to prosecute the defendant successfully and that the order constituted error.” *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995) (quoting *State v. Kim*, 398 N.W.2d 544, 547 (Minn. 1987)). “[T]he critical impact of the suppression must be first determined before deciding whether the suppression order was made in error.” *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). Here, respondent concedes that the state has satisfied the critical-impact requirement.

“When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence.” *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999) (citing *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992)). We review

de novo the legal issue of whether a search was justified by reasonable articulable suspicion and review findings of fact for clear error. *State v. Burbach*, 706 N.W.2d 484, 487 (Minn. 2005). Where the facts are undisputed, “our review is entirely de novo.” *Id.*

In this case, the parties stipulated to the record from which the district court made its factual findings. Because the parties did not stipulate to the facts, our review of the court’s factual findings is under the clear error standard of review.¹ *Id.* In evaluating conflicting evidence, “the district court has the discretion to draw its own conclusions and make factual findings from its independent review of a video recording of a traffic stop.” *State v. Shellito*, 594 N.W.2d 182, 186 (Minn. App. 1999).

We will uphold the district court’s “finding below . . . unless it ‘is not reasonably supported by the evidence as a whole.’” *State v. Farrah*, 735 N.W.2d 336, 345 (Minn. 2007) (Gildea, J., concurring in part and dissenting in part) (quoting *EOP–Nicollet Mall, L.L.C. v. Cty. of Hennepin*, 723 N.W.2d 270, 284 (Minn. 2006)). “A [district] court’s finding is erroneous if this court, after reviewing the record, reaches the firm conviction that a mistake was made.” *State v. Kvam*, 336 N.W.2d 525, 529 (Minn. 1983).

¹ We acknowledge that where, as here, the arresting officer did not testify and the court relied on the squad video and accompanying observations of the officer to make its factual findings, at least one jurisdiction has applied a de novo standard of review. See *State v. Binette*, 33 S.W.3d 215, 217 (Tenn. 2000) (“[W]e hold that when a trial court’s findings of fact at a suppression hearing are based on evidence that does not involve issues of credibility, a reviewing court must examine the record de novo without a presumption of correctness.”). The *Binette* court explained that de novo review was appropriate because “the reviewing court is in the same position as the trial court and is just as capable of reviewing the evidence.” *Id.* Here, even under Minnesota’s more deferential clear error standard of review, we are left with a firm conviction that a mistake has been made. On this record, we decline to address whether a de novo standard of review should apply.

Unreasonable searches and seizures by the government are prohibited by the United States and Minnesota Constitutions. U.S. Const. amend. IV; Minn. Const. art. I, § 10. “A police officer may, however, initiate a limited investigative seizure without a warrant if the officer has reasonable articulable suspicion of criminal activity.” *State v. Klamar*, 823 N.W.2d 687, 691 (Minn. App. 2012) (citing *Terry v. Ohio*, 395 U.S. 1, 21-22, 88 S. Ct. 1868, 1880 (1968)). After a legal traffic stop, an officer may expand the scope of the stop “to include investigation of other suspected illegal activity . . . if the officer has reasonable, articulable suspicion of such other illegal activity.” *State v. Wiegand*, 645 N.W.2d 125, 135 (Minn. 2002).

“Reasonable suspicion must be particularized and based on specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *State v. Smith*, 814 N.W.2d 346, 352 (Minn. 2012) (quotations omitted). “To be reasonable, the basis of the officer’s suspicion must satisfy an objective, totality-of-the-circumstances test.” *Id.* at 351. Observation of “only one objective indication of intoxication [can] constitute probable cause to believe a person is under the influence,” and can certainly support the lower standard of reasonable articulable suspicion. *State v. Carver*, 577 N.W.2d 245, 248 (Minn. App. 1998) (quoting *Heuton v. Comm’r of Pub. Safety*, 541 N.W.2d 361, 363 (Minn. App. 1995)).

Pursuant to Minn. Stat. § 169A.41, subd. 1 (2016), a peace officer may request a PBT when he “has reason to believe from the manner in which a person is driving, operating, controlling, or acting upon departure from a motor vehicle, or has driven, operated or controlled a motor vehicle, that the driver may be violating or has violated

section 169A.20 (driving while impaired).” The officer must have “specific and articulable facts” to support the request. *State v. Vievering*, 383 N.W.2d 729, 730 (Minn. App. 1986), review denied (Minn. May 16, 1986).

Here, according to the arresting officer’s police report, the initial expansion of the traffic stop to administer field sobriety tests was based on respondent’s driving conduct, and the officer’s initial observations, including respondent’s admission to drinking alcohol, his slow speech, his bloodshot and watery eyes, and the odor of a consumed alcoholic beverage in the vehicle. After reviewing the stipulated record, the district court disputed some of the arresting officer’s initial observations, but found that respondent was speeding and “failed to maintain a center position in his lane of traffic,” and that respondent “admitted to consuming alcohol . . . earlier [that] evening.” These findings are supported by the record, and alone are sufficient indicia of impaired driving to provide reasonable articulable suspicion, not only to ask respondent to perform the initial field sobriety tests, but also to request a PBT pursuant to Minn. Stat. § 169A.41, subd. 1.

Respondent concedes that the traffic stop of his vehicle was lawful and that the officer had reasonable articulable suspicion to conduct the initial field sobriety tests. But respondent argues that requesting a PBT exceeded the scope of the traffic stop for which the arresting officer had reasonable articulable suspicion. However, “roadside sobriety tests are not required to support an officer’s reasonable belief that a driver is intoxicated.” *Holtz v. Comm’r of Pub. Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983). Here, the district court’s findings about appellant’s driving conduct and his admission to consuming alcohol were sufficient to establish that the arresting officer had reasonable articulable suspicion

of impaired driving to conduct the field sobriety tests and to request the PBT. Nothing additional was required to support the request for the PBT.

Nonetheless, the district court held that it could not “give credibility to the [arresting [o]fficer’s observations of the [appellant’s] impairment . . . [and] the state ha[d] not met its burden of proof.” The district court found that the arresting officer “testified” that in speaking with respondent he noticed that his speech was slow, that his eyes were bloodshot and watery, and that there was an odor of a consumed alcoholic beverage coming from inside the vehicle. Based on its own review of the squad video, the district court found that “there [wa]s no observable slowness in [respondent’s] speech,” and respondent’s eyes “do not appear to be bloodshot.”

The district court’s suppression order notes that “[t]he [c]ourt admitted [the arresting officer’s] squad video,” but the order does not indicate that the record was limited to the squad video and police reports. In its findings of fact, the court states that the arresting officer “testified” multiple times, creating the impression that testimony was taken. But notably, the arresting officer did not testify at the hearing, nor did any other person. Again, because respondent failed to appear on time for the omnibus hearing, the arresting officer was excused, and the parties agreed to proceed on a stipulated record. The record is clear that the arresting officer never testified. The district court appears to be referring to the information found in the arresting officer’s police report as his “testimony.”

Further, the squad video does not capture respondent’s eyes at the time the arresting officer first observed them. Because of poor video quality, it is not possible to determine whether respondent’s eyes were bloodshot or watery when the officer first made contact

with respondent. Also, because of poor audio quality, it is not possible to determine whether respondent's speech was slow during his first interaction with the officer. Indeed, it is generally difficult to hear or discern what appellant is saying at all. The only time the squad video directly captures respondent's eyes is right before the arresting officer administers the PBT as he looks toward the squad car. Even at that point, the video's image is washed out due to the squad car's lights, as are portions of respondent's red pants. The district court's findings disputing the observations in the arresting officer's report are not supported by the record.

The district court further found that the arresting officer "testified" or observed that respondent "failed" each of the three field sobriety tests. Again, the arresting officer did not testify. But more importantly, nowhere in the record is there any indication that the arresting officer described respondent's performance on any test as "failing." The arresting officer simply reported his observations, which are consistent with the squad video, to the extent that the observations are observable on the squad video.

Regarding the HGN test, the arresting officer's report "note[s] [a] lack of smooth pursuit in both eyes and distinct and sustained nystagmus at maximum deviation in both eyes," and "also continue[s] to note the odor of a consumed alcoholic beverage" during the test. The district court acknowledged that these indicia of intoxication could not be captured by the squad video. On this record, there is no basis to contradict the officer's observations on the HGN test. But the district court gave no consideration to the well-known technological limitations of a squad video or to the arresting officer's training and

experience when it concluded that the officer's observations were not supported simply because they were not captured by the squad video.

Regarding the walk-and-turn test, the arresting officer's report notes that respondent executed the turn "in a manner other than [he] had directed." The officer's report does not refer to any flailing of arms or use of supports. However, the district court found that the squad video shows that respondent "maintained balance without flailing arms or the use of supports," and that respondent turned as instructed. But because the angle of the squad video differs from the officer's angle, and because the arresting officer did not testify, it is impossible to determine what the arresting officer observed during the test, just as it is impossible to determine from the police report what the arresting officer meant by "in a manner other than [he] had directed." The district court's findings regarding the walk-and-turn test are not supported by the record.

Regarding the one-legged-stand test, the arresting officer's report notes that, "[w]hile performing the test, [respondent] lost his balance at the 30-second mark, put his foot down and picked it up again." The district court found that, according to the squad video's time stamp, respondent actually lost his balance at 36 seconds into the test. It is not clear why this six-second distinction is important. Prior to the test, the squad video shows that the arresting officer instructed respondent that it would take "about 30 seconds," and asked him to count to 30, starting with one-thousand-one.

During the test, respondent's counting slows as he approaches 30, and respondent stumbles, puts his foot down, and nearly falls as he is saying "30." The respondent's pace of counting determined the length of time that the test lasted. Indeed, the fact that it took

respondent an additional six seconds to count to 30 seems to support the arresting officer's observation that his speech was slow. The district court's focus on this extra six seconds as a basis to dispute the arresting officer's interpretation of respondent's performance on the one-legged stand is not supported by the record.

The district court found that after the arresting officer determined that respondent "failed all three tests," he administered the PBT. Again, the arresting officer's report made no mention of respondent "failing" these tests, and the report contradicts the district court's findings. The arresting officer's report indicates that "[d]ue to [his] observations of [respondent's] driving conduct, [his] observations on initial contact, and [his] observations during field sobriety testing particularly the HGN test, [the arresting officer] asked [respondent] to submit to a PBT."

Respondent argues that because of his performance on the HGN, walk-and-turn, and one-legged-stand tests, the officer's reasonable articulable suspicion of impaired driving to request a PBT was "dispelled." Respondent relies on *State v. Hickman*, to support his position. 491 N.W.2d 673, 675 (Minn. App. 1992) (holding that an officer's reasonable articulable suspicion of driving with an expired vehicle registration was dispelled when the officer observed a valid temporary permit on the vehicle before approaching the driver), *review denied* (Minn. Dec. 15, 1992). But in *Hickman*, the officer observed something that entirely negated his previous suspicion. In this case, nothing about respondent's performance on the HGN, walk-and-turn, or one-legged-stand tests entirely negated the arresting officer's initial observations, and the officer's report includes only his observations, not whether the respondent passed or failed any of the tests.

Here, the district court concluded that because the arresting officer's observations in the police report were not supported by the court's own review of the squad video, there was not reasonable articulable suspicion of impaired driving to support the PBT request. But a review of the evidence in the record shows a rather routine DWI stop by an officer who acted professionally. The district court's findings, particularly its evaluation of a witness's "testimony" where no testimony actually occurred, are not reasonably supported by the evidence as a whole. On this record, we cannot uphold the district court's clearly erroneous findings, and we conclude that the arresting officer's reasonable articulable suspicion of impaired driving in support of the first three field sobriety tests also sufficiently supported the PBT request. We therefore reverse and remand the district court's order granting respondent's motion to suppress.

Reversed and remanded.