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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0275**

Kenneth Wayne Carlson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed March 18, 2019
Affirmed
Smith, Tracy M., Judge**

Chisago County District Court
File No. 13-CV-17-293

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

Keith Ellison, Attorney General, William Young, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Kenneth Wayne Carlson challenges the district court's order sustaining the revocation of his driving privileges, arguing that the district court erred by (1) finding that he was in physical control of the vehicle and (2) denying his motion for a new hearing based on newly discovered evidence. We affirm.

FACTS

Around 6:30 a.m. on April 11, 2017, the Chisago County Sheriff's Office received a 911 call from a woman claiming that her husband had "rammed" her vehicle with his truck in the garage of their home. Sergeant Jason Foster responded to the scene a few minutes later. Sergeant Foster immediately saw that the garage door had been "bashed in," a Ford truck was parked in front of the garage door, and Carlson was sitting in the driver's seat of the truck. The truck was not running.

Carlson told Sergeant Foster that he had "recently" caused the damage to the garage door as well as damage to his wife's vehicle. Carlson told Sergeant Foster that he did not know the garage door was coming down when he was driving his truck out of the garage. Sergeant Foster found keys in Carlson's pocket; he did not try the keys in the ignition to see if they were the keys to the truck. Sergeant Foster checked inside the cab of the truck and found it warm; he did not check the hood of the truck for warmth. Sergeant Foster examined the garage door and determined that the truck had been driven right through the garage door while it was shut, pushing Ms. Carlson's vehicle into the back wall. Sergeant Foster eventually placed Carlson under arrest for DWI.

After Carlson was arrested, respondent Minnesota Commissioner of Public Safety revoked Carlson's driver's license. Carlson petitioned for judicial review, arguing that he was not in physical control of his vehicle at the time of his arrest. At the hearing, Carlson testified that, on the night before his arrest, he pulled his truck into the garage but could not get it all the way in. He explained that the garage door was already broken and it was left partially open. Carlson started to back up, but the garage door started coming down.

His truck damaged the door, and he used his truck to bump his wife's vehicle forward so the garage door would not collapse on it. Carlson further testified that he began drinking that night because he was "bummed out about the damage" but that he did not drive. He continued drinking the next morning when he went out to sit in his truck and look at the damage to the garage door.

The district court upheld the revocation of Carlson's driver's license. The district court found that Carlson's version of events was not credible. It found that Ms. Carlson's statements in her call to the police were reliable and, relevant to this case, found—based on testimony from Sergeant Foster—that Ms. Carlson said that Carlson had "just" driven his truck through the garage and into her car. The district court concluded that "the recent damage, the mud tracks, Ms. Carlson's statements to the [p]olice, and Carlson's own statements at the time of the incident support that he had driven the truck and remained in physical control of the vehicle when law enforcement arrived."

Carlson appealed the decision and later stayed the appeal so that he could bring a motion to reopen the matter in district court under Minn. R. Civ. P. 60.02 based on newly discovered evidence. The purported newly discovered evidence was the transcript and recording of the 911 call that Ms. Carlson made to police. Because the transcript showed that Ms. Carlson did not say that Carlson had "just" driven his truck through the garage door, Carlson argued that it directly contradicted the deputy's testimony.

The district court denied Carlson's motion, and this appeal was reinstated.

DECISION

I. The district court did not err in finding that Carlson was in physical control of his vehicle at the time of his arrest.

Carlson argues that the district court erred by finding that Carlson was in physical control of his vehicle because no one saw him driving his truck and the responding officers did not determine that the keys to the truck were in Carlson's possession at the time. We disagree.

To sustain the revocation of a person's driving privileges, the commissioner must prove by a preponderance of the evidence that the person "was driving, operating, or in physical control of a motor vehicle . . . in violation of section 169A.20." Minn. Stat. § 169A.53, subd. 3(b)(1) (2018); *Llona v. Comm'r of Pub. Safety*, 389 N.W.2d 210, 211 (Minn. App. 1986) (holding that burden of proof in implied-consent case is preponderance of the evidence); *Roberts v. Comm'r of Pub. Safety*, 371 N.W.2d 605, 607 (Minn. App. 1985) (holding that actual physical control must be proved), *review denied* (Minn. Oct. 11, 1985).

"Whether a person is in physical control of a motor vehicle for purposes of the implied-consent law is a mixed question of law and fact." *Snyder v. Comm'r of Pub. Safety*, 744 N.W.2d 19, 21-22 (Minn. App. 2008). We review the district court's findings of fact for clear error, "giving due weight to inferences drawn from those facts by the district court." *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 708 (Minn. App. 2008) (quotation omitted). "Findings of fact are clearly erroneous when they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole." *Schulz v.*

Comm'r of Pub. Safety, 760 N.W.2d 331, 333 (Minn. App. 2009) (quotation omitted), review denied (Minn. Apr. 21, 2009). We will “defer to the district court’s credibility determinations and ability to weigh the evidence.” *Constans v. Comm'r of Pub. Safety*, 835 N.W.2d 518, 523 (Minn. App. 2013). “Once the facts are established, the issue of physical control is a question of law, which this court reviews de novo.” *Snyder*, 744 N.W.2d at 22.

Minnesota statutes do not define physical control, but Minnesota courts have explained that “a person is in physical control of a vehicle if he has the means to initiate any movement of that vehicle, and he is in close proximity to the operating controls of the vehicle.” *State v. Fleck*, 777 N.W.2d 233, 236 (Minn. 2010). “Mere presence in or about a vehicle is insufficient to show physical control” *Id.* Rather, “it is the overall situation that is determinative.” *Id.* Courts consider “the person’s location in proximity to the vehicle; the location of the keys; whether the person was a passenger in the vehicle; who owned the vehicle; and the vehicle’s operability.” *Id.* The physical control aspect of the statute is intended “as a preventive measure to deter the drunk driver from again driving” and “should be given the broadest possible effect.” *State v. Starfield*, 481 N.W.2d 834, 836-37 (Minn. 1992) (quotation omitted).

In *Dufrane v. Comm'r of Pub. Safety*, the appellant was found awake, intoxicated, and sitting behind the wheel of a parked car. 353 N.W.2d 705, 706 (Minn. App. 1984). The ignition key was not accessible; the appellant’s wife had taken it away from him. *Id.* at 707. This court held that “[p]hysical control does not solely depend upon the location of the ignition key. The location of the key is simply a factor, with others, to consider.”

Id. And this court ultimately concluded that “appellant’s upright presence in the front seat and behind the wheel of a car, plus the testimony of the police officer that appellant had told her he had been driving the car earlier, constitutes reasonable and probable grounds to believe appellant was in physical control of a motor vehicle.” *Id.* at 708.

A similar situation was present here. Upon arriving, Sergeant Foster found a key ring with several keys on it in the truck, but he did not determine whether any of those keys operated the truck. Carlson later testified that the keys to the truck were inside the house and were not on his person at the time of his arrest. The district court found Carlson’s version of events not credible. Additional factors supported the determination of physical control. Sergeant Foster found fresh tire tracks in the mud along the driveway and Carlson sitting in the driver’s seat, awake, with the cab of the truck a warmer temperature inside than outside. Carlson owned the truck, and the truck was operable. Taking all of these circumstances together, and giving due weight to the inferences drawn from these facts by the district court, the district court did not err in concluding that the commissioner proved that Carlson was in physical control of his vehicle at the time of his arrest.

II. The district court did not abuse its discretion when it denied Carlson’s motion to reopen the case based on the newly discovered 911 recording.

Carlson argues that the district court abused its discretion in denying his motion to vacate its previous order and reopen the case because the statements in the 911 recording would have changed the result of the implied-consent hearing. We are not persuaded.

This court reviews a district court's order denying a motion to vacate a judgment under Minn. R. Civ. P. 60.02 for an abuse of discretion. *Carter v. Anderson*, 554 N.W.2d 110, 115 (Minn. App. 1996), *review denied* (Minn. Dec. 23, 1996).

“The burden of proof in a proceeding under Rule 60.02 is on the party seeking relief.” *City of Barnum v. Sabri*, 657 N.W.2d 201, 205 (Minn. App. 2003). To warrant a new hearing or trial on the basis of newly discovered evidence under rule 60.02(b), the moving party must show that the new evidence (1) was not discovered until after trial; (2) could not have been discovered before trial by exercising due diligence; (3) is relevant and admissible and; (4) is not merely collateral, impeaching, or cumulative but rather would have “a probable effect upon the result of a new trial.” *Frazier v. Burlington N. Santa Fe Corp.*, 811 N.W.2d 618, 631 (Minn. 2012).

Here, the district court determined that the first three elements were satisfied by the newly discovered 911 recording. However, it determined that the fourth element was not satisfied because the recording was being offered merely as impeachment evidence and, even if it was used for something other than impeachment purposes, it would not have an effect on the outcome of a new hearing.

The 911 recording shows that Carlson's wife told the dispatcher, “My husband drank so much that he drove into my garage and pushed my car all the way back.” Relevant here, Ms. Carlson also said, “I don't know when he did it.” Carlson argues that this latter statement directly contradicts Sergeant Foster's testimony that Ms. Carlson told the dispatcher that Carlson “just” drove his truck through the garage. He argues that the newly

discovered statement is more than impeaching because it “contradicts the primary evidence on which the original order was based” and “corroborates Carlson’s version of events.”

Carlson’s own argument supports the district court’s determination that the evidence was offered to impeach. He contends that “[i]t would have directly contradicted [Sergeant] Foster’s testimony about when the incident occurred.” Using the 911 recording to contradict or impeach Sergeant Foster’s testimony, while bolstering Carlson’s, is not sufficient under rule 60.02(b).

Furthermore, even if the recording were to be used substantively, rather than as impeachment evidence, it also must be evidence that would have a probable effect upon the result of a new trial. *See Frazier*, 811 N.W.2d at 631. Carlson argues that “[t]he district court’s original order finding physical control and sustaining the license revocation relied heavily on Sergeant Foster’s testimony that Carlson’s wife reported to the 911 dispatcher that Carlson had ‘just’ driven his truck through the garage.” But the district court’s conclusion regarding physical control does not support this characterization. The conclusion reads:

Carlson was intoxicated and in a position to exercise dominion or control over the truck that morning when Sergeant Foster arrived. Carlson was in close proximity to [the operating] controls of the vehicle. No one else was in the truck. Carlson was awake. The keys for the truck were either in Carlson’s possession or a short walk away in the house. There is no evidence that the truck was inoperable. The recent damage, the mud tracks, Ms. Carlson’s statements to the [p]olice, and Carlson’s own statements at the time of the incident support that he had driven the truck and remained in physical control of the vehicle when law enforcement arrived.

As the district court later wrote, in rejecting Carlson’s motion to reopen, the evidence of the 911 call would not “establish a specific time when Carlson drove his vehicle [into the garage]”—it would only suggest that Ms. Carlson did not know specifically when he did. The remaining factors would continue to establish that Carlson was in physical control of the vehicle—his presence in the truck and proximity to the controls, the possession of a set of keys, and the fact that the truck appeared to have been recently driven. The 911 recording thus would not have a probable effect on the results of a new trial. The district court therefore did not abuse its discretion when denying Carlson’s motion to vacate its previous order and reopen the case for a new implied-consent hearing.

Affirmed.