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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0054**

State of Minnesota,
Respondent,

vs.

Thomas Randal Schreyer,
Appellant.

**Filed September 16, 2019
Affirmed
Kirk, Judge***

Brown County District Court
File No. 08-CR-18-302

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Roger H. Hippert, Thomas L. Borgen, New Ulm City Attorney, New Ulm, Minnesota (for respondent)

Steven P. Groschen, Kohlmeyer Hagen Law Office, Chtd., Mankato, Minnesota (for appellant)

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

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KIRK, Judge

Appellant Thomas Randal Schreyer challenges his conviction for driving while impaired, arguing that the district court erred by denying his pretrial motion to suppress the evidence based on its conclusions that the police (1) did not unconstitutionally seize appellant when they asked him to step out of his vehicle and (2) had a reasonable, articulable suspicion to administer a preliminary breath test (PBT) to appellant. Because we see no error in the denial of the motion to suppress, we affirm.

DECISION

When reviewing a pretrial order on a motion to suppress, this court applies a clearly erroneous standard to factual findings and a de novo standard to conclusions of law. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009).

1. The Seizure

When an officer asks a person to step out of a vehicle, there is sufficient force to constitute a seizure. *State v. Day*, 461 N.W.2d 404, 407 (Minn. App. 1990), *review denied* (Minn. Dec. 20, 1990); *see also State v. Klamar*, 823 N.W.2d 687, 693 (Minn. App. 2012) (holding that an officer who approached a stopped vehicle to check on the occupants' welfare and spoke to the driver through the window did not conduct a seizure until the officer asked the driver to exit the vehicle). The police officer who saw appellant in a vehicle at approximately 1:40 a.m. on February 25, 2018, asked him to step out of the vehicle, which was stuck in a snowbank at an intersection; it extended into the street and created a traffic hazard. The vehicle was still running, although a pickup truck was in front

of it and the pickup-truck driver was attempting to attach a towing strap. Appellant was in the driver's seat, staring ahead; he was wearing a seatbelt and had his hands on the wheel.

The officer had made unsuccessful efforts to contact appellant by tapping on the driver's side window and the front window. The officer testified that appellant "was almost like a thousand yards staring forward and didn't want to be seen or didn't want me to look at him [W]hen I would step around to the front window, he would turn his head off to the side to avoid eye contact." The officer testified further that he "checked the door handle and [saw] it was unlocked, and I wanted to check [appellant's] welfare. I didn't know if he was okay, if he'd been injured, if he was okay with this person towing him, what the situation was."

The officer therefore opened the vehicle door, which was not a seizure because "it is not reasonable . . . to require officers to communicate with unresponsive or unconscious drivers through closed car windows when the driver refuses or is unable to lower the window." *Overvig v. Comm'r of Pub. Safety*, 730 N.W.2d 789, 792-93 (Minn. App. 2007) (rejecting appellant's argument that he terminated the encounter with an officer who tapped on his window by turning away from the officer and holding that opening a vehicle door is not a seizure), *review denied* (Minn. Aug. 7, 2007).

The officer then asked for appellant's identification and noticed that appellant had difficulty removing it; he also noted that "[appellant] was lethargic; he had a look of stupor, . . . [H]is eyes were bloodshot and watery. His speech and movements were deliberate, almost a little bit slow, like he had to think about them. Obviously, I detected an odor of an alcoholic beverage coming from [him]." The officer testified that these

observations collectively “indicate[d] to me that [there was a] possible impairment,” and he asked appellant to step out of the vehicle.

Appellant argues that he was seized when the officer approached his vehicle because appellant did not feel free to leave: his vehicle was stuck in snow, a pickup truck was in front of it, and the vehicle was being attached to the pickup truck. *See Matter of Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 100 S. Ct. 1870, 1877 (1980) for the conclusion that a seizure occurs when “a reasonable person would have believed that he was not free to leave”). Appellant concedes that the officer’s squad car did not block his movement, but argues that the officer’s right to approach and check on appellant’s welfare was abrogated by the pickup truck that caused appellant not to feel free to leave. The logical extension of this would be that officers may not approach or check on the welfare of drivers whose vehicles are crashed, stuck, or otherwise prevented from driving away. Appellant offers no support for this argument.¹

Appellant also argues that “[h]is body language communicated that he did not wish to speak with the officer” and that he “gave the officer the cold shoulder.” But the officer knew only that appellant had driven his car into a snowbank from which it needed to be towed; he did not know whether appellant, who repeatedly turned away but did not

¹Appellant relies on *State v. Lopez*, 698 N.W.2d 18 (Minn. App. 2005) to argue that, “like *Lopez*, and unlike *Overvig*, appellant’s movement was obstructed by the snow and the truck in front of him.” But *Lopez* does not support appellant’s position; in that case, the vehicle was not stuck in snow at an intersection; it was in a parking lot, an officer’s squad car with its lights on partially blocked it, and the officer woke the occupant of the car, instructed her to unlock the door, and opened the door to check on her. *Id.* at 22.

otherwise react to the officer's obvious efforts to contact him, was injured, and he testified that he did not know if appellant "was medically okay"

Finally, appellant argues that the officer should have asked either the passenger who was standing outside appellant's car or the pickup-truck driver about appellant's condition instead of trying to ask appellant. He offers no support for the view that a police officer confronted with a driver who turns away should rely on a third party for information about the driver's condition rather than attempt to contact the driver directly.

The district court did not err by concluding that "[appellant's] behavior indicated some problem that [the officer] was justified in investigating further. The seizure in this case was justified."

2. The PBT

"An officer may require a PBT if he "has reason to believe from the manner in which a person is . . . acting upon departure from a motor vehicle . . . that the driver . . . has violated [Minn. Stat. § 169A.20 (2018)] (driving while impaired)." Minn. Stat. § 169A.41, subd. 1 (2018). An officer may request a PBT if he has "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).

After stepping out of his vehicle, appellant told the officer he had consumed three or four beers since 10 p.m., i.e., over the last three-and-a-half hours. The officer then administered a PBT that indicated an alcohol concentration of 0.133.

Appellant argues that "despite the indicia of [appellant's] intoxication," the officer lacked "a reasonable, articulable suspicion that appellant had been driving while impaired"

because of “the totality of the circumstances—including the weather conditions, the lack of field-sobriety tests or driving conduct, [and] appellant’s reluctance to speak with the officer.” But none of these circumstances would oppose a suspicion of appellant’s driving while impaired.

The weather conditions precluded field-sobriety tests. While the officer did not see appellant drive, he did see the results of appellant’s driving into a snowbank and testified that appellant’s vehicle “was very clearly stuck. It wasn’t moving anywhere.” Appellant’s decision not to open a window so the officer could speak to him, not to tell the officer he did not want to speak, and not to make eye contact with the officer was behavior consistent with trying to prevent the officer from noticing indicia of appellant’s intoxication.

The district court did not err in concluding that appellant had not been unconstitutionally seized and that the officer had a reasonable, articulable suspicion that appellant had been driving while impaired.

Affirmed.