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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A19-1055**

State of Minnesota,  
Respondent,

vs.

Tiesha Monique Moore,  
Appellant.

**Filed May 26, 2020  
Reversed and remanded  
Reyes, Judge**

Stearns County District Court  
File No. 73-CR-17-3889

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Considered and decided by Bryan, Presiding Judge; Reyes, Judge; and Bratvold,  
Judge.

**UNPUBLISHED OPINION**

**REYES, Judge**

In this direct appeal from her judgment of conviction of first-degree driving while  
intoxicated (DWI), appellant argues that the state failed to provide sufficient evidence to

prove beyond a reasonable doubt that she had three qualified prior impaired-driving incidents under Minn. Stat. § 169A.24, subd. 1(1) (2016). We reverse and remand.

### **FACTS**

On April 29, 2017, a Minnesota state trooper arrested appellant Tiesha Monique Moore upon probable cause that she had been DWI after she showed several signs of intoxication. The trooper read her the implied-consent breath-test advisory. Appellant agreed to take a breath test, which resulted in a 0.11 alcohol concentration.

Respondent State of Minnesota charged appellant with two counts of first-degree felony DWI, in violation of Minn. Stat. §§ 169A.20, subd. 1(1) (2016), 169A.24, subd. 2 (2016), and one count of gross-misdemeanor driving after cancellation, in violation of Minn. Stat. § 171.24, subd. 5 (2016). The state charged the DWIs as felonies based on appellant's two convictions of gross-misdemeanor DWI in 2011 and, according to appellant's certified driving-record history, a loss of license in April 2009 related to impaired driving.

Following appellant's waiver of her right to testify and to a jury trial, the district court held a court trial and heard testimony from the trooper and a breath-test expert. The district court found appellant guilty of all three counts and sentenced her to 75 months' imprisonment and a five-year conditional-release term on the felony DWI counts and a concurrent one-year jail term on the gross-misdemeanor driving-after-cancellation count. This appeal follows.

## DECISION

Appellant argues that the state presented insufficient evidence to support her felony DWI convictions, contending that the certified copy of her driving-record history did not establish a prior impaired-driving incident, which resulted in an incorrect sentence.<sup>1</sup> We agree.

When reviewing a challenge to the sufficiency of the evidence, we conduct a thorough analysis to determine whether the factfinder could reasonably find the defendant guilty of the charged offense based on the facts in the record and the legitimate inferences drawn from those facts. *See State v. Chambers*, 589 N.W.2d 466, 477 (Minn. 1999).<sup>2</sup>

We review factual findings for clear error and determine whether the findings are based on evidence in the record, which we view in the light most favorable to the verdict. *Rasmussen v. Two Harbors Fish Co.*, 832 N.W.2d 790, 797 (Minn. 2013). “To conclude that findings of fact are clearly erroneous we must be left with the definite and firm conviction that a mistake has been made.” *Id.* (quotation omitted). “We review questions of law de novo.” *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016).

A person is guilty of first-degree DWI if they commit that violation within ten years of the first of three or more qualified prior impaired-driving incidents. Minn. Stat. § 169A.24, subd. 1(1). A “[q]ualified prior impaired driving incident includes prior

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<sup>1</sup> Appellant does not dispute the two other impaired-driving incidents, which the state established by submitting certified copies of the convictions.

<sup>2</sup> We decline to follow the state’s application of the circumstantial-evidence standard of review because the state does not present evidence from which an inference of notice per Minn. Stat. § 169A.52, subd. 6 (2016) could be drawn. *See State v. Silvernail*, 831 N.W.2d 594, 598-99 (Minn. 2013) (describing circumstantial-evidence standard of review).

impaired driving convictions and prior impaired driving-related losses of license.” Minn. Stat. § 169A.03, subd. 22 (2016). A “[p]rior impaired driving-related loss of license includes a driver’s license suspension, revocation, cancellation, denial, or disqualification.” *Id.*, subd. 21(a) (2016). An implied-consent license revocation “becomes effective” when an officer notifies the person of the revocation and advises the person of the right to administrative or judicial review.<sup>3</sup> Minn. Stat. § 169A.52, subd. 6.

Because a revocation does not “become effective” without notice, in order to prove a defendant guilty beyond a reasonable doubt of an offense that requires a prior license revocation, the state has the burden of proving that appellant received notice of that revocation. *See State v. Burg*, 648 N.W.2d 673, 677-78 (Minn. 2002) (“The Due Process Clause of the Fourteenth Amendment to the United States Constitution ‘protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the accused] is charged.’”) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970)) (alteration in original). Moreover, we note that, in previous license-revocation cases disputing notice, the state has provided either testimony regarding notice or evidence that it provided notice to the defendant. *See, e.g., Gray v. Comm’r of Pub. Safety*, 918 N.W.2d 220, 225 (Minn. App. 2018) (identifying officer testimony that he personally provided notice); *Johnson v. Comm’r of Pub. Safety*, 889 N.W.2d 36, 37, 40 (Minn. App. 2016) (identifying officer testimony that he thought he placed notice in appellant’s property); *Johnson v. Comm’r of*

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<sup>3</sup> The state argues that the prior revocation resulted from an implied-consent test that appellant took in April 2009.

*Pub. Safety*, 394 N.W.2d 867, 868 (Minn. App. 1986) (identifying officer testimony that he placed order of revocation in front of appellant).

The Minnesota Supreme Court examined a similar situation recently. *See State v. Anderson*, \_\_\_ N.W.2d \_\_\_, 2020 WL 1870182, at \*2 (Minn. Apr. 15, 2020). It looked at second-degree DWI, which requires that “one aggravating factor [be] present when the violation was committed.” *Id.* (quoting Minn. Stat. § 169A.25, subd. 1(b) (2018)). An “aggravating factor” includes a qualified prior impaired-driving incident. Minn. Stat. § 169A.03, subd. 3(1) (2016). The supreme court held that a prior license revocation is “present as an aggravating factor as of its effective date.” *Id.* at \*5. It defined the effective date as “the time the commissioner . . . notifies the person . . . of the revocation” *Id.* at \*3. Just as a prior license revocation is “present” when the commissioner provides notice of the revocation to a person, similarly, a prior license revocation becomes “effective” when the commissioner notifies a person of the intent to revoke. Without proper notice, a prior license revocation cannot be used to enhance a current DWI charge. *See Johnson*, 889 N.W.2d at 40-41 (reversing DWI charge when state could not establish notice of revocation because district court erroneously concluded that appellant received notice and therefore dismissed petition for judicial review as untimely).

Here, the district court concluded that “the [s]tate has prove[d] beyond a reasonable doubt all of the elements of this offense” and that the certified copy of the driving-record history established a qualified prior impaired-driving incident. The district court relied on *Omwega* to reject appellant’s argument that the state had to prove notice. *State v. Omwega*, 769 N.W.2d 291, 296 (Minn. App. 2009) (noting officer properly placed notice in

appellant's bag with his other property when released from custody), *review denied* (Minn. Sept. 29, 2009). First, as discussed above, the state has the burden of proving notice. *Burg*, 648 N.W.2d at 677-78. Second, *Omwega* is distinguishable because there, the state presented evidence that the police provided the appellant with notice. *Omwega*, 769 N.W.2d at 296. There is no such evidence here, and without it, we cannot make the reasonable inference that she received this notice. *See Chambers*, 589 N.W.2d at 477. Nor does appellant's certified driving-record history allow for a reasonable inference that she received notice. The only inference the statute allows is that, if the police mailed the notice, appellant received it three days later. *See* Minn. Stat. § 169A.52, subd. 6.

Here, the certified copy of appellant's driving-record history notes a revocation of appellant's license on April 18, 2009, following a test reflecting an alcohol concentration of 0.08 or more on April 11, 2009. It notes a penalty for the 2009 DWI of a 90-day license revocation.<sup>4</sup> Finally, the driving record notes that, three months later, "notice re requirements sent." The district court found "that [appellant] had been given notice of the cancellation, or reasonably should have known of it" based on "her admission to [the trooper] at the time of the stop as well as her certified driving record." The record does not support these findings.

First, appellant's certified driving record may prove the *occurrence* of a license revocation, but it does not prove that she received *notice* of that revocation. The state contends that the driving-record notation of "notice re requirements sent" constituted proof

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<sup>4</sup> *See* Minn. Stat. § 169A.52, subd. 4(a)(1) (2016) (providing 90-day license revocation if driver had an alcohol concentration of 0.08 or more).

that the state provided appellant notice of the license revocation. But the state offers no testimony that the notation referred to the revocation, and the district court made no finding on it. Nor does the certified driving record contain any explanation of its headings, terminology, or abbreviations.

Second, appellant's "admission to the trooper" refers to the trooper asking appellant whether she knew she had any "priors," and her response of, "I guess, yeah." But the trooper never asked appellant about the specific April 2009 license revocation, and because appellant's certified driving-record history lists more than 50 incidents, we cannot determine which prior driving incident either the trooper or appellant were referring to in that exchange.

Moreover, the state apparently sent this ambiguous notice three months *after* the license revocation, which is inconsistent with the statutory requirement that notice be provided *before* revocation becomes effective. Minn. Stat. § 169A.52, subd. 6. Thus, if the July 2009 notation referred to notice of the listed April 2009 license revocation, that revocation would not have been valid until its 90-day term expired, which is an inconsistent result. *See id.* Caselaw discussing notice demonstrates that officers generally provide notice the day of the driving incident or soon thereafter, as opposed to months later. *See, e.g., Gray*, 918 N.W.2d at 225 (in-person notice provided same day and mailed to appellant four days later); *Johnson*, 889 N.W.2d at 40 (claimed in-person notice provided same day); *Omwega*, 769 N.W.2d at 296 (same). And we have reversed convictions when the state cannot establish that the appellant received notice. *See, e.g., Johnson*, 889 N.W.2d at 40 (concluding officer's testimony that he believed he placed notice with appellant's

belongings and that someone at police department would have mailed him notice insufficient to establish appellant's receipt of notice). A record with a vague notation regarding an undefined notice does not establish that appellant received notice.

Finally, we note that the driving record by itself cannot establish notice because certified driving records are documents internal to the Department of Public Safety. See Minnesota Department of Public Safety, <https://dps.mn.gov/divisions/dvs/Pages/records-request-procedure.aspx> (last visited April 2, 2020) (providing that only criminal enforcement, court agencies, and government agencies have access to driving records, whereas ordinary citizens must submit form and pay fee to receive certified driving record); see also *State v. Vonderharr*, 733 N.W.2d 847, 852 (Minn. App. 2007) (“[T]he primary purpose of DPS driver’s-license records is to provide current information about the license status of drivers to ensure that only drivers with valid licenses operate motor vehicles in the state.”). When “there is no evidence that [appellant] ever actually received [notice], it would be erroneous to find receipt of the notice.” *Johnson*, 889 N.W.2d at 40.

We need not reach appellant’s due-process argument because we conclude that the state failed to prove that appellant received notice of the license revocation, without which the state cannot demonstrate the required three qualified prior impaired-driving incidents. We reverse appellant’s conviction of first-degree DWI and remand for sentencing for second-degree DWI. Minn. R. Crim. P. 28.02, subd. 12(c).

**Reversed and remanded.**