

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0688**

Lee Ray Bolch, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed April 12, 2021
Affirmed
Bryan, Judge**

Nobles County District Court
File No. 53-CV-19-1056

Robert J. Kouba, Kans Law Firm LLC, Bloomington, Minnesota (for appellant)

Keith Ellison, Attorney General, Cory J. Marsolek, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

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

NONPRECEDENTIAL OPINION

BRYAN, Judge

In this appeal from the district court's order affirming the revocation of appellant's driving privileges, appellant challenges the following three aspects of the district court's order: (1) the district court concluded that the officer acted reasonably in conducting the driving-while-impaired (DWI) investigation; (2) the district court admitted the DataMaster

Transportable (DMT) breath-test results into evidence; and (3) the district court found that appellant's alcohol concentration exceeded the legal limit.

First, we conclude that the objective facts render the method of investigation reasonable. Second, we conclude that because the record contains a reasonable basis in fact supporting the district court's decision regarding the weight of the expert testimony, the district court did not abuse its discretion when it admitted the DMT breath-test results. Third, we conclude that because we are not left with a definite and firm conviction that a mistake has been made, the district court did not clearly err when it found that appellant's alcohol concentration exceeded the legal limit. We affirm the district court's order sustaining the revocation of appellant's driving privileges.

FACTS

On September 23, 2019, appellant Lee Ray Bolch was arrested for DWI. Respondent Commissioner of Public Safety subsequently revoked Bolch's driver's license and privileges. On October 25, 2019, Bolch petitioned for rescission of the order revoking his license. Following an implied-consent hearing, the district court denied Bolch's petition and sustained the commissioner's revocation of Bolch's driving privileges.

The evidence presented at the hearing established the following facts concerning the investigatory traffic stop and the DMT breath test. On September 23, 2019, at approximately 9:55 p.m., Officer Timothy Gaul was finishing his shift and entering his driveway when he heard loud exhaust noise coming from a motor vehicle. Gaul then saw the vehicle drive past his residence at an estimated speed of 45-50 miles per hour in a 30 miles-per-hour zone. Gaul activated his emergency lights and pursued the vehicle for

violating the speed limit and for potential violations of applicable noise restrictions. Gaul testified that he had some difficulty catching up to the vehicle and that he believed the encounter could end up in a pursuit. Gaul also testified that it was possible that the driver did not see Gaul's emergency lights. Eventually, Gaul saw the vehicle pull into a residential driveway. Gaul testified that he positioned his patrol car in the street "somewhere in the area" behind the vehicle and that the vehicle could not leave the driveway.¹

Gaul approached the driver's side of the vehicle and observed that the driver—later identified as Bolch—was the only person inside the vehicle. Upon making contact with Bolch, Gaul testified that he could smell alcohol emanating from the vehicle, Bolch's person, or Bolch's breath, but he could not isolate the source of the odor while Bolch remained in his vehicle. Gaul testified that in order to determine "where the alcohol smell [was] coming from," he decided to have Bolch sit with him in the front seat of his patrol car. Once they were both inside the patrol car, Gaul observed that Bolch's eyes were bloodshot and a bit watery, and that Bolch had slightly slurred speech. Gaul testified that he "could definitely tell" that the alcohol smell was coming from Bolch's breath.

Gaul administered a field sobriety test, which Bolch failed. Gaul also conducted a preliminary breath test, which indicated an alcohol concentration of 0.135. Gaul placed Bolch under arrest for DWI and transported him to jail to administer a DMT chemical breath test. Gaul is a certified DMT operator and is trained to administer DMT testing.

¹ At the hearing, Bolch argued that Gaul's positioning his patrol car initiated an improper seizure. The district court disagreed. This issue is not before us on appeal.

Before administering the test, Gaul observed Bolch for over 20 minutes and did not observe Bolch belch, burp, vomit, eat, or drink. Gaul also did not observe any foreign objects in Bolch's mouth. Bolch testified that he had his full upper and lower dentures in his mouth and that he often has to clean out food and other particles. Bolch testified that he did not eat or drink anything after being arrested and that he was unsure when he last ate or drank before being arrested. Gaul did not ask Bolch to remove his dentures. Gaul then ran a diagnostic check, and the DMT instrument showed no issues. Gaul proceeded to administer two tests. The first test indicated an alcohol concentration of 0.148 and the second test indicated alcohol concentration of 0.144.² The final report value showed a result of 0.14. Gaul testified that the DMT gave no error messages, and he had no reason to doubt the result.

At the hearing, both parties called experts to testify regarding mouth alcohol. The parties stipulated to the admission of the experts' curricula vitae and qualifications. Bolch's expert is a consultant in forensic toxicology who is familiar with the DMT, the Minnesota Bureau of Criminal Apprehension (BCA) testing procedure, and the BCA testing manual. He opined that the failure to remove Bolch's dentures makes the DMT test results unreliable. He explained that objects in the mouth could contain mouth alcohol and affect the results of the chemical test. The expert discussed a 1992 study concluding that

² Minnesota Statutes section 169A.03, subdivision 2 (2020), defines alcohol concentration in terms of breath, blood, and urine: "Alcohol concentration' means: (1) the number of grams of alcohol per 100 milliliters of blood; (2) the number of grams of alcohol per 210 liters of breath; or (3) the number of grams of alcohol per 67 milliliters of urine." The DMT reports its results in grams of alcohol per 210 liters of breath.

wearing dentures during the testing process had no meaningful effect on the test results. Bolch's expert disagreed with this conclusion and opined that the study was irrelevant today. The expert conceded that, aside from the 15-minute observation period, there are two other safeguards that prevent mouth alcohol from affecting the DMT test: the DMT's negative slope detector and duplicate testing. He agreed that nothing in the test record—including those two safeguards—indicated the presence of mouth alcohol in this case.

The commissioner's expert is a forensic scientist in the breath-alcohol calibration laboratory at the BCA where she maintains, repairs, and certifies instruments for breath testing. She also trains officers on how to administer breath tests accurately. She testified that Gaul conducted the test correctly and went through all necessary BCA procedures. She also testified that, based on numerous research studies, mouth alcohol will dissipate within 15 minutes and that the observation period in this case was more than enough time for any mouth alcohol to dissipate even with dentures. She explained that trainers instruct officers not to have test subjects remove dentures or tongue rings. She was also aware of the 1992 study. She testified that it remained relevant. She opined that because the study required subjects to swish alcohol in their mouths for two minutes which is much longer than regular drinking situations and the alcohol still dissipated within 20 minutes, the 1992 study supported the reliability of the testing process. She also testified concerning the other two safeguards. She testified that the DMT's negative slope detector measures mouth alcohol prior to measuring lung alcohol and that the presence of mouth alcohol will render the test invalid on the final report. In addition, she described the duplicative test safeguard which requires the agreement between the first and second tests to be within 0.02. Because

the presence of mouth alcohol would cause significant variations in duplicate test results, this safeguard enhances the test's validity. She testified that in this case, the three safeguards gave no indication of mouth alcohol, and she concluded that the test results were accurate and reliable.

Following the hearing, the district court found that Gaul followed BCA procedure, the DMT was in working condition, and the DMT was operated by a certified operator without error. Based on these findings, the district court concluded that the commissioner established a prima facie case that the test was reliable. The district court weighed the competing expert testimony and gave more weight to the commissioner's expert because of her direct experience with the DMT in the BCA laboratory and her experience utilizing the DMT. The district court noted that while Bolch's expert testified that wearing dentures affects the reliability of test results, the commissioner's expert rebutted this assertion. The district court also noted that there was no evidence to indicate the presence of mouth alcohol in this case. On the contrary, the district court credited the commissioner's expert's testimony that "the [DMT] has a negative slope detector that would note the presence of mouth alcohol based upon a decreasing alcohol slope measurement as the breath test was administered, and cause the results to be invalidated." The district court found that the negative slope detector in the case did not indicate the presence of mouth alcohol. Based on the weight of the evidence, the district court concluded that Bolch did not meet his burden of contradicting the test results "because the evidence presented by [Bolch's expert] is based on speculation about the presence of mouth alcohol which is not supported by actual evidence in this case." The district court found that Bolch's alcohol concentration

was 0.144, exceeding the legal limit. The district court then affirmed the commissioner's revocation of Bolch's driving privileges, and Bolch appeals.

DECISION

I. Investigation of the DWI Offense

Bolch argues that the expansion of the investigatory traffic stop was constitutionally invalid because it was not reasonable to ask Bolch to sit in the front seat of the patrol car.³ We disagree and conclude that because the method of investigation was reasonable, the expansion was constitutionally valid.

The United States and Minnesota Constitutions guarantee the "right of the people to be secure in their persons, houses, papers, and effects" against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. In the context of minor traffic violations, the Minnesota Supreme Court has interpreted article I, section 10 of the Minnesota Constitution to provide more protection than the Fourth Amendment of the United States Constitution, and has explicitly adopted the principles and framework of *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968) "for evaluating the reasonableness of seizures during traffic stops even when a minor law has been violated." *State v. Askerooth*, 681 N.W.2d 353, 363 (Minn. 2004). "A *Terry* analysis involves a dual inquiry. First, we

³ Separate from the challenge to the method of the DWI investigation, Bolch also seems to question the basis for Gaul's decision to expand the scope of the investigation from speeding and noise to a DWI investigation. To the extent that Bolch challenges this portion of the district court's decision, the argument lacks merit. When an officer approaches a lawfully stopped vehicle and detects the odor of alcohol, it is reasonable to expand the scope of the encounter in order to investigate a possible DWI crime. *State v. Lopez*, 631 N.W.2d 810, 814 (Minn. App. 2001), *review denied* (Minn. Sept. 25, 2001).

ask whether the stop was justified at its inception. Second, we ask whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place.” *Id.* at 364 (citations omitted). Because Bolch does not challenge the basis for the initial stop,⁴ our focus is on the second prong of the *Terry* inquiry. “The second *Terry* prong constrains the scope and methods of a search or seizure.” *Id.* “An initially valid stop may become invalid if it becomes intolerable in its intensity or scope.” *Id.* (quotations omitted). We review a challenge to the reasonableness of the investigative methods de novo.⁵ *Harrison v. Comm’r of Pub. Safety*, 781 N.W.2d 918, 920 (Minn. App. 2010).

Bolch argues that Gaul’s request for Bolch to sit in the front seat of the patrol car was unreasonable because it was not the least intrusive means available to investigate the DWI offense. We are not persuaded for two reasons. First, Bolch overstates the legal authority on which he relies. The law does not require that an officer employ the least intrusive means available. Bolch is correct that the Supreme Court used a similar phrase in *Florida v. Royer*. 460 U.S. 491, 500, 103 S. Ct. 1319, 1325-26 (1983) (encouraging

⁴ Although Bolch initially challenged the validity of the stop before the district court, Bolch does not raise this issue on appeal. We also note that Bolch does not argue that the duration of the investigative stop was excessive, and concedes that he was in the front seat of the patrol car for only a short period of time. Accordingly, we need not address either issue.

⁵ In his statement of facts, Bolch includes four footnotes that question a factual finding made by the district court. Because Bolch does not specifically argue that these asserted findings require reversal, we need not address them. See *McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (declining to address an argument to which appellant “allude[d]” but failed to adequately discuss); *State, Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to reach issues that were inadequately briefed).

officers to use “the least intrusive means *reasonably* available to verify or dispel the officer’s suspicion in a short period of time” (emphasis added)). Contrary to Bolch’s argument, however, the phrase included the modifier “reasonably,” and the Supreme Court subsequently clarified that this phrase “was directed at the length of the investigative stop, not at whether the police had a less intrusive means to verify their suspicions.” *United States v. Sokolow*, 490 U.S. 1, 11, 109 S. Ct. 1581, 1587 (1989). In fact, the Court went on to expressly reject Bolch’s interpretation of *Florida v. Royer* because such a rule is untenable:

The reasonableness of the officer’s decision to stop a suspect does not turn on the availability of less intrusive investigatory techniques. Such a rule would unduly hamper the police’s ability to make swift, on-the-spot decisions—here, respondent was about to get into a taxicab—and it would require courts to indulge in unrealistic second-guessing.

Id. (quotation omitted); *see also Moffatt*, 450 N.W.2d 116, 119 (Minn. 1990) (“The fact that the police in a given case might have investigated the case in a different way arguably taking less time does not mean that the police acted unreasonably.”). Given the subsequent interpretations of *Florida v. Royer*, we cannot agree with Bolch.

Second, we disagree with Bolch because the objective facts would warrant a person of reasonable caution to believe that the action taken in this case was appropriate. To be reasonable, the basis for intrusion “must satisfy an objective test: would the facts available to the officer at the moment of the seizure warrant a [person] of reasonable caution in the belief that the action taken was appropriate.” *Askerooth*, 681 N.W.2d at 364 (quotations omitted). Whether the action was appropriate “is based on a balancing of the government’s

need to search or seize and the individual's right to personal security free from arbitrary interference by law officers." *Id.* at 365 (quotation omitted). "[I]t is the state's burden to show that a seizure was sufficiently limited to satisfy these conditions." *Id.* "A court reviewing whether the police acted diligently and reasonably should not indulge in unrealistic second-guessing." *Moffatt*, 450 N.W.2d at 119.

In this case, it was late at night and, prior to the initial encounter, Bolch did not respond when Gaul activated his emergency lights. After Bolch turned into a driveway, Gaul finally caught up to the vehicle. Upon approaching the vehicle, Gaul immediately detected the odor of alcohol but could not determine if the odor was coming from Bolch's breath, his person, or the vehicle. To continue his investigation, Gaul needed to isolate the source of the odor of alcohol. While Bolch postulates that Gaul could have isolated the source of the odor by other means, such as having Bolch stand outside and away from the vehicle, it is unclear if this would have created enough space to isolate the odor from the vehicle. It is also unclear if Gaul would then have been able to differentiate between an odor emanating from Bolch's clothing or person and an odor emanating from his breath. The circumstances surrounding the encounter, the need to place Bolch in a controlled environment and the need for the investigating officer to remain close enough to Bolch to smell his mouth, would make a person of reasonable caution conclude that the action taken—requesting Bolch join him in the front seats of the patrol car—was appropriate. Therefore, we conclude that Gaul's method of investigation was reasonable under the circumstances.

II. DMT Breath-Test Results

Bolch argues that the district court erred when it admitted the DMT breath-test results and when it sustained the commissioner's revocation of his driving privileges based on those test results. We conclude that the district court did not abuse its discretion when it admitted the test results and did not clearly err when it found that Bolch had an alcohol concentration of 0.144.

A. Admission of DMT Results

District courts follow a multi-step process when deciding whether to admit a chemical test result. *Vondrachek v. Comm'r of Pub. Safety*, 906 N.W.2d 262, 272 (Minn. App. 2017), *review denied* (Minn. Feb. 28, 2018). Initially, “[t]he commissioner must make a prima facie case that the test is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.” *Id.* (quotations omitted). “The commissioner meets his burden by showing that a certified DMT operator administered the test and that diagnostic checks showed that the DMT machine was in working order and the chemicals used were in proper condition.” *Id.* (quotation omitted); *see also* Minn. Stat. § 634.16 (2020) (allowing admission of breath-test results without expert testimony when test is “performed by a person who has been fully trained . . . pursuant to training given or approved by the commissioner of public safety or the commissioner’s acting agent”).

After this initial step, “the driver must produce evidence suggesting why the test was untrustworthy.” *Vondrachek*, 906 N.W.2d at 272 (quotation omitted). The evidence presented by the driver must go “beyond mere speculation that questions the

trustworthiness of the report” for the district court to exclude the chemical-test results as unreliable. *Id.* at 273 (quotation omitted). “The argument that something *may have occurred* during observation to affect the test result is speculation and should not be used without supporting evidence as the basis for rescinding a revocation.” *Id.* (quotation omitted); *see also Junker v. Comm’r of Pub. Safety*, 925 N.W.2d 661, 663 (Minn. App. 2019) (“But even though Junker proved that he burped during the observation period, he failed to demonstrate that the burping actually affected his breath-test results.”), *review denied* (Minn. June 18, 2019). “The district court determines whether the test is admissible if its reliability is challenged.” *Vondrachek*, 906 N.W.2d at 272. “Rulings on evidentiary matters rest within the sound discretion of the district court and will not be reversed on appeal absent a clear abuse of discretion.” *Id.* (quotation omitted). Moreover, “[t]he weight and credibility to be given to the opinion of an expert lies with the factfinder.” *State ex rel. Trimble v. Hedman*, 192 N.W.2d 432, 440 (Minn. 1971). When a trier of fact relies on the opinion of one expert over that of another, “the decision of the [trier of fact] is not open to review on appeal,” as long as that “opinion has a reasonable basis in fact.” *Shymanski v. Nash*, 251 N.W.2d 854, 857 (Minn. 1977).

In this case, the district court concluded that the commissioner established a *prima facie* case that the test was reliable because the commissioner’s expert and Gaul’s testimony established that Gaul, a certified DMT operator, followed BCA procedure. Bolch then contested the reliability of the test results, presenting expert testimony regarding dentures and the presence of mouth alcohol during the testing process. The commissioner also presented expert testimony. Faced with conflicting expert testimony, the district court

gave more weight to the commissioner's expert. We conclude that the commissioner's expert opinion has a reasonable basis in fact. For example, the expert currently maintains, repairs, and certifies instruments for breath testing, including the DMT. She also trains officers on how to administer breath tests accurately. Her opinions that mouth alcohol will dissipate within 15 minutes and that the 1992 study was relevant were based on her experience. In addition, she opined that the test result in this case was reliable based on the two other safeguards that were in place during this test. The DMT's negative slope detector did not indicate the presence of mouth alcohol and the two tests were separated by only 0.004, well within the 0.02 standard. Finally, Bolch's expert acknowledged that his opinion was premised on the *possibility* that Bolch's dentures may have contained food particles. *See Junker*, 925 N.W.2d at 664; *Vondrachek*, 906 N.W.2d at 273. This opinion carries less weight in light of Bolch's testimony that he did not eat or drink anything after being arrested. In fact, Bolch could not recall how much time had passed since he last ate or drank anything, and there is no evidence in the record that there was food in his dentures during the testing process. For these reasons, we conclude that the district court did not abuse its discretion in admitting the test results because the commissioner's expert opinion had a reasonable basis in fact.

B. Alcohol Concentration Findings

Bolch also argues that even assuming that the test results were reliable enough to be admitted, they were not reliable enough to support the district court's factual finding that Bolch's breath sample had an alcohol concentration of 0.144. Again, we are not persuaded.

We will not set aside the district court's findings of fact unless they are clearly erroneous. *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002). "We hold findings of fact as clearly erroneous only when we are left with a definite and firm conviction that a mistake has been committed. When findings of fact rest almost entirely on expert testimony, the district court's evaluation of credibility is of particular significance." *Id.* (quotation and citation omitted).

In this case, the district court found that Bolch's alcohol concentration was 0.144 based on the expert testimony and the DMT test results themselves. For the reasons noted above regarding reliability for admission, the commissioner's expert's testimony also provides a sufficient basis for the district court to accept the accuracy of the reported DMT test results. The test was administered with all three safeguards in place. Gaul observed Bolch for over 20 minutes and did not observe Bolch belch, burp, vomit, eat, or drink. Gaul also did not observe any foreign objects in Bolch's mouth. The negative slope detector did not indicate the presence of mouth alcohol, and the two tests fell well within the range of reliable results. Moreover, Bolch did not testify that he burped or vomited, that he recalled having food particles in his dentures, or that he had anything to eat or drink. Based on the evidence presented, we are not left with a firm conviction that a mistake has been made, and we affirm the district court's factual finding that the alcohol concentration of Bolch's breath was 0.144, exceeding the legal limit.

Affirmed.