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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1649
A24-0006**

Gordon William Griebenow, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent (A23-1649),

and

State of Minnesota,
Respondent (A24-0006),

vs.

Gordon William Griebenow,
Appellant.

**Filed August 19, 2024
Affirmed in part, reversed in part, and remanded
Ede, Judge**

Olmsted County District Court
File Nos. 55-CV-22-7856, 55-CR-22-8115

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Considered and decided by Ede, Presiding Judge; Frisch, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

EDE, Judge

In these consolidated appeals from the district court's denial of his petition to rescind the revocation of his driver's license and from its judgment of conviction for third-degree driving while impaired (DWI), appellant argues that the district court erred in both matters by concluding that police had reasonable, articulable suspicion to stop appellant's vehicle and to request a preliminary breath test (PBT). Because we conclude that police had reasonable, articulable suspicion to stop appellant's vehicle and to believe appellant was driving under the influence, we affirm in part. But because we also conclude that the district court erroneously convicted appellant of both DWI and driving with an alcohol concentration at or above the established limit based on charges arising from a single behavioral incident, we reverse in part and remand.

FACTS

Respondent Commissioner of Public Safety (the commissioner) revoked appellant Gordon William Griebenow's license after a deputy stopped his tractor on November 11, 2022. And respondent State of Minnesota charged Griebenow with two counts of third-degree DWI based on the same incident. Griebenow challenged the license revocation and sought suppression of evidence in the criminal matter, arguing that the deputy lacked reasonable, articulable suspicion to stop the tractor and to expand the stop by requesting a

PBT. The facts below are based on the record of a combined implied-consent and contested-omnibus hearing.

On November 11, 2022, Griebenow's brother (brother) called 911, reporting that he thought that Griebenow was operating a tractor while intoxicated at their farm. In the 911 call, brother reported that a farm employee (employee) smelled alcohol on Griebenow's breath and that Griebenow insisted on driving a tractor through the field. Two deputies were dispatched to the farm.

At the scene, employee told one of the deputies that when he spoke to Griebenow, he could "smell [Griebenow's] breath from . . . four feet away." Brother told the same deputy that Griebenow's alcohol use was an ongoing problem and explained that Griebenow had "done this so many times . . . [that they have had to] redo the field." Brother expressed his concern that Griebenow would harm himself or drive onto the road, and brother stated that he did not believe that Griebenow should "be driving the tractor or his pick-up." Brother also informed the deputy where Griebenow was in the field, and the deputy observed that the tractor did not have any lights activated, even though it was dark outside.

At this point, brother opened what he said was Griebenow's truck because brother was curious as to how much alcohol was inside. Brother discovered "a three-quarter empty bottle of Jameson Irish Whiskey" and other bottles of alcohol inside the truck.

The deputy walked toward the edge of the field and began turning his flashlight on and off while pointing it at Griebenow. After a few minutes, the tractor began to move in the deputy's direction. Griebenow reached the edge of the field, stopped the tractor, and

opened the tractor door. The deputy walked up to the tractor and asked Griebenow how much alcohol he had consumed. Griebenow responded that he had “had a couple.” The deputy explained that it was against the law to drive a tractor while drunk. Griebenow replied that he was unaware of that and that he did not “think he was that drunk.”

Griebenow exited the tractor. Once Griebenow was standing next to him, the deputy noticed that Griebenow was “kind of unsteady on his feet.” The deputy also observed that Griebenow’s eyes were glassy, but the deputy thought that the glassiness could be attributed to the wind. The deputy did not smell alcohol on Griebenow’s breath. But as Griebenow continued to speak, the deputy noticed that Griebenow was slurring his words. Griebenow again told the deputy that he had consumed a couple of beers.

The deputy administered a horizontal gaze nystagmus (HGN) test to Griebenow. Although the deputy instructed Griebenow to follow the deputy’s finger with only his eyes, Griebenow instead moved his head along with the deputy’s finger. The deputy did not know if Griebenow “was misunderstanding [his] instructions” or if Griebenow was unable to properly complete the test. The deputy administered no other field sobriety tests because he thought that it would be unfair to conduct those tests on a gravel road.

The deputy asked Griebenow if he would submit to the PBT, and Griebenow agreed. While the deputy was preparing the PBT, Griebenow said that he had consumed two or three beers about an hour before. The PBT result was an alcohol concentration of 0.185. At this point, the deputy had formed an opinion that Griebenow’s alcohol concentration was over the legal limit and that Griebenow was under the influence of alcohol. The deputy

arrested Griebenow. After his arrest, Griebenow submitted to an evidentiary chemical test of his breath that yielded an alcohol concentration of 0.16.

The commissioner later revoked Griebenow's driver's license. Griebenow petitioned for judicial review of the revocation, and the district court stayed the revocation pending a hearing. The state also charged Griebenow with one count of third-degree DWI—operating a motor vehicle under the influence of alcohol, in violation of Minnesota Statutes section 169A.20, subdivision 1(1) (2022), and one count of third-degree DWI—operating a motor vehicle with an alcohol concentration of 0.08 within two hours, in violation of Minnesota Statutes section 169A.20, subdivision 1(5) (2022).

Several months after the state filed the criminal complaint, Griebenow moved the district court to suppress certain evidence. The matter proceeded to a combined implied-consent and contested-omnibus hearing, at which Griebenow limited the issues to: (1) whether the deputy lawfully stopped Griebenow; (2) whether the deputy had reasonable suspicion of DWI to expand the stop; and (3) whether the deputy lawfully obtained a PBT sample from Griebenow. At the hearing, the district court heard testimony from the deputy and received into evidence two video recordings from law enforcement body-worn cameras.

The district court filed an order in which it denied Griebenow's implied-consent petition, sustained his license revocation, and denied his motion to suppress. The district court concluded that the deputy had reasonable, articulable suspicion to stop the tractor, to expand the seizure of Griebenow to conduct a DWI investigation, and to request that Griebenow submit to a PBT.

Following the district court's order, Griebenow appealed the revocation of his driver's license. In his criminal matter, Griebenow waived his right to a jury and agreed to a stipulated-evidence bench trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 3.

After reviewing the stipulated evidence, the district court found that Griebenow was guilty and convicted him of both third-degree DWI counts. The district court sentenced Griebenow to 364 days on count two, third-degree DWI—operating a motor vehicle with an alcohol concentration of 0.08 within two hours. Although the district court entered a conviction on count one, third-degree DWI—operating a motor vehicle under the influence of alcohol, the district court did not sentence Griebenow on that count.

Griebenow appealed his conviction and moved to consolidate his implied-consent and criminal matters. This court ordered consolidation of Griebenow's two appeals.

DECISION

Griebenow challenges the revocation of his driver's license and his third-degree DWI conviction, asserting that the district court erred by concluding (1) that police had reasonable, articulable suspicion to stop Griebenow's vehicle and (2) that law enforcement had reasonable, articulable suspicion to believe Griebenow was driving under the influence to justify their request for a PBT. As explained below, we are not persuaded by Griebenow's arguments.

We review "a district court's determination of reasonable suspicion de novo, but accept[] the district court's factual findings unless they are clearly erroneous." *Kruse v. Comm'r of Pub. Safety*, 906 N.W.2d 554, 557 (Minn. App. 2018). "A factual finding is

clearly erroneous if it does not have evidentiary support in the record or if it was induced by an erroneous view of the law.” *State v. Ezeka*, 946 N.W.2d 393, 403 (Minn. 2020) (quotation omitted). “A finding of fact is not clearly erroneous if it is reasonably supported by the evidence as a whole.” *State v. Barshaw*, 879 N.W.2d 356, 366 (Minn. 2016).

“The United States and Minnesota Constitutions prohibit unreasonable searches and seizures.” *State v. Taylor*, 965 N.W.2d 747, 752 (Minn. 2021). “Warrantless searches and seizures are generally unreasonable.” *Id.* “A law enforcement officer may, however, consistent with the Fourth Amendment, conduct a brief, investigatory stop of a motor vehicle when the officer has a reasonable, articulable suspicion that criminal activity is afoot.” *Id.* (quotations omitted). The reasonable, articulable suspicion standard is not high, but it must be based on more than a hunch. *State v. Timberlake*, 744 N.W.2d 390, 393 (Minn. 2008). “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.’” *Taylor*, 965 N.W.2d at 752 (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

I. The district court did not err by concluding that police had reasonable, articulable suspicion to stop Griebenow’s vehicle.

Griebenow maintains that brother’s tip to dispatch was lacking both as to “identifying information and facts to support a conclusion that [Griebenow] was driving the tractor while under the influence[.]” Griebenow contends that, other than someone notifying brother about the smell of alcohol on Griebenow’s breath, the tip included no details about how brother concluded that Griebenow might have been under the influence.

Griebenow notes that no person reported seeing him drinking, that there were no complaints or observations of his driving conduct, and that there were no descriptions of him that amounted to indicia of intoxication. Griebenow's argument is limited to one aspect of the totality of the circumstances: brother's tip to the 911 dispatcher. We conclude, however, that several facts support the deputy's reasonable, articulable suspicion that Griebenow was engaged in criminal activity.

The factual basis required to support the stop of a vehicle "may be supplied by information that [an] officer acquires from another person, including an informant." *Jobe v. Comm'r of Pub. Safety*, 609 N.W.2d 919, 921 (Minn. App. 2000). "In order to justify a traffic stop, an informant's tip must possess sufficient indicia of reliability." *Id.* (quotation omitted). "The Minnesota cases dealing with traffic stops based on informant tips have focused mainly on two factors: (1) identifying information given by the informant, and (2) the facts that support the informant's assertion that a driver is under the influence." *Id.* Neither factor is dispositive. Instead, the appellate courts evaluate the basis for a stop "in light of the totality of the circumstances." *Id.* Appellate courts "begin with the presumption that citizen informants are reliable." *Id.* "But whether the police were justified in stopping [an individual] depends not only on the reliability of the tip but also on the nature of the information provided." *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 560 (Minn. App. 2005) (quotation omitted).

Here, brother told the deputy that Griebenow's alcohol use was an ongoing problem. Brother explained that Griebenow had "done this so many times" that they have had to "redo the field." The deputy observed Griebenow driving the tractor during the evening in

the dark without any lights activated. Brother also expressed concern that Griebenow could hurt himself or hurt someone else by driving the tractor onto the road. Brother told the deputy that he did not believe that Griebenow should be “driving the tractor or his pick-up.” And brother retrieved multiple bottles of alcohol from Griebenow’s truck, including an almost empty bottle of whiskey. The totality of these facts establishes a particularized basis for reasonable, articulable suspicion that Griebenow was engaged in criminal activity.

Griebenow nevertheless asserts that the district court’s factual findings are clearly erroneous, challenging the court’s determination that “employee smelled a strong odor of alcohol on [Griebenow’s] breath.”¹

We conclude that the district court’s finding that employee smelled alcohol is supported by the record. The deputy testified that, during the 911 call, brother reported that employee had smelled alcohol on Griebenow’s breath. In addition, the deputy’s body-worn camera footage reveals that employee stated that he could smell Griebenow’s breath from four feet away.

The totality of the circumstances supports reasonable, articulable suspicion that Griebenow was driving while impaired. The district court therefore did not err by determining that the deputy lawfully stopped the tractor Griebenow was driving.

¹ Griebenow further argues that the district court neglected to analyze whether the stop of his vehicle was supported by reasonable, articulable suspicion. But the district court determined that the deputy had reasonable, articulable suspicion to conduct a DWI investigation. And the district court’s factual findings support our conclusion that the deputy had reasonable, articulable suspicion to stop the vehicle.

II. The district court did not err by concluding that police had reasonable, articulable suspicion to support the expansion of the stop and to request a PBT.

Griebenow next argues that the deputy lacked reasonable, articulable suspicion to expand the traffic stop and request a PBT. More specifically, Griebenow contends that the deputy's PBT request was not justified because the deputy did not have reason to believe that Griebenow had been driving while impaired. We disagree.

When a law enforcement officer “has reason to believe from the manner in which a person is driving, operating, controlling, or acting upon departure from a motor vehicle . . . that the driver may be violating or has violated section 169A.20 (driving while impaired), . . . the officer may require the driver to provide a sample of the driver's breath for a preliminary screening test.” Minn. Stat. § 169A.41, subd. 1 (2022). “An officer must have a reasonable, articulable suspicion that a driver is under the influence of alcohol before requesting either a field sobriety test or a PBT.” *Otto v. Comm’r of Pub. Safety*, 924 N.W.2d 658, 661 (Minn. App. 2019). “One objective indicator of intoxication can constitute reasonable and probable grounds to believe a person is under the influence.” *Id.* (quotation omitted).

Griebenow cites *State v. Burbach* in support of his argument. 706 N.W.2d 484 (Minn. 2005). In *Burbach*, the supreme court held that an “officer does not have a reasonable, articulable suspicion of drug possession” that is sufficient to expand a traffic stop by requesting to search a vehicle if that “officer's suspicion . . . is supported only by a driver's nervous behavior, an unsubstantiated tip of unknown origin, and speeding,” and if “the driver does not exhibit other signs of impairment[.]” *Id.* at 491. Griebenow contends

that the deputy did not have reasonable, articulable suspicion because the only information the deputy had to expand the traffic stop was “the second-hand assertions that [Griebenow] had alcohol on his breath, an admission by [Griebenow] that he had consumed alcohol earlier (2-3 beers) and an open bottle produced by [brother from] what was alleged to be [Griebenow’s] truck.”

Griebenow’s reliance on *Burbach* is misplaced. First, unlike *Burbach*, the tip here was not from an unknown source. Instead, the deputy knew that the tip came from brother. Second, Griebenow exhibited signs of impairment. The deputy testified that Griebenow was unsteady on his feet, that his speech was slurred, and that his eyes were glassy. Griebenow’s unsteadiness and his slurred speech are also established in the record by another deputy’s body-worn camera footage. Third, Griebenow admitted to the deputy that he had been drinking and that he had recently consumed two to three beers. Fourth, brother retrieved multiple bottles of alcohol from Griebenow’s truck. These circumstances provided the deputy with more than a mere hunch that Griebenow was driving under the influence of alcohol. *See Timberlake*, 744 N.W.2d at 393.

Griebenow also asserts that, because the deputy “admitted that prior to his decision to prolong the encounter and commence his DWI investigation, he did not believe [Griebenow] was impaired[,]” the deputy could not have had reason to believe that Griebenow was driving under the influence. But the deputy did not testify that he did not believe Griebenow was under the influence. Rather, the deputy testified that, after he observed Griebenow’s slurred speech, his glassy eyes, and his unsteadiness, he did not

have an opinion about whether Griebenow was under the influence. The deputy also testified that he believed Griebenow “had used alcohol in . . . a recent time.”

Moreover, the supreme court has observed that “the preliminary screening test appears to be intended to be utilized in situations where the officer, after observing the driver, is unsure whether the driver is under the influence of alcohol.” *Marben v. State, Dep’t of Pub. Safety*, 294 N.W.2d 697, 700 (Minn. 1980). And our jurisprudence requires analysis of *objective* indicia of intoxication, not an officer’s *subjective* assessment. *See Otto*, 924 N.W.2d at 661. As discussed above, the record includes multiple objective indicators of Griebenow’s intoxication before the deputy requested that Griebenow perform the PBT.²

The circumstances that the deputy observed provided sufficient indicia of intoxication to support reasonable, articulable suspicion that Griebenow had driven the tractor while impaired. Thus, we conclude that the district court correctly determined that the deputy had reasonable, articulable suspicion to request that Griebenow submit to a PBT.

² Griebenow maintains that the deputy lacked the requisite reasonable, articulable suspicion to request that Griebenow perform the PBT because the deputy did not testify that Griebenow exhibited any signs of impairment during the HGN test. The record defeats this argument. The deputy stated that Griebenow did not properly complete the HGN test. The deputy explained that, rather than follow the deputy’s instructions that Griebenow follow the deputy’s finger with only his eyes, Griebenow instead moved his head along with the deputy’s finger. The deputy said that he did not know if Griebenow “was misunderstanding [his] instructions,” or if Griebenow was unable to perform the test appropriately. And while the deputy agreed that Griebenow’s failure to complete the HGN test did not reveal “any clues” of impairment, the deputy also testified that Griebenow’s conduct in response to the HGN test did not dispel his suspicion that Griebenow might be intoxicated because Griebenow had already admitted to drinking, the deputy had witnessed the open bottle of liquor, and the deputy had observed Griebenow’s glassy eyes, unsteadiness, and slurred speech.

III. The district court erred by convicting Griebenow of both DWI and driving with an alcohol concentration at or above the established limit based on charges arising from a single behavioral incident.

The district court convicted Griebenow of both count one, third-degree DWI—operating a motor vehicle under the influence of alcohol, in violation of Minnesota Statutes section 169A.20, subdivision 1(1), and count two, third-degree DWI—operating a motor vehicle with an alcohol concentration of 0.08 within two hours, in violation of Minnesota Statutes section 169A.20, subdivision 1(5). On appeal, neither party has argued that the district court erred in doing so. But “it is the responsibility of appellate courts to decide cases in accordance with law,” which “is not to be diluted by counsel’s oversights, lack of research, failure to specify issues or to cite relevant authorities.” *State v. Hannuksela*, 452 N.W.2d 668, 673-74 n.7 (Minn. 1990) (quotation omitted) (considering the application of the law of severance or partial invalidity “notwithstanding that the parties failed to raise or discuss the issue in their briefs or at oral argument”); *see also* Minn. R. Civ. App. P. 103.04 (providing that, “on appeal from a judgment[, the appellate courts] may review any order involving the merits or affecting the judgment” and “may review any other matter as the interest of justice may require”).

Consistent with our responsibility to decide this case in accordance with law, we conclude that the interest of justice requires our review of the district court’s decision to convict Griebenow of both count one and count two. Minnesota Statutes section 609.04, subdivision 1 (2022), provides that “[u]pon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” The Minnesota Supreme Court has interpreted this prohibition as precluding “multiple convictions under

different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Because it is a legal question, we exercise de novo review in considering whether a conviction violates section 609.04, subdivision 1. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Our precedent establishes that, where the charges arise from a single behavioral incident, a district court cannot convict a defendant of both DWI and driving with an alcohol concentration at or above the established limit. *State v. Clark*, 486 N.W.2d 166, 170-71 (Minn. App. 1992). In *Clark*, we reasoned that the appellant was convicted under “different subsections of the same statute” and that the charges “applied to one behavioral incident.” *Id.* at 171. Citing *Jackson*, we concluded that “[o]ne of the convictions must be vacated.” *Id.* at 170-71. And we later reaffirmed *Clark* in a case involving another defendant who was similarly convicted of both DWI and driving with an alcohol concentration above the legal limit. *State v. Coleman*, 944 N.W.2d 469, 487 (Minn. App. 2020), *aff’d on other grounds*, 957 N.W.2d 72 (Minn. 2021). Consistent with our reasoning in *Clark*, we concluded in *Coleman* that, because the offenses were based on the same behavioral incident, section 609.04, subdivision 1, only permitted one conviction. *Id.*

Here, the state charged Griebenow with two separate third-degree DWI offenses stemming from a single vehicle stop based on suspicion of DWI. It is undisputed that the charges arise from a single behavioral incident. Because the DWI offenses at issue are defined in separate subparts of the same subdivision of section 169A.20, the district court was not permitted to enter judgments of conviction for both crimes under section 609.04, subdivision 1.

We therefore conclude that the appropriate remedy for this error is to reverse and remand to the district court with instructions to vacate count one, third-degree DWI—operating a motor vehicle under the influence of alcohol, leaving the district court’s finding of guilt for that offense intact.³ *Coleman*, 944 N.W.2d at 487.

Affirmed in part, reversed in part, and remanded.

³ In the interest of clarity, our decision to reverse and remand relates only to count one in Minnesota Court of Appeals File No. A24-0006, which arises from Minnesota Third Judicial District Court File No. 55-CR-22-8115 (i.e., Griebenow’s criminal case). In Minnesota Court of Appeals File No. A23-1649, which arises from Minnesota Third Judicial District Court File No. 55-CV-22-7856 (i.e., Griebenow’s implied-consent case), we affirm.