

*This opinion is nonprecedential except as provided by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
A25-0535**

Brian Thomas Hunter, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed January 5, 2026
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CV-23-8413

Gerard W. Mannion, Kans Law Firm, LLC, Bloomington, Minnesota (for appellant)

Keith Ellison, Attorney General, Molly Kleist, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Slieter, Judge; and
Harris, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this appeal from the district court order denying rescission of the revocation of his driver's license, appellant Brian Thomas Hunter argues that the district court erred in concluding that he (1) refused to submit to a breath test and (2) failed to meet his burden of proving a physical inability to submit to a breath test. Because the district court did not

clearly err in finding that Hunter refused to submit to a breath test and in determining that he did not prove he was unable to submit to a breath test on the day in question, we affirm.

FACTS

The following facts derive from testimony and exhibits received at an evidentiary hearing.

In May 2023, Hunter was driving his vehicle when a police officer initiated a traffic stop for failing to stop at a stop sign. When speaking to the officer, Hunter admitted to having three alcoholic beverages that evening, one of which he drank ten minutes before the stop. The officer administered field sobriety tests and then asked Hunter to perform a preliminary breath test (PBT).

Hunter made four attempts to blow into the PBT instrument, but did not provide a sufficient breath sample. Before the first attempt and prior to each subsequent attempt, the officer instructed Hunter how to provide a sufficient PBT sample. After multiple unsuccessful attempts to administer the PBT, the officer concluded that Hunter was intentionally not providing a sufficient sample because he would “avoid blowing into the instrument, hold his breath, or barely put any air through the straw.”

The officer arrested Hunter for driving while impaired (DWI) and transported him to the police station. At the police station, the officer read Hunter the Breath Test Advisory and asked if he was willing to take the breath test. Hunter said that he understood and that he wanted to contact an attorney. Hunter left a voicemail for the attorney and waited for approximately twenty minutes. At that time, the officer informed Hunter that he would need to make his testing decision on his own, and Hunter agreed to take the breath test.

The officer then proceeded to administer a breath test with a DataMaster DMT breath-testing instrument.

Before commencing the breath test, the officer explained the testing process and instructed Hunter on how to provide a proper sample. The officer warned that he would consider Hunter to have refused to take the breath test if Hunter was “messing around with this the way [he] messed around with the roadside PBT.” In response, Hunter asked about his rights if he refused the test to which the officer responded, “[w]e’ll cross that bridge when we get there.”

As the officer began to administer the test, he instructed Hunter to “take a deep breath, make a tight seal, and blow.” The officer also continued to coach Hunter as the test was underway, advising him to keep blowing and telling him that the intermittent beeping produced by the breath-testing instrument demonstrated that he was, instead, holding his breath. The officer testified that the lack of airflow resulted in a deficient sample. The officer again attempted to explain to Hunter that he must consistently blow into the breath-testing instrument. However, the machine continued to beep intermittently, and the officer terminated the testing session, explaining to Hunter that the instrument did not get a reading because he was “not blowing into the instrument.” The officer then instructed Hunter to leave the testing room and sit on the bench just outside the room.

After a short period of time, the officer instructed Hunter to come back into the testing room where the officer explained he was willing to give Hunter another chance at providing a sufficient breath sample. As Hunter sat down, the officer referenced the machine’s intermittent beeping and again explained that the sound meant that “no air [was]

going through the system.” The officer told Hunter not to “BS me with this,” and began to say, “I am going to give you one more chance.” Hunter interrupted the officer to tell him that he had attempted to take the test four times, “twice on the road and . . . twice here.” Hunter continued to claim that he had been “as cooperative as [he] could be” by blowing through multiple instruments. At that point, the officer ended the second session. Hunter was charged with refusing to submit to a chemical test and, as a result, his driver’s license was subsequently revoked.

Hunter filed a petition seeking rescission of the driver’s license revocation, and the matter was scheduled for a hearing. At the hearing, Hunter testified that he went to see a medical professional following his arrest and discovered that he has “acute asthma” and that he has inhalers that he uses “every so often.” Hunter’s medical record that was received into evidence indicated that, several months after his arrest he was diagnosed with dyspnea (shortness of breath during exertion) with possible “underlying mild intermittent asthma.”

Hunter testified that the reason he did not tell the officer he was having difficulty blowing was because he was unaware of his medical condition. He testified that he thought he felt fine when attempting the initial PBT but, as the night went on, he experienced shortness of breath and tightness in his chest. However, Hunter confirmed that when he attempted the breath test at the police station, he did not wheeze or cough and was able to speak clearly with the officer. The district court determined that Hunter had “failed to provide an adequate breath sample” and that the officer “appropriately determined that he was refusing to provide a sample by his conduct.” Additionally, the district court

determined that there was no medical evidence that Hunter was unable to provide a sufficient breath sample on the day in question. The district court sustained the revocation of Hunter's driver's license.

Hunter appeals.

DECISION

Whether a driver refused a breath test is a question of fact that we review for clear error. *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 722 (Minn. App. 2014). In implied-consent cases, physical inability to take a breath test is also a question of fact, which will not be reversed on appeal unless the finding is clearly erroneous. *Burke v. Comm'r of Pub. Safety*, 381 N.W.2d 903, 904 (Minn. App. 1986). "A factual finding is clearly erroneous when it lacks evidentiary support in the record." *State v. Lopez*, 988 N.W.2d 107, 116 (Minn. 2023). When the record supports a district court's credibility determinations, appellate courts will not substitute their judgment of credibility for the district court's determinations. *See Engebretson v. Comm'r of Pub. Safety*, 395 N.W.2d 98, 99-100 (Minn. App. 1986) (explaining that, although a case "presented difficult credibility issues," the record demonstrates that the district court "could reasonably make the findings it did based upon the record at trial"). "Conclusions of law will be overturned only upon a determination that the [district] court has erroneously construed and applied the law to the facts of the case." *Dehn v. Comm'r of Pub. Safety*, 394 N.W.2d 272, 273 (Minn. App. 1986).

I. The district court did not clearly err in finding that Hunter refused to submit to a breath test.

Failure to reasonably comply with the administration of a test constitutes a refusal. *Sigfrinius v. Comm'r of Pub. Safety*, 378 N.W.2d 124, 126 (Minn. App. 1985). “A driver may refuse to submit to chemical testing by words or conduct,” which is determined by reviewing the totality of the circumstances. *State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010), *rev. denied* (Minn. Mar. 15, 2011). “If a driver expresses verbal agreement to submit to chemical testing but does not provide an adequate sample, [the driver’s] conduct may be deemed a refusal to submit to chemical testing.” *Stevens*, 850 N.W.2d at 721. “To determine whether a driver’s failure to provide a sample constitutes refusal, a court should look to the driver’s words and actions.” *Id.* at 722.

In *Stevens*, we concluded that sufficient evidence supported the district court’s finding that the appellant refused to submit to chemical testing when she did not provide a urine sample after three opportunities to do so. *Id.* at 721-22. Similarly, in *Connolly* a driver verbally agreed to testing but blew around the mouthpiece, failing to provide a sufficient sample. *Connolly v. Comm'r of Pub. Safety*, 373 N.W.2d 352, 353 (Minn. App. 1985). We affirmed the district court’s finding that the driver refused testing through conduct. *Id.* at 354.

In this case, the district court properly considered Hunter’s conduct from the time his vehicle was stopped until the time he was arrested. The district court found that the officer provided Hunter with instructions on how to properly blow into the PBT instrument, yet Hunter “failed to provide a sufficient breath sample to obtain a PBT reading.” The

district court made similar findings regarding the breath-test procedure at the police station. The district court found that the officer gave Hunter “instructions on how to provide a breath sample for the [breath-test instrument]” and warned him that failure to cooperate would be considered a refusal. Hunter responded by asking “what his rights were to refuse the test.” The district court further found that, after the officer offered to provide Hunter an additional chance to submit to a breath test, rather than providing a sample, he claimed that he had already done so—twice at the vehicle and twice in the police station. Evaluating the totality of the circumstances, the district court appropriately concluded that Hunter refused the breath test by his conduct.

Hunter argues, however, that when the officer offered him a second opportunity to take the breath test, “the initial perceived refusal was cured,” and so, as a matter of law, the testing process restarted, obligating the officer to provide the test. Hunter claims that because the officer was obligated to provide the test but ended the testing session without doing so, Hunter cannot be considered, as a matter of law, to have refused testing either verbally or through conduct.

Hunter cites no law to support his argument, and we have found none to exist. Instead, Hunter claims that his interpretation is “a new principle that builds upon the *Anderson* case,” citing *Anderson v. Commissioner of Public Safety*, 441 N.W.2d 126 (Minn. App. 1989). We are not convinced. In *Anderson*, we explained that “[t]he officer was not required to offer the driver another opportunity to take a test.” 441 N.W.2d at 128. Instead, the officer “gratuitously offered Anderson the opportunity” to take another test to

cure his previous refusal. *Id.* Here, the officer also gratuitously offered Hunter a second opportunity to provide a breath sample.

Because the officer was not obligated to offer Hunter a second opportunity to test, the district court properly determined that the officer “had no duty to renew an offer of testing after it had been refused.” Furthermore, its determination that Hunter refused testing by his conduct—including his conduct in questioning the need for an additional breath sample after being provided with a second opportunity to provide a breath sample at the police station—was based on the totality of the circumstances and supported by the record. Therefore, the district court did not clearly err.

II. The district court did not clearly err in finding that Hunter failed to meet his burden of proving a physical inability to submit to a breath test.

Hunter argues that the district court erred by denying his affirmative defense that he was unable to provide an adequate breath sample due to his medical condition because the district court did not consider his testimony and the medical records. We acknowledge that conflicting testimony was presented at the hearing, but “the district court’s decision is necessarily based on a determination of witness credibility, which we accord great deference on appeal.” *Alam v. Chowdhury*, 764 N.W.2d 86, 89 (Minn. App. 2009).

“It is an affirmative defense for [a driver] to prove that, at the time of the refusal, the [driver’s] refusal to permit the test was based upon reasonable grounds.” Minn. Stat. § 169A.53, subd. 3(c) (2024). If an officer determines that the driver is physically able to provide a breath sample and reports a refusal, the driver may raise the issue of physical inability at the implied-consent hearing. *Carlson v. Comm’r of Pub. Safety*, 374 N.W.2d

791, 794 (Minn. App. 1985). “The driver has the burden of showing as an affirmative defense that he was physically unable to provide a breath sample.” *Wolle v. Comm’r of Pub. Safety*, 413 N.W.2d 258, 260 (Minn. App. 1987). Whether a person is physically unable to provide a breath sample is a question of fact and will not be reversed unless clearly erroneous. *Burke*, 381 N.W.2d at 904.

The district court’s findings indicate that it did consider Hunter’s testimony regarding the symptoms he was experiencing at the time of testing and the medical records, which reference a treatment for possible “underlying mild intermittent asthma,” and considered his testimony about experiencing shortness of breath on occasions in the past. However, the district court also found that Hunter did not cough, wheeze, or seem out of breath when trying to provide the PBT breath sample or when subsequently blowing into the breath-testing instrument, and that he never informed the officer that he had a medical condition that would prevent him from providing a sufficient sample. In light of the record, Hunter failed to establish that the district court clearly erred when it rejected his affirmative defense of an inability to provide a sufficient breath sample.

Affirmed.