

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0511**

State of Minnesota,
Respondent,

vs.

Bradley Paul Radichel,
Appellant.

**Filed May 13, 2008
Affirmed
Ross, Judge**

Blue Earth County District Court
File No. VB-05-1767

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Eileen M. Wells, Mankato City Attorney, Linda Boucher. Hilligoss, Assistant City Attorney, 10 Civic Center Plaza, P.O. Box 3368, Mankato, MN 56002-3368 (for respondent)

Samuel A. McCloud, Carson J. Heefner, McCloud & Boedigheimer, P.A., Suite 1000, Circle K, Box 216, Shakopee, MN 55379 (for appellant)

Considered and decided by Ross, Presiding Judge; Lansing, Judge; and Johnson,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

On appeal from conviction of fourth-degree driving while impaired, Bradley Radichel argues that the breath test results revealing his alcohol concentration should have been suppressed because the supreme court has ruled that the 2003 version of the implied-consent statute violates a driver's right to due process. Because the unconstitutional provision in the 2003 implied-consent statute does not require the suppression of evidence obtained for use in a criminal prosecution, the district court did not err by denying Radichel's motion to suppress the results of his breath test, and we affirm the conviction.

FACTS

The facts are not in dispute. In March 2005, a Mankato police officer stopped Bradley Radichel's speeding vehicle. When the officer approached Radichel, he smelled the odor of an alcoholic beverage. Radichel's performance of several field sobriety tests and the results of a preliminary breath test indicated his intoxication. After his arrest, Radichel submitted to a formal breath test to determine his alcohol concentration. The results showed an alcohol concentration of .11.

The state charged Radichel with fourth-degree DWI in violation of Minnesota Statutes section 169A.27 and section 169A.20, subdivision 1(5) (2004). The Commissioner of Public Safety revoked Radichel's driver's license and Radichel filed a petition for judicial review. In July 2005, the attorney general administratively rescinded

Radichel's driver's license revocation based on the holding in *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340 (Minn. 2005).

In April 2006, Radichel filed a motion to suppress the test results in the related criminal case, contending that the implied-consent statute was found unconstitutional in *Fedziuk*. The district court denied his motion, and the parties agreed to submit the case to the district court on stipulated facts, under the procedures set out in *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). In February 2007, the district court found Radichel guilty of fourth-degree DWI. This appeal follows.

DECISION

We are not persuaded by Bradley Radichel's argument that the results of his breath test should have been suppressed. Because the parties do not dispute the facts, we independently review the record to determine, as a matter of law, whether the district court erred by denying the motion to suppress the breath test results. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). The district court followed the law appropriately by denying Radichel's motion.

Radichel is correct that the test was administered under an implied-consent statute that was later declared unconstitutional. *Fedziuk*, 696 N.W.2d at 347-48. In *Fedziuk*, the supreme court held that the 2003 amendments to Minnesota's implied-consent law violated due process as applied in an administrative proceeding because they omitted the requirement for prompt judicial review of a prehearing license revocation. *Id.* at 346. The supreme court severed the unconstitutional provision from the statute and revived the version of the statute that existed immediately before the 2003 amendments. *Id.* at 349.

We recently determined that a district court does not err by denying a motion to suppress the results of chemical tests because the portion of the implied-consent law that was declared unconstitutional by *Fedziuk*—tardy judicial review of the administrative action to revoke the license—does not have any effect on the evidence obtained for the related criminal DWI proceeding. *State v. Polsfuss*, 720 N.W.2d 1, 5 (Minn. App. 2006). Because the unconstitutional provision of the implied-consent statute does not affect the evidence obtained for a related criminal DWI proceeding, the district court did not err by denying Radichel’s motion to suppress the results of his breath test.

Radichel also argues that collateral estoppel should apply to a criminal DWI proceeding based on determinations in the accompanying implied-consent proceeding. Radichel failed to raise this issue to the district court. Failure to raise an issue generally constitutes waiver of that issue on appeal. *State v. Beard*, 288 N.W.2d 717, 718 (Minn. 1980). We add, however, that the supreme court recently held that collateral estoppel does not apply to criminal proceedings accompanying implied-consent proceedings. *See State v. Lemmer*, 736 N.W.2d 650, 663-64 (Minn. 2007).

Affirmed.