**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-2451**

State of Minnesota,
Respondent,

vs.

Warren Lee Mason,
Appellant.

**Filed March 24, 2009**
**Affirmed**
**Hudson, Judge**

Mille Lacs County District Court
File No. 48-CR-06-575

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Janice S. Kolb, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Courthouse Square, 525 Second Street Southeast, Milaca, Minnesota 56353 (for respondent)

Melissa Sheridan, Assistant State Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, Minnesota 55121 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Connolly, Judge.

## U N P U B L I S H E D  O P I N I O N

**HUDSON**, Judge

On appeal from a conviction of first-degree test refusal, appellant argues that (1) Minnesota's implied-consent law violates the Fourth Amendment's prohibition against unreasonable searches and seizures, (2) the district court abused its discretion and denied appellant's right to present a defense by excluding evidence of a breath test administered to appellant at jail, (3) the district court violated appellant's right to a fair trial by allowing the state to inform the jury that appellant had previously been through the implied-consent process, and (4) the district court committed prejudicial error by failing to instruct the jury on the procedural prerequisites of the test-refusal offense. We affirm.

## FACTS

At approximately 4:00 a.m. on March 5, 2006, Mille Lacs Tribal Police Officer Jeremiah Erickson received a dispatch call about a possible drunk driver. After getting a description of the vehicle and the vehicle's license plate number, Officer Erickson proceeded to the vehicle's reported location. Officer Erickson spotted the vehicle headed southbound on Highway 169 and initiated a traffic stop after witnessing the vehicle drive into the oncoming traffic lane while attempting a left turn.

Appellant Warren Lee Mason was the driver of the vehicle. As Officer Erickson approached the car, appellant opened the driver's side door. Officer Erickson smelled a strong odor of alcohol coming from inside of the vehicle and observed that appellant's eyes were bloodshot and glassy. The officer asked appellant if he had consumed any

alcoholic beverages, and appellant admitted to drinking one glass of wine. Officer Erickson then conducted two field sobriety tests with appellant, and appellant's performance indicated to Erickson that appellant was intoxicated.

Appellant was arrested for suspicion of driving under the influence of alcohol. At the tribal police department, Officer Erickson read appellant the implied-consent advisory. Appellant told Officer Erickson that he understood everything that was read to him and wanted to contact an attorney. Appellant was unable to reach his attorney despite several attempts to do so. After giving appellant time to contact an attorney, Officer Erickson again read the implied consent advisory to appellant and asked appellant if he would take a breath test. Appellant declined to take a breath test.

Appellant was charged, inter alia, with first-degree driving while impaired (DWI), in violation of Minn. Stat. § 169A.20, subd. 1(1) (2004), and first-degree refusal to submit to chemical test, in violation of Minn. Stat. § 169A.20, subd. 2 (2004). In order to prove both charges, the state was required to establish that appellant had three or more impaired-driving convictions. *See* Minn. Stat. § 169A.24, subd. 1 ("A person who violates section 169A.20 (driving while impaired) is guilty of first-degree driving while impaired if the person . . . commits the violation within ten years of the first of three or more qualified prior impaired driving incidents[.]"). Prior to trial, appellant stipulated that he had the requisite impaired-driving convictions.

Notwithstanding appellant's stipulation, the state requested that it be allowed to establish that appellant had been through the implied-consent process before if, as the state anticipated, appellant testified that he was confused regarding the test-refusal

process. Appellant's counsel agreed, but only if appellant testified that he had never been through the process before. Appellant's counsel objected, however, to the introduction of such evidence, if appellant merely testified that he was confused and wanted to speak to an attorney. The district court did not issue a ruling on the state's request, and instead said it would wait to see how appellant testified at trial.

Also prior to trial, the state moved to exclude the breath test that was administered to appellant, per standard procedure, when appellant was taken to jail. The state asserted that the breath test given to appellant at jail was irrelevant and inadmissible under Minn. Stat. § 169A.41 (2004). Appellant argued that the breath test showed that he was not intoxicated and was therefore relevant to one of the elements of test refusal—probable cause to believe appellant drove the vehicle while under the influence of alcohol. The district court excluded the test, stating that it could not find an exception to Minn. Stat. § 169A.41 through which the test would be admissible.

Appellant testified at trial, saying that he was nervous when he was taken to the tribal police department. Appellant claimed that he asked to contact an attorney six or seven times but was never told that his time to contact an attorney had expired or that he had to decide for himself whether to take the breath test. He said that he would have taken the test had he been told that his time to contact an attorney had expired.

On cross-examination, appellant admitted that Officer Erickson told him several times that if he was unable to contact an attorney, he would have to make a decision on his own as to whether to take the test. The prosecutor also inquired as to why appellant was nervous at the police department, and appellant responded by saying, "Well, it's not

every day that I get pulled over by a police officer." The prosecutor then asked appellant if he had been through the implied-consent process before. Appellant did not object to the prosecutor's question, but instead replied, "Um, I believe so."

During closing arguments, the prosecutor reminded the jury that although appellant claimed to be nervous at the police department, appellant admitted that he had been through the implied-consent process before. Appellant did not object to the prosecutor's argument. The jury acquitted appellant on the DWI charge, but found appellant guilty of test refusal. This appeal follows.

## D E C I S I O N

### I

Minn. Stat. § 169A.51, subd. 1(a) (2004), states, in relevant part, that "[a]ny person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol." "It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)." Minn. Stat. § 169A.20, subd. 2.

Appellant argues that Minnesota's implied-consent law violates the Fourth Amendment's prohibition against unreasonable searches and seizures because it takes away a criminal suspect's right to deny consent to a government search and because it conditions the privilege of driving upon relinquishment of the Fourth Amendment's protections. The constitutionality of a statute is a question of law, which is reviewed de

novo. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). A statute is presumed constitutional and "will not be declared unconstitutional unless the party challenging it demonstrates beyond a reasonable doubt that the statute violates some constitutional provision." *Miller Brewing Co. v. State*, 284 N.W.2d 353, 356 (Minn. 1979).

But appellant concedes that he did not raise his constitutional challenge before the district court. "Usually, [appellate courts] will not decide issues which are not first addressed by the [district] court and are raised for the first time on appeal even if the issues involve constitutional questions regarding criminal procedure." *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989) (citations omitted). "We may, however, at our discretion, decide to hear such issues when the interests of justice require their consideration and addressing them would not work an unfair surprise on a party." *Id.* (citations omitted).

We have previously held that Minn. Stat. § 169A.20, subd. 2, does not violate an individual's Fourth Amendment rights. *State v. Mellett*, 642 N.W.2d 779, 785 (Minn. App. 2002), *review denied* (Minn. July 16, 2002). Further, the supreme court has recently held that

> the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense.

*State v. Netland*, __ N.W.2d __, ___, 2009 WL 330940, at *9 (Minn. Feb. 12, 2009). The holdings in *Netland* and *Mellett* are dispositive of appellant's Fourth Amendment challenge to the implied-consent law; therefore, his argument fails.

**II**

Next, appellant contends that the district court erred by excluding evidence of the breath test he took upon arriving at jail, thereby depriving him of his right to present a defense. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "On appeal, the appellant has the burden of establishing that the [district] court abused its discretion and that appellant was thereby prejudiced." *Id*.

The district court excluded the breath test under Minn. Stat. § 169A.41, which states that "[w]hen a peace officer has reason to believe from the manner in which a person is driving . . . 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." The results of the breath test are "used for the purpose of deciding whether an arrest should be made and whether to require the tests authorized in section 169A.51 (chemical tests for intoxication), but must not be used in any court action," with certain exceptions. Minn. Stat. § 169A.41. In excluding the breath test here, the district court stated that it could not find any exceptions through which to admit the test. We disagree.

Minn. Stat. § 169A.41, subd. 2(4), one of the exceptions to the general inadmissibility of breath tests, explicitly states that breath tests are admissible "in a

prosecution for a violation of section 169A.20, subdivision 2 (driving while impaired; test refusal)." Here, appellant was charged both with DWI and test refusal. Accordingly, the district court abused its discretion by excluding the evidence.

We apply the harmless-error analysis when, as here, the improper exclusion of evidence allegedly violates a defendant's constitutional right to present a defense. *State v. Blom*, 682 N.W.2d 578, 622 (Minn. 2004). If there is no reasonable possibility that the evidence would have changed the verdict, the defendant's conviction must be affirmed. *Id*. at 623.

Appellant contends that the breath test is relevant to whether Officer Erickson had probable cause to (1) believe that appellant was driving while impaired, (2) arrest appellant for driving while impaired, and (3) invoke the implied-consent law to require appellant to submit to a chemical test. But the evidence clearly demonstrates that Officer Erickson had probable cause to believe appellant was driving while impaired. Officer Erickson received a dispatch call about a possible drunk driver that described appellant's vehicle and license plate number. After locating appellant's vehicle, Officer Erickson observed appellant drive into the oncoming traffic lane while attempting a left turn. When Officer Erickson stopped the vehicle, he smelled a strong odor of alcohol coming from inside of the vehicle and saw that appellant's eyes were bloodshot and glassy. Appellant admitted to Officer Erickson that he had consumed an alcoholic beverage, and the field sobriety test suggested that appellant was intoxicated.

As a result, there was overwhelming evidence that Officer Erickson had probable cause to believe appellant was driving under the influence. In turn, Officer Erickson had

probable cause to arrest appellant and require him to submit to a chemical test. Accordingly, there is no reasonable possibility that admission of the breath test would have changed the verdict, and the district court's erroneous exclusion of the breath test was harmless error.

**III**

Appellant also asserts that the district court erred by allowing the state—during cross-examination of appellant and closing arguments—to inform the jury that appellant had previously been through the implied-consent process. The issue was raised prior to trial when the state argued that it should be allowed to establish that appellant had been through the implied-consent process before if appellant testified that he was confused regarding the test-refusal process. Appellant opposed the state's argument, but the district court withheld ruling on the matter until appellant testified.

When the issue arose during trial, however, appellant did not object to the state's questions and arguments about appellant's previous experience with the implied-consent process. Failure to object to the admission of evidence generally constitutes a waiver of the right to appeal on that basis. *State v. Williams*, 525 N.W.2d 538, 544 (Minn. 1994). But we may consider an error not objected to at trial if there was (1) error, (2) the error was plain, and (3) the error affected the defendant's substantial rights; that is, "if [the error] had the effect of depriving the defendant of a fair trial." *Id.* An error is plain if the law on point is clear and controlling. *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (quotation omitted). Even if all three prongs are met, "we may correct the error

only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.*

In *State v. Clark*, 375 N.W.2d 59, 62 (Minn. App. 1985), we recognized that a court must accept the defendant's stipulation to a prior DWI offense and revoked license. The defendant in *Clark* was charged with and convicted of aggravated DWI, aggravated violations, and unlawful acts. *Id*. at 60. The district court accepted the defendant's stipulation to a prior DWI violation for purposes of the aggravated DWI but refused to accept the defendant's stipulation to a prior license revocation. *Id*. at 61. The state objected to the latter stipulation because it would remove from the jury's consideration two of the three elements of the offense. *Id*. The district court then permitted the state to submit evidence of both the prior DWI conviction and the license revocation. *Id*.

In regard to the license-revocation evidence in *Clark*, we held that

> [i]f the jury is informed that a defendant charged with driving under the influence had a revoked license at the time, we think there is serious risk that the jury will infer the defendant has a prior DWI and utilize that inference in determining the guilt of the defendant. The potential of such evidence for unfair prejudice is identical to the prejudice induced by evidence of a prior DWI conviction.

*Id*. at 62. Because appellant's prior experience with the implied-consent process carries a strong inference of at least a prior DWI arrest, the district court, in light of *Clark*, committed plain error by allowing the state to inform the jury about appellant's prior experience with the implied-consent process. But on this record, we cannot say that the district court's plain error so prejudiced appellant that he did not receive a fair trial because appellant's conviction is supported by substantial evidence—Officer Erickson's

testimony, admissions by appellant on cross-examination, and portions of the implied-consent-advisory transcript read into the record.

Further, appellant's acquittal on the DWI charge indicates that the jury did not inappropriately consider appellant's prior experience with the implied-consent process. Thus, we conclude that appellant has not established that he was denied a fair trial.

**IV**

Finally, appellant argues that the district court erred by failing to instruct the jury on the procedural prerequisites of the test-refusal offense. But appellant concedes that he did not object to the district court's instructions. In general, failure to object to jury instructions before they are submitted to the jury constitutes a waiver of the issue on appeal. *State v. Richardson*, 633 N.W.2d 879, 885 (Minn. App. 2001). But we may consider appellant's claim under the plain-error analysis. *Williams*, 525 N.W.2d at 544.

The implied-consent statute provides that a chemical test of a person's breath may be required when an officer has probable cause to believe that the person was driving, operating, or in physical control of a motor vehicle in violation of Minn. Stat. § 169A.20, and if one of the following conditions exist:

> (1) the person has been lawfully placed under arrest for violation of section 169A.20 . . . ;
>
> (2) the person has been involved in a motor vehicle accident . . .;
>
> (3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test); or
>
> (4) the screening test was administered and indicated an alcohol concentration of 0.08 or more.

Minn. Stat. § 169A.51, subd. 1(b). The person must also be informed of specific information that is set out in the statute and included in the implied-consent advisory form. *Id.*, subd. 2.

In *State v. Ouellette*, 740 N.W.2d 355, 360 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007), we held that, because an officer can request a test only when one of the conditions exists under the implied-consent statute, and because the implied-consent advisory must be given when the test is requested, those prerequisites are incorporated into the criminal-refusal statute. Accordingly, a jury must be instructed on those elements. *Id.* Here, as respondent concedes, the jury instruction did not include these procedural prerequisites. Therefore, the district court committed plain error.

But appellant cannot show that the error affected his substantial rights. Although the jury was not asked to find that one of the other conditions listed in the implied-consent statute existed, the evidence overwhelmingly indicates that there was probable cause to arrest appellant for driving while impaired, thereby satisfying the first condition. Further, there was undisputed evidence that Officer Erickson read appellant the implied-consent advisory, as required by statute. Because there was ample evidence that the procedural prerequisites contained in the implied-consent statute were met, there is no reasonable likelihood that the district court's omission affected the verdict. *See id.* (concluding that when the defendant was placed under lawful arrest for DWI and there was no dispute as to whether the officer read the defendant the implied-consent advisory, the district court's failure to instruct the jury on the procedural prerequisites of the

implied-consent statute was harmless error). Accordingly, appellant is not entitled to relief.

**Affirmed.**