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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1067

State of Minnesota,
Respondent,

vs.

Cedric Lyle Scofield,
Appellant.

Filed May 26, 2009
Affirmed
Poritsky, Judge[*]

Washington County District Court
File No. 82-K9-06-006828

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Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Poritsky, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

PORITSKY, Judge

Appellant challenges his conviction under the criminal test-refusal statute, Minn. Stat. § 169.20, subd. 2 (2006), arguing that the statute is unconstitutional. We affirm.

FACTS

Around 11:45 p.m. on October 11, 2006, Police Officer Allan Olson observed appellant, Cedrick Lyle Scofield, driving northbound on 7th Avenue in Newport, Minnesota. Olson recognized Scofield and recalled that seven to eight months earlier, Scofield was arrested for driving with a cancelled license. Olson began to follow Scofield and observed the right passenger tires of Scofield's vehicle cross over the fog lines on the street. Scofield's vehicle made a signaled right turn into a residence located at 972 7th Avenue, which was subsequently identified as his residence. Olson observed the vehicle drive onto the grass in the front yard of the house and proceed to the back of the house where it stopped.

As Olson approached the parked vehicle, Scofield exited the car and began to walk quickly away, as if he was trying to avoid the officer. But Scofield stopped walking away when Olson ordered him to stop. Olson asked Scofield if his driver's license was still cancelled, and Scofield answered that he believed that it was. While talking with Scofield, Olson detected a strong odor of alcohol emanating from him and also observed that Scofield was exhibiting behavior indicating that he was under the influence of alcohol, including: bloodshot, watery, and glossy eyes; slurred speech; and poor coordination.

Because Olson believed that Scofield had tried to avoid him, the officer was concerned that Scofield might try to escape. For that reason, and because Scofield exhibited clear signs of intoxication, Olson elected to arrest him instead of putting him through field sobriety tests. Upon arriving at the Washington County Jail, Olson observed that Scofield had urinated in the backseat of the squad car. Olson read Scofield the Motor Vehicle Implied Consent Advisory. Scofield told Olson that he understood the advisory and that he did not need to consult with an attorney. When Olson asked him to submit to a breath-alcohol content test, Scofield refused, stating that he was refusing "[c]ause [he] was not driving."

Scofield was charged with: (1) refusal to submit to a chemical test crime; (2) driving under the influence; and (3) driving in violation of restricted driver's license. In November 2007, Scofield moved to dismiss the test-refusal charge, claiming that the test-refusal statute, Minn. Stat. § 169A.20, subd. 2 (2006), is unconstitutional. The district court denied this motion.

The state dismissed the other counts against Scofield, leaving only the test-refusal charge. In May 2008, Scofield waived his right to a jury trial and submitted the test-refusal charge to the district court on a stipulated-facts hearing pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). Scofield preserved for appeal the question of the constitutionality of Minn. Stat. § 169A.20, subd. 2. The district court found Scofield guilty of refusal to submit to a chemical test. This appeal followed.

D E C I S I O N

Scofield challenges the constitutionality of the criminal test-refusal statute, Minn. Stat. § 169A.20, subd. 2 (2006).

The constitutionality of a statute is a question of law that we review de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). We presume that "Minnesota statutes are constitutional" and that "our power to declare a statute unconstitutional should be exercised with extreme caution." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn. 2000). The challenging party "bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *State v. Merill*, 450 N.W.2d 318, 321 (Minn. 1990).

Under Minnesota's implied consent law, "[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." Minn. Stat. § 169A.51, subd. 1 (2006). "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 (2006).

Here, Scofield argues that Minn. Stat. § 169A.20, subd. 2, is unconstitutional because (1) it violates his substantive due process rights; (2) it violates the Fourth Amendment prohibition against unreasonable searches and seizures; and (3) it violates the doctrine of unconstitutional conditions. We disagree.

Substantive due process rights

First, Scofield asserts that his test-refusal conviction under Minn. Stat. § 169A.20, subd. 2, must be reversed because the test-refusal statute violates his due-process rights. This argument is unpersuasive. Scofield makes this argument only in passing, and fails to cite any authority to support his argument. An assignment of error based on "mere assertion" and unsupported by argument or authority is waived unless prejudicial error is obvious on mere inspection. *State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (quoting *Schoepke v. Alexander Smith & Sons Carpet Co.*, 290 Minn. 518, 519-20, 187 N.W.2d 133, 135 (1971)). Because Scofield fails to support his assertion with any argument or authority, and because this alleged error is not prejudicial on mere inspection, this argument fails.

But, to put this argument in perspective, we note that in *State v. Netland*, 762 N.W.2d 202, 205 (Minn. 2009), the Minnesota Supreme Court determined that no due-process violation occurred in a case in which the facts were far more egregious than the facts here.

In *Netland*, the defendant asserted that the officer acted in bad faith during administration of the chemical test when the officer terminated the test and denied the defendant's request for an additional test after the results from the first test did not register. *Id.* at 209. The supreme court concluded that the officer did not act in bad faith by terminating the test or by refusing to comply with the defendant's request for an additional test, because the officer believed that the defendant had attempted to manipulate the results of her first test and that she would continue to do so if granted

another test. *Id*. The court held that although the officer deliberately denied the defendant an additional test, there was no evidence of bad faith sufficient to support a due-process violation. *Id.* Here, there is no evidence that Officer Olson acted in bad faith when attempting to administer the chemical test to Scofield. Olson merely asked Scofield to take the chemical test, and Scofield refused. Thus, the record here does not show that the officer acted in bad faith.

Nor does the record reflect that Olson's behavior shocked the conscience. In *Netland*, the supreme court held that the defendant's claim—that the officer's behavior in refusing to administer an additional chemical test shocked the conscience—was meritless because the officer did not "use force or injure Netland when he did not administer another test." *Id.* at 210. Similarly, here, upon Scofield's refusal to submit to the chemical test, Olson did not attempt to force the test or injure Scofield. There is no evidence to show that the officer's behavior shocked the conscience.

Accordingly, we conclude that Scofield's due-process rights were not violated either during the attempted administration of a chemical test or by his subsequent conviction pursuant to Minn. Stat. § 169A.20, subd 2.

Fourth Amendment rights

The main contention urged by Scofield is that the test-refusal statute constitutes an unreasonable search and seizure in violation of both the United States Constitution and the Minnesota Constitution. Specifically, he argues that the test-refusal statute is based on a theory that when persons drive in Minnesota, under certain conditions they consent to being searched, but because their "consent" is not validly given, searches pursuant to

the statute are unconstitutional. Scofield's argument, therefore, is that the statute is facially unconstitutional, and not merely unconstitutional as applied.

However, this argument is wide of the mark: Searches to determine whether a person is driving while impaired are not based on consent, but are based on the exigent-circumstances exception to the warrant requirement. In *Schmerber v. California*, 384 U.S. 757, 772, 86 S. Ct. 1826, 1836 (1966), the United States Supreme Court held that a warrantless search to determine whether a person was driving under the influence does not necessarily violate the Fourth Amendment. In *State v. Shriner*, 751 N.W.2d 538, 541-42 (Minn. 2008), the Minnesota Supreme Court ruled that exigent circumstances provide an exception to the warrant requirement. The court held that "rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances" to justify the police taking a warrantless alcohol content sample from a defendant when there is probable cause to believe that the defendant committed criminal vehicle operation. *Id.* at 549-50.

And in *Netland*, the Minnesota Supreme Court ruled that the "evanescent" nature of the evidence of alcohol in a defendant's body creates the conditions that justify warrantless searches. 762 N.W.2d at 214. The court held that "the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures . . . 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." *Id.*

Here, Officer Olson requested Scofield to perform a breath-alcohol test after: (1) knowing that Scofield recently had his license cancelled; (2) observing Scofield drive his vehicle over the fog lines in the street; (3) following Scofield to his garage where appellant quickly got out of his vehicle and began walking away; (4) talking with Scofield and observing that he was exhibiting signs of intoxication; and (5) knowing that Scofield urinated on himself while in the back of the police car after being arrested. We conclude that Olson had probable cause to suspect that Scofield was driving while impaired and therefore Olson was permitted to request a breath-alcohol content test under the exigent-circumstances exception to the warrant requirement. *See Shriner*, 751 N.W.2d at 541-42 (determining that exigent circumstances provide an exception to the warrant requirement). Therefore, Scofield's subsequent conviction under Minn. Stat. § 169A.20, subd. 2, did not violate his right to be free of unreasonable searches and seizures.

Unconstitutional conditions

Finally, Scofield argues that the criminal test-refusal statute violates the doctrine of unconstitutional conditions because it requires a person to submit to an unconstitutional search as a condition of retaining the privilege to drive.

Although the legislature may impose conditions on granted privileges, it may not condition these privileges on the relinquishment of constitutional rights. *Frost v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593-94, 46 S. Ct. 605, 607 (1926). And "[p]rincipally, the unconstitutional conditions doctrine reflects a limit on the state's ability to coerce waiver of a constitutional right where the state may not impose on that right directly."

Netland, 762 N.W.2d at 211 (citation omitted). However, to invoke this doctrine, a party must first show that the statute requires the party to give up a constitutional right in order to enjoy a benefit to which the party would otherwise be entitled; in this case, the showing would have to be that the application of Minn. Stat. § 169A.20, subd. 2, requires an individual to give up the right to be free of unconstitutional searches and seizures in order to enjoy the privilege of driving within this state. *See Council of Indep. Tobacco Mfrs. of Am. v. State*, 713 N.W.2d 300, 306 (Minn. 2006) (concluding that in order to invoke the unconstitutional conditions doctrine, appellants must first show that the statute in question denies them a benefit they could otherwise obtain only by giving up a constitutional right).

In *Netland*, the appellant argued that the breath test "constitutes an unconstitutional search because the State impermissibly conditions her driving privileges on an unconstitutional, warrantless search for blood-alcohol content." 762 N.W.2d at 211. There, the supreme court concluded that because the defendant failed to establish that the criminal test refusal statute authorizes an unconstitutional search, it was unnecessary to determine whether the unconstitutional conditions doctrine applies. *Id.* at 212. Here, Scofield has likewise failed to show that a request for submission to a breath test violates his right to be free of unconstitutional searches and seizures. And because he has failed to make that showing, it is unnecessary for us to determine whether the unconstitutional conditions doctrine applies.

Affirmed.

Judge Bertrand Poritsky