STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1227

State of Minnesota,
Respondent,

vs.

Timothy Michael Graczyk,
Appellant.

Filed June 9, 2009
Affirmed
Lansing, Judge

Sherburne County District Court
File No. 71-CR-07-1113

Lori Swanson, Attorney General, Peter Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Kathleen A. Heaney, Sherburne County Attorney, Arden Fritz, Assistant County Attorney, Government Center, 13880 Business Center Drive, Elk River, MN 55330 (for respondent)

Charles A. Ramsay, Daniel J. Koewler, Charles A. Ramsay & Assoc., PLLC, Suite 330, 2780 Snelling Avenue North, Roseville, MN 55113 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

LANSING, Judge

At a contested omnibus hearing on two first-degree charges of driving while impaired (DWI) and two companion charges, Timothy Graczyk moved to suppress the blood-test results as a violation of the unconstitutional-conditions doctrine and to dismiss both first-degree DWI charges as unconstitutionally enhanced by civil revocations for which he asserts that he did not receive notice. The district court denied the motions and found Graczyk guilty in a stipulated-facts trial. On appeal, Graczyk renews his constitutional challenges. Because both arguments are directly contrary to controlling law and his claim of lack of notice is refuted by the record, we affirm.

F A C T S

A Sherburne County deputy was assisting a stalled motorist on Highway 10 outside Elk River at 2:15 one morning in April 2007 when a pickup truck drove by, propelling sparks from its rear, passenger-side tire. The deputy followed the pickup and saw that its tire was completely shredded and the rear, passenger side was supported only by the tire rim, which was in direct contact with the highway. After stopping the pickup, the deputy spoke with the driver, later identified as Graczyk, and noticed his bloodshot, watery eyes and an odor of alcohol. Graczyk performed and failed three field sobriety tests and also failed a preliminary breath test.

The deputy arrested Graczyk for DWI and transported him to the Sherburne County Jail. After the deputy administered the Minnesota implied-consent advisory, Graczyk exercised his right to speak with an attorney, and then agreed to submit to a

blood test. The blood sample was drawn at the Monticello/Big Lake Hospital, and later analyzed by the Minnesota Bureau of Criminal Apprehension. The analysis showed an alcohol concentration of .17.

The state charged Graczyk with first-degree DWI (under the influence); first-degree DWI (alcohol concentration of .08 or more); violating a restricted driver's license; and carrying a gun without a permit. The unloaded gun was discovered underneath the front seat when the pickup was inventoried. The DWI violations were charged as first-degree offenses based on three prior impaired-driving incidents. *See* Minn. Stat. § 169A.24, subd. 1(1) (2006) (defining first-degree DWI as violating DWI statute within ten years of first of three or more qualified, prior impaired-driving incidents). The three qualified, prior impaired-driving incidents included a 2002 implied-consent revocation based on a .14 alcohol concentration, a 2003 implied-consent revocation based on a .10 alcohol concentration, and a 2004 DWI conviction based on a .13 alcohol concentration.

At his omnibus hearing, Graczyk moved to suppress the results of his blood test and to dismiss the two first-degree DWI charges. Graczyk based his suppression motion on an argument that the criminal test-refusal statute authorizes an unconstitutionally coercive search for blood-alcohol content that is prohibited by the unconstitutional-conditions doctrine. He based his dismissal motion on an argument that civil license revocations cannot be used to enhance criminal DWI charges and that, even if they could, his 2002 and 2003 revocations would be inadmissible because he did not receive notice of these revocations and did not know about his right to petition for judicial review. The

state disputed Graczyk's claim and provided copies of notices of both revocations that contained Graczyk's signature.

The district court denied Graczyk's motion to suppress the results of the blood test and his motion to dismiss the first-degree DWI charges. Graczyk waived a jury trial and submitted the case on stipulated facts consistent with the procedures outlined in *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The district court found Graczyk guilty on all four charges. Graczyk appeals, raising arguments that apply only to his conviction of first-degree DWI (more than .08 alcohol concentration) and, by reasonable extension, his first-degree DWI (driving under the influence) conviction.

D E C I S I O N

When the material facts are undisputed, we review a district court's ruling on a suppression motion or a pretrial dismissal as an issue of law. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). This involves reviewing the facts independently to determine whether, as a matter of law, "the district court erred in suppressing—or not suppressing—the evidence," or in dismissing the criminal charge. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

I

The facts supporting Graczyk's motion to suppress the results of the blood test are not disputed. Graczyk maintained that Minnesota's criminal test-refusal statute essentially authorizes an unconstitutionally coercive search for blood-alcohol content that is prohibited by the unconstitutional-conditions doctrine and, therefore, the results of his blood test were inadmissible because the evidence was obtained in violation of his

constitutional rights. *See* Minn. Stat. § 169A.20, subd. 2 (2006) (criminalizing test refusal). Graczyk acknowledged in his brief that "[t]his is the precise issue currently under review in the case of *State v. Netland*," which was pending before the Minnesota Supreme Court.

Five months after Graczyk submitted his brief, the Minnesota Supreme Court decided *State v. Netland*, 762 N.W.2d 202 (Minn. 2009). The supreme court addressed the unconstitutional-conditions doctrine and determined that, to the extent it applies to Fourth Amendment rights or to violations of the Minnesota Constitution, the criminal test-refusal statute does not result in an impermissibly conditioned, warrantless search for blood-alcohol content because, under the exigency exception to the warrant requirement, "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.* at 213-14; *see also State v. Shriner*, 751 N.W.2d 538, 549 (Minn. 2008) (holding that rapid, natural dissipation of alcohol creates exigent circumstances for warrantless blood draw), *cert. denied sub. nom. Shriner v. Minnesota*, 129 S. Ct. 1001 (2009). The exigent-circumstances exception does not "depend on the underlying crime; rather, the evanescent nature of the evidence creates the conditions that justify a warrantless search." *Netland*, 762 N.W.2d at 213.

Graczyk does not dispute the existence of probable cause for his arrest on the two first-degree DWI charges. And the record readily establishes probable cause based on a valid stop, indicia of alcohol consumption, and Graczyk's failing three field sobriety tests and the preliminary breath test. He also does not dispute that chemical impairment is an

element of first-degree DWI charges. In fact, his arguments for suppression rely on proof of chemical impairment as an element of those charges. As Graczyk acknowledged in his brief, *Netland* is dispositive of this issue. The holding in *Netland* controls, and the district court did not err in denying Graczyk's motion to suppress.

II

In his motion to dismiss the two first-degree DWI charges, Graczyk argued that his 2002 and 2003 implied-consent revocations cannot be considered as two of the three qualified, prior impaired-driving incidents because it would violate his constitutional rights to use a civil revocation, which was imposed without the procedural protections afforded criminal defendants, as a basis for enhancement of a criminal conviction. Graczyk renews this argument on appeal, relying on analogies drawn from *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983). This precise issue, however, was previously raised and decided in *State v. Dumas*, 587 N.W.2d 299, 302-04 (Minn. App. 1998), *review denied* (Minn. Feb. 24, 1999). *Dumas* analyzed the analogous arguments drawn from *Nordstrom* and held that previous civil revocations can be used to enhance a criminal charge if the revocations were constitutionally obtained. *Id.*

After receiving a license revocation, a defendant has thirty days to petition for judicial review, or, at any time during the revocation period, a defendant may petition for administrative review. Minn. Stat. § 169A.53, subds. 1-2 (2002). Even if a defendant fails to exercise available judicial review, the defendant's due process right to meaningful review has been satisfied. *State v. Goharbawang*, 705 N.W.2d 198, 202 (Minn. App. 2005), *review denied* (Minn. Jan. 17, 2006); *see also State v. Coleman*, 661 N.W.2d 296,

301 (Minn. App. 2003) (noting that alternative means of available review satisfy due process requirements), *review denied* (Minn. Aug. 5, 2003). Once judicial review has occurred or been waived, the revocation can be used as an aggravating factor. *State v. Wiltgen*, 737 N.W.2d 561, 571 (Minn. 2007).

The *Dumas* holding is directly contrary to Graczyk's argument and the holding is dispositive. Graczyk advances no argument for reconsideration of *Dumas* that is based on a consideration unanticipated by the *Dumas* analysis or that is based on a change in statutory law or constitutional interpretation. We, therefore, reject Graczyk's second argument.

III

Finally, we turn to Graczyk's argument that the 2002 and 2003 civil revocations were unconstitutionally obtained because he had no notice of either revocation and therefore was denied his right to appeal. To establish that he did not receive notice of his 2002 or 2003 civil revocations, Graczyk submitted an affidavit attesting that he "was given no 'Notice and Order of Revocation,'" and that he "had no knowledge of the [thirty]-day period in which to file a petition for judicial review." The supreme court has established criteria to raise a valid challenge to the use of an earlier conviction for purposes of sentencing enhancement. *See State v. Fussy*, 467 N.W.2d 601 (Minn. 1991) (addressing validity of prior misdemeanor DWI convictions). *Fussy* requires a defendant to notify the state that an earlier conviction violated his constitutional rights and to provide supporting evidence for each challenged conviction. *Id.* at 603. If that threshold

requirement is met, the burden shifts to the state to show that the conviction was not based on a denial of constitutional rights. *Id.*

We recognize that Graczyk's prior revocations are civil penalties not criminal convictions, but the criteria in *Fussy* apply to the civil revocations as well. *See State v. Mellett*, 642 N.W.2d 779, 789 (Minn. App. 2002) (applying *Fussy* to defendant's challenge to earlier revocations, which enhanced test-refusal charge), *review denied* (Minn. July 16, 2002); *State v. Host*, 350 N.W.2d 479, 481-82 (Minn. App. 1984) (allowing earlier, petty-misdemeanor speeding convictions to be aggregated for defendant's current speeding offense). We have serious questions about whether Graczyk's affidavit satisfies the requirements of *Fussy,* but it is unnecessary to determine that issue because the record unequivocally refutes Graczyk's claim that he did not receive notice of his 2002 and 2003 revocations.

The state provided copies of both Graczyk's 2002 and 2003 notices of revocation and each of the written documents contains Graczyk's signature. Graczyk's signature establishes that he saw the forms, including the language, "**THIS IS YOUR OFFICIAL NOTICE OF REVOCATION**," and "For information regarding reinstatement of driving privilege or appeal of this revocation see back of notice." Although Graczyk alludes to the possibility that this is not his signature, there is absolutely no evidence in the record that suggests that it is not. Graczyk had alcohol concentrations of .14 on the first revocation and .10 on the second revocation. Minnesota law required immediate service of notice with an alcohol concentration of .10 or higher. Minn. Stat. § 169A.52, subd. 7 (2002). Based on this evidence, the district court found that Graczyk had

received notice of both revocations. *See Johnson v. Comm'r of Pub. Safety*, 394 N.W.2d 867, 868 (Minn. App. 1986) (noting that district court found that appellant received notice when handed and left with "a properly executed copy"). The signed copies and the statute's requirement of immediate service established that the state met its burden to show that the earlier revocations were constitutionally obtained and could be used to enhance Graczyk's current DWI charge.

Affirmed.