**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-1462**

Laura M. McGowan, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed June 30, 2009**
**Affirmed**
**Johnson, Judge**

Isanti County District Court
File No. 30-CV-07-208

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

Lori Swanson, Attorney General, Melissa J. Eberhart, Emerald A. Gratz, Assistant Attorneys General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101 (for respondent)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

**JOHNSON**, Judge

The commissioner of public safety revoked Laura M. McGowan's driver's license based on her refusal to submit to a breath test after she was arrested on suspicion of driving while impaired (DWI). McGowan petitioned the district court to rescind her

revocation, arguing that the warrantless search of her breath violated her Fourth Amendment rights and that the revocation constituted a denial of her right to due process of law. The district court sustained the revocation. We affirm.

## FACTS

In the early morning hours of March 4, 2007, a state trooper stopped McGowan on Highway 95 in Isanti County on suspicion of DWI. Although McGowan denied that she had been drinking, the trooper observed indicia of impairment, including a strong odor of alcohol and slurred speech, and McGowan failed two field sobriety tests. The trooper transported her to the Isanti County jail, where he read to her the implied-consent advisory, which includes a notice that a person suspected of DWI is required to submit to an alcohol-concentration test and that a failure to submit to the test is a crime. *See* Minn. Stat. § 169A.51, subd. 2(1)-(2) (2006). McGowan consulted with an attorney by telephone and agreed to take the breath test.

Before administering the breath test, the trooper and another officer explained to McGowan that she had to blow long and hard through the mouthpiece of the Intoxilyzer breath-test machine. According to the trooper's testimony, McGowan "was not cooperative at all" because she would not follow the trooper's instructions. The law requires a person in McGowan's situation to provide two separate breath samples. Minn. Stat. § 169A.51, subd. 5(d) (2006). While giving her first breath sample, McGowan "would puff out her cheeks" and repeatedly interrupt the breath sample by stopping and talking. The trooper could "hear the air . . . coming around the outside of the mouthpiece" and perceived that McGowan was not blowing hard enough through the

mouthpiece. The machine showed that McGowan had a "puff count" of six, meaning that she interrupted her blowing six times. Nonetheless, McGowan blew 1.38 liters of air into the machine during the first of her two breath samples, which is slightly more than the 1.10 liters that are minimally necessary to measure alcohol content but far less than the 4.00 to 5.00 liters that a person typically blows. The result of the first breath sample was an alcohol concentration of between .146 and .150.

While providing a second breath sample, McGowan again puffed out her cheeks and blew improperly through the mouthpiece. The trooper warned McGowan that she had four minutes to provide the second sample and that failure to do so would be considered refusal to take the test. McGowan had a puff count of 16 during the second sample and provided only .14 liters of air. Because the sample was deficient, the trooper concluded that McGowan had refused to take the breath test.

Based on her test refusal, the commissioner revoked McGowan's driver's license. In March 2007, McGowan filed a petition to rescind the revocation. She brought a discovery motion to obtain the source code of the Intoxilyzer 5000EN breath-test machine. In July 2008, the district court denied the discovery motion and sustained the revocation of McGowan's driver's license. McGowan appeals.

## D E C I S I O N

### I. Reasonableness of Search

McGowan first argues that the district court erred by denying her motion to suppress on the ground that the warrantless search of her breath violated her Fourth Amendment right to be free from unreasonable searches. She contends that her consent

to the search was obtained by coercion when the officer threatened her with a criminal offense if she refused. The district court held that the search of McGowan's breath was reasonable. The constitutionality of a search is subject to a *de novo* standard of review. *State v. Davis*, 732 N.W.2d 173, 176-77 (Minn. 2007); *Haase v. Commissioner of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004).

Both the United States Constitution and the Minnesota Constitution prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Collecting a breath sample is deemed to be a search for purposes of the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989). A search conducted without a warrant is "presumptively unreasonable." *State v. Shriner*, 751 N.W.2d 538, 541 (Minn. 2008), *cert. denied*, 129 S. Ct. 1001 (2009). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Id.* (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 1947 (2006)). One exception to the warrant requirement is the consent of the person searched. *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985). Another exception to the warrant requirement is the existence of exigent circumstances. *Shriner*, 751 N.W.2d at 541.

In *State v. Netland*, 742 N.W.2d 207 (Minn. App. 2007), *aff'd in part, rev'd in part*, 762 N.W.2d 202 (Minn. 2009), the defendant argued that the implied-consent statute, which required her to submit to a breath test upon probable cause that she had been driving while impaired, unconstitutionally imposed conditions on her Fourth

Amendment right to withhold consent to a warrantless search. *Id.* at 213. This court rejected that argument, concluding that "the Fourth Amendment does not grant the right to refuse a search supported by probable cause and authorized by exigent circumstances." *Id.* at 214. On further review, the supreme court declined to address whether the implied-consent statute violates the Fourth Amendment. *Netland*, 762 N.W.2d at 212 & n.8. But the supreme court resolved Netland's case by holding that a warrantless search conducted pursuant to the implied-consent statute is not unreasonable 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.* at 214. The supreme court's holding in *Netland* is based on its prior holding in *Shriner* that "[t]he rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular operation." *Shriner*, 751 N.W.2d at 545. The *Netland* court rejected the argument that the holding in *Shriner* is confined to cases in which the driver is suspected of criminal vehicular operation:

> [E]xigency does not depend on the underlying crime; rather, the evanescent nature of the evidence creates the conditions that justify a warrantless search. It is the chemical reaction of alcohol in the person's body that drives the conclusion on exigency, regardless of the criminal statute under which the person may be prosecuted.

*Id.* at 213.

In this case, the trooper administered the warrantless breath test based on his suspicion that McGowan was driving while impaired. The district court, relying on *Shriner*, concluded that it was reasonable to test McGowan's blood-alcohol concentration within two hours. In light of *Shriner* and the supreme court's opinion in *Netland*, which was issued after briefing in this case, the trooper's suspicion that McGowan was driving while impaired by alcohol created single-factor exigent circumstances justifying the warrantless search of McGowan's breath. *See Netland*, 762 N.W.2d at 214. Thus, the search of McGowan's breath was not a violation of her Fourth Amendment rights. Because the search is independently justified by exigent circumstances, it is irrelevant whether McGowan gave consent or whether such consent was valid. *Id.* at 212 n.8.

**II. Due Process**

McGowan next argues that the revocation of her driver's license based on the trooper's conclusion that she refused to take a breath test violated her right to due process of law. If a due process argument is based on undisputed facts, appellate courts review the district court's ruling on a *de novo* basis. *Bendorf v. Commissioner of Pub. Safety*, 727 N.W.2d 410, 413 (Minn. 2007). But if a due process argument is based on the question whether a person has refused a chemical test, the argument implicates a question of fact. *Busch v. Commissioner of Pub. Safety*, 614 N.W.2d 256, 258 (Minn. App. 2000); *Lynch v. Commissioner of Pub. Safety*, 498 N.W.2d 37, 38 (Minn. App. 1993). An appellate court will uphold a district court's findings of fact unless they are clearly erroneous, giving deference to the district court's opportunity to evaluate witness

credibility. Minn. R. Civ. P. 52.01; *see also Jasper v. Commissioner of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002).

McGowan asserts two theories as to why her right to due process of law was violated. First, she argues that she was denied due process because "a malfunctioning Intoxilyzer 5000 denied [her] the ability to comply with the implied consent law." This argument cannot succeed unless McGowan is successful on her challenge to the district court's finding that she did not provide an adequate breath sample because of an intentional lack of cooperation. The record supports the district court's finding. The trooper testified that McGowan did not provide an adequate breath sample because McGowan did not follow his instructions to blow into the mouthpiece. McGowan was given approximately four minutes to provide the second breath sample. *See O'Brian v. Commissioner of Pub. Safety*, 552 N.W.2d 760, 761 (Minn. App. 1996) (stating that "four-minute period for each sample [allows] a reasonable amount of time for drivers to produce an adequate sample"). As is reflected in the audiorecording of the administration of the breath test, the trooper and another officer repeatedly instructed McGowan to blow through the mouthpiece and noted McGowan's noncompliance with those instructions. The trooper warned McGowan that her failure to provide an adequate breath sample would be deemed a refusal to submit to the test. After four minutes, McGowan had not provided an adequate sample. The trooper testified that throughout the breath test, he had no reason to believe that the instrument was malfunctioning. McGowan did not testify. In light of the evidence in the record and the district court's ability to evaluate the trooper's credibility, the district court did not clearly err in finding that the deficiency of

the breath test was due solely to McGowan's lack of cooperation. Thus, we need not go any further in analyzing McGowan's argument that the Intoxilyzer malfunctioned.

Second, McGowan argues that she was denied due process because the state trooper did not attempt to test her alcohol concentration by another means, such as a blood or urine test. Pursuant to the implied-consent statute, an officer "may direct whether the test is of blood, breath, or urine," and a person who refuses a blood or urine test must be offered an alternative test, but if an officer asks a person to submit to a breath test, the person does not have a right to an alternative test. Minn. Stat. § 169A.51, subd. 3 (2006).

The defendant in *Netland* made a virtually identical due process argument. She had failed to provide an adequate breath sample within four minutes because she did not blow hard enough and because she interrupted her blowing 19 times. 762 N.W.2d at 205. The officer deemed her to have refused the test because he observed her "starting and stopping" her breath. *Id.* at 206. She was subsequently charged and convicted of second-degree test refusal. *Id.* On appeal, Netland argued that her conviction violated her right to due process because she was "not given a meaningful opportunity to obey the law," a theory that the supreme court noted was without precedent. *Id.* at 207. Netland also argued that the "circumstances of her breath test were unfair." *Id.* at 208. The supreme court acknowledged that both the state and federal constitutions include "substantive components prohibiting certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them." *Id.* (quotation omitted). But the supreme court rejected both of Netland's theories, reasoning that there was no evidence

that the officer had acted in bad faith, *id.* at 209 (citing *State v. Larivee*, 656 N.W.2d 226, 230-31 (Minn. 2003)), and that the officer's conduct did not "'shock[] the conscience,'" *id.* at 209-10 (quoting *United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 2101 (1987)).

This case is indistinguishable from *Netland*. McGowan is deemed to have been "on notice" that a "failure to provide an adequate sample would lead to a test refusal charge." *Id.* at 209. Based on the district court's findings, McGowan intentionally did not provide a "consistent breath sample necessary to yield a valid sample." *Id.* There is no indication that McGowan was "having difficulty breathing or suffering from a medical condition that would hinder her ability to take the breath test." *Id.* The trooper's conduct does not "shock[] the conscience" because he "did not use force or injure [McGowan] when he did not administer another test." *Id.* at 210. That the trooper did not offer an alternative test after McGowan failed to generate a breath sample does not "rise[] to the level of a constitutional violation." *Id.*; *see also Larivee*, 656 N.W.2d at 232 (holding that officer did not violate due process rights by refusing to permit independent chemical test after defendant had refused police-administered test).

Thus, McGowan has not established a violation of her right to due process of law. *See Netland*, 762 N.W.2d at 210.

## III. Discovery of Source Code

In her brief, McGowan also argued that the district court erred by denying her discovery motion related to the Intoxilyzer source code. At oral argument, however, McGowan's counsel conceded that the source code would be irrelevant if we were to

uphold the district court's finding that she intentionally did not provide a proper breath sample. We have so held. Given the district court's finding, McGowan cannot show that her revocation was based in any way on the operation of the Intoxilyzer machine. Thus, we need not review the district court's ruling on McGowan's discovery motion.

**Affirmed.**