STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2340

State of Minnesota,
Respondent,

vs.

Daniel Joseph DeNucci,
Appellant.

Filed October 26, 2010
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-09-43058

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Desyl L. Peterson, Minnetonka City Attorney, Anna Krause Crabb, Assistant City Attorney, Minnetonka, Minnesota (for respondent)

Peter J. Timmons, Minneapolis, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Johnson, Judge; and Collins, 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

JOHNSON, Judge

Daniel Joseph DeNucci was convicted of driving while intoxicated with an alcohol concentration of .08 or more within two hours of driving. The state's evidence included the result of a urine test, which revealed an alcohol concentration of .15. DeNucci challenges the district court's denial of his pretrial motion to suppress evidence of the urine test. He argues that the implied consent advisory was misleading to the point that he was deprived of his right to due process. He also argues that his consent to the urine test was unlawfully coerced. We affirm.

FACTS

In the early morning hours of July 29, 2009, Sergeant Steve Kniss of the Minnetonka Police Department observed DeNucci driving his pickup truck erratically. Sergeant Kniss saw DeNucci cross the lane divider and drive in the opposing lane of traffic for approximately 75 yards. After DeNucci returned to his own lane, Sergeant Kniss saw him drive onto the curb on the right side of his lane.

Sergeant Kniss stopped DeNucci. While speaking with DeNucci, Sergeant Kniss detected slurred speech, the smell of alcoholic beverages, and bloodshot and glassy eyes. After DeNucci failed several field-sobriety tests, Sergeant Kniss arrested him for driving while impaired (DWI). At the police station, Sergeant Kniss read DeNucci the implied consent advisory. Sergeant Kniss asked DeNucci if he would take a urine test, and DeNucci responded in the affirmative. The urine test revealed an alcohol concentration

of .15. In his report, Sergeant Kniss noted, "During the entire traffic stop/Arrest DeNucci was extremely courteous, polite and accountable for his actions."

In August 2009, the state charged DeNucci with two offenses: fourth-degree DWI, a violation of Minn. Stat. § 169A.20, subd. 1(1) (2008), and DWI with an alcohol concentration of .08 or more within two hours, a violation of Minn. Stat. § 169A.20, subd. 1(5) (2008). In December 2009, DeNucci moved to suppress the evidence of the result of his urine test on two grounds. He first argued that the implied consent advisory violated his right to due process because it was misleading. He also argued that the urine test was obtained in violation of the Fourth Amendment because his consent to the test was coerced. The district court denied the motion.

DeNucci stipulated to the state's evidence. The district court found him guilty. At sentencing, the district court noted that the first count merged into the second count. The district court imposed a sentence on the second count by ordering DeNucci to spend 30 days in the workhouse, with 28 days stayed, with the option of performing 16 hours of community service in lieu of serving two days in the workhouse. DeNucci appeals.

D E C I S I O N

DeNucci argues that the district court erred by denying his motion to suppress the evidence of the result of his urine test. He reiterates the two arguments he presented to the district court. Before addressing DeNucci's arguments, however, we must address the state's argument that DeNucci's appeal should be dismissed. The state contends that, even if the results of DeNucci's urine test were to be suppressed, the record nonetheless would contain sufficient evidence to support DeNucci's conviction on the first count. In

essence, the state argues that, if the district court erred by denying DeNucci's motion to suppress, the error would be harmless.

The state's argument is foreclosed by the rules of criminal procedure and by caselaw. The parties submitted the case to the district court on stipulated evidence pursuant to Minn. R. Crim. P. 26.01, subd. 4 (2009). Counsel for the parties stated that the stipulation was being offered pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). But subdivision 4, which was promulgated in 2009, "implements the procedure authorized by" *Lothenbach* and "supersedes Lothenbach as to the procedure for stipulating to the prosecution's case to obtain review of a pretrial ruling," Minn. R. Crim. P. 26.01, 2009 cmt. The rule expressly provides that, when the parties stipulate to the state's evidence, "the parties agree that the court's ruling on a specified pretrial issue is dispositive of the case, or that the ruling otherwise makes a contested trial unnecessary." Minn. R. Crim. P. 26.01, subd. 4. By agreeing to a stipulation pursuant to subdivision 4, the state agreed that the district court's pretrial ruling—and, by extension, this court's opinion reviewing that ruling—is dispositive of the case. A harmless-error analysis does not apply. *See In re Welfare of R.J.E.*, 642 N.W.2d 708, 713 (Minn. 2002) (holding that harmless-error analysis does not apply to *Lothenbach* procedure). Thus, DeNucci's appeal should not be dismissed.

I. Implied Consent Advisory

DeNucci first argues that the implied consent advisory that Sergeant Kniss read to him is misleading and, as a result, deprived him of his right to due process. More specifically, DeNucci argues that the implied consent advisory was misleading because it

suggested that he could be charged with test refusal if he refused to submit to a urine test. DeNucci argues that the advisory should have informed him that he could be charged with test refusal if he refused to submit to both a urine test *and* a blood test. We apply a *de novo* standard of review to the question whether a defendant's right to due process was violated. *State v. Netland*, 762 N.W.2d 202, 207 (Minn. 2009).

The United States Constitution provides a criminal defendant with a right to due process of law. U.S. Const. Amend. XIV, § 1. "Under the federal constitution, due process does not permit the government to mislead individuals to either their legal obligations or to the penalties they might face should they fail to satisfy those obligations." *State v. Melde*, 725 N.W.2d 99, 103 (Minn. 2006) (citing *Raley v. Ohio*, 360 U.S. 423, 437-39, 79 S. Ct. 1257, 1266-67 (1959)). "[A] misleading implied consent advisory violates federal due process." *Id.* (citing *McDonnell v. Commissioner of Pub. Safety*, 473 N.W.2d 848, 853-55 (Minn. 1991)).

A person arrested for DWI may be asked to submit to chemical testing of his or her blood, breath, or urine to determine the person's alcohol concentration. Minn. Stat. § 169A.51, subd. 1(a) (2008). A law enforcement officer is required to advise a person arrested for DWI that, among other things, it is a crime to refuse to submit to a chemical test. Minn. Stat. § 169A.20, subd. 2(2) (2008). After being so advised, a person commits a crime by refusing to submit to a chemical test. *Id.* A police officer may choose which test to administer—blood, breath, or urine. *Id.*, subd. 3. But a person who is first asked to take either a blood or urine test may not be charged with refusal unless he or she also refuses another testing method:

> The peace officer who requires a test pursuant to this section may direct whether the test is of blood, breath, or urine. Action may be taken against a person who refuses to take a blood test only if an alternative test was offered and action may be taken against a person who refuses to take a urine test only if an alternative test was offered.

Id.

In this case, when administering the implied consent advisory to DeNucci, Sergeant Kniss used a preprinted form prepared by the Department of Public Safety, which mirrors the relevant provisions of the implied consent statute. The transcript of the audio recording of Sergeant Kniss's reading of the implied consent advisory shows that Sergeant Kniss followed the preprinted form practically verbatim. At one point, Sergeant Kniss stated, "Refusal to take a test is a crime. Do you understand that?" DeNucci responded, "I do." Five questions later, Sergeant Kniss asked, "Will you take a urine test?" DeNucci responded, "Definitely."

DeNucci contends that the implied consent advisory was misleading, and thus violative of his right to due process, because the advisory did not explain to him the provision of state law providing that "action may be taken against a person who refuses to take a urine test only if an alternative test was offered." Minn. Stat. § 169A.51, subd. 3. DeNucci does not contend that the advisory contained a misstatement of the law; he contends only that the advisory should have provided more information.

DeNucci's argument is foreclosed by this court's opinion in *Moe v. Commissioner of Pub. Safety*, 574 N.W.2d 96 (Minn. App. 1998), *review denied* (Minn. Apr. 14, 1998). In that case, two persons, Moe and Rice, were informed that "refusal to take a test is a

crime." *Id*. at 97-98. Moe was offered a blood test; Rice was offered a urine test; both drivers agreed to the tests offered. *Id*. at 98. On appeal, Moe and Rice challenged their respective implied consent advisories on the same ground as DeNucci—that the advisory was misleading because it did not inform them that they could not be charged with a crime until they had refused both the first test offered and an alternative test. *Id*. We rejected the argument, concluding that the advisories "were not inaccurate or misleading, and did not violate the drivers' constitutional rights." *Id*. We reasoned that "a state does not violate the fundamental fairness inherent to due process by choosing not to advise individuals of all the possible consequences of refusing an alcohol concentration test." *Id*. (citing *South Dakota v. Neville*, 459 U.S. 553, 564-66, 103 S. Ct. 916, 923-24 (1983)). We also reasoned that, because the two drivers agreed to take the tests that were first offered, "the arresting officers were not required to offer an alternative test." *Id*. at 98-99; *see also Workman v. Commissioner of Pub. Safety*, 477 N.W.2d 539, 540 (Minn. App. 1991) (holding that officer was not required to offer alternative test after arrestee agreed to first test offered).

The facts of this case are indistinguishable from *Moe*. Sergeant Kniss followed the standard implied consent advisory. He informed DeNucci that it would be a crime to refuse "a test." The use of the singular noun is significant. Sergeant Kniss did *not* inform DeNucci that it would be a crime to refuse the *urine* test. Thus, the advisory that Sergeant Kniss provided to DeNucci was not misleading.

We note that *Moe* still is good law. Since the *Moe* opinion was issued, it has been cited repeatedly by this court. Furthermore, the supreme court has reiterated *Moe*'s basic

principles in a case raising a similar issue. In *Melde*, the appellants argued that the implied consent advisory was misleading because it did not inform them that they would be charged with gross-misdemeanor crimes if they refused to submit to chemical tests, as opposed to misdemeanor crimes if they failed chemical tests. 725 N.W.2d at 101-02. The supreme court concluded that "the lack of more specific warnings as to the consequences of test-refusal does not violate federal due process." *Id*. at 104. The supreme court reasoned that the advisory "contains no implicit misleading assurances of the relative consequences of a test-refusal." *Id*. The supreme court noted that a more detailed advisory "is not an issue of constitutional imperative." *Id*. at 106; *see also Neville*, 459 U.S. at 564-66, 103 S. Ct. at 923-24 (holding that state did not violate defendant's right to due process by not advising him of all possible consequences of test refusal).

In light of *Moe* and *Melde*, DeNucci cannot prevail on his argument that his implied consent advisory was misleading. Thus, Sergeant Kniss's reading of the implied consent advisory did not deprive DeNucci of his right to due process.

II. Consent to Urine Test

DeNucci also argues that the evidence of the result of his urine test should have been suppressed because he did not give his valid consent to the test. We apply a *de novo* standard of review to the constitutionality of a search. *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).

The Fourth Amendment to the United States Constitution prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. The collection of a urine sample is a search for purposes of the Fourth Amendment. *See Skinner v. Railway Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413 (1989); *Mell v. Commissioner of Pub. Safety*, 757 N.W.2d 702, 709 (Minn. App. 2008). 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.* (quotation omitted). 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.

DeNucci contends that, even though he consented to the urine test, his consent is ineffective because it was coerced by the implied consent advisory, which informed him that he must submit to a chemical test or be charged with a crime. DeNucci's argument is inconsistent with recent caselaw. Regardless whether the implied-consent scheme coerced his consent, the warrantless search of DeNucci's urine is reasonable under the Fourth Amendment because of another exception to the warrant requirement—the existence of exigent circumstances. *See Netland*, 762 N.W.2d at 214.

The defendant in *Netland* argued in this court that the implied-consent statute unconstitutionally imposed conditions on her Fourth Amendment right to be free of unreasonable searches and seizures. *State v. Netland*, 742 N.W.2d 207, 213 (Minn. App.

2007), *aff'd in part, rev'd in part*, 762 N.W.2d 202 (Minn. 2009). We 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 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." *Netland*, 762 N.W.2d 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 a 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.

Netland, 762 N.W.2d at 213.

In this case, Sergeant Kniss stopped DeNucci's vehicle because of "erratic driving." After the stop, Sergeant Kniss observed indicia of intoxication, and DeNucci

thereafter failed field sobriety tests. Given these circumstances, Sergeant Kniss had probable cause to believe that DeNucci committed the offense of DWI. DeNucci does not contend otherwise.

DeNucci's argument fails because the supreme court's opinions in *Shriner* and *Netland* make clear that the evanescent nature of alcohol in a person's bloodstream constitutes exigent circumstances that justify a warrantless search of a person's blood, urine, or breath in practically every DWI case. *See id.* at 214; *Shriner*, 751 N.W.2d at 545. "Whether exigent circumstances exist is an objective determination, and the individual officer's subjective state of mind is irrelevant." *Shriner*, 751 N.W.2d at 542. In *Netland*, the supreme court rejected an argument that the exigent-circumstances exception does not apply "because the State did not show that concern for evanescent evidence motivated the officer to obtain Netland's blood-alcohol content without a warrant." 762 N.W.2d at 214. Rather, exigent circumstances were present because of "the relevant objective facts, namely the rapidly dissipating blood-alcohol evidence." *Id.*

In light of *Netland*, the facts known to Sergeant Kniss provided him with exigent circumstances to conduct a warrantless search of DeNucci's urine. It is irrelevant for purposes of the Fourth Amendment whether DeNucci gave valid consent to the urine test. Consent is only one exception to the warrant requirement; another exception is the existence of exigent circumstances. The existence of exigent circumstances provided Sergeant Kniss with sufficient, objective justification for the search of DeNucci's urine. For purposes of the Fourth Amendment, it was unnecessary for Sergeant Kniss to also obtain DeNucci's consent to the urine test.

DeNucci attempts to avoid the holding of *Netland* by arguing that the state may not rely on both the implied-consent statute and the Fourth Amendment. DeNucci cites *State v. Scott*, 473 N.W.2d 375 (Minn. App. 1991), in which this court held that "[o]nce a decision has been made to utilize the implied consent law, . . . an officer may not force the driver to submit to testing after the driver has refused." *Id.* at 377. The facts of *Scott*, however, are different from the facts of this case. The defendant in *Scott* refused to submit to a chemical test, *id*. at 376, and the question before the court was "whether the results of a *non*consensual blood test may be used in a criminal prosecution *after* a police officer has given the implied consent advisory *and the individual has refused to submit to a chemical test*," *id*. at 377 (first and third emphases added). Accordingly, the *Scott* opinion does not stand for the proposition that the state may not rely on exigent circumstances to justify a urine test obtained pursuant to the implied consent statute. Rather, the *Scott* opinion stands for the proposition that, if a law enforcement officer invokes the implied-consent statute, the state thereafter may not *physically* force a person to submit to a chemical test. *See id.* at 377. In *Netland*, the law enforcement officer invoked the implied-consent scheme, and the defendant was charged with refusal for intentionally failing to provide a proper breath sample. *Netland*, 762 N.W.2d at 205-06; *see also Shriner*, 751 N.W.2d at 540 (noting that officer did not invoke implied-consent procedure before nonconsensual drawing of blood). Thus, the *Scott* opinion does not preclude the state from relying on an exception to the warrant requirement of the Fourth Amendment in response to DeNucci's argument that the Fourth Amendment requires the suppression of evidence of the result of his urine test. Accordingly, the district court

properly rejected DeNucci's argument that the result of the urine test should be suppressed because his consent was unlawfully coerced.

In sum, the district court did not err by denying DeNucci's motion to suppress evidence of the result of his urine test.

Affirmed.