STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1244

State of Minnesota,
Appellant,

vs.

Sarah May Mickalsen,
Respondent.

Filed December 30, 2013
Reversed
Ross, Judge

Dakota County District Court
File No. 19AV-CR-12-12961

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

Alina Schwartz, Campbell Knutson, P.A., Eagan, Minnesota (for appellant)

Jeffrey B. Ring, Jeffrey B. Ring and Associates, Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

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

ROSS, Judge

A police officer stopped a car driven by Sarah Mickalsen and administered a preliminary breath test, the results of which the officer refused to tell Mickalsen. The

state appeals the district court's suppression of Mickalsen's later, post-arrest breath test result. It argues that the district court erred by determining that Mickalsen's right to counsel was not vindicated when the arresting officer refused to inform her of the exact result of the preliminary test. Because neither the defendant's federal constitutional right to obtain exculpatory evidence from the prosecutor before trial nor her state constitutional right to consult with counsel before submitting to a post-arrest breath test obligate police to disclose preliminary breath test results before requesting or administering the post-arrest breath test, we reverse.

FACTS

Officer Adam Stier noticed a car speeding and failing to signal a lane change after midnight on July 2, 2012. Officer Stier stopped the car. He smelled the odor of alcoholic beverages as he spoke with the driver, Sarah Mickalsen. The officer administered field sobriety tests and a preliminary breath test. The preliminary breath test indicated an alcohol concentration of 0.178. Officer Stier arrested Mickalsen and took her to the Lakeville police station.

Officer Stier read Mickalsen the implied consent advisory, and Mickalsen chose to exercise her right to counsel before deciding whether she would submit to the requested post-arrest breath test. Mickalsen called an attorney. During the call, Mickalsen asked Officer Stier for her preliminary breath test result. He told her merely, "It was under 0.20." After talking with her attorney for a few more minutes, Mickalsen asked the officer whether the result was above 0.16. Officer Stier refused to expand on his previous response, which he repeated. Mickalsen consented to a breath test that indicated an

alcohol concentration of 0.17. The state charged Mickalsen with driving while intoxicated.

Mickalsen moved the district court to suppress the post-arrest breath test result because Officer Stier did not provide her with the preliminary breath test result while she spoke with her attorney. The district court granted the motion. The state appeals.

D E C I S I O N

The state challenges the district court's decision to suppress evidence of Mickalsen's post-arrest breath test. Before we can address the merits of an interlocutory appeal from a pretrial decision, however, we first must decide whether the state has shown that the evidence suppression critically impacts the overall prosecution. *State v. Beall*, 771 N.W.2d 41, 44 (Minn. App. 2009) (citing *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998)). The district court's decision to suppress evidence of a chemical test result in a drunk driving case critically impacts the prosecution. *See State v. Heaney*, 676 N.W.2d 698, 704 (Minn. App. 2004), *rev'd on other grounds*, 689 N.W.2d 168 (Minn. 2004). We therefore turn to the merits of the state's challenge to the suppression decision, which we resolve de novo because the facts are undisputed. *See State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

We must next distill the argument presented to us. Mickalsen argued to the district court that, because this is a criminal case, *Brady* rights are implicated and the police officer's refusal to provide her with "exculpatory" evidence violated her constitutional rights. The argument persuaded the district court. But Mickalsen has since abandoned the *Brady* theory. She now argues that the Minnesota constitutional right to counsel required

the officer to disclose her preliminary breath test result before she decided whether to submit to a post-arrest breath test. We will consider whether a police officer is constitutionally obligated to disclose the preliminary test result under either *Brady* or the Minnesota constitutional right to pretest counsel.

I

The district court based its suppression decision on the disclosure requirements that arise from *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963). It held that because this case is criminal in nature, *Brady* required Officer Stier to provide Mickalsen with her preliminary breath test result. This reasoning attempts to distinguish Mickalsen's case from our holding that *Brady* does not apply to administrative implied-consent hearings so that an officer's refusal to disclose preliminary breath test results during the pretest consultation does not invalidate the post-arrest test result in administrative proceedings. *Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 738–39 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). *Brady* holds that where prosecutors withhold or conceal any "evidence favorable to an accused . . . [that] is material either to guilt or to punishment," the withholding violates the right to due process. 373 U.S. at 87, 83 S. Ct. at 1196–97. *Brady* reaches beyond prosecutor conduct. The state must "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police" and turn that evidence over to the defendant. *State v. Williams*, 593 N.W.2d 227, 235 (Minn. 1999) (citing *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995)) (quotation omitted).

The *Brady* rule arises from the constitutional right to a fair trial. *See*, *e.g.*, *Brady*, 373 U.S. at 87, 83 S. Ct. at 1197 (stating the rationale of the rule as "avoidance of an unfair trial to the accused"); *Cone v. Bell*, 556 U.S. 449, 472, 129 S. Ct. 1769, 1784 (2009) ("Thus, the federal question that must be decided is whether the suppression of that probative evidence deprived [defendant] of his right to a fair trial."). It ensures that each defendant is "afforded a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 2532 (1984). Our question is not whether the state had to inform Mickalsen of her preliminary test result, but rather whether it had to do so before she submitted to the post-arrest test. *Brady* does not apply here because Mickalsen sought disclosure of the evidence not merely before trial, but before charges had even been filed. Mickalsen is correct that a defendant risks a greater penalty for testing above a 0.16 (twice the statutory limit of .08) on her chemical test than for refusing the chemical test. *See* Minn. Stat. §§ 169A.03, subd. 24a (defining "twice the legal limit"); 169A.54, subd. 1(2), (3)(i)ii (2012) (requiring that a conviction for refusing to take a chemical test carries a mandatory minimum license revocation of 90 days while a conviction after a test result of above 0.16 has a mandatory minimum revocation of one year). But the record reveals no *fair trial* right that would be impeded by the officer's refusing to disclose the preliminary breath test result before she was even charged with a crime. The officer did not violate Mickalsen's *Brady* rights. The district court erred.

II

Mickalsen argues that we should nonetheless affirm the district court's decision because the Minnesota Constitution requires police officers to disclose preliminary breath

test results before the arrested driver must decide whether to submit to the official post-arrest breath test. A person arrested for driving while intoxicated has a limited right under the state constitution to consult with counsel before submitting to a chemical test. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991) (applying Minn. Const. art. I, § 6). The right is generally vindicated when police provide the driver with a telephone and a reasonable amount of time to contact an attorney. *State v. White*, 504 N.W.2d 211, 213 (Minn. 1993). Mickalsen was provided these things, and she spoke with an attorney by telephone and ended the discussion on her own. But she maintains that just as the *Friedman* court expanded constitutional protection by recognizing the significance of the defendant's test-taking decision, we should too because the criminal penalty can be substantially influenced by the level of alcohol in the driver's body. Unless the arrested driver has the preliminary test result to share with her attorney, argues Mickalsen, the attorney cannot meaningfully counsel the driver in the post-arrest test decision.

The argument is not without logic, but it necessarily assumes the existence of a constitutional principle that exceeds any cited caselaw. Mickalsen's brief does not expressly declare any underlying constitutional principle as support, and when pressed at oral argument, her counsel was unable to articulate any controlling rule of constitutional law that would compel the holding Mickalsen seeks. We think the necessarily implied principle of Mickalsen's argument must be that the right to counsel is vindicated only if counsel is informed of all evidence that the officer possesses and that would improve the quality of the attorney's advice to the defendant. This is not an unreasonable concept, but, again, Mickalsen provides no caselaw support for it and we are aware of none. This much

seems clear: the preliminary breath test is not the only information the officer would be compelled to disclose if the theory were accepted. Applied uniformly to the other evidence commonly known to the arresting officer, the hypothetical principle would require the officer to also disclose the scores he assigned the driver on the horizontal gaze nystagmus test and on the other field sobriety tests. He would also presumably be required to reveal his observations of the arrestee's driving, the extent of the odor of alcoholic beverages emanating from the driver, and all other factors that, like the specific preliminary breath test result, informed the officer's impression of the driver's level of alcohol and could similarly inform the attorney's. We are certain that *Friedman* does not rest upon Mickalsen's necessarily implied rule of law, and she offers no other legal theory to cause us to chart an apparently new constitutional course.

Reversed.