STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0053

State of Minnesota,
Respondent,

vs.

Jeremy John Donner,
Appellant.

Filed May 27, 2014
Reversed and remanded
Hudson, Judge

Chisago County District Court
File No. 13-CR-11-371

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

Janet Reiter, Chisago County Attorney, Ryan M. Flynn, Nicholas Andrew Hydukovich, Assistant County Attorneys, Center City, Minnesota (for respondent)

Ryan M. Pacyga, Shannon Hurley, Anthony M. Bussa, Derek W. Hansen, Ryan Pacyga Criminal Defense, Minneapolis, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Hudson, Judge; and Smith, Judge.

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

HUDSON, Judge

On appeal from his conviction of second-degree driving while impaired (DWI), appellant argues that his conviction must be reversed because (1) his consent to a warrantless blood test was not voluntary; (2) there were no exigent circumstances that justified a warrantless blood test; and (3) Minnesota's implied consent laws are unconstitutional. Because there are several unresolved factual questions that the district court did not consider, we reverse and remand to the district court for reconsideration in light of the Minnesota Supreme Court's recent decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014).

FACTS

Appellant Jeremy John Donner was pulled over in his gray Dodge Ram after officers received a report of a vehicle matching that description passing another vehicle on the shoulder of Highway 61 at a high rate of speed. Deputy Phillip Johnson of the Chisago County Sheriff's Office noticed a very strong smell of alcohol on appellant's breath, and appellant told Deputy Johnson he had consumed two beers that evening.

Appellant was arrested and, because he was complaining of pain, Deputy Johnson took him to a hospital instead of the sheriff's office. Deputy Johnson read the implied consent advisory, and appellant stated he understood the advisory and wanted to speak with an attorney. A recording of nearly all of the conversations at the hospital between appellant, Deputy Johnson, and medical staff was made. For 27 minutes, Deputy

Johnson gave appellant the opportunity to contact an attorney. Appellant finally did reach his attorney's voicemail, but he never actually spoke with an attorney.

After appellant reached his attorney's voicemail, Deputy Johnson ended appellant's time for contacting an attorney. Deputy Johnson asked appellant several times he if would take a blood test. Appellant twice stated "if I have to." He then stated "yah if I have to." Deputy Johnson accepted that statement as consent and the conversation went off the record, but came back on because appellant was being uncooperative with the nurse attempting to draw his blood. Eventually, the nurse was able to draw blood from appellant's arm. The blood test revealed an alcohol concentration of .16.

Appellant was charged with second-degree DWI. He filed a motion to suppress any evidence obtained after the traffic stop, including the blood-test results, claiming the officer lacked reasonable articulable suspicion to justify expanding the stop. On the day of the contested omnibus hearing, appellant amended the motion to include an argument that the blood test must be suppressed because statements "made by law enforcement and medical personnel" rendered appellant's consent to the blood test involuntary and coerced. Following the hearing, the district court denied appellant's motion in its entirety, without deciding the consent issue, concluding that the officers had reasonable articulable suspicion to expand the stop and that the blood test was "permissible pursuant to the single factor exigent circumstances exception to the warrant requirement," which was the law in Minnesota at the time. The matter was submitted to the district court on

stipulated facts, and appellant was found guilty of second-degree DWI under Minn. Stat. § 169A.20, subd. 1(5) (2010). *See* Minn. R. Crim. P. 26.01, subd. 4.

Following appellant's adjudication of guilt, the United States Supreme Court accepted certiorari in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). Appellant filed a second motion to suppress the blood test in his case, as well as to stay his sentencing until the Supreme Court issued a decision in *McNeely*. The district court denied the motion to stay, and appellant was sentenced. This appeal follows. Appellant challenges the district court's determination that the warrantless blood test was obtained constitutionally.

D E C I S I O N

Both the United States and Minnesota Constitutions guarantee individuals the right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Pursuant to the Fourth Amendment, police need a warrant supported by probable cause to conduct a search, unless an exception exists, such as the consent of the subject of the search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043–44 (1973). A blood test is considered a search for purposes of the Fourth Amendment. *Brooks*, 838 N.W.2d at 568.

At the time of appellant's contested omnibus hearing, state law permitted warrantless blood tests upon probable cause of DWI based on the single-factor exigency exception. *See State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (2013). In *McNeely*, the United States Supreme Court clarified that courts must look at the totality of the circumstances in each individual case; the dissipation of blood-alcohol levels does not create a per se exigency. 133 S. Ct.

at 1561. Following *McNeely*, the Minnesota Supreme Court decided *Brooks* and concluded that, when no exigent circumstances exist, a warrantless blood draw may still be constitutional if the suspect voluntarily consents to the test. 838 N.W.2d at 568.

For the consent exception to apply, the state must show by a preponderance of the evidence that a defendant "freely and voluntarily" consented to the search. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). To determine whether consent was voluntary, the totality of circumstances must be examined "including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999) (quotation omitted). Whether an individual voluntarily consented is a factual question normally reviewed for clear error. *Diede*, 795 N.W.2d at 846. Here, the district court relied entirely on the exigent-circumstances exception and did not make any conclusions regarding whether appellant's consent was voluntary under the totality of the circumstances. Although appellant raised the issue of consent at the district court, the state was not on notice of that argument until the day of the omnibus hearing and did not have a meaningful opportunity to respond.

Appellant argues that the facts of this case are undisputed and urges this court to review the transcript of the conversations at the hospital to make an independent determination about consent. But the record contains several factual disputes that cannot be properly resolved on appeal, and "[i]t is not within the province of [this court] to determine issues of fact on appeal." *Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (quotation omitted). For example, appellant argues that he was coerced into taking the blood test when the nurse told him that if he did not give blood the doctor may

not see him. The nurse did not testify at the omnibus hearing, and the parties dispute whether she was acting as an agent of the state at the time of those remarks. Remand will also permit the district court to fully consider appellant's arguments regarding the constitutionality of Minnesota's implied-consent laws.

Reversed and remanded.