STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0466

State of Minnesota,
Respondent,

vs.

Jamarr Marcelles Elliott,
Appellant.

Filed May 19, 2014
Affirmed
Chutich, Judge

Anoka County District Court
File No. 02-CR-11-7856

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

Anthony C. Palumbo, Anoka County Attorney, Donald LeBaron, Assistant County Attorney, M. Katherine Doty, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Drake D. Metzger, Special Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chutich, Presiding Judge; Connolly, Judge; and Smith, Judge.

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

CHUTICH, Judge

Appellant Jamarr Elliott appeals his conviction of felony test refusal, asserting that his conviction is invalid under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), and the doctrine of unconstitutional conditions. Because we hold that prosecuting Elliott for refusing to submit to a chemical test is not unconstitutional under these circumstances, we affirm.

FACTS

In the early morning of October 16, 2011, a citizen with the initials M.R. saw a black Chevrolet Suburban in Coon Rapids turn at a stoplight, go over a median, hit a sign that was in the median, and continue driving. M.R. called 911 and followed the truck until it parked in a residential neighborhood. M.R. reported to the 911 dispatcher that he saw the truck go over the median and hit a sign. M.R. gave the dispatcher the truck's description, location, and license plate number and said that the driver "stumbled a little bit" when he got out of the truck.

Officer Adam Jacobson responded to M.R.'s 911 call and saw a sign lying partially in the roadway at the intersection identified by M.R. Jacobson then went to the location identified by M.R. to find the parked truck. He found the truck and pulled his car alongside it. Jacobson shined a spotlight into the truck and saw appellant Jamarr Elliott sitting inside.

Jacobson approached the truck and saw that the driver's side window was open. Jacobson immediately "detect[ed] a strong odor of an alcoholic beverage coming from

the passenger's compartment of the vehicle" and "observed [Elliott] to have bloodshot and watery eyes and glassy eyes." Jacobson told Elliott that he was talking to him because there was a report that Elliott drove onto a median and hit a sign. Elliott "denied striking any sign or driving the vehicle" and told Jacobson that he was just dropped off. Elliott also denied drinking alcohol that night.

Jacobson saw a set of keys behind the front passenger's seat of the truck that was located within an arm's length of Elliott. When Jacobson spoke to Elliott, Elliott's speech "was slurred at times" and Jacobson smelled the odor of alcoholic beverages on Elliott's breath. Jacobson also inspected the outside of Elliott's car and saw "fresh damage on the front passenger's side of the vehicle that was consistent with what [he has] seen in the past as damage from a sign."

Jacobson asked Elliott to step out of his truck so that Jacobson could perform field sobriety tests on Elliott. Elliott refused to perform the field sobriety tests. Jacobson attempted to give Elliott a preliminary breath test (PBT), and Elliott refused to take the PBT as well. Elliott said he would not take the PBT because "the keys were not in the ignition of the vehicle." Jacobson then asked Elliott if he was going to cooperate with testing, and Elliott responded, "Let's do this." When Jacobson gave Elliot instructions for the tests, Elliott again refused to participate.

Based on his observations, training, and experience, Jacobson believed that Elliott committed the offense of driving under the influence, and he placed Elliott under arrest. Jacobson took Elliott to the Coon Rapids Police Department. Once they were at the police station, Jacobson read Elliott the implied-consent advisory. Elliott orally

responded that he was "refusing everything," and he also refused breath, blood, and urine testing based on his conduct.

Elliott was charged in Anoka County District Court with first-degree driving while impaired and felony test refusal. *See* Minn. Stat. §§ 169A.20, subds. 1(1), 2, .24, subd. 1(2) (2010). In October 2012, the state dismissed the driving-while-impaired charge, and Elliott was convicted by a jury of felony test refusal. Elliott was sentenced to 60 months in prison in December 2012. This appeal followed.

D E C I S I O N

Elliott asserts that Minnesota's test-refusal statute is unconstitutional under the United States Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), because the statute violates the doctrine of unconstitutional conditions. The state responds that, because no search actually took place, *McNeely* and the doctrine of unconstitutional conditions do not apply. Because we hold that, under the circumstances present here, the state is not constitutionally precluded from criminalizing a suspected drunk driver's refusal to submit to a chemical test, we affirm Elliott's conviction. *See State v. Bernard*, 844 N.W.2d 41, 46 (Minn. App. 2014).

We review the constitutionality of a statute de novo. *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). "Minnesota statutes are presumed constitutional[,] and . . . our power to declare a statute unconstitutional must be exercised with extreme caution and only when absolutely necessary." *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720,722 (Minn. 1999). Although we generally will not consider constitutional challenges raised for the first time on appeal, we "may deviate from this rule when the

interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Because *McNeely* was not released until after Elliott was convicted and consideration of this legal question will not prejudice the state, we address the merits of Elliott's appeal in the interests of justice.

Elliott was convicted of one count of felony test refusal, which is defined as "refus[ing] to submit to a chemical test of the person's blood, breath, or urine." Minn. Stat. § 169A.20, subd. 2. The test-refusal statute criminalizes refusal to submit to testing authorized under the implied-consent statute, which states that anyone who drives a motor vehicle consents "to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol." Minn. Stat. § 169A.51, subd. 1(a) (2010); *see* Minn. Stat. § 169A.52, subd. 1 (2010). The implied-consent and test-refusal statutes only take effect when police officers have probable cause to believe a person was driving while impaired and the person has been lawfully arrested for driving while impaired. *See* Minn. Stat. § 169A.51, subd. 1(b) (2010).

The federal and state constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Blood, breath, and urine tests are searches under the Fourth Amendment. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616–17, 109 S. Ct. 1402, 1412–13 (1989); *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). We have interpreted Minnesota's implied-consent statute as criminalizing only refusal to cooperate with searches that are constitutionally reasonable. *State v. Wiseman*, 816 N.W.2d 689, 694–95

(Minn. App. 2012), *cert. denied*, 133 S. Ct. 1585 (2013). The state may criminalize refusal to submit to a chemical test when it obtains a warrant or demonstrates that an established exception to the warrant requirement applies. *Id.* at 695.

Before *McNeely*, our state supreme court held that a warrantless blood draw was constitutionally reasonable because the natural dissipation of alcohol in the blood created a single-factor exigent circumstance. *See, e.g.*, *State v. Netland*, 762 N.W.2d 202, 213–14 (Minn. 2009), *abrogated in part by McNeely*, 133 S. Ct. 1552, *as recognized in Brooks*, 838 N.W.2d at 567; *State v. Shriner*, 751 N.W.2d 538, 549–50 (Minn. 2008), *abrogated by McNeely*, 133 S. Ct. 1552; *Wiseman*, 816 N.W.2d at 693. In *McNeely*, however, the United States Supreme Court held that the natural dissipation of alcohol in the bloodstream does *not* present "a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 133 S. Ct. at 1556. The Court concluded that "exigency . . . must be determined case by case based on the totality of the circumstances." *Id.*

Elliott contends that because the natural dissipation of alcohol can no longer be used to justify Minnesota's test-refusal statute, the statute is unconstitutional under the doctrine of unconstitutional conditions. Contrary to Elliott's argument, however, *McNeely* does not necessarily cast doubt upon the constitutionality of Minnesota's test-refusal statute. In fact, a plurality of the Supreme Court described implied-consent laws as part of a state's "broad range of *legal tools* to enforce [its] drunk-driving laws and to secure [blood-alcohol-concentration] evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566 (emphasis added).

Moreover, in interpreting *McNeely*, our supreme court noted that this description of implied-consent laws as "legal tools" is inconsistent with the argument that Minnesota's implied-consent statute is unconstitutional. *Brooks*, 838 N.W.2d at 572 ("By using this 'legal tool' and revoking a driver's license for refusing a test, a state is doing the exact thing Brooks claims it cannot do—conditioning the privilege of driving on agreeing to a warrantless search."). *Brooks* held that although *McNeely* eliminated the single-factor exigency exception to the warrant requirement, a warrantless extraction of breath, urine, and blood was still permissible under the Fourth Amendment when Brooks, under the totality of the circumstances, freely and voluntarily consented to testing. *Id.* at 568–69, 572. The supreme court further held that the effect of Minnesota's implied-consent statute, which makes it a crime to refuse a test, was not so coercive as to invalidate a driver's consent. *Id.* at 571–72.

In addition, this court has recently rejected Elliott's argument that because exigent circumstances did not exist when the officer asked him to submit to a chemical test, prosecuting him for refusing to consent is unconstitutional. *See Bernard*, 844 N.W.2d at 45. In *State v. Bernard*, we upheld the constitutionality of an appellant's conviction for test refusal, concluding that "[t]he Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test." *Id.* at 42. We reasoned that penalizing the driver's decision to forego taking a chemical test is not unconstitutional when "the circumstances establish[] a basis for the officer to have alternatively pursued a constitutionally reasonable nonconsensual test." *Id.*

The *Bernard* court explained, "Because the officer indisputably had probable cause to believe that Bernard was driving while impaired . . . , the officer also indisputably had the option to obtain a test of Bernard's blood by search warrant." *Id.* at 45. "In other words, the officer had a lawful option to require Bernard to submit to a chemical test, based on a search warrant, and he instead gave Bernard the choice to voluntarily submit to warrantless testing." *Id.* at 46. Because the officer had a "constitutionally viable alternative" to obtain a warrant when he asked Bernard to voluntarily take a breath test, penalizing Bernard's decision to refuse to submit to the test did not implicate any fundamental due-process rights because "the consequent testing under either approach would have been constitutionally reasonable." *Id.*

We note that neither our analysis in *Bernard* nor the test-refusal statute authorizes police, absent suspected criminal vehicular homicide, to actually conduct a warrantless search if the suspected drunk driver refuses to provide a chemical test on request. *See* Minn. Stat. § 169A.52, subd. 1. *Bernard* recognizes the state's constitutional authority to *punish* test refusal; it does not acknowledge or endorse the state's constitutional authority to force a warrantless test. *See* 844 N.W.2d at 45–47.

Because *Bernard* is directly applicable and we follow the published opinions of this court, we apply *Bernard* to this case. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). We hold that Jacobson had probable cause to believe that Elliott was driving while impaired. Officer Jacobson was aware of M.R.'s 911 call about Elliott's erratic driving, which detailed how M.R. saw Elliott drive over a median, hit a sign, and "stumble[] a little bit" when he got out of his

truck. On his way to investigate the call, the officer saw a sign in the road at the location identified by M.R. Jacobson smelled the odor of alcoholic beverages on Elliott's breath and observed that Elliott had "slurred" speech and "bloodshot," "glassy" eyes. Jacobson saw keys in the backseat of the truck and again confirmed the accuracy of M.R.'s 911 call when he saw damage on Elliott's truck that was consistent with hitting a sign. Based on these facts, Jacobson properly arrested Elliott and read him the implied-consent advisory according to the implied-consent statute. *See* Minn. Stat. § 169A.51, subd. 2 (2010).

Because Jacobson "indisputably" had probable cause to suspect Elliott of driving while impaired, Jacobson "also indisputably had the option to obtain a test of [Elliott's] blood by search warrant." *See Bernard*, 844 N.W.2d at 45. As in *Bernard*, we hold that Elliott's prosecution under the test-refusal statute did not violate his constitutional rights.

Given this determination, we need not decide Elliott's argument that the criminal test-refusal statute places an unconstitutional condition on his license. The doctrine of unconstitutional conditions is "properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement." *Netland*, 762 N.W.2d at 211. In *Netland*, for example, the supreme court declined to determine whether the doctrine "applies to Fourth Amendment rights or whether it should be applied to violations of the Minnesota Constitution" because Netland failed to show that the challenged conduct "would have been unconstitutional." *Id.* at 212.

Here, the test-refusal statute does not authorize an unconstitutional government infringement because, under its terms, the police may not search without a driver's express, valid consent. *See* Minn. Stat. § 169A.52, subd. 1. Although a driver may be

prosecuted for refusing a test, as here, the United States Supreme Court and the Minnesota Supreme Court have concluded that such penalties are not unduly coercive as a matter of law. *McNeely*, 133 S. Ct. at 1566, *South Dakota v. Neville*, 459 U.S. 553, 559–63, 103 S. Ct. 916, 920–22 (1983); *Brooks*, 838 N.W.2d at 570; *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855–56 (Minn. 1991).

Affirmed.