STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0719

Robert L. Foster, Jr., petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed May 19, 2014
Affirmed
Ross, Judge

Pine County District Court
File No. 58-CV-10-759

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Lori Swanson, Attorney General, James Haase, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

ROSS, Judge

Robert Foster's driver's license was revoked by statute after he performed a breath test that revealed he had been driving with an alcohol concentration greater than .08. He challenged the admissibility of the test result, arguing that the arresting officer's conduct

and the threat of criminal punishment for test refusal coerced him to take the test and that the Intoxilyzer is unreliable. The district court rejected both arguments and upheld the revocation. Because we conclude that Foster's consent to the breath test was voluntary under the totality of the circumstances, we affirm.

FACTS

Pine County Sheriff's Deputy Mark Anderson stopped Robert Foster's car suspecting drunk driving. Deputy Anderson read Foster the Implied Consent Advisory, informing Foster that he was required to perform a chemical test to determine his alcohol concentration, that refusing the test was a crime, and that he had the right to consult with an attorney before deciding whether to perform the test. Foster said that he understood the advisory and declined to call an attorney. He agreed to a breath test. The test revealed an alcohol concentration greater than .08, and the Commissioner of Public Safety revoked Foster's driver's license.

Foster contested the commissioner's decision. He filed an implied consent petition that raised numerous challenges to the reliability and admissibility of the result of his breath test, including a challenge based on the extant unresolved source-code litigation in a different district court. The parties stipulated that Foster's source-code challenge would be preserved and that the only issue remaining was whether the district court should suppress the result of his breath test on Fourth Amendment grounds. The court received no testimony or argument and decided the issue on the briefs.

The procedural setting is somewhat complicated. The district court sustained the commissioner's decision to revoke Foster's license, stating ambiguously that "[Foster's]

motion to have the revocation of his driving privileges is hereby sustained based on his challenge to the warrantless seizure of his breath sample." In reaching this conclusion, it observed that exigent circumstances and consent both constitute exceptions to the warrant requirement and that, under *State v. Netland*, 762 N.W.2d 202 (Minn. 2009), and *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), dissipation of alcohol in the blood constituted a per se exigent circumstance. So the district court seems to have applied the per se exigent circumstance exception as it existed in 2011, concluding that the breath test was constitutional on that ground.

The district court sustained the revocation of Foster's driver's license in a 2012 order that relied on the supreme court's source-code decision that Intoxilyzer results are reliable. It invited Foster to request a hearing if he could provide evidence establishing a basis for one. Foster requested the hearing and made several motions in limine. He raised new challenges to the Intoxilyzer's reliability and sought to suppress the test result on different grounds based on the Missouri Supreme Court's decision in *State v. McNeely*, 358 S.W.3d 65 (Mo. 2012), or, in the alternative, to stay the case and await the U.S. Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

The district court held the second hearing in 2013, but the transcript is not in the record. Foster asserted his intent to litigate the reliability of the specific machine used to test his breath and argue that he has a medical condition that may have influenced the result. The district court concluded that the stipulation the parties entered in 2011 barred both arguments. It denied Foster's motions in limine and sustained the revocation of his

driver's license. The district court's order does not indicate that the parties discussed the suppression issue at the second hearing, nor does the record elsewhere.

Foster appealed, and the commissioner moved to stay the appeal pending the outcome of *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied* (U.S. Apr. 7, 2014). We granted that motion but dissolved the stay after the supreme court decided *Brooks*. Foster's appeal now awaits our decision.

D E C I S I O N

The parties do not dispute the facts, so we focus on the district court's challenged decision not to suppress the result of Foster's breath test. When the facts are undisputed, whether the district court properly denied a suppression motion based on the constitutional validity of a search is a question of law, and we review the decision de novo. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

Foster first contends that the breath-test result should be suppressed as unconstitutional. The federal and state constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A breath test is a search. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616–17, 109 S. Ct. 1402, 1413 (1989). Warrantless searches are generally unreasonable unless an exception applies. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). Exigent circumstances are one exception to the warrant requirement. *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011).

Foster argues specifically that the district court mistakenly concluded that the breath test was justified by exigent circumstances. The natural dissipation of alcohol in the body was previously thought to constitute a per se exigent circumstance that would

justify warrantless alcohol-concentration tests. *State v. Netland*, 762 N.W.2d 202, 212–14 (Minn. 2009), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (2013). But the Supreme Court recently held that this factor alone cannot constitute a per se exigency justifying a warrantless search. *McNeely*, 133 S. Ct. at 1568; *State v. Brooks*, 838 N.W.2d 563, 567 (Minn. 2013), *cert. denied* (U.S. Apr. 7, 2014). The district court did not have the benefit of the *McNeely* decision, and Foster is correct that the district court erred by concluding that exigent circumstances justified the breath test. The district court based its conclusion on *Netland*, which *McNeely* abrogated, and the state did not establish any other exigent circumstances.

Foster also argues that he did not voluntarily consent to the breath test. Consent is an exception to the warrant requirement, but the state must prove that the consent was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973); *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). We decide whether consent was voluntary by analyzing the totality of the circumstances. *Brooks*, 838 N.W.2d at 568. Those circumstances include why the police suspected the driver of drunk driving, whether and how police read the driver the implied consent advisory, and the driver's ability to consult with an attorney. *Id.* at 569. We "infer consent less readily" if the suspect was in custody at the time he consented, but a defendant may nonetheless voluntarily consent despite being in custody. *Diede*, 795 N.W.2d at 847. "[A]cquiescing to a claim of lawful authority" is not voluntary consent. *Brooks*, 838 N.W.2d at 569. But forcing the suspect to make a difficult or uncomfortable choice, such as the choice the implied consent law offers between submitting to an alcohol-concentration test or

refusing and facing criminal punishment, does not render consent involuntary. *Id.* at 569–70.

Foster asserted in his implied consent petition that the threat of criminal charges and the conduct of Deputy Anderson coerced his compliance. But Foster made no specific allegations regarding Deputy Anderson's conduct and the record does not detail his conduct, so the claim as it regards the deputy's conduct has no apparent factual support. And *Brooks* rejected the notion that unconstitutional coercion results from a defendant having to choose between consenting to a test and facing a test-refusal charge. *Id.* at 570. Foster also argues, for the first time on appeal, that he did not consent under the totality of the circumstances. He did not raise this argument before the district court, which did not make findings on the issue, and he asks us to remand so the district court can make those findings. But Foster did not offer the district court any facts from which it could find coercion. The facts are not in dispute, so we need not remand. *See Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004) (stating that we independently analyze undisputed facts to determine legality of search).

Foster's circumstances are similar to those in *Brooks*, and those circumstances convinced the supreme court that the driver had voluntarily consented. The officers in *Brooks* had probable cause to suspect that the driver was impaired, and they took him into custody, read him the implied consent advisory, and allowed him to contact his attorney. 838 N.W.2d at 565–66, 569–70. Foster similarly was stopped for suspected drunk driving, taken into custody, read the implied consent advisory, and given the opportunity to contact an attorney before police requested that he perform the breath test. Foster

emphasizes that he was in custody when he agreed to a test and argues that this implies coercion. Again, although we more strictly assess alleged consent that was given while the defendant was in custody, we do not treat custody as presumptively coercive. *See Brooks*, 838 N.W.2d at 571; *Diede*, 795 N.W.2d at 847. Brooks's consent was voluntary even though he was in custody when he agreed to take a test. *Brooks*, 838 N.W.2d at 571 ("[T]he fact that Brooks was under arrest is not dispositive.").

It is true that, unlike Brooks, Foster never actually consulted with an attorney. Foster relies on this distinction and contends that the implied consent advisory mischaracterizes the nature of the "choice" he faced and what the law "requires" of him and that, without the assistance of an attorney, he could not understand the law well enough to voluntarily consent. But the *Brooks* court placed only tepid emphasis on the role that consulting with a lawyer before agreeing to a test has in the assessment of voluntariness. *Id.* (stating merely that driver's consulting with a lawyer "*reinforces* the conclusion that . . . consent was not illegally coerced" (emphasis added)). Foster overstates the significance of actually consulting with an attorney in a totality-of-the-circumstances analysis. Foster's choice not to consult an attorney—a choice he does not contend was pressured by police—does not significantly distinguish his circumstances from those the court considered in *Brooks*. Given the lack of any allegedly coercive circumstances and Foster's affirmative agreement to perform the test after being given the choice whether to do so, we hold that Foster voluntarily consented to the breath test under the totality of the circumstances.

Affirmed.