STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0770

State of Minnesota,
Respondent,

vs.

Roland Olando Mawolo,
Appellant.

Filed May 19, 2014
Affirmed
Stauber, Judge
Klaphake, Judge,[*] dissenting

Hennepin County District Court
File No. 27CR1230804

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

Michael Colich, Brooklyn Park City Attorney, Amanda J. Krueger, Assistant City Attorney, Colich & Associates, Minneapolis, Minnesota (for respondent)

Cathryn Young Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Stauber, Judge; and Klaphake, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

STAUBER, Judge

On appeal from his conviction of second-degree test refusal, appellant argues (1) his conviction must be reversed because he was arrested without probable cause when his car was stopped by two police squads and he was ordered out at gunpoint and handcuffed and (2) his test-refusal conviction must be reversed because the test-refusal statute is unconstitutional after the United States Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). We affirm.

FACTS

On September 16, 2012 the Brooklyn Park Police Department received an eyewitness report that a burglary was in progress at a residence. The reporting witness identified himself and stated that he observed a black male "walk up to the door of the residence, pound on it and try to pry it open." The witness also stated that he saw the suspect with a "crowbar or some sort of a tool that he was using as leverage to get into the house." Officer Jamie Angerhofer received the call at 4:26 am, and arrived at the scene shortly thereafter along with Officer Michael Wrobel who arrived in a separate squad car. While the police were en route, dispatch updated them with additional information that the witness saw the suspect get into a vehicle and that the lights inside the vehicle were on. When the police arrived at the scene they observed a vehicle backing out of the driveway. The police activated their emergency lights, at which time the driver pulled forward toward the garage. There were no other people or cars in the area.

Because the police were informed that the driver was armed with a crowbar, they conducted a "high-risk stop." The officers drew their service weapons, asked the driver to exit the vehicle with his hands up and to walk backwards towards them. The driver complied and was handcuffed and pat-searched for weapons. The police identified the driver as appellant Roland Mawolo.

Officer Angerhofer walked appellant to the back of his squad car while Officer Wrobel investigated the alleged burglary. Officer Wrobel looked inside appellant's vehicle to check to see if anyone else was in the car. He saw a tire iron in the back of the car, which somewhat resembled a crowbar. He also tried to contact any occupants of the residence. Officer Wrobel observed that there were pry marks on the door, but he could not tell whether they were new or old. He received additional information that the police department had contacted a woman at the address but that she was uncooperative, and that appellant listed the address as his residence.

Meanwhile, Officer Angerhofer was speaking with appellant and detected "an odor of an alcohol beverage" and observed that appellant had "bloodshot, watery eyes and also slurred speech." Officer Angerhofer asked appellant to take a preliminary breath test (PBT). Appellant would not blow into the straw on the PBT device. After Officer Angerhofer learned that there had not been a burglary, he removed appellant's handcuffs and had him exit the squad car. Officer Angerhofer then asked appellant to perform a series of field sobriety tests, including a horizontal gaze nystagmus test, the walk and turn test, and the one-legged stand test, all resulting in "clues" that suggested intoxication. Officer Angerhofer again asked appellant to take a PBT. Appellant again refused to blow

into the straw. Appellant was placed under arrest for driving while intoxicated (DWI). Appellant was transported to the police department and read the implied consent advisory around 5:14am. Appellant again refused to take a breath test.

Appellant was charged with one count of third-degree driving while impaired, and one count of second-degree test refusal. Appellant moved to suppress the evidence of intoxication and test refusal on the grounds that the police lacked probable cause to arrest him for DWI. The district court denied appellant's motion. Appellant was subsequently convicted at trial of second-degree test refusal, and was acquitted of DWI. This appeal followed.

D E C I S I O N

I.

"When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotations omitted). The standard for reviewing reasonable suspicion and probable cause determinations is de novo. *In re Welfare of G.M.*, 560 N.W.2d 687, 690 (Minn. 1997).

Appellant argues that the evidence of his test refusal should have been suppressed because it was the product of an unlawful arrest. "The United States and Minnesota Constitutions protect '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (quoting U.S. Const. amend. IV, citing Minn. Const. art.

I, § 10). The exclusionary rule provides that evidence seized in violation of the constitution generally must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007). An arrest is lawful where the police first obtain a warrant, or where the police have adequate probable cause for the arrest and an exception to the warrant requirement applies, such as the exception for felony arrests in a public place. *See State v. Dickey*, 827 N.W.2d 792, 798 (Minn. App. 2013). "The test of probable cause to arrest is whether the objective facts are such that under the circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Johnson*, 314 N.W.2d 229, 230 (Minn. 1982) (quotation omitted).

Appellant argues that the police lacked probable cause to arrest him for burglary, and that he was arrested when the police stopped his car, held him at gunpoint, and handcuffed him. But the state contends that appellant was not arrested on suspicion of burglary but was lawfully detained pursuant to a *Terry* investigatory stop. *See Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968). We agree. When a crime has been recently committed, the police may detain a person found at the scene in order to "freeze" the situation for the purpose of investigating the alleged crime. *Wold v. State*, 430 N.W.2d 171, 174-75 (Minn. 1988). Moreover, when an officer has reasonable, articulable suspicion that a suspect is armed, the officer may "lawfully make a forcible investigative stop" to check the suspect for weapons in the interest of officer safety. *State v. Gilchrist*, 299 N.W.2d 913, 916 (Minn. 1980). An investigatory stop does not require probable cause; rather, the police must have a "particularized and objective basis for suspecting the particular person[] stopped of criminal activity." *Berge v. Comm'r of Pub.*

Safety, 374 N.W.2d 730, 732 (Minn. 1985) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18, 101 S. Ct. 690, 694-95 (1981)). An officer must consider "all of the circumstances" and may rely on her special training as a police officer. *Id.* (quotations omitted).

On these facts, the police had sufficient reasonable suspicion to conduct the *Terry* stop. The police received a report that someone was attempting to break into a residence using something that looked like a crowbar, and that the suspect got into a vehicle. When the police arrived at the scene, appellant was the only person around, and his vehicle was the only vehicle in the area. Appellant also matched the physical description provided to the police. Because the suspect reportedly had a crowbar and was allegedly in the process of committing a burglary, the police had reason to believe that he was armed and dangerous. *See State v. Moffatt*, 450 N.W.2d 116, 120 (Minn. 1990) (concluding that investigatory stop of suspects for alleged burglary was reasonable where "the men might have had one or more weapons in the car"). Based on the totality of the circumstances, and given the legitimate concerns for officer safety, the stop was justified and supported by reasonable suspicion.

But appellant argues that, because he was handcuffed and seized at gunpoint, he was de facto arrested. Even though a *Terry* stop is justified by reasonable suspicion, the scope of the detention must not exceed constitutional limits. *State v. Blacksten*, 507 N.W.2d 842, 846 (Minn. 1993). But the mere fact that appellant was handcuffed and held at gunpoint does not convert the *Terry* stop into a full arrest. "[I]f an officer making a reasonable investigatory stop has cause to believe that the individual is armed, he is

justified in proceeding cautiously with weapons ready." *State v. Munson*, 594 N.W.2d 128, 137 (Minn. 1999) (quotation omitted). "[B]riefly handcuffing a suspect while the police sort out the scene of an investigation does not per se transform an investigatory detention into an arrest, nor does placing the suspect in the back of a squad car while the investigation proceeds." *Id.*

Appellant argues that even if the police had reasonable suspicion to stop him for the burglary, they lacked probable cause to arrest him for DWI because the only indicium of intoxication was the smell of alcohol emanating from his person when he was handcuffed by the police. We disagree. When the police initially smelled alcohol on appellant, they had reasonable, articulable suspicion to believe that he was driving while intoxicated. On this basis, the police were justified in expanding the scope of the stop to include an investigation of whether appellant was driving drunk. *See State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004) ("An intrusion not closely related to the initial justification for the search or seizure is invalid . . . unless there is independent probable cause or reasonableness to justify that particular intrusion."). Appellant was arrested for DWI after he exhibited numerous indicia of intoxication including bloodshot and watery eyes, slurred speech, and difficulty walking, and after he failed several field-sobriety tests. Upon these facts, the police had ample probable cause to arrest appellant for DWI. Because evidence of appellant's test refusal was not the result of an unlawful seizure, the evidence was properly admitted at trial.

II.

Appellant also argues that his conviction should be reversed because the criminal test-refusal statute is unconstitutional following the U.S. Supreme Court's recent decision in *McNeely*, and the Minnesota Supreme Court's follow up decision in *Brooks*. *See McNeely*, 133 S. Ct. 1552; *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013). The constitutionality of a statute is a question of law that we review de novo. *State v. Melde*, 725 N.W.2d 99, 102 (Minn. 2006). This court presumes that Minnesota statutes are constitutional. *Id.* The party questioning the constitutionality of a statute must demonstrate beyond a reasonable doubt that it violates a constitutional provision. *State v. Wolf*, 605 N.W.2d 381, 386 (Minn. 2000).

Appellant was convicted of second-degree test refusal, which consists of "refus[ing] to submit to a chemical test of the person's blood, breath, or urine." Minn. Stat. § 169A.20, subd. 2 (2012). The statute criminalizes refusal to submit to testing authorized under the implied-consent law, which provides that anyone who drives a vehicle has consented to a chemical blood, breath, or urine test for alcohol. Minn. Stat. § 169A.51, subd. l(a) (2012). Consent to testing is implied when officers have probable cause to believe a person was driving while intoxicated. Minn. Stat. § 169A.51, subd. l(b) (2012). Taking a breath sample implicates a suspect's Fourth Amendment rights. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413 (1989). We have interpreted Minnesota's implied consent statute as criminalizing only refusal to cooperate with searches that are constitutionally reasonable, so that the state must establish a lawful basis for the warrantless breath test that appellant refused. *See State v.*

Wiseman, 816 N.W.2d 689, 694-95 (Minn. App. 2012), *cert. denied*, 133 S. Ct. 1585 (2013).

The state argues that this court should not reach the merits of this question because appellant did not raise this argument before the district court. Appellate courts "generally will not decide issues which were not raised before the district court, including constitutional questions." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But this court may consider "any other matter, as the interests of justice may require." Minn. R. Crim. P. 28.02, subd. 11. In this case, the Supreme Court's decision in *McNeely* was pronounced after appellant's trial, but while his case was still pending. Moreover, the parties have adequately briefed the issue. *See Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1982) (stating that a constitutional question may be decided on appeal where "the parties have had adequate time to brief such issues"). Therefore, we will consider the merits of appellant's constitutional argument.

The state also argues that the rule in *McNeely* should not be applied to appellant's case because the rule does not apply retroactively. *See Danforth v. State*, 761 N.W.2d 493, 496 (Minn. 2009) (allowing for the retroactive effect of a new rule only in limited circumstances). But the retroactivity rule affirmed in *Danforth* only applies to convictions that have become final. *Id.* at 498. A conviction becomes final after the time for appeal is exhausted. *O'Meara v. State*, 679 N.W.2d 334, 340 (Minn. 2004), *overruled on other grounds by Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029 (2008). Because the time for appeal has not yet expired in this case, we conclude that *McNeely* applies to this case without needing to decide whether *McNeely* has retroactive effect.

Appellant argues that after *McNeely* the test-refusal statute is unconstitutional because it violates the doctrine of unconstitutional conditions. Specifically, appellant argues that the state may not compel a driver to submit to a blood-alcohol test using the threat of criminal punishment. The doctrine of unconstitutional conditions "reflects a limit on the state's ability to coerce waiver of a constitutional right where the state may not impose on that right directly." *State v. Netland*, 762 N.W.2d 202, 211 (Minn. 2009), *abrogated in part by McNeely*, 133 S. Ct. 1552. "The doctrine is properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement." *Id.*

In *Netland*, the supreme court addressed a similar challenge and upheld the constitutionality of the statute on the grounds that the defendant could not show that a warrantless search for her blood-alcohol content would have been unconstitutional. *Id.* at 213-14. The supreme court relied upon *State v. Shriner*, 751 N.W.2d 538, 545 (Minn. 2008), *abrogated by McNeely*, 133 S. Ct. 1552, which held that the dissipation of alcohol in the blood created a per se exigent circumstance justifying a warrantless blood-alcohol test so long as the police had probable cause. Following the reasoning in *Shriner*, the supreme court stated in *Netland* that

> the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions 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.

But *McNeely* held that the evanescent nature of alcohol in the blood does not create a per se exception to the warrant requirement, abrogating *Shriner*. *McNeely*, 133 S. Ct. at 1556. "[E]xigency . . . must be determined case by case based on the totality of the circumstances." *Id.* Accordingly, appellant argues that, absent exigent circumstances the state may not lawfully compel a suspect to submit to a blood-alcohol test by imposing criminal penalties for test refusal. And the state has not established the existence of any special circumstances in this case.

But *McNeely* did not invalidate state test-refusal statutes. In fact, a plurality of the Supreme Court cited with favor state implied-consent laws, stating that they represent a "broad range of *legal tools* to enforce [state] drunk-driving laws and to secure [blood-alcohol concentration] evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566 (emphasis added). In *Brooks*, our supreme court stated that the conclusion that our implied-consent laws are unconstitutional is "inconsistent" with the description of implied-consent laws as "*legal tools*" in *McNeely*. 838 N.W.2d at 572 (quotation omitted).

In *State v. Bernard*, 844 N.W.2d 41, 42 (Minn. App. 2014), *pet. for review filed* (Minn. Apr. 17, 2014), this court recently addressed a similar challenge to the test-refusal statute and concluded that "[t]he Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test for alcohol content" because as long as the police have probable cause the test is constitutionally reasonable. *See also Brooks*, 838 N.W.2d at 571 ("Although refusing the test comes with criminal penalties in Minnesota, the Supreme Court has made clear that while the choice

to submit or refuse to take a chemical test will not be an easy or pleasant one for a suspect to make, the criminal process often requires suspects and defendants to make difficult choices" (quotations omitted)); *Wiseman*, 816 N.W.2d at 691 ("[T]he imposition of criminal penalties for refusing to submit to a properly requested chemical test is a reasonable means to a permissible state objective.").

Because we conclude that a breath test is a constitutionally reasonable search so long as the police have probable cause to believe the suspect was driving while intoxicated, we need not address appellant's argument that the test-refusal statute imposes an unconstitutional condition on motorists. *See Netland*, 762 N.W.2d at 212 (concluding that it was unnecessary to determine whether the test-refusal statute imposed an unconstitutional condition where the defendant could not show that a warrantless blood-alcohol test would have been unconstitutional).

Affirmed.

KLAPHAKE, Judge (dissenting)

Because I believe that Minnesota's test-refusal statute is unconstitutional, following the Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), I respectfully dissent from that part of the majority's opinion in this case.

In rejecting appellant's claim that the test-refusal statute is unconstitutional, the majority follows this court's decision in *State v. Bernard*, 844 N.W.2d 41 (Minn. App. 2014), *pet. for review filed* (Minn. Apr. 17, 2014). I find the analysis in *Bernard* to be flawed because it fails to identify a legitimate exception to the warrant requirement and creates an exception that renders the Fourth Amendment meaningless when a person is merely suspected of driving while intoxicated.

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967). Chemical tests for blood, breath, or urine are searches under both the Fourth Amendment and the Minnesota Constitution. *See Skinner v. Ry. Labor Execs. Ass'n.*, 489 U.S. 602, 616, 109 S. Ct. 1402, 1412-13 (1989); *Ellingson v. Comm'r of Pub. Safety*, 800 N.W.2d 805, 807 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

Minnesota's test-refusal statute makes it a "crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine." Minn. Stat. § 169A.20, subd. 2 (2012). The majority acknowledges that this court has "interpreted Minnesota's

implied consent statute as criminalizing only refusal to cooperate with searches that are constitutionally reasonable, so that the state must establish a lawful basis for the warrantless . . . test that appellant refused," citing *State v. Wiseman*, 816 N.W.2d 689, 694-95 (Minn. App. 2012), *review denied* (Minn. Sept. 24, 2012), *cert. denied*, 133 S. Ct. 1585 (2013). Following *McNeely*, however, *Wiseman* is no longer good law.

In *Wiseman*, the defendant raised a substantive-due-process challenge to the test-refusal statute, claiming that it criminalized constitutionally protected activity involving "the passive or nonviolent refusal to submit to a warrantless police search." *Id.* The *Wiseman* court rejected that challenge, concluding that if an officer has probable cause to believe that a person is under the influence of alcohol, there is no "fundamental right" to refuse a chemical test because the police can obtain a sample for chemical testing under the single-factor exigent circumstances exception based on "[t]he rapid, natural dissipation of alcohol in the blood." *Id.* (quoting *State v. Shriner*, 751 N.W.2d 538, 549-50 (Minn. 2008)).

An integral part of this court's decision in *Wiseman* is its reliance on the single-factor or per se exigency of dissipation of blood alcohol evidence. In *McNeely*, however, the Supreme Court clarified that police cannot rely solely on the natural and rapid dissipation of alcohol as the per se exigency to support a warrantless chemical test and that exigent circumstances must be based on an analysis of the totality of the circumstances. 133 S. Ct. at 1558-60. In a given case, special circumstances may exist that would justify a warrantless seizure of a defendant's blood, breath, or urine under a totality-of-the-circumstances exigency analysis, despite a refusal to submit to chemical

testing. *Id.* at 1561, 1563. Under *McNeely*, police cannot justify the request for a chemical test solely on the single-factor exigent circumstances exception involving the natural and rapid dissipation of alcohol in the blood. Thus, any reliance on *Wiseman* is questionable after *McNeely*.

Nevertheless, this court has fully followed *Wiseman* in *Bernard*, holding that "Bernard's prosecution did not implicate any fundamental due process rights" because there was a "*constitutionally* viable alternative." 844 N.W.2d at 46 (emphasis in original). But *Bernard* fails to identify such an alternative. Instead, *Bernard* relies on an *un*constitutional alternative: because the officer had probable cause to believe Bernard was under the influence of alcohol, the officer could have obtained a "hypothetical" search warrant to test his blood. *See id.* Following the reasoning set out in *Wiseman*, the *Bernard* court held that because the officer could have obtained a search warrant, Bernard had no right to refuse to submit to a lawful test and committed a crime when he refused that test. *Id*.

I find this logic to be inherently flawed and circular, suggesting that because police had probable cause and *could* have obtained a warrant, an exception to the warrant requirement exists. Such reasoning goes against all common sense and essentially eviscerates the warrant requirement with an exception so broad that it becomes meaningless. *See Katz*, 389 U.S. at 357, 88 S. Ct. at 515 ("Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause.'") The fact that police have probable cause to believe a defendant is under the influence of alcohol does not permit a warrantless search for chemical testing.

McNeely, 133 S. Ct. at 1561 ("In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.")

Because appellant had a constitutional right to refuse to submit to a warrantless search under the facts of this case, the test-refusal statute has criminalized appellant's constitutionally protected activity. There is no recognized exception that would permit police to obtain a warrantless search for chemical testing merely because they had probable cause to request such a test and could have obtained a warrant. The Fourth Amendment and *McNeely* require that police either obtain a warrant under these circumstances or establish, by a totality of the circumstances, the existence of exigent circumstances. Because I conclude that the test-refusal statute is unconstitutional, I would reverse appellant's test-refusal conviction.