STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1024

State of Minnesota,
Appellant,

vs.

Christopher Glenn Gieseke,
Respondent.

Filed March 24, 2014
Reversed and remanded
Kirk, Judge

Sibley County District Court
File No. 72-CR-09-50

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

David E. Schauer, Sibley County Attorney, Donald E. Lannoye, Assistant County Attorney, Winthrop, Minnesota (for appellant)

Richard L. Swanson, Chaska, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

KIRK, Judge

Appellant State of Minnesota challenges the district court's suppression of respondent's breath test, arguing that respondent voluntarily consented to the search. We

hold under the totality of the circumstances that respondent consented to take the breath test and reverse and remand.

FACTS

At approximately 9:30 p.m. on March 27, 2009, Deputy Charles Fenger of the Sibley County Sherriff's Office was on routine patrol on Highway 19 west of Henderson. Deputy Fenger observed an oncoming vehicle driving too fast for conditions as it approached a curve in the highway and veered onto the shoulder. Deputy Fenger initiated a traffic stop of respondent Christopher Glenn Gieseke's vehicle. As Deputy Fenger approached the vehicle, he smelled the odor of an alcoholic beverage. When Deputy Fenger asked respondent where he was going, respondent replied that he was on his way to visit his friend Bob, but he did not know Bob's last name. Respondent admitted to consuming three and a half beers that evening.

Respondent failed the field sobriety tests, and the results of his preliminary breath test revealed that his alcohol concentration was .119. Deputy Fenger arrested respondent for suspicion of driving while intoxicated and transported him to the county jail. At the jail, Deputy Fenger read respondent the implied consent advisory and provided him with two phone books and a telephone. Respondent spoke to an attorney and then agreed to take a breath test. The test registered respondent's alcohol concentration at .15. The state charged respondent with operating a motor vehicle under the influence of alcohol, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2008), and driving with an alcohol concentration in excess of .08, in violation of Minn. Stat. § 169A.20, subd. 1(5) (2008).

Respondent moved to suppress the results of his breath test under a number of theories, including that the police violated his Fourth Amendment rights by failing to secure a warrant before administering the breath test. Although the evidence establishes that respondent took a breath test, the district court held under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), that the warrantless search of respondent's urine without a showing of exigent circumstances was improper, and respondent did not voluntarily consent to take a urine test.[1] The district court granted respondent's motion and suppressed the results of the test.

The state appeals.

D E C I S I O N

When reviewing a pretrial suppression order where the facts are not in dispute, this court "may independently review the facts and determine, as a matter of law, whether the evidence need be suppressed." *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

The state argues that the district court erred when it suppressed respondent's test results under the Fourth Amendment. Minnesota's implied consent advisory law requires police officers to inform individuals suspected of driving while impaired that Minnesota law requires that they perform a test to ascertain whether they are under the influence of alcohol, that refusal to take the test is a crime, and that they have the right to consult with an attorney. Minn. Stat. § 169A.51, subds. 1, 2 (2008).

[1] The district court's finding that respondent submitted to a urine test was a typographical error.

The United States Constitution and Minnesota Constitution prohibit unlawful searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Collection and testing of an individual's blood, breath, or urine constitutes a search. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989). If an individual voluntarily consents to a search, the police do not need a warrant. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973). The state must show by a preponderance of the evidence that the individual freely and voluntarily consented to the search. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011).

In *State v. Brooks*, the Minnesota Supreme Court held that, as a matter of law, the criminal test-refusal penalty is not coercive, and courts should examine the totality of the circumstances to determine whether an individual suspected of driving while under the influence consented to testing. 838 N.W.2d 563, 570-72 (Minn. 2013). The relevant circumstances the supreme court considered in *Brooks* included: (1) the factors that led the police to suspect that Brooks was driving while intoxicated, and if respondent was (2) informed of the implied consent advisory before testing, (3) asked to take a blood or urine test, and (4) provided access to legal counsel. *Id.* at 569.

The facts in this case establish that respondent voluntarily consented to taking the breath test. A sheriff's deputy arrested respondent on suspicion of driving while impaired after he observed respondent drive recklessly and fail the standard field sobriety tests. The deputy informed respondent of the implied consent advisory and requested that respondent take a breath test, which he agreed to do. The deputy provided respondent with phone books and access to a telephone, and respondent was able to

contact an attorney. Because the circumstances show that respondent freely and voluntarily consented to a breath test, we reverse and remand.

Reversed and remanded.