**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-1434**

State of Minnesota,
Appellant,

vs.

Scott David Harrom,
Respondent.

**Filed April 14, 2014**
**Reversed and remanded**
**Chutich, Judge**

Dakota County District Court
File No. 19HA-CR-12-947

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

James C. Backstrom, Dakota County Attorney, Heather D. Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for appellant)

Stephen R. O'Brien, Minneapolis, Minnesota (for respondent)

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

The state appeals the district court's pretrial order suppressing the results of respondent's breath test, arguing that the warrantless breath test is admissible under an

exception to the warrant requirement. Because respondent Scott David Harrom validly consented to the breath test, we reverse and remand.

## FACTS

On March 14, 2012, at approximately 1:20 a.m., a police officer saw a red truck speeding and cross over the fog line three times. The officer pulled the truck over and identified Harrom as the driver. While talking with Harrom, the officer smelled alcohol coming from inside the truck and noticed that Harrom's eyes were bloodshot and watery and that his speech was slightly slurred. Harrom agreed to perform standard field-sobriety tests and "performed poorly on the tests." Harrom's preliminary breath test showed a blood-alcohol concentration of .131.

The officer arrested Harrom and took him to the Lakeville Police Department, where he read Harrom the implied-consent advisory. Harrom stated that he understood, waived his right to consult with an attorney, and agreed to provide a breath sample. At 2:12 a.m., the breath test reported a blood-alcohol concentration of .14, well above the legal limit of .08.

The state charged Harrom with two counts of first-degree driving while impaired (operating a motor vehicle under the influence of alcohol). *See* Minn. Stat. §§ 169A.20, subd. 1(1), .24, subds. 1(1), 2, .276, subd. 1(a) (2010).

Harrom moved to dismiss the results of his breath test, arguing that, under the Supreme Court's decision in *Missouri v. McNeely*, the breath test was a search requiring a warrant and that none of the warrant exceptions applied. *See* 133 S. Ct. 1552 (2013). The state countered that *McNeely* does not apply to breath tests, and, if *McNeely* does

apply, the breath test was permissible as a search incident to arrest and a consensual search.

After a hearing, the district court granted Harrom's motion and suppressed the breath-test results, finding that no warrant exception applied to the seizure of Harrom's breath. The state appealed.

## D E C I S I O N

### I. Critical Impact

When the state appeals a pretrial order that suppresses evidence, the state must "clearly and unequivocally" show that (1) the ruling was erroneous and (2) the district court's order "will have a critical impact on its ability to prosecute the case." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quotation omitted). The state can demonstrate critical impact when exclusion of the evidence "completely destroys" the state's case or "significantly reduces the likelihood of a successful prosecution." *Id.* (quoting *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987)).

The critical-impact test has been satisfied here. The breath-test evidence is unique in nature and quality because it is not dependent on the officer's observations. *See In re Welfare of L.E.P.*, 594 N.W.2d 163, 168 (Minn. 1999) ("Suppressed evidence particularly unique in nature and quality is more likely to meet the critical impact test."). Without the results of the breath test, which showed that Harrom had a blood-alcohol concentration of .14, the state's chances of successfully prosecuting Harrom for driving while impaired are greatly reduced. *See Kim*, 398 N.W.2d at 551.

## II. Suppression of Test Results

Taking samples of a person's blood, breath, or urine is a search under the Fourth Amendment. *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), *pet. for cert. filed* (U.S. Feb. 24, 2014) (No. 13-1028). "[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner*, 489 U.S. at 619, 109 S. Ct. at 1414. To determine reasonableness, courts must "weigh the promotion of legitimate governmental interests against the degree to which the search intrudes upon an individual's privacy." *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (quotations omitted).

Here, the state argues that a warrantless breath test is reasonable because breath tests are minimal intrusions and that the state has a compelling interest in highway safety and keeping impaired drivers off of roads. But we need not determine the reasonableness of the breath test because the Minnesota Supreme Court's recent decision in *Brooks* is controlling. *See* 838 N.W.2d at 572.

In *Brooks*, the supreme court concluded that, based on the totality of the circumstances, a warrant was not required to take samples of Brooks's blood or urine because he consented to the search. *Id.* at 572. A warrantless search is valid if a person consents to the search. *Id.* at 568. Consent must be given "freely and voluntarily" based on the preponderance of the evidence. *Id.* To determine whether a person validly consents, we must consider "the totality of the circumstances, including the nature of the

encounter, the kind of person the defendant is, and what was said and how it was said." *Id.* at 569 (quotation omitted).

Here, the district court did not have the benefit of the *Brooks* decision when it determined that Harrom's consent was invalid because the implied-consent advisory is a "coercive statement." But under *Brooks*, "a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Id.* at 570. By reading the implied-consent advisory, the police make it clear that the driver has "a choice of whether to submit to testing," and "the fact that someone submits to the search after being told that he or she can say no to the search supports a finding of voluntariness." *Id.* at 572.

Based on *Brooks*, the district court erred by finding that Harrom's consent was coerced. The record reveals that Harrom's consent was freely and voluntarily given. The police officer arrested Harrom after he showed signs of impaired driving and his preliminary breath test showed that his blood-alcohol concentration was over the legal limit. The officer read Harrom the implied-consent advisory at the police department, and, according to undisputed facts in the record, Harrom "stated he understood," "waived his right to consult with an attorney," and "agreed to provide a breath sample." While Harrom did not talk to an attorney, nothing in the record shows that his decision not to consult an attorney affected the voluntariness of his consent.

In his pretrial motion, Harrom challenged his consent, claiming only that it was coerced because refusal of the test is a crime, an argument that the *Brooks* court explicitly rejected. *See id.* at 570. Moreover, Harrom has not responded to this appeal. Based on

*Brooks* and the uncontested facts of this case, Harrom freely and voluntarily consented to the breath test.

We hold, therefore, that a warrant was not required to take Harrom's breath sample and that the test results are admissible at Harrom's trial.[1] We reverse the district court's order and remand for proceedings consistent with this opinion and Minnesota law.

**Reversed and remanded.**

[1] Because the state prevails on the consent argument, we need not address the state's argument on the warrant exception for searches incident to arrest.