STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1531

Lawrence Jeffrey Erickson,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed June 23, 2014
Affirmed
Willis, Judge*

Hennepin County District Court
File No. 27-CV-13-8834

Steven J. Meshbesher, Adam T. Johnson, Meshbesher & Associates, P.A., Minneapolis, Minnesota (for appellant)

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

Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Willis, 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

WILLIS, Judge

Appellant challenges the decision of the district court sustaining the revocation of his driver's license, arguing that (1) the results of his breath test should have been suppressed as the product of an unconstitutional search and (2) the implied-consent law unconstitutionally conditions his driving privilege on forfeiture of the right to be free from unreasonable searches. We affirm.

FACTS

On April 30, 2013, appellant Lawrence Erickson was arrested for driving while impaired. Police read Erickson the implied-consent advisory and requested that he take a breath test to determine his alcohol concentration. Erickson submitted to a breath test, which showed an alcohol concentration of 0.31. Based on that result, respondent Minnesota Commissioner of Public Safety revoked Erickson's driver's license and subsequently cancelled his driver's license as inimical to public safety. Erickson petitioned for judicial review, arguing that the results of the breath test should be suppressed because (1) neither exigent circumstances nor consent justified the warrantless search and (2) the implied-consent law unconstitutionally conditions his driving privilege on forfeiture of his right to be free from unreasonable searches. Based on the parties' stipulated facts, the district court sustained the revocation and cancellation. This appeal follows.

D E C I S I O N

I. Erickson validly consented to the warrantless breath test.

Erickson first argues that the warrantless collection and testing of his breath was an unconstitutional search. "When the facts are not in dispute, the validity of a search is a question of law subject to de novo review." *Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004). In reviewing the constitutionality of a search, "we independently analyze the undisputed facts to determine whether evidence resulting from the search should be suppressed." *Id.*

Taking a sample of a person's breath for chemical testing is a search, requiring either a warrant or an exception to the warrant requirement. *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, 567 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). One such exception to the warrant requirement is consent. *Brooks*, 838 N.W.2d at 568. The state bears the burden of showing by a preponderance of the evidence that the defendant freely and voluntarily consented. *Id.* Whether consent is voluntary is determined from 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). The nature of the encounter includes how the police came to suspect the driver was under the influence, whether police read the driver the implied-consent advisory, and whether the driver had the right to consult with an attorney. *Id.* But a driver's consent is not coerced as a matter of law simply because he faces criminal consequences for refusal to submit to testing. *Id.* at 570.

The parties' factual stipulation establishes the circumstances of Erickson's breath test. Police arrested Erickson based on probable cause to believe he was driving while impaired. Erickson was not detained for an extended period of time before testing, subjected to questioning, or otherwise pressured by police to submit to testing. Rather, police read Erickson the standard implied-consent advisory, which "informs drivers that Minnesota law requires them to take a chemical test for the presence of alcohol, that refusing to take a test is a crime, and that drivers have the right to talk to a lawyer before deciding whether to take a test." *See id.* at 565. As Erickson notes, the advisory does not expressly inform drivers that Minnesota law generally prohibits administering a chemical test to drivers who refuse. *See* Minn. Stat. § 169A.52, subd. 1 (2012). But it leaves the decision whether to submit to testing up to drivers, which the supreme court has held "makes clear that drivers have a choice of whether to submit to testing." *Brooks*, 838 N.W.2d at 570.

Erickson asserts that his consent was not voluntary because he, unlike Brooks, did not consult with an attorney before submitting to testing. We disagree. The supreme court did not consider the opportunity to consult with counsel dispositive of the issue of voluntariness but merely a factor that "reinforce[d] the conclusion that [Brooks's] consent was not illegally coerced." *Id.* at 571. And while Erickson did not consult with an attorney prior to receiving the breath test, he was afforded the opportunity to do so and voluntarily declined it.

The record as a whole indicates that Erickson voluntarily chose to submit to testing rather than commit the crime of test refusal; that is a choice that the law permits

him freely to make. Because Erickson's consent justified the breath test, we conclude that the district court did not err by upholding the revocation and cancellation of his driver's license based on the results of that test.

II. The implied-consent law did not impose an unconstitutional condition on Erickson's driving privilege.

Erickson also argues that the implied-consent law unconstitutionally conditions his driving privilege on forfeiture of the right to be free from unreasonable searches. We review de novo the legal question whether a statute is constitutional. *State v. Wenthe*, 839 N.W.2d 83, 87 (Minn. 2013). We presume Minnesota statutes are constitutional and "will uphold a statute unless the challenging party demonstrates that it is unconstitutional beyond a reasonable doubt." *State v. Ness*, 834 N.W.2d 177, 182 (Minn. 2013) (quotation omitted).

The unconstitutional-conditions doctrine holds that the government may grant a privilege "upon such conditions as it sees fit to impose" but "it may not impose conditions which require the relinquishment of constitutional rights." *Frost & Frost Trucking Co. v. R.R. Comm'n of Cal.*, 271 U.S. 583, 593-94, 46 S. Ct. 605, 607 (1926). While no Minnesota court has held the doctrine applicable in the context of the Fourth Amendment, it is "properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement." *State v. Netland*, 762 N.W.2d 202, 211 (Minn. 2009), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (2013); *see Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286-88, 118 S. Ct. 1244, 1252-53 (1998) (holding unconstitutional-conditions doctrine inapplicable to

inmate's claim that a voluntary interview coerced forfeiture of the right to remain silent because there was no Fifth Amendment violation). That requirement is not satisfied here.

Erickson claims that he has a constitutional right to be free from unreasonable searches and that the implied-consent statute required him to submit to an unconstitutional, warrantless search as a condition of driving. This argument essentially restates his challenge to the voluntariness of his consent to the search and is markedly similar to the constitutional challenge the supreme court rejected in *Brooks*. *See Brooks*, 838 N.W.2d at 572-73 (concluding that driver who consented to testing failed to substantiate unconstitutional-conditions challenge to implied-consent law). Fundamentally, Erickson was not *required* to submit to a warrantless search; he voluntarily consented to a warrantless search. In the absence of any demonstrated infringement on Erickson's right to be free from unreasonable searches, his constitutional challenge fails.

Affirmed.