STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1590

State of Minnesota,
Appellant,

vs.

Benjamin Curtiss Ornquist,
Respondent.

Filed June 9, 2014
Reversed and remanded
Bjorkman, Judge

Clay County District Court
File No. 14-CR-13-1141

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

Brian J. Melton, Clay County Attorney, Heidi M.F. Davies, Chief Assistant County Attorney, Moorhead, Minnesota (for appellant)

Mark R. Western, Nilles Law Firm, Fargo, North Dakota (for respondent)

Considered and decided by Ross, Presiding Judge; Bjorkman, 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

BJORKMAN, Judge

The state challenges the pretrial dismissal of respondent's test-refusal charge. Because a warrantless search of respondent's blood, breath, or urine for alcohol concentration would have been constitutionally reasonable, we reverse and remand.

FACTS

Shortly before midnight on April 2, 2013, Officer Trenton Bachman of the Moorhead Police Department observed a vehicle "spinning its tires" in a muddy area behind a bar. As Officer Bachman approached, the driver, later identified as respondent Benjamin Curtiss Ornquist, parked and stepped out of the vehicle. Officer Bachman smelled "a strong odor of an alcoholic beverage emitting from Ornquist's breath" and saw that Ornquist's eyes were bloodshot and watery. A protective pat search revealed a "hard, plastic tube" containing what Officer Bachman identified as marijuana residue. Ornquist admitted consuming two beers and three whiskey drinks since 3:30 p.m. that day. He failed field sobriety tests and refused to take a preliminary breath test.

Ornquist was arrested for driving while impaired and transported to the Clay County Jail. Officer Bachman read him the implied-consent advisory. Ornquist made several telephone calls but was unable to speak with a lawyer. Ornquist then refused to submit to a breath test. The state charged Ornquist with refusal to submit to a chemical test, in violation of Minn. Stat. § 169A.20, subd. 2 (2012).[1] Ornquist moved to dismiss,

[1] Ornquist was also charged with possession of drug paraphernalia. Disposition of that charge is pending at the district court.

arguing that the test-refusal statute is unconstitutional. The district court granted the motion, concluding that, following the United States Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), a warrantless test of Ornquist's breath would have been an unreasonable search in violation of the Fourth Amendment to the United States Constitution. The district court further concluded that Minn. Stat. § 169A.20, subd. 2, "coerces the waiver of the constitutional right to be secure in one's person against unreasonable searches," and therefore violates the unconstitutional-conditions doctrine.

The state appealed. We stayed the appeal pending the Minnesota Supreme Court's decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). Following that decision, we dissolved the stay, and this appeal proceeded.

D E C I S I O N

To prevail in a pretrial appeal, the state must clearly and unequivocally show that the district court erred "and that the error, unless reversed, will have a critical impact on the outcome of the prosecution." *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009) (quotation omitted). The parties do not dispute this court's jurisdiction because a district court order dismissing criminal charges has a critical impact on the prosecution. *See id.*

The state argues that the district court erred in ruling that the test-refusal statute is unconstitutional. The constitutionality of a statute is a question of law, which we review de novo. *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).

Minnesota's test-refusal statute states that it is 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. The statute criminalizes refusal to comply with the implied-consent statute, which states that "[a]ny person who drives . . . a motor vehicle within this state . . . consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance." Minn. Stat. § 169A.51 (2012).

The state argues that the test-refusal statute does not violate the Fourth Amendment because a suspected drunk driver does not have the right to withhold consent to a warrantless search of blood, breath, or urine. And the state asserts that the test-refusal statute does not violate the unconstitutional-conditions doctrine because the decision to attach a penalty to the refusal to test is not coercive. We address each argument in turn.

I. The test-refusal statute does not violate Ornquist's constitutional rights because a warrantless search of his blood, breath, or urine would have been constitutionally reasonable.

The district court concluded that a warrantless test of Ornquist's blood, breath, or urine "would have been an unreasonable search and, hence, a violation of the Fourth Amendment to the U.S. Constitution." "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) (alteration in original) (quoting U.S. Const. amend. IV) (citing Minn. Const. art. I, § 10). A warrantless search is "presumptively unreasonable unless one of a few specifically established and well-delineated exceptions applies." *Id.* at 846 (quotations omitted). Blood, breath, and urine tests for alcohol concentration are searches. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413 (1989).

We recently considered the issues presented in this case in *State v. Bernard*, 844 N.W.2d 41 (Minn. App. 2014), *review granted* (Minn. May 27, 2014). In *Bernard*, as here, the defendant refused to submit to chemical testing and was prosecuted under the test-refusal statute. 844 N.W.2d at 42-43. Bernard argued that *Missouri v. McNeely* "bars criminal charges for test refusal because it eliminates what had been a per se exigent circumstance that justifies both executing a search and criminalizing a refusal." *Id.* at 44. We rejected this argument, focusing on *State v. Wiseman*, 816 N.W.2d 689, 694-95 (Minn. App. 2012), *cert. denied*, 133 S. Ct. 1585 (2013), where we determined that the test-refusal prosecution was constitutionally sound because exigent circumstances justified a warrantless search. We observed that *McNeely* only removed one justification for warrantless testing—the dissipation of alcohol in the bloodstream as a per se exigent circumstance—and examined whether the requested search of Bernard's breath was constitutionally reasonable on other grounds. *Id.* at 45.

We 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 when the circumstances established a basis for the officer to have alternatively

pursued a constitutionally reasonable nonconsensual test by securing and executing a warrant." *Id.* at 42. We reasoned that the fact

> [t]hat the officer chose one approach (the authority to make the request under the implied consent statute) rather than another (the authority to obtain a warrant under the impaired driving statute) does not make penalizing Bernard's decision unconstitutional because the consequent testing under either approach would have been constitutionally reasonable.

Id. at 46. Like *Wiseman*, we held that Bernard's test-refusal prosecution "did not implicate any fundamental due process rights." *Id.*

As in *Bernard*, we consider whether the officers had probable cause sufficient for a warrant to obtain Ornquist's breath. The existence of probable cause depends on "the particular circumstances, conditioned by [the officers'] own observations and information and guided by the whole of their police experience." *State v. Olson*, 436 N.W.2d 92, 94 (Minn. 1989), *aff'd*, *Minnesota v. Olson*, 495 U.S. 91, 110 S. Ct. 1684 (1990). This is an objective inquiry. *State v. Hardy*, 577 N.W.2d 212, 216 (Minn. 1998).

The record shows that the arresting officer observed Ornquist driving erratically in a muddy parking area behind a bar close to midnight.[2] Ornquist exhibited indicia of intoxication, including a strong odor of alcohol and watery, bloodshot eyes. The officer saw alcoholic beverages in the vehicle, Ornquist admitted drinking and using marijuana, and he failed several field sobriety tests. On this record, the officer had probable cause to believe that Ornquist was driving while impaired. Accordingly, police had the option to

[2] The parties agreed that, for purposes of this motion, the record consists of the audio recording and transcript of the implied-consent-advisory reading, and Officer Bachman's supplementary report.

obtain a test of his blood, breath, or urine by search warrant. *Bernard*, 844 N.W.2d at 45. And because that test, either by search warrant or Ornquist's consent, would have been constitutionally reasonable, prosecuting Ornquist for test refusal does not violate his constitutional rights. *See id.* at 46.

II. The test-refusal statute does not violate the unconstitutional-conditions doctrine.

"The state cannot deny a benefit on a basis that infringes appellants' constitutionally protected interests." *Council of Indep. Tobacco Mfrs. v. State*, 713 N.W.2d 300, 306 (Minn. 2006). "But to invoke this 'unconstitutional conditions' doctrine, appellants must first show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their [constitutional] rights." *Id.*

Because we hold that Ornquist's test-refusal prosecution does not implicate any constitutional rights, his unconstitutional-conditions argument must fail. Moreover, our supreme court rejected Ornquist's argument in *Brooks*, concluding that "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." 838 N.W.2d at 570. And it concluded that the implied-consent laws do not unconstitutionally "imply someone's consent to waive his or her Fourth Amendment rights as a condition of granting the privilege to drive in Minnesota," but that consent is determined based on an examination of the totality of the circumstances. *Id.* at 572-73.

In sum, the district court erred in concluding that a warrantless search of Ornquist's blood, urine, or breath would have been unreasonable and that the test-refusal

statute violates the unconstitutional-conditions doctrine. We reverse and remand for further proceedings.

Reversed and remanded.