STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1602

State of Minnesota,
Appellant,

vs.

Mark Harlan Olson,
Respondent.

Filed May 5, 2014
Reversed and remanded
Larkin, Judge

Cass County District Court
File No. 11-CR-13-647

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

Christopher J. Strandlie, Cass County Attorney, Benjamin T. Lindstrom, Assistant County Attorney, Walker, Minnesota (for appellant)

Drake D. Metzger, Attorney at Law, St. Louis Park, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and Kirk, Judge.

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

LARKIN, Judge

In this pretrial appeal, appellant argues that the district court erred by granting respondent's motion to suppress the results of a urine test. Because the collection of

respondent's urine sample was reasonable under the consent exception to the warrant requirement, we reverse and remand.

FACTS

Cass County Deputy Mark Diaz responded to a report that an intoxicated male was driving a Buick to the Palace Casino near Cass Lake. Deputy Diaz observed a Buick pull into a handicap parking spot. The Buick did not have a handicap permit or plate. Deputy Diaz activated his squad-car emergency lights, stopped the driver, and identified him as respondent Mark Harlan Olson. Deputy Diaz observed several indicia of intoxication. He administered a field sobriety test, which Olson failed. Deputy Diaz arrested Olson for driving while impaired (DWI) and drove him to the Cass County Detention Center.

At the detention center, Deputy Diaz read Olson an implied-consent advisory. Olson agreed to take a urine test, which returned an alcohol-concentration reading of .13. Deputy Diaz did not obtain a search warrant prior to administering the urine test. Based on the result of the urine test, appellant State of Minnesota charged Olson with fourth-degree DWI.

Olson moved the district court to suppress the results of the urine test, arguing that the collection of his urine without a search warrant was unconstitutional under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). The district court concluded that the collection of Olson's urine without a warrant violated the Fourth Amendment because the "case completely lacks any additional exigent circumstances [beyond the natural dissipation of alcohol] necessary to negate the warrant requirement." The district court further concluded that Olson's consent to the urine test was not voluntary because "[t]here is

little voluntariness in the choice between a warrantless BAC test and another criminal charge which carries with it the critical consequence of a license revocation."[1] The district court granted Olson's motion to suppress the urine-test results, and the state appealed. This court stayed the appeal pending the supreme court's decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied* (U.S. Apr. 7, 2014). After *Brooks* was decided, we dissolved the stay and received additional briefing from the parties.

D E C I S I O N

I.

When the state appeals a pretrial order suppressing evidence, it must "clearly and unequivocally show both that the [district] court's order will have a critical impact on the state's ability to prosecute the defendant successfully and that the order constituted error." *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998) (quotation omitted). Critical impact is shown "in those cases where the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987). As a result of the district court's suppression order, the state no longer has evidence to prove that Olson's alcohol concentration was greater than .08, which is an

[1] The district court noted that it did not conduct "an analysis of the constitutionality of Minnesota's Implied Consent Statute," but instead made "a factual determination . . . in the context of warrantless blood alcohol concentration tests following an arrest for [d]riving [w]hile [impaired] in light of the Supreme Court's ruling in *McNeely*." Nonetheless, both parties make arguments regarding the constitutionality of the Minnesota Implied Consent Law on appeal. Because the district court did not consider or decide that issue, we decline to address it. *See State v. Tayari-Garrett*, 841 N.W.2d 644, 655-56 (Minn. App. 2014) ("Generally an appellate court will not consider matters not argued to and considered by the district court."), *review denied* (Minn. Mar. 26, 2014).

element of the charged offense. *See* Minn. Stat. § 169A.20, subd. 1(5) (2012) (defining offense of driving while impaired). Olson "concedes that the [s]tate has met its threshold issue of critical impact and that the [district] [c]ourt's order is appealable." We agree that the critical-impact standard is satisfied.

II.

The state argues that the collection of Olson's urine was lawful under the consent exception to the warrant requirement. "When reviewing pretrial orders on motions to suppress evidence, [appellate courts] may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's findings of fact under a clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

The United States and Minnesota Constitutions prohibit the unreasonable search and seizure of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "Taking blood and urine samples from someone constitutes a 'search' under the Fourth Amendment." *Brooks*, 838 N.W.2d at 568. Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). The state bears the burden of establishing the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001).

In its supplemental brief, the state argues that the district court's suppression order should be reversed in light of the *Brooks* decision. We agree that *Brooks* is dispositive here. On three separate occasions, Brooks was arrested for suspicion of DWI, was read

an implied-consent advisory, and submitted to either blood or urine testing. *Brooks*, 838 N.W.2d at 565-66. Brooks argued that "under *McNeely*, the warrantless searches of his blood and urine cannot be upheld solely because of the exigency created by the dissipation of alcohol in the body." *Id*. at 567. The supreme court agreed that the searches were not justified based on the exigency created by the dissipation of alcohol in the body, but noted that the "police do not need a warrant if the subject of the search consents." *Id.* at 567-68. The supreme court described the consent exception to the warrant requirement as follows:

> For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented. Whether consent is voluntary is determined by examining the totality of the circumstances. Consent to search may be implied by action, rather than words. And consent can be voluntary even if the circumstances of the encounter are uncomfortable for the person being questioned. An individual does not consent, however, simply by acquiescing to a claim of lawful authority.
>
> . . . .
>
> . . . This analysis requires that we 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 568-69 (quotations and citations omitted).

The supreme court explained that "the nature of the encounter includes how the police came to suspect Brooks was driving under the influence, their request that he take the chemical tests, which included whether they read him the implied consent advisory, and whether he had the right to consult with an attorney." *Id*. at 569. The supreme court concluded that Brooks's consent was voluntary in all three searches because he did not

dispute that the police had probable cause to believe he had been driving under the influence; he did not "contend that police did not follow the proper procedures established under the implied consent law"; the police read "the implied consent advisory before asking him whether he would take all three tests, which makes clear that drivers have a choice of whether to submit to testing"; the "police gave Brooks access to telephones to contact his attorney and he spoke to a lawyer"; and "[a]fter consulting with his attorney, Brooks agreed to take the tests in all three instances." *Id*. at 569-70. The supreme court further noted that although Brooks was in custody, he "was neither confronted with repeated police questioning nor was he asked to consent after having spent days in custody." *Id*. at 571.

In this case, Olson does not dispute that the police had probable cause to arrest him for DWI. He does not contend that the police failed to follow the proper implied-consent procedures. Deputy Diaz read Olson the implied-consent advisory, which made it clear that Olson could refuse the test. And although Olson elected not to consult with an attorney, he did so after Deputy Diaz advised him that he had the right to consult with an attorney and that a telephone and directory would be available to him for that purpose. Olson was not confronted with repeated police questions, nor did he agree to provide a urine sample after having spent days in custody. For those reasons, we conclude that Olson consented to the urine sample. The record does not suggest that Olson was coerced into providing the sample. *See id*. ("[N]othing in the record suggests that Brooks was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired." (quotation omitted)).

Olson argues that "any 'consent' a driver gives after receiving the implied consent advisory is anything but free and voluntary." Olson approvingly cites the district court's conclusion that "[t]here is little voluntariness in the choice between a warrantless BAC test and another criminal charge which carries with it the critical consequence of a license revocation. The choice is one bound with outside threat of prosecution of a new crime." But *Brooks* specifically rejects the district court's conclusion that consent to an implied-consent test is per se involuntary because of the attendant threat of a criminal charge for refusal. *See id*. at 570 ("Based on the analysis in [*South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916 (1983)] and [*McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991)], 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.").

Olson also argues that he "was confused during the implied consent advisory" and "was under the impression that he would have to apply for a lawyer in order to speak with one, or that he needed to already have a lawyer to consult with." But Olson acknowledges "that Deputy Diaz indicated that he would allow him to consult a lawyer." And during the implied-consent advisory, Deputy Diaz told Olson that if he wished to speak with an attorney, "a telephone and directory [would] be available to [him]." Olson fails to explain how any confusion regarding his right to speak to an attorney demonstrates that his "will had been overborne." *See id*. at 571. Moreover, whether or not Olson spoke to an attorney is not dispositive. *Brooks* does not hold that a driver must speak to a lawyer for consent to be voluntary. The supreme court stated that "[t]he fact

that Brooks consulted with counsel before agreeing to take each test *reinforces the conclusion* that his consent was not illegally coerced." *Id*. (emphasis added).

In sum, the collection of Olson's urine sample was reasonable under the consent exception to the warrant requirement. The district court therefore erred by suppressing evidence of the urine-test results.

Reversed and remanded.