STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1691

State of Minnesota,
Appellant,

vs.

Jonathan Lee Church,
Respondent.

Filed May 12, 2014
Reversed and remanded
Cleary, Chief Judge

Cass County District Court
File No. 11-CR-13-963

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

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

Melvin R. Welch, Appelman Law Firm, LLC, St. Louis Park, Minnesota (for respondent)

Considered and decided by Cleary, Chief Judge; Larkin, Judge; and Stauber, Judge.

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

CLEARY, Chief Judge

The State of Minnesota has filed this pretrial appeal from the district court's order granting respondent Jonathan Lee Church's motion to suppress the results of a breath test on the basis that it was taken without a warrant and without respondent's voluntary consent. Based on the totality-of-the-circumstances analysis set out by the Minnesota Supreme Court in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied* (U.S. Apr. 7, 2014), we reverse and remand.

FACTS

On May 18, 2013, at approximately 12:54 a.m., a Cass County Deputy Sheriff observed a vehicle weaving back and forth in front of him. The deputy caught up to the vehicle and saw it cross the centerline three times and the fog line twice over a distance of approximately one mile. The deputy stopped the vehicle and identified respondent as the driver.

The deputy noticed that respondent's speech was slurred, his eyes were bloodshot and watery, and his movements were slow. The deputy also noticed a strong odor of alcohol emanating from respondent. When the deputy asked respondent how much he had to drink, he stated that he had consumed a couple of beers.

Respondent failed several field sobriety tests. The deputy explained the preliminary breath test to respondent and eventually was able to obtain a sample reading of .125.

The deputy arrested respondent and took him to the detention center where he was read the implied-consent advisory. Respondent answered "no" when asked if he wanted to speak with an attorney and responded "yes" when asked if he would take a breath test. Respondent submitted a sample that reported an alcohol concentration of .15.

Respondent has a prior conviction for driving while intoxicated (DWI) from February 2008. He was charged with two counts of third-degree DWI: driving with an alcohol concentration of .08 or more, and driving under the influence of alcohol, in violation of Minn. Stat. §§ 169A.20, subd. 1(1), (5), 169A.26 (2012).

Respondent moved to suppress the breath-test results and dismiss the charges based on the United States Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). On August 29, 2013, the district court issued an order denying respondent's motion to declare the implied-consent statutes unconstitutional and denying his motion to dismiss, but granting his motion to suppress the warrantless seizure of his breath as taken without his consent. The court concluded that respondent's consent was not voluntary merely because he consented to the test by signing the implied-consent advisory.

The state appeals that part of the order granting suppression of the results of respondent's breath test.

D E C I S I O N

"When reviewing pretrial orders on motions to suppress evidence, we 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). The state must demonstrate "clearly and unequivocally that

the trial court has erred in its judgment and that, unless reversed, the error will have a critical impact on the outcome of the trial." *State v. Underdahl*, 767 N.W.2d 677, 681 (Minn. 2009) (quotation omitted).

I.

Critical impact is shown when 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). "Evidence unique in nature and quality is more likely to satisfy the critical impact requirement." *Underdahl*, 767 N.W.2d at 683.

In this case, respondent was charged with driving with an alcohol concentration of .08 or more within two hours of driving, in violation of Minn. Stat. § 169A.20, subd. 1(5). The pretrial order suppressing the results of the breath test clearly has a critical impact on the prosecution's case because it will result in dismissal of one of the charges against respondent and prevent the state from prosecuting respondent on that charge. *See Underdahl*, 767 N.W.2d at 684 (finding critical impact when pretrial orders suppress breath-test results in DWI cases). In addition, breath-test results cannot be duplicated by other evidence. *Id.* The state has met the critical-impact test.

II.

Taking samples of a person's blood, breath, or urine is a search under the Fourth Amendment, requiring a warrant or an exception to the warrant requirement. *See Brooks*, 838 N.W.2d at 568 (citing *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (1989)). The single exigency of dissipation of alcohol in the

bloodstream is an insufficient reason to justify a warrantless search. *McNeely*, 133 S. Ct. at 1563. A person may consent to a warrantless search. *Brooks*, 838 N.W.2d at 568.

The state has the burden to show by a preponderance of the evidence that the person's consent was given "freely and voluntarily." *Id.* To determine whether a person freely and voluntarily consented, 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). The "nature of the encounter" includes how law enforcement came to suspect the person was driving while impaired, whether the person was read the implied-consent advisory, and whether the person was allowed to consult with an attorney. *Id.*

In this case, respondent consented to the breath test. The record includes some limited factual information about the circumstances surrounding respondent's consent. Respondent does not claim that his consent was involuntary and does not cite to any specific facts or circumstances that might suggest coercion or lack of consent. Respondent admits that his case is indistinguishable from *Brooks*, except for the fact that he did not speak with an attorney, while Brooks did consult with an attorney. The fact that a person has consulted with counsel can "reinforce" the conclusion that his consent was not coerced. *Id.* at 571. But, the fact that a person chooses to not consult with counsel does not render consent involuntary without additional facts to establish coercion.

Neither party in this case claims that the record is insufficient to analyze whether, under the totality of the circumstances, respondent's consent was voluntary. Respondent

stipulated to the state's evidence, which included the probable cause packet, and waived the opportunity to present testimony at an omnibus hearing. In *Brooks*, the supreme court concluded that the record was sufficiently developed because the facts on which the court relied were facts to which the parties had stipulated. 838 N.W.2d at 568 n.2. Similarly, here, the parties stipulated to the facts as presented by the state.

Applying the *Brooks* totality-of-the-circumstances analysis to the undisputed facts presented here, we conclude that respondent voluntarily consented to the breath test. Respondent does not claim that his consent was coerced and does not point to any facts that would suggest his consent was coerced or not freely given. Because respondent was given an opportunity to speak with counsel, but declined, and agreed to submit to a breath test after being given the implied-consent advisory, this case falls squarely under *Brooks*. In light of *Brooks*, the district court erred in determining that respondent's consent was not voluntary and in granting respondent's motion to suppress the results of his breath test. The suppression order is reversed, and the matter is remanded for further proceedings.

Reversed and remanded.