STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1693

State of Minnesota,
Appellant,

vs.

Michael John Selle,
Respondent.

Filed May 27, 2014
Reversed and remanded
Hudson, Judge

Hennepin County District Court
File No. 27-CR-12-30407

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

Peter A. MacMillan, Michele Wallace, MacMillan, Wallace, Athanases & Patera, P.A., Minneapolis, Minnesota (for appellant)

James M. Ventura, Wayzata, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

HUDSON, Judge

In this pretrial prosecution appeal, the state argues that the district court erred by determining that the warrantless blood sample obtained from respondent under the implied-consent law was unreasonable and unconstitutional. Because appellant

voluntarily consented to the blood draw, we conclude that the search was not unreasonable, and we reverse and remand.

FACTS

On April 27, 2012, Crystal police officers investigating the scene of a motor vehicle collision observed that one of the drivers, respondent Michael John Selle, showed signs of impairment. The state alleged that officers detected the smell of marijuana coming from the open window of respondent's vehicle and observed that he was unsteady on his feet, agitated, and had slurred speech, body tremors, and dilated pupils. Respondent failed several field sobriety tests, but a preliminary breath test (PBT) did not detect the presence of alcohol. The officer transported respondent to the Crystal police station, where an officer administered a drug-influence evaluation (DRE). The officer concluded that respondent had operated a motor vehicle in violation of the driving-while-impaired (DWI) law and then read respondent the implied-consent advisory:

> OFFICER: All right, Mr. Michael John Selle, I believe you've been driving, operating or controlling a motor vehicle in violation of Minnesota's DWI law and you've been placed under arrest for this offense. Do you understand that?
>
> RESPONDENT: No, I don't understand that, but I guess I'm gonna have to. I'll be fighting it in a court of law so.
>
> OFFICER: Okay. Minnesota law requires you to take a test to determine if you are under the influence of a hazardous or schedule one through five controlled substance or to determine the presence of a controlled substance or its metabolite listed in schedule one or two, other than marijuana or tetrahydrocannabinols. Do you understand that?

RESPONDENT: Okay, read that again? (inaudible) THC and what?

OFFICER: Other than marijuana or tetrahydrocannabinols, do you want me to read the whole paragraph?

RESPONDENT: Yeah, so-

OFFICER: Minnesota law requires you to take a test to determine if you are under the influence of a hazardous or schedule one through five controlled substance or to determine the presence of a controlled substance or its metabolite listed in schedule one or two, other than marijuana or tetrahydrocannabinols.

RESPONDENT: (inaudible).

OFFICER: Refusal to take a test is a crime, [d]o you understand that?

RESPONDENT: Yeah.

OFFICER: Before making your decision about testing, you have the right to consult with an attorney. If you wish to do so, a telephone and directory will be available to you. If you aren't able to contact an attorney, you must make the decision on your own. You must make a decision within a reasonable period of time. Do you understand that?

RESPONDENT: Yeah, a reasonable amount of time is in like right now?

OFFICER: Yeah. If the test is unreasonably delayed, or if you refuse to make a decision, you will be considered to have refused this test. Do you understand that?

RESPONDENT: Yeah.

OFFICER: Do you understand what I just explained?

RESPONDENT: Yes, I do.

OFFICER: Do you wish to consult with an attorney?

RESPONDENT: Yes, I do.

Respondent attempted to call an attorney on his cell phone, but was unable to reach an attorney. After about three minutes passed, the officer asked respondent whether he wanted to proceed or whether he wanted to keep trying to reach an attorney. Respondent stated that he wanted to continue and confirmed that he was finished using the phone. The officer then asked respondent:

OFFICER: All right, will you take the urine test?

RESPONDENT: Blood test.

OFFICER: So you're saying no to the urine test?

RESPONDENT: Yes. That'll take too long for me to pee.

OFFICER: It'll take too long for you to pee?

RESPONDENT: No-no-no, I can try real quick but otherwise, what are you guys gonna take me somewhere for the blood test?

OFFICER: Yes.

RESPONDENT: Yeah, let's just do the blood test.

Respondent was transported to a hospital, where his blood was drawn without a warrant; testing revealed the presence of the controlled substances THC and Alprazolam.

The state charged respondent with misdemeanor driving while impaired, driving while under the influence of a controlled substance, in violation of Minn. Stat. § 169A.20, subd. 1(2) (2010). Respondent initially moved to suppress evidence resulting

from the search, arguing that the implied-consent advisory as read was misleading, that the burden of proof was improperly shifted to him to prove that he used Alprazolam according to its prescribed use, and that the DRE and an officer's testimony were obtained in violation of his *Miranda* rights. After an evidentiary hearing, the district court issued an order denying the motion to suppress.

After the United States Supreme Court issued its decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), respondent renewed his motion to suppress evidence based on that holding. *See id*. at 1563 (holding that the dissipation of alcohol in a defendant's blood did not, by itself, establish exigent circumstances sufficient to excuse police from obtaining a search warrant required under the Fourth Amendment). Respondent argued that, because his consent to testing was not voluntary, and no other warrant exception applied, he was compelled to submit to testing in violation of his Fourth Amendment rights.

The district court considered written arguments and granted the motion to suppress. The district court applied the totality-of-the-circumstances test articulated in *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2048 (1973), and concluded that the state failed to meet its burden to establish that respondent freely and voluntarily consented to the search. The district court noted that when respondent was first asked whether he understood the circumstances of his arrest, he stated that he did not; and that although his right to counsel may have been vindicated, the threat of serious criminal prosecution that accompanies refusal weighed against the voluntariness of the search.

The state challenged the order in this court, which stayed the appeal pending release of the Minnesota Supreme Court's decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 124 S. Ct. 1799 (2014). Following *Brooks*, we reinstated this appeal and permitted the parties to submit supplemental briefing.

D E C I S I O N

The state may appeal a pretrial order in a criminal case if the district court's alleged error, unless reversed, will have a critical impact on the outcome of trial. Minn. R. Crim. P. 28.04, subds. 1(1), 2(1). "[T]he standard for critical impact is that the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *State v. Edrozo*, 578 N.W.2d 719, 723 (Minn. 1998) (quotation omitted). Dismissal of a charge following the suppression of evidence meets the critical-impact standard. *State v. Holmes*, 569 N.W.2d 181, 184 (Minn. 1997). Because the district court dismissed the DWI charge after suppressing the evidence, the state has met the critical-impact test.

"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). The state's challenge to the district court's suppression order presents a question of law, and we examine the facts and review de novo whether the district court erred by suppressing the evidence. *Id.*

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are unreasonable, unless an exception applies. *State v. Flowers*, 734 N.W.2d

239, 248 (Minn. 2007). The state has the burden to establish the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001). One exception to the warrant requirement is voluntary consent. *Schneckloth*, 412 U.S. at 219, 93 S. Ct. at 2043–44; *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011).

"Taking blood and urine samples from someone constitutes a 'search' under the Fourth Amendment." *Brooks*, 838 N.W.2d at 568. In *Brooks*, the Minnesota Supreme Court held that a totality-of-the-circumstances test applies in assessing whether a defendant voluntarily consented to chemical testing. *Id.* Whether consent was voluntary is a question of fact, and a totality-of-the-circumstances analysis requires evaluation of "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). 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 he had the right to consult with an attorney. *Brooks*, 838 N.W.2d at 569. But a driver's consent is not coerced as a matter of law simply because he or she is advised of criminal consequences for test refusal. *Id.* at 570.

Here, although *Brooks* had not yet been issued, the district court appropriately analyzed the issue of respondent's consent under the totality-of-the-circumstances standard later enunciated in *Brooks*. *See Schneckloth*, 412 U.S. at 227, 93 S. Ct. at 2048. We disagree, however, with the district court's determination that, based on that standard, respondent did not voluntarily consent to testing.

In *Brooks*, the supreme court held that the defendant consented to a warrantless search of his blood and urine, based on circumstances that he was properly read the implied-consent advisory, had access to a telephone and spoke to an attorney, and agreed to testing. *Brooks*, 838 N.W.2d at 570–72. Similarly, we conclude that in this case, the totality of the circumstances—"the nature of the encounter, the kind of person [respondent] is, and what was said and how it was said"—supports a determination, as a matter of law, that respondent voluntarily consented to testing. *Deszo*, 512 N.W.2d at 880. Respondent was seized at the scene of an accident when he displayed signs of obvious impairment. The arresting officer read him the implied-consent advisory as set out by statute. *See* Minn. Stat. § 169A.51, subd. 2 (2010) (listing requirements of implied-consent advisory); *see also Hallock v. Comm'r of Pub. Safety*, 372 N.W.2d 82, 83 (Minn. App. 1985) (stating that "[u]niformity in giving the implied consent advisory is highly encouraged"). Although respondent initially expressed that he did not understand his arrest for DWI, after hearing the advisory and being provided with an opportunity to contact an attorney, he declined a urine test but unequivocally agreed to take a blood test.

Respondent argues that, unlike the defendant in *Brooks*, he was not able to consult with an attorney before deciding whether to submit to testing. In *Brooks*, the supreme court noted that the defendant's "consult[ation] with counsel before agreeing to [testing] reinforces the conclusion that his consent was not illegally coerced." *Brooks*, 838 N.W.2d at 571. But a defendant's consultation with an attorney is only one factor in the analysis of whether consent was voluntary. *See id.* Here, respondent has not argued that his right to counsel was not vindicated. The record shows that the officer provided ample

opportunity for him to contact an attorney, and when he finished using the phone, asked whether he wished to proceed or to try again to reach an attorney. Although declining a urine test, respondent replied unequivocally that he would take a blood test. We conclude that the totality of the circumstances shows, as a matter of law, that respondent voluntarily consented to the search, and the district court erred by suppressing the evidence.

Reversed and remanded.