STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1896

Jeffrey Ross Lindquist, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed June 23, 2014
Reversed
Reilly, Judge

Dakota County District Court
File No. 19HA-CV-13-2549

James L. Blumberg, Apple Valley, Minnesota (for respondent)

Lori Swanson, Attorney General, Jeffrey S. Bilcik, Kristi Ann Nielsen, Assistant Attorneys General, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Reilly, Judge.

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

REILLY, Judge

Appellant Minnesota Commissioner of Public Safety appeals the district court's rescission of respondent Jeffrey Ross Lindquist's driver's license revocation. On appeal, commissioner argues that the district court erred when it concluded that Lindquist's

consent to a breath test was not voluntary. Because Lindquist voluntarily consented to the breath test, we reverse.

FACTS

The facts are undisputed.[1] Around 1:00 a.m. on May 5, 2013, a Rosemount police officer noticed a vehicle driven by Lindquist traveling 40 miles per hour in a 30-mile-per-hour speed zone. The officer pulled Lindquist over and began questioning him about his speed. While speaking with Lindquist, the officer noticed a strong odor of cigarette smoke coming from inside the car; that Lindquist's eyes appeared glazed, watery, and red; and that Lindquist's speech was slightly slurred. When asked about any alcohol intake, Lindquist told the officer that he had consumed "a couple mixed drinks" that evening. The officer suspected that Lindquist was under the influence of alcohol and conducted field sobriety testing. The officer then administered a preliminary breath test. The breath tested indicated an alcohol concentration of .123.

The officer transported Lindquist to the Rosemount Police Department, where he read the implied-consent advisory to Lindquist. The officer informed Lindquist that Minnesota law required that he take a test to determine if he was under the influence of alcohol, that refusal to take a test was a crime, and that he had a right to consult with an attorney before making a decision about taking the test. After Lindquist requested to speak with his attorney, the officer provided phone directories and a telephone to him at 1:48 a.m. At 2:29 a.m., Lindquist finished speaking with his attorney and said that he

[1] At the July 19, 2013 implied-consent hearing, both parties stipulated to the facts contained in the police reports. Additionally, Lindquist agreed to waive all issues but the *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), issue at the hearing.

would take the breath test. An officer administered a breath test, and the test revealed an alcohol-concentration reading of .10. Lindquist signed the notice and order of license revocation, and commissioner revoked his driver's license and impounded his license plates.

On June 3, 2013, Lindquist filed an implied-consent petition, challenging the revocation of his license and impoundment of his license plates. He also filed a motion to suppress the breath test results based on the lack of a warrant. On August 5, 2013, the district court issued an order rescinding the revocation. The district court found that there were no exigent circumstances in this case to justify a warrantless search and that Lindquist did not voluntarily consent to the breath test. This appeal follows.

D E C I S I O N

Commissioner argues, among other things, that the totality of the circumstances demonstrated that Lindquist consented to the breath test. Commissioner claims that the Minnesota Supreme Court's recent decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014), disposes of the argument that Lindquist made to the district court—that his consent was involuntarily obtained because he was told test refusal was a crime.

The federal and state constitutions guarantee the right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. A breath test is a search. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413 (1989). When the facts are undisputed, "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). Warrantless searches are unreasonable unless the state proves that an exception to the warrant requirement applies. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). Free and voluntary consent is an exception to the warrant requirement. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011).

Whether consent is voluntary must be determined case by case based on the totality of the circumstances. *State v. Lemert*, 843 N.W.2d 227, 233 (Minn. 2014) (citing *Missouri v. McNeely*, 133 S. Ct. 1552, 1536 (2013)). Voluntary consent is that consent given without coercion, such that a reasonable person would feel free to decline law enforcement's requests or otherwise terminate the encounter. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994); *see Schneckloth v. Bustamonte*, 412 U.S. 218, 225-26, 93 S. Ct. 2041, 2047 (1973) (stating that a suspect is coerced when "his will has been overborne and his capacity for self-determination critically impaired").

The supreme court recently held that a driver's consent to testing may be voluntary even if law enforcement informs the driver that refusal to submit to testing is a crime. *Brooks*, 838 N.W.2d at 568. The *Brooks* court acknowledged that chemical testing under the DWI and implied-consent laws is a search subject to Fourth Amendment protections; as such, a warrant is required unless the search falls under an exception to the warrant requirement. *Id.* No warrant, however, is necessary if the subject of the search validly consents to the warrantless search. *Id.*

In response to defendant's argument that he was illegally coerced into testing because he was told that test refusal is a crime, the *Brooks* court stated that the existence of a penalty for refusal does not coerce a driver to take a test. *Id.* at 570-71 ("[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."). Rather, whether consent is voluntary or coerced must be determined by examining "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.

Similar to the circumstances in *Brooks*, nothing in the record suggests that Lindquist's consent to the breath test was not voluntary. The officer initiated the traffic stop after observing Lindquist driving above the posted speed limit. After stopping Lindquist, the officer suspected that Lindquist was under the influence of alcohol due to his outwardly exhibited signs of impairment; and neither party disputes the legality of the stop and the arrest on appeal.

At the police station, the officer read Lindquist the implied-consent advisory and informed him of his right to counsel. Lindquist requested to speak with an attorney, and an officer provided a telephone and phone directories to him, and Lindquist spent almost 40 minutes on the telephone. Lindquist then consented to a breath test. Lastly, the record does not show that law enforcement subjected Lindquist to any type of coercion, extended questioning, or prolonged custody. And Lindquist's consultation with an attorney before consenting buttresses a finding of voluntariness. *See Brooks*, 838 N.W.2d at 571 ("The fact that Brooks consulted with counsel before agreeing to take each test reinforces the conclusion that his consent was not illegally coerced."). Accordingly, based on the totality of the circumstances, Lindquist voluntarily consented to the search and a search warrant was not required.

Lastly, commissioner raises additional arguments concerning the validity of Minnesota's implied consent statute, the effect of *Missouri v. McNeely* on the controlling statutes, and the exclusionary rule. Because we hold that Lindquist voluntarily consented to the breath test, this issue is dispositive and we need not address commissioner's other arguments. Thus, we reverse the district court's order rescinding the revocation of Lindquist's driver's license.

Reversed.