STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1926

Erin Anthony Ryan, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed June 2, 2014
Reversed
Johnson, Judge

Dakota County District Court
File No. 19AV-CV-12-3651

David L. Ayers, Ayers & Riehm, P.A., Mendota Heights, Minnesota (for respondent)

Lori Swanson, Attorney General, Kristi Nielsen, Assistant Attorney General, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

JOHNSON, Judge

The commissioner of public safety revoked Erin Anthony Ryan's driver's license after he was arrested for driving while impaired (DWI), and a breath test showed that his alcohol concentration was 0.08. The district court rescinded the commissioner's

revocation on the ground that Ryan's consent to the breath test was not voluntary for Fourth Amendment purposes. We conclude that the totality of the circumstances shows that Ryan voluntarily consented to the breath test and, therefore, reverse.

FACTS

In the early morning hours of November 8, 2012, in the parking lot of a bar in the city of Burnsville, Ryan struck an unoccupied vehicle with his own vehicle and drove away. Sergeant Steven Stoler observed the incident, pursued Ryan as he drove away, and eventually stopped Ryan's vehicle to investigate the suspected hit-and-run. While speaking with Ryan, Sergeant Stoler detected a strong odor of alcohol coming from the vehicle. Sergeant Stoler also noticed that Ryan's speech was slurred and that his eyes were glassy, watery, and bloodshot. Ryan admitted that he had been drinking. Ryan failed several field-sobriety tests, and a preliminary breath test indicated an alcohol concentration of 0.10.

Sergeant Stoler arrested Ryan for DWI and took him to the Burnsville Police Department, where he read Ryan the implied-consent advisory. Ryan indicated that he understood the advisory. When Sergeant Stoler asked Ryan whether he wished to speak to an attorney, Ryan responded in the affirmative. Sergeant Stoler provided Ryan with a telephone and numerous telephone books. Ryan stared straight ahead but made no attempt to speak to an attorney. Sergeant Stoler reminded Ryan that this was his opportunity to contact an attorney if he wished to do so. Ryan said that he would contact an attorney at a later date.

Sergeant Stoler then asked Ryan whether he would submit to a breath test. Ryan responded, "Yeah, sure." The breath test showed an alcohol concentration of 0.08. Ryan was served with a notice and order of revocation of his driver's license, which he signed.

In December 2012, Ryan petitioned the district court for judicial review of the commissioner's revocation of his driver's license. *See* Minn. Stat. § 169A.53, subd. 2 (2012). In July 2013, the district court conducted an implied-consent hearing. Ryan was represented by counsel but was not personally present. At the outset of the hearing, Ryan's attorney identified two issues: the validity of the investigatory stop and "the *McNeely* issue." The parties stipulated to an exhibit consisting of the implied-consent peace-officer's certificate, the implied-consent advisory, Ryan's breath-test results, the criminal complaint, and Sergeant Stoler's police report. Sergeant Stoler testified about the circumstances that caused him to stop Ryan and to arrest him. In August 2013, the district court issued an order rejecting Ryan's challenge to the investigatory stop but rescinding the commissioner's order of revocation on the ground that the warrantless breath test was unlawful because Ryan did not voluntarily consent to it. The commissioner appeals.

D E C I S I O N

The commissioner argues that the district court erred by rescinding Ryan's license revocation. The commissioner contends that the district court's order is inconsistent with *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014), which was issued by the supreme court after the district court issued its order. The

commissioner further contends that the totality of the circumstances shows that Ryan voluntarily consented to the breath test.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. A test of a person's breath constitutes a search for purposes of the Fourth Amendment and, thus, requires either a warrant or an exception to the warrant requirement. *Skinner v. Railway Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413 (1989); *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (2013), *as recognized in Brooks*, 838 N.W.2d at 567. The exigency created by the dissipation of alcohol in a suspect's body is not a *per se* exception to the warrant requirement. *McNeely*, 133 S. Ct. at 1568. But the consent of the person whose breath is tested is an exception to the warrant requirement. *Brooks*, 838 N.W.2d at 568. In an implied-consent case, the commissioner bears the burden of showing by a preponderance of the evidence that the driver voluntarily consented to chemical testing. *Johnson v. State, Comm'r of Pub. Safety*, 392 N.W.2d 359, 362 (Minn. App. 1986).

In this case, the district court concluded, as a matter of law, that Ryan did not voluntarily consent to the breath test because, in light of the criminal penalties for refusing a test, "consent given under such circumstances cannot be truly voluntary." The

district court did not have the benefit of the supreme court's opinion in *Brooks*, which was issued three months after the district court's order and expressly rejected the district court's reasoning. *See* 838 N.W.2d at 570. In *Brooks*, the supreme court held that a driver's consent is not coerced as a matter of law simply because the driver would face criminal consequences if he were to refuse testing. *Id.* Instead, "[w]hether consent is voluntary is determined by examining the totality of the circumstances." *Id.* at 568 (quotation omitted). Thus, in light of *Brooks*, the district court erred by holding that Ryan's consent was not voluntary as a matter of law. *See id.* at 570.

In *Brooks*, the supreme court applied the totality-of-the-circumstances test and concluded that Brooks's consent was voluntary. *Id.* at 572. The supreme court stated that the relevant circumstances include "'the nature of the encounter, the kind of person the defendant is, and what was said and how it was said.'" *Id.* at 569 (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)). When considering the nature of the encounter, a court should ask 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. *Id.* The supreme court identified three primary reasons why Brooks's consent was voluntary and not coerced. First, the supreme court noted that Brooks was read the implied-consent advisory, which "made clear to him that he had a choice of whether to submit to testing." *Id.* at 572. The supreme court reasoned that "[w]hile an individual does not necessarily need to know he or she has a right to refuse a search for consent to be voluntary, the fact that someone submits to the search after being told that he or she can say no to the search supports a finding of

voluntariness." *Id.* Second, the supreme court noted that Brooks had "the ability to consult with counsel." *Id.* at 571-72. The supreme court reasoned that "the ability to consult with counsel about an issue supports the conclusion that a defendant made a voluntary decision." *Id.* at 572. Third, the supreme court noted that Brooks "was neither confronted with repeated police questioning nor was he asked to consent after having spent days in custody." *Id.* at 571 (citing *State v. High*, 287 Minn. 24, 27-28, 176 N.W.2d 637, 639 (1970)). The supreme court reasoned that "nothing 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." *Id.* (quotation marks omitted).

In this case, the undisputed facts indicate that Ryan voluntarily consented to the breath test in essentially the same manner as Brooks. First, Ryan was read the implied-consent advisory and indicated that he understood it. Second, Ryan was given the opportunity to speak with an attorney. Third, Ryan was not "confronted with repeated police questioning," and there is nothing in the record to suggest that Ryan "was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired." *See id.* Thus, the totality of the circumstances indicates that Ryan voluntarily consented to the breath test.

Ryan does not argue that the factual circumstances of this case are distinguishable from the factual circumstances of *Brooks*. Instead, Ryan contends that the supreme court's opinion in *Brooks* was wrongly decided. Such a contention obviously is without merit because this court is bound by the decisions of the supreme court. *See Haugen v. Superior Dev., Inc.*, 819 N.W.2d 715, 720 (Minn. App. 2012); *State v. M.L.A.*, 785

N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010); *State v. Ward*, 580 N.W.2d 67, 74 (Minn. App. 1998). Ryan seems to rely on the possibility that the United States Supreme Court might grant a petition for certiorari and thereafter reverse the Minnesota Supreme Court. After Ryan's appeal was submitted, however, the Supreme Court denied Brooks's petition for certiorari. *See Brooks v. Minnesota*, 134 S. Ct. 1799 (2014). Thus, Ryan's argument necessarily fails.

In sum, the district court erred by rescinding the revocation of Ryan's driver's license on the ground that the breath test violated his Fourth Amendment rights. Based on our examination of the totality of the circumstances, we conclude that Ryan voluntarily consented to the breath test. In light of that conclusion, we need not consider the commissioner's argument that chemical testing under the implied-consent law is *per se* reasonable or the commissioner's argument that the exclusionary rule does not apply.

Reversed.