STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1984

State of Minnesota,
Appellant,

vs.

Daniel John Seifert,
Respondent.

Filed April 7, 2014
Reversed and remanded
Halbrooks, Judge

Rice County District Court
File No. 66-CR-13-1140

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

Paul Beaumaster, Rice County Attorney, Terence Swihart, Assistant County Attorney, Faribault, Minnesota (for appellant)

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for respondent)

Considered and decided by Cleary, Chief Judge; Halbrooks, Judge; and Schellhas, Judge.

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

HALBROOKS, Judge

The state challenges the suppression of evidence from respondent's breath test, arguing that respondent freely and voluntarily consented to the search, respondent had no

expectation of privacy in his breath, and a good-faith exception to the exclusionary rule should apply. Because we conclude that respondent's consent was freely and voluntarily given, we reverse and remand on that basis and do not reach the state's other arguments.

FACTS

In the evening of April 26, 2013, respondent Daniel Seifert was pulled over by a state trooper for weaving and driving over the fog line several times. The trooper suspected Seifert of driving while impaired (DWI) because Seifert smelled of alcohol; had glossy, watery, red eyes; and appeared to be concealing something in a place in the car where an open can of beer was later found. Seifert acknowledged that he had been drinking that evening.

The trooper asked Seifert to step out of the vehicle and administered the horizontal gaze nystagmus, walk-and-turn, and one-leg-stand tests. Seifert was arrested after he performed poorly on the field sobriety tests and scored .135 on a preliminary breath test. The trooper read the implied-consent advisory to Seifert at the Rice County Law Enforcement Center, and Seifert acknowledged that he understood it. After consulting with an attorney, Seifert agreed to take a breath test. He failed the breath test with a reading of .14 alcohol concentration.

Seifert was charged with operating a motor vehicle under the influence of alcohol, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2012), and possession of an open bottle, in violation of Minn. Stat. § 169A.35, subd. 3 (2012). Seifert moved the district court to suppress the evidence of the breath test and to dismiss the DWI charge on the

ground that the trooper's failure to seek a warrant before subjecting Seifert to a breath test violated his Fourth Amendment rights.

The district court granted the suppression motion and dismissed the DWI charge for lack of probable cause, but stayed its decision at the state's request pending our supreme court's decision in *State v. Brooks*. Seifert challenged the stay, asserting that it violated his right to a speedy trial and noting that the state could avail itself of the expedited pretrial appeal procedures under Minn. R. Crim. P. 28.04. The district court then amended its order to rescind the stay, and reinstated the DWI charge because the charge under Minn. Stat. § 169A.20, subd. 1(1), did not require a specific alcohol concentration as an element.

With respect to the breath test, the district court determined that the trooper's failure to obtain a warrant before administering the breath test violated Seifert's Fourth Amendment rights. Specifically, the district court found that (1) Seifert did not voluntarily consent to the test because he did so after being informed that refusal is a crime, (2) no exigency existed to take a breath sample without a search warrant, and (3) there is no good-faith exception to the exclusionary rule under Minnesota law. This appeal follows.

D E C I S I O N

Because the facts are undisputed, the district court's pretrial suppression order presents a question of law, which we review de novo. *See State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). We first consider the threshold, jurisdictional question of whether the suppression of the evidence has a critical impact on the state's ability to

prosecute the defendant. *See State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998); *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004). 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). Seifert argues that the breath-test evidence here has minimal bearing on the ultimate issues before the court. We disagree.

When analyzing critical impact, an appellate court first examines all the admissible evidence available to the state in order to determine what impact the absence of the suppressed evidence will have. *State v. Zanter*, 535 N.W.2d 624, 630-31 (Minn. 1995). An appellate court then examines

> the inherent qualities of the suppressed evidence itself, its relevance and probative force, its chronological proximity to the alleged crime, its effect in filling gaps in the evidence viewed as a whole, its quality as a perspective of events different than those otherwise available, its clarity and amount of detail and its origin.

In re Welfare of L.E.P., 594 N.W.2d 163, 168 (Minn. 1999) (citation omitted). Suppressed evidence that is unique in nature and quality is more likely to meet the critical-impact test. *Id.*

When viewed as a whole, the breath-test evidence here is unique in nature and quality in that it is the only evidence that is not dependent on the trooper's observations. Despite the fact that a specific alcohol concentration is not an element of the charged offense, we conclude that suppression of this evidence significantly reduces the likelihood of a successful prosecution. *See Kim*, 398 N.W.2d at 551. We therefore turn

to whether the suppression of the evidence constitutes error. *See Scott*, 584 N.W.2d at 416.

The state argues that the district court erred by suppressing Seifert's breath-test results because (1) his consent was given freely and voluntarily, (2) he did not have an expectation of privacy in his breath, and (3) a good-faith exception to the exclusionary rule should apply.

A warrantless search is valid if the person voluntarily consents to the search. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013), *pet. for cert. filed* (U.S. Feb. 24, 2014) (No. 13-1028). The state bears the burden of showing by a preponderance of the evidence that the defendant freely and voluntarily consented. *Id.* Whether consent is given freely and voluntarily is determined by examining the "totality of the circumstances." *Id*. (quotation omitted). A driver's decision to take a test is not coerced or extracted "simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Id.* at 570.

The district court did not have the benefit of the supreme court's *Brooks* decision when it ruled that Seifert's "consent was 'extracted' and not given freely and voluntarily" because Seifert was informed that refusal to submit to a test is a crime. But the supreme court stated in *Brooks* that the implied-consent advisory by itself does not coerce consent. *Id*. at 570. The issue of consent must be evaluated based on 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 (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)).

Applying the *Brooks* totality-of-the-circumstances analysis to the undisputed facts here, we conclude that Seifert voluntarily consented to the breath test. The facts of this case are very similar to those in *Brooks*. In *Brooks*, the appellant was arrested three different times for driving under the influence, was read the implied-consent advisory each time, spoke with an attorney each time, and submitted to testing each time. *Id.* at 569-70. Based on these facts, the supreme court held that the appellant freely and voluntarily consented in each instance. *Id.* at 572.

Similarly, in this case, "the nature of the encounter, the kind of person [Seifert] is, and what was said and how it was said" indicate that Seifert freely and voluntarily consented to take the breath test. *See id.* at 569 (quotation omitted). The trooper observed Seifert weaving and driving over the fog line and detected a moderate odor of alcohol on Seifert's breath when they spoke. After Seifert performed poorly on various field sobriety tests and failed a preliminary breath test, he was arrested. The trooper then read Seifert the implied-consent advisory, which explained that Minnesota law requires him to submit to a test, that refusing the test is a crime, and that he had the right to speak with an attorney. Seifert made a phone call and spoke with an attorney. He then agreed to take the breath test. That Seifert "consulted with counsel before agreeing to take [the] test reinforces the conclusion that his consent was not illegally coerced." *See id.* at 571.

In sum, the totality of the circumstances demonstrates that Seifert voluntarily consented to the breath test. No evidence suggests that Seifert was coerced to submit to the breath test, and the record reflects that the trooper properly followed all of the procedures established under the implied-consent law. Because Seifert's consent was

given freely and voluntarily, a search warrant was not required. Because we conclude that the district court erred by suppressing the evidence of the breath test, we reverse and remand on that basis. Our resolution of this issue makes it unnecessary to reach the state's arguments that Seifert had no expectation of privacy in his breath or that a good-faith exception to the exclusionary rule should apply.

Reversed and remanded.