STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2226

Timothy Leroy Carlson, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed June 30, 2014
Reversed
Chutich, Judge

Cass County District Court
File No. 11-CV-13-1460

Richard Kenly, Backus, Minnesota (for appellant)

Lori A. Swanson, Attorney General, James E. Haase, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Chutich, Judge; and Huspeni, Judge.*

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

CHUTICH, Judge

The Commissioner of Public Safety challenges the district court's rescission of Carlson's driver's license revocation, contending that the district court erred by

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

suppressing evidence of Carlson's breath test. Because Carlson voluntarily consented to the test under the supreme court's holding in *State v. Brooks*, we reverse.

FACTS

On July 21, 2013, Officer Shawn Birr saw a Chevy Silverado on Highway 87 in Backus "cross the fog line several times" and "jerk[] . . . back and forth in the lane." Officer Birr stopped the truck and identified the driver as respondent Timothy Carlson. The officer smelled "the strong odor of an alcoholic beverage coming from [Carlson's] breath," saw that Carlson had "bloodshot watery eyes," and noticed Carlson had "slurred speech." Carlson also had "poor balance" and admitted to having "a few drinks."

Officer Birr asked Carlson to perform field-sobriety tests, but Carlson responded that "he was not ok to drive and would not be able to pass any test." Officer Birr observed signs of impairment while performing the horizontal gaze nystagmus test on Carlson, and Carlson agreed to take a preliminary breath test (PBT). The PBT revealed an alcohol concentration of .168. Because Officer Birr believed he had probable cause to arrest Carlson for driving under the influence, he arrested Carlson and took him to the Cass County Jail.

The officer read Carlson the implied-consent advisory and told Carlson that he could call an attorney. Carlson called his attorney and left a message. Officer Birr asked Carlson if he wanted to contact another attorney, and Carlson said, "[N]o let['s] just get this done," and agreed to submit to a breath test. The breath test revealed an alcohol concentration level of .18.

Because Carlson's alcohol concentration was over the legal limit, the Commissioner of Public Safety (commissioner) revoked Carlson's driver's license. Carlson petitioned for judicial review of the revocation of his driver's license and moved to suppress evidence of the breath test. Both parties agreed to waive a hearing and to have the case decided based on the police reports, implied-consent advisory, and testing records.

In September 2013, the district court granted Carlson's motion to suppress and rescinded the revocation of his driver's license. This appeal followed.

D E C I S I O N

The commissioner asserts that the district court erred when it found that Carlson did not voluntarily consent to the breath test. The 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), rebuts the argument that Carlson made to the district court—that his consent was involuntarily obtained in violation of the Fourth Amendment because he was told it was a crime to refuse the test. Because the totality of the circumstances shows that Carlson voluntarily consented to the breath test, we reverse the district court's ruling.

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). We must "independently analyze the undisputed facts to determine whether evidence resulting from the search should be suppressed." *Id.*

The United States and Minnesota 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). 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). Consent is an exception to the warrant requirement and must be given freely and voluntarily. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011).

The supreme court recently held in *Brooks* that a driver may validly consent to chemical testing after being informed that refusal to submit to testing is a crime. 838 N.W.2d at 568. The *Brooks* court acknowledged that chemical testing under the implied-consent statute is a search subject to Fourth Amendment protections. *Id.* at 568. Unless the search falls under an exception to the warrant requirement, a warrant is required for chemical testing. *Id.* No warrant is necessary if, based on the totality of the circumstances, a person consents to chemical testing after being read the implied-consent advisory. *Id.* In license-revocation cases, the commissioner has the burden of proving by a preponderance of the evidence that a search was constitutional. *Diede*, 795 N.W.2d at 846; *see Johnson v. Comm'r of Pub. Safety*, 392 N.W.2d 359, 362 (Minn. App. 1986).

Following *Brooks*, we begin our totality-of-the-circumstances analysis by evaluating the statutory requirements of the implied-consent law, which are: (1) anyone who drives a motor vehicle in Minnesota consents to chemical testing to determine the presence of alcohol; (2) before requiring testing, a peace officer must have probable cause to believe a person has been driving while impaired by alcohol; and (3) an advisory

must be given explaining that the law requires a driver suspected of driving while impaired to take a test, the person may consult with an attorney, and that consequences are imposed for refusing. *Id.* at 569. If these statutory requirements are met, we then consider other relevant circumstances to determine whether a person consented to testing. *Id.* Among these are "'the nature of the encounter, the kind of person the defendant is, and what was said and how it was said.'" *Id.* (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)).

The existence of a criminal penalty for test refusal does not unconstitutionally coerce a driver to take a chemical test. *Id.* at 570. The implied-consent advisory makes it clear to an individual "that he ha[s] a choice of whether to submit to testing." *Id.* at 572. Someone in custody may be more susceptible to coercion, but arrest alone is not sufficient to negate consent, particularly if the person is not subjected to repeated questioning or facing a prolonged period in custody. *Id.* at 571.

The district court did not have the benefit of *Brooks* when it made its ruling in Carlson's case. But applying the supreme court's analysis here, the record demonstrates that Officer Birr complied with all of the statutory requirements of the implied-consent law, and the totality of the circumstances shows that Carlson voluntarily consented to the breath test. The facts of the stop and arrest are not in dispute on appeal. Officer Birr initiated the traffic stop after he observed Carlson crossing the fog line. Upon stopping Carlson, Officer Birr suspected that Carlson was under the influence of alcohol because he smelled like alcoholic beverages, had slurred speech, had bloodshot, watery eyes, and had trouble balancing. Carlson's PBT showed a result of .168.

After being arrested, Officer Birr properly read Carlson the implied-consent advisory and informed Carlson of his right to consult with an attorney. Carlson tried to call his attorney, and he did leave a message for his attorney. After Officer Birr asked Carlson whether he wanted to call another attorney, Carlson said no and agreed to take a breath test. Nothing in the record suggests that Carlson was subjected to any type of coercion, extended questioning, or prolonged custody by the police officer. Based on the totality of the circumstances, we conclude that Carlson voluntarily consented to the breath test and that a search warrant was not required.

Reversed.