STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2241

Shawn David Greene, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed June 9, 2014
Affirmed
Larkin, Judge

Becker County District Court
File No. 03-CV-13-507

Richard Kenly, Kenly Law Firm, Backus, Minnesota (for appellant)

Lori Swanson, Attorney General, James Haase, Adam Kujawa, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Stauber, Judge.

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

LARKIN, Judge

Appellant challenges the district court's decision sustaining the revocation of his driver's license. We affirm.

FACTS

Respondent commissioner of public safety revoked appellant Shawn David Greene's driver's license after he was arrested for driving while impaired and refused to submit to a chemical test, under Minnesota's implied-consent law, to determine his alcohol concentration. Greene challenged his license revocation in district court and moved "to have Minnesota Statutes § 169A.20 (DWI Statute) and § 169A.53 (Implied Consent Statute) declared unconstitutional." The district court held a hearing, at which Greene limited the issue to "whether Minnesota's test refusal statute is unconstitutional in light of the United States Supreme Court decision in *Missouri v. McNeely*," 133 S. Ct. 1552 (2013). Greene waived all other issues. In a written order, the district court concluded that "Minnesota's test refusal statute remains constitutional" and denied Greene's request to rescind the revocation of his driver's license. Greene appeals.

D E C I S I O N

Greene challenges the district court's decision sustaining the revocation of his driver's license. The sole issue that was raised and determined in district court is whether Minnesota's test refusal statute is unconstitutional in light of the United States Supreme Court's decision in *McNeely*. Although Greene challenges the district court's ruling regarding the constitutionality of the "test refusal" statute, Greene does not identify the specific statute that is at issue.[1] Moreover, he does not articulate the standard of review that applies to a constitutional challenge. Because the constitutional challenge was the

[1] In district court, Greene challenged the constitutionality of Minn. Stat. § 169A.53 (2012), which provides for administrative and judicial review of license revocation.

only issue that Greene raised in district court and the district court decided that issue, we construe his appellate arguments as a constitutional challenge to Minn. Stat. § 169A.52, subd. 3(a) (2012), which provides for license revocation "[u]pon certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and that the person refused to submit to a test."

The constitutionality of a statute presents a question of law, which appellate courts review de novo. *State v. Cox*, 798 N.W.2d 517, 519 (Minn. 2011). "Minnesota statutes are presumed constitutional and . . . [an appellate court's] power to declare a statute unconstitutional must be exercised with extreme caution and only when absolutely necessary." *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). "The party challenging a statute has the burden of demonstrating, beyond a reasonable doubt, that a constitutional violation has occurred." *Id*.

In his appellate brief, Greene argues: (1) "The blood alcohol testing conducted by the state is a search subject to the protections guaranteed by the Fourth Amendment of the United States Constitution and article I, section 10 of the Minnesota state constitution"; (2) "If there is no exception to the warrant requirement, the police must obtain a warrant before a search"; (3) "The implied consent advisory does not imply consent as a matter of law and allow the state to ignore the warrant requirement"; and (4) "The remedy for a violation of [his] Fourth Amendment protections is dictated by Minn. Stat. [§] 169A.53." Greene also contends that he "had a right to refuse an

unreasonable, warrantless search," and asserts that "[o]ne cannot be punished for exercising a constitutional right."

At oral argument before this court, Greene clarified his constitutional theory. Essentially, he argues for constitutional relief based on the following contentions. First, a person cannot be criminally punished for exercising his constitutional right to refuse an illegal search. Second, the threat of a criminal sanction for refusing an illegal search is an improper threat, and Minnesota's implied-consent advisory contains such a threat. Third, the threat of a criminal sanction for refusing to submit to chemical testing is unconstitutional, which makes an attendant driver's license revocation based on the refusal unconstitutional. Fourth, because the state used the threat of criminal prosecution in the implied-consent advisory in this case, the resulting revocation of Greene's driver's license for test refusal is improper. Although Greene articulated a legal theory, he did not cite legal authority to support any of the contentions that underlie his theory.

Greene has not met his "heavy burden" of demonstrating that the implied-consent statute is unconstitutional beyond a reasonable doubt. *See State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990) (stating that "the challenger bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional"). First, *McNeely* is not dispositive. The holding of *McNeely* does not address the constitutional validity of implied-consent statutes. *McNeely* held only that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *McNeely*, 133 S. Ct. at 1568.

Second, even though the *McNeely* holding does not address the constitutional validity of implied-consent statutes, the Supreme Court spoke approvingly of such statutes. In explaining that its holding will not "undermine the governmental interest in preventing and prosecuting drunk-driving offenses," the Supreme Court described "legal tools" available to states "to secure BAC [(blood alcohol concentration)] evidence without undertaking warrantless nonconsensual blood draws." *Id*. at 1566. Among the tools are "implied consent laws" adopted by "all 50 States . . . that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id*. The Supreme Court also noted that "[s]uch laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id*. Although dictum, the Supreme Court's apparent approval of implied-consent statutes is entitled to weight. *See In re Estate of Bush*, 302 Minn. 188, 207, 224 N.W.2d 489, 501 (1974) ("Even dictum, if it contains an expression of the opinion of the court, is entitled to considerable weight.").

Third, the Minnesota Supreme Court recently addressed the constitutional validity of Minn. Stat. § 169A.51, subd. 1(a) (2012), in *State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). Section 169A.51, subdivision 1(a), part of the Minnesota Implied Consent Law, states that

> [a]ny person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance.

Minn. Stat. § 169A.51, subd. 1(a). In *Brooks*, the supreme court conducted a totality-of-the-circumstances analysis and held that Brooks, a DWI defendant, "voluntarily consented to the searches at issue in [the] case." 838 N.W.2d at 572. But the supreme court also addressed Brooks's alternative argument that "even if he were found to have consented by operation of the implied consent statute, Minn. Stat. § 169A.51, subd. 1(a), . . . the statute itself is unconstitutional." *Id*. Brooks contended "that the Legislature does not have the power to imply someone's consent to waive his or her Fourth Amendment rights as a condition of granting the privilege to drive in Minnesota." *Id*. The supreme court stated that "Brooks's constitutional argument fails." *Id*. The supreme court explained that

> Brooks's argument is inconsistent with the Supreme Court's discussion of implied consent laws in *McNeely*. As the Supreme Court recognized in *McNeely*, implied consent laws, which "require motorists, as a condition of operating a motor vehicle within the State, to consent to blood alcohol concentration testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense," are " *legal tools*" states continue to have to enforce their drunk driving laws. [*McNeely*,] 133 S. Ct. at 1566 (plurality opinion) (emphasis added). The Court noted that these laws typically require suspected drunk drivers to take a test for the presence of alcohol and mandate that a driver's license will be revoked if they refuse a test. *Id*. By using this "legal tool" and revoking a driver's license for refusing a test, a state is doing the exact thing Brooks claims it cannot do—conditioning the privilege of driving on agreeing to a warrantless search.

Id.

We recognize that the supreme court's statement regarding the constitutionality of the Minnesota Implied Consent Law is dictum because it was not necessary to the supreme court's holding. *See id.* at 572-73 ("Even more importantly, however, we do not hold that Brooks consented because Minnesota law provides that anybody who drives in Minnesota consents to a chemical test. Rather, we hold that Brooks consented based on our analysis of the totality of the circumstances of this case." (quotation omitted)); *State v. Misquadace*, 629 N.W.2d 487, 490 n.2 (Minn. App. 2001) ("Dictum is a statement in an opinion that could have been eliminated without impairing the result of the opinion."), *aff'd*, 644 N.W.2d 65 (Minn. 2002). We also recognize that Greene's constitutional argument is somewhat different from Brooks's argument. But in any event, we are hard pressed to ignore the favorable statements of the United States and Minnesota Supreme Courts regarding implied-consent legislation, especially in light of the presumption that statutes are constitutional and the burden of proof applicable to Greene's constitutional challenge.

Because Greene has not met his very heavy burden of demonstrating beyond a reasonable doubt that the implied-consent statute is unconstitutional, we affirm.

Affirmed.