STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2366

Cory David Williams, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed June 30, 2014
Affirmed
Larkin, Judge

Morrison County District Court
File No. 49-CV-13-1400

Charles A. Ramsay, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

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

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Larkin, 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 order sustaining the revocation of his driver's license under Minnesota's implied-consent law, arguing that the district court

erred by finding that he voluntarily consented to the collection of a breath sample. We affirm.

FACTS

At approximately 1:00 a.m. on September 15, 2013, Minnesota State Patrol Trooper Bryan Bearce observed a vehicle traveling 42 miles per hour in a 55 miles-per-hour zone. The vehicle then accelerated to 62 miles per hour in the same 55 miles-per-hour zone. Trooper Bearce followed the vehicle and saw the vehicle cross over the fog line and off of the roadway twice. Trooper Bearce stopped the vehicle and identified the driver as appellant Cory David Williams.

Williams told Trooper Bearce that he was coming from a bar where he had consumed six alcoholic beverages. Williams smelled of alcohol, had bloodshot and watery eyes, and slurred his speech. Williams submitted to a preliminary breath test, which returned an alcohol-concentration reading of .217.

Trooper Bearce arrested Williams for driving while impaired (DWI) and transported him to the Morrison County Jail. At the jail, Trooper Bearce read Williams an implied-consent advisory. Williams indicated that he wanted to contact an attorney, so Trooper Bearce provided him with a telephone, telephone books, and his cellphone. Williams attempted to contact an attorney for 11 minutes and then agreed to take a breath test, which returned an alcohol-concentration reading of .19. Trooper Bearce did not obtain a search warrant before administering the breath test. Based on the results of the breath test, respondent commissioner of public safety revoked Williams's driver's license under Minnesota's implied-consent law.

Williams petitioned for judicial review of the license revocation, arguing that the collection of his breath sample without a search warrant was unconstitutional under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). Williams waived all other issues. The district court sustained the revocation of Williams's driver's license, concluding that Williams "voluntarily consented to the warrantless search of his breath" under *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). Williams appeals.

D E C I S I O N

The United States and Minnesota Constitutions prohibit the unreasonable search and seizure of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. The collection of a breath sample is a search under the Fourth Amendment. *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 709-10 (Minn. App. 2008). Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). The state bears the burden of establishing the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001). One such exception is consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973).

"[T]he question whether a consent to search was in fact 'voluntary' or was the product of duress or coercion, express or implied, is a question of fact . . . ." *Id.* at 227, 93 S. Ct. at 2047-48. "Therefore, the 'clearly erroneous' standard controls [appellate] review of a district court's finding of voluntary consent." *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). "Findings of fact are clearly erroneous if, on the entire evidence,

[a reviewing court is] left with the definite and firm conviction that a mistake occurred." *Id.* at 846-47.

Williams argues that "[b]ecause [he] did not freely and voluntarily consent to the execution of a warrantless search and seizure of his breath, the results of any analysis of that sample should have been suppressed by the district court." The commissioner responds that "[t]he totality of the circumstances demonstrate that [Williams] consented to testing."

In *Brooks*, the supreme court reiterated that the "police do not need a warrant if the subject of the search consents." 838 N.W.2d at 568. The supreme court described the consent exception to the warrant requirement as follows:

> For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented. Whether consent is voluntary is determined by examining the totality of the circumstances. Consent to search may be implied by action, rather than words. And consent can be voluntary even if the circumstances of the encounter are uncomfortable for the person being questioned. An individual does not consent, however, simply by acquiescing to a claim of lawful authority.
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> . . . This analysis requires that we consider 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 (quotations and citations omitted).

The supreme court explained that "the nature of the encounter includes how the police came to suspect [the defendant] was driving under the influence, their request that he take the chemical tests, which included whether they read him the implied consent

advisory, and whether he had the right to consult with an attorney." *Id.* at 569. The supreme court concluded that Brooks voluntarily consented to three searches because he did not dispute that the police had probable cause to believe he had been driving under the influence; he did not "contend that police did not follow the proper procedures established under the implied consent law"; the police read "the implied consent advisory before asking him whether he would take all three tests, which makes clear that drivers have a choice of whether to submit to testing"; the "police gave Brooks access to telephones to contact his attorney and he spoke to a lawyer"; and "[a]fter consulting with his attorney, Brooks agreed to take the tests in all three instances." *Id.* at 569-70. The supreme court further noted that although Brooks was in custody, he "was neither confronted with repeated police questioning nor was he asked to consent after having spent days in custody." *Id.* at 571.

In this case, Williams does not dispute that Trooper Bearce had probable cause to believe he had been driving under the influence. He does not contend that the police failed to follow proper procedures under the implied-consent law. Trooper Bearce read Williams the implied-consent advisory, which made it clear that Williams had a choice of whether to submit to testing. And although there is no indication that Williams spoke to an attorney, he spent 11 minutes trying to contact one after Trooper Bearce informed him that he had the right to do so and provided him a telephone, telephone books, and his cellphone for that purpose. When Williams agreed to take a breath test, he had not been confronted with repeated police questioning or held in custody for days. This record does not suggest that Williams was coerced into providing a breath sample. *See id.*

("[N]othing 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." (quotation omitted)). We therefore conclude that the district court's finding that Williams consented to the collection of his breath sample for chemical analysis is not clearly erroneous.

Williams argues that this case is distinguishable from *Brooks* because he is a different "kind of person" than Brooks. *See id*. at 569 (stating that the totality of the circumstances include "the kind of person the defendant is" (quotation omitted)). At oral argument to this court, Williams stressed that "Brooks is not the type of person whose will would be easily overborne by the mere reading of an implied consent" because he is "tough," "mean," and has multiple felony convictions, whereas Williams cried during his interaction with Trooper Bearce. But appellate counsel conceded that Williams, like Brooks, had a prior conviction for driving while impaired. Williams also argues that he did not "freely and voluntarily consent" to the breath test because he exercised his *Miranda* rights, indicating that he would have refused to give a breath sample but for the coercive nature of the implied-consent advisory. But that argument cuts both ways: it could suggest that because Williams had the will to refuse to provide a statement, he had the will to refuse to provide a breath sample. In sum, Williams's arguments regarding the kind-of-person factor do not persuade us that the district court clearly erred in finding that he voluntarily consented to provide a breath sample.

Williams next argues that he did not consent to the search because he "did not speak to an attorney for clarification of his constitutional rights under Minnesota's Implied Consent [L]aw." But whether or not Williams spoke to an attorney is not

dispositive. *Brooks* does not state that a driver must speak to a lawyer for consent to be voluntary. Instead, the supreme court stated that "[t]he fact that Brooks consulted with counsel before agreeing to take each test *reinforce[d] the conclusion* that his consent was not illegally coerced." *Id*. at 571 (emphasis added). In this case, Williams was given the opportunity to contact an attorney, which is the relevant consideration under *Brooks*. *See id*. at 569 (stating that the totality of the circumstances includes "whether [the defendant] had the right to consult with an attorney").

Williams also argues that he did not "freely and voluntarily" consent to the search because "Trooper Bearce led [him] to believe that submitting to a breath test was legally required and any refusal would be labeled a crime." But *Brooks* specifically rejects Williams's argument that consent to an implied-consent test is per se involuntary because of the attendant threat of a criminal charge for refusal. *See id*. at 570 ("Based on the analysis in [*South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916 (1983)] and [*McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991)], 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.").

Williams also argues that "[t]he fact that [he] was in custody and under arrest at the time law enforcement attempted to execute a warrantless search weighs strongly in favor of finding that any consent was coerced." But Brooks was also under arrest and in custody, yet the supreme court determined that his consent was voluntary. *Id*. at 571. And like Brooks, Williams "was neither confronted with repeated police questioning nor was he asked to consent after having spent days in custody." *Id*.

Williams next argues that "[i]t is inherently coercive to inform Minnesota drivers that they are 'required' by law to submit to testing when they have the right to refuse." Williams notes that Minnesota's implied-consent advisory "begins with a crucial phrase that colors the rest of the statutory language: 'Minnesota law requires you to take a test to determine if you are under the influence of alcohol.'" But this is the same language that was used in *Brooks*, and the supreme court held that Brooks's consent was voluntary. *See id*. at 565 (stating that the implied-consent advisory "informs drivers that Minnesota law requires them to take a chemical test for the presence of alcohol, [and] that refusing to take a test is a crime").

Williams's attempt to avoid application of *Brooks* is unavailing. He criticizes the decision, arguing that *Brooks* "understated the emphasis Minnesota courts have traditionally put on the custody status of an individual who is being 'asked' to consent to a warrantless search" and "minimized the long standing precedent in Minnesota that individuals under arrest or in jail are typically not going to be able to 'freely and voluntarily' consent to a warrantless search." But this court must follow Minnesota Supreme Court precedent.[1] *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). And although Williams's thorough review of Minnesota caselaw regarding the consent exception is commendable, the most recent and relevant precedent here is *Brooks*, and the facts of this case are very similar to those in *Brooks*. We therefore conclude that the district court did not clearly err by finding that

[1] We note that the United States Supreme Court denied review in *Brooks*. *Brooks v. Minnesota*, 134 S. Ct. 1799 (2014).

Williams voluntarily consented to the warrantless search of his breath under *Brooks*. We therefore affirm without addressing Williams's argument regarding the good-faith exception to the exclusionary rule or the commissioner's alternative arguments in support of affirmation.

Affirmed.