STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1395

State of Minnesota,
Respondent,

vs.

Corey Christopher Isaacson,
Appellant.

Filed March 31, 2014
Affirmed
Schellhas, Judge

Meeker County District Court
File No. 47-CR-11-727

Lori Swanson, Attorney General, Karen B. Andrews, Assistant Attorney General, St. Paul, Minnesota; and

Anthony Spector, Meeker County Attorney, Litchfield, Minnesota (for respondent)

Corey Christopher Isaacson, Moose Lake, Minnesota (pro se appellant)

Considered and decided by Hudson, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

On remand from the supreme court, appellant challenges his test-refusal conviction on the ground that the test-refusal statute is unconstitutional. We affirm.

FACTS

The facts in this case are found in *State v. Isaacson*, No. A12-1395, 2013 WL 4710650, *1–2 (Minn. App. Sept. 3, 2013) (*Isaacson I*), *vacated in part and review granted* (Minn. Nov. 12, 2013). Isaacson appealed from convictions that included his conviction for felony refusal to submit to chemical testing under Minn. Stat. § 169A.20, subd. 2 (2010). *Id.* at *2. We affirmed, *id.* at *8, and the supreme court granted Isaacson's petition for review and remanded to this court for consideration of Isaacson's challenge to the test-refusal statute and further proceedings consistent with *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

D E C I S I O N

Appellant Corey Isaacson challenges his test-refusal conviction under section 169A.20, subdivision 2, which criminalizes "refus[al] to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)." Isaacson argues that, in light of *McNeely*, the statute is unconstitutional under the United States and Minnesota Constitutions that protect against unreasonable searches and that the statute places an unconstitutional condition on his driver's license. He also contends that the statute "violates due process of law," but he waives that argument by failing to support it with argument or authority. *See State v. Sontoya*, 788 N.W.2d 868, 876 (Minn. 2010) (noting that "an assignment of error based on mere assertion and not supported by any argument or authorities is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection" (quotations omitted)).

Respondent State of Minnesota argues that this court should not address Isaacson's constitutional challenge to the test-refusal statute because he did not raise it in district court and therefore waived it. Appellate courts "ordinarily do not consider issues raised for the first time on appeal, even when those issues . . . are challenges to the constitutionality of a statute." *State v. Williams*, 794 N.W.2d 867, 874 (Minn. 2011). But we address Isaacson's arguments because the supreme court expressly remanded this case to us for consideration of Isaacson's test-refusal-statute challenge and for further proceedings consistent with *McNeely*, which the Supreme Court decided during the pendency of Isaacson's appeal before us in *Isaacson I*.

We review de novo as legal questions whether statutes are unconstitutional. *State v. Wenthe*, 839 N.W.2d 83, 87 (Minn. 2013). "Minnesota statutes are presumed constitutional and [appellate courts] exercise [their] authority to declare a statute unconstitutional with extreme caution and only when absolutely necessary." *Id.* (quotation omitted). Appellate courts "will uphold a statute unless the challenging party demonstrates that it is unconstitutional beyond a reasonable doubt." *State v. Ness*, 834 N.W.2d 177, 182 (Minn. 2013) (quotation omitted).

"The United States and Minnesota Constitutions protect '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *State v. Diede*, 795 N.W.2d 836, 842 (Minn. 2011) (quoting U.S. Const. amend. IV, citing Minn. Const. art. I, § 10); *see Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013) (noting that "[t]he Fourth Amendment[is] applicable through the Fourteenth Amendment to the States"). Taking a breath sample is a search. *Skinner v. Ry. Labor*

Execs.' Ass'n, 489 U.S. 602, 616–17, 109 S. Ct. 1402, 1413 (1989). "[W]arrantless searches are presumptively unreasonable unless one of 'a few specifically established and well-delineated exceptions' applies." *Diede*, 795 N.W.2d at 846 (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967) (other quotation omitted)). Two exceptions are consent, *id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043–44 (1973)), and exigent circumstances, *McNeely*, 133 S. Ct. at 1558.

Before *McNeely*, the Minnesota Supreme Court held that "[t]he rapid, natural dissipation of alcohol in the blood creates a *single-factor* exigent circumstance that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation." *State v. Shriner*, 751 N.W.2d 538, 549–50 (Minn. 2008) (emphasis added), *abrogated by Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

In *McNeely*, the United States Supreme Court held that "the natural metabolization of alcohol in the bloodstream [does not] present[] a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 133 S. Ct. at 1556. "[E]xigency . . . must be determined case by case based on the totality of the circumstances." *Id.* We discern nothing in *McNeely* that counsels in favor of a conclusion that section 169A.20, subdivision 2, is unconstitutional; to the contrary, the Supreme Court's statements in *McNeely* about implied-consent laws counsel otherwise. *Id.* at 1552–68. The Supreme Court described implied-consent laws as one of a state's "broad range of *legal tools* to

enforce their drunk-driving laws and to secure [blood-alcohol-concentration (BAC)] evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566 (emphasis added). Minnesota's implied-consent statute provides that a person "consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol" by "driv[ing] . . . a motor vehicle within this state." Minn. Stat. § 169A.51, subd. 1(a) (2012). Considering *McNeely*'s impact on our implied-consent law, the Minnesota Supreme Court in *State v. Brooks* concluded that an argument that Minnesota's implied-consent statute is unconstitutional is "inconsistent" with the Supreme Court's description of implied-consent laws as "*legal tools*." 838 N.W.2d 563, 572 (Minn. 2013) (quotation omitted).

Isaacson argues that section 169A.20, subdivision 2, is unconstitutional because it criminalizes refusal to consent to warrantless searches. His argument is unpersuasive. In *State v. Bernard*, relying on *State v. Wiseman*, 816 N.W.2d 689, 691 (Minn. App. 2012), *cert. denied*, 133 S. Ct. 1585 (2013), this court recently held that "[t]he Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test" and that penalizing the driver's decision not to submit to a chemical test is not unconstitutional because testing him under the implied-consent statute is constitutionally reasonable. *State v. Bernard*, ___ N.W.2d ___, ___, 2014 WL 996945, at *1, *3–4 (Minn. App. Mar. 17, 2014); *see also Brooks*, 838 N.W.2d at 571 ("Although refusing the test comes with criminal penalties in Minnesota, the Supreme Court has made clear that while the choice to submit or refuse to take a chemical test 'will not be an easy or pleasant one for a suspect to make,' the criminal process 'often

requires suspects and defendants to make difficult choices." (quoting *South Dakota v. Neville*, 459 U.S. 553, 564, 103 S. Ct. 916, 922–23, (1983)); *Wiseman*, 816 N.W.2d at 691 ("[T]he imposition of criminal penalties for refusing to submit to a properly requested chemical test is a reasonable means to a permissible state objective."); *State v. Mellett*, 642 N.W.2d 779, 781, 785 (Minn. App. 2002) (holding that "Minn. Stat. § 169A.20, subd. 2 (2000) does not violate the United States or Minnesota constitutions" and specifically that it "does not violate appellant's Fourth Amendment rights"), *review denied* (Minn. July 16, 2002).

We rejected Bernard's argument that, "because exigent circumstances did not exist when the officer asked him to submit to a chemical test . . . , prosecuting him for refusing to consent to the test violate[d] his due process rights." *Bernard*, 2014 WL 996945, at *4. And we reasoned that, "[b]ecause the officer indisputably had probable cause to believe that Bernard was driving while impaired . . . , the officer also indisputably had the option to obtain a test of Bernard's blood by search warrant" and, when "the officer asked Bernard whether he would submit to a breath test, the officer could have just as lawfully asked an independent jurist to issue a search warrant to test Bernard's blood." *Id.* "In other words, the officer had a lawful option to require Bernard to submit to a chemical test, based on a search warrant, and he instead gave Bernard the choice to voluntarily submit to warrantless testing." *Id.* We held that Bernard's prosecution did not implicate any fundamental due-process rights. *Id.*

As in *Bernard*, the officers in this case indisputably had probable cause to believe that Isaacson was driving while impaired. Isaacson drove quickly and slammed on his

brakes after seeing the deputy activate his vehicle's emergency lights; he left his vehicle's engine running and driver's side door open when he exited his vehicle and approached the deputy; the deputy observed an open can of beer on the console of Isaacson's vehicle; Isaacson strongly smelled of alcohol and had bloodshot and watery eyes, slurred speech, and difficulty maintaining his balance; Isaacson told the deputy that he was "'trying to get away'"; he refused to perform the field sobriety tests; and, at the police station, he still smelled of alcohol, was "'very glassy eyed,'" had "'runny, runny eyes, teary, teary eyes,'" and "'mumbled.'" *Isaacson I*, 2013 WL 4710650, at *1.

As in *Bernard*, we hold that Isaacson's prosecution under section 169A.20, subdivision 2, does not implicate any fundamental due-process rights. Isaacson has failed to prove beyond a reasonable doubt that the criminal test-refusal statute is unconstitutional.

Because we conclude that the search of Isaacson's breath was reasonable and did not implicate any fundamental due-process rights, we decline to determine Isaacson's argument that the criminal test-refusal statute "places an unconstitutional condition on the citizen's license." "[T]he unconstitutional conditions doctrine reflects a limit on the state's ability to coerce waiver of a constitutional right where the state may not impose on that right directly," but "[t]he doctrine is properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement." *State v. Netland*, 762 N.W.2d 202, 211 (Minn. 2009), *abrogated on other grounds by Missouri v. McNeely*, 133 S. Ct. 1552 (2013). The supreme court in *Netland* declined to determine whether the doctrine "applies to Fourth Amendment rights or

whether it should be applied to violations of the Minnesota Constitution" when Netland failed to show that "a warrantless search for her blood-alcohol content would have been unconstitutional." *Id.* at 212.

Affirmed.