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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-1902**

Jonathon Joel Bathen, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed May 27, 2014**
**Affirmed**
**Ross, Judge**

Dakota County District Court
File No. 19AV-CV-13-1160

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

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

Considered and decided by Bjorkman, Presiding Judge; Hudson, Judge; and Ross, Judge.

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

**ROSS**, Judge

Police officers arrested Jonathon Bathen after police saw him driving erratically, fleeing from his car, and hiding nearby. Bathen was taken to a detention center, read the implied consent advisory, and given the opportunity to contact an attorney. Bathen agreed

to submit to a breath test, which revealed an alcohol concentration of .19 and caused his driver's license to be revoked. Bathen petitioned the district court for review. The district court found that Bathen had voluntarily consented to the breath test and affirmed the revocation. Because the district court's finding that Bathen's consent was voluntary is not clearly erroneous, we affirm.

## FACTS

Early in the morning on April 14, 2013, Officer David Engel began following a car in Apple Valley after seeing it run a red light. The car swerved, struck a median, and veered back into its lane. Officer Engel activated his squad car's emergency lights. The car did not stop. It accelerated, went off the road and down an embankment, and hit a retaining wall. It continued through a parking lot and between two businesses and then abruptly stopped behind a building. Officer Engel saw a man later identified as Jonathon Bathen running from the car.

Badger, a police dog, led Officers Zachary Broughten and Andy Helgerson to a cluster of trees where they found Bathen lying on his stomach. Badger bit Bathen's left arm. Officer Helgerson ordered Bathen to stop fighting Badger. Officer Broughten grabbed Bathen's left arm near his wrist. Bathen tensed his muscles and tried to pull away. The officers ordered Bathen to free his right arm. Bathen did not comply. Officer Broughten struck Bathen in the back and thigh three or four times while Officer Helgerson struck him in the upper body and face. Bathen finally gave up his right arm. Officers handcuffed Bathen, who smelled of alcoholic beverages, had red watery eyes, and slurred his words.

Officer Engel took Bathen to the Apple Valley detention center. Bathen had minor scrapes and scratches on his left arm. Medical personnel determined that he was fit to remain in custody. Officer Engel read Bathen his Miranda rights. Bathen indicated that he understood them and agreed to speak with Officer Engel without a lawyer. He told the officer that he had been picking someone up from a service station but denied he was driving. He would not say who was driving and refused to answer any more questions. Officer Engel read Bathen the implied consent advisory. Bathen said that he understood and wanted to speak with an attorney. Officer Engel gave Bathen access to a telephone and directories. Bathen made a call and then indicated that he was finished trying to contact an attorney. He then agreed to take a breath test, which revealed an alcohol concentration of .19.

The commissioner of public safety revoked Bathen's driver's license, and Bathen petitioned for judicial review. The district court held an implied consent hearing at which the parties presented no live testimony and stipulated to the admission of police reports and test results. The only issue was whether *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), required the breath test results to be suppressed. The district court concluded that by voluntarily driving in Minnesota, Bathen had presumably consented to the breath test under the implied consent law. Bathen appeals.

**D E C I S I O N**

Bathen argues that the district court erred by denying his suppression motion because his breath test was an unreasonable search. We review for clear error the factual findings that underlie a district court's prehearing suppression order and determine as a

matter of law whether the evidence should have been suppressed. *State v. Barajas*, 817 N.W.2d 204, 217 (Minn. App. 2012), *review denied* (Minn. Oct. 16, 2012).

Both the United States and Minnesota Constitutions guarantee persons the right to be free from unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Outside specifically established exceptions, warrantless searches are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967); *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985). A breath test is a search under the Fourth Amendment. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616–18, 109 S. Ct. 1402, 1412–14 (1989); *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009), *abrogated on other grounds by Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

Consent is one exception to the warrant requirement. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). "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." *Id.* We examine the totality of the circumstances to determine whether consent is voluntary. *Id.* We consider the nature of the defendant's encounter with law enforcement, including "what was said and how it was said," and "the kind of person the defendant is." *Id.* at 569 (quotation omitted).

Bathen argues that his agreement to take the breath test was not free and voluntary. Whether consent was voluntary is a question of fact. *See Barajas*, 817 N.W.2d at 218. The district court found that "[t]here is no evidence that [Bathen's] will was overborne such that his consent was not validly made." It noted that Bathen was read the

implied consent advisory, had the opportunity to consult with an attorney, and chose to submit to the test.

Bathen maintains that he was coerced because he was told, as part of the advisory reading, that "Minnesota law requires" him to take the test. *See* Minn. Stat. § 169A.51, subd. 2(1) (2012). He asserts that the supreme court did not address this portion of the advisory in *Brooks*. He misreads *Brooks*. The *Brooks* court concluded that reading the advisory, which "informs drivers that *Minnesota law requires* them to take a chemical test for the presence of alcohol," "makes clear that drivers have a choice of whether to submit to testing." 838 N.W.2d at 565, 570 (emphasis added). And it summarized the *McNeely* decision to highlight that requiring motorists to consent to testing as a condition of driving is a "*legal* tool." *Id.* at 572 (emphasis added).

Bathen also insists that his consent was involuntary because he never spoke to an attorney. The record does not specify whether Bathen contacted an attorney. The district court found and the record shows only that he was given access to a phone and directories, made a phone call, and indicated that he was finished trying to contact an attorney. Even assuming the call was unsuccessful, Bathen's alleged failure to contact an attorney is not dispositive. The supreme court did not rely on the fact that Brooks contacted an attorney to conclude that his consent to testing was voluntary. The supreme court instead agreed with the district court that "nothing 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." *Id.* at 571 (quotation omitted). Then it added, "The fact that Brooks consulted with counsel before agreeing to take each test *reinforces*

the conclusion that his consent was not illegally coerced." *Id.* (emphasis added). This language in context suggests that the supreme court would not have decided differently even if Brooks had not consulted with counsel. The court reasoned, it is "the *ability* to consult with counsel about an issue" that makes a subsequent decision more likely to be voluntary. *Id.* at 572 (emphasis added). Bathen, like Brooks, had "the ability to" contact an attorney before agreeing to testing. If Bathen chose not to take advantage of that opportunity, the opportunity was no less his.

Bathen next argues that his consent was involuntary because he was bitten and beaten during his arrest. We are unconvinced. Badger bit Bathen because Bathen fled and hid, and the officers used force during the arrest because he resisted their attempts to restrain him. These police actions were an attempt to coerce Bathen to submit to their authority to take him into custody, not to submit to a breath test. Bathen does not explain how they had any effect on his ability to refuse a breath test. Bathen was read his *Miranda* rights, permitted without any demonstration of police force to refuse to answer police questions, read the advisory, allowed to contact an attorney, and asked whether he would submit to testing. No evidence suggests that officers unconstitutionally pressured Bathen to be tested for alcohol concentration.

Bathen contended at oral argument that we should conclude his consent was involuntary because he had shown his unwillingness to give the police evidence that could be used against him. He points to his flight from police and his refusal to answer questions as evidence of this unwillingness. But Bathen's running and hiding and his refusal to answer questions supports the district court's finding that he had *not* been

coerced to submit to testing. This uncooperative conduct demonstrates his fortitude to resist lawful police directives and requests despite knowing that police prefer that he comply and despite knowing of the potential consequences of noncompliance.

The record evidence confirms the district court's finding that Bathen voluntarily chose to take the breath test. We need not consider the validity of the district court's rationale that Bathen's consent was presumed under the implied consent law because even without the presumption his consent is apparent.

**Affirmed.**