STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0495

Jacob Kevin Mikiska, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed November 24, 2014
Reversed
Rodenberg, Judge

Dakota County District Court
File No. 19AV-CV-13-2746

Thomas W. Jakway, Woodbury, Minnesota (for respondent)

Lori Swanson, Attorney General, Kristi A. Nielson, Assistant Attorney General, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and Schellhas, Judge.

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

RODENBERG, Judge

Appellant Commissioner of Public Safety challenges the district court's order rescinding the revocation of respondent Jacob Kevin Mikiska's driver's license. Because the district court erred in applying the totality of the circumstances test, we reverse.

FACTS

In the early morning hours of August 30, 2013, Lakeville Police Officer Adam Stier was on routine patrol in the city of Lakeville and observed a vehicle accelerating very quickly and believed the vehicle was exceeding the speed limit. Officer Stier activated his squad radar, which indicated the vehicle was traveling 63 miles per hour in a 45 miles-per-hour zone. Officer Stier initiated a traffic stop of the vehicle and identified the driver as respondent. Officer Stier detected a strong odor of an alcoholic beverage and observed that respondent's eyes were bloodshot and watery and that his speech was slurred. Respondent admitted drinking alcohol that evening. Officer Stier administered standard field sobriety tests and asked respondent to submit to a preliminary breath test (PBT), which respondent refused. Officer Stier arrested respondent and transported him to the Lakeville Police Department. Once at the police department, Officer Stier read respondent the Minnesota Motor Vehicle Implied Consent Advisory. Respondent stated that he understood the advisory. He waived his right to contact an attorney and submitted to a breath test, which revealed an alcohol concentration of 0.22. His driver's license was revoked under the implied consent law.

Respondent petitioned the district court to rescind the revocation of his driver's license. The parties stipulated to the admission of police reports. No witnesses testified. The district court rescinded the revocation of respondent's driver's license, concluding that appellant failed to demonstrate that respondent knowingly and voluntarily consented to the search of his breath. This appeal followed.

D E C I S I O N

A district court's "findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." Minn. R. Civ. P. 52.01. In reviewing questions of fact, our review is limited to determining whether there is "reasonable evidence to sustain the findings." *Morton Bldgs., Inc. v. Comm'r of Revenue*, 488 N.W.2d 254, 257 (Minn. 1992) (quotation omitted). But "[t]he application of law to the stipulated facts is a question of law, thus freely reviewable. *Id.* In reviewing the constitutionality of a search, "we independently analyze the undisputed facts to determine whether evidence resulting from the search should be suppressed." *Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004). A district court's conclusions of law are not overturned "absent erroneous construction and application of the law to the facts." *Id.*

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. "Warrantless searches are presumptively unreasonable unless one of 'a few specifically established and well-delineated exceptions' applies." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)). One such exception exists when the subject of the search consents. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-4 (1973).

To determine whether a driver voluntarily consented to an alcohol concentration test, the "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.'" *State v. Brooks*, 838 N.W.2d 563, 569 (Minn. 2013) (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)). However, "[c]onsent must be received, not extracted." *Dezso*, 512 N.W.2d at 880. The Minnesota Implied Consent Law also provides that a law-enforcement officer may request that a driver submit to a chemical test of the person's blood, breath, or urine when the officer has "probable cause to believe the person was driving, operating, or in physical control of a motor vehicle" while impaired. Minn. Stat. § 169A.51, subd. 1(b) (2012). In *Brooks*, the supreme court noted that "the choice to submit or refuse to take a chemical test 'will not be an easy or pleasant one for a suspect to make' [but] the criminal process 'often requires suspects and defendants to make difficult choices.'" 838 N.W.2d at 571 (quoting *South Dakota v. Neville*, 459 U.S. 553, 564, 103 S. Ct. 916, 922-23 (1983)). "[T]he fact that someone submits to the search after being told that he or she can say no to the search supports a finding of voluntariness." *Id.* at 572.

In applying the totality of the circumstances test, the district court found that appellant provided no evidence of the nature of the encounter between Officer Sties and respondent. The nature of the encounter "includes how the police came to suspect [the subject] 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. Here, despite its finding that appellant

had not provided evidence of the nature of the encounter, the district court's own findings of fact, and the stipulated police reports on which those findings are based, detail that Officer Sties could smell the odor of an alcoholic beverage emanating from respondent's car, noticed respondent's eyes were watery and bloodshot, and observed that respondent was slurring his speech. Officer Sties then asked respondent to perform sobriety tests and to take a PBT, which respondent refused. At that time, Officer Sties arrested respondent and transported him to the police department where he read respondent the Minnesota Implied Consent Advisory, which included informing respondent that he could contact an attorney. Respondent acknowledged that he understood the advisory, waived his right to contact an attorney, and agreed to provide a breath sample for testing. No contrary or conflicting evidence was offered. Appellant not only proved the precise nature of the encounter, detailing (1) how the police believed respondent was driving under the influence, (2) that respondent agreed to take a chemical test, (3) that respondent was read the implied consent advisory, and (4) that respondent was advised that he could speak to an attorney, but there also is no conflicting evidence concerning the encounter. The unrebutted record proves the encounter between Officer Sties and respondent, and nothing about that encounter suggests that respondent's agreement to provide a sample of his breath was coerced within the meaning of *Brooks*. Respondent understood the advisory, waived his right to speak with an attorney, and validly consented to the breath test. The district court's finding that there was no evidence of the nature of the encounter is clearly erroneous.

The *Brooks* totality of the circumstances test also requires an assessment of the kind of person respondent is. The district court concluded that respondent was unlike the defendant in *Brooks* because (1) Brooks had multiple arrests and convictions for DUI while this was respondent's first arrest for DUI and (2) respondent did not have legal advice before testing as Brooks did. In *Brooks*, the supreme court found that Brooks' consultation with his attorney "*reinforces* the conclusion that his consent was not illegally coerced." 838 N.W.2d at 571 (emphasis added). The district court here found that respondent's consent was not knowing and voluntary, in part, because this was his first DUI and he did not have legal advice before testing. The district court did not clearly err in considering this factor as indicating that respondent did not knowingly and voluntarily consent to the test.

The district court failed to address the third factor of the *Brooks* totality of the circumstances test: what was said and how it was said. *Id.* at 569. That failure is clear error. *See id.* (stating that "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" (citations and quotations omitted)). The record establishes that respondent was "neither confronted with repeated police questioning nor was he asked to consent after having spent days in custody." *See id.* at 571. The supreme court stated in *Brooks* that reading a driver the implied consent advisory before asking him whether he would submit to chemical testing "makes clear that drivers have a choice of whether to submit to testing." *Id.* at 570. Here, Officer Sties read respondent the implied consent advisory only once. Respondent replied "Yep" that he understood

the advisory, stated "No" to whether he wanted to consult with an attorney, and replied "Yes" to the question of whether he would take a breath test. These questions were each asked only once. There is no evidence of repeated questioning. The record supports no conclusion other than that what was said and how it was said indicates respondent knowingly and voluntarily consented to the breath test.

Without a finding on the third part of the three-part totality of the circumstances test, and a clearly erroneous finding on the first prong, the district court's findings are insufficient to support a conclusion that respondent did not knowingly and voluntarily consent to the search.

Ordinarily it is not our role to engage in fact-finding. Fact-finding is generally reserved for the district court. But it is our proper role to conduct an independent review of the application of the law to stipulated evidence. *Morton*, 488 N.W.2d at 257. "A remand may be required if the [district] court fails to make adequate findings. A remand is unnecessary, however, when we are able to infer the findings from the [district] court's conclusions." *Welch v. Comm'r of Pub. Safety*, 545 N.W.2d 692, 694 (Minn. App. 1996) (citations omitted). When the stipulated facts lead to only one reasonable conclusion of law, we need not remand the case to the district court to arrive at that conclusion. Here, and under the relevant standards established by the supreme court in *Brooks*, the stipulated evidence supports no conclusion other than that respondent voluntarily consented to the search. We therefore reverse the district court and reinstate the revocation of respondent's driver's license.

Reversed.