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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2124**

Joseph Thomas Herbst, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed September 10, 2012
Affirmed
Schellhas, Judge**

Clay County District Court
File No. 14-CV-11-2142

Joseph Thomas Herbst, Fargo, North Dakota (pro se appellant)

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

Considered and decided by Wright, Presiding Judge; Schellhas, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's decision sustaining the revocation of his driving privileges, arguing that (1) one of the district court's findings is clearly erroneous and (2) his due-process rights were violated because a police officer gave him misleading information. We affirm.

FACTS

In May 2011, Trooper Brian Cheney arrested appellant Joseph Herbst for driving under the influence. Trooper Cheney read Herbst the implied-consent advisory, at the end of which the following exchange occurred:

HERBST: What if I'm a North Dakota resident now?

TROOPER CHENEY: Hang on. If the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test. Do you understand what I have just explained?

HERBST: Well, I don't understand the implications of like how I live in North Dakota but my license—I was about to transfer it over on Monday.

TROOPER CHENEY: That doesn't make any difference what state you live in. Minnesota DWI laws are Minnesota DWI laws.

HERBST: But how does it work though? If I have a Minnesota license now and I transfer, which I've been intending to do, back to North Dakota, then how does that affect anything?

TROOPER CHENEY: As far as this?

HERBST: Yeah.

TROOPER CHENEY: It doesn't affect it at all.

HERBST: Are you sure?

TROOPER CHENEY: Well, I guess I don't understand what you're asking me.

HERBST: Okay, so as of today, I'm a resident of North Dakota.

TROOPER CHENEY: Yes, that doesn't make any difference.

HERBST: But my driver's license is still a Minnesota driver's license.

TROOPER CHENEY: Yes, it's a valid license.

HERBST: So, in terms of driving privileges, if I consent to . . . ?

TROOPER CHENEY: Oh, I see what you're asking me. Yeah, you are correct. Minnesota . . . I can only take your Minnesota—not me, the state, because it's administrative, it's not even through the criminal system; it's administrative. Administratively, the state will take away your Minnesota

driving privileges. They can't take away your North Dakota driving privileges because it's a different state.

HERBST: But I haven't yet because I haven't actually transferred over yet.

TROOPER CHENEY: Right and if you go and get a North Dakota driver's license tomorrow, after this, they'll give you a driver's license.

HERBST: But it's Saturday.

TROOPER CHENEY: Well, it's Thursday now. Well, yeah, I understand what you're asking me. For example, if you had a North Dakota license right now, I could not take that North Dakota license from you. Okay? And I won't take this one either because you need a form of ID but the State of Minnesota can only take away your driving privileges in this state. They can't take it away from North Dakota. North Dakota has to do that. Is that kind of what you're asking me?

HERBST: Yeah, I think so. I don't know. I'm just trying to understand the implications of all of this.

TROOPER CHENEY: Right. Now, do you understand what I read to you?

HERBST: I think so. I don't know.

TROOPER CHENEY: Okay, what don't you understand?

HERBST: Well, it's kind of a lot.

TROOPER CHENEY: Okay, do you want me to go over it again?

HERBST: That would take a long time.

TROOPER CHENEY: No, it won't. It will take me just a minute. We'll do it.

Trooper Cheney then re-read the implied-consent advisory to Herbst.

Herbst invoked his right to an attorney but was unsuccessful in contacting an attorney. Ultimately, Trooper Cheney deemed Herbst to have refused a chemical test, and the Minnesota Department of Public Safety revoked Herbst's driver's license under the implied-consent law. *See* Minn. Stat. § 169A.52, subd. 3(a) (2010) (requiring revocation of license for test refusal). Herbst subsequently was unable to obtain a North Dakota driver's license because his Minnesota driving privileges were revoked. *See* N.D. Cent.

Code § 39-06-03(2) (2010) (prohibiting, with inapplicable exceptions, the issuance of a license “to any person whose license has been revoked”).

Herbst petitioned for judicial review of his license revocation, arguing in part that he was “not informed of the rights and consequences of taking or refusing the test as required by statute.” Following a hearing, the district court sustained his license revocation.

Herbst appeals.

D E C I S I O N

On appeal from the district court’s order sustaining an implied-consent revocation, an appellate court will not set aside the district court’s findings unless they are clearly erroneous. *Jasper v. Comm’r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002). “We hold findings of fact as clearly erroneous only when we are left with a definite and firm conviction that a mistake has been committed.” *Id.* (quotation omitted).

When an officer requests that an individual take a chemical test to determine the presence of alcohol, the officer must read the implied-consent advisory to the individual, which advises the individual that “refusal to take a test is a crime.” Minn. Stat. § 169A.51, subs. 1, 2(2) (2010). An individual may refuse to take a test and may raise as an affirmative defense that the refusal was reasonable. Minn. Stat. §§ 169A.52, subd. 1, 169A.53, subd. 3(c) (2010). “Whether a refusal is reasonable is generally characterized as a question of fact for the district court that will be reversed only if clearly erroneous.” *Maietta v. Comm’r of Pub. Safety*, 663 N.W.2d 595, 598 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003).

Challenge to the District Court's Finding

Herbst first challenges the district court's finding that Herbst asked about the consequences of consenting to a test. The court stated, "A close review of the pertinent portion of the conversation between [Herbst] and Cheney reveals that [Herbst] asked about the consequences of *consenting* to the test." Herbst argues that "he was in fact attempting to understand the consequences of voluntarily consenting to the charge of refusal if he decided not to test." As evidence that Trooper Cheney believed that Herbst asked him about refusal, Herbst points to Trooper Cheney's comment about an administrative penalty and that "[a]n administrative revocation of license arises when a test has been refused." Herbst's arguments are unpersuasive.

We treat the district court's statement about Herbst asking about the consequences of *consenting* as a finding, although it is contained in the court's conclusions of law. *See Dailey v. Chermak*, 709 N.W.2d 626, 631 (Minn. App. 2006) (noting that "the mislabeling of a finding of fact as a conclusion of law, or vice versa, is not determinative of the true nature of the item"), *review denied* (Minn. May 16, 2006). The record shows that Herbst began to ask Trooper Cheney, "So, in terms of driving privileges, if I consent to" Although Trooper Cheney answered before Herbst could finish asking his question, Herbst did not ask any follow-up questions about the consequences of *refusing* the test. We therefore conclude that the district court's finding that Herbst asked about the consequences of *consenting* to the test is not clearly erroneous.

Challenge to Trooper Cheney's Statement

Herbst argues that Trooper Cheney violated his due-process rights because the trooper's statement that Herbst could get a driver's license in North Dakota "tomorrow" was misleading and caused Herbst to "consent[] to this crime of refusal."

"Under the federal constitution, due process does not permit the government to mislead individuals as to either their legal obligations or the penalties they might face should they fail to satisfy those obligations." *State v. Melde*, 725 N.W.2d 99, 103 (Minn. 2006). In the implied-consent context, the supreme court has "taken notice of whether individual suspects were actively misled by police regarding their statutory obligation to undergo testing." *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 854 (Minn. 1991). A refusal therefore may be reasonable if "the police misled the driver into believing that somehow a refusal . . . was reasonable or . . . [if] police made no attempt to explain to a confused driver" the driver's obligations. *State, Dep't of Pub. Safety v. Lauzon*, 302 Minn. 276, 277, 224 N.W.2d 156, 157 (1974); see *Frost v. Comm'r of Pub. Safety*, 401 N.W.2d 454, 456 (Minn. App. 1987) (citing *Lauzon* and explaining when refusal would be reasonable). But "a state does not violate the fundamental fairness inherent to due process by choosing not to advise individuals of all the possible consequences they could face in refusing a . . . test." *McDonnell*, 473 N.W.2d at 853.

The district court determined that Trooper Cheney did not mislead Herbst because Herbst did not ask Cheney about the consequences of refusing a test. The court found that Trooper Cheney "truthfully indicated that the State of Minnesota could administratively take away [Herbst's] Minnesota driving privileges, but not his North Dakota driving

privileges.” The court also noted that although Trooper Cheney is “an agent of the State of Minnesota” and is therefore “charged with knowledge of the laws of Minnesota,” Trooper Cheney “is not an agent of the State of North Dakota” and “may not be charged with greater knowledge of the laws of North Dakota than any other member of the general populace who is similarly not an agent of the State of North Dakota.” The court therefore concluded that Herbst’s “reliance on any statement that [Trooper] Cheney made about North Dakota law, particularly one that [Herbst] took as a response to a question that he did not actually ask [Trooper] Cheney, was not a reasonable basis to refuse to submit to the required test.” We agree with the district court’s conclusion.

Herbst argues that Trooper Cheney “had no legal duty to offer advice to Herbst beyond what is required in the Implied Consent Advisory” and that because of Herbst’s vulnerability, he gave “exceptional weight to Cheney’s explanatory statements.” Herbst’s arguments are unpersuasive. The record does not indicate that Trooper Cheney misled Herbst. Trooper Cheney accurately informed Herbst that the State of Minnesota could take away Minnesota driving privileges and not North Dakota driving privileges. *See* Minn. Stat. § 169A.52, subds. 3 (requiring revocation of a license for test refusal), 8 (requiring certain actions “[w]hen a nonresident’s privilege to operate a motor vehicle *in this state* has been revoked or denied” (emphasis added)) (2010). Although Trooper Cheney stated that Herbst could get a North Dakota driver’s license “tomorrow” and “they’ll give you a driver’s license,” he qualified that statement by saying that only North Dakota could take away Herbst’s driving privileges in North Dakota. *See Golinvaux v. Comm’r of Pub. Safety*, 403 N.W.2d 916, 919 (Minn. App. 1987) (concluding that

officer's statements that gave appellant impression that his license revocation period might be reduced by a lenient judge did not confuse appellant or give appellant "improper advice as to the serious consequences of refusal"); *Schmidt v. Comm'r of Pub. Safety*, 486 N.W.2d 473, 475–76 (Minn. App. 1992) (concluding, in the context of the right to obtain additional testing, that an officer's statements about the ability to obtain an additional test were accurate as they pertained "to persons in custody" and did not actively mislead appellant).

Moreover, a law-enforcement officer has no responsibility "to advise [drivers] of all the possible consequences they could face in refusing a . . . test." *McDonnell*, 473 N.W.2d at 853. Herbst's alleged question of Trooper Cheney regarding "the consequences of voluntarily consenting to the charge of refusal if he decided not to test" is one that requires legal analysis, and such analysis is the domain of an attorney and not a law-enforcement officer. *See Maietta*, 663 N.W.2d at 599 ("[A]n attorney, not a police officer, is the appropriate source of legal advice to clear up confusion"); *Fehler v. Comm'r of Pub. Safety*, 591 N.W.2d 752, 754 (Minn. App. 1999) (noting that legal analysis "is the domain of the attorney and is beyond the scope of the law enforcement officer's function"), *review denied* (Minn. July 28, 1999). And Herbst cites no authority that requires Minnesota law-enforcement officers to inform individuals, who are the subjects of an implied-consent advisory, about the consequences of their test decision in a neighboring state.

We conclude that the district court's finding that Herbst's refusal was unreasonable is not clearly erroneous.

Affirmed.