STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2247

David John Schroeder, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 23, 2008
Affirmed
Lansing, Judge

Cass County District Court
File No. 11-CV-07-1550

Richard Kenly, P.O. Box 31, Backus, MN 56435 (for appellant)

Lori Swanson, Attorney General, Marcus D. Campbell, Assistant Attorney General, Jeffrey F. Lebowski, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Minge, Judge.

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

LANSING, Judge

David Schroeder appeals the district court's order sustaining the revocation of his driver's license under the implied-consent law, claiming that he was denied a reasonable

opportunity to consult with an attorney. Schroeder's claim is based on the failure of the police to turn off a recording device in the room when Schroeder was using the telephone to speak with his attorney. Although any use of recorded information could raise constitutional issues, we conclude that this challenge solely to the inadvertent recording, and not to any actual or informational use of the recording, did not violate Schroeder's right under the Minnesota Constitution to consult with an attorney before deciding whether to submit to a chemical test, and we affirm.

F A C T S

A Hackensack police officer arrested David Schroeder for driving while impaired in June 2007. The officer transported Schroeder to the Cass County jail. As part of the procedure, the officer recorded his recitation of the implied-consent advisory, using a digital recording device. He placed the recording device on a table near Schroeder and activated it. Following the advisory, Schroeder indicated that he wanted to consult with an attorney.

The officer provided Schroeder with a telephone and telephone book. The officer was unfamiliar with the recording device, and he unintentionally failed to pause the recording function. Shortly after calling his attorney, Schroeder realized that the recording device was still recording and ended his telephone conversation. When Schroeder ended the telephone conversation, the officer asked him to submit to a breath test. Schroeder refused and asked for a blood test instead. The officer explained that a blood test was not available, and Schroeder again declined to take a breath test. As a

result of Schroeder's refusal, his license was revoked for one year. *See* Minn. Stat. § 169A.52, subd. 3(a) (2006) (imposing one-year revocation of license for test refusal).

Schroeder petitioned the district court for review of his license revocation. *See* Minn. Stat. § 169A.53, subd. 2 (2006) (setting forth procedure for seeking judicial review). He argued that the police officer violated his constitutional rights when he did not turn off the recording device. The district court sustained the license revocation, and Schroeder appeals.

D E C I S I O N

The Minnesota Supreme Court has recognized a right under the Minnesota Constitution for a person arrested for driving while impaired (DWI) to consult with an attorney before submitting to chemical testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). In extending this state constitutional right, the supreme court recognized that under the federal constitution a decision about whether to submit to chemical testing does not trigger the Sixth Amendment right to counsel. *Id.* at 832. But the court determined that in the context of a DWI investigation the Minnesota Constitution places greater restrictions on police activity than the federal constitution. *Id.* at 829-35; *see also Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81, 100 S. Ct. 2035, 2040 (1980) (recognizing that states are free to interpret their own constitutions to provide greater protection for individual rights than federal constitution).

The supreme court emphasized that a DWI arrestee's right to consult counsel before chemical testing is a limited right. *Friedman*, 473 N.W.2d at 835. Because of the "evanescent nature" of the evidence, the individual need only be given "a reasonable time

to contact and talk with counsel" before the testing decision must be made. *Id*. In a later case, *Comm'r of Pub. Safety v. Campbell*, the court clarified the boundaries of the "limited" right to counsel. 494 N.W.2d 268, 269 (Minn. 1992). The court stated that, because an arrestee may later try to testify that "ingestion of something at the station might have affected the test results," the police "do not have to provide a DWI arrestee with a private telephone" to contact an attorney. *Id*. at 269-70. The arrestee is not entitled to privacy in communicating with his attorney and his right to counsel is fully vindicated by requiring exclusion of any overheard statements the arrestee might make to his counsel and any fruits of those statements. *Id.*

This judicially created exclusionary rule was drawn from earlier Minnesota cases that relied on a statutory provision, Minn. Stat. § 481.10 (1976), for recognizing a driver's right to consult with an attorney before deciding whether to take an alcohol-concentration test. *See Dep't of Pub. Safety v. Held*, 311 Minn. 74, 76, 246 N.W.2d 863, 864 (1976) (enunciating court-created rule forbidding use in evidence of any statement made by driver to counsel in telephone call); *Prideaux v. Dep't of Pub. Safety*, 310 Minn. 405, 419, 247 N.W.2d 385, 393 (1976) (relying on Minn. Stat. § 481.10). Because *Friedman* was decided on state constitutional grounds, some uncertainty remained on whether the caselaw developed under Minn. Stat. § 481.10 would be applied to the limited right to counsel announced in *Friedman*. *Campbell*, 494 N.W.2d at 269. The supreme court settled this issue in *Campbell* by restating the relevant law interpreting Minn. Stat. § 481.10—including the judicially created exclusionary rule—and suggesting that it should be applied regardless of the basis for the right to counsel. *Campbell*, 494

N.W.2d at 269-70. Thus, although the rule suppressing overheard statements and the fruits of those statements was initially created by the supreme court to remedy violations of Minn. Stat. § 481.10, the rule applies equally as a remedy for violations of the limited right to counsel under the Minnesota Constitution. *Campbell*, 494 N.W.2d at 269-70.

Schroeder does not dispute that under Minnesota law a DWI arrestee will not be provided privacy to speak with an attorney before making a decision on whether to submit to a chemical test. Instead, he argues that his right to counsel was violated because what he said to his attorney was not only heard but recorded. And, alternatively, he argues that the Minnesota rule requiring suppression of overheard statements is no longer available to protect his right to counsel because the Eighth Circuit recently held that an officer's act of recording a DWI arrestee's statements to his attorney did not implicate the arrestee's Fourth Amendment rights. *See Sherbrooke v. City of Pelican Rapids*, 513 F.3d 809, 815 (8th Cir. 2008) (holding that, because DWI arrestee could not reasonably expect that what he said to attorney was private, police act of recording statements was not unconstitutional under Fourth Amendment). Neither argument withstands analysis.

First, *Campbell* establishes that an arrestee's limited right to counsel is vindicated even if an officer overhears what a DWI arrestee says to his attorney. 494 N.W.2d at 269. In the Fourth Amendment context, courts have held that the use of a recording device is not constitutionally impermissible unless the government uses the device to listen to conversations it could not otherwise have heard. *Lopez v. United States*, 373 U.S. 427, 439, 83 S. Ct. 1381, 1388 (1963); *State v. Olkon*, 299 N.W.2d 89, 102-03

(Minn. 1980). We see no reason to apply a different rule in the context of the limited right to counsel. Therefore, because Schroeder was not entitled to a private telephone conversation, we conclude that Schroeder's limited right to counsel was fully vindicated notwithstanding the officer's recording of Schroeder's side of the conversation.

Second, the Eighth Circuit's decision in *Sherbrooke* does not affect the Minnesota rule requiring suppression of statements between a DWI arrestee and his attorney. The suppression requirement is a judicially created rule that works in conjunction with the limited right to counsel under the state constitution. *See Campbell*, 494 N.W.2d at 269-70 (suggesting that judicially created exclusionary rule vindicates limited constitutional right to counsel); *State v. Webster*, 642 N.W.2d 488, 491 (Minn. App. 2002) (noting that DWI arrestee's right to consult counsel before testing exists "only under the Minnesota Constitution"). *Sherbrooke* analyzed whether a DWI arrestee's Fourth Amendment right against unreasonable searches had been violated. 513 F.3d at 815. It did not address the issue of whether the Minnesota Constitution requires suppression of recorded statements. *Id.* In fact, the Eighth Circuit cited *Friedman* for the proposition that the arrestee's right to call his attorney "is properly addressed, if at all, under constitutional provisions other than the Fourth Amendment." *Id.* Thus, the Minnesota rule requiring suppression of statements between a DWI arrestee and his attorney remains valid and is unaffected by *Sherbrooke*.

Finally, we address the three sets of arguments put forward by Schroeder. First, Schroeder raises arguments that rely primarily on Fourth Amendment decisions relating to unreasonable searches. U.S. Const. amends. IV, XIV. The link between these

arguments and Schroeder's implied consent violation, however, is not readily established, either directly or indirectly. Even in circumstances in which the Fourth Amendment fully applies, the remedy for an unlawful search or the exploitation of an unlawful search is suppression of the resulting evidence. *See Wong Sun v. United States*, 371 U.S. 471, 485-87, 83 S. Ct. 407, 416-17 (1963) (discussing Fourth Amendment exclusionary rule). But the evidence at issue in this proceeding is proof of Schroeder's refusal to take the breath test. The officer witnessed Schroeder's act of refusal, and the officer's testimony is the only evidence the state offered. It did not use the recording or derive any evidence from the recording. Thus, whether or not the act of recording violated the Fourth Amendment, the suppression remedy is unavailable.

Second, the indirect relationship that Schroeder seeks to establish is equally tenuous. Schroeder argues that evidence of his refusal was derived from the act of recording because it indirectly caused his refusal. Even if we were to assume that the officer conducted an illegal search, evidence of Schroeder's independent action in refusing the breath test would not be suppressed as a justifiable response to the allegedly illegal search. *See City of St. Louis Park v. Berg*, 433 N.W.2d 87, 89-90 (Minn. 1988) (agreeing with LaFave that suspect's independent acts in response to illegal arrest does not fall within exclusionary rule when police were not "seeking to exploit the illegality . . . to gain some advantage"); *see also State v. Ingram*, 570 N.W.2d 173, 178 (Minn. App. 1997) (noting that evidence of crime committed in response to illegal arrest or search is not suppressed as fruit of prior illegality), *review denied* (Minn. Dec. 22, 1997).

Third, Schroeder's argument appears to rest on the premise that his refusal should be excused because he did not know that the recording would be excluded from evidence. The Minnesota Supreme Court has never held that the limited right to counsel requires an officer to inform a DWI arrestee that his statements to his attorney cannot be admitted as evidence against him even though the statements may be overheard. *See Campbell*, 494 N.W.2d at 270 (noting concern that "presence of police officer in the room when the arrestee talks with the attorney may inhibit the arrestee" and professing belief that "experienced attorneys will understand the situation and ask 'yes or no' questions that allow the attorneys to get the information they need to advise the arrestees properly"). The Minnesota legislature statutorily requires officers to advise DWI arrestees that they have a "right to consult with an attorney." Minn. Stat. § 169A.51, subd. 2 (2006). But Schroeder does not dispute that he was read the implied-consent advisory and informed of his right to consult with an attorney. Furthermore the record indicates that Schroeder did not ask the officer to stop recording his statements, which would have given the officer an opportunity to address Schroeder's concerns. Under these circumstances, we conclude that Schroeder's right to counsel was vindicated and there is no statutory or constitutional basis for rescinding the license revocation.

Affirmed.