

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1521
A13-1622**

State of Minnesota,
Respondent,

vs.

Douglas Allan Barth,
Appellant

Douglas Allan Barth, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed March 3, 2014
Affirmed
Bjorkman, Judge**

Mower County District Court
File Nos. 50-CR-08-3713, 50-CR-08-3825

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Thomas C. Baudler, Austin City Attorney, Baudler, Maus, Forman, Kritzer & Wagner,
LLP, Austin, Minnesota (for respondent State of Minnesota)

Brandon V. Lawhead, Lawhead Law Offices, Austin, Minnesota (for appellant)

Lori Swanson, Attorney General, Kristi Nielsen, James E. Haase, Assistant Attorneys
General, St. Paul, Minnesota (for respondent Commissioner of Public Safety)

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

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges his conviction of driving while impaired (DWI) and the revocation of his driver's license under the implied-consent law, arguing that the district court erred by denying his motion to suppress the alcohol-concentration evidence obtained from a warrantless breath test. We affirm.

FACTS

On October 12, 2008, appellant Douglas Barth was stopped for illegal driving conduct and submitted to a breath test, which revealed an alcohol concentration of .08. Respondent State of Minnesota charged Barth with DWI, and respondent Minnesota Commissioner of Public Safety revoked Barth's driver's license. Barth subsequently moved to suppress the results of his breath test as a warrantless search in violation of the Fourth Amendment under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), and to dismiss the DWI charge and rescind the license revocation. The district court denied the motions, determining that a warrant was unnecessary because Barth consented to the test and that the implied-consent advisory he received, which details the criminal consequences of refusing testing, is not inherently coercive. Barth submitted the DWI charge to the district court on stipulated facts, and the district court found him guilty. These consolidated appeals follow.

DECISION

Collection and testing of a person's blood, breath, or urine constitutes a search under the Fourth Amendment to the United States Constitution, requiring a warrant or an exception to the warrant requirement. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (1989); *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). The exigency created by the dissipation of alcohol in the body is insufficient to dispense with the warrant requirement. *McNeely*, 133 S. Ct. at 1561. But a warrantless search of a person's breath, blood, or urine is valid if the person voluntarily consents to the search. *Brooks*, 838 N.W.2d at 568. The state bears the burden of showing by a preponderance of the evidence that the defendant freely and voluntarily consented. *Id.*

Barth argues that the state failed to prove that he voluntarily consented to a breath test. "Whether consent is voluntary is determined by examining the totality of the circumstances." *Id.* The relevant circumstances include "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Id.* at 569 (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)). The nature of the encounter includes how the police came to suspect the driver was under the influence, whether police read the driver the implied-consent advisory, and whether he had the right to consult with an attorney. *Id.* But a driver's consent is not coerced as a matter of law simply because he or she faces criminal consequences for refusal to submit to testing. *Id.* at 570.

The district court thoroughly examined the circumstances of Barth's breath test and made the following largely undisputed findings. Minnesota State Trooper Scott

Crabtree stopped Barth on October 12, 2008, after observing him change lanes several times without signaling and roll through a stop sign. While speaking with Barth, Trooper Crabtree noted indicia of intoxication and asked Barth to perform field sobriety tests, which he failed. Trooper Crabtree arrested Barth and took him to the Mower County Detention Center, where he read Barth an implied-consent advisory. The advisory makes it clear that drivers have the right to consult with an attorney and have a choice whether to submit to testing. *See id.* at 572 (stating “the fact that someone submits to the search after being told that he or she can say no . . . supports a finding of voluntariness”). Barth indicated that he understood the advisory, did not wish to consult an attorney, and was willing to take a breath test. There was nothing about the implied-consent procedure to indicate that Barth’s consent to the breath test was anything but voluntary. Accordingly, we conclude that the district court did not err by denying Barth’s motion to suppress the results of his breath test.

Affirmed.