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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1523

State of Minnesota,
Appellant,

vs.

Carl James White, Jr.,
Respondent.

Filed May 12, 2014
Reversed and remanded
Kirk, Judge

Cass County District Court
File No. 11-CR-13-759

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

Christopher J. Strandlie, Cass County Attorney, Benjamin T. Lindstrom, Assistant County Attorney, Walker, Minnesota (for appellant)

Melvin R. Welch, Appelman Law Firm, LLC, St. Louis Park, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Worke, Judge; and Klaphake, Judge.[*]

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[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KIRK, Judge

In this prosecution appeal, the state argues that the district court erred by suppressing evidence of respondent's alcohol concentration, and that the suppression of the evidence had a critical impact on the state's ability to prosecute respondent. We agree and reverse and remand.

FACTS

These facts are undisputed: At about 3:45 a.m. on April 19, 2013, Cass County Deputy Sheriff Mark Diaz responded to a report of a car in the ditch near Walker. Deputy Diaz found the car and respondent Carl James White Jr. standing nearby. Respondent admitted he had been driving the car and had been drinking. Deputy Diaz observed that respondent had poor balance and smelled of alcohol, his speech was slurred, and his eyes were watery and bloodshot. After conducting field sobriety tests, Deputy Diaz arrested respondent and took him to jail.

Deputy Diaz read respondent the implied-consent advisory, including the warning that refusal to consent to an alcohol-concentration test is a crime. Respondent was given an opportunity to contact an attorney, but was unsuccessful. He then agreed to take a breath test, and the alcohol-concentration reading was .16. Deputy Diaz issued respondent a citation for fourth-degree driving while impaired (DWI) under Minn. Stat. § 169A.27. Respondent was booked on that charge and held until his first appearance at 11:30 a.m. the same day.

Respondent moved to suppress the breath-test evidence, arguing that the administration of the test violated the Fourth Amendment. The district court granted the motion, concluding that the case lacked exigent circumstances sufficient to negate the search warrant requirement, and respondent's consent to the breath test was not voluntary because it was compelled by the threat of prosecution for the crime of test refusal. The state timely appealed.

D E C I S I O N

When the facts of a case are undisputed, the district court's pretrial suppression order presents a question of law that this court reviews independently. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

I. The district court's suppression order had a critical impact on the state's ability to prosecute the case.

"When the state appeals a pretrial order, it must show clearly and unequivocally (1) that the ruling was erroneous and (2) that the order will have a 'critical impact' on its ability to prosecute the case." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quoting *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004)). Critical impact is a threshold issue; appellate courts will not review a pretrial order that does not have a critical impact. *Id*. The state must satisfy the critical-impact test in order for this court to have jurisdiction. *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004). "The state can show . . . critical impact not only when excluding the evidence 'completely destroys' the state's case, but also when excluding the evidence 'significantly reduces the likelihood of a successful prosecution.'" *McLeod*, 705 N.W.2d at 784 (quoting *State v.*

Kim, 398 N.W.2d 544, 551 (Minn. 1987)). Critical impact is a "demanding standard" and "[w]hether [exclusion] of a particular piece of evidence will significantly reduce the likelihood of a successful prosecution depends in large part on the nature of the state's evidence against the accused." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995). "[E]xcluded evidence that is 'particularly unique in nature and quality is more likely to meet the critical impact test.'" *McLeod*, 705 N.W.2d at 784 (quoting *In re Welfare of L.E.P.*, 594 N.W.2d 163, 168 (Minn. 1999)).

DWI offenses are defined by Minn. Stat. § 169A.20, subds. 1–1c (2012). The offenses potentially at issue here are defined by subdivisions 1(1) and 1(5). Under subdivision 1(1), "[i]t is a crime for any person to drive, operate, or be in physical control of any motor vehicle . . . when . . . under the influence of alcohol." Subdivision 1(5) makes it a crime to drive a motor vehicle if "the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more." The citation issued by Deputy Diaz makes no reference to the definitions of DWI crimes found in section 169A.20. Instead, it refers to section 169A.27, which assigns fourth-degree severity to the crimes defined by section 169A.20 when the defendant has no prior offenses and there are no aggravating factors. Prior to respondent's first appearance, a more specific tab charge was entered in the record, charging respondent under subdivision 1(1).

The state argues that the citation's general reference to section 169A.27 permits the state "to proceed under all applicable theories under [section] 169A.20." The state correctly points out that the rules require much more specificity in a complaint than in a

citation. Minnesota Rule of Criminal Procedure 2.01, subdivision 1, requires a complaint to specify the offense charged, the specific statute allegedly violated, and the maximum penalty. As for citations, Minn. R. Crim. P. 6.01, subd. 4, provides for their general form and requires that they include notices regarding failure to appear and payment of fines, but does not expressly require specificity as to the offense charged, the statute allegedly violated, or the maximum penalty. But Minn. R. Crim. P. 4.02, subd. 5(2), requires that when a person is arrested and detained until his first appearance, a complaint "must be filed promptly," and "must be presented to the judge before the [first] appearance." Minn. R. Crim. P. 4.02, subd. 5(3), provides that "[i]f no complaint is filed by the time of the defendant's first appearance . . . the court administrator must enter upon the records a tab charge." Either way, the rules contemplate that charges brought by citation will be promptly clarified by a complaint or a tab charge. In this case, the charges were clarified by entry of a tab charge. Unless the state amends the tab charge, or dismisses it and recharges, respondent may only be prosecuted under subdivision 1(1). We must decide whether suppression of alcohol-concentration evidence has a critical impact on the state's ability to prosecute respondent under subdivision 1(1).

Respondent correctly asserts that alcohol-concentration evidence is not essential to a conviction under subdivision 1(1); that subdivision makes no reference to alcohol-concentration evidence. But the test for critical impact is not whether the suppressed evidence is essential to a conviction. "The state can show . . . critical impact not only when excluding the evidence completely destroys the state's case, but also when

excluding the evidence significantly reduces the likelihood of a successful prosecution." *McLeod*, 705 N.W.2d at 784 (quotations omitted).

When analyzing critical impact, an appellate court first examines all the admissible evidence available to the state in order to determine what impact the absence of the suppressed evidence will have. *L.E.P.*, 594 N.W.2d at 168. The court should then

> examine the inherent qualities of the suppressed evidence itself, its relevance and probative force, its chronological proximity to the alleged crime, its effect in filling gaps in the evidence viewed as a whole, its quality as a perspective of events different than those otherwise available, its clarity and amount of detail and its origin.

Id. (citation omitted). Suppressed evidence that is unique in nature and quality is more likely to meet the critical-impact test. *Id.*

Here, potentially admissible evidence supporting a charge under subdivision 1(1) includes: (1) respondent's admission that he had been drinking and driving; (2) Deputy Diaz's observations that respondent smelled of alcohol and had poor balance, bloodshot eyes, and slurred speech; (3) Deputy Diaz's testimony about the field sobriety tests; and (4) the alcohol-concentration test results that the district court suppressed. The alcohol-concentration evidence is unique in nature and quality because it does not depend on Deputy Diaz's observations and testimony. Deputy Diaz's testimony would be subject to a jury's assessment of his credibility, but the alcohol-concentration evidence is uniquely objective and relatively immune from credibility assessments. As a result, the alcohol-concentration evidence would likely be uniquely persuasive to a jury. In short, although alcohol-concentration evidence is not essential to a conviction under subdivision 1(1), its

suppression still "significantly reduces the likelihood of a successful prosecution." *Kim*, 398 N.W.2d at 551. We conclude that under the facts of this case, the critical-impact test is satisfied, and we therefore have jurisdiction to review the pretrial order.

II. The district court erred by suppressing the evidence of respondent's alcohol-concentration test.

We turn to the question of whether the district court erred by suppressing the alcohol-concentration evidence. In view of the Minnesota Supreme Court's decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied* (U.S. Apr. 7, 2014), we conclude that the answer is yes.

Collection and testing of a person's breath constitutes a search under the Fourth Amendment to the United States Constitution, and therefore requires 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). The exigency created by the dissipation of alcohol in the body is not sufficient, on its own, to dispense with the warrant requirement. *Missouri v. McNeely*, 133 S. Ct. 1552, 1561 (2013). But a warrantless search is valid if the person voluntarily consents. *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.* Whether consent is given freely and voluntarily is determined by examining the "totality of the circumstances." *Id.* (quotation omitted). A driver's decision to take a test is not coerced or extracted "simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Id.* at 570.

The district court based its decision to grant respondent's suppression motion on its conclusions that the case lacked exigent circumstances sufficient to negate the warrant requirement, and that respondent's consent to the breath test was not voluntary because it was compelled by the threat of prosecution for the crime of test refusal. Before this court, the state does not argue that the warrantless breath test was justified by exigent circumstances. Instead, the state argues that respondent voluntarily consented. We agree.

Under *Brooks*, the implied-consent advisory by itself does not coerce consent, and the issue of consent must be evaluated based on 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." *Id.* at 569 (quotation omitted). Analysis of the undisputed facts of this case demonstrates that respondent voluntarily consented.

The squad car video indicates that the interactions between Deputy Diaz and respondent were respectful and amiable. Respondent was compliant and cooperative, and Deputy Diaz repeatedly thanked him for his cooperation. Respondent's car had come to rest near a body of water, and the two men discussed the potentially fatal consequences if the car had gone in the water; respondent and one of his passengers expressed appreciation for Deputy Diaz's concern.

The audio recording of the implied-consent advisory also reflects a positive interaction. Deputy Diaz gave respondent detailed instructions on how to use the phone in an effort to contact an attorney, provided phone books for his use, and allowed him to call his family when he could not reach an attorney. Respondent's answers during the

advisory clearly indicated that he understood the advisory and freely agreed to take the breath test. The documentation of the advisory demonstrates that it was properly given, and respondent has not challenged the propriety of the advisory itself.

Respondent suggests that his inability to contact an attorney rendered his consent involuntary. This fact does distinguish this case from *Brooks*; in *Brooks* the defendant was able to speak with his attorney, who was actually a passenger in his car at the time of one of the three arrests at issue in the case, and who he contacted by phone during the other two arrests. 838 N.W.2d at 565. The supreme court observed that Brooks's ability to consult with counsel before consenting to tests "reinforce[d] the conclusion that his consent was not illegally coerced." *Id*. at 571. But the *Brooks* court did not hold or suggest that inability to contact an attorney renders consent involuntary.

In sum, the only evidence that respondent's consent may have been coerced is the fact that Deputy Diaz read him the implied-consent advisory, which states that refusal to consent to chemical testing is a crime. The district court, acting before the *Brooks* decision and without the benefit of its guidance, relied exclusively on this single factor in deciding that respondent's consent was not valid. The supreme court later held, in *Brooks*, that consent is not coerced or extracted "simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Id.* at 570. All of the other circumstances show that respondent voluntarily consented. We therefore conclude that the district court erred by suppressing the alcohol-concentration evidence for lack of consent.

Reversed and remanded.