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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1923

Chad Robert Bauer, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed June 23, 2014
Reversed
Johnson, Judge

Rice County District Court
File No. 66-CV-13-1376

Carson J. Heefner, Heefner Nelson Law, P.A., St. Paul, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Johnson, Judge; and Chutich, Judge.

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

JOHNSON, Judge

The commissioner of public safety revoked Chad Robert Bauer's driver's license after he was arrested for driving while impaired and a urine test showed that his alcohol concentration was 0.08. The district court rescinded the commissioner's revocation on

the ground that Bauer's consent to the urine test was not voluntary for Fourth Amendment purposes. We conclude that the totality of the circumstances shows that Bauer voluntarily consented to the urine test and, therefore, reverse.

FACTS

At approximately noon on March 30, 2013, Bauer's former girlfriend called police to report that Bauer was driving with an open container of alcohol inside his vehicle near the library in the city of Northfield. Officer Jeffrey Gigstad was dispatched to the area. Officer Gigstad saw Bauer's vehicle and followed him for a few blocks without observing any driving violations.

After Bauer stopped in a parking lot, Officer Gigstad and another officer in another squad car parked near Bauer's vehicle. Officer Gigstad approached Bauer and informed him that police had received a report of an open container of alcohol in his vehicle. Bauer said that he had both empty and unopened cans of beer in the back seat, but he denied that he had any open containers of alcohol in his vehicle. While speaking with Bauer, Officer Gigstad detected the odor of alcohol on Bauer's breath and noticed that his speech was slurred. Bauer said that he had consumed three beers earlier that day. Bauer failed several field-sobriety tests, and a preliminary breath test indicated an alcohol concentration of 0.097.

Officer Gigstad arrested Bauer for driving while impaired and took him to the Northfield Safety Center, where he read Bauer the implied-consent advisory. Bauer indicated that he understood the advisory. When Officer Gigstad asked Bauer whether he wished to speak with an attorney, Bauer responded in the affirmative. Officer Gigstad

provided Bauer with a telephone and a telephone directory. After approximately 30 minutes, Bauer told Officer Gigstad that he would submit to a chemical test. A test of Bauer's urine sample revealed an alcohol concentration of 0.08.

The commissioner of public safety revoked Bauer's driver's license. In May 2013, Bauer petitioned the district court for judicial review of the commissioner's revocation of his license. *See* Minn. Stat. § 169A.53, subd. 2 (2012). In July 2013, the district court conducted an implied-consent hearing. Bauer was represented by counsel but was not present. At the outset of the hearing, Bauer's attorney identified "the only issue" as "*McNeely*." The commissioner offered an exhibit consisting of the implied-consent peace-officer's certificate, the implied-consent advisory, Bauer's urine-test results, and Officer Gigstad's police report. Bauer did not object, and the exhibit was received into evidence. Neither party called any witnesses. In August 2013, the district court issued an order in which it rescinded the commissioner's order of revocation on the ground that the warrantless urine test was unlawful because Bauer did not voluntarily consent to it. The commissioner appeals.

D E C I S I O N

The commissioner argues that the district court erred by rescinding Bauer's license revocation. The commissioner contends that the district court's order is inconsistent with *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014), which was issued by the supreme court after the district court issued its order. The commissioner further contends that the totality of the circumstances shows that Bauer voluntarily consented to the urine test.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV; *see also* Minn. Const. art. I, § 10. A test of a person's urine constitutes a search for purposes of the Fourth Amendment and, thus, requires either a warrant or an exception to the warrant requirement. *Skinner v. Railway Labor Execs.' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989); *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (2013), *as recognized in Brooks*, 838 N.W.2d at 567. The exigency created by the dissipation of alcohol in a suspect's body is not a *per se* exception to the warrant requirement. *McNeely*, 133 S. Ct. at 1568. But the consent of the person whose urine is tested is an exception to the warrant requirement. *Brooks*, 838 N.W.2d at 568. In an implied-consent case, the commissioner bears the burden of proving by a preponderance of the evidence that the driver voluntarily consented to chemical testing. *Johnson v. State, Comm'r of Pub. Safety*, 392 N.W.2d 359, 362 (Minn. App. 1986).

In this case, the district court concluded, as a matter of law, that Bauer did not voluntarily consent to the urine test because, "[w]hen a refusal of a test results in criminal sanctions, the 'consent' to search cannot be construed as 'freely and voluntarily' given." The district court did not have the benefit of the supreme court's opinion in *Brooks*, which was issued two months after the district court's order and expressly rejected the

district court's reasoning. *See* 838 N.W.2d at 570. In *Brooks*, the supreme court held that a driver's consent is not coerced as a matter of law simply because the driver would face criminal consequences if he were to refuse testing. *Id.* Instead, "[w]hether consent is voluntary is determined by examining the totality of the circumstances." *Id.* at 568 (quotation omitted). Thus, in light of *Brooks*, the district court erred by holding that Bauer's consent was not voluntary as a matter of law. *See id.* at 570.

In *Brooks*, the supreme court applied the totality-of-the-circumstances test and concluded that Brooks's consent was voluntary. *Id.* at 572. The supreme court stated that 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)). When considering the nature of the encounter, a court should ask 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.* The supreme court identified three primary reasons why Brooks's consent was voluntary and not coerced. First, the supreme court noted that Brooks was read the implied-consent advisory, which "made clear to him that he had a choice of whether to submit to testing." *Id.* at 572. The supreme court reasoned that "[w]hile an individual does not necessarily need to know he or she has a right to refuse a search for consent to be voluntary, the 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.* Second, the supreme court noted that Brooks had "the ability to consult with counsel." *Id.* at 571-72. The supreme court reasoned that "the ability to

consult with counsel about an issue supports the conclusion that a defendant made a voluntary decision." *Id.* at 572. Third, the supreme court noted that Brooks "was neither confronted with repeated police questioning nor was he asked to consent after having spent days in custody." *Id.* at 571 (citing *State v. High*, 287 Minn. 24, 27-28, 176 N.W.2d 637, 639 (1970)). The supreme court reasoned that "nothing in the record suggests that Brooks was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired." *Id.* (quotation marks omitted).

In this case, the undisputed facts indicate that Bauer voluntarily consented to the urine test in essentially the same manner as Brooks. First, Bauer was read the implied-consent advisory and indicated that he understood it. Second, Bauer was given the opportunity to speak with an attorney. Third, Bauer was not "confronted with repeated police questioning," and nothing in the record suggests that Bauer "was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired." *See id.* Thus, the totality of the circumstances indicates that Bauer voluntarily consented to the urine test.

Bauer contends that the commissioner did not satisfy her burden of proving by a preponderance of the evidence that Bauer freely and voluntarily consented because "the State presented no evidence outside of the facts that [Bauer] was arrested, and was read the mandatory form by the officer." The commissioner's exhibit and the inferences that may be drawn from the exhibit are sufficient to prove that Officer Gigstad read the implied-consent advisory to Bauer, that Bauer understood the advisory, that Bauer was given an opportunity to speak with an attorney, and that there was an absence of coercion

before Bauer consented to a urine test. Bauer did not introduce any contrary evidence. Thus, the commissioner satisfied her burden of persuasion on the question whether Bauer validly consented to a chemical test.

In sum, the district court erred by rescinding the revocation of Bauer's driver's license on the ground that the urine test violated his Fourth Amendment rights. Based on our examination of the totality of the circumstances, we conclude that Bauer voluntarily consented to the urine test. In light of that conclusion, we need not consider the commissioner's arguments that chemical testing under the implied-consent law is *per se* reasonable or that the exclusionary rule does not apply.

Reversed.