STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1952

State of Minnesota,
Appellant,

vs.

Glenn David Heitzman,
Respondent.

Filed April 21, 2014
Reversed
Ross, Judge

Stearns County District Court
File No. 73-CR-13-6436

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for appellant)

Mark D. Nyvold, Fridley, Minnesota; and

Todd V. Peterson, Sauk Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (interested observer)

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

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

ROSS, Judge

A deputy sheriff arrested Glenn Heitzman for drunk driving and Heitzman agreed to a urine test that confirmed his intoxication. Heitzman moved the district court to suppress the test result because the state administered the test without a warrant. The state appeals the district court's decision to suppress the test result and dismiss the charge, arguing that the district court erroneously concluded that circumstances coerced Heitzman to take the test. We conclude that Heitzman voluntarily consented and we therefore reverse.

FACTS

Stearns County Deputy Sheriff Chad Meemken noticed a Chevy Suburban being driven erratically in Rockville and weaving in its lane. As he followed the Suburban it made a wide turn onto another road and drifted into the oncoming lane. Deputy Meemken activated his lights and siren but the Suburban traveled about a quarter mile farther before stopping in a driveway. Glenn Heitzman was driving. Deputy Meemken smelled the odor of alcoholic beverages when he spoke to Heitzman and noticed that Heitzman had watery, bloodshot eyes. After the deputy asked him for identification, Heitzman struggled to locate his wallet even though it lay in plain view on the console.

Deputy Meemken asked Heitzman to step out of the SUV to perform field sobriety tests. When Heitzman exited, the deputy noticed that his zipper was down and the crotch of his pants was wet and smelled of urine. Heitzman could not hold his head still during the horizontal gaze nystagmus test, and the test indicated intoxication. He declined to

perform other tests, claiming hip problems. He also refused to submit to a preliminary breath test. Deputy Meemken arrested Heitzman, placed him in the squad car, and began reading the implied consent advisory. Heitzman said he wanted to call an attorney, so Deputy Meemken took him to the St. Cloud Hospital where Heitzman had access to a telephone and a directory. Heitzman struggled to operate the phone, so Deputy Meemken dialed an attorney's number for him. Heitzman spoke to an attorney and refused a blood test but agreed to give a urine sample. The urine test revealed an alcohol concentration of .12. The state charged Heitzman with alternative counts of fourth-degree driving while impaired for driving while intoxicated and for driving with an alcohol concentration above the per se violation limit.

Heitzman moved the district court to suppress the result of his urine test under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), because the state lacked a warrant and had not established that an exception to the warrant requirement applied. The district court determined that Heitzman's consent was coerced and granted his motion, suppressing the urine test result and dismissing the second count.

The state appeals.

D E C I S I O N

Because the facts are undisputed, the district court's pretrial suppression order presents a question of law that we review de novo. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). The parties agree that the district court's order suppressing the urine test result and dismissing one charge had a critical impact on the state's case against

Heitzman, so the state's appeal meets the threshold critical-impact requirement. *See* Minn. R. Crim. P. 28.04, subd. 2.

The state argues that the district court erred when it granted Heitzman's motion to suppress the result of his urine test on constitutional grounds. The federal and state constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A urine test is a search. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989). Warrantless searches are unreasonable unless an exception to the warrant requirement applies. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). Voluntary consent is an exception to the warrant requirement. *Othoudt*, 482 N.W.2d at 222. The state must prove that consent was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222, 93 S. Ct. 2041, 2045 (1973); *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). We consider the totality of the circumstances to decide if consent was voluntary. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013), *cert. denied* (U.S. Apr. 7, 2014). Consent is not involuntary simply because the decision to consent is difficult, but "acquiescing to a claim of lawful authority"—like a purportedly valid search warrant—does not constitute voluntary consent. *Id.* at 569. And a suspected drunk driver's consent to an alcohol test is not involuntary or coerced just because the driver is warned that Minnesota's implied consent law criminalizes refusal to take the test. *Id.* at 570.

Heitzman persuaded the district court that, under *McNeely*, the criminal penalties for test refusal coerced him into consenting to the test. But after *McNeely*, the *Brooks* court established that the criminal penalties for refusing a chemical test do not invalidate

consent that is otherwise voluntary under the totality of the circumstances. We therefore need to decide only whether the district court erroneously concluded that Heitzman did not voluntarily consent under the totality of the circumstances.

The relevant circumstances include the reasons the deputy suspected Heitzman of driving while intoxicated, his request that Heitzman take a blood or urine test, including reading the implied consent advisory, and Heitzman's access to legal counsel. *See id.* at 569. Heitzman's circumstances are substantially similar to those that satisfied the *Brooks* court that the suspected drunk driver had voluntarily consented. The officers in *Brooks* had probable cause to suspect Brooks of driving under the influence, they read him the implied consent advisory, and they allowed him to consult with his attorney. *Id.* at 569–70. Heitzman does not dispute that the erratic driving, alcohol breath, untimely urination, and other indicia of drunkenness gave Deputy Meemken probable cause to suspect that he was driving under the influence. Deputy Meemken appropriately read Heitzman the implied consent advisory, informing him that refusing the test would subject him to criminal penalties. He also helped Heitzman contact an attorney, who presumably further advised Heitzman of his rights and any risks associated with alcohol testing. Heitzman has identified no facts or circumstances suggesting that his consent was coerced.

Heitzman's only argument, which cannot withstand the holding in *Brooks*, is that the test-refusal criminal penalties coerced his compliance. The district court's "primary factor," or its only factor, in finding coercion was its conclusion that "[t]he imposition of criminal sanction upon test refusal plainly serves to coerce an individual to give his actual consent." The district court's erudite reasoning leading to this conclusion

notwithstanding, the conclusion falls under the supreme court's decision in *Brooks* twenty days later: "[A] driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Id.* at 570. We hold that the criminal penalties alone did not coerce Heitzman. Because the circumstances establish that Heitzman was not coerced but freely and voluntarily consented to the urine test, we reverse.

Reversed.