STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2000

Tylor John Neuman, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed June 2, 2014
Reversed
Cleary, Chief Judge

Cass County District Court
File No. 11-CV-13-861

Rich Kenly, Backus, Minnesota (for respondent)

Lori Swanson, Attorney General, Jacob Fischmann, Assistant Attorney General, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Cleary, Chief Judge; and Larkin, Judge.

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

CLEARY, Chief Judge

Appellant Commissioner of Public Safety appeals a district court order suppressing the results of respondent Tylor John Neuman's breath test and rescinding

the revocation of his driver's license. On appeal, appellant argues that the district court erred in suppressing the breath-test results and rescinding the revocation after concluding that respondent did not voluntarily consent to the test. Because, under the totality-of-the-circumstances analysis, respondent consented to the breath test, we reverse.

FACTS

In the early morning of April 26, 2013, respondent was arrested for driving while intoxicated (DWI) in Cass County, Minnesota. Respondent was read the implied-consent advisory and agreed to take a breath test. Respondent declined the opportunity to consult with an attorney prior to taking the test. The test indicated that respondent had an alcohol concentration of .11. Police did not obtain a warrant prior to administering the test. Respondent's driver's license was subsequently revoked.

Respondent filed a petition to rescind the revocation of his license and a motion to suppress the results of his breath test in district court, arguing that Minnesota's implied-consent law is unconstitutional. At the implied-consent hearing, respondent conceded that there was probable cause for his arrest. The sole issue before the district court was whether the administration of the warrantless breath test violated respondent's rights under the Fourth Amendment. On August 15, 2013, the district court suppressed the breath-test results and rescinded the revocation of respondent's driver's license after determining that respondent did not voluntarily consent to the test. This appeal followed.

D E C I S I O N

When the facts are not in dispute, a district court order rescinding a license revocation based on an alleged violation of the right to be secure against unreasonable searches and seizures is reviewed de novo. *See Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004). In reviewing the constitutionality of a search, "we independently analyze the undisputed facts to determine whether evidence resulting from the search should be suppressed." *Id.* A district court's conclusions of law are not overturned "absent erroneous construction and application of the law to the facts." *Id.*

The Fourth Amendment to the U.S. Constitution and Article I, Section 10 of the Minnesota Constitution guarantee people the right to be free from unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Taking a sample of a person's breath constitutes a search under the Fourth Amendment and generally requires a warrant. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (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 State v. Brooks*, 838 N.W.2d 563, 567 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). However, one exception to the warrant requirement is consent. *Brooks*, 838 N.W.2d at 568. "For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented." *Id.* Voluntary consent is consent without coercion or submission to an

assertion of authority. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). In determining whether consent is voluntary, we consider 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." *Brooks*, 838 N.W.2d at 568-69 (quoting *Dezso*, 512 N.W.2d at 880). The nature of the encounter in implied-consent cases includes how the police came to suspect the driver was under the influence, whether the driver was read the implied-consent advisory, and whether the driver had the right to consult with an attorney. *Id.* at 569. A driver's consent is not per se coerced and involuntary because it is a crime to refuse consent for testing. *Id.* at 570.

The issue before the supreme court in *Brooks* was whether a driver had consented to testing in three separate incidents of arrest for DWI. *Id.* at 569-72. Brooks did not assert that the police lacked probable cause to believe he had been driving under the influence, and he did not argue that the police failed to follow the proper procedures under the implied-consent law. *Id.* at 569-70. The court noted that Brooks was read the implied-consent advisory before he was asked to take the tests. *Id.* at 570. After consulting with his attorney, Brooks agreed to take the tests in all three incidents. *Id.* The court determined 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.* at 571 (quotation marks omitted). Brooks's consent was found to be voluntary under these circumstances. *Id.* at 572.

Here, the district court determined that respondent did not voluntarily consent to the breath test when his only other option was to face license revocation for test refusal under Minn. Stat. § 169A.52, subd. 3 (2012) and a criminal charge under Minn. Stat. § 169A.20, subd. 2 (2012). Although the district court did not expressly hold that the implied-consent statute is unconstitutional, the only circumstance that it considered in determining whether respondent voluntarily consented was that he faced license revocation and a criminal charge if he refused the test. The court did not undergo a totality-of-the-circumstances analysis by considering the nature of the encounter, the kind of person the defendant is, and what was said and how it was said, as required by *Brooks*. The district court therefore erred in suppressing respondent's breath-test results and rescinding his license revocation.

Appellant asserts that the record supports a determination that respondent voluntarily consented to the breath test under the totality-of-the-circumstances analysis for three main reasons: (1) as in *Brooks*, respondent conceded that there was probable cause to arrest him for DWI; (2) respondent acknowledged that he understood the implied-consent advisory and declined to speak with an attorney; and (3) respondent verbally agreed to take the test.

The totality of the circumstances indicates that respondent consented to the breath test. As the court stated in *Brooks*, by reading the implied-consent advisory, police make clear to a driver that there is a choice of whether to submit to testing. *Id.* at 572. Additionally, "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.* Respondent was read the advisory, indicated he understood the advisory, and agreed to take the test. As in *Brooks*, nothing in the record suggests that respondent was coerced in the sense that his will was overborne and his capacity for self-determination critically impaired. Although the record is limited because the parties stipulated at the implied-consent hearing that the district court be presented with only a legal question, there is enough undisputed evidence in the record such that remand is not required. Because respondent consented to the breath test, the district court erred in suppressing the results of respondent's test and in rescinding the revocation of his license.

Reversed.