STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0962

State of Minnesota,
Respondent,

vs.

Maureen Ann O'Brien,
Appellant.

Filed June 23, 2014
Affirmed
Stoneburner, Judge*

Hennepin County District Court
File No. 27-CR-10-35267

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

Sandra Johnson, Bloomington City Attorney, Torrie J. Schneider, Assistant City Attorney, Bloomington, Minnesota (for respondent)

Max A. Keller, Lexie D. Stein, Keller Law Offices, Minneapolis, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Reyes, Judge; and Stoneburner, Judge.

* 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

STONEBURNER, Judge

Appellant challenges her conviction of fourth-degree driving while impaired, arguing that the district court erred by denying her motion to suppress the results of a warrantless breath test because her consent to the test was coerced. Because the record conclusively shows that appellant's consent was not coerced, we affirm.

FACTS

An automobile driven by appellant Maureen Ann O'Brien, a licensed Florida attorney since 1977, was stopped in Bloomington after a police officer observed an unsignaled lane change and lane-line straddling. After stopping the vehicle and making contact with O'Brien, the officer also observed that O'Brien had watery eyes and smelled an odor of alcohol coming from inside of the vehicle. O'Brien told the officer that she had consumed a couple of drinks that evening. Based on these observations and O'Brien's performance on several field sobriety tests, the officer arrested O'Brien, took her to the area within the Bloomington Police Department that is used to conduct Intoxilyzer tests, and read the Implied Consent Advisory to her. O'Brien stated that she understood the advisory and wanted to contact an attorney. A telephone and telephone books were made available to her. She made a number of telephone calls and, after approximately 80 minutes, indicated that she was done using the telephone and would consent to a breath test. The test showed an alcohol concentration of .17.

O'Brien was charged with two counts of fourth-degree driving while impaired. She moved to suppress evidence of the breath test as obtained in violation of her

constitutional rights. The motion was denied orally at the suppression hearing and the case proceeded to a jury trial.

At trial, O'Brien denied that she had engaged in unlawful driving conduct and asserted that she had passed all of the field sobriety tests. The jury found her guilty as charged and she was sentenced. After sentencing, the district court filed a written order with accompanying memorandum addressing the issues raised at the suppression hearing. O'Brien appealed, and this court stayed the appeal pending the supreme court's decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014), which examined three cases involving consent to alcohol-concentration testing. After the opinion in *Brooks* was released, the stay was lifted.

In this appeal, O'Brien challenges only the district court's denial of her motion to suppress the results of the breath test based solely on the argument that the state failed to prove that her consent to the test was voluntary.

D E C I S I O N

1. Adequacy of record for review

As a preliminary matter, respondent State of Minnesota argues that this appeal should be dismissed because O'Brien's failure to provide a transcript of the suppression hearing results in a record that is inadequate for appellate review. Generally, the appellant bears the burden of providing an adequate record for appeal. *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995). The record must be "sufficient to show the alleged errors and all matters necessary for consideration of the questions presented." *Truesdale v. Friedman*, 267 Minn. 402, 404, 127 N.W.2d 277, 279 (1964);

see also Eisenschenk v. Eisenschenk, 668 N.W.2d 235, 243 (Minn. App. 2003) (stating that "[a] party cannot complain about a district court's failure to rule in [the party's] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question"). If the record is not sufficient to support review, the appeal may be dismissed. *Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530, 531 (1968).

Because the district court orally denied O'Brien's motion to suppress, lack of a transcript prevents our review of what was argued to the district court, whether the district court made oral findings, and whether the district court's written memorandum sets forth all of the reasons underlying the denial of O'Brien's motion to suppress. In its written memorandum, the district court stated, under the heading "[c]oerced consent and due process," that it declined to address that issue raised by O'Brien because it was not briefed.

Generally this court will not consider matters, including constitutional issues, not argued to and addressed by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981). Nonetheless, because (1) O'Brien, the state, and the district court did not have the benefit of the supreme court's ruling in *Brooks*; (2) there are sufficient undisputed facts surrounding O'Brien's consent to testing in the record for this court to review the voluntariness of O'Brien's consent under *Brooks*; and (3) the rule that issues raised for the first time on appeal will not be addressed is not ironclad, we decline to dismiss this appeal for lack of a transcript of the suppression hearing. *See* Minn. R. Crim. P. 28.02, subd. 11 (stating

that "[o]n appeal from a judgment, the court may review any order or ruling of the district court or any other matter, as the interests of justice require"). We also decline O'Brien's request that this matter be remanded to the district court for specific findings on the issue of voluntary consent, noting that the supreme court in *Brooks* determined that the defendant voluntarily consented to chemical testing based on the totality of circumstances even though it did not have specific district court findings on consent in at least two of the cases before it. 838 N.W.2d at 566, 569–72.

2. Voluntariness of O'Brien's consent to testing

The Minnesota and United States Constitutions protect citizens from unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A breath test is a search 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, 1413 (1989). The exception relied on by the state in this case is consent. "[P]olice do not need a warrant if the subject of the search consents." *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 [to a search]." *Id.*

O'Brien argues that she "merely acquiesced" to authority and did not voluntarily consent to the breath test. Consent is not voluntary when an individual simply acquiesces to a claim of lawful authority. *Id.* at 569. Rather, consent is evaluated by examining 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.* (quotation omitted). The "nature of the encounter" includes how law enforcement came to suspect that the

defendant was driving impaired, whether the person was read the implied consent advisory, and whether the person was allowed to consult with an attorney. *Id.*

On appeal, O'Brien, a mature person and seasoned attorney, does not challenge the validity of the stop, even though she disputes the driving conduct testified to by the arresting officer. And, although O'Brien testified that she did not fail the field sobriety tests, she has never disputed the officer's observations of watery eyes and an odor of alcohol and her admission that she had consumed alcohol. "An officer needs only one objective indication of intoxication to constitute probable cause to believe a person is under the influence[,]" *Heuton v. Comm'r of Pub. Safety*, 541 N.W.2d 361, 363 (Minn. App. 1995), and "[w]hen a driver admits to drinking, the admission may support probable cause to believe that the driver is under the influence[,]" *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 841 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000).

O'Brien testified that the arresting officer was "very nice," explained and demonstrated the field sobriety tests, and fully accommodated her use of the telephone. O'Brien concedes that the implied consent advisory was read to her, she understood the advisory, and she was given an opportunity to consult with an attorney.

O'Brien argues that two critical factors indicate that her consent to testing was not voluntary. First, she contends that the implied consent advisory is inherently coercive because it communicates that refusal to take a test is a crime. But the supreme court has held that "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." *Brooks*, 838 N.W.2d at 570.

Second, she contends that it is not clear whether she consulted with an attorney licensed to practice in Minnesota and argues that failure to have actual contact with an attorney licensed to practice in Minnesota distinguishes her case from *Brooks* and establishes that her consent was not voluntary. But *Brooks* does not hold that the failure to consult with an attorney, standing alone, establishes that consent to testing is not voluntary. The supreme court noted only that "[t]he fact that [the defendant] consulted with counsel before agreeing to take each test *reinforces* the conclusion that his consent was not illegally coerced." *Id*. at 571 (emphasis added). The supreme court reasoned that "the *ability* to consult with counsel about an issue" makes a subsequent decision more likely to be voluntary. *Id.* at 572 (emphasis added). Here, the record is clear (and O'Brien does not dispute) that O'Brien had the ability to contact an attorney before agreeing to take the breath test. And because that opportunity plainly included the opportunity to contact an attorney licensed to practice in Minnesota, we decline to further address O'Brien's unsupported assertion that contact must be with a Minnesota attorney to render consent voluntary.

O'Brien also argues that the Minnesota Constitution affords greater protections against searches in the context of motor vehicles than the federal constitution. But O'Brien does not specify what additional protections the state constitution provides her in the circumstances of this case, and the cases that she cites to support this proposition do not address the voluntariness of consent in the context of DWI testing.

Under the totality of the circumstances delineated in *Brooks*, we conclude that the record demonstrates that O'Brien's consent was not coerced. The district court did not err by denying O'Brien's motion to suppress evidence of the results of her breath test.

Affirmed.