STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0306

State of Minnesota,
Respondent,

vs.

Janet Lee Parrish,
Appellant.

Filed November 24, 2014
Affirmed
Chutich, Judge

Hennepin County District Court
File No. 27-CR-13-13289

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

Steven M. Tallen, Tallen & Baertschi, Minneapolis, Minnesota (for respondent)

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.P., Roseville, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Chutich, Judge; and Reilly, Judge.

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

CHUTICH, Judge

Following her conviction of second-degree driving while impaired, appellant Janet Parrish challenges the denial of her pretrial motion to suppress evidence of her refusal to

submit to chemical testing, claiming that it is unconstitutional to criminalize her refusal. Because we find that prosecuting Parrish for her refusal to submit to chemical testing is not unconstitutional under these circumstances, we affirm.

FACTS

In April 2013, Medina Police Officer Jeremiah Jessen received a report of a hit-and-run accident involving a pedestrian. Witnesses at the scene told police that they were standing near the street when they heard a car accelerate, traveling an estimated 50 to 55 miles per hour on a residential street with a posted speed limit of 30 miles per hour. One of the witnesses, C.D., yelled "Stop," and stepped into the street to get the driver's attention and slow down the car. The car slowed but did not stop. When the car neared C.D., it accelerated suddenly and struck his right hip and thigh. Fortunately, C.D. was not injured. The witnesses gave dispatch a description of the car and driver and a license plate number.

Soon after, Officer Jessen stopped a car matching the description of the one involved in the hit-and-run accident and identified the driver as the appellant, Janet Parrish. Officer Jessen observed that Parrish had bloodshot and watery eyes, her pupils were constricted, she smelled of alcohol, and her speech was slurred. Parrish refused to leave her car, take a preliminary breath test, or perform any field sobriety tests.

Officer Jessen arrested Parrish on suspicion of driving under the influence. He then transported her to the police station and read her the Minnesota Implied-Consent Advisory. Parrish said that she understood the advisory and asked to call an attorney.

After Parrish made several calls and contacted at least one attorney, Officer Jessen asked if she would submit to a breath test, and Parrish refused.

Parrish was charged with (1) second-degree refusal to submit to a chemical test in violation of Minnesota Statutes section 169A.20, subdivision 2 (2012) ("test-refusal statute"); (2) third-degree driving while impaired in violation of Minnesota Statutes section 169A.26, subdivision 1(a) (2012); (3) obstruction of legal process in violation of Minnesota Statutes section 609.50, subdivision 1 (2012); (4) reckless driving in violation of Minnesota Statutes section 169.13, subdivision 1(a) (2012); and (5) failure to provide information at the scene of an accident in violation of Minnesota Statutes section 169.09, subdivision 3 (2012).

Parrish filed a pre-trial motion to suppress evidence of her test refusal and to dismiss her second-degree refusal to submit to a chemical test. In her motion, Parrish argued, among other things, that the test-refusal statute unconstitutionally criminalized her Fourth Amendment right to refuse to submit to any form of chemical testing under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). The district court denied the motion.

Before trial, the state dismissed counts three through five, and the parties agreed to a stipulated-facts trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 3. At the conclusion of the trial, Parrish was convicted of gross misdemeanor second-degree[1] refusal to submit to a chemical test and gross misdemeanor third-degree driving while impaired. Minn. Stat. §§ 169A.20, subd. 2, .26, subd. 1(a). This appeal followed.

[1] Five days after the district court issued its first order, the court amended its original order to reflect that Parrish was charged and convicted of second-degree (not third-

D E C I S I O N

Parrish challenges the constitutionality of the test-refusal statute, arguing that a person cannot be criminally punished for refusing to consent to a warrantless search, a person has a fundamental right to say "no" to a warrantless search, and the doctrine of unconstitutional conditions applies. Parrish also claims that this court's ruling in *State v. Bernard*, 844 N.W.2d 41 (Minn. App. 2014), *review granted* (Minn. May 20, 2014), is not binding here and contradicts United States Supreme Court precedent. Because *Bernard* applies and because the state is not constitutionally precluded from criminalizing a suspected drunk driver's refusal to submit to a reasonable chemical test under the circumstances here, we affirm.

The constitutionality of a statute is a question of law that this court reviews de novo. *Rew v. Bergstrom*, 845 N.W.2d 764, 776 (Minn. 2014) (citing *Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 653 (Minn. 2012)). Statutes are presumed to be constitutional, and this court will only exercise the power to declare a statute unconstitutional when it is absolutely necessary. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). "[A] party challenging the constitutionality of a statute must demonstrate beyond a reasonable doubt that the statute violates a constitutional provision." *State v. Cox*, 798 N.W.2d 517, 519 (Minn. 2011). Parrish challenges the constitutionality of the test-refusal statute, and in doing so, Parrish bears the burden of

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degree) refusal to submit to a chemical test in violation of Minnesota Statutes section 169A.20, subdivision 2.

proving beyond a reasonable doubt that the test-refusal statute is unconstitutional. *See State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990).

The implied-consent law requires any person who "drives, operates, or is in physical control of a motor vehicle" to submit to a chemical test of blood, breath, or urine if the police have probable cause to suspect that the person is driving while impaired. Minn. Stat. § 169A.51, subd. 1 (2012). Under the implied-consent law mandates, the test-refusal statute criminalizes a person's refusal to submit to a chemical test. Minn. Stat. § 169A.20, subd. 2.

Applicability of Bernard

This court addressed Parrish's constitutional objections in *Bernard*—specifically whether a person can be criminally punished for refusing to consent to a warrantless search and whether a person has a fundamental right to say "no" to a warrantless search. *See Bernard*, 844 N.W.2d at 46. Because *Bernard* provides a framework for answering the constitutional issues that Parrish raises, we apply *Bernard* here.

In *Bernard*, the respondent was charged with refusal to submit to a chemical test, and he argued, similar to Parrish, that the test-refusal statute was unconstitutional under the doctrine of unconstitutional conditions and *McNeely*. *Id.* at 42-43. This court upheld the constitutionality of the test-refusal statute. *Id.* at 46. The *Bernard* court reasoned that when an officer has a constitutionally viable alternative to asking a driver to voluntarily submit to a warrantless test, penalizing the driver's refusal to take the test does not make the test-refusal statute unconstitutional because "the constitutional and statutory grounds for a warrant plainly existed before the request." *Id.* A constitutionally viable alternative

exists under *Bernard* when an officer has probable cause to believe that a suspect is driving under the influence. *Id.* at 45.

Whether an officer has probable cause to make an arrest is an objective inquiry. *State, Lake Minnetonka Conservation Dist. v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000). Probable cause exists when "a person of ordinary care and prudence [would] entertain an honest and strong suspicion that a crime has been committed." *Id.* (alteration in original) (quotation omitted). The arresting officer in *Bernard* had probable cause to suspect that the respondent was driving while impaired: witnesses identified the respondent as the driver, he was holding the keys, he was unstable, and he smelled of alcohol. 844 N.W.2d at 45.

Here, Officer Jessen also had probable cause to suspect that Parrish was driving under the influence: Parrish's car matched the description of the car recently involved in a hit-and-run accident; when Officer Jessen pulled Parrish over, her eyes were red, watery, and bloodshot; Parrish smelled of an alcoholic beverage; and she slurred her words while speaking to Jessen. Based on these facts, a person of ordinary care and prudence would suspect that Parrish was driving under the influence. *See Horner*, 617 N.W.2d at 795. Because Officer Jessen had probable cause to suspect that Parrish was driving under the influence, Jessen "indisputably had the option to obtain a test of [Parrish's] blood by search warrant." *Bernard*, 844 N.W.2d at 45. Thus, Parrish's constitutional rights were not violated when the state prosecuted her under the test-refusal statute.

Parrish also relies on *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 87 S. Ct. 1727 (1967), arguing that a person cannot be criminally punished for merely exercising her right to refuse to consent to a warrantless search and seizure. Although *Bernard* explained that the state can criminally punish a person's refusal to submit to chemical testing when an officer has probable cause to suspect that the person was driving under the influence, 844 N.W.2d at 46, we will briefly address Parrish's contention that *Camara* applies here.

In *Camara*, the defendant repeatedly refused to allow inspectors into his apartment and was criminally charged for his refusal. 387 U.S. at 526-27, 87 S. Ct. at 1729-30. The inspection was "lawful" under section 503 of the city housing code, which allowed inspectors to enter dwellings or buildings at a reasonable time to conduct an inspection. *Id.* at 526, 87 S. Ct. at 1729. The defendant argued that the city housing code violated his Fourth and Fourteenth Amendment rights because it permitted inspectors to enter his apartment without a search warrant and without probable cause. *Id.* at 527, 87 S. Ct. at 1730. The Supreme Court agreed, holding that the defendant had a constitutional right to insist upon a warrant and therefore could not be convicted for refusing the inspection. *Id.* at 540, 87 S. Ct. at 1736-37.

The housing code in *Camara* allowed the inspectors to enter a person's premises without a warrant or probable cause. *Id.* at 526, 87 S. Ct. at 1729. In contrast, the implied-consent statute does not authorize a warrantless search of a person's blood, breath, or urine. *See Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 725 (Minn. App. 2014) ("[T]he implied-consent statute does not authorize a warrantless search of a

person's blood, breath, or urine by implying, as a matter of law, that every licensed driver has consented to such a search."). Thus, Parrish's reliance on *Camara* is erroneous because under the circumstances here, the attempted search of Parrish under the implied-consent law would not have violated the Fourth Amendment in the same way as the attempted search in *Camara*. *Bernard* also explicitly recognized that the state's constitutional authority is limited to punishing test refusal; the state does not have the authority to conduct a warrantless, nonconsensual chemical test. 844 N.W.2d at 45-47. Before an officer can conduct a warrantless search under the implied-consent statute, the officer must have probable cause that the driver is under the influence and must obtain voluntary consent. *Id.* at 45-46.

Unconstitutional Conditions Doctrine

Lastly, Parrish contends that the test-refusal statute violates the doctrine of unconstitutional conditions. The unconstitutional conditions doctrine invalidates legislation if the state conditions its grant or denial of a privilege on the recipient's surrender of a constitutional right. *Frost v. R.R Comm'n of Cal.*, 271 U.S. 583, 594, 46 S. Ct. 605, 607 (1926), *abrogated on other grounds by State v. Brooks*, 838 N.W.2d 563 (Minn. 2013). The doctrine of unconstitutional conditions is "properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement." *State v. Netland*, 762 N.W.2d 202, 211 (Minn. 2009), *abrogated in part by McNeely*, 133 S. Ct. 1552.

Here, the implied-consent statute does not authorize an unconstitutional government infringement because the police may not search without a driver's voluntary

consent, except in very limited circumstances. *See* Minn. Stat. §§ 169A.51-.52 (2012). And even if a driver may be prosecuted for refusing to submit to a chemical test, as here, the United States Supreme Court and the Minnesota Supreme Court have concluded that such penalties are not unduly coercive as a matter of law. *McNeely*, 133 S. Ct. at 1566; *South Dakota v. Neville*, 459 U.S. 553, 559-64, 103 S. Ct. 916, 920-23 (1983); *Brooks*, 838 N.W.2d at 570; *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855-56 (Minn. 1991).

Because Parrish has failed to demonstrate beyond a reasonable doubt that the test-refusal statute is unconstitutional under these circumstances, we affirm.

Affirmed.