STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0722

Michael Aaron Sears, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed November 24, 2014
Affirmed
Chutich, Judge

Washington County District Court
File No. 82-CV-14-417

Jeremy J. Plesha, Plesha Criminal Defense, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Anne Fuchs, Assistant Attorney General, St. Paul, Minnesota (for respondent)

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

Appellant Michael Sears challenges his license revocation and plate impoundment, arguing that the police failed to follow proper implied-consent procedures, violated his rights to due process by misleading him about his testing obligations, and coerced his

consent. Because the police are not required to reread the implied-consent advisory before administering additional breath tests, correctly informed Sears about his testing obligations and possible penalties, and obtained his voluntary consent, we affirm.

FACTS

In the early-morning hours of January 1, 2014, Newport Police Officer Jeremy Brodin arrested appellant Michael Sears for driving under the influence. At the Washington County Jail, Officer Brodin read Sears the implied-consent advisory. When he asked Sears if he understood what had been read to him, Sears said yes; when he asked Sears if he wanted to contact an attorney, Sears said no. Sears then agreed to take a breath test.

The initial reading from the breath test machine read 0.147, but an error voided the test. Officer Brodin informed Sears of the error and asked Sears if he would take another test, and Sears agreed. The second test produced readings of 0.157 and 0.143, but another error again voided the test results. Officer Brodin informed Sears of the machine error and asked if he would provide another sample. Sears said he was willing to blow into the machine one more time. Officer Brodin told Sears that he could also take a blood or urine test, or he could use a different breath machine. Sears opted for another breath test on a different machine. This test resulted in a total reported value of 0.14.

Because the 19-year-old Sears had a previous driving-while-impaired conviction within the last ten years, Officer Brodin filled out a notice and order of revocation form and a license plate impoundment form, both of which he explained to Sears. Sears did not ask any questions about the forms and was released to a sober adult.

Sears filed a petition challenging the revocation. The parties stipulated to a record consisting of the implied-consent certificate, advisory, test results, police report, and notice and order of revocation. Sears argued that (1) Officer Brodin failed to comply with proper implied-consent procedures by not reading Sears the advisory before each test; (2) the test was conducted without a warrant and any consent was involuntary; and (3) Officer Brodin violated Sears's rights to due process by actively misleading him to believe that refusal to test a third time was a crime. The district court sustained the revocation. This appeal followed.

D E C I S I O N

I. Implied-Consent Procedures

Sears first argues that Officer Brodin did not follow the proper implied-consent procedures because he was required to reread the implied-consent advisory to Sears before the third test. The commissioner argues, and we agree, that the implied-consent advisory did not need to be reread under the circumstances present here.

A. Standard of Review

A district court's findings of fact are reviewed under a clearly erroneous standard. *Frost v. Comm'r of Pub. Safety*, 348 N.W.2d 803, 804 (Minn. App. 1984). This court will overturn a district court's conclusions of law only if it determines that the district court erroneously applied the law to the facts of the case. *Dehn v. Comm'r of Pub. Safety*, 394 N.W.2d 272, 273 (Minn. App. 1986). Issues of statutory interpretation are reviewed de novo. *Nelson v. Comm'r of Pub. Safety*, 779 N.W.2d 571, 575 (Minn. App. 2010).

B. Rereading the Advisory

Sears argues that the plain language of the implied-consent statute demonstrates that the advisory must be read before every test. The statute in relevant part reads: "At the time a test is requested, the person must be informed . . . ." Minn. Stat. § 169A.51, subd. 2 (2012). Sears claims that the plain language of the statute requires the advisory to be read again if another test is requested. But Sears's reading of the implied-consent statute has previously been rejected by this court.

In *Hansen v. Commissioner of Public Safety*, 393 N.W.2d 702, 704 (Minn. App. 1986), the district court held that a driver should have been reread the implied-consent advisory before an officer requested a second test after the first sample was deficient. This court overturned this decision, noting, "Neither the statute nor the rule require the police to reread the implied consent advisory when an alternative test is necessary due to the driver's physical inabilities." *Id.* at 705.

This reading of the statute was reaffirmed in *State v. Fortman*, 493 N.W.2d 599 (Minn. App. 1992). In *Fortman*, a second test was requested because the breath machine malfunctioned, and only a portion of the implied-consent advisory was reread before a second test occurred. *Id.* at 600. This court found no error in this procedure, holding:

> [A] police officer is not required to reread the entire implied consent advisory when an alternative test is necessary due to the malfunction of the Intoxilyzer. It is undisputed that the police are required to give the information mandated by the implied consent statute. However, neither the statute nor relevant case law requires a rereading of the entire implied consent advisory before an alternative sample is requested.

Id. at 601 (internal citation omitted).

Both *Hansen* and *Fortman* make clear that the implied-consent statute need not be reread before another test is requested. And despite Sears's claims otherwise, neither case limited their holdings to only a *second* test; both cases hold that their rules apply to "alternative" samples. *See id.* at 601; *Hansen*, 393 N.W.2d at 705. Here, where the three breath tests followed closely upon one another and all took place within 35 minutes, the holdings of *Hansen* and *Fortman* apply.

We also reject Sears's argument that *Hansen* and *Fortman* are no longer good law in light of *McNeely v. Missouri*, 133 S. Ct. 1552 (2013), and *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). Nothing in the holdings of those cases affects the analysis in *Hansen* and *Fortman*.

Sears also argues that because 35 minutes passed between Officer Brodin reading him the advisory and requesting the third sample, it was unreasonable to expect that Sears remembered the advisory. But as the district court noted, no evidence suggests that Sears did not understand what was being requested of him. Without that evidence, the advisory does not need to be reread. *See Hansen*, 393 N.W.2d at 705 (holding that absent findings of confusion, a refusal based on the grounds that the advisory should have been reread is unreasonable). And the implied-consent statute does not mandate that the advisory be read at a specific time before the test occurs; it only requires that the advisory be read when a test is requested. *See* Minn. Stat. § 169A.51.

Sears also initially argued that Officer Brodin was obligated to give him a blood or urine test after the second machine malfunction, but he withdrew this claim at oral argument given established caselaw. *See Benolkin v. Comm'r of Pub. Safety*, 408

N.W.2d 710, 711-12 (Minn. App. 1987) ("The officer is not limited to only a blood or urine test alternative; if another [breath test] machine is available and functioning properly, the officer may again request a breath test."). We note that not only was the offer of a third breath test under these circumstances permissible, it arguably was a more reasonable option than the more intrusive blood or urine tests available.

II. Due Process

Sears next asserts that his rights to due process were violated because Officer Brodin actively misled him to believe that if he refused his license would be revoked and he would face criminal charges. We disagree. This challenge presents a question of law, which we review de novo. *Cf. Nelson*, 779 N.W.2d at 573.

Sears bases his argument on *McDonnell v. Commissioner of Public Safety*, 473 N.W.2d 848 (Minn. 1991). In *McDonnell*, the suspected drunk driver[1] was taken to the police station and warned that refusal to submit to testing might expose her to criminal penalties. *Id.* at 851. The district court rescinded the revocation because the driver did not have a prior revocation and therefore could not have been prosecuted for test refusal.[2] *Id.* The supreme court affirmed the revocation rescission because the driver was misinformed that she might be prosecuted. *Id.* at 853. The supreme court noted its

[1] *McDonnell* was a consolidated case involving four different drivers. 473 N.W.2d at 850. Sears's argument is based on the decision regarding only one of the drivers involved in the case.

[2] At that time, the test refusal statute read: "It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169.123 if the person's license has been revoked once within the past five years, or two or more times within the past ten years." Minn. Stat. § 169.121, subd. 1a (Supp. 1989). The advisory warned that "if testing is refused, the person may be subject to criminal penalties . . . ." Minn. Stat. § 169.123, subd. 2(b)(2) (1990).

concern with law enforcement misleading individuals regarding their obligations to undergo testing. *See id.* at 853-54. Because the implied-consent advisory permitted police to threaten criminal charges that the state could not impose, the supreme court held that portion of it unconstitutional as applied to the driver. *Id.* at 855.

Sears's reliance on *McDonnell* is misplaced. In *McDonnell*, the driver was misinformed because, despite what the officer told her, the state could not prosecute her for refusal because she never had a previous revocation. *Id.* at 853; *see also* Minn. Stat. § 161.121, subd. 1a (Supp. 1989). Here, Officer Brodin correctly informed Sears that refusal to submit to a chemical test is a crime. This statement conforms to the current law in Minnesota. *See* Minn. Stat. § 169A.20, subd. 2 (2012) ("It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine . . . ."); *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 731 (Minn. App. 2014) (holding that the implied-consent statute does not violate the unconstitutional conditions doctrine); *State v. Bernard*, 844 N.W.2d 41, 47 (Minn. App. 2014) (upholding the criminalization of test refusal), *review granted* (Minn. May 20, 2014). An officer does not mislead an individual if the officer truthfully explains the chemical testing obligations. *McDonnell*, 473 N.W.2d at 854.

Additionally, as the district court noted, no evidence suggests that Sears was confused about either the testing process or his obligations. Because Officer Brodin did not mislead Sears about his testing obligations and no evidence shows that Sears was confused about the testing procedure, this argument fails.

III. Consent

Finally, Sears contends that Officer Brodin coerced him into submitting to the breath search, which rendered his consent invalid. Sears claims he was coerced because (1) Officer Brodin did not comply with proper procedures and Sears never consulted an attorney; (2) Sears is young and inexperienced with the law; and (3) Sears was in custody and confronted with repeated requests to provide a sample. The commissioner asserts, and we agree, that the totality of the circumstances shows that Sears's consent was voluntarily given.

A. Standard of Review

Both the United States and Minnesota Constitutions prohibit unreasonable searches. U.S. Const. amend IV; Minn. Const. art. I, § 10. A breath test is considered a search under the Fourth Amendment. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413 (1989). A warrantless search is generally unreasonable unless the state proves that the search fell within an exception to the warrant requirement. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). This court applies Fourth Amendment principles from criminal cases to license-revocation proceedings. *See Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 920 (Minn. App. 2010).

One exception to the warrant requirement is consent. *Brooks*, 838 N.W.2d at 568. To fall under the consent exception, "the State must show by a preponderance of the evidence that consent was given freely and voluntarily." *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). "Whether consent [is] voluntary is determined 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). Consent is not involuntary merely because the encounter is uncomfortable. *Id.* Whether consent is voluntary or coerced is a question of fact, and therefore this court applies the "clearly erroneous" standard to a district court's finding of voluntary consent. *Id.* The district court's findings will not be overturned unless the court is "left with the definite and firm conviction that a mistake occurred." *Id.* at 846-47.

B. The Totality of the Circumstances

In its order and memorandum sustaining the revocation, the district court found that Sears was not coerced into consenting to the tests. The district court noted Sears's cooperative nature throughout the encounter, and that he agreed to a breath test three separate times. In reaching its decision, the district court stated:

> This Court is unable to conclude factually after a series of cooperative acts by [Sears] where he is known to say words to the effect that "I will provide a sample of my breath" such affirmative actions and words, in the absence of misleading information or coercive actions or words by the officer, would lead a judge to conclude that: "yes" I will test (three times) really means "no I do not want to test" and was in fact compelled to test in this case.

An examination of the totality of the circumstances demonstrates that this conclusion by the district court was not clearly erroneous.

1. Nature of the Encounter

The district court's consideration of the totality of the circumstances includes the nature of the encounter. *Brooks*, 838 N.W.2d at 569. Within the context of implied consent, the nature of the encounter includes how the police came to suspect the driver

was under the influence; their request that he take a chemical test—including whether the implied-consent advisory was read; and whether he had the right to consult with an attorney. *Id.*

Sears does not dispute that police had probable cause to arrest him. Instead, he argues that his consent was not voluntary because Officer Brodin did not follow the proper procedures. Specifically, Sears argues that he was not reread the implied-consent advisory immediately before his test and he was not given a blood or urine test after the breath test machine malfunctioned. But as discussed above, Officer Brodin did not have to reread the implied-consent advisory, and he properly tested Sears on a different machine. Because Officer Brodin acted properly, this argument fails.

Sears also attempts to distinguish his situation from that of *Brooks* by arguing that his consent was coerced because he did not actually speak to an attorney. But *Brooks* did not turn on whether the defendant actually spoke with an attorney. Instead, the supreme court explained that, in examining the nature of the encounter, courts look at whether a driver "had the right to consult with an attorney." *Id.* at 569. Here, the parties stipulated that Sears was properly read the implied-consent advisory—which included informing Sears that he had a right to counsel—and that Sears waived that right. Because he was informed of his right to counsel, Sears's argument on this point fails.

2. The Kind of Person the Driver Is

Sears next argues that the kind of person he is shows that his consent was involuntary: he is a 19 year-old unfamiliar with the intoxication testing process. But this

claim is belied by the record—Sears may only be 19 years old, but this charge followed a previous conviction of driving while impaired.

3. What Was Said and How It Was Said

Finally, Sears contends that what was said to him and how it was said shows that his consent was coerced, because: (1) he was in custody; (2) he was misled about his obligation to test;[3] (3) he was confronted with repeated requests; and (4) he was detained for 35 minutes. This argument lacks merit.

To be sure, Sears was in custody when he was asked to test. Consent is inferred less readily when a person is in custody because he becomes more susceptible to coercion. *Diede*, 795 N.W.2d at 847. Nevertheless, a person may still voluntarily consent after he is seized. *Id.*

Sears also argues that his consent was coerced because Officer Brodin repeatedly asked him to test. Sears likens his situation to those of *State v. Dezso*, *State v. George*, and *Diede*.

In *Dezso*, a state trooper stopped the defendant for speeding. 512 N.W.2d 877, 878–79 (Minn. 1994). Believing the defendant was trying to hide something in his wallet, the trooper began questioning the defendant:

> Officer: Mind if I take a look at your wallet?
> Def.: No, it's just my stuff.
> Officer: Can I take a look at the wallet?
> Def.: Yeah, I got, ah [unintelligible] cards.
> Officer: What do you got in your hand there?
> Def.: Oh, a piece of paper.

[3] Because we have already concluded that Officer Brodin did not mislead Sears about his obligation to test, we do not address it again here.

> Officer: Mind if I take a look at it?
> Def.: Well, it's mine * * * not doing anything.

Id. at 879 (alteration in original). The defendant handed over the wallet, which contained LSD. *Id.* The court determined that the defendant did not voluntarily consent, in part because of the persistent questioning by the trooper. *Id.* at 881.

In *George*, the court found that a defendant did not validly consent to a search of his motorcycle and jacket in part because "each response by [the defendant] to the question of the trooper led to additional queries." 557 N.W.2d 575, 581 (Minn. 1997).

In *Diede*, the defendant was asked multiple times to turn out her pockets and open her cigarette package. 795 N.W.2d at 841. The package was later found to contain methamphetamine. *Id.* at 842. The court again found the consent to be involuntary, in part because she was asked multiple times to open the package. *Id.* at 848.

The questioning here is distinguishable from those cases. Officer Brodin asked Sears three times if he would consent to a test, and each time he replied that he would. Unlike the defendants in *Dezso* and *Diede*, he was not continually questioned after he initially refused the officer's request. *See Diede*, 795 N.W.2d at 848 ("Here, the police response to Diede's unequivocal refusal to consent to a search was to continue asking whether they could search."). The three requests occurred only because the test machine malfunctioned. Sears was not bombarded with near-constant requests as in *Deszo*. Instead, the requests were spaced between tests and machine malfunctions. And unlike *George*, each response by Sears did not lead to more questions by Officer Brodin; each malfunction led to Officer Brodin asking essentially the same question. Finally, we do

not conclude that Sears's "will had been overborne," *Brooks*, 838 N.W.2d at 571, by the multiple requests to test because his answer to the requests never changed: each time he was asked to test, he agreed.

Sears also contends that he was coerced into consenting because he was in custody for 35 minutes. But 35 minutes is not so long a time as to render consent involuntary. *See id.* ("[The defendant] was . . . [not] asked to consent after having spent days in custody.").

Finally, the parties do not dispute that Officer Brodin read Sears the implied-consent advisory. This advisory informed Sears four times that he could make a "decision" about submitting to a test. "While 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." *Brooks*, 838 N.W.2d at 572. That Officer Brodin informed Sears of his choice lends further credence to the district court's finding that Sears consented to the search.

Because the totality of the circumstances demonstrates that Sears consented to the breath test, the district court properly sustained the license revocation.

Affirmed.