STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1840

State of Minnesota,
Respondent,

vs.

Dennis Dean Blumke,
Appellant.

Filed September 18, 2017
Reversed and remanded
Reilly, Judge

Swift County District Court
File No. 76-CR-14-345

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

Danielle H. Olson, Swift County Attorney, Allison T. Whalen, Assistant County Attorney, Benson, Minnesota (for respondent)

John D. Ellenbecker, St. Cloud, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Stauber, 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

REILLY, Judge

Appellant Dennis Dean Blumke challenges his impaired-driving conviction on the ground that the district court erred by denying his motion to suppress the results of his blood test in light of *State v. Birchfield*. Because appellant's judgment of conviction was not final at the time of *Birchfield*'s release, we reverse and remand to the district court for further consideration.

FACTS

This appeal arises out of appellant Dennis Dean Blumke's impaired-driving conviction. Following his impaired-driving arrest in June 2014, an officer read appellant the implied-consent advisory and informed him that Minnesota law required him to submit to a chemical test to determine if he was under the influence of alcohol and that refusing such a test was a crime. Appellant agreed to a blood test, which revealed an alcohol concentration above the legal limit. The state charged appellant with impaired driving in July 2014. Appellant moved to suppress the blood test results and dismiss the complaint; the court denied the motion in June 2015, determining that Minnesota's implied consent statute was constitutional under *State v. Brooks*, 838 N.W.2d 563, 569-72 (Minn. 2013), and *State v. Bernard*, 859 N.W.2d 762, 774 (Minn. 2015). The district court adjudicated appellant guilty of the offense in May 2016.

In June 2016, the United States Supreme Court upheld the constitutionality of Minnesota's test-refusal statute as it applies to breath tests but ruled that the search-

incident-to-arrest exception and implied consent did not justify a warrantless blood test. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184-86 (2016), *aff'g State v. Bernard*, 859 N.W.2d 762 (Minn. 2015). In August 2016, appellant sought a new trial in light of "recent decisions of the United States Supreme Court [that] have a material impact on the admissibility of evidence," which appellant earlier sought to suppress. One week later, the court sentenced appellant to prison. Appellant now challenges the district court's order adjudicating him guilty of impaired driving.

D E C I S I O N

The crux of the appeal is appellant's assertion that the district court erred by declining to apply *Birchfield*'s holding to the facts of his case. Appellant's challenge presents a question of law, which we review de novo. *State v. Dorn*, 887 N.W.2d 826, 830 (Minn. 2016).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A blood test constitutes a search. *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966). The United States Supreme Court held that a warrantless blood test incident to a lawful impaired-driving arrest is not a permissible search under the Fourth Amendment. *Birchfield*, 136 S. Ct. 2160, 2184-86. Minnesota courts also recognize that a driver cannot be criminally punished for refusing to submit to a warrantless blood test absent an exception to the warrant requirement. *See State v. Trahan*, 870 N.W.2d 396, 403-05 (Minn. App. 2015) (holding that a driver may not be prosecuted under test-refusal statute for refusing to submit to a warrantless blood test), *aff'd*, 886 N.W.2d 216 (Minn. 2016); *see*

also State v. Thompson, 873 N.W.2d 873, 878-80 (Minn. App. 2015) (holding that a driver may not be prosecuted under Minnesota's test-refusal statute for refusing to submit to a warrantless urine test), *aff'd*, 886 N.W.2d 224 (Minn. 2016). Appellant contends that the district court erred by denying his motion to suppress the results of his blood test under the precepts articulated in *Birchfield*.

We conclude that the district court erred by declining to consider appellant's case in light of *Birchfield*, which was released before appellant's conviction became final. A judgment of conviction is final when direct appeals are exhausted or the time for filing a direct appeal has expired. *State v. Losh*, 721 N.W.2d 886, 893-94 (Minn. 2006); *see also Hutchinson v. State*, 679 N.W.2d 160, 162 (Minn. 2004) (noting that a case is final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or finally denied"). But an appeal "suspends a judgment and deprives it of its finality," which is essential in criminal cases "because to apply a new rule [of law] to the case in which it was announced but to not apply it to other cases that were then on direct appeal would be to treat similarly situated criminal defendants differently." *State v. Lewis*, 656 N.W.2d 535, 537-38 (Minn. 2003) (quotation and citation omitted). *Birchfield* was announced after appellant's adjudication of guilt, but before sentencing. Appellant's case is now pending on direct review. Appellant's judgment of conviction is not yet final, *Losh*, 721 N.W.2d at 893-94, and he is entitled to application of the rule of law articulated in *Birchfield*. *See Lewis*, 656 N.W.2d at 538 (determining that supreme court decision applied to case pending appellate review at time of decision). We therefore reverse and remand for additional factual findings on the

voluntariness of appellant's consent to the warrantless blood test under the totality of the circumstances, and in a manner consistent with the *Birchfield* ruling. *See* 136 S. Ct. at 2186 (noting that voluntariness of driver's consent to a search "must be determined from the totality of all the circumstances," which must be decided in the first instance by the district court).

Appellant also challenges additional aspects of the district court's denial of his suppression motion and argues that he is entitled to dismissal of the charges. Because appellant failed to prepare a sufficient record on appeal, we decline to consider these arguments now. *See, e.g.*, *State v. Heithecker*, 395 N.W.2d 382, 383 (Minn. App. 1986) (declining to consider issue where appellant failed to provide trial transcript necessary for appellate review); Minn. R. Civ. App. P. 110.02, subd. 1(a) (requiring appellant to submit "a transcript of those parts of the proceedings . . . which are deemed necessary for inclusion in the record").

Reversed and remanded.