STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0290

Hugh Herman Hansen, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed October 22, 2018
Affirmed in part, reversed in part, and remanded
Kirk, Judge

Faribault County District Court
File No. 22-CV-15-593

Thomas K. Hagen, Steven P. Groschen, Kohlmeyer Hagen Law Office, Chtd., Mankato, Minnesota (for appellant)

Lori Swanson, Attorney General, Lindsay LaVoie, Peter Magnuson, Stephen D. Melchionne, Katherine L. Hansen, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

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

KIRK, Judge

This court previously reversed the district court's order denying appellant Hugh Herman Hansen's petition to rescind the revocation of his driving privileges, concluding that his due-process rights had been violated by the reading of an inaccurate implied-

consent advisory. On respondent Commissioner of Public Safety's petition for further review, the Minnesota Supreme Court vacated this court's opinion and remanded the case for reconsideration in light of its recent decision in *Morehouse v. Comm'r of Pub. Safety*, 911 N.W.2d 503 (Minn. 2018), which—together with *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506 (Minn. 2018)—clarified the requirements for establishing a due-process violation based upon the reading of a misleading implied-consent advisory.

Although Hansen submitted to a chemical test of his blood after being read an inaccurate advisory, he presented no evidence or testimony in support of his petition to the district court sufficient to establish that he had prejudicially relied on the advisory in providing his consent to the test, and so he has failed to establish a due-process violation. However, because the implied-consent advisory read to Hansen was misleading, further findings by the district court are necessary to determine whether Hansen's consent to the chemical test was voluntary for purposes of the Fourth Amendment in light of this inaccuracy. We affirm in part, reverse in part, and remand.

FACTS

On July 25, 2015, Blue Earth Police initiated a traffic stop of a vehicle driven by Hansen. Hansen displayed several indicia of intoxication. Police arrested him for driving while impaired (DWI) and transported him to the Faribault County Jail. At the jail, police read Hansen the Minnesota Motor Vehicle Implied Consent Advisory, which states in part that refusal to submit to chemical testing is a crime. Hansen stated that he understood the advisory and chose not to consult with an attorney. Police asked Hansen if he would submit

to a blood test; Hansen agreed, and he was transported to a hospital. A blood test revealed an alcohol concentration of 0.20.

Respondent revoked Hansen's driver's license. Hansen petitioned to rescind the revocation of his driver's license, arguing (1) that his consent to the search of his blood was invalid because he "was given misleading information" concerning the state's ability to prosecute him for refusing a chemical test, and (2) that the implied-consent advisory read to him violated his due-process rights pursuant to *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991), because it threatened a penalty that the state was not authorized to impose. Following an evidentiary hearing, the district court sustained the revocation, concluding that the implied-consent advisory was not misleading and that Hansen's consent to the testing of his blood was voluntary. Hansen appealed.

This court reversed, concluding that Hansen was entitled to the reinstatement of his driving privileges because the implied-consent advisory was in fact misleading in light of the supreme court's decision in *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and so violated his due-process rights under *McDonnell*. *Hansen v. Comm'r of Pub. Safety*, No. A16-0290, 2016 WL 7041973 (Minn. App. Dec. 5, 2016), *vacated* (Minn. May 29, 2018) (mem.). Because this court resolved the matter on due-process grounds, it was unnecessary to address Hansen's Fourth Amendment claim.

Respondent petitioned for further review. The supreme court granted the petition and stayed proceedings in this matter pending its disposition of *State v. Phillips*, No. A16-0129, *review granted* (Minn. Nov. 15, 2016), *and appeal dismissed* (Minn. May 18, 2017). *Morehouse*, 911 N.W.2d at 503; and *Johnson*, 911 N.W.2d at 506. After dismissing the

appeal in *Phillips* and issuing decisions in *Morehouse* and *Johnson*, the supreme court vacated this court's opinion and remanded for reconsideration of its decision in light of *Morehouse*.

D E C I S I O N

I. Due Process

The state cannot "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; *see also* Minn. Const. art. I, § 7. An allegation of a due-process violation presents a question of constitutional law, which we review de novo. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012).

In *McDonnell*, the supreme court held that an implied-consent advisory that threatens a criminal consequence the state is not actually authorized to impose violates a suspect's constitutional due-process rights and requires rescission of the order revoking his or her driving privileges. 473 N.W.2d at 855. In the court's recent opinion in *Johnson*, it explained that a due-process violation under *McDonnell* does not lie "solely because a driver had been misled" by the implied-consent advisory. 911 N.W.2d at 508. Rather, it concluded:

> A license revocation violates due process when: (1) the person whose license was revoked submitted to a breath, blood, or urine test; (2) the person prejudicially relied on the implied consent advisory in deciding to undergo testing; and (3) the implied consent advisory did not accurately inform the person of the legal consequences of refusing to submit to the testing.

Id. at 508-09.

In *Morehouse*, issued the same day as *Johnson*, the supreme court applied this test in addressing a situation similar to Hansen's in which the petitioner was read an inaccurate implied-consent advisory and thereafter consented to a warrantless blood test. 911 N.W.2d at 504. The supreme court found that Morehouse was not entitled to reinstatement of his driving privileges because he did not satisfy the second prong of the test: "But, as to the second element, the district court did not find, nor did Morehouse claim, that he prejudicially relied on the implied consent advisory in deciding to submit to the test." *Id.* at 505. Applying this test in Hansen's case, we similarly conclude that he is not entitled to reinstatement of his driving privileges because he failed to present any evidence establishing his prejudicial reliance on the inaccurate implied-consent advisory.

The parties do not dispute that Hansen has satisfied the first prong of the *Johnson* test, as there is no question that he submitted to a chemical test of his blood. And we conclude that the third-prong of the test has been satisfied as well, notwithstanding that Hansen was read the implied-consent advisory prior to this court's opinion in *State v. Trahan*, which found it unconstitutional to criminalize a suspect's refusal to submit to a warrantless test of his blood. 870 N.W.2d 396, 404 (Minn. App. 2015), *aff'd*, 886 N.W.2d 216 (Minn. 2016).

In its order denying rescission of Hansen's license revocation, the district court found that the implied-consent advisory in this matter was not misleading because Hansen could have been charged with a crime for refusal at the time it was read to him. In light of the United States Supreme Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), however, we decline to adopt this reasoning. In *Birchfield*, petitioner Beylund—

like Hansen—submitted to a blood test after being told that refusal to submit to a chemical test is a crime. *Id.* at 2172. Beylund appealed, arguing that his consent was coerced by the advisory. *Id.* The Court, having concluded that the state could not permissibly compel a warrantless blood test, remanded Beylund's case to the district court "to reevaluate [his] consent given the partial inaccuracy of the officer's advisory." *Id.* at 2186. For purposes of a Fourth Amendment analysis, thus, the Supreme Court gave Beylund the benefit of the *Birchfield* decision by characterizing the implied-consent advisory as inaccurate despite it having been correct at the time of its reading.

Hansen's case presents an analogous situation, and we cannot discern any reasoned basis on which to find this same advisory as accurate for purposes of a due-process analysis and yet inaccurate for purposes of a Fourth Amendment analysis. Accordingly, we hold that the implied-consent advisory read to Hansen was inaccurate for purposes of the third prong of the *Johnson* test.

As to the second prong of the test, Hansen argues that he established his prejudicial reliance on the inaccurate implied-consent advisory as an integral part of his Fourth Amendment claim in district court. There, in asserting that his consent to the chemical test was involuntary, Hansen stated that he "was given misleading information that influenced his decision to provide a blood sample[,]" and now relies upon this statement and the nature of the claim itself as sufficient to have established his prejudicial reliance. Respondent, however, notes that this assertion was not supported by any actual evidence or testimony on which the district court could have actually determined this fact. We agree.

It is well established that a factual assertion by counsel for a party does not itself constitute evidence of that fact. *See, e.g.*, *Tang v. I.N.S.*, 223 F.3d 713, 720 (8th Cir. 2000) (factual assertions in brief "was argument of counsel and not evidence"); *State v. Nissalke*, 801 N.W.2d 82, 102 (Minn. 2011) ("bare assertions" are not evidence supporting request for alternative-perpetrator instruction); *State v. Mahkuk*, 736 N.W.2d 675, 685 (Minn. 2007) (prosecutor's assertions in support of courtroom closure is not evidence of its necessity). And it is clear from the supreme court's opinion in *Morehouse* that a due-process violation requires a factual finding by the district court that the driver prejudicially relied on an improper advisory, and that the driver bears the burden of establishing this fact. 911 N.W.2d at 505.

Accordingly, because the only support Hansen provided for his claim of prejudicial reliance was the assertions of his counsel in his district court brief, he provided no actual evidence that either "established" this fact or even provided a basis on which the district court could reasonably have found it. *Id.* Thus, like Morehouse, Hansen "is not entitled to a rescission of his license revocation under *McDonnell*[,]" and we therefore affirm the district court's denial of relief on due-process grounds. *Id.*

II. Fourth Amendment

The United States and Minnesota Constitutions guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects" against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "Generally, warrantless searches are per se unreasonable." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008). The taking of a blood or urine sample from someone constitutes a "search" under the Fourth

Amendment, but a warrant is unnecessary if the person consents. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). Consent is only a valid exception to the warrant requirement, however, if it was given "freely and voluntarily." *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). Whether a suspect's consent to a search was voluntary is a factual determination based upon the totality of the circumstances, and which this court reviews for clear error. *Id.*

In denying Hansen's request for relief under the Fourth Amendment, the district court acknowledged that the validity of Hansen's consent to the chemical test was dependent on whether or not he was misled by the implied-consent advisory. It then went on to conclude that the advisory was not misleading at the time it was read, and so Hansen's consent was thus voluntary. As discussed above, however, the implied-consent advisory was in fact misleading, and so the district court's analysis is now inadequate to resolve the issue of voluntary consent because the principal assumption on which it relied has now been refuted. Like for petitioner Beylund in *Birchfield*, the determination of the inaccuracy of the implied-consent advisory here has altered the "totality of all the circumstances" under which the voluntariness of Hansen's consent must be evaluated, and so a similar remedy is appropriate. 136 S. Ct. at 2186 (quotation omitted). We therefore reverse the district court's finding with respect to the voluntariness of Hansen's consent and remand for the district court to review the existing record to "reevaluate [Hansen's] consent given the partial inaccuracy of the officer's advisory." *Id.*

Affirmed in part, reversed in part, and remanded.