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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0547

Amy Lynn-Ishwar Butani, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed October 29, 2018
Affirmed in part, reversed in part, and remanded
Stauber, Judge[*]

Dakota County District Court
File No. 19AV-CV-15-1566

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Considered and decided by Worke, Presiding Judge; Bratvold, 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

STAUBER, Judge

On remand from the supreme court, appellant challenges the district court's order sustaining the revocation of her driving privileges. She argues that (1) evidence from field sobriety and preliminary breath tests was obtained in violation of the Fourth Amendment, (2) her due-process rights were violated because of an untimely notice of revocation, (3) the district court erred by admitting evidence from her urine test despite a lack of evidentiary foundation, (4) her due-process rights were violated when she was misinformed that refusing to take a urine test is a crime, and (5) evidence from her urine test was obtained in violation of the Fourth Amendment.

We affirm the district court's order on issues one through four. On issue five, concerning whether evidence from appellant's urine test was obtained in violation of the Fourth Amendment, we reverse and remand for a finding on whether appellant voluntarily consented, under the totality of the circumstances, to the search of her urine in light of an inaccurate implied-consent advisory, and if appellant did not voluntarily consent, whether exclusion of the evidence obtained is appropriate.

FACTS

In April 2015, around 2:00 a.m., an officer observed a vehicle signal a left turn at an intersection where a left turn was prohibited. The driver of the vehicle, appellant Amy Lynn-Ishwar Butani, turned off the turn signal and proceeded through the intersection. She then failed to make a complete stop at another intersection.

The officer stopped the vehicle and observed that Butani's eyes were bloodshot and her speech was slurred. He smelled a strong odor of alcohol. Butani indicated that she had not been drinking and was a sober driver for her friends. In order to explain her driving conduct, she indicated that she was not familiar with the area. The officer administered field sobriety tests, and Butani failed those tests. The officer administered a preliminary breath test (PBT), which indicated a reading above the legal limit.[1] He arrested Butani for driving while impaired.

The officer read Butani the implied-consent advisory. She was informed that refusal to take a test is a crime. She was offered a urine test and agreed to take the test. There was no female officer available, so the arresting officer explained to Butani the proper procedures to ensure that a reliable sample was taken. He instructed her to leave the white powder in the testing container and to not turn the sink on, he put blue dye in the toilet so that water could not be used to dilute the sample, and he instructed her to not flush the toilet. He stood outside the bathroom door and heard nothing to indicate that she did not follow his directions. Butani was the only individual in the restroom. The officer observed that the container Butani handed him was warm and appeared to contain urine. Butani initialed the seal on the container, indicating that it was her urine in the container. The urine was tested and indicated an alcohol concentration above the legal limit.

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[1] In general, PBT results "must be used for the purpose of deciding whether an arrest should be made" and whether to require chemical testing for intoxication; the use of a PBT as evidence of intoxication is limited. Minn. Stat. § 169A.41, subd. 2 (2016).

Butani's license was revoked effective June 1, 2015. The mailing date on the notice of license revocation was May 22, but it was postmarked May 26. The notice indicated that revocation would be effective beginning June 1. Butani petitioned for an implied-consent review hearing. Following a hearing, the district court issued an order sustaining the revocation of Butani's driving privileges.

In an unpublished opinion, we reversed and remanded for reinstatement of Butani's driver's license because, pursuant to *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991), Butani's due-process rights were violated when she was misinformed that refusing to take a warrantless urine test is a crime. *Butani v. Comm'r of Pub. Safety*, No. A16-0547, 2017 WL 74376, at *1-2 (Minn. App. Jan. 9, 2017), *vacated and remanded* (Minn. May 29, 2018). We did not consider the other issues raised by Butani. The supreme court granted review and stayed further proceedings pending decisions in *Morehouse v. Comm'r of Pub. Safety*, 911 N.W.2d 503 (Minn. 2018), and *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506 (Minn. 2018). The supreme court released opinions in *Morehouse* and *Johnson* in May 2018, vacated the stay in this matter, and remanded to this court for reconsideration in light of *Morehouse*, and for consideration of the issues that we did not decide when we previously reversed and remanded.

DECISION

I. Evidence from field sobriety tests was not obtained in violation of the Fourth Amendment. Probable cause for arrest was established prior to the PBT, a determination of the constitutionality of the PBT is therefore unnecessary, and even if a warrant was required, the search-incident-to-arrest exception is applicable.

Butani argues that the district court erred in determining that there was probable cause for arrest by relying on evidence from warrantless field sobriety tests and a PBT. Butani asserts that these tests are searches subject to the Fourth Amendment's warrant requirement. We address the constitutionality of these two types of tests separately. We begin with the field sobriety tests.

The officer administered the horizontal-gaze-nystagmus test, the walk-and-turn test, and the one-legged-stand test. Butani failed all three. These tests involve visual observations and are not searches under the Fourth Amendment. *Vondrachek v. Comm'r of Pub. Safety*, 906 N.W.2d 262, 269 (Minn. App. 2017), *review denied* (Minn. Feb. 28, 2018). No warrant was therefore required. *See id.*; *State v. Klamar*, 823 N.W.2d 687, 696 (Minn. App. 2012) (determining an officer's observation of two indicia of intoxication reasonably justified further intrusions in the form of field sobriety testing).

We next address the PBT. Butani challenges the district court's use of the PBT evidence in determining whether there was probable cause for arrest. We review de novo whether probable cause to arrest exists. *State v. Lee*, 585 N.W.2d 378, 382-83 (Minn. 1998). Based on the three failed field sobriety tests and other indicia of intoxication, the officer had probable cause to arrest Butani prior to the PBT. A determination of the constitutionality of the PBT is therefore unnecessary.

Even if the PBT is considered a search, the search-incident-to-arrest exception to the warrant requirement is applicable. In *Vondrachek*, an officer established probable cause for arrest prior to a PBT, and we concluded that the test was therefore permitted under the search-incident-to-arrest exception. 906 N.W.2d at 272. Given the existence of

probable cause for arrest prior to the PBT being administered to Butani, the search-incident-to-arrest exception is applicable here.

II. Butani's procedural due-process rights were not violated because of an untimely notice of revocation.

Butani argues that her procedural due-process rights were violated because she did not receive seven days of driving privileges prior to her license revocation. The facts at issue are undisputed, so we review Butani's challenge de novo. *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 413 (Minn. 2007).[2]

Under Minn. Stat. § 169A.52, subds. 4, 6, 7 (2014), if an individual fails an alcohol test, and the failure is properly certified, the commissioner must revoke the individual's driver's license. Revocation is effective upon notice. *Id.*, subd. 6. Notice that is mailed "is deemed received three days after mailing to the last known address of the person." *Id.* In cases where it is immediately clear that an individual has failed an alcohol test, an officer must immediately revoke the individual's license and issue a temporary seven-day license. *See id.*, subd. 7.

Butani took a urine test on April 18, 2015. The notice of revocation was dated May 22 and postmarked May 26. Pursuant to Minn. Stat. § 169A.52, subds. 6, the notice was deemed "received" on May 29. The notice informed Butani that her revocation would

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[2] The state asserts that Butani's procedural due-process claim is not properly before this court because it is not one of the enumerated issues that may be raised at an implied-consent hearing. *See* Minn. Stat. § 169A.53, subd. 3(b) (2014). This court recently held that a procedural due-process argument may be raised in implied-consent hearings, despite not being one of the enumerated issues set forth under Minn. Stat. § 169A.53, subd. 3(b). *Gray v. Comm'r Pub. Safety*, ___ N.W.2d ___, ___, 2018 WL 3716262, at *1 (Minn. App. Aug. 6, 2018).

become effective three days later on June 1. Butani asserts that she had a procedural due-process right to seven days of driving privileges after notice and before revocation.

To determine whether an individual's procedural due-process rights have been violated by a prehearing license revocation, we apply the three-part balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). *Williams v. Comm'r of Pub. Safety*, 830 N.W.2d 442, 446 (Minn. App. 2013), *review denied* (Minn. July 16, 2013). "We first examine of the private interest that will be affected by the official action, second, the risk of an erroneous deprivation of such interest through the procedures used, and additional or substitute procedural safeguards, and third, the government's interest." *Id.* (quotations omitted).

Prior incarnations of Minnesota's prehearing license-revocation scheme have withstood procedural due-process scrutiny under the three-factor *Mathews* test. *See Davis v. Comm'r of Pub. Safety*, 509 N.W.2d 380, 388-90 (Minn. App. 1993) ("[U]nder the applicable balancing test, we conclude the current implied consent law does not violate procedural due process."). Butani does not challenge the scheme, but effectively asserts that her loss of seven days of driving privileges between the time of notice and the time of revocation has altered the *Mathews* analysis and tipped the scales in favor of a due-process violation.

The presence of seven days of driving privileges between the time of notice and the time of revocation is relevant to the *Mathews* analysis. A temporary seven-day license is a form of "hardship relief," which is taken into consideration when determining the weight given to the "private interest" factor under *Mathews*. *Id.* at 388. However, this court has

previously made a distinction between the importance of temporary driving privileges when a driver faces immediate revocation, and the diminished importance of temporary driving privileges in circumstances like the present, where a driver has "substantially more time to contemplate the possibility that their driving privileges are imperiled and to plan for the possibility of losing their driving privileges." *Williams*, 830 N.W.2d at 447. Given the three days of notice that Butani received, the approximately one-and-a-half months between testing and revocation, and the additional forms of hardship relief that have emerged since *Davis*, such as the ignition-interlock program, we cannot conclude that Butani's procedural due-process rights were violated. *See* 2010 Minn. Laws ch. 366, § 14, at 1633-36 (replacing ignition-interlock device pilot project with ignition-interlock device program).

III. The district court properly admitted evidence from Butani's urine test.

Butani argues that the district court erred by admitting her urine-test results because the state failed to make a prima facie showing that the test was properly administered. Specifically, Butani asserts that the officer did not follow proper procedures because he was not present in the room for the collection of the urine sample.

A party offering a chemical-test result into evidence "has the burden of establishing a prima facie case that the test is reliable and that its administration conformed to the procedure necessary to ensure reliability." *Genung v. Comm'r of Pub. Safety*, 589 N.W.2d 311, 313 (Minn. App. 1999) (quotation omitted), *review denied* (Minn. May 18, 1999). Once a prima facie case of reliability is established, "[t]he burden of production then shifts to the party opposing admission to show why the test is untrustworthy," but "[t]he burden

of persuasion regarding the accuracy of the result remains with the proponent of the evidence." *Id.* This court reviews the district court's findings for clear error, and its burden of proof determination de novo. *Id.*

The state made a prima facie showing of reliability. Although the officer was not in the room out of respect for gender differences, the state presented sufficient evidence indicating reliability. *See State v. Dille*, 258 N.W.2d 565, 568 (Minn. 1977) (concluding that sufficient indicia of reliability in the testing process were present so as not to preclude admissibility). The district court made detailed findings on the precautionary steps taken by the officer. As the district court found, the officer was "effectively present during the administration of the test."

Butani has failed to rebut the showing of trustworthiness. In *Pasek v. Comm'r of Pub. Safety*, 383 N.W.2d 1, 3-4 (Minn. App. 1986), this court rejected a challenge to a breathalyzer result obtained while the defendant had chewing tobacco in his mouth during the test. We concluded that the test results were reliable; the defendant merely speculated that the chewing tobacco could affect the results without producing evidence to support this assertion. *Id.* Likewise, Butani has failed to offer anything beyond mere speculation to indicate that the test performed here is untrustworthy.

IV. Because Butani failed to establish that she prejudicially relied on the inaccurate implied-consent advisory, her *McDonnell* due-process challenge fails, and under *Morehouse* no remand is necessary.

Without first obtaining a warrant, the officer read Butani the implied-consent advisory, told her that refusal is a crime, and offered her a urine test. The advisory was inaccurate because "the [s]tate may not criminalize refusal of a . . . urine test absent a

search warrant or a showing that a valid exception to the warrant requirement applies." *Johnson v. State*, 916 N.W.2d 674, 679 (Minn. 2018).

Butani argued before the district court that the inaccurate advisory constituted a due-process violation, entitling her to rescission of her license revocation, regardless of any showing that she actually relied on the officer's inaccurate statement. We agreed, and reversed and remanded on those grounds. *Butani*, 2017 WL 74376, at *2-3. The supreme court granted review, vacated this court's opinion, and remanded for reconsideration in light of *Morehouse*, 911 N.W.2d 503, which together with *Johnson*, 911 N.W.2d 506, clarified the requirements for establishing a due-process violation based upon the reading of an inaccurate implied-consent advisory. We therefore reconsider Butani's claim in light of *Morehouse*. "Whether an implied-consent advisory violates a driver's due-process rights is a question of law, which this court reviews de novo." *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 561 (Minn. App. 2005).

In *Morehouse*, the supreme court addressed whether a driver's due-process rights are violated when the driver submits to a blood test after receiving an inaccurate implied-consent advisory. 911 N.W.2d at 503-04. The supreme court used a three-factor test outlined in *Johnson* for determining whether a license revocation should be rescinded because of an inaccurate advisory. *Id.* at 505. Under the three-factor test, a license revocation should be rescinded "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.* (quotation omitted). The driver in *Morehouse* satisfied the first prong because he submitted to a test, but the driver failed to satisfy the second prong because "the district court did not find, nor did [the driver] claim, that he prejudicially relied on the implied consent advisory in deciding to submit to the test." *Id.*

Here, the first and third prongs from *Morehouse* and *Johnson* are satisfied. Butani submitted to a urine test, and the advisory misinformed her that refusal was a crime. *See Johnson*, 916 N.W.2d at 679. As to the second prong, Butani asserts in her supplemental brief that she is entitled to a remand for a contested hearing. She claims that she did not present evidence of prejudicial reliance because of the "prevailing interpretation" that a *McDonnell* due-process claim does not require a showing of prejudicial reliance.

In *Johnson*, the supreme court indicated that a *McDonnell* due-process claim has always required a showing of prejudicial reliance. 911 N.W.2d at 508-09. And in *Morehouse*, the supreme court concluded that, because of a failure to establish prejudicial reliance in the district court, the driver was not entitled to relief. 911 N.W.2d at 505. The supreme court did not remand or otherwise offer an opportunity to expand the factual record on the issue of prejudicial reliance. *Id.* We see no meaningful distinction between this case and *Morehouse*, and we therefore conclude that Butani is not entitled to a remand. The district court did not find that Butani prejudicially relied on the inaccurate advisory, and Butani concedes that she "did not present evidence that she prejudicially relied on the inaccurate advisory." Butani did not testify at the implied-consent hearing. Under *Morehouse*, Butani has failed to establish prejudicial reliance, and her due-process challenge fails.

V. A remand is necessary to determine if evidence from a urine test was obtained in violation of the Fourth Amendment.

Butani argued in district court, and argues here, that the warrantless search of her urine violated the Fourth Amendment because no exception to the warrant requirement applies, she did not validly consent to the search of her urine, and the good-faith exception to the exclusionary rule does not apply. The state asserts that Butani consented to the search, and even if a Fourth Amendment violation occurred, the good-faith exception applies.[3] The district court did not expressly rule on this issue, but did note that imposing criminal consequences for refusal "does not unlawfully or unconstitutionally compel a driver to submit to a test," and there was "no requirement for a warrant."

The Fourth Amendment protects against "unreasonable searches." U.S. Const. amend. IV. Taking a urine sample from someone constitutes a search under the Fourth Amendment. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). A police officer generally cannot take a urine sample from a suspect without a search warrant unless a valid exception applies. *Id.* But if the suspect consents to the search, no warrant is required so long as the consent is voluntary. *Id.*; *State v. Hanley*, 363 N.W.2d 735, 739 (Minn. 1985). Determining whether consent is voluntary requires an examination of the totality of the circumstances. *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999) (quotation omitted).

Without a warrant, the officer read Butani the implied-consent advisory, informed her that test refusal is a crime, and offered her a urine test. Butani could have lawfully

[3] The state also asserted that the search-incident-to-arrest exception is applicable, but this argument was rejected by the supreme court in *State v. Thompson*, 886 N.W.2d 224, 233 (Minn. 2016).

refused to submit to the warrantless test, and the state effectively misinformed her of the criminality of test refusal. *See Thompson*, 886 N.W.2d at 233 (concluding that a warrantless urine test does not qualify as a search incident to arrest and conducting a urine test without a warrant violates the Fourth Amendment).

Given the officer's inaccurate statement that test refusal is a crime, it is necessary to remand for the district court to determine whether, under the totality of the circumstances, Butani validly consented to the search of her urine despite the partial inaccuracy of the implied-consent advisory. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016) (remanding to allow the district court to reevaluate consent given the partial inaccuracy of the officer's advisory). The issue of whether consent was voluntary is a question of fact. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011); *see Kucera v. Kucera*, 146 N.W.2d 181, 183 (Minn. 1966) ("It is not within the province of [appellate courts] to determine issues of fact on appeal."). The district court must determine whether Butani validly consented to the search of her urine. If her consent was not valid and no warrant exception applies, the district court must then determine whether exclusion of the evidence is appropriate. *See State v. Lindquist*, 869 N.W.2d 863, 876-77 (Minn. 2015) (discussing good-faith exception). We leave to the district court the decision whether to reopen the record on remand.

Affirmed in part, reversed in part, and remanded.