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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0569

Jesse John Susa, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed October 8, 2018
Reversed and remanded
Cleary, Chief Judge

Pine County District Court
File No. 58-CV-15-498

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

Lori Swanson, Attorney General, Dominic J. Haik, Assistant Attorney General, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Cleary, Chief Judge; and Jesson, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

The supreme court vacated this court's decision affirming the district court's order rescinding the revocation of respondent Jesse John Susa's driver's license. The supreme

court remanded the matter to this court for reconsideration in light of *Morehouse v. Comm'r of Pub. Safety*, 911 N.W.2d 503 (Minn. 2018). Applying *Morehouse*, we conclude that appellant is not entitled to rescission of his driver's license on due-process grounds; however, we remand to allow the district court to consider if respondent's consent was voluntary under the Fourth Amendment, and if not, whether the good-faith exception to the exclusionary rule applies.

FACTS

On July 1, 2015, respondent Jesse John Susa was arrested and transported to the Pine County Jail after a deputy sheriff initiated a traffic stop and determined there was probable cause to believe respondent was driving while impaired. After the deputy read the Minnesota Implied Consent Advisory, respondent provided a urine sample. Analysis of the sample indicated an alcohol concentration of 0.14. Appellant, commissioner of public safety, revoked respondent's driver's license.

Respondent sought judicial review of the revocation of his driving privileges, arguing that (1) the warrantless search of his urine was unconstitutional under the Fourth Amendment, and (2) his due-process rights were violated because the implied-consent advisory was misleading in that it advised him that it was a crime to refuse to submit to a warrantless blood or urine test. The commissioner called one witness to testify at the hearing, the deputy who stopped and arrested respondent. The deputy testified that he read the implied-consent advisory to respondent, he offered respondent the opportunity to consult an attorney, respondent declined, and he offered respondent the choice of a blood

or a urine test. Respondent chose a urine test. The deputy denied threatening or coercing respondent to take a test. Respondent did not testify or call any witnesses at the hearing.

In a memorandum in support of his motion, respondent argued that the warrantless urine test was unconstitutional because there were no valid exceptions to the warrant requirement and respondent had a right to refuse a warrantless blood or urine test under *State v. Trahan*, 870 N.W.2d 396 (Minn. App. 2015), *aff'd,* 886 N.W.2d 216 (Minn. 2016) (concluding test-refusal statute, which criminalized driver's refusal to take a warrantless blood test, was unconstitutional as applied to Trahan where there were no exigent circumstances justifying a warrantless search of his blood). Respondent also relied on *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991), to support his argument that the implied-consent advisory was misleading and violated his due-process rights. Finally, respondent argued that the good-faith exception does not apply to license revocation proceedings.

The district court rescinded respondent's driver's license revocation based solely on this court's decision in *State v. Thompson*, 873 N.W.2d 873 (Minn. App. 2015) (concluding that a warrantless urine test cannot be justified under the search-incident-to-arrest exception to the warrant requirement, and the test-refusal statute was unconstitutional as applied to a person who refuses to submit to a blood or urine test), *aff'd,* 886 N.W.2d 224 (Minn. 2016).[1] The district court did not consider any other exceptions to the warrant

[1] The supreme court concluded that a urine test raises the same privacy concerns as a blood test, so a warrantless urine test is not justified by the search-incident-to-arrest exception to the warrant requirement. 886 N.W.2d at 233. The supreme court further concluded that the good faith exception to the exclusionary rule did not apply because there was no

requirement or whether respondent's consent was voluntary despite the partial inaccuracy of the advisory. The district court also did not consider respondent's *McDonnell* due-process claim. The commissioner appealed.

In an unpublished opinion, this court affirmed the district court's rescission order on *McDonnell* due-process grounds. *Susa v. Comm'r of Pub. Safety*, No. A16-0569, 2016 WL 7188703, at *2 (Minn. App. Dec. 12, 2016). We concluded that respondent's due-process rights were violated by the misleading implied-consent advisory that threatened to criminally punish respondent for refusing to submit to a warrantless blood or urine test. *Id.* at *4. We reasoned that "[r]ecent holdings of the Minnesota Supreme Court and the United States Supreme Court make clear that the state cannot criminally punish respondent for his refusal to submit to either the blood or urine tests offered by the deputy." *Id.* (citing *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016); *Thompson*, 886 N.W.2d at 234; *Trahan*, 886 N.W.2d at 224). We declined to extend the good-faith exception to due-process violations, and we did not consider "whether the warrantless collection of respondent's urine was permissible under the Fourth Amendment." *Id.* at *5. Judge Ross concurred specially. *Id.* at *6.

The supreme court granted the commissioner's petition for review and stayed the proceedings pending final disposition in *Morehouse v. Comm'r of Pub. Safety*, No. A16-0277, 2016 WL 4497470 (Minn. App. Aug. 29. 2016), *aff'd,* 911 N.W.2d 503 (Minn.

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evidence to exclude. *Id.* Lastly, the supreme court concluded that the state could not prosecute Thompson for refusing to submit to an unconstitutional warrantless urine test, and the test-refusal statute was unconstitutional as applied to Thompson. *Id.* at 234.

2018), and *Johnson v. Comm'r of Pub. Safety*, 887 N.W.2d 281 (Minn. App. 2016), *rev'd,* 911 N.W.2d 506 (Minn. 2018). After the supreme court issued its decisions in *Morehouse* and *Johnson*, the supreme court vacated the stay, vacated this court's decision, and remanded the matter to this court for reconsideration in light of *Morehouse*. We reinstated the appeal and asked the parties to submit supplemental memoranda addressing the application of *Morehouse* to this case.

D E C I S I O N

On remand, our review is limited by the supreme court's remand instructions. *See Bauerly v. Bauerly*, 765 N.W.2d 108, 110 (Minn. App. 2009) (stating court's "duty on remand is to execute the mandate of the remanding court strictly according to its terms")(quotation omitted)).

In *Morehouse*, the commissioner of public safety revoked Morehouse's driver's license after he submitted to a blood test showing an alcohol concentration above the legal limit. 911 N.W.2d at 504 (citing Minn. Stat. § 169A.52, subd. 4(a) (2014)). Morehouse petitioned for judicial review of the license revocation decision, and the district court sustained the revocation on the basis that Morehouse voluntarily consented to the blood test. *Id.* The district court did not address Morehouse's *McDonnell* due-process claim. *Id.* This court reversed and remanded for an evaluation of the voluntariness of Morehouse's consent. *Id.* The supreme court granted Morehouse's petition for review but did not consider the voluntariness of Morehouse's consent. *Id.* n.1.

In its due-process analysis, the supreme court relied on its decision in *Johnson v. Comm'r of Pub. Safety*, which was released the same day as *Morehouse*. *Id.* at 505. In

Johnson, the supreme court clarified that a *McDonnell* due-process violation occurs when: (1) the driver has submitted to a breath, blood, or urine test; (2) the driver demonstrates prejudicial reliance on the implied-consent advisory in deciding to undergo testing; and (3) the implied-consent advisory did not accurately inform the driver of the legal consequences of refusing to submit to testing. 911 N.W.2d at 508-09 (citing *McDonnell*, 473 N.W.2d at 853-55). The supreme court concluded that Johnson's claim failed on the first two elements because he refused to submit to blood and urine tests, so "there is no concern here that Johnson was prejudiced by relying on misleading statements by the officer about the consequences of refusing a test." *Id.* at 509.

Morehouse, on the other hand, submitted to a blood test, so he satisfied the first element of a *McDonnell* claim. *Morehouse*, 911 N.W.2d at 505. "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.* "Because Morehouse did not even claim, much less establish, that he prejudicially relied on the implied-consent advisory, Morehouse is not entitled to rescission of his license revocation under *McDonnell*." *Id.*

In supplemental briefing, the commissioner argues that this case is like *Morehouse*. Respondent submitted to a urine test, and he was misinformed that he could be charged with the crime of refusal for failing to submit to a warrantless urine test. But there is no evidence in the record establishing that respondent prejudicially relied on the advisory. The commissioner argues that this court should reverse the district court's order rescinding

respondent's driver's-license revocation and should not remand to permit him to develop a factual record on prejudicial reliance.

Respondent, on the other hand, argues that a remand is necessary to allow him to develop a factual record on prejudicial reliance. At the time respondent petitioned for judicial review of his license revocation, this court had not required a showing of prejudicial reliance on a misleading implied-consent advisory. *See Olinger v. Comm'r of Pub. Safety*, 478 N.W.2d 806, 808 (Minn. App. 1991) (concluding *McDonnell* due-process violation occurs when police threaten criminal charges the state is not authorized to impose, without any showing of prejudicial reliance). Respondent contends that *Johnson* and *Morehouse* "fundamentally changed the rule of law with respect to the prejudicial effect of a misleading Implied Consent Advisory." But the supreme court in *Morehouse* and *Johnson* has now clarified that a *McDonnell* due-process violation has three elements, one of which requires proof of prejudicial reliance. The supreme court did not remand to the district court to give Morehouse an opportunity to develop a factual record on prejudicial reliance. 911 N.W.2d at 505.

Applying *Morehouse*, as we are required to do by the supreme court's remand instructions, we are persuaded that respondent did not allege or establish the second element of a *McDonnell* due-process violation. Respondent did not testify at the evidentiary hearing, and he did not claim prejudicial reliance in his written submissions to the district court. Because the record does not establish that respondent prejudicially relied on the misleading implied-consent advisory in making the decision to submit to testing, respondent has not established a *McDonnell* due-process violation, and he is not entitled to

rescission of his driver's license revocation on due-process grounds. We decline to remand for further development of the record on the prejudicial-reliance element of a due-process violation, because the supreme court did not give Morehouse an opportunity to develop a record on prejudicial reliance.

But the absence of a due-process remedy does not end this court's analysis. Respondent also argued to the district court that the urine test was an unconstitutional warrantless search under the Fourth Amendment because there were no valid exceptions to the warrant requirement. The district court decided this issue solely on the grounds that the search was not valid under *Thompson*, and did not consider other exceptions to the warrant requirement, such as whether respondent's consent was voluntary under the totality of the circumstances, despite the partial inaccuracy of the advisory. *See Birchfield*, 136 S. Ct. at 2186 (reversing and remanding, instructing state court to "reevaluate Beylund's consent [to the warrantless blood test] given the partial inaccuracy of the officer's advisory"). The district court also did not consider whether the good-faith exception to the exclusionary rule applies to implied-consent proceedings to prevent exclusion of evidence on Fourth Amendment grounds. *See State v. Lindquist*, 869 N.W.2d 863, 876 (Minn. 2015) (concluding "exclusionary rule does not apply to violations of the Fourth Amendment to the U.S. Constitution, or Article I, Section 10, of the Minnesota Constitution when law enforcement acts in objectively reasonable reliance on binding appellate precedent"). This court cannot decide these issues because the district court did not consider them. *See State v. Lemmer*, 736 N.W.2d 650, 656 (Minn. 2007) (stating that this court will not "decide issues that have not been first addressed by the district court and are raised for the first time

on appeal"). A remand is appropriate to allow the district court to decide these issues in the first instance.

Accordingly, we reverse the order rescinding the revocation of respondent's driver's license on due-process grounds and remand the matter to the district court for determination of whether respondent's consent to submit to urine testing was voluntary under the totality of the circumstances, and if not, whether the good-faith exception to the exclusionary rule applies in implied-consent proceedings.

Reversed and remanded.