STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0852

Ellen Louise Arnt, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed October 29, 2018
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge

Pipestone County District Court
File No. 59-CV-15-419

Paul M. Malone, Malone & Mailander, Slayton, Minnesota (for appellant)

Lori Swanson, Attorney General, Stephen Melchionne, Justin A. Moor, Lindsay LaVoie Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

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

RODENBERG, Judge

Appellant challenges the district court's order sustaining the revocation of her driving privileges. Appellant argues that (1) her privacy interest was violated by the urine test, (2) her due-process rights were violated because of an inaccurate implied-consent advisory, and (3) she did not voluntarily consent to the urine test. We reject appellant's

privacy-interest argument. We also reject appellant's due-process argument, one that appellant did not make to the district court, but we reverse and remand to the district court to reconsider the voluntariness of appellant's consent under the Fourth Amendment.

FACTS

On September 11, 2015, at approximately 11:15 p.m., Pipestone County Sheriff's Deputy Jeff Sannow was traveling east on State Highway 30. Deputy Sannow noticed a car that was "speeding up and slowing down." Using his radar equipment, Deputy Sannow clocked the car at 72 miles per hour in a 55-mile-per-hour zone.

Deputy Sannow stopped the car and identified the driver as appellant Ellen Louise Arnt. Deputy Sannow noticed that appellant's behavior was "slow" and she was "fumbling around," her speech was slurred, her eyes were glassy, and there was an "alcoholic" smell coming from inside the car. As appellant retrieved her insurance information and driver's license, she moved a sweatshirt located inside the car, revealing an open beer can. Deputy Sannow asked appellant several times if she had been drinking before she drove. She told him that she had been at the casino and had consumed some beer. After appellant got out of the car, Deputy Sannow retrieved the open beer can and noticed that it was "cold" and still had "some liquid inside."

Appellant performed several field sobriety tests, the results of which indicated impairment. Deputy Sannow requested that appellant complete a preliminary breath test (PBT). Appellant agreed to take that test. Despite three attempts, Deputy Sannow could not obtain a result from the PBT because appellant "kept playing with the machine."

Appellant was arrested for driving while impaired and was taken to the Pipestone County Jail.

At the jail, Deputy Sannow read appellant the implied-consent advisory. Appellant asked to speak to her attorney and was provided a telephone and a phone directory. Despite repeated attempts, appellant failed to contact an attorney. Deputy Sannow asked appellant to take a breath test to which she consented, but appellant failed to provide a sufficient sample. Deputy Sannow reread the implied-consent advisory[1] to appellant and offered her an "alternative" test.[2] Appellant indicated that she understood the implied-consent advisory. She was again offered an opportunity to speak to her attorney, but again failed to contact an attorney.

Deputy Sannow asked appellant to submit to a urine test, to which appellant agreed. Because there were no female officers or employees on duty at the time, a female dispatcher was called in to assist with the urine test. A urine sample was obtained, and later testing revealed that appellant's alcohol concentration was 0.14 at the time of the test.

Based on the urine-test results, the Minnesota Commissioner of Public Safety revoked appellant's driver's license under Minn. Stat. §§ 169A.50-.53 (2014). Appellant sought judicial review of the revocation of her driving privileges, arguing that the officer lacked a factual basis for the traffic stop, that her arrest was unlawful, that the implied-

[1] Deputy Sannow read the same implied-consent advisory both times, stating that "[r]efusal to take a test is a crime."

[2] At the time of this second reading, Deputy Sannow did not specify whether his reference to an "alternative" test meant a blood test or a urine test. But by using the term "alternative," he was not offering or suggesting another breath test.

consent process is unconstitutional, that the unconstitutional-conditions doctrine applied, that a warrant was required to obtain a urine sample, and that the urine sample violated her Fourth-Amendment right to privacy.

The district court issued a written order sustaining the revocation of appellant's driver's license. It concluded that Deputy Sannow, based on his initial observations, had reasonable articulable suspicion for the initial stop and that, based upon his interaction with appellant, Deputy Sannow had probable cause to arrest her. The district court also determined that the unconstitutional-conditions doctrine was inapplicable under *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 723 (Minn. App. 2014), and that, per *Stevens*, appellant's right to privacy was outweighed by the government's interests in combatting drunk driving. Finally, the district court determined that, because appellant had been read the implied-consent advisory twice and had not been coerced, she had voluntarily consented to the warrantless urine test. It did not resolve a due-process argument, apparently because no record was made of a due-process challenge.

This appeal followed.[3]

[3] This appeal was initially stayed pending the supreme court's decision in *State v. Phillips*, No. A16-0129, 2016 WL 4497355 (Minn. App. Aug. 29, 2016), *review dismissed* (Minn. May 18, 2017). Following Phillips's death and the supreme court's dismissal of the case, the matter was again stayed pending final dispositions 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). After the supreme court issued its decisions in *Morehouse* and *Johnson*, we reinstated the appeal and both parties submitted supplemental briefs on the application of these cases.

D E C I S I O N

I. Privacy Interest

Appellant argues that Minnesota's implied-consent law, which requires a person to urinate in the presence of a law enforcement officer, is "an unreasonable invasion of privacy in violation of the Minnesota and Federal Constitutions."

"The reasonableness of any search must be considered in the context of the person's legitimate expectations of privacy." *Maryland v. King*, 569 U.S. 435, 462, 133 S. Ct. 1958, 1978 (2013). The Minnesota Supreme Court has recognized the privacy concerns inherent in urine testing. In *State v. Thompson*, Thompson was arrested for a suspected driving while impaired (DWI) and refused to submit to a warrantless blood or urine test. 886 N.W.2d 224, 226 (Minn. 2016). The Minnesota Supreme Court examined "the impact urine tests have on individual privacy interests" and the "weighty privacy concerns" implicated in such testing. *Id.* at 230, 232. Because of how urine samples are obtained and the type of information they may reveal, such tests may not be conducted absent an exception to the warrant requirement. *Id.* at 231-34. Appellant's claimed privacy interest is grounded in the warrant requirement for a urine test adopted in *Thompson*.

Consent is an exception to the warrant requirement. *State v. Brooks*, 838 N.W.2d 563, 568-69 (Minn. 2013). As discussed below, the district court found that appellant consented to the urine test. Appellant cites no authority for the notion that, even when a driver validly consents to a urine test, the driver has a separate non-Fourth-Amendment privacy right that precludes such testing. We are aware of no such authority and, as an error-correcting court, it is not our proper role to construct such a right not recognized by

either the legislature or the Minnesota Supreme Court. *See Finn v. All. Bank*, 838 N.W.2d 585, 603 (Minn. App. 2013), *aff'd as modified*, 860 N.W.2d 638 (Minn. 2015); *N. Star Int'l Trucks, Inc. v. Navistar, Inc.*, 837 N.W.2d 320, 325 (Minn. App. 2013); *State v. Kelley*, 832 N.W.2d 447, 456 (Minn. App. 2013), *aff'd on other grounds*, 855 N.W.2d 269 (Minn. 2014).

II. Due Process

Next, appellant argues that her due-process rights were violated by the reading of an inaccurate implied-consent advisory. "We review due-process challenges de novo." *Thole v. Comm'r of Pub. Safety*, 831 N.W.2d 17, 19 (Minn. App. 2013), *review denied* (Minn. July 16, 2013). The Minnesota Supreme Court has concluded that an implied-consent advisory which "permit[s] police to threaten criminal charges the state was not authorized to impose . . . violat[es] the constitutional guarantee of due process." *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991).

The Minnesota Supreme Court recently clarified that a due-process violation does not occur "solely because a driver had been misled." *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506, 508 (Minn. 2018). The *Johnson* court held that a due-process violation under *McDonnell* requires three elements:

> 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.

All three elements must be present to entitle an appellant to rescission of a district court's license revocation order. *Morehouse v. Comm'r of Pub. Safety*, 911 N.W.2d 503, 505 (Minn. 2018). In *Morehouse*, the supreme court rejected Morehouse's due-process-violation argument and found that, "[b]ecause Morehouse did not even claim, much less establish, that he prejudicially relied on the implied consent advisory, Morehouse is not entitled to a rescission of his license revocation under *McDonnell*." *Id.*

Here, the first element of *Johnson* is satisfied because appellant submitted to a urine test. Appellant, in her supplemental brief, attempts to distinguish *Morehouse* by arguing that "[a]ppellant is raising the fact that she was prejudiced by the threat of impossible criminal charges." But, like *Morehouse*, appellant did not even claim in the petition for judicial review, much less establish at the evidentiary hearing in district court, that she prejudicially relied on the implied-consent advisory. Appellant did not testify at the hearing, and she produced no other evidence tending to show that she prejudicially relied on the inaccurate implied-consent advisory. Appellant raised the question of prejudicial reliance on the implied-consent advisory for the first time in her supplemental brief on appeal. Under *Morehouse*, because appellant "did not even claim, much less establish, that [s]he prejudicially relied on the implied consent advisory, [appellant] is not entitled to a rescission of [her] license revocation under *McDonnell*." *Morehouse*, 911 N.W.2d at 505.

Appellant nevertheless asks that we remand to allow her to develop a record on prejudicial reliance. The supreme court did not remand in *Morehouse* to give the driver an opportunity to develop a record on prejudicial reliance. *Id.* Given the factual and legal

similarities between this case and *Morehouse*, remanding to allow appellant to develop the record regarding any prejudicial reliance would stray from the *Morehouse* disposition.

We see no basis on which to reverse the district court's denial of appellant's petition for rescission of the revocation of her license because appellant has not claimed, much less established, a *McDonnell* due-process violation.

III. Fourth Amendment

Finally, appellant argues that she did not voluntarily consent to give a urine sample because she was coerced by Deputy Sannow reading her the inaccurate implied-consent advisory.[4] Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. *See* U.S. Const. amend. IV; Minn. Const. art. I, § 10. The Minnesota Supreme Court has held that, under the Fourth Amendment, taking a urine sample constitutes a search. *Brooks*, 838 N.W.2d at 568. "Searches conducted without a warrant, outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Thompson*, 886 N.W.2d at 228 (quotation omitted). One such recognized exception is the consent exception, where "the subject of the search consents." *Brooks*, 838 N.W.2d at 568. "For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented." *Id.* "Whether consent was voluntary is determined by examining the totality of the

[4] The state argues for the first time on appeal that the good-faith exception to the exclusionary rule applies. We decline to address this issue as we generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

circumstances, including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999) (quotation omitted). If the circumstances indicate that the encounter was coercive, then consent is involuntary and evidence must be suppressed. *Id.* Whether consent was voluntary is a question of fact that is reviewed for clear error. *State v. Diede*, 795 N.W.2d 836, 846-47 (Minn. 2011).

After reviewing the evidence at the implied-consent hearing, the district court found that appellant voluntarily consented to the urine test. The district court based its conclusion upon an analysis of the circumstances surrounding appellant's arrest and her interactions with Deputy Sannow. The district court specifically noted that Deputy Sannow read appellant the implied-consent advisory twice and that appellant was provided a choice: comply and provide evidence of intoxication or refuse and be charged with refusing to take the test. The district court also noted that appellant was twice offered access to and means by which to contact counsel. Based upon Deputy Sannow's testimony, which the district court credited, the district court implicitly found that appellant did not face any overtly coercive police tactics. Reviewing appellant's claims, the district court found that appellant had "offered no evidence that indicated that she was improperly coerced by the Deputy." Applying *Brooks*, the district court concluded that "[b]ased on the totality of the circumstances, the [appellant] voluntarily consented to provide a breath and urine test. Therefore, a warrant was not required[.]"

In finding that appellant's consent to the test was voluntary, the district court relied on appellant having twice been read the implied-consent advisory. But the second implied-

consent advisory inaccurately advised appellant that she could be charged with a crime for refusing a warrantless urine test.

The United States Supreme Court considered a similar issue in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). Defendant Beylund was arrested in North Dakota for driving while impaired and "submitted to a blood test after police told him that the law required his submission." *Id.* at 2186. Because the blood test results revealed Beylund was intoxicated at the time, he had his license "suspended for two years after an administrative hearing." *Id.* at 2172. Beylund appealed, "arguing that his consent to the blood test was coerced by the officer's warning that refusing to consent would itself be a crime." *Id.* The North Dakota Supreme Court affirmed the license suspension, "emphasiz[ing] that North Dakota's implied consent advisory was not misleading because it truthfully related the penalties for refusal." *Id.* The United States Supreme Court in *Birchfield*, after concluding that states may not compel warrantless blood tests, remanded to the North Dakota Supreme Court to "reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory [in light of the Supreme Court's decision]." *Id.* at 2186.

At the time the district court determined that appellant voluntarily consented to the warrantless urine search, the district court did not have the benefit of the supreme court's decisions in *Thompson*, *Johnson*, or *Morehouse*. It therefore did not consider whether the inaccuracy of the second implied-consent advisory might have rendered appellant's consent to the urine test involuntary. Accordingly, we reverse and remand to the district court to reconsider whether, in light of the inaccurate implied-consent advisory, the totality

of the circumstances indicates that appellant's consent to the urine test was voluntarily given.[5]

Affirmed in part, reversed in part, and remanded.

[5] Our remand for reconsideration of the voluntariness of appellant's consent is no indication of how the district court should resolve the issue. Because consent is a fact-dependent issue, *see Brooks*, 838 N.W.2d at 568-69; *Harris*, 590 N.W.2d at 104, the district court must assess all evidence available to it. This is uniquely the district court's proper role. Whether the record should be reopened on remand is left to the district court's discretion.