STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0993

Barbara Faye Sproul, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 17, 2018
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Cass County District Court
File No. 11-CV-15-1974

Rich Kenly, Kenly Law Office, Backus, Minnesota (for appellant)

Lori Swanson, Attorney General, Daniel S. Schueppert, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Reilly, Judge; and Florey, Judge.

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

JESSON, Judge

The commissioner of public safety revoked appellant Barbara Sproul's driver's license based on a failed urine test, and the district court denied her petition to rescind the revocation. She argues on appeal that the implied-consent advisory violated her due-process rights by informing her that she was "required by law" to submit to chemical

testing without a warrant. She also maintains that the district court clearly erred by finding that she voluntarily consented to the warrantless search. We reject Sproul's due-process argument because the record lacks evidence that she prejudicially relied on the implied-consent advisory. But we reverse and remand for the district court to reconsider the voluntariness of her consent.

FACTS

At about 12:30 a.m. on June 21, 2015, a Cass County Sheriff's deputy was on patrol going northbound on Highway 371. He was following a vehicle that was crossing the fogline when attempting to navigate curves and on the straightaway. Because he was concerned that the driver might be impaired, he activated his emergency lights and stopped the vehicle. He had the driver, appellant Barbara Sproul, perform field sobriety tests. A preliminary breath test showed a result of 0.098. He then arrested Sproul based on probable cause that she was driving while impaired.

The deputy escorted Sproul to the Cass County Jail, where he read her the Minnesota Implied-Consent Advisory. The recording of that advisory provides:

> Q.: Minnesota law requires you to take a test to determine if you are under the influence of alcohol. Do you understand that?
>
> A.: Yes.
>
> Q.: Refusal to take a test is a crime. Do you understand that?
>
> A.: Yes.
>
> Q.: Before making your decision about testing you have the right to consult with an attorney. If you wish to do so, a telephone and directory will be available to you.

> If you are unable to contact an attorney, you must make the decision on your own. You must make your decision within a reasonable period of time.
>
> Do you understand that?
>
> A.: Yes.
>
> Q.: If the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test. Do you understand that?
>
> A.: Yes.
>
> Q.: Okay, you understand everything that I just explained?
>
> A.: I—I took the test so everything is ok, right?
>
> Q.: Ok. Just listen to me. Do you understand everything that I just explained?
>
> A.: Yes.
>
> Q.: Ok. Do you wish to consult with an attorney right now?
>
> A.: No.
>
> Q.: Ok. Are you willing to give me a urine test right now?
>
> A.: Ye—yes. [slowly].
>
> Q.: Ok.

The deputy then had a corrections officer administer a urine test, which showed an alcohol concentration of 0.104. That officer testified at the implied-consent hearing that Sproul was "extremely cooperative, very pleasant," and showed "no negativity, no body language to imply that she is not willing to give a sample anymore." The corrections officer was not present during the giving of the implied-consent advisory.

Based on the test results, the commissioner of public safety revoked Sproul's driver's license. Sproul challenged the revocation, arguing that her due-process rights were violated because she was misled by the implied-consent advisory, which informed her that she was "required by law" to submit to chemical testing. She also contended that under the totality of the circumstances, she did not freely and voluntarily consent to the warrantless search.

The district court sustained the revocation, holding that "under the current state of Minnesota law, criminalizing a person's refusal to submit to a properly requested warrantless chemical test, is constitutional." The district court concluded that it was proper for the deputy to read the portion of the implied-consent advisory informing Sproul that she would receive a criminal charge if she refused testing. The district court also determined that the warrantless search was permissible because Sproul freely and voluntarily submitted to testing.

Sproul appealed the district court's order. This court issued two orders staying the appeal pending relevant decisions before the Minnesota Supreme Court, but reinstated the appeal and ordered additional briefing following the supreme court's 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).

D E C I S I O N

Minnesota's implied-consent law governs the administration of breath, blood, and urine tests to drivers who are suspected of being under the influence of alcohol or hazardous or controlled substances. Minn. Stat. § 169A.50-.53 (2018); *Johnson,* 911 N.W.2d at 507

(Minn. 2018). If a driver refuses to permit a test, the commissioner of public safety revokes that driver's license. Minn. Stat. §169A.52, subd. 3. If a driver submits to chemical testing, and the test results show an alcohol content of 0.08 or more, the commissioner also revokes the driver's license. *Id*., subd. 4.

Sproul argues that: (1) she was denied due process when she was told that she would be charged with the crime of test refusal if she exercised her right to refuse warrantless chemical testing, and (2) her consent to testing was not voluntary, as required for a warrantless search under the Fourth Amendment. We address each argument in turn. After doing so we conclude that Sproul's due-process rights were not violated because she did not present evidence to the district court to support her argument that she prejudicially relied on the reading of the implied-consent advisory. But we remand for the district court to further address her argument that she did not voluntarily consent to the warrantless search.

Due process

Whether an implied-consent advisory violates a driver's due-process rights presents a question of law, which we review de novo. *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 561 (Minn. App. 2005). In *McDonnell v. Comm'r of Pub. Safety*, the supreme court set forth a three-part test for determining whether a due-process violation has occurred in the context of a driver's-license revocation. 473 N.W.2d 848, 853-55 (Minn. 1991). Under that test, a license revocation violates due process when: (1) the driver submitted to chemical testing; (2) "the [driver] prejudicially relied on the implied-consent advisory in deciding to undergo testing"; and (3) the advisory failed to accurately inform the driver of the legal consequences of test refusal. *Johnson*, 911 N.W.2d at 508-09 (citing

McDonnell, 473 N.W.2d at 853-55). The supreme court noted that a due-process violation is not established under *McDonnell* "solely because a driver [has] been misled" by an implied-consent advisory. *Id*. at 508. The supreme court has held that under the test in *McDonnell*, a driver was not entitled to have his license revocation rescinded when he submitted to blood testing and "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." *Morehouse*, 911 N.W.2d at 505; *see also Johnson*, 911 N.W.2d at 508-09 (holding that the first two elements of *McDonnell* were not satisfied when a driver refused to submit to chemical testing).

We have recently held that a district court errs when it grants relief under *McDonnell* without first determining that the three elements of a due-process claim under *McDonnell* have been established. *Windsor v. Comm'r of Pub. Safety*, ___ N.W.2d ___, ___, 2018 WL 5780410, at *3.[1] In *Windsor*, we also concluded that a remand is unnecessary if the record does not show evidence sufficient to establish all three elements. *Id*. at *4.

Here, we conclude that Sproul has failed to establish all three elements of the *McDonnell* test which would entitle her to relief under that analysis. She has satisfied the first and third elements of the *McDonnell* test because she submitted to a urine test and because the implied-consent advisory did not accurately inform her of the legal consequences of refusing chemical testing. *See Johnson*, 911 N.W.2d at 508-09 (citing

[1]*Windsor* expressly overruled *Olinger v. Comm'r of Pub. Safety*, 478 N.W.2d 806, 807 (Minn. App. 1991), which had held that the mere misstatement of the law entitled drivers to rescission of their license revocations without a showing of actual prejudice.

McDonnell, 473 N.W.2d at 853-55). But on this record, she has not satisfied the second element: establishing that she prejudicially relied on the implied-consent advisory in making her decision to submit to testing. *See id.*; *see also Windsor*, 2018 WL 5780410, at *3.

Sproul did not testify at the district-court hearing or proffer any written evidence to show prejudicial reliance. She points out that her counsel asserted in briefing to the district court that "[law enforcement] actively misled her" with the mandatory language in the implied-consent advisory, which led her to believe that she was required to submit to testing. But counsel's factual assertions in a brief do not constitute evidence presented to the district court. *See State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004) (noting that "arguments of attorneys are not evidence") (quotation omitted); *see also Tang v. I.N.S.*, 223 F.3d 713, 720 (8th Cir. 2000) (stating that factual assertions in a brief were "argument of counsel and not evidence"). And in *Morehouse*, the supreme court emphasized that the driver must establish, and the district court must find, prejudicial reliance in order to establish that factor under *McDonnell*. *Morehouse*, 911 N.W.2d at 505.

We conclude that because Sproul did not establish prejudicial reliance on the implied-consent advisory in deciding to submit to testing, the second *McDonnell* factor has not been satisfied. *See id*. We therefore, reject her due-process argument. We also note that in *Windsor* we did not see fit to order a remand when the supreme court in *Morehouse* had declined to do so. *See Windsor*, 2018 WL 5780410, at *4. Following *Windsor*, we also decline to order a remand to develop the record on this issue. *See id.*

Fourth Amendment

Sproul also asserts a Fourth Amendment challenge to the revocation of her license, arguing that her consent to a warrantless search was not voluntary. The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art I, § 10. A urine test is a search subject to Fourth Amendment protections. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). Unless an exception to the warrant requirement applies, a warrantless search is per se unreasonable. *Ellingson v. Comm'r of Pub. Safety*, 800 N.W.2d 805, 807 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011).

Under one exception, a warrant is not necessary if the subject of the search consents. *Brooks*, 838 N.W.2d at 568. To satisfy the consent exception to the warrant requirement, the state must show by a preponderance of the evidence that consent was freely and voluntarily given. *Id*. Voluntariness presents a question of fact, which this court reviews for clear error. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). To determine whether consent was voluntary, a court examines the totality of the circumstances, which includes the nature of the encounter, the kind of person the defendant is, what was said, and how it was said. *Id*. A person does not consent "simply by acquiescing to a claim of lawful authority." *Brooks*, 838 N.W.2d at 569.

The district court found that under *Brooks*, Sproul's consent to the urine test was voluntary, and her consent was not negated by any shortcomings in the language of the implied-consent advisory. Two months after the district court's order, however, the United States Supreme Court issued its opinion in *Birchfield v. North Dakota*, 136 S. Ct.

2160, (2018). In *Birchfield*, petitioner Beylund submitted to a blood test in North Dakota after law enforcement told him that refusal to submit to chemical testing was a crime. *Id*. at 2172. Beylund appealed the suspension of his license, arguing that his consent was coerced by the advisory. *Id*. The Supreme Court concluded that the state may not compel warrantless blood tests, and because voluntariness of consent to a search requires analyzing the totality of the circumstances, it remanded the case to state court to "reevaluate [the driver's] consent [to the warrantless blood test] given the partial inaccuracy of the officer's advisory." *Id*. at 2186.

Following *Birchfield*, the Minnesota Supreme Court has held that absent a warrant or exigent circumstances, a defendant could not be prosecuted under Minnesota's test-refusal statute for refusing to submit to a blood test. *State v. Trahan*, 886 N.W.2d 216, 218 (Minn. 2018). And in *State v. Thompson*, the supreme court extended that reasoning to urine tests, concluding that such tests given under the test-refusal law implicated privacy rights and that conducting a warrantless urine test violates the Fourth Amendment. 886 N.W.2d 224, 230, 234 (Minn. 2018). Thus, without a warrant, law enforcement was required to obtain Sproul's consent before proceeding with chemical testing. *See id*.

Here, the district court did not have the benefit of the *Birchfield*, *Trahan*, and *Thompson* cases when it issued its order finding that Sproul voluntarily consented to testing. Because Sproul could not be criminally prosecuted for refusing a urine test, the implied consent advisory given by the officer was partially inaccurate. *See Birchfield*, 136 S. Ct. at 2186; *Thompson*, 886 N.W.2d at 234. In addition, the district court did not

address all of the circumstances surrounding the giving of the implied-consent advisory, including Sproul's reaction at the time she was read the advisory.

The question of the voluntariness of Sproul's consent to testing is fact-specific and properly addressed by the district court. *See Diede*, 795 N.W.2d at 846. We therefore reverse the district court's finding on the voluntariness of Sproul's consent and remand to the district court for further consideration of that issue.[2]

Affirmed in part, reversed in part, and remanded.

[2] The commissioner also argued before the district court that a good-faith exception to the exclusionary rule applies. Because the district court did not address this issue, we decline to do so. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court must generally consider only issues "presented [to] and considered by the [district] court in deciding the matter before it"). Should the district court deem it appropriate, it may address this issue on remand.