STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1369

Paul Simon Lindstrom, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed November 5, 2018
Affirmed
Schellhas, Judge

Kanabec County District Court
File No. 33-CV-15-22

Mark D. Kelly, Law Offices of Mark D. Kelly, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Stephen D. Melchionne, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Tracy M. Smith, Judge.

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

SCHELLHAS, Judge

Arguing that his right to due process was violated, appellant challenges the district court's denial of his petition to rescind the revocation of his driving privileges. We affirm.

FACTS

Responding to a complaint about diesel-fuel theft and other items from abandoned properties, Kanabec County Deputy Sheriff Justin Frisch observed a white Ford truck travelling across a plowed field road. Deputy Frisch followed the truck until it stopped. When the driver exited the truck and approached the deputy's squad car, Deputy Frisch recognized the driver as appellant Paul Lindstrom and instructed him to get back into his truck. Deputy Frisch thereafter arrested Lindstrom for possession of a controlled substance and transported him to the county jail where Lindstrom failed two field sobriety tests. Deputy Frisch then read Lindstrom the Minnesota Motor Vehicle Implied Consent Advisory three times and gave Lindstrom a telephone and directory to enable him to contact an attorney. Lindstrom said that he wanted to "move onto the next step," and Deputy Frisch asked him if he wanted to take a blood a test. Lindstrom responded "f**k no," and refused to provide a urine test as an alternative to a blood test.

Kanabec County reported Lindstrom's chemical-test refusal to respondent Minnesota Commissioner of Public Safety, who revoked Lindstrom's driving privileges. Lindstrom petitioned for rescission of his license revocation. The district court denied Lindstrom's petition, and Lindstrom appealed. This court stayed his appeal pending the supreme court's decision in *State v. Phillips*, No. A16-0129 (Minn. App. Aug. 29, 2016), *review granted* (Minn. Nov. 15, 2016), *and appeal dismissed* (Minn. May 18, 2017). After the dismissal of *Phillips*, this court stayed the appeal pending the supreme court's filing of its 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). After the supreme court

filed its decisions in those cases, this court reinstated this appeal and instructed that "[a]ny reply brief" filed by Lindstrom "shall address the application of *Morehouse* and *Johnson*." Lindstrom did not file a reply brief.

This appeal follows.

D E C I S I O N

The commissioner revoked Lindstrom's license under the Implied Consent Law after he refused to submit to chemical testing. *See* Minn. Stat. §§ 169A.50–.53 (2014) (governing administration of blood, urine, and breath tests to drivers suspected of being under the influence of alcohol, controlled substances, or hazardous substances). Lindstrom petitioned the district court for rescission of his driver's license revocation on numerous bases, including:

> The Minnesota Implied Consent Advisory as it is currently worded is unconstitutional because, among other reasons, it fails to advise the Petitioner of the criminal and civil consequences of testing over .16 or that a full "16-Step" test on the Breath Test with an actual reported value may be deemed a refusal, thereby preventing the Petitioner from making a voluntary and intelligent decision regarding testing.

In his memorandum of law in support of his petition, Lindstrom argued that "Minnesota's implied consent statute as applied to this case, violates his right to fundamental fairness and substantive due process because it implicates his privilege to operate a motor vehicle for refusing an unconstitutional, warrantless search." And at oral argument before the district court, Lindstrom's counsel stated that the "test refusal was for a blood/urine test . . . and this was a warrantless – demand made without a warrant by the Court." Relying on *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717 (Minn. App. 2014), the district court

rejected Lindstrom's Fourth Amendment argument, and Lindstrom neither challenges the district court's ruling on the issue nor raises the argument on appeal.

Citing *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991), Lindstrom argues that the revocation of his driving privileges violated his due-process rights because the implied-consent advisory misled him by threatening "criminal charges the State was not authorized to impose."[1] But Lindstrom makes that argument for the first time on appeal. Before the district court, Lindstrom argued in his memorandum of law that the implied-consent statute "violates his right to fundamental fairness and substantive due process because it implicates his privilege to operate a motor vehicle for refusing an *unconstitutional, warrantless search*." (Emphasis added.)

We need not consider issues raised for the first time on appeal. *See Andersen v. State*, 913 N.W.2d 417, 428 n.11 (Minn. 2018) (refusing to consider issues raised for the first time on appeal); *State v. Winbush*, 912 N.W.2d 678, 684 n.1 (Minn. App. 2018) ("There is no indication in the record that appellant previously raised this argument. Therefore, it is not properly before the court, and we do not address it."), *review denied* (Minn. May 29, 2018). Because Lindstrom's *McDonnell* claim is not properly before this court, we do not consider it and affirm the district court's order denying his petition.

Even if we considered Lindstrom's *McDonnell* claim, we agree with the state that his claim fails under *Johnson*. The Due Process Clause guarantees that no state shall "deprive any person of life, liberty or property without due process of law." U.S. Const.

[1] Referred to by the supreme court as a "*McDonnell* claim." *Johnson*, 911 N.W.2d at 508–09.

amend. XIV, § 1; Minn. Const. art. I, § 7. "Whether a law or government violates substantive due process is a constitutional question, which we review de novo." *State v. Rey*, 905 N.W.2d 490, 495 (Minn. 2018).

In *McDonnell*, the supreme court held that revocation of driving privileges based on an implied-consent advisory that threatens a criminal consequence unauthorized by law violates a driver's due-process rights and requires rescission. 473 N.W.2d at 855. But in *Johnson*, the supreme court held that a *McDonnell* claim does not exist "solely because a driver had been misled" by the implied-consent advisory. 911 N.W.2d at 508. Rather, a due-process violation occurs only if a driver can show "three key elements":

> (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.

Johnson, 911 N.W.2d at 508–09. The supreme court concluded that Johnson was not deprived of due process because he could not satisfy the first two elements when he refused to submit to testing, and because he was not prejudiced "by relying on misleading statements by the officer about the consequences of refusing a test." *Id*. at 509.

Here, similar to the facts in *Johnson*, Lindstrom refused to submit to blood and urine testing. Lindstrom's *McDonnell* claim therefore fails to meet the first two *Johnson* elements. *See id.* at 508–09 (listing elements of a *McDonnell* claim); *cf. Morehouse*, 911 N.W.2d at 505 (concluding no due-process violation under *Johnson* where driver submitted

to a blood test, but failed to claim that he prejudicially relied on the implied-consent advisory).

Affirmed.