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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1391**

James Willard Francisco, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

**Filed December 24, 2018
Reversed and remanded
Klaphake, Judge***

Anoka County District Court
File No. 02-CV-15-5064

Paul P. Sarratori, Mesenbourg & Sarratori Law Offices, P.A., Coon Rapids, Minnesota (for respondent)

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Considered and decided by Worke, Presiding Judge, Halbrooks, Judge; and Klaphake, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant commissioner of public safety (commissioner) challenges the district court's order rescinding the revocation of respondent James Willard Francisco's driver's license. This matter was stayed pending the supreme court's resolution of *State v. Phillips*, No. A16-0129 (Minn. App. Aug. 29, 2016), *review granted* (Minn. Nov. 15, 2016), *and appeal dismissed* (Minn. May 18, 2017); *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). Following the disposition of those cases, we vacated the stay and reinstated the appeal. Both parties submitted supplemental briefing. Because the record contains no evidence that Francisco prejudicially relied on an inaccurate implied-consent advisory, we reverse. Because the district court did not address whether Francisco voluntarily consented to the search of his urine, we remand for the district court to address that issue.

DECISION

I. Due Process

The commissioner argues that, in light of the disposition of *Morehouse* and *Johnson*, Francisco did not meet his burden to show a due-process violation. The state cannot “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1; *see also* Minn. Const. art. I, § 7. An allegation of a due-process violation presents a question of constitutional law, which we review de novo. *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012).

The supreme court held in *McDonnell v. Comm'r of Pub. Safety* 473 N.W.2d 848, 855 (Minn. 1991), that an implied-consent advisory that threatens a criminal consequence that the state is not actually authorized to impose violates a suspect's constitutional due-process rights and requires rescission of the order revoking his or her driving privileges. In its recent opinion in *Johnson*, the supreme court clarified that a due-process violation under *McDonnell* does not occur "solely because a driver had been misled" by the implied-consent advisory. 911 N.W.2d at 508. Rather:

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 508-509.

In *Morehouse*, issued the same day as *Johnson*, the supreme court applied this three-part test in addressing a situation in which a petitioner was read an inaccurate implied-consent advisory and thereafter consented to a warrantless blood test. 911 N.W.2d at 504. The supreme court found that Morehouse was not entitled to reinstatement of his driving privileges because he did not satisfy the second prong of the test. *Id.* 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."). The supreme court did not remand Morehouse's case to allow him to develop the record and establish that he prejudicially relied on the inaccurate implied-consent advisory. *Id.*; *see also Windsor v. Comm'r of Pub. Safety*, ___ N.W.2d ___, ___, 2018 WL 5780410,

at *1 (Minn. App. Nov. 5, 2018) (holding that a claimant is not entitled to a remand to develop a factual record regarding the prejudicial-reliance element of a *McDonnell* due-process claim when the record does not contain evidence of prejudicial reliance).

In this case, Francisco submitted to a urine test after being read an implied-consent advisory that inaccurately stated he could face criminal penalties for refusing to provide a blood or urine sample. However, as in *Morehouse* and *Windsor*, the record here provides no evidence that Francisco prejudicially relied on the inaccurate implied-consent advisory. Francisco argues that we should presume that he prejudicially relied on the inaccurate implied-consent advisory, but this is contrary to the supreme court's decision in *Morehouse*, which requires a petitioner to establish "that he prejudicially relied on the implied consent advisory." *Morehouse*, 911 N.W.2d at 505.

Francisco presented no evidence that could provide a basis on which the district court could reasonably have found that he prejudicially relied on the inaccurate implied-consent advisory. Thus, like *Morehouse* and *Windsor*, Francisco "is not entitled to a rescission of his license revocation under *McDonnell*" or to remand to further develop the record. *See id.* Accordingly, we reverse the district court's grant of relief on due-process grounds.

II. Fourth Amendment

The United States and Minnesota Constitutions guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects" against "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "Generally, warrantless searches are per se unreasonable." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008).

Taking a urine sample from someone constitutes a search under the Fourth Amendment, but a warrant is unnecessary if the person consents. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). Consent is only a valid exception to the warrant requirement, however, if it was given “freely and voluntarily.” *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). Whether a suspect’s consent to a search was voluntary is a factual determination based upon the totality of the circumstances. *Id.*

In this case, Francisco argued to the district court that his consent to take the urine test was coerced by the inaccurate implied-consent advisory and that the subsequent search of his urine violated his Fourth Amendment rights. However, the district court granted Francisco’s petition on due-process grounds and never addressed whether the search violated his Fourth Amendment rights. The question of whether Francisco freely and voluntarily consented to the search of his urine is a factual question, and “[i]t is not within the province of this court to determine issues of fact on appeal.” *Kucera v. Kucera*, 146 N.W.2d 181, 183 (Minn. 1966). Given the inaccurate implied-consent advisory, it is necessary to remand for the district court to determine whether, under the totality of the circumstances, Francisco validly consented to the search of his urine and whether any other exceptions to the warrant requirement may apply. *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). We leave to the district court the decision whether to reopen the record on remand.

Reversed and remanded.