STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0173

Brian Paul Keller, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed December 17, 2018
Reversed
Stauber, Judge[*]

Anoka County District Court
File No. 02-CV-16-83

Paul W. Rogosheske, Ryan J. Grove, Rogosheske, Rogosheske, & Atkins, PLLC, South St. Paul, Minnesota (for respondent)

Lori Swanson, Attorney General, William Young, Assistant Attorney General, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Smith, Tracy M., Judge; and Stauber, Judge.

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

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

STAUBER, Judge

Appellant commissioner of public safety (the commissioner) appeals the district court's rescission of respondent Brian Paul Keller's license revocation, arguing that (1) the implied-consent advisory did not violate respondent's due-process rights; (2) respondent voluntarily consented to the warrantless blood test; and (3) even if respondent's consent was involuntary, the good-faith exception to the exclusionary rule precludes the results of the blood test from being suppressed. We reverse.

FACTS

On September 13, 2015, Officer Nordby of the Blaine Police Department was on routine patrol when he observed a vehicle cross over the dividing line of the road it was traveling on for about 100 yards before swerving back into its lane. The vehicle then slowed in response to a red light and continued to slow even though the light turned green. The vehicle reacted slowly to yet another green light. Officer Nordby believed this to be a delayed reaction, which is a sign of impairment. He stopped the vehicle and determined that respondent Brian Paul Keller was the driver.

Officer Nordby observed that respondent was driving with ignition interlock and had bloodshot, watery eyes. He believed respondent to be under the influence of marijuana after observing a green leafy substance on respondent's shirt and pant leg and a brown substance on the back of respondent's tongue.[1] Further, respondent appeared to be

[1] The substance later tested negative for marijuana.

confused about where he was traveling, which is another indication of impairment. Officer Nordby's partner found methadone located in a safe in the back of respondent's vehicle and observed that the dose was higher than what respondent said he was prescribed.

Respondent failed a field sobriety test, and a preliminary breath test showed a blood-alcohol reading of 0.00, furthering Officer Nordby's suspicion that respondent was under the influence of a controlled substance. Officer Nordby believed respondent could not safely operate a vehicle and placed him under arrest for driving while impaired. He then read the implied-consent advisory to respondent, which stated that refusing to take a test was a crime. Officer Nordby gave respondent the chance to speak with an attorney, but he declined. Respondent stated that he understood the advisory and agreed to take a blood test, which produced a positive result for methadone.

The commissioner revoked respondent's driver's license. The district court held an implied-consent hearing after respondent petitioned for judicial review of the license revocation. The commissioner called the only witness, Officer Nordby. The district court rescinded the revocation of respondent's driver's license on the basis that the misleading advisory violated his due-process rights and because he did not consent voluntarily to the warrantless blood test. The commissioner appealed. This court stayed the appeal pending the supreme court's review of *State v. Phillips*, A16-0129 (Minn. App. Aug. 29, 2016), *review granted* (Minn. Nov. 15, 2016) *and appeal dismissed* (Minn. May 18, 2017). This court further stayed the appeal pending the decisions in *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506 (Minn. 2018), and *Morehouse v. Comm'r of Pub. Safety*, 911 N.W.2d 503

(Minn. 2018). Following the supreme court's decisions in *Johnson* and *Morehouse*, this court reinstated the appeal, and directed the parties to submit their briefs.

D E C I S I O N

I. Respondent's due-process rights were not violated because he did not prejudicially rely on the implied-consent advisory.

The commissioner argues that respondent's due-process rights were not violated under *Johnson* and *Morehouse* because respondent failed to establish that he prejudicially relied on the inaccurate implied-consent advisory when he made the decision to submit to testing. We agree.

This court reviews due-process challenges de novo. *Anderson v. Comm'r of Pub. Safety*, 878 N.W.2d 926, 928 (Minn. App. 2016). The supreme court held in *McDonnell v. Comm'r of Pub. Safety*, that an implied-consent advisory that threatened a criminal consequence the state is not authorized to impose violated the appellant's due-process rights and required rescission of her license revocation. 473 N.W.2d 848, 855 (Minn. 1991). In *Johnson*, the supreme court stated that, under *McDonnell*, a due-process violation did not occur solely because a driver had been misled by an inaccurate implied-consent advisory. 911 N.W.2d at 508. The supreme court clarified that a license revocation violates due process when: (1) the person whose license was revoked submitted to a blood, breath, or urine test; (2) the person prejudicially relied on the implied consent advisory in consenting to the test; and (3) the implied consent advisory was legally inaccurate. *Id.* at 508-509. In *Johnson*, the supreme court stated that Johnson's claim failed on the first and second elements because Johnson did not submit to testing. *Id.* at 509.

In *Morehouse*, which was issued contemporaneously with *Johnson*, the supreme court held that Morehouse, who did consent to a blood test, was not entitled to rescission of his revocation under *McDonnell.* 911 N.W.2d at 505. Morehouse's argument failed on the second prong because "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.*

In this case, the district court found that respondent's due-process rights were violated because the advisory was misleading under *McDonnell*. But the facts here are analogous to *Morehouse*. Like Morehouse, respondent agreed to take the test, therefore satisfying the first element of a *McDonnell* claim. But, as in *Morehouse*, respondent did not establish, nor did the district court find, that he prejudicially relied on the implied-consent advisory when he decided to take the test.[2] Respondent's claim fails on the second prong, and he therefore is not entitled to a rescission of his license revocation under *McDonnell*.

II. Under the totality of the circumstances, respondent's consent to the warrantless blood test was voluntary.

The commissioner argues that the district court clearly erred when it found that respondent's consent was involuntary because an analysis of the totality of the circumstances shows that respondent voluntarily consented. We agree.

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[2] Our decision that respondent is not entitled to due-process relief is further guided by this court's recent published opinion in *Windsor v. Comm'r of Pub. Safety*, __ N.W.2d __, __, 2018 WL 5780410, at *3 (Minn. App. Nov. 5, 2018). In *Windsor*, this court held that the supreme court's decisions in *Johnson* and *Morehouse* overruled *Olinger v. Comm'r of Pub. Safety*, 478 N.W.2d 806 (Minn. App. 1991) (holding a driver could obtain due-process relief under *McDonnell* without establishing prejudicial reliance). *Windsor*, 2018 WL 5780410, at *3.

The United States and Minnesota Constitutions prohibit the unreasonable search and seizure of persons, houses, papers, and effects. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Taking a blood sample constitutes a search under the Fourth Amendment. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). Warrantless searches are per se unreasonable and subject to limited exceptions, one of which is consent. *Poeschel v. Comm'r of Pub. Safety*, 871 N.W.2d 39, 45 (Minn. App. 2015). To satisfy this exception, the state must show by a preponderance of the evidence that consent was free and voluntary. *Id.* Whether consent to search was voluntary and not the product of duress or coercion is a question of fact that we review for clear error. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). Findings of fact are clearly erroneous if, based on the entire record, a reviewing court is left with the definite and firm conviction that a mistake occurred. *Id.* at 846-47.

Voluntariness must be considered in light of the totality of the 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. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). Consent to testing is voluntary unless the totality of the circumstances demonstrates that the driver consented because his will was overborne and his capacity for self-determination was critically impaired. *Brooks*, 838 N.W.2d at 571-72; *accord Poeschel*, 871 N.W.2d at 46. 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, based on the totality of the circumstances, the commissioner failed to establish that respondent freely and voluntarily consented to the blood test. The district court made findings that Officer Nordby read the implied-consent

advisory to respondent, which informed him that refusal to take the test was a crime, respondent indicated that he understood, respondent was given the opportunity to speak with an attorney but declined, and respondent agreed to take the test only after being read the advisory. The district court found that there was no evidence showing that respondent's consent was the result of a free and voluntary choice unrelated to the misleading advisory and that "the record does not show that Petitioner's agreement to take the test was a result of anything other than the information in the [a]dvisory that he was required to by law, and would be subject to criminal sanctions if he did not."

However, the record here does show facts favoring a finding of voluntariness, including that respondent indicated he understood, he was given the opportunity to speak with an attorney, and never indicated that he did not wish to take the test. Further, although respondent was briefly in custody, the fact that consent to testing was made while in custody is not dispositive. *Brooks*, 838 N.W.2d at 571. And the record indicates that respondent was not yelled at or subjected to repeat questioning by Officer Nordby while in custody, and the reading of the implied-consent advisory and respondent consenting to the test took only three minutes. The only circumstance that does not support a finding of voluntariness is that the implied-consent advisory was misleading when it advised that test refusal would be a crime. But "a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Brooks*, 838 N.W.2d at 570. Further, although respondent did not actually speak with an attorney, the supreme court has recognized that the ability to consult with counsel supports a conclusion that consent was voluntary. *Id.* at 572. We therefore conclude that the district

court clearly erred because the record did not establish that respondent's will or capacity for self-determination were overborne. Respondent's consent was voluntary based on the totality of the circumstances.

Because we determine that respondent's Fourth Amendment rights were not violated, we need not address the commissioner's argument regarding the applicability of the good-faith exception.

Reversed.