STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0325

State of Minnesota,
Appellant,

vs.

Terrell Cavanaugh Griffin,
Respondent.

Filed October 8, 2018
Reversed and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CR-15-22152

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan L. Segal, Minneapolis City Attorney, David S. Bernstein, Assistant City Attorney, Minneapolis, Minnesota (for appellant)

Mary F. Moriarty, Hennepin County Public Defender, Geoffrey Isaacman, Assistant Public Defender, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Reyes, Judge; and Kalitowski, 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

ROSS, Judge

A state trooper arrested Terrell Griffin for driving under the influence of a controlled substance. Griffin agreed to provide a urine sample to be tested for drugs after the trooper read him the implied-consent advisory stating that refusing to submit to a chemical test is a crime. The district court suppressed the test results before trial based on the Due Process Clause, relying on *McDonnell v. Commissioner of Public Safety*, 473 N.W.2d 848 (Minn. 1991), because the refusal-is-a-crime warning had by then been held to be inaccurate due to its constitutional unenforceability. We reverse the due-process decision because Griffin did not allege and the district court did not find that the inaccuracy led him to agree to take the urine test. We remand for the district court to address Griffin's alternative argument that the Fourth Amendment requires suppression of the test results as the fruit of a warrantless search.

FACTS

A state trooper stopped Terrell Griffin's van and arrested him, suspecting he was driving under the influence of a controlled substance. The trooper read Griffin the implied-consent advisory, which informed Griffin that refusing to take a chemical test is a crime. He gave Griffin the choice of a blood test or a urine test, and Griffin agreed to a urine test. The test results led the state to charge Griffin with two counts of driving while impaired and one count of careless driving.

Griffin moved the district court to suppress evidence of the test results, offering two theories. He argued first that his due-process rights were violated because the implied-

consent advisory's warning about criminal prosecution for refusing a blood or urine test is now constitutionally unenforceable and therefore inaccurate and misleading. He argued second that the results are the fruit of an unconstitutional, warrantless search under the Fourth Amendment. The state argued that the district court should deny the motion by analyzing Griffin's challenge only under a Fourth Amendment framework, not the Due Process Clause. It urged the district court to conclude either that Griffin consented to the test so as to meet a recognized exception to the warrant requirement or that the trooper's reading of the advisory falls under the good-faith exception to the exclusionary rule because the advisory had been accurate when the trooper read it to Griffin.

The district court suppressed the test results. It reasoned that the implied-consent advisory was rendered retroactively inaccurate by constitutional decisions issued after Griffin's arrest. It concluded that "[c]ontinuation of this case using evidence obtained from a warrantless search . . . results in a violation of [Griffin's] due process right to be free of unreasonable searches and seizures."

The state appeals the pretrial order suppressing the test-result evidence.

D E C I S I O N

The state argues that the district court improperly applied a due-process analysis instead of a Fourth Amendment analysis to Griffin's suppression motion. We stayed the state's appeal pending decisions by the Minnesota Supreme Court in *Morehouse v. Commissioner of Public Safety*, 911 N.W.2d 503 (Minn. 2018), and *Johnson v. Commissioner of Public Safety*, 911 N.W.2d 506 (Minn. 2018). Neither case decided the question of whether the Fourth Amendment or due process under *McDonnell* provides the

proper framework for determining the constitutionality of a search performed after an implied-consent advisory that was accurate when given but later rendered inaccurate. For reasons that follow, the *Morehouse* decision nevertheless resolves this appeal.

Because this is a pretrial appeal by the state, we first must decide whether the suppression of Griffin's urine-test results will have a critical impact on the case. This is because we will not review an alleged pretrial error against the state unless the state establishes that the alleged error will have a critical impact on the outcome of a trial if it is not reversed. Minn. R. Crim. P. 28.04, subd. 2. An error critically impacts a trial's outcome if it significantly reduces the likelihood of a conviction. *State v. Aubid*, 591 N.W.2d 472, 477 (Minn. 1999). Griffin faces two counts of driving while impaired by a controlled substance, and one count of careless driving. One of the driving-while-impaired counts requires proof that Griffin was under the influence of any controlled substance, and the other requires proof that his body contained any amount of a statutorily specified controlled substance. Minn. Stat. § 169A.20, subd. 1(2), (7) (2014). Not being able to present the urine-test results makes it significantly unlikely that the state could prove that Griffin's body contained a controlled substance. The alleged pretrial error in suppressing evidence of those results would therefore critically impact a trial. We turn to the merits of the appeal.

The state's threshold contention is that Griffin's evidence-suppression motion must be decided under a Fourth Amendment analysis rather than a due-process analysis. This court has stated the opposite: "If a person challenges the accuracy of an implied-consent advisory as a violation of due process, the claim should be analyzed under the Due Process Clause, consistent with Minnesota precedent." *Johnson v. Comm'r of Pub. Safety*, 887

N.W.2d 281, 283 (Minn. App. 2016), *rev'd*, 911 N.W.2d 506 (Minn. 2018). Applying this general holding, the *Johnson* court concluded that, "[b]y providing the inaccurate advisory, the state misinformed Johnson regarding the potential penalty for refusing to submit to a urine test and violated his right to due process, as established in *McDonnell*." *Id.* at 295. But the supreme court reversed this court's decision in *Johnson* that the advisory violated his due-process rights under *McDonnell* because Johnson refused to submit to testing and *McDonnell* recognized a driver's due-process right not to have his license revoked based on an inaccurate advisory only "when the driver *submitted* to testing." *Johnson*, 911 N.W.2d at 509.

The parties here have assumed that our general holding in *Johnson* about the propriety of a due-process analysis is undermined by the reversal. This is an uncertain assumption. In reversing, the *Johnson* supreme court had no occasion to address this court's comprehensive statement that when a person makes a due-process challenge to an implied-consent advisory, the Due Process Clause rather than the Fourth Amendment provides the analytical framework to address the challenge. On one hand, one might maintain that the reversal undermines only the section of our *Johnson* opinion that was rejected expressly by the supreme court, which was not our declaration that a *McDonnell* due-process theory is available in the implied-consent setting but, rather, our case-specific holding that Johnson satisfied the elements of a *McDonnell* claim. But on the other hand, one might maintain that a premise in our *Johnson* decision that a *McDonnell* due-process theory is available generally in the implied-consent setting was implicitly rejected by *Morehouse*, the companion opinion released contemporaneously with the *Johnson* reversal. Our

premise was that a *McDonnell* claim invokes procedural rather than substantive due process, a distinction that bears on whether the Fourth Amendment is the better analytical source. *Johnson*, 887 N.W.2d at 285. But the *Morehouse* court suggested otherwise. It said, "The district court did not address Morehouse's argument, made under *McDonnell* . . . , that the legal inaccuracy of the implied consent advisory violated his *substantive* due process rights." *Morehouse*, 911 N.W.2d at 504 (emphasis added). The *Morehouse* court added in a footnote, "For the first time in this litigation, Morehouse raises a procedural due process challenge to his license revocation in his brief to this court. . . . [W]e do not address whether the circumstances here violated procedural due process." *Id.* at 505 n.3. The *Morehouse* court therefore indicates that a *McDonnell* claim is one of substantive rather than procedural due process.

For our purposes, however, we need not decide whether a *McDonnell* claim is substantive or procedural, nor whether our holding in *Johnson* about the priority between a due-process analysis and a Fourth Amendment analysis remains precedential. The supreme court's reasoning in *Johnson* and *Morehouse* renders these issues unnecessary to our decision. Both cases confirm that an inaccurate implied-consent advisory supports a due-process claim only when the inaccuracy actually caused the driver to submit to the chemical test. *Johnson*, 911 N.W.2d at 509 ("What we recognized in *McDonnell* was a due process violation in revoking a driver's license when the driver *submitted* to testing because the implied consent advisory inaccurately stated that refusing to submit to testing was a crime."); *Morehouse*, 911 N.W.2d at 505 (rejecting driver's *McDonnell* due-process argument because the driver failed to establish that he submitted to testing because of the

inaccurate implied-consent advisory). A valid due-process claim therefore requires more than just an identified inaccuracy in the advisory; it requires a causal link between the inaccuracy and the driver's decision to test. Here Griffin did not argue to the district court that he submitted to the test because of the inaccurate part of the advisory, and the district court did not find that he did. Griffin argued instead, and the district court reasoned, that the existence of the inaccuracy alone required it to suppress the test results. Guided by *Morehouse*, *Johnson*, and *McDonnell*, we must reject this bright-line approach and hold that the inaccuracy did not create a due-process violation unless Griffin actually relied on it.

The state argues that Griffin's due-process claim fails because he did not actually rely on the advisory's inaccurate threat of a criminal charge when he submitted to the urine test. The supreme court rejected Morehouse's due-process argument 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." *Morehouse*, 911 N.W.2d at 505. Griffin is in the same situation as Morehouse. A driver who submits to testing for reasons other than the inaccurate advisory has suffered no harm, let alone constitutionally significant harm, from the inaccuracy. Because the district court did not find, and Griffin did not claim, that he actually relied on the advisory when he decided to take the urine test, we must reverse.

Griffin creatively argues for a different result despite *Morehouse.* He beads together a thread of loose inferences to contend that proof that a driver took the test because he relied on the advisory is necessary to support a *McDonnell* due-process claim only in

license-revocation appeals (like *Morehouse*, *Johnson*, and *McDonnell*), but not in a criminal appeal (like this one). That is, in a criminal-charge appeal after the driver submitted to a test, unlike a license-revocation appeal after the driver submitted to a test, courts must presume (apparently irrebuttably) that the driver prejudicially relied on the inaccurate advisory as a matter of law and suppress the test results. This is so, Griffin offers, because *McDonnell* discussed a driver's choice between the "less onerous" license revocation and an impliedly more onerous criminal conviction. *See McDonnell*, 473 N.W.2d at 854. From that discussion in *McDonnell*, Griffin supposes that a driver who submits to testing but later challenges the results in a license-revocation proceeding has shown only his concern about losing his license but not about being charged with a crime. He infers that this driver's lack of demonstrated concern for being charged with a crime is the reason the *Morehouse* court rejected the appellant's *McDonnell* due-process claim for failing to show that he actually relied on the threat of a criminal charge. Griffin says that the *Morehouse* appellant "appears to have ignored" the criminal consequences of his choice to submit to testing (the test results) and focused only on the license-revocation consequences, as evidenced by the nature of his challenge. But a driver who, like Griffin, instead submitted to testing and then challenged the results in a *criminal proceeding* has, by the nature of his challenge, shown his concern about being convicted of a criminal charge. In other words, courts must conclude—without receiving any evidence, claim, or argument—that the same purpose to avoid a potential criminal conviction motivating a driver to challenge his test results must have also motivated that driver to take the test in the first place. The argument at its core insists that we speculate about the rationale

motivating supreme court precedent in order to speculate about the rationale motivating drivers who submit to chemical testing. Unconvinced, we will instead follow *Morehouse* and not presume that Griffin prejudicially relied on the advisory's inaccurate warning.

Our holding that Griffin's due-process argument fails under *Morehouse* leads us to his yet unresolved, alternative argument that the Fourth Amendment requires the district court to suppress the test results because those results arose from a warrantless search. We do not consider issues that were presented to but not decided by the district court. *State v. Lemmer*, 736 N.W.2d 650, 656 (Minn. 2007). The district court did not address this argument or the merits of the state's counterarguments that Griffin's consent constituted a valid exception to the warrant requirement and that a good-faith exception prevents exclusionary-rule suppression. We therefore will not decide the parties' Fourth Amendment arguments. We reverse the district court's due-process decision and remand the case for further proceedings.

Reversed and remanded.