STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0547

State of Minnesota,
Respondent,

vs.

Merlin John Sherer,
Appellant.

Filed April 23, 2018
Reversed
Florey, Judge

Cook County District Court
File No. 16-CR-15-22

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

Molly Hicken, Cook County Attorney, Grand Marais, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Lauren W. Linderman, Bruce Jones, Tom Pryor, Special Assistant Public Defenders, Faegre Baker Daniels LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Florey, Judge.

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

FLOREY, Judge

Appellant challenges his conviction for first-degree driving while impaired (DWI), arguing that the state violated his due-process rights and the Fourth Amendment when an

officer advised him that refusal to submit to a blood or urine test was a criminal offense. Based on the reasoning set forth in *Johnson v. Comm'r of Pub. Safety*, 887 N.W.2d 281 (Minn. App. 2016), *review granted* (Minn. Jan. 25, 2017), we reverse.

FACTS

On February 1, 2015, law-enforcement officers received a report of a suspected intoxicated driver. The officers responded to the scene and found appellant Merlin John Sherer unconscious in the driver's seat of a car partially on the road and partially in the ditch. The car was running and the tires were spinning. Appellant was difficult to wake, he appeared confused, and he had a white powdery substance near his nose. The officers did not perceive an odor of alcohol, but found a glass pipe containing residue and a "snorting straw" near appellant.

Appellant was transported to the law-enforcement center where an officer read him the implied-consent advisory. Appellant was advised that Minnesota law requires him to take a test to determine if he is under the influence of a controlled substance and that refusal to take a test is a crime. He was offered a blood or a urine test and consented to a blood test. The blood test confirmed the presence of amphetamine and methamphetamine in appellant's system.

Appellant was charged with first-degree DWI (controlled substance), in violation of Minn. Stat. § 169A.20, subd. 1(2) (2014), fifth-degree possession of a controlled substance, possession of a small amount of marijuana, and possession of drug paraphernalia. Appellant moved to suppress the results of the blood test, arguing that the warrantless blood draw violated the Fourth Amendment and his right to due process. The district court denied

appellant's motion to suppress the results of the blood test. Citing *State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013), the district court explained that "the law currently provides that test results from a consensual warrantless blood draw are admissible." The district court found that the officer followed the statutory requirements of the implied-consent law before appellant consented to the test.

In April 2016, the parties agreed to submit the DWI charge to the district court for trial pursuant to Minn. R. Crim. P. 26.01, subd. 4, with all other charges dismissed. Appellant maintained his not-guilty plea and stipulated to the prosecution's case. The parties agreed that the district court's pretrial ruling was dispositive of the case. The district court found appellant guilty of first-degree DWI and sentenced him to 66 months' imprisonment.

This appeal followed.

D E C I S I O N

Appellant argues that, under *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991), and *Johnson*, the state violated his due-process rights when giving the implied-consent advisory by "threaten[ing] criminal charges the state was not authorized to impose." The state argues that appellant's due-process rights were not violated by the implied-consent advisory because it was accurate at the time it was given.

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. amend. XIV, § 1; *see* Minn. Const. art. I, § 7 ("No person shall be held to answer for a criminal offense without due process of law . . . ."). "Whether a due process violation has occurred presents a question

of constitutional law, which we review de novo." *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012).

In *McDonnell*, an officer read the defendant the implied-consent advisory, which warned her that "refusal to submit to testing might expose her to criminal penalties." 473 N.W.2d at 851. The defendant had not had a previous license revocation and therefore could not be prosecuted for refusing to submit to testing under Minn. Stat. § 169.121, subd. 1a (Supp. 1989). *Id.* at 850 n.1, 851. The Minnesota Supreme Court recognized that "due process does not permit those who are perceived to speak for the state to mislead individuals as to either their legal obligations or the penalties they might face should they fail to satisfy those obligations." *Id.* at 854. The implied-consent advisory was unconstitutional as applied to the defendant because it "permitted police to threaten criminal charges the state was not authorized to impose." *Id.* at 855.

During the pendency of appellant's case, the Minnesota Supreme Court held that a defendant could not be prosecuted under Minnesota's test-refusal statute for refusing to submit to a blood test, absent a warrant or exigent circumstances. *State v. Trahan*, 886 N.W.2d 216, 218, 224 (Minn. 2016). The supreme court extended that holding to warrantless urine tests in *State v. Thompson*, holding that a defendant may not be prosecuted for refusing to submit to an unconstitutional blood or urine test. 886 N.W.2d 224, 234 (Minn. 2016).

Following *Trahan* and *Thompson*, this court applied the reasoning of *McDonnell* to an implied-consent advisory that warned a driver that refusal to submit to a urine test is a crime. *Johnson*, 887 N.W.2d at 289. We examined whether the advisory permitted police

to threaten criminal charges the state was not constitutionally permitted to impose. *Id.* We held that the driver's due-process rights were violated when the officer informed him that he could be subjected to criminal penalties for refusing to take a urine test, when the state would not have been authorized to impose a criminal penalty. *Id.* at 295. We rejected an argument that, because *Thompson* had not been decided at the time the advisory was given, the advisory was legally accurate at the time it was given and did not violate the driver's due-process rights. *Id.* at 292.

The state argues that this case is distinguishable from *Johnson* because *Johnson* involved a charge of test refusal and a civil license revocation, where here appellant consented to a test after an officer read the advisory and now seeks to suppress the test results. We have held that an implied-consent advisory violates a defendant's due-process rights when he is misinformed of the consequences of the testing decision, regardless if he thereafter took the test. *Olinger v. Comm'r of Pub. Safety*, 478 N.W.2d 806, 808 (Minn. App. 1991); *see also Steinolfson v. Comm'r of Pub. Safety*, 478 N.W.2d 808, 809 (Minn. App. 1991) (indicating that drivers were entitled to relief under *McDonnell* "without regard to their decision regarding testing"). Moreover, while not binding precedent, this court has applied the reasoning of *Johnson* to criminal cases in which a defendant consented to a blood or urine test after being informed that refusal to take a test is a crime.[1] *See State v. Gehloff*, No. A16-0976, 2016 WL 6923714, at *3 (Minn. App. Nov. 28, 2016); *State v.*

[1] "Although not precedential, unpublished opinions may be persuasive." *Sarber v. Comm'r of Pub. Safety*, 819 N.W.2d 465, 469 n.3 (Minn. App. 2012).

Reps, No. A16-0975, 2016 WL 6826312, at *3 (Minn. App. Nov. 21, 2016) ("The fact that [the defendant] consented to an unconstitutional search does not change the due-process analysis.").

Johnson and *McDonnell* are dispositive in this case. Appellant was informed that refusal to submit to a test is a crime, and he was then offered a blood or urine test. Under *Thompson* and *Trahan*, the state was not authorized to impose criminal charges if appellant refused a test. Under *McDonnell*, the state violated appellant's right to due process when it misinformed him of the criminal penalties he would face for refusal to take a blood or urine test.[2]

The state argues that, because the advisory was read to appellant before *Thompson* and *Trahan* were decided, the advisory was legally accurate at the time it was given and therefore did not violate appellant's right to due process. We applied this reasoning in *Morehouse v. Comm'r of Pub. Safety*, No. A16-0277, 2016 WL 4497470, at *1 (Minn. App Aug. 29, 2016), *review granted* (Minn. Nov. 15, 2016). However, we rejected *Morehouse*'s reasoning in *Johnson*, explaining that the temporal relationship between the

[2] In *State v. Melde*, the supreme court considered whether the implied-consent advisory violated criminal defendants' due-process rights because it did not notify the defendants of specific criminal and penal consequences of test refusal. 725 N.W.2d 99, 104 (Minn. 2006). In analyzing whether the advisory violated state and federal due-process protections, the supreme court considered *McDonnell* and other license-revocation cases without distinguishing between the due-process rights owed in a criminal context or a civil context. *Id.* at 103-06. Given the supreme court's willingness to consider *McDonnell* and other license-revocation cases in criminal matters, we do not depart from this analytical framework.

date the advisory was given and the release of *Thompson* was not sufficient to persuade us that the defendant was not entitled to due process. 887 N.W.2d at 293.

Evidence secured by a violation of a defendant's right to due process is subject to "total exclusion" by the courts. *State v. Stumpf*, 481 N.W.2d 887, 890 (Minn. App. 1992); *State v. Wilkens*, 492 N.W.2d 275, 277 (Minn. App. 1992). The district court erred in denying appellant's motion to suppress the test results. Because the results of the blood test should have been excluded on due-process grounds, we do not reach appellant's argument that the inaccurate implied-consent advisory rendered his consent involuntary. Because we do not consider the question of whether the implied-consent advisory violated the Fourth Amendment, we need not consider the state's argument that the good-faith exception to the exclusionary rule should be applied. The good-faith exception applies to evidence excluded for Fourth Amendment violations. *State v. Lindquist*, 869 N.W.2d 863, 864 (Minn. 2015). It does not apply to evidence excluded on due-process grounds.

Reversed.