STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0589

Jeremy Richard Ullrich, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 24, 2018
Reversed and remanded
Smith, Tracy M., Judge

Blue Earth County District Court
File No. 07-CR-04-540

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

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

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

SMITH, TRACY M., Judge

Appellant Jeremy Richard Ullrich pleaded guilty in 2004 to refusing to submit to chemical testing of his blood or urine after his arrest on suspicion of driving while impaired.

In 2016, Ullrich petitioned for postconviction relief based upon the Minnesota Supreme Court's decisions in *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016), and *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), which held that a person may not be prosecuted for refusing to submit to a warrantless blood or urine test unless an exception to the warrant requirement is shown to apply. The postconviction court denied relief, concluding that *Thompson* and *Trahan* were not retroactively applicable to Ullrich's case and that Ullrich's guilty plea forfeited his right to bring a Fourth Amendment challenge to his conviction. In light of the supreme court's recent opinion in *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018), we reverse and remand for further proceedings.

FACTS

On January 19, 2004, Mankato police stopped Ullrich's vehicle based on the officer's knowledge that Ullrich had a suspended license. After arresting Ullrich, police took him to the law enforcement center, where an officer read him the implied-consent advisory. Ullrich stated that he understood the advisory, consulted with an attorney, and then refused to consent to either a blood or urine test.

Based upon items found during the search of Ullrich's vehicle, the state charged him with first-degree controlled-substance crime, conspiracy to commit first-degree controlled-substance crime, fifth-degree controlled-substance crime, first-degree driving while impaired, and first-degree test-refusal. On July 29, Ullrich pleaded guilty to an amended count of attempted manufacture of methamphetamine and to first-degree test-refusal. The district court sentenced Ullrich to 23 and 69 months for these offenses, respectively.

On October 12, 2016, the Minnesota Supreme Court issued opinions in *Thompson*, 886 N.W.2d 224, and *Trahan*, 886 N.W.2d 216, which held that a person may not be prosecuted for refusing to submit to a warrantless blood or urine test unless an exception to the warrant requirement applies. Ullrich subsequently petitioned the district court for postconviction relief, asserting that he was entitled to the retroactive application of these decisions and to have his test-refusal conviction vacated. In March 2017, the postconviction court issued an order denying Ullrich's petition for relief. In doing so, the court concluded that *Thompson* and *Trahan* were not retroactively applicable to Ullrich's case and that Ullrich had forfeited his right to bring a Fourth Amendment challenge to his conviction when he pleaded guilty. Ullrich appealed.

This court issued an unpublished opinion on January 22, 2018, affirming the postconviction court's denial of relief. *Ullrich v. State*, 2018 WL 492630 (Minn. App. Jan. 22, 2018). In doing so, this court relied on its opinion in *Johnson v. State*, 906 N.W.2d 861 (Minn. App. 2018), *rev'd*, 916 N.W.2d 674 (Minn. 2018), which held that *Thompson* and *Trahan* announced new procedural rules that were not retroactively applicable to cases that were final at the time those opinions were issued. *Ullrich*, 2018 WL 492630 at *2. Ullrich petitioned for further review; the supreme court granted the petition and stayed proceedings pending its review of *Johnson*.

The supreme court issued its opinion in *Johnson* on August 22, 2018, holding that the United States Supreme Court's decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016)—on which the holdings in *Trahan* and *Thompson* are premised—announced a new substantive rule that is retroactively applicable to cases otherwise final at the time it was

decided. *Johnson*, 916 N.W.2d at 684. It held as well that, because a challenge to the constitutionality of a criminal statute is essentially a challenge to the subject-matter jurisdiction of the court, a defendant's ability to raise such a claim is not waived or forfeited by his plea of guilty to a violation of the statute so challenged. *Id.* at 681. The supreme court noted, however, that a defendant is not automatically entitled to relief because there must be a case-by-case evaluation to determine whether a warrant or an exception to the warrant requirement existed at the time he or she was asked to submit to a chemical test. *Id.* at 684. The supreme court then remanded the case so the district court could "apply the *Birchfield* rule and determine if the test-refusal statute was unconstitutional as applied to Johnson." *Id.*

The supreme court thereafter dissolved its stay in Ullrich's case, vacated this court's prior opinion, and remanded the matter to this court "for reconsideration in light of *Johnson*." This court reinstated Ullrich's appeal and directed the parties to file supplemental briefs addressing the impact of *Johnson* on the issues presented.

D E C I S I O N

Appellate courts review a district court's decision to deny a petition for postconviction relief for an abuse of discretion. *See Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted). In determining whether a court has erred as matter of law, "[t]he general rule is that appellate courts apply the law as it exists at the time they rule on a case, even if the law has changed since a lower court ruled

on the case." *Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000).

Here, the postconviction court denied Ullrich's petition for relief on two separate grounds: (1) because the rules announced in *Thompson* and *Trahan* did not apply retroactively to final cases, and (2) because Ullrich forfeited his right to bring a Fourth Amendment challenge to his conviction when he pleaded guilty. In his initial brief to this court, Ullrich argued that these conclusions were in error. In light of the supreme court's decision in *Johnson*, which held contrary to the postconviction court on both grounds, we agree and conclude that the postconviction court erred as a matter of law. 916 N.W.2d at 681, 684.

As in *Johnson*, though, Ullrich is only entitled to relief if neither a search warrant existed nor any exception to the Fourth Amendment's warrant requirement applied at the time he refused to submit to chemical testing. *Id.* at 684. In his supplemental brief, Ullrich argues that the appropriate remedy is to remand this matter for the district court to determine whether either of these circumstances existed and so to determine whether the test-refusal statute was unconstitutional as applied to his specific case. Conversely, the state argues that a remand for further proceedings is unnecessary because Ullrich, as the petitioner in this matter, failed to meet his burden of proof of the facts that would entitle him to relief. And because Ullrich did not request an evidentiary hearing on his petition in district court, the state argues that he is not entitled to any additional such opportunity on remand and that the order of the postconviction court should be affirmed.

It is generally correct, as the state notes, that the petitioner in a postconviction matter "bears the burden to establish by a preponderance of the evidence that facts exist that warrant postconviction relief." *Tscheu v. State*, 829 N.W.2d 400, 403 (Minn. 2013); *see also* Minn. Stat. § 590.04, subd. 3 (2018). And on appeal from the denial of postconviction relief, this court would ordinarily review the record to determine whether the petitioner had met this burden of proof and would affirm the denial if he failed to do so. *See, e.g.*, *Miles v. State*, 840 N.W.2d 195, 203-04 (Minn. 2013) (petitioner failed to prove that hearsay declarant was unavailable or that statement was trustworthy); *Tscheu*, 829 N.W.2d at 404 (petitioner failed to prove that newly discovered evidence was credible). But, based upon the supreme court's opinion in *Trahan*, this typical burden assignment does not apply in cases such as Ullrich's.

In *Trahan*, the defendant stayed his direct appeal and filed a petition for postconviction relief seeking withdrawal of his guilty plea on the grounds that Minnesota's test-refusal statute was unconstitutional. 886 N.W.2d at 220. On appeal after the postconviction court's denial of relief, the supreme court ultimately held under *Birchfield* that the test-refusal statute would be unconstitutional as applied to Trahan if chemical testing was not supported by either a search warrant or an applicable exception to the warrant requirement. *Id.* at 221. In then evaluating whether a warrant exception applied, the supreme court stated unqualifiedly that "[t]he government has the burden to show that exigent circumstances existed." *Id.* at 222. And, after analyzing the facts, the court concluded "that the State cannot meet its burden to prove exigent circumstances." *Id.* at 223.

Consequently, we conclude that the burden to prove the existence of either a search warrant or an applicable exception to the warrant requirement in cases such as Ullrich's lies with the state. Consistent with the supreme court's opinion in *Johnson*, we therefore reverse and remand for further proceedings, including application of the *Birchfield* rule and a determination as to whether "the test-refusal statute was unconstitutional as applied to [Ullrich]." *Johnson*, 916 N.W.2d at 684. Because the parties agree that no search warrant had been issued in this case, the state on remand shall bear the burden of proving that an exception to the warrant requirement existed at the time law-enforcement officers asked Ullrich to submit to a chemical test of his blood or urine.

Reversed and remanded.