**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-0377**

State of Minnesota,
Appellant,

vs.

Jennifer Marie Rosenbush,
Respondent.

**Filed July 9, 2018**
**Reversed and remanded**
**Bjorkman, Judge**

Dakota County District Court
File No. 19HA-CR-17-3326

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

James C. Backstrom, Dakota County Attorney, Anna Light, Assistant County Attorney, Hastings, Minnesota (for appellant)

Jeffrey S. Sheridan, Sheridan & Dulas, P.A., Eagan, Minnesota (for respondent)

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

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

**BJORKMAN**, Judge

The state appeals the district court's suppression of respondent's blood-test results, arguing that respondent, who was arrested for driving while impaired (DWI), did not have

a limited state constitutional right to consult with an attorney before submitting to chemical testing directed by a search warrant. Because the record does not indicate that respondent was faced with a choice regarding the testing, we reverse and remand for trial.

## FACTS

On July 23, 2017, Dakota County Sheriff's Deputy Daniel Hoover was dispatched to investigate a car in a ditch that had reportedly left the scene of an accident. When he arrived on the scene, Deputy Hoover noticed the vehicle had front-end damage. The driver, respondent Jennifer Marie Rosenbush, was distressed and crying. She admitted that she had misjudged a turn, gone off the road, hit a sign, and driven away. Deputy Hoover noticed that she was slow to respond to questions and smelled mildly "of consumed alcoholic beverage." Rosenbush acknowledged drinking two or three beers that day, but was unable to perform field sobriety tests because she was too upset. A preliminary breath test yielded an alcohol concentration of 0.164. When Deputy Hoover asked about marks on her wrists, Rosenbush told him that she had attempted suicide a few days earlier and was again feeling suicidal. Deputy Hoover placed her under arrest for DWI and transported her to a hospital as recommended by a county crisis unit.

While Rosenbush was being transported to the hospital, Deputy Hoover's supervisor obtained a search warrant to obtain a blood sample for chemical testing. At the hospital, Deputy Hoover informed Rosenbush of the search warrant and that it was a crime to refuse the test; he did not give her an opportunity to consult with an attorney before her blood was drawn. The test revealed an alcohol concentration of 0.113.

The state charged Rosenbush with DWI and failure to stop for a collision. Rosenbush moved to suppress the blood-test evidence, arguing that "the test was obtained in violation of her state constitutional right to consult with an attorney before deciding whether to submit to a test." Following an evidentiary hearing, the district court granted the suppression motion. The state appeals.

## D E C I S I O N

The state argues that suppressing the evidence will have a critical impact on the state's likelihood of obtaining a conviction and that the district court erred by ruling that Rosenbush had a limited constitutional right to consult with counsel before submitting to the warranted blood test. We address each argument in turn.

### I. Suppression of the blood-test evidence has a critical impact on the state's case.

"When the state appeals a pretrial order, it must show clearly and unequivocally (1) that the ruling was erroneous and (2) that the order will have a critical impact on its ability to prosecute the case." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005) (quotation omitted); *see* Minn. R. Crim. P. 28.04, subd. 2(2). The state can satisfy this requirement by showing that the exclusion of the evidence will "significantly reduce[] the likelihood of a successful prosecution." *McLeod*, 705 N.W.2d at 784 (quotation omitted).

Rosenbush was charged with fourth-degree DWI, which makes it a crime for a person to be "under the influence of alcohol" when driving, operating, or in physical control of a vehicle. Minn. Stat. § 169A.20, subd. 1(1) (2016). The parties acknowledge, and we agree, that suppression of the blood-test evidence will have a critical impact on the state's case because "[a] chemical test showing an alcohol level in excess of the statutory

limit is evidence of . . . probative value in a DWI prosecution." *State v. Ault*, 478 N.W.2d 797, 799 (Minn. App. 1991). Accordingly, interlocutory appellate review is appropriate.

## II. The warranted search of Rosenbush's blood was not a "critical stage" of a criminal proceeding that gave her a limited right to counsel.

Where, as here, a challenged pretrial ruling is based on undisputed facts, our standard of review is de novo. *State v. Lugo*, 887 N.W.2d 476, 487 (Minn. 2016).

As a general rule, the right to counsel "does not attach until the commencement of formal judicial proceedings." *State v. Nielsen*, 530 N.W.2d 212, 215 (Minn. App. 1995), *review denied* (Minn. June 14, 1995). Our supreme court recognized a limited exception to this rule for cases involving chemical testing of suspected drunk drivers in *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991).

After Friedman was arrested for DWI, the officer read her the implied-consent advisory, which stated "that [her] driver's license would be revoked for 1 year if she refused the chemical test for blood alcohol, that the refusal or the results of the test would be used against her at trial, and that she had a right to consult an attorney after testing." 473 N.W.2d at 829. Friedman expressed confusion, telling the officer that she did not understand the advisory and had already submitted to testing in the squad car. *Id.* She also asked to speak with a lawyer. *Id.* The officer construed Friedman's questions as a refusal to test and her driver's license was immediately revoked. *Id.*

Friedman challenged the revocation, arguing that article I, section 6 of the Minnesota Constitution afforded her the right to consult a lawyer before deciding whether to test. The supreme court agreed, holding that a driver who is asked by police to submit

to chemical testing and given a choice that has legal consequences, is at "a critical stage in the criminal process" that entitles her to a limited right to consult with counsel. *Id.* at 832. After describing the typical "implied consent"[1] process, the supreme court considered Friedman's situation, reasoning that her confusion and inability to understand "the legal ramifications of her decision" transformed what was otherwise a purely investigative testing procedure to a "critical stage" of a DWI proceeding at which counsel could "function[] as an objective advisor . . . [to] explain the alternative choices." *Id*. at 833.

In 2017, the legislature amended the DWI and license-revocation statutes. When an officer requests a breath test, a "breath test advisory" must be given that—like the prior implied-consent advisory—informs the driver of her right to consult a lawyer prior to testing. Minn. Stat. § 169A.51, subd. 2 (Supp. 2017). Before blood or urine is obtained pursuant to a search warrant, police must inform the driver "that refusal to submit to a blood or urine test is a crime." Minn. Stat. § 171.177, subd. 1 (Supp. 2017); *see* Minn. Stat. § 169A.20, subd. 2 (2016) (criminalizing a person's refusal to submit to a chemical test). If the driver refuses a warranted blood or urine test, "then a test must not be given."

[1] We note that in criminal proceedings the consent-by-implication analysis has been replaced by a framework of other Fourth Amendment principles. *See, e.g.*, *State v. Trahan*, 886 N.W.2d 216, 224 (Minn. 2016) (holding that a warrantless blood test violates the Fourth Amendment); *State v. Thompson*, 886 N.W.2d 224, 233 (Minn. 2016) (holding that "conducting a blood or urine test without a warrant violates the Fourth Amendment"); *State v. Bernard*, 859 N.W.2d 762, 767 (Minn. 2015) (holding that "a warrantless breath test does not violate the Fourth Amendment because it falls under the search-incident-to-a-valid-arrest exception" to the warrant requirement), *aff'd sub nom*. *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

Minn. Stat. § 171.177, subd. 13 (Supp. 2017). These amendments took effect on July 1, 2017, shortly before Rosenbush's arrest. *See* 2017 Minn. Laws ch. 83, art. 2, § 4, at 356.

During the pendency of this appeal, the supreme court decided *State v. Hunn*, holding that the limited right to counsel recognized in *Friedman* "is triggered only when the implied-consent advisory is read." ___ N.W.2d ___, ___, 2018 WL 2223746, at *3 (Minn. May 16, 2018). After arresting Hunn for DWI in February 2016, the officer asked him if he was willing to take a urine test. *Id.* at *1. Hunn immediately responded, "Why not?," and provided the sample. *Id*. The state appealed the district court's suppression of the chemical-test results based on the officer's failure to vindicate Hunn's limited right to counsel. *Id*. at *2. The supreme court explained that *Friedman* only applies to implied-consent cases because of "the unique decision and consequences that come with the reading of the advisory." *Id.* at *3. Deciding to consent presents a risk of giving police evidence essential to a DWI conviction; deciding not to consent results in immediate license revocation and a possible test-refusal conviction. *Id*. The court stated that language in *Friedman* suggesting broader application to cases that do not arise under the implied-consent law was "dictum," and the court expressly declined to "consider whether the Minnesota Constitution should otherwise be extended to provide a limited right to counsel." *Id*. at *4.

Against this backdrop, the state urges us to rule that the limited right to counsel recognized in *Friedman* is only implicated when chemical testing is sought under the implied-consent law. The state asserts that a search warrant ensures that a driver's Fourth Amendment rights are protected because it is only issued after a probable-cause

determination by a judge or magistrate. And because a warrant "commands" a DWI arrestee to submit to testing, eliminating any choice to do otherwise, the testing is merely investigative. *See* Minn. Stat. § 626.05 (2016) (defining search warrant as written order "signed by a court" that "command[s]" a peace officer to "make a search as authorized by law"); *see also State v. Condon*, 497 N.W.2d 272, 275 (Minn. App. 1993) (recognizing that when "a driver has no choice . . . , there is no need, and hence no right, to contact counsel"). The state also argues that the existence of the warrant shields the driver from having to "meet[] his adversary" in the form of a police officer who acts "with the full legal power of the state." *Friedman*, 431 N.W.2d at 833-34. These arguments have merit.

Rosenbush maintains that the current statutory scheme—like that at issue in *Friedman*—presents a driver who is subject to a warranted search of her blood or urine with a choice whether to submit that carries immediate consequences. She contends that "it is only when drivers do not have the choice to refuse testing that the right to counsel does not attach." This argument also has merit. Prior to warranted testing, police must advise a driver that "refusal to submit to a blood or urine test is a crime." Minn. Stat. § 171.177, subd. 1. But if a driver refuses to comply, no test may be given. *Id.*, subd. 13. This suggests that drivers may still face a consequential choice even when chemical testing is supported by a warrant.

But we need not reach the broader issue of whether the presence of a search warrant defeats the limited right to counsel recognized in *Friedman*. As in *Hunn*, the record does not establish that Rosenbush was presented with the "unique choice" underlying the

decision in *Friedman*. At the omnibus hearing, Deputy Hoover testified that he served the search warrant on Rosenbush at the hospital. The prosecutor continued:

> [PROSECUTOR]: Did you say anything to Ms. Rosenbush about what would happen if she refused to cooperate with the search warrant?
>
> [DEPUTY HOOVER]: Yes. I informed her that refusal to take the test would be a crime.
>
> [PROSECUTOR]: Did she respond to that statement?
>
> [DEPUTY HOOVER]: She did not.

On cross-examination, defense counsel questioned Deputy Hoover further:

> [DEFENSE COUNSEL]: So, when you told her refusal to take a test is a crime, you knew that she had a choice that had to be made at that point, correct?
>
> [DEPUTY HOOVER]: That's correct.
>
> [DEFENSE COUNSEL]: Whether to voluntarily submit to the test, correct?
>
> [DEPUTY HOOVER]: Correct.
>
> [DEFENSE COUNSEL]: And the new statute says that if she says no even in the face of a warrant that no test shall be given, correct?
>
> [DEPUTY HOOVER]: That's correct.
>
> [DEFENSE COUNSEL]: So [if] she had said no. You'd have had to honor that request and not draw the blood even though you had the warrant, right?
>
> [DEPUTY HOOVER]: Correct.

This record does not demonstrate that Deputy Hoover either asked Rosenbush whether she would *agree* to take a blood test or told her that no test would be given if she *chose* not to submit. In short, Deputy Hoover did not give Rosenbush a choice.

We are persuaded that the information Rosenbush received makes this case more like *Hunn* than *Friedman*. While Deputy Hoover knew that blood would not be forcibly taken against Rosenbush's will, he did not share that information with her. As a result, Rosenbush was not presented with a choice between alternatives that carried different, significant, legal ramifications. Accordingly, the warranted blood test was investigative, not a critical stage of a criminal proceeding to which a limited right to counsel would attach. *See Hunn*, 2018 WL 2223746, at *4 (noting that when "the officer did not read the implied-consent advisory . . . , under *Friedman* the limited right to counsel was not triggered [and] [i]t was error for the district court to suppress the urine-test results on that ground." On this record, we conclude that the district court erred in suppressing the evidence of Rosenbush's blood test, and we reverse and remand for trial.

**Reversed and remanded.**