STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0668

John Carl Berg,
Appellant,

vs.

One 2016 Chevrolet Passenger Vehicle,
VIN #3GCUKREC6GG290768,
MN LIC Plate 355UNB,
Respondent.

Filed August 12, 2019
Affirmed
Florey, Judge

Becker County District Court
File No. 03-CV-17-793

Isaiah P. Volk, Robert Thorwaldsen, Thorwaldsen & Malmstrom, P.L.L.P., Detroit Lakes, Minnesota (for appellant)

Brian W. McDonald, Becker County Attorney, Braden F. Sczepanski, Assistant Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Cochran, Judge.

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

FLOREY, Judge

Appellant John Carl Berg challenges the district court's order and judgment forfeiting his 2016 Chevrolet passenger vehicle. We affirm.

FACTS

In the spring of 2017, appellant was arrested for driving while impaired (DWI) and his vehicle was seized.[1] *See* Minn. Stat. § 169A.63, subd. 2 (2016). Becker County Sheriff's Office served appellant with a notice of seizure and intent to forfeit vehicle. *See id.*, subd. 8(b) (2016). Appellant was charged with second-degree DWI. *See* Minn. Stat. §§ 169A.03, subd. 3(1), .20, subd. 1(1), (5), .25, subd. 1(a) (2016).[2] Appellant's second-degree DWI qualified as a "designated offense" under Minnesota's vehicle-forfeiture statute. *See* Minn. Stat. § 169A.63, subd. 1(e)(1) (2016) (stating a designated offense includes second-degree DWI).

Appellant filed a demand for judicial determination of the forfeiture, alleging that the vehicle was improperly seized. *See* Minn. Stat. § 609.5314, subd. 3 (2018). Shortly thereafter, he filed a slightly amended demand for judicial determination. Appellant's improper-seizure claim was based on the following grounds: (1) the seizure of his vehicle was not incident to a lawful arrest or lawful search; (2) the vehicle was not the subject of a

[1] Details on appellant's driving offense and arrest are not part of the record. Accordingly, some of the facts in our decision are taken from the parties' statements of fact as presented in their appellate briefs.

[2] Although the appellate record is scarce, it appears, based on the parties' appellate briefs, that appellant had prior DWI convictions, making his driving offense a second-degree charge.

prior judgment in favor of the state in a criminal injunction or forfeiture proceeding under Minn. Stat. § 169A.63 (2016); (3) the sheriff's department had made no showing of probable cause to believe that any delay occasioned by the necessity to obtain process would result in the removal or destruction of the vehicle; (4) appellant had not been convicted of a designated offense; and (5) appellant had not failed to appear in related proceedings. In the fall of 2017, appellant pleaded guilty to second-degree DWI.

In January 2018, pursuant to Minn. Stat. § 169A.63, subd. 5a, appellant served the state with a petition for remission or mitigation, requesting that the vehicle be returned to him. The state denied appellant's request, and a forfeiture hearing was held in district court.[3] At the start of the hearing, appellant, through his counsel, made a request on the record that the matter be continued based on proposed legislation regarding the reform of state civil-forfeiture laws. Appellant explained that the proposed legislation "would allow anybody that received a forfeiture notice to keep their vehicle, so long as they participate in the ignition-interlock program within 60 days of receiving that notice."

The state objected to the continuance. The state argued that the proposed legislation was not law, nor was it certain to become law, the proposed language in the bill was absent of any discussion regarding retroactivity, and there was no dispute that appellant was the owner of the seized vehicle and that he was convicted of a designated offense. Appellant

[3] Appellant states in his brief that, on the day of the forfeiture hearing, "an off the record meeting" between appellant's attorney, the state, and the judge took place in the judge's chambers. He states, "During the meeting, the parties had a conversation pertaining to the pending change in legislation in allowing relief during the pending stages of a forfeiture and whether that change would be applied to the [a]ppellant." Based on the existing record, we are unable to verify what took place in the chambers meeting.

conceded that, because he had been convicted of a designated offense, "the forfeiture requirements ha[d] been met so [there was] no defense to the merits of the forfeiture claim." The district court took appellant's request for a continuance under advisement in order to allow it to review the proposed legislation.

In February 2018, the district court issued an order denying appellant's request for a continuance and ordering appellant's vehicle forfeited to the county sheriff's department. In the order, the district court acknowledged that appellant had conceded that there was no meritorious defense to the forfeiture action itself and found that appellant's request for a continuance was based "solely on the proposed legislation," that the proposed legislation did not include retroactivity provisions, and that the proposed legislation was not the law in the state. The district court entered judgment accordingly.

On April 2, 2018, this court issued a published opinion in another vehicle-forfeiture case. *See Olson v. One 1999 Lexus*, 910 N.W.2d 72 (Minn. App. 2018), *aff'd in part, rev'd in part*, 924 N.W.2d 594 (Minn. 2019). In *Olson*, we held that Minn. Stat. § 169A.63, subd. 9(d), was unconstitutional as applied to both the non-owner driver and the owner of the seized vehicle because their procedural due-process rights were violated when they were "denied prompt, post-deprivation judicial review for over 18 months pending the resolution of the driver's related criminal action." *Id.* at 74.

On April 26, 2018, appellant filed a notice of appeal of the district court's order and judgment forfeiting his vehicle. Relying on our decision in *Olson* and arguing that *Olson* should be applied retroactively to his case, appellant argued that Minn. Stat. § 169A.63, subd. 9(d) was unconstitutional as applied to him. Appellant argued that this court had

jurisdiction to review the constitutionality of the forfeiture even though the issue was not argued before the district court. Alternatively, appellant argued that, if the facts presented in the record were insufficient for appellate review, the matter should be remanded for further findings consistent with our *Olson* decision.

On June 19, 2018, the Minnesota Supreme Court granted review of *Olson*. Consequently, we stayed appellant's appeal pending the supreme court's decision. *See* Minn. App. Spec. R. Prac. 1 ("If a case pending in the [s]upreme [c]ourt will be dispositive of a case pending before the [c]ourt of [a]ppeals, the [c]hief [j]udge may order that scheduling be deferred until the [s]upreme [c]ourt has acted.").

On March 13, 2019, the supreme court issued its decision. *Olson*, 924 N.W.2d 594. Affirming in part, and reversing in part, the supreme court held that Minn. Stat. § 169A.63, subd. 9(d), was constitutional on its face, constitutional as applied to the non-owner driver, and unconstitutional as applied to the purportedly innocent owner. *Id.* at 598. We, then, reinstated appellant's appeal and ordered the parties to file informal supplemental briefs addressing the application of *Olson* to the matter before us.

D E C I S I O N

In light of the supreme court's decision in *Olson*, appellant contends that Minn. Stat. § 169A.63, subd. 9(d), deprived him of procedural due process. "We review questions of whether procedural due process has been violated de novo." *Id.* at 601.

Minn. Stat. § 169A.63, subd. 9(d)

Minnesota's vehicle forfeiture statute, Minn. Stat. § 169A.63, allows for the civil forfeiture and automatic seizure of vehicles used during designated crimes, including

second-degree DWI. Unless an interested party contests the forfeiture by filing a demand for judicial determination of the forfeiture, *see* Minn. Stat. § 169A.63, subd. 8(e), the seizure results in administrative forfeiture without a judicial hearing. *Id.* at 598. Once an interested party files a timely demand for a judicial determination of the forfeiture, "the forfeiture proceedings must be conducted as provided under subdivision 9." Minn. Stat. § 169A.63, subd. 8(g). Subdivision 9 sets forth the procedural requirements for forfeiture proceedings.

Specifically, subdivision 9(d) provides:

> A judicial determination under this subdivision must be held at the earliest practicable date, and in any event no later than 180 days following the filing of the demand by the claimant. If a related criminal proceeding is pending, the hearing shall not be held until the conclusion of the criminal proceedings. The district court administrator shall schedule the hearing as soon as practicable after the conclusion of the criminal prosecution. The district court administrator shall establish procedures to ensure efficient compliance with this subdivision. The hearing is to the court without a jury.

Appellant contends that subdivision 9(d) violates his procedural due-process rights—a similar claim addressed earlier this year by the supreme court in *Olson*. 924 N.W.2d at 598.

Olson v. One 1999 Lexus

Olson involved a constitutional challenge to the vehicle-forfeiture statute by both the non-owner driver of a seized vehicle and the vehicle's purportedly innocent owner. *Id.* Megan Olson, the non-owner driver, was arrested in August 2015 for DWI. *Id.* She had three prior DWI convictions and was charged with two counts of felony first-degree DWI.

Olson, 910 N.W.2d at 74. Because first-degree DWI is a designated offense, *see* Minn. Stat. § 169A.63, subd. 1(e), police seized the vehicle Megan was driving, a 1999 Lexus, for forfeiture. *Id.* Megan was the primary driver of the Lexus, but Megan's mother, Helen Olson, was the vehicle's registered owner. *Id.* Accordingly, both Megan and Helen received notice of the seizure and intent to forfeit. *Olson*, 924 N.W.2d at 598.

In October 2015, Megan and Helen filed a timely joint demand for judicial determination of the forfeiture. *Id.* at 599. They raised several defenses, including that the statute violated their constitutional rights to due process. *Id.* at 600. Although the hearing on the Olsons' petition was originally scheduled for February 2016, it was continued several times pursuant to the forfeiture statute's requirement that a "hearing shall not be held until the conclusion of the criminal proceedings." Minn. Stat. § 169A.63, subd. 9(d); *Olson*, 924 N.W.2d at 600.

In October 2016, Megan pleaded guilty to first-degree DWI. *Olson*, 924 N.W.2d at 600. Two days later, the Olsons moved for summary judgment in the forfeiture action, arguing that the forfeiture statute violated their procedural due-process rights. *Id.* On February 13, 2017, Megan was adjudicated guilty in the criminal action, and on February 23, 2017, a hearing in the forfeiture action on the Olsons' summary-judgment motion was held. *Id.* Eighteen months had passed since the date the vehicle was seized to the date of the forfeiture hearing. *Id.* Following the forfeiture hearing, the district court granted the Olsons' summary-judgment motion. *Id.* The district court found that the forfeiture statute violated the Olsons' rights to procedural due process and ordered the return of the vehicle. *Id.*

On appeal by the state, we affirmed. *Id.* We concluded that section 9(d) was constitutional on its face, but unconstitutional as applied to both Olsons "because their right to procedural due process was violated when they were denied prompt, post-deprivation judicial review for over 18 months pending the resolution of the driver's related criminal action." *Olson*, 910 N.W.2d at 74, 77.

The supreme court affirmed in part and reversed in part. *Olson*, 924 N.W.2d at 598. With regard to whether the vehicle forfeiture statute was unconstitutional on its face, the supreme court affirmed our holding, concluding, "Because we can conceive of a circumstance where the legitimacy of the forfeiture (and the demand for judicial determination) can be resolved in a constitutionally prompt manner following the swift resolution of the underlying criminal proceedings, Minn. Stat. § 169A.63, subd. 9(d), is not unconstitutional in all applications." *Id.* at 608 (quotation omitted). The supreme court also affirmed our holding that subdivision 9(d) was unconstitutional as applied to the non-driver owner of the vehicle, Helen Olson. *Id.* at 616. However, with regard to the non-owner driver, Megan Olson, the supreme court reversed our decision, and held that subdivision 9(d) was constitutional as applied to her. *Id.* at 611-12.

In determining the constitutionality of the vehicle-forfeiture statute, the supreme court concluded that, as a preliminary matter, the factors identified in *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893 (1976), provided the proper framework under which to analyze and resolve the Olsons' procedural due-process claims. *Id.* at 603. *Mathews* identified the following set of "three distinct factors" a court must balance when assessing procedural due-process challenges:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S. Ct. at 903. Additionally, in analyzing the private interest, courts balance "(1) the duration of the deprivation of property; (2) the availability of hardship relief; and (3) the availability of prompt [post-deprivation] review." *Olson*, 924 N.W.2d at 602 (quotation omitted).

With regard to the non-owner driver, Megan Olson, the supreme court concluded that, "[o]n the whole," her private interest in the seized vehicle was not "particularly strong." *Id.* at 609. The court found that, while she did have an interest in the use value of the vehicle, that interest was "diminished because her license was previously cancelled for being 'inimical to public safety.'" *Id.* Thus, "to the extent Megan ha[d] any interest in the Lexus, it [was] limited to the potential that Megan could ask family or friends to use the vehicle to drive her to and from particular locations." *Id.*

The supreme court found that, compared to Megan's interest, the state had a strong "functional, fiscal, and administrative interest in the matter." *Id.* "[T]he state has a compelling interest in highway safety that justifies its efforts to keep impaired drivers off the road, particularly those drivers who have shown a repeated willingness to drive while impaired." *Id.* (quotation omitted). The supreme court reasoned that, "[i]f courts were required to hold a prompt hearing shortly after a vehicle is seized in every single case of

DWI forfeiture, it would add substantially to the cost and administrative burden of courts and prosecutors." *Id.*

And, finally, the supreme court concluded that there was a limited risk of erroneous deprivation with regard to Megan's interest. *Id.* at 609-611. The supreme court explained that the state's ability to lawfully seize Megan's vehicle under section 169A.63 depended on whether she committed a "designated offense." *Id.* at 609 (citing Minn. Stat. § 169A.63, subd. 1(e)(1)). The court held: "This inquiry is straightforward: (1) was Megan driving while intoxicated; and (2) did she have three prior DWI incidents in the last decade." *Id.* at 609-10 (citing Minn. Stat. § 169A.24, subd. 1 (2018)). While the court concluded that "[t]he record d[id] not provide much insight into the procedures used by the officer on the night of Megan's arrest," it noted that "the officer observed Megan that night and that he had probable cause to arrest her for driving under the influence," that "the Olsons' attorney noted during the forfeiture summary judgment hearing that the officer used a breath test to determine whether Megan was intoxicated," and, further, that "records of prior offenses are typically captured in the [s]tate's database, an objective source of such information." *Id.* at 610.

The supreme court concluded that, because "the [s]tate's determination that Megan committed the designated offense of first-degree DWI [wa]s reliable," the urgency of a prompt forfeiture hearing was "substantially reduce[d]." *Id.* at 610-11. Further, the supreme court noted that, while a forfeiture hearing cannot be delayed indefinitely, the plain language of the forfeiture statute demonstrates that the legislature intended—for "legitimate reasons"—to delay a forfeiture hearing pending a related criminal action. *Id.*

at 611. In balancing the *Mathews* factors, the court concluded that, "while Megan waited for 18 months for a hearing on the demand for judicial determination pending the resolution of her criminal charges, Minn. Stat. § 169A.63, subd. 9(d), [was] constitutional as applied to her." *Id.* at 611-12.

On the other hand, the supreme court concluded that the interest of Helen Olson, the non-driver owner of the vehicle, was "more significant than Megan's interest." *Id.* at 612. While the court reasoned that Helen's interest in the use value of the vehicle was diminished, because her license had also been canceled as inimical to public safety, it held that "the lack of driving privileges does not eliminate Helen's economic interest in selling, leasing, or using the vehicle as collateral to obtain financial benefits." *Id.*

Similarly, the supreme court concluded that the state's interest was "weaker as applied to Helen than it [was] as applied to Megan." *Id.* The court noted the state's interest in keeping drunk drivers off the road, but concluded that, because the vehicle was not seized as a result of Helen driving it while impaired, "the government interest in keeping repeat DWI offenders off the road weigh[ed] less with regard to her." *Id.* The court also concluded that the state's "fiscal and administrative interest in avoiding the cost and burden of numerous prompt post-seizure hearings" was weaker as applied to Helen. *Id.*

Finally, the supreme court concluded that the risk of erroneous deprivation was "[t]he decisive *Mathews* factor in Helen's case." *Id.* at 613. The court explained, "The substantive inquiry into whether the [s]tate ultimately may take the vehicle from Helen under section 169A.63 is two-fold: (1) did Megan commit a 'designated offense,' and (2) is Helen an innocent owner." *Id.* at 613 (citing Minn. Stat. § 169A.63, subds. 1(e), 7(d)).

While the supreme court took no issue with the first prong, it concluded that "the inquiry regarding the legal basis for forfeiture of Helen's vehicle—whether Helen [was] an innocent owner—received *absolutely no consideration* before the seizure." *Id.* (emphasis in original). The court concluded that, because the forfeiture statute provided "no assessment whatsoever—let alone a reliable assessment—that the [s]tate has the legal authority to permanently take the vehicle of a purportedly innocent owner like Helen," "due process urgently require[d] a prompt hearing on innocent-owner defenses." *Id.* Furthermore, the supreme court concluded that the statute's mitigation, remission, and bond procedures provided Helen with inadequate hardship relief. *Id.* at 614. Consequently, the court held, "[T]he balance of interests demonstrate[d] that Helen's right to procedural due process was denied as a result of the 18-month delay between the seizure of her property and the hearing on her demand for judicial determination, including in particular her innocent-owner defense." *Id.* at 616.

Appellant waived his constitutional challenge to subdivision 9(d)

Before addressing the merits of appellant's due-process claim, we must determine, as a preliminary matter, whether his constitutional challenge is properly before us. While appellant concedes that he did not argue the constitutionality of subdivision 9(d) in district court, he argues that we, nevertheless, have jurisdiction to review his claim.

"A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court in deciding the matter before it." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotation omitted); *see also Watson v. United Servs. Auto. Ass'n*, 566 N.W.2d 683, 687 (Minn. 1997) ("[T]he general rule is

that appellate courts will not consider questions which were not presented to or decided by the district court."). We generally decline to address constitutional issues raised for the first time on appeal. *Constans v. Comm'r of Pub. Safety*, 835 N.W.2d 518, 526 (Minn. App. 2013) ("[Appellant] did not present any procedural-due-process argument to the district court and we therefore decline to reach the merits of his argument here."); *see also Erickson v. Fullerton*, 619 N.W.2d 204, 208-09 (Minn. App. 2000) (declining to address constitutional challenge, in part, because issue was not adequately considered by district court and record was insufficient for review).

However, "[o]n rare occasions, appellate courts have exercised their discretion to allow a party to proceed on a theory not raised at trial." *Roth v. Weir*, 690 N.W.2d 410, 413 (Minn. App. 2005) (quotation omitted); *see also* Minn. R. Civ. App. P. 103.04 (providing that appellate courts "may review any other matter as the interest of justice may require," but the appellate court's scope of review "may be affected by whether proper steps have been taken to preserve issues for review on appeal").

Under the "well-established" exception to the general rule prohibiting parties from raising issues for the first time on appeal:

> An appellate court may base its decision upon a theory not presented to or considered by the trial court *where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and where*, as in a case involving undisputed facts, *there is no possible advantage or disadvantage to either party in not having had a prior ruling by the trial court on the question.*

Watson, 566 N.W.2d at 687 (emphasis in original) (quotation omitted). Factors weighing in favor of appellate review include the following: "the issue is a novel legal issue of first

impression; the issue was raised prominently in briefing; the issue was implicit in or closely akin to the arguments below; and the issue is not dependent on any new or controverted facts." *Id.* at 688 (quotations omitted).

In the case before us, appellant contends that, while "not specifically argued on the record," he sufficiently raised before the district court "constitutional issues arising out of the forfeiture statute," including in the amended demand for judicial determination, in the off-the-record chambers meeting, and at the forfeiture hearing when his counsel argued for a continuance. Appellant contends that the third ground listed on the amended demand for judicial determination "put the [state] on notice that [he] was challenging the taking of his vehicle and exercising his right to procedural due process."[4] According to appellant, because the district court took his request for a continuance under advisement, but later issued an order denying his request while simultaneously ordering appellant's vehicle forfeited, the district court provided appellant an insufficient opportunity to present his constitutional challenge.

Because appellant's constitutional challenge to section 169A.63, subdivision 9(d), was neither presented to nor considered by the district court, and the record is insufficient for appellate review, we conclude that the issue is not properly before us. *See Constans*, 835 N.W.2d at 526; *Erickson*, 619 N.W.2d at 208-09. First, appellant concedes that the issue "was not argued during [the] district court hearing," and in the transcript of the

[4] The third ground alleged by appellant was that the sheriff's department "ha[d] made no showing of probable cause to believe that any delay occasioned by the necessity to obtain process would result in the removal or destruction of [the] vehicle."

forfeiture hearing, appellant expressly affirmed that there was "no defense to the merits of the forfeiture claim." The district court stated before adjourning, "If there's nothing else then that'll conclude the hearing." Appellant did not raise any other issues or indicate that he would be challenging the constitutionality of the forfeiture.

Second, the appellate record, a mere 24 pages in total, is insufficient for us to determine whether subdivision 9(d) deprived appellant of his procedural due-process rights. For example, appellant argues that his "interest in this 2016 Chevrolet passenger vehicle is more significant" than the purportedly innocent owner's interest in *Olson* "based on greater financial value available for [a]ppellant's 2016 vehicle." However, other than the district court's forfeiture order containing appellant's vehicle identification number and license-plate number, as well as statements made by appellant alleging the vehicle's value, the record is devoid of information about appellant's vehicle.

The record is also devoid of crucial facts, including details on appellant's arrest, his prior DWI convictions, and the resulting criminal charges. And, while appellant contends that he was "denied a prompt, meaningful review because he was not heard until 315 days following his [d]emand for [j]udicial [d]etermination," the state argues that appellant was the "driving force behind the delay of the criminal matter," alleging that appellant requested five continuances throughout the seven-month duration of the criminal case. Whether appellant contributed to the delay, however, is unverifiable because his requested continuances are not included in the appellate record. *See Erickson*, 619 N.W.2d at 208-09.

Third, appellant's constitutional challenge to section 169A.63, subdivision 9(d), does not fit within the "well-established" exception to the general rule prohibiting parties from raising issues for the first time on appeal. *See Watson*, 566 N.W.2d at 687-88. One, procedural due-process claims are not a novel concept; two, the constitutional issue was neither implicit in nor closely akin to the arguments raised below; and three, the issue depends on disputed facts—for example, whether appellant raised the issue in the off-the-record chambers meeting, as he alleges. *Id.* at 688.

Subdivision 9(d) is constitutional as applied to appellant

Even if appellant had properly preserved the issue for appeal, we conclude that subdivision 9(d) is constitutional as applied to appellant.[5] There is no dispute that the first *Mathews* factor—"the private interest that will be affected by the official action"—weighs in appellant's favor. *See Mathews*, 424 U.S. at 335, 96 S. Ct. at 903. Although appellant's license was suspended at the time of his arrest, "the lack of driving privileges does not eliminate [his] economic interest in selling, leasing, or using the vehicle as collateral to obtain financial benefits." *Olson*, 924 N.W.2d at 612. The rest of the *Mathews* factors, however, weigh in the state's favor.

In a DWI forfeiture case where the vehicle's owner is also the driver, the state's functional, fiscal, and administrative interest is strong. Unlike the owner's vehicle in

[5] We note that, prior to the supreme court's *Olson* decision, the parties to the matter before us filed appellate briefs addressing whether our *Olson* decision applied retroactively to appellant's forfeiture. In light of the supreme court's *Olson* decision, which reversed, in part, our holding, we conclude that, whether our *Olson* decision applies retroactively is an issue that is now moot.

Olson, appellant's vehicle was seized because he, himself, was driving it while impaired. As the *Olson* court noted, drivers like appellant "pose a severe threat to the health and safety of the citizens of Minnesota," and the government's significant interest in ensuring roads are safe "justif[y] its efforts to keep impaired drivers off the road, particularly those drivers who have shown a repeated willingness to drive while impaired." *Id.* at 609 (quotation omitted). The supreme court further concluded that requiring courts to conduct prompt hearings in every single case of DWI forfeiture "would impose a significant burden and cost on courts and prosecutors." *Id.*

While a forfeiture hearing cannot be delayed indefinitely, there are "legitimate reasons to support a delay" in forfeiture actions involving a related criminal case. *Id.* at 611. The delay is both to protect the criminally charged individual from self-incrimination, and to protect the state from a prior civil proceeding that could "substantially hamper" or "estop later criminal proceedings." *Id.* (quoting *United States v. Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in U.S. Currency*, 461 U.S. 555, 567, 103 S. Ct. 2005, 2013 (1983)). Like appellant, the driver in *Olson* was criminally charged for a DWI offense. In light of the policy reasons supporting the delay mandated by the forfeiture statute, the supreme court concluded that there was "not an urgent need for a prompt post-seizure hearing for Megan." *Olson*, 924 N.W.2d at 611. Appellant is similarly situated to Megan in this regard.

Lastly, the risk that appellant was erroneously deprived is slim. Although not part of the record, there is no dispute that appellant was charged by criminal complaint with second-degree DWI. And, as appellant concedes, he did not raise a motion challenging

probable cause. While appellant argues that he was denied the opportunity to develop the record on his arrest and the arresting officers' procedures, appellant expressly conceded at the forfeiture hearing that "the forfeiture requirements ha[d] been met so there's no defense to the merits of the forfeiture claim."

Although appellant was the registered owner of his vehicle, his circumstances, overall, are more analogous to Megan's, and, in light of the supreme court's decision in *Olson*, his constitutional rights to procedural due process were not violated. First, appellant was the driver of the seized vehicle; second, the vehicle was seized because it was used by appellant in committing a designated offense; third, appellant had a history of prior DWI convictions—thereby making the state's interest in keeping him off the road significant—fourth, appellant's driving offense resulted in a criminal charge supported by probable cause; and, lastly, his criminal proceedings justified some delay in the forfeiture action. Subdivision 9(d) is constitutional as applied to appellant.

Affirmed.