STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1774

State of Minnesota,
Respondent,

vs.

Cory Francis Sandhurst,
Appellant.

Filed September 16, 2019
Affirmed
Reyes, Judge

Lyon County District Court
File No. 42-CR-17-1298

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Rick Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Tracy M. Smith, Judge; and Florey, Judge.

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

REYES, Judge

In this direct appeal from final judgments of conviction of driving while impaired, appellant argues that law enforcement failed to vindicate his limited constitutional right to

counsel before deciding whether to submit to a chemical test pursuant to a warrant. We affirm.

FACTS

In August 2017, a law-enforcement officer located appellant Cory Francis Sandhurst in the driver's seat of his parked vehicle. Appellant admitted to the officer that he had been drinking, and the officer observed indicia that the car had been running recently and shut off. The officer arrested appellant and transported him to the police station for failing to respond to requests for field sobriety and preliminary breath tests.

The officer applied for and obtained a search warrant for a blood or urine sample. The officer reviewed the warrant with appellant, provided him with the required warrant advisory,[1] and then asked him if he would provide a blood or urine sample. Appellant repeatedly asked to speak with an attorney, and the officer informed him that he could speak with an attorney after he provided the sample. Appellant refused to provide a blood sample but agreed to provide a urine sample, and the test results revealed an alcohol concentration of 0.216.

The state charged appellant with one count of third-degree driving while impaired (over 0.08), Minn. Stat. § 169A.20, subd. 1(5) (2016), and one count of third-degree driving while impaired (under the influence), Minn. Stat. § 169A.20, subd. 1(1) (2016). Appellant

[1] Minn. Stat. § 171.177, subd. 1 (2018), provides that, "[a]t the time a blood or urine test is directed pursuant to a search warrant under sections 626.04 to 626.18, the person must be informed that refusal to submit to a blood or urine test is a crime." If the person refuses the chemical test, "then [it] must not be given," unless certain circumstances exist, which are not present here. Minn. Stat. § 171.177, subd. 13(a) (2018).

moved to dismiss his charges and suppress the test results based on the officer's failure to vindicate his right to counsel before making "the critical decision of whether to submit to the chemical test." The district court held an omnibus hearing and subsequently denied appellant's motion. The parties agreed to a stipulated court trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court found appellant guilty of both counts, imposed a sentence on count 1 of 365 days in jail with 350 days stayed, and placed appellant on probation for two years. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by denying his motions to suppress and dismiss because, even subject to a search warrant, he faced a "unique choice" similar to the one in *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 832 (Minn. 1991),[2] that triggered his "limited right to consult an attorney before deciding whether or not to submit to chemical testing for blood alcohol." We disagree.

"The determination of whether an officer vindicates a driver's right to counsel is a mixed question of law and fact." *Hartung v. Comm'r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001), *review denied* (Minn. Dec. 11, 2001). When the parties do not dispute the facts, as here, appellate courts review the district court's legal determination de novo.

[2] In *Friedman*, an implied-consent case, the supreme court determined that a driver's decision regarding whether to submit to chemical testing is a "critical and binding" one that will affect the driver in subsequent proceedings. 473 N.W.2d at 832. As a result, when asked to submit to a chemical test, drivers find themselves at a "critical" stage in the DWI process, thus triggering a "limited right to consult an attorney before deciding whether or not to submit to chemical testing." *Id.* at 829.

Kuhn v. Comm'r of Pub. Safety, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992).

Appellant acknowledges that *State v. Rosenbush*, 931 N.W.2d 91, 93, (Minn. 2019), is relevant to the issue in his case. In *Rosenbush*, police arrested Rosenbush for driving while intoxicated and obtained a search warrant to obtain a blood sample from her. *Id.* An officer served Rosenbush with the warrant and read the warrant advisory. Rosenbush submitted to testing. She later moved to suppress her blood-test results, arguing that, under *Friedman*, while she didn't ask to talk to her attorney, the officer failed to vindicate her limited constitutional right to counsel before submitting to the test. *Id*. at 94. Rosenbush asserted that, like the driver in *Friedman*, she faced a choice of either submitting to the test and giving the police potentially incriminating evidence or refusing and having her license automatically revoked. *Id.* at 97.

The supreme court held that "the limited right to counsel established in *Friedman* does not apply when an individual is asked to submit to a blood test pursuant to a warrant," *id.* at 93, because the presence of a warrant "fundamentally changes [a driver's] encounter from the one at issue in *Friedman*," *id*. at 97. The supreme court reasoned that the decision whether to comply with a warrant is not a unique one because every person who is the subject of a warrant has that choice,[3] and the Minnesota Constitution does not provide subjects of a search warrant with the right to counsel before the warrant is executed. *Id*. at 98. Additionally, the supreme court noted that the existence of a search warrant eliminates

[3] *Rosenbush* cites to Minn. Stat. § 609.50, subd. 1(1) (2018) (making it a crime to obstruct, hinder, or prevent police from lawfully executing any legal process). *Id.* at 98

many of the concerns that the *Friedman* court's limited expansion of the right to counsel intended to address. *Id*. Specifically, the involvement of a neutral judicial officer who determines that the police may lawfully obtain a sample from the driver addresses the *Friedman* court's concern of drivers being faced with the "unchecked legal power of the state." *Id*. (quotation omitted).

Rosenbush is dispositive of appellant's case. Here, as in Rosenbush, the officer applied for and obtained a search warrant, reviewed it with appellant, and provided a warrant advisory. Both Rosenbush and appellant eventually submitted to testing, with Rosenbush providing a blood sample and appellant refusing to provide a blood sample but agreeing to provide a urine sample. Both subsequently challenged the denial of their motions to suppress evidence, making identical arguments about their alleged limited right to counsel. Under *Rosenbush*, the "unique choice" appellant claims he faced is not enough to justify an extension of *Friedman's* limited right to counsel pursuant to a warranted search.

Affirmed.