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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2081

Donovan Jon Gilfillan, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 26, 2019
Affirmed
Cochran, Judge

Wright County District Court
File No. 86-CV-18-506

Daniel M. Mohs, Minneapolis, Minnesota (for appellant)

Keith Ellison, Attorney General, Stephen D. Melchionne, Assistant Attorney General, St. Paul, Minnesota (for respondent)

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

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

COCHRAN, Judge

Appellant Donovan Jon Gilfillan challenges the district court's denial of his petition to rescind the revocation of his driving privileges. Gilfillan argues that the district court violated the best-evidence rule by declining to admit an audio recording of the implied-consent process and erred by concluding that Gilfillan freely and voluntarily

consented to submit to a breath test. Because the district court did not violate the best-evidence rule, and the evidence supports the district court's finding that Gilfillan freely and voluntarily consented to submit to the breath test, we affirm.

FACTS

In December 2017, a Minnesota State Patrol trooper initiated a traffic stop of appellant Donovan Jon Gilfillan. The trooper arrested Gilfillan for driving while impaired (DWI). The trooper brought Gilfillan to the Wright County Jail. Before reading the implied-consent advisory, the trooper told Gilfillan that there would be a 15-minute observation period to ensure that he did not have anything in his mouth that could affect the breath test. Gilfillan asked what would happen if he burped or coughed during the observation period. The trooper responded that, if he could not get a valid breath test, he could elect to seek a blood or urine test.

The trooper then read Gilfillan the implied-consent advisory, informing Gilfillan that he was under arrest for DWI, that he was required to submit to a breath test, that refusal to submit to a breath test was a crime, and that Gilfillan had the right to contact an attorney. Gilfillan said that he understood the advisory and that he wanted to contact an attorney. Gilfillan attempted to contact a particular attorney but was unsuccessful. Gilfillan declined to attempt to contact any other attorney.

The trooper then asked Gilfillan whether he would submit to a breath test. Gilfillan said that he wanted a blood test. The trooper informed Gilfillan that it was not his choice, and that he was only being offered a breath test. The trooper told Gilfillan that if he did

not agree to submit to a breath test, the trooper would consider Gilfillan to be refusing the breath test.

The trooper then began the 15-minute observation period. Gilfillan burped during the observation period, so the trooper began drafting a search-warrant application for a blood sample from Gilfillan. The trooper informed Gilfillan that he would seek a blood test if Gilfillan continued to burp. The trooper never submitted the search-warrant application because Gilfillan then complied with the observation-period process and completed the breath test, which revealed an alcohol concentration of 0.09.

Based on Gilfillan's breath test, the commissioner of public safety revoked his driving privileges. Gilfillan filed a petition with the district court requesting rescission of the revocation of his driver's license. During a hearing on the petition, Gilfillan's attorney sought to introduce a compact disc (CD) containing an audio recording of the trooper reading the implied-consent advisory to Gilfillan. The commissioner objected to the audio recording because Gilfillan's attorney did not provide the commissioner with the audio recording prior to the hearing. The district court sustained the objection on the grounds that the audio recording had not been disclosed to the commissioner prior to the hearing. Later in the hearing, the district court also noted that the foundation for the recording was questionable because the trooper could not identify the CD.

During the hearing, Gilfillan testified that he agreed to submit to a breath test, but that he did not believe that he had a choice because refusal to take the test was a crime. Gilfillan testified that the choice between taking a breath test and a charge for refusal "wasn't much of a choice." Gilfillan further testified that he believed the trooper initially

told him that he would be allowed to choose a breath, blood, or urine test. Gilfillan testified that his decision to take a breath test was not voluntary because he wanted to take a blood test.

The district court concluded that Gilfillan freely and voluntarily consented to submit to the breath test and upheld the revocation of his driving privileges. This appeal follows.

D E C I S I O N

Gilfillan argues that the district court erred by declining to admit an audio recording of the implied-consent process because the audio recording was the best evidence of the exchange between Gilfillan and the trooper. Gilfillan also argues that the district court erred in concluding that Gilfillan freely and voluntary consented to submit to a breath test. We address each issue in turn.

I. The best-evidence rule did not require the district court to admit the audio recording.

Gilfillan argues that the best-evidence rule required admission of the recording of the interaction between the trooper and Gilfillan. The best-evidence rule provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required." Minn. R. Evid. 1002. "In a trial before the court without a jury and also where the best-evidence rule is raised as an objection, the trial judge is given wide discretion, and there will be a reversal only where prejudicial error is clearly shown." *Kunz v. Comm'r of Pub. Safety*, 349 N.W.2d 593, 596 (Minn. App. 1984) (quotation omitted).

Gilfillan argues that the recording had to be admitted by the district court because it was the best evidence of the interaction between the trooper and Gilfillan. But the best-evidence rule does not require an original recording to be admitted to prove what was said during a recorded conversation. Rather, the best-evidence rule requires an original recording to prove "the content of . . . [the] recording." Minn. R. Evid. 1002. As the Minnesota Supreme Court explained in *State v. Bauer*, "a witness with first-hand knowledge of what was said in a conversation may permissibly testify as to what he heard," even if a recording of the conversation exists. 598 N.W.2d 352, 368 (Minn. 1999).

In *Bauer*, police officers testified about incriminating statements made by a defendant during a recorded interview. *Id.* When the defense tried to introduce the entire recording of the interview, the state objected, and the district court upheld the objection. *Id.* On appeal, the defendant argued that the district court's ruling violated the best-evidence rule. *Id.* The supreme court affirmed the district court. *Id.* at 370. The supreme court also noted that the defense cross-examined the officers at trial about their statements and that "[o]n appeal, appellant has not pointed to any inaccuracies in the officers' testimony or provided evidence that the testimony was in any way misleading." *Id.*

Similarly, in this case, the trooper testified as to his own first-hand knowledge of what was said in his conversation with Gilfillan, not as to the content of the recording. Thus, the best-evidence rule does not apply. Furthermore, there appears to be at most one disputed issue of fact about which the recording may have provided additional evidence: whether the trooper ever told Gilfillan that he would have the choice among a

breath, blood, or urine test. But, as discussed in further detail below, this factual dispute is immaterial. Accordingly, even if the district court had erred by declining to admit the audio recording, any error was not prejudicial.[1]

II. The district court did not err by concluding that Gilfillan freely and voluntarily consented to taking the breath test.

Gilfillan argues that the breath test constituted an unconstitutional warrantless search. He argues that his consent to take the breath test was not voluntary because he was confused about the testing methods available to him. Gilfillan further argues that the trooper coerced his consent by preparing a search-warrant application in front of him.

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. A warrantless search of a person is presumptively unreasonable unless it falls within a limited exception to the warrant requirement. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). Consent is one exception to the warrant requirement. *Id.* To establish that the consent exception applies, the state bears the burden of proving by a preponderance of the evidence that the defendant freely and voluntarily consented to the search. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). "Whether consent is voluntary is determined by examining the totality of the circumstances." *Id.* (quotation omitted). Accurately informing an individual about the consequences of refusing to

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[1] On appeal, Gilfilan only argues that the best-evidence rule required the admission of the CD, not that the district court erred in sustaining the commissioner's objection based on the lack of disclosure of the CD and insufficient foundation for the CD. Accordingly, we do not address those issues. Nevertheless, we note that, for the reasons discussed below, any error in not admitting the CD was harmless. *See State v. Guzman*, 892 N.W.2d 801, 812-13 (Minn. 2017) ("When an alleged evidentiary error is harmless, an appellate court need not address the merits of the claimed error." (quotation omitted)).

provide a chemical test does not render the individual's consent to the test involuntary. *Id.* at 570-72.

"The question of whether an individual voluntarily consented to a search is a question of fact." *Poeschel v. Comm'r of Pub. Safety*, 871 N.W.2d 39, 45 (Minn. App. 2015). "Therefore, this court reviews the district court's finding of voluntary consent for clear error." *Id.* "Findings of fact are clearly erroneous if, on the entire evidence, a reviewing court is left with the definite and firm conviction that a mistake occurred." *Id.* at 45-46 (quotation omitted).

Gilfillan argues that, because the trooper initially told him that he had the option of a blood or urine test, he was confused about the testing methods available to him and his right to refuse a breath test. But even accepting Gilfillan's assertion that the trooper initially told him that he would have the option to choose a blood test, the totality of the circumstances demonstrates that Gilfillan freely and voluntarily submitted to a breath test. Gilfillan testified that he agreed to the breath test because he did not want to be charged with the crime of test refusal. Thus, at the time that he made his decision, Gilfillan understood that the trooper was offering him only a breath test and that if he refused the breath test, he would be charged with test refusal.

Gilfillan also testified that he felt his consent was coerced because the choice between submitting to a breath test and being charged with test refusal was not much of a choice. But in *Brooks*, the Minnesota Supreme Court rejected this argument. 838 N.W.2d at 570. In that case, Brooks argued "that he did not truly have a choice of whether to submit to the tests because police told him that if he did not do so, he would be committing a

crime." *Id.* The supreme court noted that "a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Id.*

Although Gilfillan did not like the choices he faced, submitting to a breath test or being charged with test refusal, the trooper accurately informed him of his options, and Gilfillan freely and voluntarily consented to submit to a breath test. As the supreme court noted in *Brooks*, "consent can be voluntary even if the circumstances of the encounter are uncomfortable for the person being questioned." *Id.* at 569.

Gilfillan also argues that because the trooper started drafting a search-warrant application in front of him, his consent to the breath test was coerced. "[T]he fact that someone submits to [a] search after being told that he or she can say no to the search supports a finding of voluntariness." *Id.* at 572. The drafting of the search warrant demonstrated that Gilfillan had the option not to provide a breath test. If he declined, the trooper could have proceeded with the search-warrant application. Thus, the search-warrant application only reinforced Gilfillan's option to refuse to submit to a breath test, and the consequences for choosing that option.

The fact that Gilfillan did not want to face the consequence of refusing a breath test, a consequence that was reinforced by the drafting of the warrant, does not mean that his consent was coerced. Gilfillan did not present any evidence to demonstrate that his will was overborne by the trooper drafting the search-warrant application in front of him or that he was otherwise coerced by the trooper into agreeing to take the breath test. *Cf. id.* at 571 (noting that Brooks was not confronted with repeated police questioning or asked to give

his consent after having spent days in jail and that there was no evidence in the record that Brooks's will was overborne). We conclude that, under the totality of the circumstances, the district court did not err in finding that Gilfillan freely and voluntarily consented to submit to a breath test.[2]

Affirmed.

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[2] The commissioner separately argues that even if Gilfillan did not validly consent to the breath test, no warrant was required because the breath test was a valid search incident to arrest pursuant to *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). But the commissioner did not make this argument before the district court and appellate courts generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Consequently, and also because we conclude that Gilfillan freely and voluntarily consented to the breath test, we do not address this issue.