STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0119

State of Minnesota,
Respondent,

vs.

Adrian Thomas Howell,
Appellant.

Filed August 26, 2019
Affirmed
Larkin, Judge

Chippewa County District Court
File No. 12-CR-18-442

Keith Ellison, Attorney General, Peter D. Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Matthew Haugen, Chippewa County Attorney, Montevideo, Minnesota (for respondent)

Joel A. Novak, John E. Mack, New London Law, P.A., New London, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges his judgments of conviction for first-degree test refusal and driving after cancellation, arguing that his constitutional right to counsel was violated. He also argues that the evidence was insufficient to establish his guilt on an unadjudicated conviction of first-degree driving while impaired (DWI). We affirm.

FACTS

On July 28, 2018, Granite Falls Police Officer Kyler Jelen was on routine patrol and pulled a vehicle over after it failed to stop at a stop sign. Appellant Adrian Thomas Howell was the driver. Howell's eyes were "bloodshot, glossy, and watery," he avoided making eye contact, and his speech was slow.

Officer Jelen learned that Howell's driver's license was cancelled as inimical to public safety and arrested Howell for driving after cancellation. The officer handcuffed Howell and placed him in the back seat of a squad car. Officer Jelen then spoke with Howell's passenger, H.W., who admitted that she had a bag of hypodermic needles in the vehicle. Officer Jelen searched the bag and found four hypodermic needles, a tourniquet, a substance that appeared to be marijuana, and a few loose prescription drug pills. H.W. told Officer Jelen that one of the syringes recently contained methamphetamine. H.W. also told Officer Jelen that she and Howell had last used methamphetamine that morning.

Officer Jelen advised Howell of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966). Howell agreed to speak with the officer. Officer Jelen removed Howell from the squad car, removed his handcuffs, administered field sobriety tests, and

observed signs of impairment. The officer transported Howell to Yellow Medicine County Jail.

While at the jail, the officer obtained a search warrant for Howell's blood. The officer advised Howell that refusal to submit to blood-alcohol testing is a crime and asked Howell if he would submit to a blood or urine test. *See* Minn. Stat. § 171.177, subd. 1 (Supp. 2017) ("At 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."). Howell asked for a lawyer, but was not allowed to contact one. Howell refused to provide a sample for testing.

Respondent State of Minnesota charged Howell with first-degree DWI, first-degree test refusal, and driving after cancellation. The district court held an omnibus hearing in November 2018, and Howell raised three issues: (1) whether there was probable cause to support the first-degree DWI charge, (2) whether a defendant has a right under the Minnesota Constitution or the Fifth Amendment to consult an attorney before deciding whether to submit to a blood test pursuant to a search warrant, and (3) whether the expansion of the underlying traffic stop was supported by reasonable suspicion.

Neither the state nor Howell presented testimony at the omnibus hearing. Instead, the state offered eight exhibits: Officer Jelen's police report, two reports regarding Howell's criminal history, squad video from Officer Jelen's squad car, two videos from the jail, a report from Officer Jelen indicating that Howell refused to provide a blood sample, and a report indicating that Officer Jelen did not read Howell Minnesota's statutory breath-test advisory. *See* Minn. Stat. § 169A.51, subd. 2 (Supp. 2017) (stating that when

an officer requests a breath test, a "[b]reath test advisory" must be given that informs the driver of his right to consult a lawyer prior to testing). The district court took the matter under advisement and later rejected all of Howell's arguments for relief.

The parties agreed to proceed under Minn. R. Crim. P. 26.01, subd. 4, which allows a defendant to stipulate to the prosecution's case to obtain review of a ruling on a specified pretrial issue. The parties executed, and the district court received, Howell's Waiver of Rights Before Trial on Stipulated Evidence Pursuant to Minn. R. Crim. P. 26.01, subd. 4. Pursuant to the parties' agreement, the district court received 14 exhibits. Based on those exhibits, the district court found Howell guilty of first-degree DWI, first-degree test refusal, and driving after cancellation. The district court entered judgments of conviction for first-degree test refusal and driving after cancellation and sentenced Howell to serve 60 months in prison.

Howell appeals.

D E C I S I O N

I.

Howell contends that the police violated his limited right to counsel under the Minnesota Constitution because he requested counsel before the police asked him to submit to chemical testing and the police did not accommodate that request. Whether an officer has vindicated a driver's right to counsel presents a mixed question of law and fact. *Mell*

v. Comm'r of Pub. Safety, 757 N.W.2d 702, 712 (Minn. App. 2008). If the facts are undisputed, we review de novo whether an individual's right to counsel was violated. *Id.*

Howell relies on *Friedman v. Comm'r of Pub. Safety*, in which the Minnesota Supreme Court held that "[t]he Minnesota Constitution, article I, section 6 gives [an individual] a limited right to consult an attorney before deciding whether or not to submit to chemical testing for blood alcohol." 473 N.W.2d 828, 829 (Minn. 1991); *see* Minn. Const. art. I, § 6 ("The accused shall enjoy the right to . . . have the assistance of counsel in his defense.").

After oral argument in this case, the supreme court decided *State v. Rosenbush*, which squarely addresses the issue presented in this case: whether a driver arrested on suspicion of DWI and presented with a search warrant authorizing a search of his blood has a limited right to counsel under article I, section 6 of the Minnesota Constitution, as recognized in *Friedman*, before deciding whether to submit to chemical testing. ___ N.W.2d ___, ___, 2019 WL 3000809, at *2 (Minn. July 10, 2019).

The facts of *Rosenbush* are similar to those in this case. A sheriff's deputy arrested Rosenbush for DWI and obtained a search warrant to take a sample of her blood for alcohol-concentration testing. *Id.* at *1. When the deputy presented Rosenbush with the search warrant, he read her Minnesota's statutory advisory regarding blood and urine tests, telling her that "refusal to submit to a blood or urine test is a crime." *Id.*; *see* Minn. Stat. § 171.177, subd. 1. Rosenbush allowed her blood to be drawn, and tests showed that she had an alcohol concentration over the legal limit. *Rosenbush*, 2019 WL 3000809, at *1.

The state charged Rosenbush with DWI, and she moved to suppress the results of her blood test, arguing that under *Friedman*, she had a limited constitutional right to consult with an attorney before submitting to the test and that the deputy failed to vindicate that right. *Id.* at *2. Rosenbush argued that regardless of the presence of a warrant, the consequences of her decision to submit to a blood test were identical to those that the driver in *Friedman* faced and that she therefore should have the same limited right to counsel as the driver in *Friedman*. *Id.* at *5. The state countered that the presence of a warrant fundamentally changed Rosenbush's encounter from the one at issue in *Friedman*. *Id.*

The supreme court agreed with the state and 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 *1, *5-6. The supreme court reasoned that "the existence of a search warrant eliminates many of the concerns that led [it] to expand the right to counsel in *Friedman*," explaining that when a suspected impaired driver is presented with a search warrant for a blood or urine test, "the driver is not meeting his adversary in the same manner as the driver in *Friedman* because a neutral judicial officer has determined that the police may lawfully obtain a sample of the driver's blood." *Id.* at *5 (quotation omitted).

Rosenbush was pending when this court heard oral arguments in this case. Howell addressed *Rosenbush* in this appeal, arguing that "[i]f Rosenbush prevails, [he] must prevail" and that "[e]ven if Rosenbush does not prevail, [he] should prevail." As support for the latter proposition, Howell argues that unlike Rosenbush, he requested an attorney and "[a]rticle I, section 6 of the Minnesota Constitution must cover when an arrested

Defendant asks for an attorney, when that Defendant is facing possible prosecution based on his answer to a question posed by State actors."

As support for that argument, Howell refers both to the state constitutional right to counsel under *Friedman* and the right to counsel that arises when an arrestee is read his *Miranda* rights. As to Howell's reliance on *Friedman* and his attempt to distinguish *Rosenbush* factually, the supreme court's reasoning in *Rosenbush* does not suggest a different outcome in this case based on Howell's request for counsel. *See id.* ("[W]e have never held that the Minnesota Constitution provides the subject of a search warrant with the right to consult counsel before a warrant can be executed."). We therefore follow *Rosenbush* and hold that because the police obtained a warrant for Howell's blood, he did not have a limited right to counsel under *Friedman*. We address Howell's arguments regarding the *Miranda* right to counsel in section II of this opinion.

II.

Howell contends that the police violated his Fifth Amendment right to counsel as set forth in *Miranda*, 384 U.S. at 444-45, 86 S. Ct. at 1612. Under *Miranda*,

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. . . . Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made

> voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

384 U.S. at 444-45, 86 S. Ct. at 1612 (footnote omitted).

The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; see Minn. Const. art. I, § 7 ("No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."). "A right to counsel arises under the Fifth Amendment when a suspect is in custody in order to protect the suspect's constitutional privilege against self-incrimination." *State v. Borg*, 806 N.W.2d 535, 545-46 (Minn. 2011) (citing *Miranda*, 384 U.S. at 469, 86 S. Ct. at 1625). "[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege . . . ." *Miranda*, 384 U.S. at 469, 86 S. Ct. at 1625.

Howell argues that his Fifth Amendment right to counsel was violated because he was read his *Miranda* rights, he invoked his right to counsel, and the officers did not give him an opportunity to contact counsel, but instead "made him orally choose between allowing them to take blood, or refusing to allow them to take blood."[1] For the reasons that follow, we are not persuaded.

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[1] Howell also asserts that he is entitled to relief on "Due Process grounds" and that his Sixth Amendment right to counsel was violated. And he alludes to "First Amendment problems." Such claims were not raised and decided in the district court and therefore are not among the issues addressed in the district court's dispositive pretrial ruling. Moreover, Howell does not provide adequate legal authority or legal argument regarding the purported due-process, Sixth Amendment, and First Amendment violations. We therefore do not consider those issues. *See State v. Ortega*, 770 N.W.2d 145, 147 n.1, 149 (Minn. 2009)

Not every incriminating response to police questioning is protected by the Fifth Amendment. "[T]he special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation." *Rhode Island v. Innis*, 446 U.S. 291, 300, 100 S. Ct. 1682, 1689 (1980). "'Interrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.*

Focusing on the "compulsion" requirement, the United States Supreme Court has held that "the admission into evidence of a defendant's refusal to submit to [a blood-alcohol] test . . . does not offend the right against self-incrimination." *South Dakota v. Neville*, 459 U.S. 553, 554, 559-64, 103 S. Ct. 916, 917-18, 920-23 (1983). In doing so, the Supreme Court reasoned that "no impermissible coercion is involved when the suspect refuses to submit to take the test." *Id.* at 562, 103 S. Ct. at 921. The Supreme Court explained:

> In the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*. As we stated in *Rhode Island v. Innis*, police words or actions "normally attendant to arrest and custody" do not constitute interrogation. The police inquiry here is highly regulated by state law, and is presented in virtually the same words to all suspects. It is similar to a police request to submit to fingerprinting or photography. [A suspect's] choice of refusal thus enjoys no prophylactic *Miranda* protection outside the basic Fifth Amendment protection.

(stating that review of a rule 26.01, subdivision 4, proceeding is limited to the dispositive pretrial ruling); *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts "generally will not decide issues which were not raised before the district court); *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (stating that issues not adequately briefed are waived), *review denied* (Minn. Aug. 5, 1997).

Id. at 564 n.15, 103. S. Ct. at 923 n.15 (citation omitted). In sum, "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." *Id.* at 564, 103 S. Ct. at 923.

In *Nyflot v. Comm'r of Pub. Safety*, the Minnesota Supreme Court relied on *Neville* and held that a "[d]river who is arrested for driving while under the influence of alcohol has no right, statutory or constitutional, to consult with counsel before deciding whether to submit to chemical testing under the implied consent law." 369 N.W.2d 512, 513, 517 (Minn. 1985), *overruled in part by Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991). As to the Fifth Amendment right to counsel, the supreme court explained:

> It is also clear that the right to counsel recognized in *Miranda* does not apply to the limited questioning of a driver to determine if he will consent to a chemical test. The *Miranda* right to counsel applies only to "interrogation," which the Court has defined as express questioning or other words or actions by police reasonably likely to evoke an incriminating response. In *South Dakota v. Neville*, the Court made it clear that "in the context of an arrest for driving while intoxicated, a police inquiry of whether the suspect will take a blood-alcohol test is not an interrogation within the meaning of *Miranda*."

Id. at 516 (citations omitted).

Although the Minnesota Supreme Court later overruled *Nyflot* in *Friedman*, it did so only to the extent that it recognized—under article I, section 6 of the Minnesota Constitution—a driver's limited right to consult an attorney before deciding whether to submit to chemical testing for blood alcohol. *Friedman*, 473 N.W.2d at 829-32; *see* Minn. Const. art. I, § 6 ("The accused shall enjoy the right to . . . have the assistance of counsel

in his defense."). In doing so, the supreme court noted that although "[s]tate courts must follow the United States Supreme Court in matters of federal constitutional law," "[t]hey are free to interpret their own law . . . so as to provide greater protection for individual rights than that which the federal Constitution minimally mandates." *Friedman*, 473 N.W.2d at 830. The supreme court emphasized: "We decide [*Friedman*] solely on the basis of article I, section 6 of [the] Minnesota Constitution, and not on any provision of either federal law or the United States Constitution." *Id.* at 837.

The supreme court's decision based on article I, section 6 of the Minnesota Constitution in *Friedman* does not impact its previous conclusion, in *Nyflot*, that under United States Supreme Court precedent, the Fifth Amendment right to counsel does not apply when a person is asked to submit to a blood-alcohol test after an arrest for DWI. Moreover, the Minnesota Supreme Court has not interpreted article I, section 7 of the Minnesota Constitution to provide greater protection against compelled self-incrimination than the corresponding provisions of the Fifth and Fourteenth Amendments to the federal constitution. *See McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 856 (Minn. 1991) (rejecting argument that "the privilege against compelled self-incrimination protected by article 1, section 7 of the Minnesota Constitution has been interpreted by [the supreme] court to provide greater protection than does the privilege protected by the fifth and fourteenth amendments to the federal constitution").

Howell focuses on the fact that his oral refusal to submit to testing was an "incriminating testimonial communication," which resulted from express questioning. *See Innis*, 446 U.S. at 300-01, 100 S. Ct. at 1689 ("[T]he *Miranda* safeguards come into play

whenever a person in custody is subjected to either express questioning or its functional equivalent."). Howell relies on *State v. Heinonen*, in which the Minnesota Supreme Court stated that "a defendant's communication is only testimonial under the Fifth Amendment" if it "speaks his guilt." 909 N.W.2d 584, 593 (Minn. 2018) (quotation omitted). Howell argues that his "refusal to consent to [the] search itself was an incriminating testimonial communication" because it "spoke [his] guilt."

Howell's reliance on *Heinonen* is unavailing because that case involved a request for a DNA sample, and not a request for a blood-alcohol test after a DWI arrest, and the supreme court therefore did not address the United States Supreme Court's holding in *Neville*. *See id.* at 587 ("This case requires us to decide whether police officers violated an arrestee's Fifth Amendment right when, after the arrestee invoked his privilege against self-incrimination, the officers later asked him if he was willing to sign a written consent to the taking of a DNA sample . . . .").

In sum, caselaw regarding the Fifth Amendment right to counsel in the context of blood-alcohol testing after a DWI arrest establishes that Howell's refusal to submit to testing is not protected by the Fifth Amendment. Thus, the state's failure to honor his request for counsel did not violate the Fifth Amendment.

III.

Howell contends that the evidence was insufficient to sustain the district court's finding of guilt on his first-degree DWI charge, arguing that the state did not prove beyond a reasonable doubt that he was "under the influence of a controlled substance." The state counters that because Howell stipulated to the prosecution's case to obtain review of the

district court's pretrial ruling under Minn. R. Crim. P. 26.01, subd. 4, he "is foreclosed from challenging his guilt on appeal."

Minn. R. Crim. P. 26.01, subd. 4(a) provides: "When the parties agree that the [district] court's ruling on a specified pretrial issue is dispositive of the case, or that the ruling makes a contested trial unnecessary, the following procedure must be used to preserve the issue for appellate review." The defendant must maintain a not-guilty plea; acknowledge that the pretrial issue is dispositive; waive the right to a jury trial; waive the right to testify at trial, call witnesses, and question the prosecution's witnesses; stipulate to the prosecution's evidence; and "*acknowledge that appellate review will be of the pretrial issue, but not of the defendant's guilt*, or of other issues that could arise at a contested trial." Minn. R. Crim. P. 26.01, subd. 4(b)-(f) (emphasis added) (stating that a defendant "must personally waive the rights specified in Rule 26.01, subdivision 3(b)(1)-(4)"); *see id.*, subd. 3(b)(1)-(4) (requiring waiver of right to testify at trial, call witnesses, and question the prosecution's witnesses).

Howell argues that it is unclear whether the parties proceeded under subdivision 4 of rule 26.01, as opposed to subdivision 3, which provides for a trial on stipulated facts or on stipulated evidence and allows the defendant to appeal "from the judgment of conviction and raise issues on appeal as from any trial to the court." Minn. R. Crim. P. 26.01, subd. 3(f). The record refutes that argument. The waiver that Howell signed is captioned as a "Waiver of Rights Before Trial on Stipulated Evidence Pursuant to Minn. R. Crim. P. 26.01, subd. 4." The language in that waiver specifically tracks the requirements of rule 26.01, subdivision 4, as set forth above. Moreover, the court and the parties referred to the

trial as a proceeding under subdivision 4. And the district court's order finding Howell guilty states that the trial "was conducted under Rule 26.01, subd. 4."

Howell notes that in district court, the parties referred to both "stipulated facts" and "stipulated evidence" when discussing the procedure on the record. Howell also notes that his written waiver refers to both a "Trial on Stipulated Evidence" and a "Stipulated Facts Trial." Those discrepancies are inconsequential for three reasons: (1) Howell's written waiver cites subdivision 4 and complies with all of the requirements of subdivision 4, (2) the parties expressly referred to the proceeding as one under subdivision 4, and (3) the district court identified and treated the proceeding as one under subdivision 4.

Howell also argues that his pretrial challenge to probable cause for the first-degree DWI charge raised "[s]ufficiency of the evidence" as a pretrial issue and therefore preserved it for appeal. Howell asserts that his probable-cause challenge required the district court to determine whether "there would be enough evidence to convict" him.

Howell's attempt to equate a probable-cause challenge with a sufficiency challenge is unavailing. When assessing whether there is probable cause for a criminal charge, a court asks "whether the evidence worthy of consideration brings the charge against the prisoner within reasonable probability." *State v. Gayles*, 915 N.W.2d 6, 11-12 (Minn. App. 2018) (quotation omitted). However, when assessing whether there is sufficient evidence to sustain a guilty verdict, a court asks whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the fact-finder to reach the verdict that it did, consistent with the presumption of innocence and the beyond-a-reasonable-doubt standard of proof. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004); *State v.*

Webb, 440 N.W.2d 426, 430 (Minn. 1989).[2] Thus, although a probable-cause challenge and a sufficiency challenge both require assessment of the supporting evidence, they are distinct challenges governed by different standards. *See, e.g.*, *State ex rel. Hastings v. Bailey*, 116 N.W.2d 548, 551 (Minn. 1962) (noting that at a preliminary hearing, the state need not prove guilt beyond a reasonable doubt).

Moreover, once a defendant has been found guilty, a pretrial probable-cause challenge is immaterial because "[t]he standard for the sufficiency of the evidence to support a conviction is much higher than probable cause." *State v. Holmberg*, 527 N.W.2d 100, 103 (Minn. App. 1995), *review denied* (Minn. Mar. 21, 1995). And Minnesota caselaw establishes that a proceeding under rule 26.01, subdivision 4, is meant to preserve pretrial issues for appeal; it is not "a means for obtaining an appellate sufficiency of the evidence review." *State v. Busse*, 644 N.W.2d 79, 88-89 (Minn. 2002); *see State v. Mahr*, 701 N.W.2d 286, 292 (Minn. App. 2005) (stating that a subdivision 4 proceeding is "a concession that the state's facts are accurate, with the primary purpose of permitting the defendant to appeal a pretrial ruling, while avoiding a trial for reasons of judicial economy"), *review denied* (Minn. Oct. 26, 2005).

In sum, Howell's sufficiency challenge to the guilty verdict is barred under the clear language of Minn. R. Crim. P. 26.01, subd. 4, as well as caselaw applying that rule. Howell

[2] If the state relies on circumstantial evidence to prove an element of an offense, an appellate court applies a heightened standard of review. *See State v. Harris*, 895 N.W.2d 592, 601-03 (Minn. 2017) (applying circumstantial-evidence standard to individual element of criminal offense that was proved by circumstantial evidence).

therefore cannot challenge the sufficiency of the evidence to sustain the district court's finding of guilt on his first-degree DWI charge.

Lastly, we note that because the district court did not enter judgment of conviction or sentence Howell on the first-degree DWI charge, his sufficiency challenge is moot. *See State v. Martin*, 773 N.W.2d 89, 108 (Minn. 2009) (stating that because judgment of conviction was not entered for a crime committed for the benefit of a gang and defendant was not sentenced for that offense, "the issue of whether there was sufficient evidence to convict him on that count is moot.").

Affirmed.