STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0777

Ellen Louise Arnt, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 23, 2019
Affirmed
Reilly, Judge

Pipestone County District Court
File No. 59-CV-15-419

Paul M. Malone, Malone & Mailander, Slayton, Minnesota (for appellant)

Keith Ellison, Attorney General, William Young, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Cochran, Judge.

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

REILLY, Judge

In this appeal after remand to determine whether appellant voluntarily consented to provide a urine sample given the partial inaccuracy of the implied-consent advisory, appellant argues that (1) the district court's decision that appellant freely and voluntarily provided a urine sample was clearly erroneous based on the totality of the circumstances,

(2) the district court improperly required evidence that appellant's will was overborne to find that her consent was coerced, and (3) the district court should have drawn an adverse inference against the respondent commissioner of public safety because the commissioner failed to introduce into evidence video recordings of the arrest and implied-consent advisory. Because the district court's findings of fact were not clearly erroneous and the district court did not otherwise err, we affirm.

FACTS

In September 2015, a deputy with the Pipestone County Sheriff's Department was on patrol when he observed a vehicle traveling in front of him that was "speeding up and slowing down." The deputy activated his radar and obtained a speed reading of approximately 72 miles per hour. Because the driver of the vehicle was traveling over the posted 55-miles-per-hour speed limit, the deputy activated his emergency lights and stopped the vehicle.

The deputy approached the vehicle and identified the driver as appellant Ellen Louise Arnt. While speaking with appellant, the deputy observed multiple indicia of intoxication. The deputy also saw an open can of beer in appellant's center console and appellant admitted that she had a "couple" of beers. Based on these observations, the deputy asked appellant to perform field sobriety tests. After failing the field sobriety tests, appellant agreed to take a preliminary breath test; however, the deputy was unable to obtain a result because appellant was not properly blowing into the machine. Because the deputy believed appellant was under the influence of alcohol, he placed appellant under arrest. The deputy handcuffed appellant and she was transported to jail.

At the implied-consent hearing in December 2015, the deputy testified that he read appellant the implied-consent advisory twice, word-for-word in the booking room at the Pipestone county jail. The first time he read the advisory to appellant, she asked to speak with an attorney. The deputy provided appellant with a telephone and directory and allowed her "quite some time" to make calls, but appellant was unable to reach the attorney with whom she wanted to speak. The deputy then offered appellant a breath test and appellant agreed; however, the test produced a deficient sample because appellant was not blowing the required amount of air.

The deputy again read the advisory, which informed appellant that it was a crime to refuse a test, and appellant responded that she understood. The deputy asked appellant if she wanted to contact an attorney. Appellant was provided with a telephone and directory and again attempted to reach an attorney but was unable to do so. The deputy offered appellant a urine test and she agreed to take the test. The deputy testified that appellant was handcuffed while she was in the jail and the booking room due to protocol. The deputy further testified that he had a calm demeanor while dealing with appellant and that he did not get upset at her, yell at her, or physically or verbally threaten her.

The district court denied appellant's petition to rescind the license revocation and appellant subsequently appealed. We affirmed in part,[1] reversed in part and remanded to the district court "to reconsider whether, in light of the inaccurate implied-consent

[1] We rejected appellant's due-process challenge because appellant did not testify at the hearing or produce any other evidence to establish that she "prejudicially relied" on the implied-consent advisory. *Arnt v. Comm'r of Pub. Safety*, No. A16-0852, 2018 WL 5316090, at *3 (Minn. App. Oct. 29, 2018).

advisory, the totality of the circumstances indicates that appellant's consent to the urine test was voluntarily given." *Arnt*, 2018 WL 5316090, at *5. This court left to the district court's discretion whether to reopen the record on remand. *Id*. at *5 n.5.

At the hearing following remand, the district court reopened the record and allowed appellant to testify, because she did not testify at the previous hearing. Appellant testified that, while at the jail, she was read the implied-consent advisory and allowed to call an attorney, but was unable to reach one. Appellant was handcuffed during this time, with one handcuff attached to the counter and the other cuff unhooked so she could use the phone. After agreeing to and unsuccessfully attempting the breath test, the deputy again read the advisory to appellant. Appellant testified that the deputy was "quite upset," he was screaming at her and that he seemed agitated. Appellant further testified that she was given a second opportunity to consult with an attorney and was provided a telephone and phone books, but she was again unable to reach an attorney. Appellant was told that it was a crime to refuse to take a test, which upset her. Appellant agreed to take a urine test because she didn't want to commit a crime. Appellant agreed that while at the jail, the deputy never physically threatened her. When asked whether she was verbally threatened, appellant responded that the deputy was very upset, raised his voice, and was never calm. She said that the most threatening thing was his intonation. Appellant also testified that she was previously arrested for DWI in 1993 and 1998.

The deputy also testified. He was asked, among other things, whether the events involving appellant were videotaped, and the deputy agreed that they were. The deputy

indicated that "the State" should have the videotape. The video was never offered as evidence by either party.

The district court found that appellant's consent to the urine test was voluntarily given and again denied appellant's motion to rescind the revocation of her driver's license. The district court found that "[t]he [p]rocess of arresting the [appellant] appears to have followed protocol. Nothing in the record credibly suggests that [the deputy] was threatening or acted abusively toward [appellant]." The district court also found that the "process of booking the [appellant], as well as the reading of the advisory, followed established protocol and was not abusive or threatening in nature." Additionally, the district court found that "this was the third occasion on which the [appellant] had been arrested for [DWI] rendering her less likely to have been intimidated or frightened by the nature of the encounter." Finally, the district court found that "the [appellant] was afforded an adequate opportunity to consult with an attorney." After examining the totality of the circumstances, the district court concluded that appellant's

> consent to testing was freely and voluntarily given. The encounter was no doubt unpleasant for the [appellant] but her will was not overborn [sic] such that her consent was coerced. The nature of the stop, the questioning, and [appellant's] eventual arrest evidences no coercive behavior on the part of [the deputy].

This appeal follows.

D E C I S I O N

I. The district court's finding that appellant freely and voluntarily provided a urine sample was not clearly erroneous based on the totality of the circumstances.

Appellant argues that the district court clearly erred when it found that appellant freely and voluntarily provided a urine sample based on the totality of the circumstances. "Under the Fourth Amendment to the United States Constitution and Article I, § 10 of the Minnesota Constitution, warrantless searches are presumptively unreasonable unless one of a few specifically established and well-delineated exceptions applies." *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011) (quotations and citations omitted). "Taking blood and urine samples from someone constitutes a 'search' under the Fourth Amendment." *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). However, if the subject of the search consents, the police do not need a warrant. *Id*. For the consent exception to apply, the state must show "by a preponderance of the evidence that consent was given freely and voluntarily." *Diede*, 795 N.W.2d at 846. "Whether consent was voluntary is determined by examining 'the totality of the circumstances, including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said.'" *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999) (citation omitted). "[I]nvoluntariness of a consent to a police request is not to be inferred simply because the circumstances of the encounter are uncomfortable for the person being questioned." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994).

Whether consent is given voluntarily is a question of fact "and it varies with the facts of each case." *Id*. As such, this court reviews the district court's findings for clear

error. *Diede*, 795 N.W.2d at 843. "Findings of fact are clearly erroneous if, on the entire evidence, we are left with the definite and firm conviction that a mistake occurred." *Id*. at 846-47.

First, appellant contends that her consent was not voluntary because the implied-consent advisory was inaccurate and she was threatened with criminal charges. We agree that the implied-consent advisory read to appellant was partially inaccurate because it conveyed to her that refusing to submit to a warrantless urine test was a crime. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (holding that the states cannot impose criminal penalties on the refusal to submit to a warrantless blood test); *see also State v. Thompson*, 886 N.W.2d 224, 234 (Minn. 2016) (concluding that a person cannot be prosecuted for refusing to submit to an unconstitutional warrantless blood or urine test). However, we disagree that the "threat" of criminal charges made appellant's consent involuntary, as the supreme court has previously rejected the notion that a driver's consent is coerced when a consequence exists for refusing to take a chemical test. *See Brooks*, 838 N.W.2d at 570 ("[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."). Moreover, the inaccurate advisory and threat of criminal charges are but factors to be considered under the totality of the circumstances. *See Harris*, 590 N.W.2d at 102 ("Whether consent was voluntary is determined by examining 'the totality of the circumstances.'").

Second, appellant contends the district court's reasoning that appellant was not coerced because she had previously been arrested for DWI and was therefore comfortable around police is "opposed to real life." The district court found that "this was the third

occasion on which the [appellant] had been arrested for [DWI] rendering her less likely to have been intimidated or frightened by the nature of the encounter." Appellant does not cite to any legal authority or evidence in the record to support her contention that the district court's reasoning is "opposed to real life" or contrary to appellant's experience. The district court's findings regarding appellant's previous experience with law enforcement and DWI arrests are not clearly erroneous.

Third, appellant contends that the police protocols, including the protocol of handcuffing appellant, rendered her consent involuntary. We are not persuaded. In *Poeschel v. Comm'r of Pub. Safety*, this court addressed Poeschel's contention that her consent was involuntary because she was asked to perform field sobriety tests, handcuffed during her arrest, and placed in a locked police car. 871 N.W.2d 39, 46 (Minn. App. 2015). We rejected those arguments, finding that the facts of the case "show[ed] a routine arrest for DWI" and concluded that Poeschel voluntarily consented to provide a urine sample. *Id*. Here, the district court found that appellant's arrest followed protocol and that nothing in the record, "credibly suggests that [the deputy] was threatening or acted abusively toward [appellant]." The district court's finding that the deputy was not threatening toward appellant is not clearly erroneous.

Finally, appellant contends that even though appellant was twice afforded opportunities to speak with counsel, because appellant was not able to reach an attorney, her consent was coerced. In *Brooks*, the supreme court noted that it has "recognized that the ability to consult with counsel about an issue supports the conclusion that a defendant made a voluntary decision." 838 N.W.2d at 572. While the supreme court found that the

ability to speak with an attorney weighs in favor of a voluntary consent, the court did not otherwise conclude that the inability to speak with an attorney renders consent involuntary. The district court's finding that appellant was "afforded an adequate opportunity to consult with an attorney" was not clearly erroneous.

The district court's finding that appellant's consent to testing was "freely and voluntarily given" is not clearly erroneous based on the totality of the circumstances.

II. The district court did not apply the incorrect standard of proof.

Appellant argues that the district court applied the incorrect standard of proof because the district court required a showing that appellant's "will was not overborn [sic] such that her consent was coerced." In order for the consent exception to apply to a search, the state must prove by a preponderance of the evidence that the consent was "given freely and voluntarily." *Diede*, 795 N.W.2d at 846.

The district court, after examining "the totality of the circumstances" surrounding the encounter between the deputy and the appellant was satisfied that appellant's "consent to testing was freely and voluntarily given." The district court found that "[t]he encounter was no doubt unpleasant for the [appellant] but her will was not overborn [sic] such that her consent was coerced."[2] There is no indication that the district court erroneously shifted the burden to appellant to show that her will was overborne or that the district court ever

[2] This language mirrors the language in *Brooks*, 838 N.W.2d at 571. In *Brooks*, the supreme court noted that the Hennepin County District Court found that nothing in the record suggested that Brooks "was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired." *Id*. at 568.

declared or implied that appellant was required to make a showing that her will was overborne in order to succeed on her claim. As such, appellant's claim is without merit.

III. The district court was not required to make an adverse inference against the commissioner of public safety based on the commissioner's failure to submit into evidence video recordings of appellant's arrest and the implied-consent advisory.

Appellant argues that because the commissioner did not produce "the best evidence available"—a video and audio recording of appellant's arrest and testing—the district court erred in not drawing an adverse inference against the commissioner. "Minnesota, like most jurisdictions, permits an unfavorable inference to be drawn from failure to produce evidence in the possession and under the control of a party to litigation . . . [the finder of fact] may infer the evidence, if produced, would have been unfavorable to that party." *Federated Mut. Ins. Co. v. Litchfield Precision Components, Inc.*, 456 N.W.2d 434, 436-37 (Minn. 1990) (quotations and citations omitted). While the district court is permitted to draw an adverse inference if a party fails to produce evidence, it is not required to draw such an inference. *See Wajda v. Kingsbury*, 652 N.W.2d 856, 861 (Minn. App. 2002) (stating that Minnesota "permits" an adverse inference to be drawn and the factfinder "may" infer that the evidence would have been unfavorable), *review denied* (Minn. Nov. 19, 2002). Because the district court was not required to draw an adverse inference based on the commissioner's failure to offer the video evidence, appellant's argument fails.

Affirmed.