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STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1147

Mark Jerome Johnson, petitioner,
Respondent,

vs.

State of Minnesota,
Appellant.

Filed June 22, 2020
Reversed and remanded
Hooten, Judge

Ramsey County District Court
File No. 62-CR-10-1150

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for respondent)

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

John J. Choi, Ramsey County Attorney, St. Paul, Minnesota; and

Adam E. Petras, Special Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Jesson, Judge.

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

HOOTEN, Judge

This appeal follows the Minnesota Supreme Court's reversal of respondent Mark Jerome Johnson's DWI test-refusal conviction pursuant to *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016) and its remand to the district court for further proceedings. The state argues that: (1) the postconviction court erred in vacating Johnson's conviction because the United States Supreme Court's decision in *Missouri v. McNeely*, 569 U.S. 141, 133, S. Ct. 1552 (2013), did not apply retroactively to respondent's conviction; and (2) the postconviction court erred in placing the burden on the state to show the presence of an exigent circumstance permitting a request for a warrantless blood test. Because this court has already ruled that *McNeely* applies retroactively to test refusal convictions in *Hagerman v. State*, __ N.W.2d __ (Minn. App. 2020), we reverse and remand for further proceedings consistent with the heightened pleading requirement in *Fagin v. State*, 933 N.W.2d 774 (Minn. 2019).

FACTS

In 2009, a St. Anthony police officer stopped Johnson while driving because his vehicle had expired tabs. While speaking with Johnson, the officer "smelled the strong odor of an alcoholic beverage coming from Johnson's breath" and observed that his eyes were "red, watery and bloodshot." After Johnson failed two field sobriety tests, the officer asked Johnson to take a preliminary breath test. Johnson refused. The officer arrested Johnson for DWI and read him the implied consent advisory. The officer asked if he would

submit to a blood or urine test, but Johnson refused to respond. Because Johnson had three or more qualifying prior impaired driving incidents in the previous ten years, the state charged him with first-degree refusal to submit to a chemical test in violation of Minn. Stat. § 169A.20, subd. 2 (2008). Johnson pleaded guilty and was convicted of first-degree test refusal.

In a separate criminal case in 2014, Johnson again refused to take a blood or urine test after being stopped by police and suspected of driving while intoxicated. *Johnson v. State*, 916 N.W.2d 674, 678 (Minn. 2018). After the state brought charges for first-degree test refusal in the 2014 case, Johnson pleaded guilty and was convicted. *Id.* Johnson did not file direct appeals in either case, but filed a consolidated petition for postconviction relief in 2016. *Id.*

The postconviction court denied Johnson's petition, concluding that the rule announced by the United States Supreme Court in *Birchfield*, as applied in Minnesota through *Trahan* and *Thompson*, does not apply retroactively to Johnson's convictions. Johnson appealed to this court, and we affirmed the postconviction court's denial of his postconviction petition. *Johnson v. State*, 906 N.W.2d 861, 867 (Minn. App. 2018). The Minnesota Supreme Court granted review and reversed this court's decision. *Johnson*, 916 N.W.2d at 684.

In its decision, the Minnesota Supreme Court considered whether the *Birchfield* rule—that "the State may not criminalize refusal of a blood or a urine test absent a search warrant or a showing that a valid exception to the warrant requirement applies"—existed retroactively. *Id.* at 679. First, the Minnesota Supreme Court considered whether the

Birchfield rule is procedural or substantive. *See Teague v. Lane*, 489 U.S. 228, 305–07, 109 S. Ct. 1061, 1072–73 (1989) (describing the *Teague* exceptions that new rules generally do not have a retroactive effect). The Minnesota Supreme Court ruled that the *Birchfield* rule is substantive because it "does not merely regulate the manner in which a defendant is determined to be guilty or not guilty" but "changes who can be prosecuted for test refusal." *Johnson*, 916 N.W.2d at 682. Therefore, a person who refuses to submit to a warrantless blood or urine test cannot be prosecuted for test refusal unless an exception to the warrant requirement applies. *Id.* Accordingly, the Minnesota Supreme Court held that the *Birchfield* rule applies retroactively to Johnson's convictions. *Id.* at 684. However, it determined that the reversal of his convictions was not automatic and remanded for the district court to apply the *Birchfield* rule and decide if the test-refusal statute was unconstitutional as applied to Johnson. *Id.*

The postconviction court ruled that the test-refusal statute, as applied to Johnson's 2009 conviction,[1] was unconstitutional as the search was warrantless and no exigent circumstances existed. The postconviction court noted that the state carried the burden of showing under the totality of the circumstances that an exception to the warrant requirement applied. The postconviction court ruled that the state did not meet this burden and vacated Johnson's 2009 conviction.

The state appeals.

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[1] Johnson's convictions were treated separately upon remand from the Minnesota Supreme Court and the only conviction at issue in this appeal is his 2009 test-refusal conviction.

D E C I S I O N

I. As held in *Hagerman v. State*, *McNeely* applies retroactively to test-refusal convictions.

The state argues that the postconviction court erred when it vacated Johnson's conviction because *McNeely* does not apply retroactively, and at the time of Johnson's crime, the single factor of alcohol dissipation from his blood justified a warrantless search.

We review decisions of the postconviction court for an abuse of discretion. *Dikken v. State*, 896 N.W.2d 873, 876 (Minn. 2017). "A postconviction court abuses its discretion when it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (quotations omitted).

In 2009, when Johnson refused to submit to a blood or urine test, the single factor of dissipation of alcohol from the bloodstream was considered a per se exigent circumstance to justify a warrantless search. *See State v. Shriner*, 751 N.W.2d 538, 546 (Minn. 2008) ("[T]he rapid dissipation of blood-alcohol content caused by the body's natural processes is a single factor that creates the exigent circumstances . . . to justify a warrantless blood draw."). In its 2013 decision in *McNeely*, the United States Supreme Court ruled that the natural dissipation of alcohol in the bloodstream does not present a per se exigency to justify an exception to the warrant requirement. 569 U.S. at 156, 133 S. Ct. at 1563. Instead, the Supreme Court held that exigency "must be determined case by case based on the totality of the circumstances." *Id.*

On remand from the Minnesota Supreme Court, the state argued that McNeely does not apply retroactively to Johnson's 2009 test-refusal conviction. But the district court did not answer this question. Rather, the district court ruled that under either a pre- or post-*McNeely* standard, the state did not meet its burden of showing that a warrantless search of Johnson's blood was justified.

In our recent decision in *Hagerman*, we addressed whether *McNeely* applies retroactively to test-refusal convictions. ___ N.W.2d at ___. We held that *McNeely* "applies retroactively when a petitioner challenges a final conviction for test refusal under the rule announced by the [United States] Supreme Court in *Birchfield*." *Id.* at ___. In doing so, we held that to uphold Hagerman's test-refusal conviction based on a per se exigency exception would "carry a significant risk that [he] stands convicted of an act that the law does not make criminal." *Id.* at __ (quotation omitted). In the context of a test refusal conviction, "[i]f the totality of the circumstances does not establish an exigency justifying a warrantless search of a driver's blood or urine, the driver's refusal is in a category of conduct outside the State's power to punish." *Id.* at ___ (quotation omitted).

Because the *McNeely* rule applies retroactively when a test-refusal conviction is challenged under *Birchfield*, the rule announced in *McNeely* applies to Johnson's 2009 test-refusal conviction. Therefore, Johnson's conviction is only valid if, under a totality of the circumstances, exigent circumstances justified a warrantless search of his blood.

II. The postconviction court erred when it placed the burden on the state to show the presence of exigent circumstances justifying a warrantless search.

The postconviction court vacated Johnson's conviction by finding that, under either standard, the state did not meet its burden of showing exigent circumstances existed to justify a warrantless search of his blood. In doing so, the postconviction court placed the burden to show exigent circumstances on the state. On appeal, both parties agree that Johnson carries the burden of refuting the state's reliance on an exception to the warrant requirement.

In *Fagin*, the Minnesota Supreme Court adopted a "heighted pleading requirement for *Birchfield*/*Johnson* postconviction proceedings." 933 N.W.2d at 780. First, *Fagin* requires that the postconviction petitioner must allege that no search warrant was issued and that no warrant exception applied. *Id.* Then, the burden shifts to the state to admit or deny the existence of a warrant, and if there is no warrant, to "admit the lack of an exception or . . . state specifically the exception relied on and the grounds for the State's reliance." *Id.* "The exception and its grounds must be pleaded in sufficient detail to give the petitioner adequate notice of the State's position." *Id.* After announcing this heightened standard in *Fagin*, the Minnesota Supreme Court remanded the case to the postconviction court to "allow the parties to file supplemental pleadings that comply with the standard," and gave the petitioner the opportunity to refute the state's reliance on an exception to the warrant requirement. *Id.* at 781.

Because the parties have not complied with the evidentiary procedures set forth in *Fagin*, and the postconviction court failed to consider the evidence in accordance with the principles set forth in *Fagin*, we reverse and remand.

Reversed and remanded.