**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-1466**

John Noel McCormick, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed May 4, 2020**
**Affirmed**
**Reyes, Judge**

Hennepin County District Court
File No. 27-CV-18-6309

Robert M. Christensen, Robert M. Christensen, P.L.C., Minneapolis, Minnesota (for appellant)

Keith Ellison, Attorney General, Jacqueline A. Destache, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Reyes, Judge; and Bryan, Judge.

**S Y L L A B U S**

Whether an officer gave a breath-test advisory that informed a person that refusal to submit to a breath test is a crime depends on whether the given advisory, considered in its context as a whole, is misleading or confusing.

## O P I N I O N

**REYES**, Judge

In this appeal from the district court's order sustaining the revocation of appellant's driving privileges, appellant argues that the district court incorrectly concluded that the breath-test advisory an officer read to him complied with Minn. Stat. § 169A.51, subd. 2 (2018), when the officer informed him that "refusal to take a test is a crime," not that "refusal to submit to a breath test is a crime." We affirm.

## FACTS

In April 2018, a police officer read a breath-test advisory to appellant John Noel McCormick upon probable cause that he had been driving while impaired. The officer stated that "[t]his is the breath test advisory of [appellant]" and that "Minnesota law requires you to take a test to determine if you are under the influence of alcohol. Refusal to take a test is a crime. . . . Do you understand what I've just explained?" Appellant responded "Yes." The officer asked appellant if he would take a breath test, and he responded, "Sure." The breath test revealed an alcohol concentration above the legal limit.

The commissioner of public safety (commissioner) revoked appellant's driving privileges, and appellant filed a petition for judicial review. Appellant limited his implied-consent challenge to whether the officer properly informed him of his rights and the consequences of taking or refusing the test under Minn. Stat. § 169A.51, subd. 2. *See* Minn. Stat. § 169A.53, subd. 3(b)(6) (2018). The parties stipulated to the admission of the advisory the officer read to appellant, the video recording of the officer reading the advisory, and a transcript of that video. Neither party presented testimony. The parties

submitted written briefs. The district court sustained the revocation of appellant's driving privileges, determining that the breath-test advisory the officer read did not violate Minn. Stat. § 169A.51, subd. 2, because the statute does not require a verbatim reading of its language. This appeal follows.

## ISSUE

Did the district court properly conclude that the breath-test advisory the officer read to appellant complies with Minn. Stat. § 169A.51, subd. 2?

## ANALYSIS

Appellant challenges the district court's order sustaining the revocation of his driving privileges, arguing that the officer failed to comply with Minn. Stat. § 169A.51, subd. 2, because the officer read a breath-test advisory that stated that refusal to submit to "a test" is a crime, when the statute provides that "refusal to submit to a breath test is a crime."[1] We disagree.

Resolving this issue requires us to interpret the requirements of Minn. Stat. § 169A.51, subd. 2. We review questions of statutory interpretation de novo. *Gray v. Comm'r of Pub. Safety*, 918 N.W.2d 220, 223 (Minn. App. 2018). The first step of statutory interpretation is to determine whether the language of the statute is ambiguous. *Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010). A statute is ambiguous only when it has "more than one reasonable interpretation." *State v. Fleck*, 810 N.W.2d 303, 307 (Minn. 2012). If

[1] Appellant does not claim a due-process violation, which provides a separate framework for challenging the adequacy of a breath-test advisory. *See McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 853-55 (Minn. 1991).

the statute is not ambiguous, we apply its plain and ordinary language and do not explore its purpose. *See Dupey v. State*, 868 N.W.2d 36, 39 (Minn. 2015).

The commissioner must revoke the license of a person who refuses to submit to a breath test requested by law enforcement upon probable cause to believe that the person has been driving while impaired. Minn. Stat. § 169A.52, subd. 3 (2018). The commissioner may revoke a license only if law enforcement complied with the implied-consent statutes. *Tyler v. Comm'r of Pub. Safety*, 368 N.W.2d 275, 280-81 (Minn. 1985). Section 169A.51, subdivision 2, requires that

> [a]t the time a breath test is requested, *the person must be informed*:
> (1) that Minnesota law requires the person to take a test:
> (i) to determine if the person is under the influence of alcohol; and
> . . .
> (2) *that refusal to submit to a breath test is a crime*; and
> (3) that the person has the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the test.

(Emphases added.) A person may seek judicial review of a license revocation to raise the issue of whether the officer, at the time of the breath-test request, "inform[ed] the person of the person's rights and the consequences of taking or refusing the test as required by section 169A.51, subdivision 2." Minn. Stat. § 169A.53, subd. 3(b)(6).

Appellant does not argue that section 169A.51, subdivision 2, is ambiguous. Rather, he essentially argues that the statute requires officers to read its language verbatim. He asserts that the officer's failure to state "breath" directly before "test" misstated the law

both because it is not a crime to refuse a warrantless blood or urine test[2] and because it makes the word "breath" in section 169A.51, subdivision 2, meaningless, contrary to the legislature's intent.

The plain language of section 169A.51, subdivision 2, unambiguously requires officers to "inform" a person "that refusal to submit to a breath test is a crime." The statute does not define the word "inform." However, we may consider dictionary definitions when determining the plain meaning of a word. *See In re Restorff*, 932 N.W.2d 12, 19-21 (Minn. 2019). To "inform" means to "impart information to; make aware of something." *The American Heritage Dictionary* 899 (4th ed. 2000). To inform a person that refusal to submit to a breath test is a crime therefore requires that officers make the person aware that refusal to submit to a breath test is a crime.

Here, the district court found that the officer stated that "[t]his is the *breath* test advisory of [appellant]," stated that refusal to submit to "a test" is a crime, and asked appellant only if he wanted to take a breath test, without mentioning any other test. (Emphasis added.) Appellant does not dispute these findings, and the record supports them. Based on the context of the advisory that the officer gave to appellant, the officer informed appellant by making him aware that refusing to take the breath test, as the only test offered, would be a crime. The officer did not mention or request a blood or urine test

[2] It is not a crime to refuse to take a warrantless blood or urine test. *See State v. Thompson*, 886 N.W.2d 224, 229-30, 234 (Minn. 2016) (interpreting *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016)). The Minnesota Legislature removed the terms "blood" and "urine" from the test-refusal statute in 2017 and changed "refusal to take a test is a crime" to "refusal to submit to a breath test is a crime." 2017 Minn. Laws ch. 83, art. 2, §§ 2-5, at 355-56.

and therefore did not improperly inform appellant that refusal to submit to one of those tests is a crime.

Moreover, appellant points to no legal authority concluding that the implied-consent statute requires a verbatim recitation of section 169A.51, subdivision 2. The plain language does not require officers to "read" or "recite" the statute's language verbatim in order to inform a person that refusal to submit to a breath test is a crime.

We presume that the legislature understood the effect of using "inform" and of not using language requiring a verbatim recitation of the statute. *See Dayton Hudson Corp. v. Johnson*, 528 N.W.2d 260, 262 (Minn. App. 1995) (stating that we "presume that the legislature understood the effect of its words"); *cf., e.g.*, Minn. Stat. § 270C.4451, subds. 3, 4 (2018) (requiring "the following verbatim statements," followed by quoted language); Minn. Stat. § 332B.11, subd. 2 (2018) (requiring "the following verbatim disclosure," followed by quoted language); Minn. Stat. § 144.6521 (2018) (providing written disclosure "must read as follows," followed by quoted language).[3] It is not the role of this court to read additional language into statutes. *See State v. Noggle*, 881 N.W.2d 545, 550 (Minn. 2016). When an officer fails *entirely* to read any advisory before asking a person to take a test, the results of the test may not serve as the basis of a license revocation pursuant to the

[3] We reference these statutes for comparative purposes only and express no opinion as to their interpretation.

implied-consent statute. *Tyler*, 368 N.W.2d at 280-81.[4] But the officer here read the breath-test advisory.

We have upheld advisories that deviate from the language of the implied-consent statute so long as the information the officer provides is not misleading or confusing. In *Hallock v. Comm'r of Pub. Safety*, the officer added to the advisory, "Your decision whether or not to submit to testing is final and may not be changed following any conversation with your attorney." 372 N.W.2d 82, 83 (Minn. App. 1985). We concluded that this addition was not a misstatement of law or "so confusing as to render the advisory illegal." *Id.* In *Connor v. Comm'r of Pub. Safety*, we concluded that additional information the officer provided after the advisory that "refusal to take the test implies guilt" was not misleading or "so confusing as to render the advisory illegal." 386 N.W.2d 242, 244-45 (Minn. App. 1986) (citing *Hallock*, 372 N.W.2d at 83). Finally, in *Dehn v. Comm'r of Pub. Safety*, the driver contended that the officer's responses to her questions after providing the advisory stating that she would spend the night in jail unless she had cash bail or "bl[ew] a pass on this machine" rendered the advisory illegal and confusing. 394 N.W.2d 272, 274 (Minn. App. 1986). We concluded that the additional information provided by the officer did not render the advisory illegal because it was not "unduly coercive or confusing" and the appellant made no showing that the officer misled her. *Id.* Here, appellant does not claim that the advisory the officer read confused or misled him.

[4] *Tyler* discusses the "implied consent advisory," which is now the breath-test advisory. *See* Minn. Stat. § 169A.51, subd. 2; *see also* 2017 Minn. Laws ch. 83, art. 2, § 3, at 355-56.

We "highly encourage[]" uniformity in breath-test advisories and "recommend that police officers read the exact words of the statute in order to avoid any possibility of confusion or improper deviation." *See Hallock*, 372 N.W.2d at 83. Although no previous published opinion has addressed the adequacy of a breath-test advisory stating that failure to take "a test" is a crime, we have concluded in three unpublished opinions that this language is not a misstatement of law or misleading when the officer offers the person only a breath test.[5] We find these opinions persuasive.

We therefore hold that whether an officer gave a breath-test advisory that informed a person that refusal to submit to a breath test is a crime depends on whether the given advisory, considered in its context as a whole, is misleading or confusing. Because we conclude that the officer complied with the implied-consent statute by informing appellant that refusing to take the breath test would be a crime, we do not reach the state's argument that any misstatement of law in the advisory would be only a technical statutory violation not requiring reversal of government action.

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[5] *See Patnode v. Comm'r of Pub. Safety*, No. A18-1074, 2019 WL 1434315, at *2-3 (Minn. App. Apr. 1, 2019) (concluding, based on context of advisory, that officer did not misstate law by advising appellant that "refusal to take a test" is a crime because "[t]he officer only offered appellant the option of taking a breath test"); *Dyrdahl v. Comm'r of Pub. Safety*, No. A18-0801, 2019 WL 510774, at *3-4 (Minn. App. Feb. 11, 2019) (concluding, in due-process analysis, advisory that "refusal to take a test is a crime" accurately informed appellant of consequences of refusal, "[a]s he was only asked to submit to a breath test and refusing to submit to a breath test is a crime" and concluding no statutory violation because no prejudice); *State v. Dyrdahl*, No. A18-0627, 2018 WL 4201227, at *2 (Minn. App. Sept. 4, 2018) (concluding, in due-process analysis, advisory stating "refusal to take 'a test' is a crime" not misleading given circumstances of officer offering only breath test).

## D E C I S I O N

Whether an officer gave a breath-test advisory that informed a person that refusal to submit to a breath test is a crime depends on whether the given advisory, considered in its context as a whole, is misleading or confusing. Here, based on the context, the officer informed appellant that his refusal to take a breath test is a crime by telling him that "this is the breath test advisory of [appellant]" and that "refusal to take a test is a crime," making no mention of any other test, and offering only a breath test to him. The district court therefore properly determined that the advisory complied with Minn. Stat. § 169A.51, subd. 2, and sustained the revocation of appellant's driving privileges.

**Affirmed.**