STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1796

Kelly Jenko Triebwasser, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed May 26, 2020
Affirmed
Hooten, Judge

St. Louis County District Court
File No. 69HI-CV-19-521

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, PLLC, Roseville, Minnesota (for appellant)

Keith Ellison, Attorney General, Leah M. P. Hedman, Assistant Attorney General, St. Paul, Minnesota (for respondent)

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

In this appeal from the district court's order denying her motion to rescind the revocation of her driver's license, appellant argues that she should not be deemed to have refused breath testing when—after initially refusing the test, being arrested, and being

transported to jail—she retracted her refusal and agreed to submit to a breath test. We affirm.

FACTS

On March 24, 2019, a trooper with the Minnesota State Patrol pulled over appellant Kelly Jenko Triebwasser on suspicion of driving while impaired. After Triebwasser failed field sobriety testing, the trooper arrested Triebwasser and transported her to the Chisholm Police Department.

The trooper indicated that Triebwasser was "very upset" and "very uncontrolled" while in route to the police department. Triebwasser slipped out of her handcuffs and threw them at the glass partition immediately behind the trooper, attempted to open the rear doors of the squad car, and called the trooper "provocative names throughout the transport."

Once they arrived at the station, the trooper attempted to read Triebwasser the Implied Consent Advisory. Triebwasser was "outraged," refused to listen, attempted to talk over the trooper, and swore at her. An audio recording from the record reveals that, while the trooper attempted to give Triebwasser the advisory, Triebwasser threatened to kill the trooper with a knife. After the trooper read the advisory multiple times, Triebwasser indicated that she understood.

The trooper asked Triebwasser if she wanted to speak to an attorney, and Triebwasser indicated that she did. While speaking with her attorney, the trooper stated that Triebwasser was "emotional" and had "mood swings wherein one moment [Triebwasser] was crying and the next would become upset." After she spoke with her attorney, Triebwasser agreed to take a breath test.

Prior to administering a breath test, the trooper was required to conduct a 15-minute observation period. After the 15 minutes, the trooper attempted to administer the breath test, but Triebwasser told her that she "would not blow into anything." The trooper asked Triebwasser again if she would blow into the machine. Triebwasser responded, "No, I'm not," and "I already told you no like an hour ago." Based on this, the trooper concluded that Triebwasser refused the test.

The trooper placed Triebwasser in handcuffs, put her in a squad car, and transported her to the St. Louis County jail for booking. On the way to the jail, Triebwasser "threaten[ed] to take [the trooper] to a land where nobody would find [her]" and pledged to make it "her life mission to find [the trooper] off-duty to stab [her]."

Once they arrived at the jail, Triebwasser stated that she wanted to take the breath test but remained uncooperative with jail staff.

Based on Triebwasser's refusal to submit to a breath test at the Chisholm Police Department, the Commissioner of Public Safety revoked Triebwasser's driver's license. Triebwasser filed a petition for judicial review of the revocation of her driver's license. Following a motion hearing, the district court denied Triebwasser's motion to rescind the revocation of her driving privileges and driver's license. Triebwasser appeals.

D E C I S I O N

Triebwasser argues that law enforcement should have honored her decision to submit to a breath test after she initially refused and that this court should reverse the district court's denial of her motion to rescind the revocation of her driving privileges. The district court held that Triebwasser's "conduct, along with her direct refusal to submit to

testing after two separate requests, constitutes refusal to submit to a lawful request for a chemical test," and Triebwasser's "refusal to submit to testing was not cured by her demand for testing at the St. Louis County Jail."

Findings of fact "shall not be set aside unless clearly erroneous." Minn. R. Civ. P. 52.01. But this court may overturn conclusions of law if the district court "erroneously construed and applied the law to the facts." *O'Brian v. Comm'r of Pub. Safety*, 552 N.W.2d 760, 761 (Minn. App. 1996). A district court's ruling on whether a person refused to submit to testing is a question of fact, which this court reviews for clear error. *Maietta v. Comm'r of Pub. Safety*, 663 N.W.2d 595, 598 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003). "But where there is no dispute as to facts, the legal significance of the facts may be a question of law." *Id.*

Any person who drives a motor vehicle in Minnesota consents to a chemical test "for the purpose of determining the presence of alcohol." Minn. Stat. § 169A.51, subd. 1(a) (2018). However, a driver may refuse a chemical test. *Schultz v. Comm'r of Pub. Safety*, 447 N.W.2d 17, 18 (Minn. App. 1989). If a driver refuses a lawfully requested test, that person's driving privileges will be revoked. Minn. Stat. § 169A.52, subd. 3(a) (2018).

A driver who initially refuses testing does not have an absolute right to retract her refusal. *Palme v. Comm'r of Pub. Safety*, 541 N.W.2d 340, 344 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996); *Mossak v. Comm'r of Pub. Safety*, 435 N.W.2d 578, 579–80 (Minn. App. 1989), *review denied* (Minn. Apr. 10, 1989). While law enforcement is encouraged to be flexible when a driver retracts a refusal almost immediately, Minnesota

courts have not abandoned the "absolute rule" that law enforcement need not honor a subsequent consent to testing after an initial refusal. *Palme*, 541 N.W.2d at 344.

A seminal case regarding the retraction of a refusal to submit to testing is *Mossak*, 435 N.W.2d at 578. In that case, Mossak initially refused to submit to testing. *Mossak*, 435 N.W.2d at 579. Within ten minutes, and after speaking to a friend, Mossak asked to take the test but an officer denied her request. *Id.* Her driver's license was revoked by the commissioner of public safety. *Id.* We applied the absolute rule and sustained the commissioner's revocation. *Id.* at 580.

Later, in *Schultz*, we held that the absolute rule would not be followed when the driver "almost immediately" changed his mind and consented to testing. 447 N.W.2d at 19. We held that the driver's change of mind "was not separated from his initial response by any substantial time, place, or a telephone call to counsel or a friend." *Id.* Instead, "[t]he only action the officer took was to mark a refusal on the implied consent form." *Id.* Therefore, we ruled that the breath test should have been administered. *Id.*

In *Parsons v. Comm'r of Pub. Safety*, we held subsequently that the driver's retraction of her refusal to submit to testing, nine minutes after the refusal and after speaking with an attorney, did not cure her initial refusal. 488 N.W.2d 500, 50203 (Minn. App. 1992). "This court has consistently held that a subsequent change of heart does not revoke an initial refusal, even when a relatively short period of time has elapsed between the initial refusal and the reconsideration except for an 'almost immediate' change of mind." *Lewis v. Comm'r of Pub. Safety*, 737 N.W.2d 591, 593 (Minn. App. 2007).

In this case, Triebwasser spoke to her attorney and then indicated that she would take a breath test. During the 15-minute observation period, Triebwasser told the trooper, "Then I'll refuse the test, f--- it. Let's just skip it." The trooper asked Triebwasser again if she would take the test, and Triebwasser replied, "No, I'm not," and "I already told you no like an hour ago." As the district court noted, the trooper gave Triebwasser several opportunities to take the breath test but Triebwasser "continued to be argumentative and combative toward the Trooper, failing to provide a clear answer." The audio recording indicates that the trooper gave Triebwasser several opportunities to take the breath test, but Triebwasser refused to respond to those requests. The district court found that Triebwasser's "conduct, along with her direct refusal to submit to testing after two separate requests, constitutes refusal to submit to a lawful request for a chemical test".

After Triebwasser was transported to the jail, she indicated that she would submit to testing. But at the jail, the trooper indicated that Triebwasser remained uncooperative and was "still very upset." The audio recording reveals that Triebwasser continued to yell and swear at the trooper. Because she "remained combative and belligerent not only during her transport but once she reached the St. Louis County Jail," the district court found that her conduct "belied" her subsequent consent. The district court stated that her subsequent consent "did not immediately follow her initial refusal, nor come within a reasonable time following the request for testing," and the trooper was therefore not required to offer Triebwasser another opportunity to take the breath test.

Based upon this record, the district court did not err in its conclusion that Triebwasser's purported consent to testing was too far removed from her initial (and

continued) refusal to test. At least ten minutes elapsed between her final refusal and arrival at the St. Louis County jail, as the drive from the Chisholm Police Department to the St. Louis County jail takes ten minutes. The district court reasoned that her uncooperative and belligerent behavior at the jail also indicates that her subsequent consent was not credible. *See Goldman v. Greenwood*, 748 N.W.2d 279, 284 (Minn. 2008) (providing that reviewing courts defer to the credibility determinations of district courts); Minn. R. Civ. P. 52.01 (noting that appellate courts give due regard to the credibility determinations of the district court).

There is no dispute that Triebwasser repeatedly and unequivocally refused to take the breath test offered by the trooper, that she did not ask to take the test until she arrived at the jail more than ten minutes after her last refusal, and that she continued to act in an uncooperative and belligerent manner once she arrived at the jail. Because we conclude that the district court did not err by concluding that her test refusal was not cured by her request to submit to testing upon arrival at the jail, we therefore affirm the district court's denial of Triebwasser's motion to rescind revocation of her driving privileges.

Affirmed.