STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2057

Jason Charles Cibulka, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 28, 2020
Reversed
Bratvold, Judge

Washington County District Court
File No. 82-CR-11-1478

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and Slieter, Judge.

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

BRATVOLD, Judge

In this appeal from the denial of a second petition for postconviction relief, appellant argues that his conviction for refusing to submit to a warrantless blood test is

unconstitutional because the rule announced by the United States Supreme Court in *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 (2013), is substantive and retroactively applies to him. We agree and therefore reverse his conviction.

FACTS

In April 2011, a police officer responded to a report of an intoxicated driver. The officer stopped the driver for passing three cars in a no-passing zone and identified him as appellant Jason Charles Cibulka. After a preliminary breath test showed that Cibulka was not under the influence of alcohol, a second police officer performed a drug-recognition evaluation. Based on the evaluation, the second officer suspected that Cibulka was under the influence of drugs. Cibulka agreed to take a urine test but could not provide a sample. Officers then asked Cibulka to take a blood test, but he refused.

The state charged Cibulka with first-degree test refusal under Minn. Stat. §§ 169A.20, subd. 2, 169A.24, subd. 1(2) (2010). Cibulka pleaded guilty. In October 2012, the district court sentenced Cibulka to 54 months in prison, stayed execution of the sentence, placed Cibulka on probation, and ordered that Cibulka serve 270 days in jail. In January 2013, after Cibulka violated a condition of probation, the district court revoked Cibulka's probation and executed the 54-month prison sentence.

In October 2013, Cibulka petitioned for postconviction relief. He argued that he should have been allowed to withdraw his guilty plea because the test-refusal statute was unconstitutional as applied to him. He argued that the rule announced by the United States Supreme Court in *Missouri v. McNeely*—that the natural dissipation of alcohol in the bloodstream is not a single-factor exigent circumstance that justifies a warrantless blood

test—retroactively applied to his test-refusal conviction. 569 U.S. at 156, 133 S. Ct. at 1563. The postconviction court denied the petition because it determined that *McNeely* did not apply retroactively to Cibulka. Cibulka appealed. This court affirmed, concluding that "*McNeely* [did] not apply retroactively to Cibulka's conviction of first-degree test refusal." *Cibulka v. State*, No. A14-1631, 2015 WL 5194617, at *4 (Minn. App. Sept. 8, 2015), *review denied* (Minn. Nov. 25, 2015).

In June 2019, Cibulka filed a second petition for postconviction relief. He argued that, under the holdings in *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), "[t]he Fourth Amendment prohibits convicting [a person] for refusing a blood or urine test requested of him absent the existence of a warrant or exigent circumstances." He also argued that the holdings in those cases, described as "the *Birchfield* rule," retroactively applied to him under the Minnesota Supreme Court's decision in *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018). Cibulka requested that the postconviction court vacate his test-refusal conviction or order an evidentiary hearing to determine whether exigent circumstances justified a warrantless blood or urine search.

The postconviction court denied Cibulka's petition in a written order. The postconviction court first determined that "*McNeely* is not retroactive" and, when Cibulka was arrested, "the dissipation of drugs was sufficient to establish exigent circumstances such that a warrant was not necessary to request a blood or urine sample." Thus, the postconviction court concluded Cibulka was "lawfully [] charged with and convicted of test refusal." Cibulka appeals.

D E C I S I O N

We review an order denying a postconviction petition for abuse of discretion. *Brown v. State*, 895 N.W.2d 612, 617 (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) (quotation omitted). But we review a postconviction court's legal conclusions de novo. *Greer v. State*, 836 N.W.2d 520, 522 (Minn. 2013). "Whether a rule of federal constitutional law applies retroactively to convictions that were final when the rule was announced is a legal question that [appellate courts] review de novo." *Johnson*, 916 N.W.2d at 681.

We first consider whether the merits of Cibulka's appeal are properly before us. Concluding that they are, we next examine whether Cibulka is entitled to postconviction relief.

I. Cibulka's argument that *McNeely* is retroactive is properly before this court.

At the outset, the state contends that we should not consider Cibulka's arguments about *McNeely*'s retroactivity for three reasons, which we address in turn.

First, the state argued to the postconviction court that Cibulka's petition is untimely under Minn. Stat. § 590.01, subd. 4 (2018). The postconviction court did not analyze or discuss the time bar, but concluded that "*McNeely* is not retroactive." The state repeats its timeliness argument on appeal. Generally, postconviction petitions have a two-year limitation period. "No petition for postconviction relief may be filed more than two years after . . . the entry of judgment of conviction or sentence if no direct appeal is filed."

Minn. Stat. § 590.01, subd. 4(a)(1). Cibulka did not pursue a direct appeal. His conviction became final in January 2013, meaning that he needed to seek postconviction relief no later than January 2015. *See* Minn. R. Crim. P. 28.02, subds. 4(3)(a) (requiring direct appeal to be filed "within 90 days after final judgment or entry of the order being appealed"), 2(1) (providing conviction becomes final "when the district court enters a judgment of conviction and imposes or stays a sentence").

But a petitioner who "asserts a new interpretation of federal or state constitutional or statutory law" and "establishes that this interpretation is retroactively applicable to the petitioner's case" falls under an exception to the two-year limitation period. Minn. Stat. § 590.01, subd. 4(b)(3). A petitioner who invokes this exception must file his postconviction petition "within two years of the date the claim arises." *Id.*, subd. 4(c). A claim under this statute "arises" when the petitioner "knew or *should have known* that the claim existed." *Sanchez v. State*, 816 N.W.2d 550, 552 (Minn. 2012) (emphasis added).

As explained below, the *McNeely* rule applies retroactively to test-refusal convictions challenged under the *Birchfield* rule. *Hagerman v. State*, 945 N.W.2d 872, 873 (Minn. App. 2020), *review granted* (Minn. Aug. 25, 2020). And a petition for postconviction relief from a test-refusal conviction under the *Birchfield* rule is timely if filed within the two-year period following the *Johnson* decision in 2018. *Edwards v. State*, ___ N.W.2d ___, ___, No. A19-1943, slip op. at 9-10 (Minn. App. Sept. 22, 2020). Cibulka filed his second postconviction petition in 2019, which was within two years of *Johnson*. Thus, Cibulka's second postconviction petition is not time-barred under Minn. Stat. § 590.01, subd. 4(c).

For the first time on appeal, the state argues that we may not consider *McNeely*'s retroactivity for two other reasons. Even if we consider the state's second and third arguments—neither presented to nor decided by the district court, *see, e.g.*, *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996)—the state's arguments fail.

Second, the state argues that Cibulka waived the issue of *McNeely*'s retroactivity because he failed to assert the *McNeely* decision in his second postconviction petition, which emphasized the *Birchfield* rule. "It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." *Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (quotation omitted). But Cibulka's second postconviction petition sought relief under the *Birchfield* rule. And the rule announced in *McNeely* retroactively applies to test-refusal convictions challenged under the *Birchfield* rule. *Hagerman*, 945 N.W.2d at 873. We determine that, by seeking relief under the *Birchfield* rule, Cibulka implicitly sought relief under *McNeely* "as applied through the *Birchfield* rule." *Id.* at 874. Moreover, the postconviction court specifically denied Cibulka's petition because it determined that "*McNeely* is not retroactive." Thus, the retroactivity of *McNeely* is squarely before us.[1]

[1] Even if that were not so, we could, in our discretion, consider the retroactive application of *McNeely* to Cibulka's petition if it would serve the interests of justice, the record is sufficiently developed to resolve the issue, and considering the issue would not unfairly surprise a party. *See, e.g.*, *Roby*, 547 N.W.2d at 357; *but see State v. Berrios*, 788 N.W.2d 135, 141 (Minn. App. 2010) (refusing to consider merits of issue raised for first time on appeal without adequate record), *review denied* (Minn. Nov. 16, 2010). Because of the similarities between this case and *Hagerman*, the interests of justice warrant our review of Cibulka's *McNeely* arguments. The record is also sufficiently developed to review Cibulka's arguments. And the state fully briefed *McNeely*'s retroactivity, so considering the issue would not cause any unfair surprise.

Third, the state argues that the law-of-the-case doctrine bars Cibulka's arguments about *McNeely*'s retroactivity because, in 2015, we concluded that *McNeely* did not retroactively apply to Cibulka's conviction. *Cibulka*, 2015 WL 5194617, at *4. Under the law-of-the-case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the *same issues* in subsequent stages in the *same case*." *State v. Miller*, 849 N.W.2d 94, 98 (Minn. App. 2014) (quotation omitted). But the law-of-the-case doctrine is not absolute. "When there has been a change in the law by a judicial ruling entitled to deference between appeals of the case, law of the case does not typically apply." *Peterson v. BASF Corp.*, 675 N.W.2d 57, 65 (Minn. 2004), *vacated on other grounds*, 544 U.S. 1012, 1012, 125 S. Ct. 1968, 1968 (2005). We conclude that *Hagerman* established a material change in the law when it held *McNeely* to be retroactive and therefore the law-of-the-case doctrine does not apply here. Thus, we reject the state's three threshold arguments, determine that this appeal is properly before us, and consider the merits of Cibulka's arguments on *McNeely*.

II. The district court erred by denying Cibulka's second postconviction petition.

Cibulka argues that the postconviction court erred by denying his second petition because "*McNeely* is retroactive as applied to [him]," and therefore the state must prove that an exception to the warrant requirement existed before he could be convicted of first-degree test refusal. The state argues that *McNeely* is not retroactive, so Cibulka's conviction is valid because the law at the time of his test refusal justified a warrantless blood test.

We begin by summarizing relevant Fourth Amendment jurisprudence because it has changed considerably on the validity of a warrantless search of a driver's breath, blood, or urine. The Fourth Amendment protects "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. Const. amend. IV. A search is per se unreasonable without a warrant or an exception to the warrant requirement. *Riley v. California*, 573 U.S. 373, 381-82, 134 S. Ct. 2473, 2482-83 (2014). "In the suspected-impaired-driving context, administering a chemical test of breath, blood, or urine is a search." *Hagerman*, 945 N.W.2d at 876.

Our decision in *Hagerman* summarized relevant legal developments. When Cibulka was arrested and convicted, existing law allowed warrantless blood tests, based on a single-factor exigency exception to the warrant requirement. *See id.* But, as *Hagerman* also explained, *McNeely* overturned this warrant exception in 2013:

> Before the Supreme Court's 2013 decision in *McNeely*, the Minnesota Supreme Court categorically upheld warrantless chemical tests in the DWI context under the exigent-circumstances doctrine, holding that "the 'rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances.'" In *McNeely*, the state of Missouri similarly urged a rule that, "whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because [alcohol-concentration] evidence is inherently evanescent." The Supreme Court rejected a per se exigency approach, holding instead that the exigency "must be determined case by case based on the totality of the circumstances."

Hagerman, 945 N.W.2d at 876 (citations omitted). A few years after Cibulka was convicted, the United States Supreme Court considered another warrant exception in *Birchfield*, and reversed a test-refusal conviction:

> In 2016, the [United States] Supreme Court in *Birchfield* addressed another exception to the warrant requirement—the search-incident-to-arrest exception. . . . The Court noted that *McNeely* addressed the exigent-circumstances exception but did not address any other warrant exceptions. The Court then evaluated the search-incident-to-arrest exception as it applies to breath and blood tests, examining "the degree to which they intrude upon an individual's privacy and the degree to which they are needed for the promotion of legitimate governmental interests." It held that, while a breath test is a permissible search incident to a lawful arrest, a blood test is not.

Hagerman, 945 N.W.2d at 876 (citations omitted). Following *Birchfield*, the Minnesota Supreme Court overturned test-refusal convictions predicated on a refusal to submit to warrantless blood and urine tests as unconstitutional. *See Trahan*, 886 N.W.2d 216 (blood); *Thompson*, 886 N.W.2d 224 (urine). Shortly after, the Minnesota Legislature revised Minn. Stat. § 169A.20, subd. 2(1)-(2) (2018), so that it now criminalizes a driver's refusal to submit to a breath test *without a warrant*, as well as a blood or urine test *with a warrant*.

Finally, the Minnesota Supreme Court considered the retroactivity of the *Birchfield* rule, which it summarized as meaning that "in the DWI context, 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." *Johnson*, 916 N.W.2d at 679. We summarized *Johnson*'s retroactivity analysis in *Hagerman*:

> After these cases, the Minnesota Supreme Court in *Johnson* addressed whether the *Birchfield* rule announced a

> substantive, rather than a procedural, rule of constitutional law that applies retroactively to final convictions on collateral review. . . . The rule is substantive, the supreme court concluded, because it "defin[es] who can and who cannot be culpable for refusing to submit to a chemical test."

Hagerman, 945 N.W.2d at 876-77. *Johnson* also determined that reversal of a test-refusal conviction under the *Birchfield* rule is not "automatic." *Johnson*, 916 N.W.2d at 684. Rather, postconviction courts must make "case-by-case determinations to assess whether there was a warrant or an exception to the warrant requirement." *Id.* Still, *Johnson* expressly stated "no opinion" about whether *McNeely* applied to "any exigent-circumstances determination" for a test-refusal conviction. *Id.* at 684-85, n.8.

We recently considered *McNeely*'s retroactivity in *Hagerman*, which was issued while this appeal was pending.[2] Like Cibulka, Hagerman was arrested in 2011 "on suspicion of drunk driving," no search warrant was obtained, and Hagerman refused to take a blood or urine test. 945 N.W.2d at 874-75. Hagerman was convicted of test refusal and petitioned for postconviction relief in 2017, seeking to vacate his conviction under the *Birchfield* rule. *Id.* Hagerman argued that *McNeely* overturned the single-factor exigency exception to the warrant requirement on which the state had relied. *Id.* We held that "*McNeely*, as applied through the *Birchfield* rule, is *substantive and retroactive*." *Id.* at 881 (emphasis added). We also reversed the denial of Hagerman's petition and vacated his conviction. *Id.*

[2] Cibulka identified *Hagerman* as a supplemental significant legal authority under Minn. R. Civ. App. P. 128.05. Both parties addressed the applicability of *Hagerman* during oral argument.

Hagerman controls here. Cibulka was convicted of refusing to submit to a warrantless blood test based on pre-*McNeely* caselaw providing that the natural dissipation of alcohol in the bloodstream is a single-factor exigency. *See State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009), *abrogated in part by McNeely*, 569 U.S. 141, 133 S. Ct. 1552. The United States Supreme Court later held that the dissipation of alcohol in the bloodstream is *not* a single-factor exigency and does *not* provide an exception to the warrant requirement. *McNeely*, 569 U.S. at 156, 133 S. Ct. at 1563. The rule announced in *McNeely* applies retroactively. *Hagerman*, 945 N.W.2d at 881. Thus, Cibulka's conviction for test refusal is unconstitutional. *See id.*

The only remaining issue is whether remand is necessary for proceedings consistent with *Fagin v. State*, 933 N.W.2d 774, 780-81 (Minn. 2019), which was decided a few weeks before the postconviction court issued its order denying relief. *Fagin* articulated a heightened pleading standard that applies to *Birchfield-Johnson* postconviction proceedings for test-refusal convictions and held a petitioner must plead that police did not have a warrant authorizing a chemical test and that no exception to the warrant requirement justified a warrantless chemical test. *Id.* at 780. The burden then shifts to the state to plead with specificity an applicable exception, and the grounds for such exception, to the warrant requirement. *Id.* The postconviction court may hold an evidentiary hearing, if appropriate, at which the burden would again shift to the petitioner. *Id.*

The parties request that, if we reverse Cibulka's conviction, we should remand under *Fagin*. We disagree. In his second postconviction petition, Cibulka argued that his test-refusal conviction must be vacated because police officers "never secured a warrant to

search [his] blood or urine" and "the state cannot demonstrate that . . . exigent circumstances were present." In response, the state contended that "the undisputed facts show that a single-factor exigency existed under the law as it existed when [Cibulka] was convicted." The state did not argue that any other exception to the warrant requirement applied.

Fagin held that the state must articulate an exception to the warrant requirement in response to a postconviction petition based on *Birchfield/Johnson* "or the argument will be deemed waived." *Fagin*, 933 N.W.2d at 780. Here, the state relied only on single-factor exigency and therefore waived argument on any other exception to the warrant requirement. Thus, because the parties functionally followed the heightened *Fagin* pleading standard, we conclude that remand is unnecessary and therefore we reverse Cibulka's conviction. *See Hagerman*, 945 N.W.2d at 881 (reversing test-refusal conviction because defendant's postconviction petition asserted officers had no warrant and no exigent circumstances existed and, in response, the state only asserted the single-factor exigency exception rejected in *McNeely*).

Reversed.