STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1526

Eric Kenny Hagerman, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 23, 2021
Affirmed
Smith, Tracy M., Judge

Ramsey County District Court
File No. 62-CR-11-9339

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Lyndsey M. Olson, St. Paul City Attorney, Steven E. Heng, Assistant City Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Johnson, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Eric Kenny Hagerman was convicted of test refusal in 2011 after refusing to provide a blood or urine sample following his arrest for driving while impaired (DWI). He petitioned for postconviction relief in 2017, arguing that his conviction must be

reversed under the *Birchfield* rule, which holds that the state may not criminalize a suspected impaired driver's refusal to submit to a blood or urine test in the absence of a search warrant or a valid exception to the warrant requirement. *See Johnson v. State*, 916 N.W.2d 674, 678 n.2, 679 (Minn. 2018) (*Johnson I*). The district court applied the *Birchfield* rule and concluded that Hagerman's conviction was constitutional because, at the time of Hagerman's test refusal, a per se exigent-circumstances exception to the warrant requirement applied. The district court declined to retroactively apply the United States Supreme Court's 2013 decision in *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 (2013), which invalidated the per se exigent-circumstances exception, because it reasoned that *McNeely* did not announce a substantive rule of law that applies retroactively to Hagerman's case.

On appeal, we concluded that the rule announced in *McNeely* is substantive and applies retroactively in the context of test-refusal cases challenged under the *Birchfield* rule. *Hagerman v. State*, 945 N.W.2d 872 (Minn. App. 2020), *vacated* (Minn. Apr. 20, 2021) (mem.). Because the state relied on the per se exigent-circumstances exception invalidated by *McNeely* to justify the warrantless test request, we held that Hagerman's test-refusal conviction was unconstitutional and accordingly reversed. Thereafter, the Minnesota Supreme Court held that "the rule announced in *McNeely* is procedural and does not apply retroactively to test-refusal convictions on collateral review." *Johnson v. State*, 956 N.W.2d 618, 620 (Minn. 2021) (*Johnson II*). The supreme court vacated our opinion in this case and remanded the matter for reconsideration in light of *Johnson II*.

Hagerman maintains on remand that his conviction should be reversed or, in the alternative, that the case should be remanded for further development of the record regarding the existence of exigent circumstances in this case. But, because the supreme court's decision in *Johnson II* allows the state to rely, as it did, on the pre-*McNeely* per se exigent-circumstances exception, and because Hagerman conceded in district court that, under pre-*McNeely* law, the per se exigent-circumstances exception justified the request for a blood or urine test in his case, we affirm.

FACTS

In November 2011, St. Paul police officers arrested Hagerman on suspicion of drunk driving after Hagerman's vehicle ran a red light, struck the median, and rolled over. According to the criminal complaint, Hagerman attempted to flee the scene on foot before being apprehended and transported to the hospital. An officer observed that Hagerman appeared "obviously intoxicated" because he smelled of alcohol and had glassy eyes, and Hagerman admitted to the officer that he had been drinking "a little." Hagerman declined to submit to preliminary breath testing. The officer then read him the implied-consent advisory and asked him to submit to blood or urine testing but did not obtain a search warrant for a blood or urine sample. Hagerman refused to submit to either test.

The state charged Hagerman with third-degree test refusal in violation of Minn. Stat. § 169A.20, subd. 2 (2010), and fourth-degree DWI in violation of Minn. Stat. § 169A.20, subd. 1(1) (2010). Hagerman pleaded guilty to and was convicted of third-degree test refusal, and the state dismissed the fourth-degree DWI charge. As part of his guilty plea, Hagerman admitted that he had "consumed enough alcohol to impair [his] ability to drive"

at the time of the accident. He also agreed that, when the officers asked him to submit to chemical testing, "they knew [he had] been drinking based upon their observations."

In 2016, the United States Supreme Court decided *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), and the Minnesota Supreme Court correspondingly decided *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016). These three cases collectively make up "the *Birchfield* rule," which holds that states may not criminalize a suspected impaired driver's refusal to submit to a blood or urine test in the absence of a search warrant or a valid exception to the warrant requirement. *See Johnson I*, 916 N.W.2d at 678 n.2, 679. In July 2017, Hagerman filed a petition for postconviction relief under the *Birchfield* rule, arguing that his conviction violated the constitution because it was based on refusing to submit to a warrantless blood or urine test in the absence of an exception to the warrant requirement.

The district court denied Hagerman's petition, determining that the *Birchfield* rule did not apply retroactively to final convictions. Hagerman appealed, and in April 2018, this court stayed the appeal pending a decision by the Minnesota Supreme Court in *Johnson I*. In *Johnson I*, the supreme court held that *Birchfield* announced a substantive rule that applies retroactively to convictions that were final before the rule was announced. 916 N.W.2d at 677. The supreme court remanded Johnson's case to the district court to determine "whether a warrant or an exception to the warrant requirement existed at the time of the test refusal," *id.* at 684-85, and this court likewise reversed and remanded Hagerman's case to the district court for further proceedings consistent with *Johnson I*.

On remand, the state asserted in the district court that one exception to the warrant requirement existed at the time of Hagerman's test refusal: the per se exigent-circumstances exception. Under the per se exigent-circumstances exception, the natural dissipation of alcohol in the blood stream constitutes a per se exigency justifying a warrantless search. *O'Connell v. State*, 858 N.W.2d 161, 165 (Minn. App. 2015), *review granted* (Minn. Mar. 25, 2015), *review denied* (Minn. Oct. 20, 2015). The Supreme Court invalidated the per se exigent-circumstances exception in 2013 in *McNeely*, 569 U.S. 141, 133 S. Ct. 1552, but the state argued that *McNeely* did not apply retroactively to Hagerman's 2011 conviction.

Hagerman argued in response that *McNeely* does apply retroactively and that the state accordingly could not rely on the per se exigent-circumstances exception to support his conviction. He submitted that his case turned on the single legal question of whether "warrant exceptions [are] defined by current law, or by prior law," and that, "[i]f warrant exceptions are defined by prior law, no hearing is necessary." He conceded that, "[i]f the state is correct" that the per-se exigent-circumstances exception applies to his case, "a hearing would be futile—indeed, the entire remand process undertaken by the supreme court and the court of appeals would have been a waste."

The district court again denied Hagerman's petition for postconviction relief, determining that *McNeely* did not apply retroactively to Hagerman's case and that the pre-*McNeely* per se exigent-circumstances exception justified the warrantless blood or urine test at the time of Hagerman's test refusal. Hagerman appealed, and this court reversed,

holding that the *McNeely* rule applies retroactively when a petitioner challenges a final conviction for test refusal under the *Birchfield* rule. *Hagerman*, 945 N.W.2d at 874, 881.

Hagerman filed a petition for further review with the supreme court. The supreme court granted review and stayed the proceedings pending its decision in *Johnson II*. In *Johnson II*, the supreme court held that "[t]he rule announced in *Missouri v. McNeely* is procedural and does not apply retroactively on collateral review of final test-refusal convictions." 956 N.W.2d at 620 (citation omitted). The supreme court then vacated this court's decision in *Hagerman* and remanded the case for reconsideration in light of its decision in *Johnson II*.

We reinstated Hagerman's appeal and ordered supplemental briefing from the parties addressing the impact of *Johnson II*. Both parties submitted supplemental briefing, and we now reconsider the matter in light of *Johnson II*.

DECISION

Appellate courts generally review a district court's denial of postconviction relief 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). Legal issues are reviewed de novo. *Id.*

Hagerman petitioned for postconviction relief under the *Birchfield* rule, arguing that the officer who requested the blood or urine test did not have a warrant and that no exception to the warrant requirement applied. The state asserted that the pre-*McNeely* per

se exigent-circumstances exception applied at the time of Hagerman's test refusal and that that exception justified the warrantless blood or urine test. The district court agreed with the state and denied Hagerman's request for postconviction relief without an evidentiary hearing.

On appeal, Hagerman argued that the district court erred because the *McNeely* rule is substantive and applies retroactively when a petitioner challenges a final conviction for test refusal under the *Birchfield* rule. His briefing focused on the *McNeely*-retroactivity argument and did not raise any other challenges to the district court's order.

The supreme court has now squarely decided, in *Johnson II*, that "the rule announced by *McNeely* is procedural in the test-refusal context and does not apply retroactively" in postconviction challenges to convictions that were final before *McNeely*. *Johnson II*, 956 N.W.2d at 626. Hagerman's conviction became final on February 19, 2012, and *McNeely* was decided on April 17, 2013. Thus, the district court correctly determined that the *McNeely* rule did not apply retroactively to Hagerman's conviction and that the state could rely on the pre-*McNeely* per se exigent-circumstances standard to justify the warrantless blood or urine test request.

In his supplemental briefing following the supreme court's remand in this matter, Hagerman concedes that, in light of *Johnson II*, his challenge to his test-refusal conviction is "governed by the pre-*McNeely* definition of the exigent circumstances warrant exception." He argues, though, that this court should nevertheless reverse his conviction because "the state has failed to adequately assert a valid warrant exception" under the pleading requirements of *Fagin*. *See Fagin v. State*, 933 N.W.2d 774, 780-81 (Minn. 2019).

Alternatively, he argues that the case should be remanded "for further development of the record on whether the exigent circumstances exception under pre-*McNeely* law applies" to his case.

In *Fagin*, the supreme court outlined a three-step procedure that a postconviction petitioner and the state must follow in cases challenging test-refusal convictions under the *Birchfield* rule. *Id.* at 780. First, the postconviction petitioner "must affirmatively allege that no search warrant was issued and that (at least upon information or belief) no warrant exception was applicable." *Id.* Second, the pleading obligation shifts to the state, which "shall admit or deny the existence of a warrant." *Id.* Third, and if no warrant issued, the state "shall admit the lack of an exception or, alternatively, state specifically the exception relied on and the grounds for the State's reliance." *Id.* Ultimately, "the burden of proof in a *Birchfield*/*Johnson* postconviction proceeding is on the petitioner, . . . [and] the petitioner must prove two negatives: no warrant and no exception." *Id.*

While we recognize that *Fagin* had not yet been decided when this matter was pending in district court,[1] we nonetheless conclude that the pleading standard outlined in

[1] The district court issued its second order denying postconviction relief in July 2019, and Hagerman filed the notice of appeal in this case in September 2019. The supreme court issued the *Fagin* opinion in October 2019. *See Fagin*, 933 N.W.2d at 774.

We note that, on appeal, the state argues that Hagerman "forfeited" his argument regarding the adequacy of the state's pleadings under *Fagin*. *See, e.g.*, *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (explaining that appellate courts generally decline to consider matters not first argued to and considered by the district court). Given the timing of the *Fagin* decision relative to Hagerman's case, though, we disagree that the typical forfeiture rule applies. In any event, we elect to address Hagerman's argument in the interest of judicial economy. *See, e.g.*, *Bode v. Minn. Dep't of Nat. Res.*, 612 N.W.2d 862, 869 (Minn. 2000) (addressing an issue to avoid the "exercise in judicial inefficiency" that would result

Fagin was satisfied here. Hagerman satisfied the first step by affirmatively alleging, in his postconviction petition memorandum, that the officer who asked him to submit to a urine or blood test did not have a warrant and that no exigent circumstances justified a warrantless test. The state initially responded by arguing that Hagerman could not challenge his conviction under the *Birchfield* rule because that rule is not substantive and retroactively applicable, and the district court agreed. Later though, after remand following the supreme court's *Johnson I* decision that the *Birchfield* rule is substantive and retroactively applicable, the state filed a supplemental response to the postconviction petition. In its supplemental response, the state met its pleading obligations under steps two and three of the *Fagin* procedure. The state conceded that it did not have a warrant for the search and that it needed to "show that a valid exception to the warrant requirement applies to uphold [Hagerman's] petition." The state then affirmatively asserted the per se exigency exception that existed at the time of Hagerman's test refusal, contending that, "[b]ecause [Hagerman's] case was final before *McNeely* was decided, the natural dissipation of alcohol constitutes a per se exigent circumstance."

Hagerman contends that the state should have asserted the exception that it relied on with more specificity. But *Fagin* provides that the state must assert the warrant exception it relies on in order "to give the petitioner adequate notice of the State's position." 933 N.W.2d at 780. Hagerman indisputably had notice of the state's position here, as

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from a remand); *State v. Faber*, 343 N.W.2d 659, 660 (Minn. 1984) (addressing a question not properly before the court, stating that "in the interest of judicial economy, we will put substance over form in this case").

evidenced by the fact that he countered it at length in his reply brief by arguing that the per se exigency exception should not apply as a matter of law. Additionally, Hagerman conceded in that same briefing that, if the pre-*McNeely* per se exigency exception does apply, "a hearing would be futile." In other words, Hagerman pursued only a legal, and not a factual, challenge to the applicability of the per se exigent-circumstances exception. The district court determined that the per se exigent-circumstances exception applied as a matter of law and that the exception justified the blood- or urine-test request in this case. We will not reverse Hagerman's conviction or remand for an evidentiary hearing when the pleading requirements of *Fagin* were satisfied and Hagerman conceded that a hearing on the matter was unnecessary if pre-*McNeely* law applied.[2]

In sum, the district court did not err by concluding that the per se exigent-circumstances exception applied and by denying Hagerman's request for postconviction relief.

Affirmed.

[2] Hagerman's concession was well founded given the record in this case. Under the per se exigency rule, an exigency existed to justify a warrantless blood or urine test "whenever an officer had probable cause to believe that a defendant committed 'a crime in which chemical impairment is an element of the offense.'" *Johnson II*, 956 N.W.2d at 621 (quoting *State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009)). The record here, specifically, the transcript of Hagerman's plea hearing, shows that Hagerman admitted that he had consumed alcohol prior to driving, that it impaired his ability to drive, and that the officers "knew [he had] been drinking based upon their observations." The record amply supports a determination that the officers had probable cause to believe that Hagerman was driving while impaired.