**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A20-0815**

Jeffrey Allan Braun, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 30, 2021**
**Reversed and remanded**
**Jesson, Judge**

Stearns County District Court
File No. 73-CR-07-11062

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

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

Renee N. Courtney, St. Cloud City Attorney, Kevin M. Voss, Deputy City Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Ross, Judge; and Jesson, Judge.

**NONPRECEDENTIAL OPINION**

**JESSON**, Judge

In 2009, appellant Jeffrey Braun refused to submit to testing—that is, to provide a blood or urine sample—after being stopped for erratic driving. He subsequently pleaded guilty to criminal test refusal in violation of Minnesota Statutes section 169A.20, subdivision 2 (2006). But in the twelve years following his plea, the law concerning

driving while intoxicated (DWI) underwent seismic changes. *See, e.g.*, *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016); *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552 (2013). These changes led Braun to file a petition for postconviction relief, arguing that precedent prohibiting the criminalization of driving-while-impaired test refusal—absent a warrant or exigent circumstances—requires that his 2009 conviction be vacated. Because the rules derived from these cases do not apply retroactively to Braun's case, we do not vacate his conviction. But because the law as it existed in 2009 does not conclusively establish that the suspected presence of drugs in Braun's system creates, in and of itself, an exigent circumstance, we reverse and remand for further proceedings.

**FACTS**

In late August 2009, a trooper with the Minnesota State Patrol in St. Cloud received reports of erratic driving. After locating the car and observing the driver make an improper turn, the trooper executed a traffic stop. When the trooper approached, he identified appellant Jeffrey Braun as the driver with his 13-year-old son in the vehicle. Braun indicated that they were on their way to Fergus Falls. During their conversation, the trooper noticed that Braun was sweating excessively and had bloodshot eyes. He also exhibited quick hand and finger movements and at times spoke rapidly. Suspecting that Braun may be under the influence of a controlled substance, the trooper administered several field sobriety tests and a preliminary breath test. Although Braun performed poorly on the field sobriety tests, he had an alcohol concentration of 0.00, which led the trooper to believe that Braun was under the influence of a stimulant. Braun was arrested and taken to a local hospital, where the trooper read him an implied-consent advisory. Braun indicated that he

understood the consequences of refusing to provide a blood or urine sample and did not wish to speak to an attorney. Despite this, when asked if he would submit to testing, Braun refused. As a result, the state charged Braun with second-degree test refusal. Minn. Stat. §§ 169A.20, subd. 2, .25, subd. 1(b) (2006).

Stipulating to the facts above, Braun pleaded not guilty to second-degree test refusal.[1] In exchange, the state agreed to a reduced sentence. Based on the stipulated facts, the district court found Braun guilty of second-degree test refusal and sentenced him to 365 days' imprisonment, with 335 days stayed for six years of probation and credit given for seven days already served.

Ten years passed, during which the landscape of DWI law changed considerably. Encouraged by these changes, Braun filed a petition for postconviction relief in 2019, asking the court to vacate his 2009 conviction. He argued that precedent adopted after his conviction which prohibited criminalization of DWI test refusal—absent a warrant or exigent circumstances—applied retroactively and required vacation of his conviction.

The state disagreed, claiming that the potential dissipation of the drug believed to be in Braun's system created a valid exigent-circumstance exception to the warrant requirement. In response, Braun asserted that the exigent circumstance exception only applied when the defendant was suspected of being under the influence of *alcohol*, not drugs. Because the trooper believed Braun was under the influence of a stimulant, Braun

[1] Previously known as a *Lothenbach* plea, this type of plea—where a defendant enters a guilty plea, waives his right to a jury trial, and stipulates to the prosecution's case—was incorporated into the Minnesota Rules of Criminal Procedure in 2007. *State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980), *superseded by* Minn. R. Crim. P. 26.01, subd. 4.

claimed that no valid warrant exception applied. But the postconviction court was unpersuaded by Braun's arguments and denied his petition for relief.

Braun appeals.[2]

**DECISION**

Much has changed in DWI law since Braun was found guilty of criminal test refusal. Therefore, to provide adequate context for Braun's claim, we find it instructive to trace the relevant progression of DWI-test-refusal caselaw from the time of Braun's arrest to the present. After establishing how the law has changed, we then consider the merits of Braun's petition.

The first major shift in DWI test-refusal law occurred in *Missouri v. McNeely*, 569 U.S. at 141, 133 S. Ct. at 1552. Applying Fourth Amendment principles, the United States Supreme Court recognized that although warrantless searches, such as blood draws, are presumptively unreasonable, in some instances "exigent circumstances" allow law enforcement to conduct such searches. *McNeely*, 569 U.S. at 148-50, 133 S. Ct. at 1558-59. But the Court also limited what qualified as a valid warrant exception, holding that alcohol dissipation does not, in and of itself, present an exigent circumstance justifying a warrantless blood test for a person suspected of DWI. *Id.* at 156, 133 S. Ct. at 1536. Or, to place this holding in terms used by our previous caselaw, the dissipation of alcohol is

[2] We granted the state's motion to stay the appeal pending the Minnesota Supreme Court's review of *Hagerman v. State*, 945 N.W.2d 872 (Minn. App. 2020) and *Johnson v. State*, 2020 WL 3409773 (Minn. App. June 22, 2020). On March 24, 2021, the supreme court issued its decision in *Johnson v. State*, 956 N.W.2d 618, 626 (Minn. 2021) (*Johnson II*). We subsequently dissolved the stay and the parties submitted supplemental briefing.

not a "single-factor exigent circumstance." *See, e.g.*, *State v. Shriner*, 751 N.W.2d 538, 542 (Minn 2008) ("We have described the test for single-factor exigent circumstances as one in which the existence of *one fact alone* creates exigent circumstances." (quotation omitted)); *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990) (explaining that "in certain situations a single factor alone can create exigent circumstances").

Three years later, in *Birchfield v. North Dakota*, the Court returned to the issue of warrantless blood tests in DWI cases. 136 S. Ct. at 2160. *Birchfield* asked the Court to determine whether a defendant's refusal to submit to a warrantless blood test may be criminalized. *Id.* at 2166-67. Relying on the same Fourth Amendment principles highlighted in *McNeely*, the Court held that warrantless test refusal by a suspected impaired driver—like Braun—may be criminalized only when a warrant exception applies. *Id.* at 2184-85.

Following *Birchfield*, the Minnesota Supreme Court addressed the retroactivity of these decisions. First, in *Johnson v. State*, 916 N.W.2d 674, 684 (Minn. 2018) (*Johnson I*), the supreme court held that the rule announced in *Birchfield* applied retroactively. This was followed most recently by *Johnson II*, where the supreme court concluded that the rule announced in *McNeely*—that alcohol dissipation does not present a per se exigent circumstance justifying a warrant exception—does not apply retroactively. *Johnson*, 956 N.W.2d at 626.

Against this backdrop, we turn to Braun's petition. In the proceedings before the postconviction court, which took place before the supreme court's *Johnson II* decision, Braun argued that the retroactive application of *McNeely* required vacation of his

conviction. After all, there was only a single, exigent circumstance relied upon by the state: that the dissipation of drugs in Braun's system necessitated a warrantless search. And Braun further asserted that even if *McNeely* was not retroactive, controlling caselaw in 2009 did not recognize a single-factor exigent circumstance exception based upon the dissipation of *drugs* in one's system, only *alcohol*. At minimum, Braun asserted, he was entitled to an evidentiary hearing to determine the rate at which drugs dissipate in the body and whether this created a sufficient exigency to justify a warrantless search.

The postconviction court denied Braun's request for relief, presciently reasoning that *McNeely* did not retroactively apply to his case. *Johnson II*, 956 N.W.2d at 626. Accordingly, the court relied on Minnesota precedent in effect in 2009—*State v. Shriner*—and concluded that the dissipation of drugs in Braun's system was sufficient to establish an exigent circumstance.

When a court denies a petition for postconviction relief, we review that decision for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). The postconviction court's application of the law, however, presents a legal question which we review de novo. *Id.* Because the supreme court confirmed in *Johnson II* that *McNeely* is not retroactive, the focus of our de novo review is the district court's application of *Shriner* to Braun's case. *Johnson II*, 956 N.W.2d at 626.

Shriner asked the supreme court to determine whether the dissipation of alcohol in the blood created exigent circumstances sufficient to justify a warrantless blood draw. 751 N.W.2d at 539. Although warrantless searches, such as blood draws, are presumptively unreasonable, where the "exigencies of the situation" would make obtaining

a warrant objectively unreasonable, a warrantless search may be permissible. *Id.* at 541. Whether the circumstances are exigent typically depends on the totality of the circumstances. *Id.* But, in some instances, "the existence of *one fact alone* creates exigent circumstances." *Id.* at 542 (quotation omitted). If none of the single-factor circumstances are clearly implicated, then the courts apply the totality-of-the-circumstances test. *Id.*

To determine whether the presence of alcohol in the blood created exigent circumstances, in *Shriner*, the supreme court looked to established examples of exigent circumstances for guidance, including hot pursuit of a fleeing felon, the protection of human life, and most relevant, the imminent destruction of evidence. *Id.* at 541-42. Because the "rapid, natural dissipation of alcohol in the blood" threatens the imminent destruction of evidence in DWI cases, the supreme court concluded that the suspected presence of alcohol in the body, by itself, created an exigent circumstance sufficient to justify a warrantless blood draw. *Id.* at 542-45.

It is this conclusion that the postconviction court relied upon when denying Braun's petition. According to the court, *Shriner* applied to circumstances in which the defendant was suspected of being under the influence of alcohol *or* drugs. We disagree. *Shriner* focused exclusively on the dissipation of *alcohol* in the blood and was silent as to whether the dissipation of drugs in the blood created a similarly pressing need for a blood or urine test. *Id.* at 545. The distinction is especially important here because the state relied on that factor alone to support its argument that a warrant exception applied. If the *Shriner* single-factor exigent circumstances exception does not apply to the dissipation of drugs,

the state could not show that a valid warrant exception applied in Braun's case.[3] Therefore, because *Shriner* did not conclusively establish that the dissipation of drugs is a single-factor exigent circumstance, it was error for the postconviction court to apply *Shriner* to Braun's case.[4]

Still, the state maintains that *Shriner* and subsequent caselaw support the conclusion that the dissipation of drugs in the body creates single-factor exigent circumstances. *State v. Netland*, 762 N.W.2d 202, 213 (Minn. 2009); *Peppin v. Comm'r of Pub. Safety*, No. A12-0164, 2012 WL 5990267, at *1 (Minn. App. Dec. 3, 2012). We remain unpersuaded. As explained above, *Shriner* only considered the dissipation of *alcohol* in the body. The same is true for *Netland*. 762 N.W.2d at 213 ("It is the chemical reaction of alcohol in the person's body that drives the conclusion on exigency."). And although *Peppin* addresses the dissipation of drugs, the case is nonprecedential, and therefore, not binding. Minn. Stat. § 480A.08, subd. 3(b) (2020); Minn. R. Civ. App. P. 136.01, subd. 1(c).[5]

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[3] Because Braun affirmatively alleged that no warrant exception was applicable to his circumstances, the burden shifted to the state to show that a specific exception applied. *State v. Fagin*, 933 N.W.2d 774, 780 (Minn. 2019). We note, however, that neither before the postconviction court nor on appeal does the state explicitly address *Fagin*.

[4] Because the postconviction court erred in its application of the law, we do not address whether the record supports the postconviction court's factual findings. *Pearson*, 891 N.W.2d at 596.

[5] The state also relies on *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 109 S. Ct. 1402 (1989), which we relied on in *Peppin* to conclude that "the evanescent quality of drug metabolites in this case justified the warrantless seizure of evidence." *Peppin*, 2012 WL 5990267, at *4. But *Skinner* was not a criminal case—it involved private railroad companies taking blood and urine samples from employees involved in train accidents. *Skinner*, 489 U.S. at 606, 109 S. Ct. at 1407. As such, we decline to rely on *Skinner* for

In sum, the postconviction court correctly concluded that *McNeely* did not apply retroactively. But because *Shriner* did not conclusively establish that the dissipation of drugs in the blood creates a single-factor exigent circumstance in the same manner as alcohol, the postconviction court's reliance on *Shriner* to reach that conclusion was error. Accordingly, we reverse and remand for further proceedings on the question of whether the dissipation of drugs in the body establishes an exigent circumstance justifying a warrantless search of a suspect's blood.

**Reversed and remanded.**

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the proposition that in criminal cases, the single-factor exigent circumstances exception to the warrant requirement applies to drugs as well as alcohol.