STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1511

Darrell Evans Fulks, petitioner,
Respondent,

vs.

State of Minnesota,
Appellant.

Filed September 7, 2021
Affirmed
Bratvold, Judge

Ramsey County District Court
File No. 62-CR-13-6046

Mark D. Nyvold, Fridley, Minnesota (for respondent)

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

John J. Choi, Ramsey County Attorney, Jeffrey A. Wald, Assistant County Attorney, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and Hooten, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this appeal from a district court order granting postconviction relief and vacating respondent's conviction for first-degree refusal to submit to a chemical test, appellant argues that the district court erred. We first conclude that the district court did not abuse its

discretion by determining that, under *Fagin v. State*, 933 N.W.2d 774 (Minn. 2019), appellant failed to plead with sufficient detail the exigent circumstances that justified a warrantless search of respondent's blood or urine. Even if we assume that appellant's pleading was sufficiently detailed, we next conclude that the district court did not err by concluding respondent met his burden of proving no exigency existed at the time of his arrest. Thus, a warrantless search of respondent's blood and urine was not justified, and we affirm.

FACTS

Offense and conviction

The following summarizes the relevant facts from the postconviction order, most of which are undisputed. On August 15, 2013, at around 2:05 a.m., a Minnesota State Patrol trooper stopped a black SUV on I-94 in St. Paul, travelling eastbound at 75 miles per hour in a 55-mile-per-hour zone. The trooper identified the driver as respondent Darrell Evans Fulks. The trooper noted an odor of alcohol coming from Fulks, who failed field sobriety tests. Fulks admitted he had consumed three beers and smoked marijuana a few hours before driving. Fulks refused a preliminary breath test. The trooper arrested Fulks and transported him directly to the Ramsey County Detention Center.

At 2:48 a.m., the trooper read Fulks the implied-consent advisory. Fulks asked to speak with an attorney. The trooper provided a phone and phone books, and at 2:57 a.m., Fulks stated he was finished. The trooper asked if Fulks would submit to a blood or urine test and Fulks refused.

The appellant State of Minnesota charged Fulks with first-degree driving while impaired—refusal to submit to a chemical test.[1] After reaching an agreement with the state, Fulks pleaded guilty in September 2014 to refusal to submit to a chemical test. On January 12, 2015, the district court sentenced Fulks to 84 months in prison with a five-year conditional-release period after confinement. Fulks did not appeal.

Postconviction petition

On February 21, 2019, Fulks petitioned for postconviction relief requesting that his test-refusal conviction be vacated as unconstitutional. Fulks argued that the state lacked a warrant to obtain his blood or urine and no exception to the warrant requirement applied, relying on *Johnson v. State*, 916 N.W.2d 674, 684 (Minn. 2018) (*Johnson I*).[2] The state opposed his petition and argued that exigent circumstances excused the warrant requirement. After an evidentiary hearing in May 2019, the district court granted Fulks's petition, concluding that the state failed to prove that an exigency existed at the time of Fulks's arrest. The state appealed.

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[1] The state also charged Fulks with first-degree driving while impaired, operating a motor vehicle under the influence of alcohol (count two), and theft of a motor vehicle (count three). In the plea agreement, Fulks agreed to plead guilty to the test-refusal offense and to count three. The state agreed to dismiss count two. The district court imposed a 27-month prison sentence for count three, served concurrently with his sentence for the test-refusal conviction.

[2] As discussed below, *Johnson I* held that the "*Birchfield* rule" applies retroactively. 916 N.W.2d at 684. *Johnson I* explained that the *Birchfield* rule arose from *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016), and *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185-86 (2016). Taken together, these three opinions held that the state cannot prosecute a test-refusal charge for failing to take a blood or urine test unless the state obtained a warrant or an exception to the warrant requirement applied. *Johnson I*, 916 N.W.2d at 679.

First appeal and remand

In May 2020, this court reversed and remanded the district court's order granting postconviction relief, determining that the district court erred when it placed the burden on the state to prove that an exception to the warrant requirement justified the warrantless search of Fulks's blood and urine. *Fulks v. State*, No. A19-1123 (Minn. App. May 21, 2020) (order op.). We relied on *Fagin v. State*, 933 N.W.2d 774, which was issued while the state's appeal was pending. *Fagin* held that the petitioner has the burden to prove that no warrant existed and none of the exceptions to the warrant requirement applied. *Id.* at 779-80.

In September 2020, the district court held a second evidentiary hearing. The district court received one piece of evidence by stipulation of the parties: an affidavit of the arresting trooper. The trooper averred that "[a]t no time did I request a search warrant," "[n]othing prevented me from attempting to obtain a search warrant," and "[i]t did not occur to me to get a search warrant." In response to questions from the court, the state argued that it pleaded the exigency "with specificity; namely, that this event happened in the middle of the night, there was a two-hour window, and that at the time of the refusal, there was only one hour left." The state relied on Minn. Stat. § 169A.20, subd. 1(5) (2012), which requires the state to prove that defendant's alcohol concentration exceeded the legal limit within two hours of driving. Fulks argued that no exigent circumstances existed because the state could have obtained a warrant.

The district court granted Fulks's postconviction petition and vacated his test-refusal conviction. The district court first determined that the state failed to plead the

exigency in sufficient detail. The district court then considered the circumstances surrounding the warrantless search and found that "Fulks was stopped at 2:05AM and refused to voluntarily submit to a test at 2:57AM. This gave [the trooper] approximately 68 minutes to obtain a warrant within the two-hour window. Sixty-eight minutes is sufficient time to obtain a warrant." The district court finally determined that "under the circumstances here, Fulks has established by a preponderance of evidence that a judge would have been available, and a telephonic warrant could have been obtained without much delay and without undermining the efficacy of the search." The district court concluded, "Because law enforcement did not obtain a warrant and exigent circumstances were not present, any search of Fulks's blood or urine was unconstitutional under the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution."

The state appeals.

DECISION

The state argues that the district court "abused its discretion in vacating respondent's test-refusal conviction because Fulks failed to submit any evidence to satisfy his burden to prove the lack of exigent circumstances." Fulks argues that the record "supports, factually and legally, the District Court's findings and conclusion that sufficient time existed to obtain a warrant, and no exigency existed." Fulks also contends that the evidence shows that "no warrant was ever going to be sought making it irrelevant whether a warrant could have been obtained within 68 minutes, or any other period of time."

Appellate courts review the district court's decision to grant or deny a petition for postconviction relief for an abuse of discretion. *Fagin*, 933 N.W.2d at 777. Appellate courts review the district court's factual findings under the clearly erroneous standard, and its legal conclusions de novo. *Id.*; *State v. Stavish*, 868 N.W.2d 670, 677 (Minn. 2015). In particular, appellate courts review a district court's "ultimate determination of exigency de novo." *Stavish*, 868 N.W.2d at 677.

Before analyzing the district court's reasons for granting relief, we begin by summarizing the relevant law. Calling it the "*Birchfield* rule," the Minnesota Supreme Court held 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 I*, 916 N.W.2d at 679 (citing *Birchfield*, 136 S. Ct. at 2185-86 (2016)). *Johnson I* determined that the "*Birchfield* rule" is substantive and applies retroactively to criminal defendants' convictions on collateral review. *Id.* at 684. This means that although Fulks was convicted in 2013, well before the *Birchfield* rule was articulated, the rule applies to his conviction.

The *Birchfield* rule has led to many postconviction petitions that, like Fulks's petition, challenge the validity of a test-refusal conviction. *Fagin* set out the procedural and pleading standards that apply to a postconviction petition based on the *Birchfield* rule. *Fagin*, 933 N.W.2d at 780-81. The petitioner first must affirmatively allege that no search warrant was issued and that (at least upon information or belief) no warrant exception applied. *Id.* at 780. If the petitioner satisfies this requirement, then the burden shifts to the state, which must "admit or deny the existence of a warrant," and if no warrant was issued,

"shall admit the lack of an exception or, alternatively, state specifically the exception relied on and the grounds for the State's reliance. The exception and its grounds must be pleaded in sufficient detail to give the petitioner adequate notice of the State's position." *Id.* The district court must then hold an evidentiary hearing, unless the record shows the petitioner is not entitled to relief. *Id.* at 781. At the evidentiary hearing, the petitioner must prove that no warrant exception applied "by a fair preponderance of the evidence." *Id.* at 779 (quotation omitted); *see* Minn. Stat. § 590.04, subd. 3 (2020).

Here, the parties dispute whether exigent circumstances supported a warrantless search of Fulks's blood. To determine whether an exigency justified a warrantless search, courts examine the totality of the circumstances. *Trahan*, 886 N.W.2d at 222. Caselaw has specifically addressed whether the dissipation of alcohol over time provides exigent circumstances that justify a warrantless search. "[W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *Missouri v. McNeely*, 569 U.S. 141, 156 (2013).[3]

[3] The Minnesota Supreme Court has also held that "alcohol dissipation, by itself, is not 'an exigency in every case sufficient to justify conducting a blood test without a warrant.'" *Johnson v. State*, 956 N.W.2d 618, 621 (Minn. 2021) (*Johnson II*) (quoting *McNealy*, 569 U.S. at 165).

Johnson II also held that the rule announced in *McNeely*—that the natural dissipation of alcohol in a suspect's blood stream is not a single factor, per se exigent circumstance—is procedural and does not apply retroactively on collateral review of final test-refusal convictions. 956 N.W.2d at 626-27. The state concedes that *Johnson II* is inapplicable to Fulks's claim. *McNeely* was decided before Fulks's driving conduct and subsequent test-refusal; therefore, *McNeely*, and not *Johnson II*, applies to Fulks's petition.

In *McNeely*, the Supreme Court identified a variety of circumstances that may establish an exigency sufficient to justify a warrantless search, such as emergency assistance to an endangered person, 'hot pursuit' of a fleeing suspect, or entry of a burning building to put out a fire and investigate its cause. *Id.* at 149. *McNeely* stated a two-step test to determine whether exigent circumstances support a warrantless search: "While these contexts do not necessarily involve equivalent dangers, in each a warrantless search is potentially reasonable because there is [1] compelling need for official action and [2] no time to secure a warrant." *Id.* (quotation omitted). In *Mitchell v. Wisconsin*, the Supreme Court the court explained that the second step of the exigency test—no time to secure a warrant—is established when "(1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." 139 S. Ct. 2525, 2537, 2539 (2019) (holding exigent circumstances "almost always" support a warrantless blood test of an unconscious driver where police have probable cause of drunk driving).[4]

With this background in mind, we turn to the parties' arguments.

[4] *Mitchell* determined that there is a compelling need for blood-alcohol testing for reasons that generally apply to most, if not all, alcohol-related driving arrests: because highway safety is a vital public interest, alcohol limits in our criminal law promote highway safety, and enforcing those criminal laws requires a test "that is accurate enough to stand up in court." *Id.* at 2535-2536. In this appeal, the parties do not discuss the compelling-need step of the exigency test, so this opinion does not consider it further.

A. The district court did not err by determining that the state failed to plead exigency with specificity.

Fulks's petition affirmatively alleged that no search warrant was issued, and no warrant exception applied. The state conceded that no warrant was issued and argued that an exigency existed and circumstances supported a warrantless search. "Specifically," the state pleaded, "the record does not show that the arresting police officer had the ability to obtain a warrant within a reasonable amount of time given that petitioner's driving conduct occurred shortly after 2:00 am on August 15, 2013."[5]

The district court's order granting Fulks's petition stated:

> Consistent with *Fagin*, Fulks alleged no warrant was obtained and no exigent circumstances existed. The State's response admits the lack of a warrant but *identified* exigent circumstances as the exception upon which they would rely.

In a footnote, the district court explained that the state's pleading articulated no factual basis to plead the existence of a warrant exception; the state "simply chose to identify one rather than plead with specificity."

[5] At the evidentiary hearing, the district court asked the prosecuting attorney to articulate the grounds for the exigency. The district court asked on what the prosecuting attorney based its assertion that "one hour is [an] insufficient amount of time to obtain a warrant," and the prosecuting attorney responded, "Um, it's a good question." The district court asked, "if . . . something might come up that will prevent you from getting a warrant, that creates exigent circumstances? . . . Not knowing what it might be?" The prosecuting attorney responded, "No." The district court specifically asked whether there was a fire, whether there was a power outage, and whether the trooper had a phone. The prosecuting attorney acknowledged there was no fire, no outage, and that the trooper had a phone. But the prosecuting attorney argued there was an exigency because "this event happened in the middle of the night, there was a two-hour window, and that at the time of the refusal, there was only one hour left."

On appeal, the state argues in its brief to this court that the district court "erred by concluding that the State failed to articulate any basis for pleading exigency." The state contends that it sufficiently pleaded these grounds: "the driving conduct occurred in the middle of the night; at the time of the refusal, there was only a little over an hour to obtain a warrant; and the record did not show that [the trooper] could have obtained a warrant in a reasonable amount of time." The state concludes, "These grounds were sufficient to show that an exigency *may have* existed, which is all that *Fagin* requires."

The supreme court in *Fagin* cautioned against the state positing exceptions to the warrant requirement that lack explanation and thereby force a petitioner to disprove the existence of an exception in the abstract:

> [W]e acknowledge that the petitioner must prove two negatives: no warrant and no exception. Proving the lack of a warrant is easy enough . . . . But proving the lack of a warrant exception may be more difficult, particularly if the State stands silent . . . *or invokes an exception with no explanation whatsoever.* Allowing the State to stand silent in this unusual context would be contrary to our longstanding jurisprudence that equity is an important component of postconviction relief.

Fagin, 933 N.W.2d at 780 (emphasis added) (quotation omitted). *Fagin* held that "[t]he exception and its grounds must be pleaded in sufficient detail to give the petitioner adequate notice of the State's position." *Id.*

Here, in response to Fulks's petition, the state invoked the exigent-circumstances exception but only alleged that "the record does not show that the arresting police officer had the ability to obtain a warrant within a reasonable amount of time given that petitioner's driving conduct occurred shortly after 2:00 am on August 15, 2013." The state later

identified more specific circumstances in its brief on appeal—the incident occurred in the middle of the night; when Fulks refused, there was just over an hour to obtain a warrant; and the record did not show the trooper could have obtained a warrant within that timeframe. We doubt that the state should be allowed, on appeal, to supplement the circumstances alleged to support an exception to the warrant requirement. *See id.*; *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

More fundamentally, we are aware of no existing caselaw that recognizes the circumstances that the state claims created an exigency at the time of Fulks's arrest, and the state cites no precedent for support.[6] *Mitchell* held that exigency supports a warrantless search when (1) alcohol evidence is dissipating "*and* (2) *some other factor* creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." 139 S. Ct. at 2537 (emphasis added). Here, the state failed to plead "some other factor" creating a "pressing" need that took "priority over a warrant application" at the time of Fulks's arrest. *See id.* Thus, we conclude that the state did not plead the grounds for the exigency with sufficient specificity, as required by *Fagin*. 933 N.W.2d at 780.

Because the state failed to plead an exigency sufficient to excuse the warrant requirement, the district court did not abuse its discretion by granting relief. But even if we assume the sufficiency of the state's pleadings in response to Fulks's petition, we then

[6] The state relies on several unpublished and nonprecedential opinions by this court. Unpublished and nonprecedential opinions are not binding. Minn. R. Civ. App. P. 136.02, subd. 1(c). And we do not find the cited opinions helpful or persuasive.

consider the district court's second reason, which is an independent basis for granting relief.

B. The district court did not err by determining that Fulks met his burden to prove no exigent circumstances justified a warrantless search at the time of his arrest.

The district court determined that Fulks met his burden of proof after accepting the state's argument that 68 minutes remained when Fulks refused a blood and urine test. The district court found that 68 minutes was "sufficient time to obtain a warrant" because there are judges on call in Ramsey County every night, Minnesota provides a "fully-functioning" system for issuing telephone warrants, the trooper had a phone, there was not a power outage in the area at the time, and Fulks was in custody and available for testing. The district court relied on the arresting trooper's affidavit, which stated that "[n]othing prevented [him] from attempting to obtain a search warrant."

The state argues that there is no record evidence establishing that 68 minutes was sufficient to obtain a warrant, and thus the district court's finding is clearly erroneous. Fulks responds that he proved the availability of telephone warrants at the time of his arrest, judges were on call, and he was "in custody the entire time and so his availability for testing was clear. He was fully available."

The supreme court's analysis of the exigent-circumstances exception in *Stavish* and *Trahan* guides our analysis of this record. In *Stavish*, the defendant was charged with driving under the influence of alcohol and causing an accident that led to a passenger's death. *Stavish*, 868 N.W.2d at 672-73. After the accident, the defendant was taken to a hospital and, before being transported to another hospital for emergency treatment, the

arresting officer, without a warrant, obtained a blood sample revealing an alcohol concentration above the legal limit. *Id.* at 673. The district court granted the defendant's motion to suppress the test results, and the state appealed. *Id.* at 674. The issue before the supreme court was whether the warrantless blood draw violated the defendant's Fourth Amendment rights and required suppression of the test results. *Id.* at 674.

The supreme court reasoned that because the defendant had sustained serious injuries that required treatment at another hospital, his medical condition and need for treatment rendered his future availability for a blood draw uncertain. *Id.* at 678. The supreme court held that "the seriousness and uncertainty of Stavish's medical condition, coupled with the possibility of transport to another hospital, made it impossible for [the officer] to know how long Stavish would be available for a blood draw. Thus, [the officer] was faced with an emergency situation . . . ." *Id.* at 680. The supreme court upheld the warrantless search. *Id.*

On the other hand, in *Trahan*, the supreme court rejected the state's position that an exigency justified the warrantless search. 886 N.W.2d at 223. The officer stopped the defendant at 12:34 a.m., arrested him for driving under the influence of alcohol, and brought him to a nearby jail. *Id.* at 219. Around 1:53 a.m., the officer requested a blood or urine test, and the defendant provided a urine test. *Id.* Believing the defendant tampered with the test, the officer asked him to submit to a blood test, which he refused. *Id.* The defendant pleaded guilty to first-degree test refusal, but sought to withdraw his plea

through postconviction proceedings. *Id.* at 220. The district court denied relief. *Id.*[7] Ultimately, the issue before the supreme court was whether an exigency justified a warrantless search so as to make the defendant's test-refusal conviction constitutional. *Id.* at 221.

The supreme court concluded that "the circumstances presented here convince[] us that there was no exigency." *Id.* at 222. The defendant was in custody and immediately accessible to police, and "if blood were to be drawn, officers would have had to transport [the defendant] to a hospital to have his blood drawn . . . , meaning that there would have been some delay during which law enforcement could have attempted to secure a warrant." *Id.* at 222-23. The supreme court rejected a warrantless search and held the test-refusal statute was unconstitutional as applied to the defendant. *Id.* at 224.

Trahan and *Stavish* support the district court's determination that Fulks met his burden to prove that no exigency excused a warrantless search at the time of his arrest. Like the defendant in *Trahan*, Fulks was in custody and fully available to law enforcement, and the trooper could have sought a warrant before the two-hour statutory window expired. Indeed, during the hearing, the district court asked whether the state agreed that Fulks was available for testing, and the prosecuting attorney responded, "I believe so." Unlike in *Stavish*, there was no uncertainty about Fulks's availability for testing or a medical delay that threatened destruction of evidence. In short, as the caselaw discussed above requires,

[7] In the first phase of the appeal, this court affirmed the district court. *Id*. The supreme court reversed and remanded to this court for further review in light of new caselaw; on remand, we reversed Trahan's conviction. 886 N.W.2d at 219.

Fulks established that no "other factor" created a "pressing health, safety, or law enforcement need[] that would take priority over a warrant application." *See Mitchell*, 139 S. Ct. at 2537.

The state argues the district court erred by finding that judges were available during the hours after Fulks's arrest to issue telephone warrants and that the state was thereby prejudiced. The state also argues that district court erred by taking judicial notice that "there is always a judge available to review a warrant."[8] It is true that no record evidence establishes how long it takes to get a telephone warrant nor whether a judge was actually on call to sign a warrant on the night of Fulks's arrest.[9] Still, it is undisputed that Minnesota has established a process for obtaining telephone search warrants at any time, as set out in Minn. Stat. §§ 626.05 to 626.22 (2020) and Minn. R. Crim. P. 36. More importantly, caselaw does not suggests that the availability of a judge or magistrate to sign a telephone warrant creates an exigency that justifies a warrantless search.

Finally, the trooper's affidavit stated that "[n]othing prevented [him] from attempting to obtain a search warrant." The state stipulated to admission of the affidavit

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[8] We need not decide the judicial-notice issue because any error was harmless. *See* Minn. R. Crim. P. 31.01 (harmless errors "must be disregarded"). The issue was foreclosed by the trooper's affidavit, which stated that nothing prevented him from obtaining a warrant.

[9] The state argues on appeal that Fulks failed to prove that an "on-call judge was available to issue a warrant precisely between 3 and 4 a.m. (or if that judge was occupied with a personal emergency, or busy with other warrant requests)" and that therefore an exigency existed. This argument focuses on the availability of a particular judge to sign the warrant, but this exigency was not identified in the state's responsive pleadings, thus, we do not consider the argument. *Fagin*, 933 N.W.2d at 780; *Roby*, 547 N.W.2d at 357. Asking Fulks to disprove the state's theories as they are developed on appeal contravenes *Fagin*'s warning that "equity is an important component of postconviction relief." *Id.*

and cannot challenge its accuracy or validity. Accordingly, the record evidence supports the district court's inference that a warrant was obtainable within 68 minutes. Thus, based on a fair preponderance of all the record evidence, the district court did not err by determining that Fulks met his burden of establishing that the exigent circumstances exception did not excuse a warrant requirement at the time of his arrest.

Affirmed.