STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0292

Mohamed Abdikadir Ahmed, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed September 13, 2021
Affirmed
Reyes, Judge

Dakota County District Court
File No. 19HA-CV-20-1848

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

Keith Ellison, Attorney General, Nicholas Moen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from a district court's order denying reinstatement of appellant's driving privileges, appellant argues that (1) his license cannot be revoked because he did not refuse both a urine and a blood test and (2) even if he did refuse testing, he had an "immediate change of mind." We affirm.

FACTS

In April 2020, a Minnesota state patrol officer stopped appellant Mohamed Abdikadir Ahmed on suspicion of driving while impaired. The officer obtained a search warrant to test appellant's blood or urine. The officer told appellant that he had a warrant and asked if he would take a blood test. Appellant said he does not like blood and asked to do a urine test instead. The officer agreed. Appellant drank several glasses of water over the course of approximately an hour and a half. However, he was unable to provide a urine sample.

The officer told appellant that he would be considered to have refused testing. Appellant then asked to provide a blood sample instead, but the officer rejected his request, and marked appellant as a refusal. Respondent commissioner of public safety (the commissioner) revoked appellant's driving privileges.

Appellant petitioned for judicial review, seeking to reinstate his driving privileges. The district court held a remote hearing in September 2020, at which appellant's attorney appeared but he did not. The commissioner called the officer as its sole witness, and appellant's attorney submitted a recording of the officer's interactions with appellant as its sole exhibit. In addition to testifying about the above facts, the officer testified that he thought appellant had a reasonable time to provide a urine sample and tried to "manipulat[e] the time." The district court denied appellant's petition for reinstatement. This appeal follows.

DECISION

Following denial of a petition to reinstate driving privileges, we review the district court's findings of fact and credibility determinations for clear error. *Frost v. Comm'r of Pub. Safety*, 348 N.W.2d 803, 804 (Minn. App. 1984); *see also Becker v. Comm'r of Pub. Safety*, 374 N.W.2d 313, 306 (Minn. App. 1985). We review the district court's conclusions of law de novo. *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985).[1] Whether a driver refused to submit to testing is a question of fact that we review for clear error. *Stevens v. Comm'r of Pub. Safety*, 850 N.W.2d 717, 722 (Minn. App. 1988).

I. A driver need not refuse both a blood test and urine test for the commissioner to revoke the driver's driving privileges.

Appellant concedes that his inability to produce a urine sample constitutes refusal of a urine test by conduct but argues that his license cannot be revoked unless he refused both a urine and a blood test. We disagree.

The commissioner must revoke the license of a driver who refuses to submit to chemical testing. Minn. Stat. 171.177, subd. 4. "Action may be taken against a person who refuses to take a blood test only if a urine test was offered and *action may be taken against a person who refuses to take a urine test only if a blood test was offered*." Minn. Stat. § 171.177, subd. 2 (emphasis added). This statute requires that an alternative test be offered to a driver. *Id.*; *State v. Hagen*, 529 N.W.2d 712, 714 (Minn. App. 1995) (interpreting same language in Minn. Stat. § 169.123, subd. 2(c) (1992), which is

[1] We may rely on caselaw interpreting the driving-while-impaired statutes, Minn. Stat. § 169A.01-.78 (2018), in cases under Minn. Stat. § 171.177 (2018). *Jensen v. Comm'r of Pub. Safety*, 932 N.W.2d 844, 846-47 (Minn. App. 2019).

predecessor to current driving-while-impaired statute, Minn. Stat. § 169A.51, subd. 4 (2020)). The alternative-test requirement is satisfied if an officer *initially* offers a driver both tests. *Hagen*, 529 N.W.2d at 714. If both tests are offered, a driver is bound by his choice of test and, if the driver subsequently refuses his chosen test, the officer need not reoffer the unchosen or declined test. *Franko v. Comm'r of Pub. Safety*, 432 N.W.2d 469, 472 (Minn. App. 1988). A driver's refusal may be based on the driver's conduct, including inability to produce a sample, in light of the totality of the circumstances. *State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010); *see also State, Dept. of Highways v. Lauseng*, 183 N.W.2d 926, 927 (Minn. 1971) (noting that officers should not have to "ascertain whether or not the driver is making a good-faith effort to produce a sample"). We construe the driving-while-impaired statutes liberally in favor of the public interest and against the private interests of the drivers involved. *Franko*, 432 N.W.2d at 472.

Here, the officer offered appellant a blood test but appellant declined it. Appellant asked to take a urine test, which the officer provided. Appellant then refused the urine test by failing to produce a sample, even after having an hour and a half to do so, during which appellant drank several glasses of water. Section 171.177, subdivision 2, requires only that appellant be offered both tests, not that he must refuse both tests. On these particular facts, we conclude that the officer offered appellant both tests and appellant refused the urine test, which is sufficient to revoke his driving privileges.

Appellant argues that, under *Lauseng*, the officer must reoffer an alternative test after a driver is unable to produce an adequate sample for his chosen test. The supreme court stated in *Lauseng* that "officers *acted properly* when, upon defendant's apparent

inability to produce a urine sample, they then offered him the alternative of a blood or breath test." 183 N.W.2d at 927 (emphasis added). Appellant argues that only after a driver refuses the reoffered test may the driver's license be revoked. This argument is not persuasive for three reasons.

First, this passage in *Lauseng* is dicta. Dicta are expressions by the court that do not squarely address the facts and issues before it. *Wheeler v. State*, 909 N.W.2d 558, 562-63 n.1 (Minn. 2018). As such, dicta are not binding in subsequent cases. *Id.* *Lauseng* addressed whether the driver refused testing by failing to produce a urine sample and then refusing to take subsequently offered alternative tests. 183 N.W.2d at 926-27. The *Lauseng* court's comment that the officers "acted properly" by reoffering the alternative tests does not squarely address that issue and is therefore not binding on this court.

Second, this passage in *Lauseng* does not stand for the proposition that officers *must* reoffer a previously declined or unchosen alternative test before a license can be revoked. It states that officers acted properly by reoffering a test but does not require them to do so. *Id.* at 927.

Third, subsequent caselaw confirms that officers are not required to reoffer, or acquiesce to requests to take, previously declined or unchosen tests. In *Franko*, this court considered whether a driver who initially agreed to a blood test, then refused the blood test and requested a urine test, refused testing. 432 N.W.2d at 471. In holding that the driver refused testing under those circumstances, this court stated that, after a driver has chosen between tests, the testing officer need not reoffer an alternative test if the driver later refuses

the chosen test.[2] *Franko*, 432 N.W.2d at 473. Like *Lauseng*, *Franko* recognizes that the officer may reoffer a test and even that it may be the better procedure to do so. But neither case requires it. Appellant's reliance on *Lauseng* therefore is not persuasive.

II. Appellant did not have an immediate change of mind.

Appellant argues that, even if he refused testing, he had an immediate change of mind. We are not persuaded.

As an initial matter, the district court did not address this argument, even though appellant raised it in his briefing to the district court. We treat the district court's failure to address an argument as an implicit rejection of that argument. *See Palladium Holdings, LLC v. Zuni Mortg. Loan Trust 2006-OA1*, 775 N.W.2d 168, 177-78 (Minn. App. 2009) (noting that failure to address a motion is an implicit denial of that motion), *review denied* (Minn. Jan. 27, 2010); *see also Gunderson v. Comm'r of Pub. Safety*, 351 N.W.2d 6, 7 (Minn. 1984) (reversing on issue district court did not address).

A driver's withdrawal of his refusal to submit to a test cannot cure the refusal unless the withdrawal is "almost immediate." *Schultz v. Comm'r of Pub. Safety*, 447 N.W.2d 17, 19 (Minn. App. 1989). Withdrawal is immediate if it is "not separated from [the] initial response by any substantial time, place, or a telephone call to counsel or a friend." *Id.* We have consistently rejected adopting a more flexible rule allowing drivers to withdraw

[2] This statement squarely addresses the facts and issue in *Franko*, including that the driver requested an alternative test which the officer did not allow her to take, and is therefore not dicta. *Wheeler*, 909 N.W.2d at 562-63 n.1.

refusal in more circumstances. *See Lewis v. Comm'r of Pub. Safety*, 737 N.W.2d 591, 593 (Minn. App. 2007) (citing cases).

The facts of this case are similar to those in *Franko*, which was decided after *Schultz*, in which an officer offered the driver a choice between tests and the driver chose a blood test, thereby declining a urine test. 432 N.W.2d. at 471. She then refused to take the blood test for fear of contracting AIDS and requested to take a urine test. *Id.* The officer did not allow the urine test, and this court affirmed revocation of the driver's license. *Id.* at 473. Here, appellant declined a blood test and instead chose a urine test. He then changed his mind about wanting to take a blood test an hour and a half later. We therefore conclude that appellant did not have an immediate change of mind.

Appellant appears to argue that we should determine immediacy from when the officer marked him as a refusal rather than from when he declined the blood test and chose a urine test. But by making his choice to take the urine test, appellant declined the blood test from the outset, and that is the relevant time from which to determine immediacy. *See Franko*, 432 N.W.2d at 473. Other cases likewise have measured immediacy from the driver's response to the offer of testing rather than from the officer's actions based on that response. *See, e.g.*, *Mossak v. Comm'r of Pub. Safety*, 435 N.W.2d 578, 579 (Minn. App. 1989) (affirming revocation despite attempted withdrawal five to ten minutes after driver's expression of refusal), *review denied* (Minn. Apr. 10, 1989); *Schultz*, 447 N.W.2d at 19 (stating that change of mind "not separated from [driver's] *initial response* by any substantial time"); *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502-03 (Minn. App. 1992) (affirming revocation, without reference to officer's actions, when driver

changed her mind nine minutes after expressing refusal). Appellant's argument is therefore unavailing.

Affirmed.