STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2057

Jason Charles Cibulka, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 7, 2022
Affirmed
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.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In 2012, appellant was convicted of driving while impaired (DWI)—test refusal. In 2019, appellant filed his second postconviction petition challenging the legality of his conviction under the *Birchfield* rule. In the appeal from the district court's order denying

appellant's petition, we reversed and remanded after concluding the petition was timely under the new-interpretation-of-law exception and determining appellant was entitled to relief. The supreme court granted the state's petition for review, vacated our decision, and remanded for reconsideration in light of two recent supreme court decisions. We affirm the district court's decision to deny postconviction relief because appellant's petition is untimely. Thus, we need not decide the merits of appellant's petition.

FACTS

The relevant facts are summarized from our decision in appellant's first postconviction appeal. *See Cibulka v. State*, No. A14-1631, 2015 WL 5194617, at *1 (Minn. App. Sept. 8, 2015) (*Cibulka I*), *rev. denied* (Minn. Nov. 25, 2015). In April 2011, a Forest Lake police officer received a report of an erratic driver. *Id.* The officer "observed a vehicle travel east in the westbound lane," pass cars in a no-passing zone, and "force oncoming traffic to swerve out of the way." *Id.* The officer stopped the vehicle and identified the driver as appellant Jason Charles Cibulka. *Id.*

"The officer suspected Cibulka was impaired," and, despite detecting no alcohol with a preliminary breath test, arrested and transported Cibulka to the police station, where "another officer performed a drug-recognition evaluation and observed that Cibulka had eyelid tremors, was jittery, complained of dry mouth, and had an elevated heart rate and blood pressure." *Id.* The officers suspected Cibulka was under the influence of illegal drugs, read Cibulka the implied-consent advisory, and asked him to submit to a urine test. *Id.* Cibulka could not produce a urine sample, so the officers offered him a blood test, which he refused. *Id.*

The state charged Cibulka with first-degree DWI—test refusal. *Id.* Cibulka pleaded guilty, and the district court stayed a 54-month prison sentence on October 12, 2012. *Id.* The district court later revoked appellant's probation and executed the prison sentence. *Id.*

A. First postconviction proceeding

Cibulka first petitioned for postconviction relief in October 2013, six months after the Supreme Court issued *Missouri v. McNeely*, 569 U.S. 141 (2013). Cibulka's petition sought to vacate his 2012 conviction, arguing it was unconstitutional for the officer to require Cibulka's submission to warrantless urine and blood testing. Cibulka contended: (1) *McNeely* overruled Minnesota caselaw, specifically *State v. Shriner*, 751 N.W.2d 538 (Minn. 2008), and *State v. Netland*, 762 N.W.2d 202 (Minn. 2009), which together held the natural dissipation of alcohol in the bloodstream is a per se exigency that provides an exception to the search-warrant requirement; (2) the test-refusal statute is unconstitutional because it criminalizes a driver's refusal to consent to a presumptively unreasonable warrantless search; and (3) the test-refusal statute violates the doctrine of unconstitutional conditions. The district court denied postconviction relief without an evidentiary hearing, concluding *McNeely* did not apply retroactively to Cibulka's conviction, which was final before *McNeely* was decided. The district court did not address the merits of Cibulka's petition.

Cibulka appealed. We affirmed the district court's order after concluding *McNeely* did not apply retroactively to Cibulka's conviction. *Cibulka I*, 2015 WL 5194617, at *4. Cibulka petitioned for further review, but the Minnesota Supreme Court denied review.

B. Second postconviction proceeding

On June 5, 2019, Cibulka again petitioned for postconviction relief, asking the district court to vacate his 2012 conviction based on *Birchfield v. North Dakota*, 579 U.S. 438 (2016), *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016), which together articulated the *Birchfield* rule.[1] Cibulka contended the *Birchfield* rule applied retroactively to his conviction under *Johnson I*, 916 N.W.2d 674. Cibulka also argued that because law enforcement did not secure a warrant to search his blood or urine, "[t]he only question is whether an exception such as exigent circumstances was present to justify law enforcement's demand for a warrantless search of [his] blood or urine." To support his argument that a warrantless request for urine and blood was not justified by the exigent-circumstances exception under the totality of the circumstances, Cibulka relied on *McNeely,* 569 U.S. 141, and *State v. Stavish*, 868 N.W.2d 670, 677–78 (Minn. 2015).

Cibulka acknowledged his petition "may fall outside the two-year window for seeking postconviction relief," but relied on the exception under Minn. Stat. § 590.01, subd. 4(b)(3) (2018) ("subdivision 4(b) exception"), for a new interpretation of federal or state constitutional law that is retroactively applicable to the petitioner's case. Cibulka

[1] The Minnesota Supreme Court stated the *Birchfield* rule means, "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 v. State*, 916 N.W.2d 674, 679 (Minn. 2018) (*Johnson I*) (citing *Birchfield*, 579 U.S. 438; *Trahan*, 886 N.W.2d 216; *Thompson*, 886 N.W.2d 224).

asserted his petition was timely because he filed it within two years of the supreme court's decision in *Johnson I*, which held the *Birchfield* rule applies retroactively.

In opposing Cibulka's petition, the state argued *McNeely* did not retroactively apply to Cibulka's conviction and the petition should be summarily denied as procedurally barred because (1) Cibulka's first postconviction petition raised *McNeely*, and (2) the second petition was untimely filed outside the two-year deadline for postconviction petitions. The state concluded that because Cibulka had not shown *McNeely* is a new rule that retroactively applies to his case, Cibulka did not satisfy a subdivision 4(b) exception.

The district court denied postconviction relief. The district court determined that although the *Birchfield* rule applies to Cibulka's case, *McNeely* is not retroactive, and under pre-*McNeely* precedent, "the natural dissipation of drugs or alcohol in a person's body was a single-factor, per se exigent circumstance that justified warrantless tests." The district court determined Cibulka was, therefore, lawfully convicted of test refusal because "the dissipation of drugs was sufficient to establish exigent circumstances such that a warrant was not necessary to request a blood or urine sample."

Cibulka appealed. In a nonprecedential opinion, we concluded Cibulka's postconviction petition was timely under Minn. Stat. § 590.01, subd. 4(c) (2018), and therefore was properly before our court. *Cibulka v. State*, No. A19-2057, 2020 WL 5757476, *2 (Minn. App. Sept. 28, 2020) (*Cibulka II*), *vacated* (Minn. Sept. 21, 2021) (mem.). We relied on *Edwards v. State*, a recent decision by our court that held a *Birchfield*-rule claim is timely under the subdivision 4(b) exception if filed within two years of *Johnson I*, which held the *Birchfield* rule is retroactive. *Id.* at *2; *see Edwards v.*

State, 950 N.W.2d 309, 316 (Minn. App. 2020), *vacated* (Minn. Sept. 21, 2021) (mem.). Because Cibulka filed his second postconviction petition in 2019, within two years of the date *Johnson I* was issued, we concluded his petition was timely. *Cibulka II*, 2020 WL 5757476, at *2.

Next, we determined "the retroactivity of *McNeely* is squarely before us" and relied on *Hagerman v. State*, a recent decision by our court that held *McNeely* is retroactive. *Id.* at *2–3; *see Hagerman v. State,* 945 N.W.2d 872 (Minn. App. 2020), *vacated* (Minn. Apr. 20, 2021) (mem.).[2] We reasoned that because *McNeely* applies retroactively to Cibulka's 2012 conviction for refusing to submit to a warrantless blood test, Cibulka's conviction for test refusal is unconstitutional unless the state shows a warrant exception applied. *Cibulka II*, 2020 WL 5757476, at *5. Finally, we determined a remand was unnecessary because the state relied only on a single-factor exigency, which was invalid under *McNeely*. *Id.* As a result, we reversed Cibulka's test-refusal conviction. *Id.* at *6.

The state petitioned the supreme court for further review of three issues: (1) whether *McNeely* applies retroactively; (2) whether a claim that an exception to the two-year time limit under Minn. Stat. § 590.01, subd. 4(b)(3), arises when a new rule is announced or only after an appellate court announces the new rule is retroactive; and (3) whether the court of appeals erred by concluding *McNeely* applies retroactively when Cibulka did not raise that issue in his second petition for postconviction relief.

[2] In its brief, the state argued Cibulka's claim that *McNeely* is retroactive is barred by law of the case because that issue was decided in his first postconviction appeal. We rejected this argument after reasoning the *Hagerman* decision was an intervening change in the law.

The supreme court granted the state's petition for review and stayed proceedings pending final dispositions in *Johnson v. State*, No. A19-1147, and *Aili v. State*, A20-0205. After the supreme court issued decisions in those cases, it vacated the stay, vacated our previous decision in this case, and remanded the matter for reconsideration of *Johnson v. State*, 956 N.W.2d 618 (Minn. 2021) (*Johnson II*), and *Aili v. State*, 963 N.W.2d 442 (Minn. 2021). The parties filed supplemental briefs.

DECISION

This court reviews a district court's denial of postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A district court abuses its discretion by exercising its discretion in an arbitrary or capricious manner, basing its decision on an erroneous view of law, or making clearly erroneous factual findings. *Id.* This court reviews legal issues de novo and reviews factual issues to determine whether there is sufficient evidence in the record to sustain the district court's findings. *Id.*

Cibulka raises two issues in his supplemental brief on remand. First, Cibulka argues that even under pre-*McNeely* standards, law enforcement's demand to search his blood and urine was unlawful because "the dissipation of drugs in his system did not satisfy the single-factor exigency required to justify a warrantless blood test." Based on this argument, Cibulka contends we should "remand the case for further litigation" to determine whether the dissipation of drugs created an exigent circumstance in the same manner as the dissipation of alcohol. Second, Cibulka argues the timeliness of his petition is not before our court because the state forfeited this defense by failing to assert it during district court

proceedings. Because the timeliness of Cibulka's postconviction petition is dispositive, we address this issue first.

We begin by considering the deadlines for filing a postconviction petition. A postconviction petition must be filed within two years of the entry of judgment of conviction or sentence if no direct appeal is filed. Minn. Stat. § 590.01, subd. 4(a)(1) (2018). Cibulka was convicted and sentenced on October 12, 2012, and his conviction became final 90 days later, on January 10, 2013, when the time for filing a direct appeal expired. *See Campos v. State*, 816 N.W.2d 480, 488 n.6 (Minn. 2012). Thus, Cibulka's June 2019 petition is untimely unless a statutory exception applies.

The postconviction statute identifies five exceptions that permit a court to hear an untimely petition for postconviction relief. Minn. Stat. § 590.01, subd. 4(b)(1)–(5) (2018). In petitioning, Cibulka relied on the exception in subdivision 4(b)(3), which permits review of untimely claims asserting a new interpretation of constitutional law by the United States Supreme Court or a Minnesota appellate court when the interpretation is retroactively applicable to the petitioner's case. Subdivision 4(c) mandates that a petition invoking a subdivision 4(b) exception "be filed within two years of the date the claim arises." Minn. Stat. § 590.01, subd. 4(c); *see also Sanchez v. State*, 816 N.W.2d 550, 556 (Minn. 2012). Thus, the two-year time limit in subdivision 4(c) applies to all subdivision 4(b) exceptions. *Sanchez*, 816 N.W.2d at 557. The two-year time limit under subdivision 4(c) begins to run when the defendant "knew or should have known" of the claim. *Id.* at 559.

Next, we summarize Cibulka's claim that a new interpretation of constitutional law invalidates his conviction. Unlike Cibulka's argument in his primary brief in this appeal,

his supplemental brief no longer contends his conviction is invalid under *McNeely*, no doubt because the supreme court held *McNeely* is not retroactive in *Johnson II*. 956 N.W.2d at 620. Rather, on remand, Cibulka argues his test-refusal conviction is invalid based on the *Birchfield* rule and pre-*McNeely* caselaw. The *Birchfield* rule means, "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. As explained in *Johnson I*, the *Birchfield* rule derives from three other decisions, two of which directly considered and invalidated convictions of test refusal involving blood and urine testing: (1) *Birchfield*, 579 U.S. at 438 (holding that the Fourth Amendment prohibits a driver from being convicted of refusing a blood test unless the officer obtained a search warrant or exigent circumstances existed); (2) *Trahan*, 886 N.W.2d at 216 (applying *Birchfield* to conclude Trahan could not be prosecuted for refusing to submit to an unconstitutional warrantless blood test); and (3) *Thompson*, 886 N.W.2d at 225 (extending *Birchfield* to warrantless urine tests and concluding Thompson could not be prosecuted for refusing to submit to an unconstitutional warrantless blood or urine test).

The supreme court has instructed our court to reconsider the timeliness of Cibulka's petition, given the supreme court's recent decision on the timeliness of a postconviction petition that makes a subdivision 4(b) claim. In *Aili*, the supreme court held a claim for postconviction relief based on a new, retroactive, interpretation of law arises when the United States Supreme Court or a Minnesota appellate court announces a new interpretation of law that supports the claim for relief. 963 N.W.2d at 443–44. In other

words, the date a subdivision 4(b) claim arises, triggering the subdivision 4(c) two-year time limit, is not when a postconviction petitioner knew or should have known that they would prevail, but when a petitioner knew or should have known information that would allow them to assert a claim that a subdivision 4(b) exception applied. *Id.* at 447. For a claim that a test-refusal conviction based on a warrantless blood or urine test is unconstitutional, the decisions that "announced a new retroactive rule of law are the opinions that announced the *Birchfield* rule." *Id.* at 449.

Cibulka did not file his second postconviction petition within two years of the opinions announcing the *Birchfield* rule. Cibulka's conviction for test refusal rests on his testimony that he agreed to take a urine test, but could not provide a urine sample, and then refused a blood test. Based on *Aili*, Cibulka's postconviction claim arose when *Birchfield* was decided on June 23, 2016, because that is when the Supreme Court held the Fourth Amendment does not permit a warrantless blood test for impaired driving absent an exception to the warrant requirement. Even if Cibulka's claim arose later, on October 12, 2016, when the Minnesota Supreme Court issued *Thompson* and *Trahan* and applied the *Birchfield* rule to invalidate convictions for refusal of blood and urine tests, his petition is still untimely because it was filed in June 2019, more than two years after October 12, 2016. Thus, Cibulka's claim that we should apply *Birchfield* as a new rule of constitutional law fails because he did not petition within two years of the decisions announcing the basis for his claim. *See Aili*, 963 N.W.2d at 443–44.

Cibulka argues in his supplemental brief that the timeliness of his second postconviction petition under subdivision 4(c) "is not before this Court" because the state

forfeited this defense by failing "to assert that Cibulka's petition was untimely under the 2–year statute of limitations in subdivision 4(c)." Cibulka relies on *Carlton v. State*, which held the time limitation in subdivision 4(c) is not a jurisdictional bar and may be forfeited if the state fails to assert it. 816 N.W.2d 590, 606–07 (Minn. 2012). The state counters that it did not forfeit the timeliness issue because Cibulka failed to show that a subdivision 4(b) exception applied. The state reasons that a necessary result of that failure is that Cibulka's claim is "time-barred under the two-year statute of limitations for postconviction petitions."

Cibulka is correct that the state did not argue during district court proceedings that his second postconviction petition was untimely under subdivision 4(c). Instead, the state argued Cibulka did not establish a new interpretation of federal or state constitutional law that applies retroactively to his case under subdivision 4(b)(3). The state argued *McNeely*, not *Birchfield*, governs Cibulka's petition. The state contended that, because Cibulka's conviction was final before *McNeely* was decided and *McNeely* is not retroactive, Cibulka failed to show a new interpretation of law that is retroactively applicable under subdivision 4(b)(3) and would entitle him to relief from his conviction. On remand, the state continues this line of argument, contending the supreme court has definitively concluded in *Johnson II* that *McNeely* is not retroactive. The state argues, therefore, Cibulka has not established a new rule of constitutional law that applies retroactively to his case, nor has Cibulka asserted any other subdivision 4(b) exception. The state also argues, as it did in its primary brief in this appeal, that Cibulka's postconviction claim is untimely under subdivisions 4(b) and 4(c).

We are not persuaded the state has forfeited its argument that Cibulka's petition is untimely. The state's failure to specifically argue timeliness under subdivision 4(c) does not end its argument that Cibulka's postconviction claim is untimely. Subdivision 4(c) does not stand alone: it is a requirement that applies to petitions invoking any subdivision 4(b) exception. *Sanchez*, 816 N.W.2d at 556. Cibulka must establish a subdivision 4(b) exception to overcome the two-year deadline for postconviction petitions in subdivision 4(a)(1) because he petitioned seven years after his conviction became final.

The supreme court's analysis in *Carlton* is instructive. Although the supreme court held the state forfeited its timeliness argument under subdivision 4(c) by failing to assert it during district court proceedings, the supreme court ultimately concluded Carlton's postconviction claims were barred by the two-year deadline in subdivision 4(a)(1), because Carlton did not show a subdivision 4(b) exception applied to his postconviction petition. 816 N.W.2d at 609 (holding that Carlton had not established an exception under subdivision 4(b)(5) and concluding the district court properly denied his postconviction petition as untimely under subdivision 4(a)(1)).

Just as the supreme court reasoned in *Carlton*, we reason here that, while the state forfeited its argument about subdivision 4(c), Cibulka's petition is untimely under subdivision 4(a)(1) because he has not established a new interpretation of state or federal law that applies retroactively to his case under subdivision 4(b)(3). *Johnson II* refutes Cibulka's claim that *McNeely* applied retroactively to his conviction. 956 N.W.2d at 620. Cibulka's emphasis on pre-*McNeely* caselaw in his supplemental brief does not save his

petition because those cases are not a new interpretation of state or federal law that apply retroactively to his case.

Cibulka also argues our court may not consider the timeliness of his petition because the district court did not consider timeliness when it denied postconviction relief. Although the district court did not consider whether Cibulka's petition was timely, our court can affirm a district court's decision on alternative grounds not decided by the district court if "there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted." *State v. Grunig*, 660 N.W.2d 134, 137 n.4 (Minn. 2003); *see also* Minn. R. Civ. App. P. 103.04 (stating our court can affirm a judgment or order appealed from as the interest of justice may require).

Following the supreme court's remand instructions to reconsider this matter given *Aili* and *Johnson II*, we determine Cibulka's petition is untimely because he did not establish a new interpretation of constitutional law—*McNeely*—that retroactively applies to his case under subdivision 4(b)(3). We therefore affirm on this alternative ground and need not consider the merits of Cibulka's second issue that, under pre-*McNeely* caselaw, the single-factor exigency that applies to the natural dissipation of alcohol does not apply to the dissipation of drugs.

Affirmed.