STATE OF MINNESOTA
IN COURT OF APPEALS
A24-0158

Denise Jean Thordson, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed July 15, 2024
Reversed
Frisch, Judge

Freeborn County District Court
File No. 24-CV-23-1050

Michelle K. Olsen, Zachary Webster, Birkholz & Associates, LLC, Mankato, Minnesota (for respondent)

Keith Ellison, Attorney General, Cory J. Marsolek, Assistant Attorney General, St. Paul, Minnesota (for appellant)

Considered and decided by Ede, Presiding Judge; Frisch, Judge; and Wheelock, Judge.

SYLLABUS

Review on appeal of a district court's determination in an implied-consent proceeding that a driver proved or failed to prove a prescription-drug affirmative defense under Minn. Stat. § 169A.53, subd. 3(i) (2022), is for an abuse of discretion.

OPINION

FRISCH, Judge

Appellant Commissioner of Public Safety seeks reversal of the district court's rescission of respondent's driver's license revocation, arguing that respondent received an adequate implied-consent advisory. Respondent argues that even if the district court erred by determining that the advisory was inadequate, we should nevertheless affirm the rescission of her driver's license revocation because the district court abused its discretion by also determining that she did not meet her burden to prove a prescription-drug affirmative defense. Because the implied-consent advisory adequately advised respondent that refusal to submit to a chemical test was a crime, we reverse the rescission of respondent's driver's license revocation. And we decline to affirm the rescission of respondent's driver's license revocation because the district court did not abuse its discretion by determining that respondent failed to meet her burden to prove the prescription-drug affirmative defense.

FACTS

On February 16, 2023, a Minnesota State Trooper responded to a report that a "vehicle was traveling at low speeds, at times driving on the shoulder, and crossing the fog line." Based on the report, the trooper suspected that the driver of the vehicle was impaired. The trooper located the vehicle and followed it for a short distance. The trooper observed the vehicle's tires touching the fog line, and he initiated a traffic stop. The trooper identified the driver as respondent Denise Jean Thordson and noticed that Thordson's eyes were bloodshot. Thordson told the trooper that she was leaving a bar, and the trooper

instructed Thordson to step out of the car for field sobriety testing. After conducting the field sobriety testing, the trooper did not believe that Thordson was under the influence of alcohol. But Thordson's bloodshot eyes and behavior suggested to the trooper that Thordson was under the influence of marijuana. The trooper directed Thordson to perform additional field sobriety tests, the results of which indicated possible impairment.

The trooper arrested Thordson on suspicion of driving while impaired, and he told her that they would be going to the hospital for a blood draw. The trooper secured a warrant for the test, and he showed the warrant to Thordson. The trooper then advised Thordson that "refusal to take a test was a crime." Thordson provided a blood sample, and the sample was positive for marijuana and amphetamines. The commissioner revoked Thordson's driver's license.

Thordson petitioned for judicial review of the revocation, arguing in relevant part that the trooper failed to adequately advise her of the consequences of taking or refusing a test and that she had a valid prescription for the controlled substance in her system. The district court held an evidentiary hearing at which it heard testimony from the trooper consistent with the above account and received evidence relating to Thordson's prescribed use of an amphetamine known as Adderall. A physician's assistant testified that Thordson was her patient and that she had prescribed Adderall to Thordson. The prescription terms directed Thordson to take one pill every morning. The physician's assistant testified that she was not concerned that Thordson was misusing the prescription and that the rate at which Thordson requested new refills was consistent with normal use. The physician's assistant was unable to testify whether the concentration of amphetamine found in

Thordson's blood at the time of the stop, 0.037 mg/L, was consistent with therapeutic use. When asked whether Thordson would be using the prescription appropriately if she were doing so while also using marijuana, the physician's assistant stated: "I don't know that I can answer that question. I can tell you that in terms of what I'm prescribing for her I have indication she's taking it correctly and not abusing it and not taking it to excess." The physician's assistant further stated, "A lot of people use THC and cannabis products for chronic pain. So what are the parameters for that in ADHD meds? I can't tell you. I don't think there's any established." Thordson also testified about her prescribed use of amphetamines, explaining that she usually took her prescribed medication only on weekdays and that she took her medication on the day of the stop.

The district court, relying on our decision in *Nash v. Commissioner of Public Safety*, 989 N.W.2d 705 (Minn. App. 2023) (*Nash I*), *rev'd*, 4 N.W.3d 812 (Minn. 2024) (*Nash II*), granted Thordson's motion for the rescission of her license revocation. It concluded that the trooper's implied-consent advisory was inadequate because it referenced only blood tests and omitted any reference to urine tests. The district court also determined that Thordson failed to prove that she took her prescription as prescribed.

The commissioner appealed, arguing only that the implied-consent advisory was adequate. Thordson then filed a notice of related appeal, seeking to challenge the district court's determination that she failed to prove her prescription-drug defense. We concluded that Thordson had "preserved [her] arguments regarding the prescription-drug affirmative defense" in the original appeal filed by the commissioner without the necessity of a related appeal.

We now address the merits of the two issues on appeal.

ISSUES

I. Did the trooper adequately advise Thordson of the consequences of refusing to comply with a warrant for a blood test under Minn. Stat. § 171.177 (2022)?

II. Did the district court abuse its discretion when it concluded that Thordson failed to meet her burden to prove the prescription-drug affirmative defense under Minn. Stat. § 169A.53, subd. 3(i)?

ANALYSIS

I. The trooper provided an adequate implied-consent advisory.

The Minnesota Supreme Court recently addressed the adequacy of an implied-consent advisory in *Nash II*. In *Nash II*, the supreme court considered the language of the implied-consent advisory set forth in Minn. Stat. § 171.177, subd. 1, which provides that "[a]t the time a blood or urine test is directed pursuant to a search warrant under sections 626.04 to 626.18, the person must be informed that refusal to submit to a blood or urine test is a crime." *Nash II*, 4 N.W.3d at 815 (emphasis omitted). After analyzing the statute, the supreme court concluded that an implied-consent advisory only requires that the driver be "informed that refusal to take a test (without mentioning blood or urine) is a crime." *Id.* at 817 (quotation omitted). And it concluded that the statute does not require "that an officer inform a driver that a person can refuse a blood test or a urine test and it is a crime if and only if the person refuses both types of test." *Id.* at 818. The supreme court therefore reversed our decision in *Nash I*, in which we had concluded that the advisory was inadequate.

We note that the district court considered the adequacy of the implied-consent advisory in light of our now-reversed decision in *Nash I* and that the parties agree that the implied-consent advisory at issue in *Nash I* and *Nash II* is analogous to that provided here.[1] And we agree. "The general rule is that appellate courts apply the law as it exists at the time they rule on a case, even if the law has changed since a lower court ruled on the case." *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000). Accordingly, we consider the adequacy of the advisory here within the framework of the supreme court's decision in *Nash II*. Applying *Nash II*, we conclude that the trooper's advisory was sufficient because it informed Thordson that refusal to take a test was a crime. Therefore, the district court erred as a matter of law in rescinding Thordson's driver's license revocation based on an inadequate advisory.

II. The district court did not abuse its discretion by determining that Thordson failed to meet her burden to prove the prescription-drug affirmative defense.

Thordson asks us to affirm the district court's rescission of her driver's license revocation on an alternative ground—that the district court abused its discretion in

[1] At oral argument, Thordson's counsel suggested for the first time that the underlying facts in this case could be distinguished from *Nash*. But in her brief to this court, Thordson argued to the contrary, stating that *Nash I* "is *completely on point with the facts of this matter* and the district court was correct granting Respondent's Petition to rescind the revocation of her license." (Emphasis added.) We decline to consider the new position offered for the first time at oral argument. *See Getz v. Peace*, 934 N.W.2d 347, 353 n.3 (Minn. 2019) (declining to address an argument first raised at oral argument because "we generally will not consider arguments raised for the first time on appeal" (quotation omitted)).

determining that she failed to meet her burden to prove the prescription-drug affirmative defense under Minn. Stat. § 169A.53, subd. 3(i).[2] We decline to do so.

As a threshold matter, the commissioner noted at oral argument that the standard of review is unsettled in evaluating a district court's determination that a petitioner has, or has not, proven prescription-drug use as an affirmative defense to a license revocation. We agree that clarification of the applicable standard of review is required. The prescription-drug defense is set forth in Minn. Stat. § 169A.53, subd. 3(i), and provides:

> It is an affirmative defense to the presence of a Schedule I or II controlled substance that the person used the controlled substance according to the terms of a prescription issued for the person according to sections 152.11 and 152.12, unless the court finds by a preponderance of the evidence that the use of the controlled substance impaired the person's ability to operate a motor vehicle.

By its plain language, the statute requires a district court to evaluate whether a petitioner proved that they used a controlled substance according to the terms of the prescription.[3]

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[2] The commissioner argues that we "should not address Respondent's argument that she proved the affirmative defense of prescription drugs, because [this court] denied Respondent's Notice of Related Appeal ("NORA") as premature." Nothing in our order indicates that the issue identified in the NORA was "premature." Our order instead provides that Thordson "preserved [her] arguments regarding the prescription-drug affirmative defense." The order is consistent with the well-settled principle "that a respondent may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, even though the argument may involve an attack upon the reasoning of the lower court or an insist[e]nce upon matters overlooked or ignored by it." *Hunt by Hunt v. Sherman*, 345 N.W.2d 750, 753 n.3 (Minn. 1984). We therefore consider the argument.

[3] We observe that the plain language of the statute does not set forth the standard of proof to establish whether the person asserting the defense used the controlled substance according to the terms of the issued prescription. But both parties on appeal apply the preponderance-of-the-evidence standard of proof to establish whether the person asserting

And in reviewing a district court's compliance with statutory requirements and evaluation of evidence—which presents a mixed question of law and fact—we have traditionally applied an abuse-of-discretion standard of review. *See, e.g.*, *Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997) (stating that when reviewing "mixed questions of law and fact" appellate courts "correct erroneous applications of law, but accord the trial court discretion in its ultimate conclusions and review such conclusions under an abuse of discretion standard"); *O'Donnell v. O'Donnell*, 678 N.W.2d 471, 474 (Minn. App. 2004) ("An abuse of discretion occurs when the district court resolves the matter in a manner that is 'against logic and the facts on [the] record.'" (quoting *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984))). Because the abuse-of-discretion standard encompasses correction of clearly erroneous findings of fact, this approach is consistent with our clear-error review of a district court's factual findings underlying an implied-consent decision. *See Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002) (applying clear-error review to a district court's finding of fact in an implied-consent case).

We therefore hold that review on appeal from a district court's determination in an implied-consent proceeding that a driver proved or failed to prove a prescription-drug

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the defense used the controlled substance according to the terms of the prescription. We therefore assume without deciding that the preponderance-of-the-evidence standard of proof applies. Our application of this standard is consistent with our recognition that where the legislature does not expressly provide for a standard of proof "for statutorily-created causes of action, this silence reflects a signal that the legislature intended the preponderance of the evidence standard to apply." *Weiler v. Ritchie*, 788 N.W.2d 879, 883 (Minn. 2010) (quotations omitted).

affirmative defense under Minn. Stat. § 169A.53, subd. 3(i), is for an abuse of discretion.[4] Having determined the applicable standard of review, we turn to the merits of Thordson's argument that the district court abused its discretion by determining that she failed to meet her burden of proof to establish the prescription-drug affirmative defense.

The commissioner must revoke a driver's license if a peace officer has certified that the driver was operating a motor vehicle while impaired "and that the person submitted to a test and the test results indicate . . . the presence of a controlled substance listed in Schedule I or II or its metabolite, other than marijuana." Minn. Stat. § 169A.52, subd. 4(a) (2022). Amphetamines are generally Schedule I or II substances. Minn. Stat. § 152.02, subds. 2(g), 3(d)(1) (2022). Because the trooper certified that he had probable cause to believe that Thordson was driving while impaired and that her test results showed the presence of amphetamines, the commissioner was required to revoke Thordson's license. But the prescription-drug affirmative defense allows a petitioner to assert as an affirmative

[4] We distinguish our review of the question of whether a petitioner *met their burden* to establish an affirmative defense from the question of whether an affirmative defense *is available at all*. "The availability of an affirmative defense is a question of law" subject to our de novo review. *Axelberg v. Comm'r of Pub. Safety*, 831 N.W.2d 682, 684 (Minn. App. 2013), *aff'd*, 848 N.W.2d 206 (Minn. 2014). In *Axelberg*, the question presented was whether the common-law affirmative defense of necessity applied in implied-consent proceedings. *Id.* This required us to interpret the implied-consent statute to determine whether it intended to abrogate the common-law necessity defense. *Id.* at 685-86. Our task in *Axelberg* was to determine, under the language of the statute, whether the defense existed at all, not whether the petitioner met their burden to prove the applicability of the defense.

defense to the revocation that they used that controlled substance "according to the terms of a prescription."[5] Minn. Stat. § 169A.53, subd. 3(i).

The district court found that Thordson failed to meet her burden to prove that she was taking her prescription according to its prescribed terms. This finding is supported by the record; indeed, the finding is based on undisputed evidence. Thordson testified that she did not take her medication every day—which is one of the prescribed terms, as the prescription instructed her to take one pill daily. This evidence is sufficient on its own to support the conclusion that Thordson failed to meet her burden to prove the prescription-drug affirmative defense because the evidence does not show that she "used the controlled substance according to the terms of a prescription," Minn. Stat. § 169A.53, subd. 3(i).

In addition, in determining that Thordson did not meet her burden to prove that she took her medication as prescribed, the district court noted that it was unable to reconcile Thordson's testimony about her failure to *take* her medication according to the prescribed terms with the physician assistant's testimony that Thordson *filled* her prescription consistent with its prescribed terms, leaving open the possibility that Thordson may have consumed *more* than the prescribed amount. The district court therefore determined that Thordson did not meet her burden to establish that she took her medication as prescribed on the night of the traffic stop, and this determination is not against the logic and facts in

[5] We note that Minn. Stat. § 169A.53, subd. 3(i), allows for this affirmative defense "unless the court finds by a preponderance of the evidence that the use of the controlled substance impaired the person's ability to operate a motor vehicle." Whether Thordson's use of prescription amphetamines impaired her ability to operate a motor vehicle is not at issue in this matter.

the record. Accordingly, the district court did not abuse its discretion in determining that Thordson failed to satisfy her burden of proving the affirmative defense.

We note that the district court made additional findings that there was no "confirmation that the BCA test results are within the therapeutic levels for Petitioner based on the dosage amount of her prescribed Adderall" and that there was no evidence that Thordson could comply with the terms of her Adderall prescription while also using marijuana. While these findings may be supported by the record or a fair inference from the record, the plain language of the statute does not require Thordson to prove that the amount of amphetamine in her system was within therapeutic levels or address potential effects resulting from a combination of drugs. The statute instead requires a petitioner to prove the use of a prescription according to its terms. We note that the imposition of additional requirements beyond those set forth in the statute may amount to a misapplication of the law and therefore an abuse of discretion. *See Braend ex rel. Minor Child. v. Braend*, 721 N.W.2d 924, 926-27 (Minn. App. 2006*)* (stating that a district court abuses its discretion when it misapplies the law). But here, because the undisputed record evidence establishes that Thordson had not taken her medication according to its prescribed terms, the district court did not abuse its discretion in determining that Thordson failed to meet her burden to prove the prescription-drug affirmative defense.

DECISION

We reverse the district court's order rescinding the driver's license revocation because the officer gave a legally sufficient advisory when he informed Thordson that refusal to take a test was a crime. We reject Thordson's alternative ground for

affirmance—that she was entitled to the prescription-drug affirmative defense under Minn. Stat. § 169A.53, subd. 3(i). We review a district court's decision whether a driver has proven a prescription-drug affirmative defense for an abuse of discretion. The district court did not abuse its discretion by concluding that Thordson failed to meet her burden to prove that she took her medication as prescribed.

Reversed.