This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).

STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2019

State of Minnesota,
Appellant,

vs.

Mary Beth McGee,
Respondent.

Filed April 26, 2011
Reversed; motion granted
Collins, Judge[*]

Hennepin County District Court
File No. 27-CR-10-12940

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan L. Segal, Minneapolis City Attorney, Zenaida Chico, Jennifer A. Saunders, Assistant City Attorneys, Minneapolis, Minnesota (for appellant)

Rebecca Rhoda Fisher, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Collins, Judge.

---

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D   O P I N I O N

COLLINS, Judge

The state challenges the district court's pretrial order suppressing respondent's urine test in this driving-while-impaired case (DWI). Because respondent's consent to a urine test was not coerced by the officer's failure to inform her of alternative test methods when respondent did not overtly refuse the first test offered, we reverse. We also grant respondent's motion to strike portions of the state's brief and appendix.

FACTS

Respondent Mary Beth McGee was arrested on suspicion of DWI and transported to a chemical-testing unit. The arresting officer read respondent the Minnesota Implied Consent Advisory (ICA), and respondent indicated that she understood the rights read to her. After the ICA reading, the following colloquy occurred:

> OFFICER: Do you wish to consult with an attorney?
> [RESPONDENT]: I don't think so.
> OFFICER: You don't think so?
> [RESPONDENT]: No. I really don't understand. No, let's just proceed.
> OFFICER: Okay. Will you take the urine test?
> [RESPONDENT]: It has to be the urine test?
> OFFICER: We take the urine test.
> [RESPONDENT]: I don't have any experience with this. I would rely on your expertise to tell me what I'm supposed to do.
> OFFICER: It's really up to you. I'm just asking if you'll take the urine test.
> [RESPONDENT]: I would. Without any information or any experience in this, yes.

Respondent provided a urine sample, which tested at an alcohol-concentration level of .17. Respondent was charged with two counts of gross-misdemeanor DWI and one misdemeanor traffic violation.

Respondent challenged the admissibility of the urine test at a *Rasmussen* hearing, arguing that the officer's failure to inform her of alternative tests to the urine test was a fatal error. The district court agreed, concluding that the officer materially misled respondent by failing to inform her of alternative tests, and thereby coerced her consent to the urine test. The district court ordered the suppression of the results of the urine test. The state's appeal followed.

D E C I S I O N

Suppression Order

When appealing a pretrial order, the state must "clearly and unequivocally" demonstrate that (1) the order will have a "critical impact" on the state's ability to successfully prosecute the defendant and (2) the order was erroneous. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). Respondent concedes that the state has demonstrated that the suppression order critically impacts the state's prosecution in this case; thus, our analysis focuses solely on whether the district court erred by suppressing respondent's urine test.

The collection of a urine sample is a search for purposes of the Fourth Amendment. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989); *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 709 (Minn. App. 2008). "Under the federal constitution, due process does not permit the government to mislead

individuals as to either their legal obligations or the penalties they might face should they fail to satisfy those obligations." *State v. Melde*, 725 N.W.2d 99, 103 (Minn. 2006) (citing *Raley v. Ohio*, 360 U.S. 423, 437-39, 79 S. Ct. 1257, 1266-67 (1959)). Evidence obtained as the result of a constitutional violation must generally be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007). "When reviewing pretrial orders on motions to suppress evidence, [an appellate court] may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing . . . the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The state argues that the district court erred by concluding that the officer coerced respondent's consent to a urine test. A person arrested for DWI may be asked to submit to chemical testing of her blood, breath, or urine to determine the person's alcohol concentration. Minn. Stat. § 169A.51, subd. 1(a) (2008). The decision of which test to administer—blood, breath, or urine—is within the discretion of the police officer. *Id.*, subd. 3 (2008). Although alternative tests are available, an officer is not required to explain this or offer another means of testing until the driver refuses the first test offered. *Workman v. Comm'r of Pub. Safety*, 477 N.W.2d 539, 540 (Minn. App. 1991). And after reading the ICA, the officer has no obligation to explain the law to the driver. *See Melde*, 725 N.W.2d at 104 (noting that the ICA clearly outlines the law); *Sigfrinius v. Comm'r of Pub. Safety*, 378 N.W.2d 124, 126-27 (Minn. App. 1985) (stating that an officer is not responsible for explaining the import of the law after clearly informing the driver of the law).

Here, respondent was read the ICA and indicated that she understood her rights as stated therein. When asked if she would provide a urine sample, respondent replied, "It has to be the urine test?" This is a question—not a test refusal. Absent a clear refusal of the first test, the officer had no obligation to alert respondent of alternative testing methods. *See Workman*, 477 N.W.2d at 540 (holding that an officer is not required to offer an alternative test unless the driver *first refuses* a blood or urine test). The officer's response that "We take the urine test" could have been more forthcoming, but clarification of the process is in the province of legal counsel, not the officer. *See Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991) ("An attorney, not a police officer, is the appropriate source of legal advice."). Respondent expressly declined her opportunity to consult with an attorney, stating, "No, let's just proceed." Because respondent did not overtly refuse the urine test, the district court erred by concluding that the officer coerced respondent to consent to urine testing by not informing her of alternative testing methods.

Finally, both parties unnecessarily address whether the district court erred by finding that respondent's right to counsel was not vindicated. The sole basis of the suppression order is the district court's determination of coerced consent. Because the district court did not fully consider and reach a determination as to vindication of the right to counsel, we decline to review the issue. *See generally Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts do not review issues not considered by the district court, including constitutional questions of criminal procedure).

Motion to Strike

Respondent moves to strike portions of the state's brief and appendix which were neither entered into evidence nor contained in the hearing transcript. "The record on appeal consists of the papers filed in the district court, the offered exhibits, and the transcript of the proceedings, if any." Minn. R. Crim. P. 28.02, subd. 8. Therefore, we grant respondent's motion to strike in its entirety. *See State v. Eibensteiner*, 690 N.W.2d 140, 155 (Minn. App. 2004) (granting motion to strike materials not included in the district court record), *review denied* (Minn. Mar. 15, 2005).

Reversed; motion granted.