STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0476

Alan Lee Viessman, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 9, 2013
Reversed
Johnson, Judge
Dissenting, Halbrooks, Judge

Chippewa County District Court
File No. 12-CV-12-508

Kevin K. Stroup, Stoneberg, Giles & Stroup, P.A., Marshall, Minnesota (for appellant)

Lori Swanson, Attorney General, Joseph M. Simmer, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Alan Lee Viessman was arrested for driving while impaired. A law-enforcement officer asked him three times to submit to chemical testing pursuant to the implied-consent statute. Viessman declined three times. After the officer stated that Viessman

would be deemed to have refused chemical testing, Viessman immediately changed his mind and agreed to chemical testing. But the officer did not allow Viessman to take a test, and his driver's license was revoked. A district court denied Viessman's petition to rescind the revocation. We conclude that Viessman's consent to testing is valid because he changed his mind immediately after the officer declared that he had refused. Therefore, we reverse.

FACTS

On an evening in July 2012, Chippewa County Deputy Sheriff Irek Marcinkowski responded to a report of a disturbance outside a bar in the city of Watson. Deputy Marcinkowski's investigation gave him reason to believe that Viessman had driven a motor vehicle while intoxicated. Deputy Marcinkowski administered a preliminary breath test, which indicated an alcohol concentration of 0.20. Deputy Marcinkowski arrested Viessman for driving while impaired (DWI).

When Deputy Marcinkowski and Viessman arrived at the sheriff's department, Viessman was argumentative and belligerent. Deputy Marcinkowski read Viessman the implied-consent advisory, but Viessman did not pay attention and talked loudly about the incident at the bar. Deputy Marcinkowski read the advisory two more times, but Viessman continued to be uncooperative. After the third reading, Viessman told the deputy that he "didn't have to tell him sh-it" and "didn't have to do anything." Deputy Marcinkowski stated that he was deeming Viessman to have refused testing and would arrest him for the crime of refusal. Viessman then said that he would agree to a test. But

Deputy Marcinkowski persisted in deeming Viessman to have refused testing and did not allow him to take a test.

The commissioner revoked Viessman's driver's license. In August 2012, Viessman petitioned for judicial review of the revocation. In December 2012, the district court held an implied-consent hearing at which five witnesses testified. In January 2013, the district court issued an order denying Viessman's petition and sustaining the revocation. Viessman appeals.

D E C I S I O N

Viessman raises four issues in his appellate brief. His first argument is that the district court erred by concluding that he refused testing even though he consented to testing immediately after Deputy Marcinkowski stated that he was deeming Viessman to have refused. Because we ultimately conclude that Viessman is entitled to relief on his first argument, we confine our discussion to that issue, without addressing his other arguments.

A law-enforcement officer may request that a driver submit to a chemical test if the officer has "probable cause to believe the person was driving, operating, or in physical control of a motor vehicle" while impaired. Minn. Stat. § 169A.51, subd. 1(b) (2012). "If a person refuses to permit a test, then a test must not be given . . . ." *Id.* § 169A.52, subd. 1. As a general rule, once a driver has refused to submit to testing, the driver cannot later change his or her decision by agreeing to be tested. *State v. Palmer*, 291 Minn. 302, 308, 191 N.W.2d 188, 191 (1971); *Lewis v. Commissioner of Pub. Safety*, 737 N.W.2d 591, 593 (Minn. App. 2007); *Palme v. Commissioner of Pub. Safety*, 541

N.W.2d 340, 344 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996); *Anderson v. Commissioner of Pub. Safety*, 379 N.W.2d 678, 681 (Minn. App. 1986). The general rule is justified by concerns for "the deterioration of evidence and the efficient use of police efforts." *Parsons v. Commissioner of Pub. Safety*, 488 N.W.2d 500, 503 (Minn. App. 1992).

Notwithstanding the above-stated general rule, the caselaw encourages law-enforcement officers to be flexible in allowing drivers to consent to chemical testing after an initial decision not to do so. In *Mossak v. Commissioner of Pub. Safety*, 435 N.W.2d 578 (Minn. App. 1989), *review denied* (Minn. Apr. 10, 1989), this court noted the supreme court's comment that a law-enforcement officer "'might well have permitted [a driver] to take the test after he had changed his mind.'" *Id.* at 580 (quoting *Palmer*, 291 Minn. at 308, 191 N.W.2d at 191). In reliance on that portion of *Palmer*, we observed that "consent for testing serves the evident purpose of the implied consent statute, and that law enforcement officers serve minimum public expectations by being flexible in disregarding a tentative refusal which is promptly withdrawn." *Id.*

In *Schultz v. Commissioner of Pub. Safety*, 447 N.W.2d 17 (Minn. App. 1989), this court recognized the limits of the general rule in a case in which a driver initially refused testing but changed his mind and consented to testing almost immediately after his initial refusal. *Id.* at 19. We reversed the district court's denial of the driver's petition, reasoning as follows:

> [A]ppellant's change of mind was almost immediate, and was not separated from his initial response by any substantial time, place, or a telephone call to counsel or a friend. The

> only action the officer took was to mark a refusal on the implied consent form. The officer had not completed his processing of appellant's case . . . . [W]e hold that under these facts, appellant did not refuse testing, and the breath test should have been administered.

Id. Our caselaw has since acknowledged that "a subsequent change of heart does not revoke an initial refusal . . . *except for* an 'almost immediate' change of mind." *Lewis*, 737 N.W.2d at 593 (emphasis added).

In this case, the district court acknowledged that "[t]he facts of this case are nearly identical to the facts in *Schultz*" but nonetheless denied Viessman's petition. The district court reasoned that *Mossak* requires law enforcement officers to be flexible only upon "a tentative refusal" that is "promptly withdrawn," but that "there was nothing tentative about [Viessman's] refusals to test throughout the three readings of the implied consent advisory." The district court also reasoned that "[t]he public does not expect police officers to extend extra courtesies to belligerent and uncooperative arrestees." (Emphasis omitted.)

Viessman contends that the district court erred in its analysis and its conclusion because he "immediately changed his mind with no intervening time and should have been allowed to take the test."[1] In essence, Viessman seeks to apply the *Schultz*

[1]In her responsive brief, the commissioner argues that the issue whether Viessman refused or consented to testing should not be considered by this court because it was not properly raised in the district court. A person petitioning to rescind a revocation of his or her driver's license must identify the issues to be determined at an implied-consent hearing. Minn. Stat. § 169A.53, subd. 2(b)(3). In this case, Viessman identified three issues in his petition but did not include the issue whether he should be deemed to have refused testing despite his subsequent change of mind and agreement to be tested. Viessman raised the change-of-mind issue in his post-hearing memorandum, which was

exception to the general rule. We apply a *de novo* standard of review to the district court's order and memorandum. *See Parsons*, 488 N.W.2d at 501.

Viessman's argument is supported by the record, which shows that Viessman promptly changed his mind and consented to testing as soon as the deputy stated that he was deeming Viessman to have refused testing. At the implied-consent hearing, Viessman's counsel asked Deputy Marcinkowski, "How soon after the third reading did [Viessman] change his mind and say he would take the test?" The deputy responded, "As soon as I informed him that I considered him as a refusal." Viessman's counsel also asked the deputy whether he agreed that, "[a]fter the three attempts, Mr. Viessman then said he would take the test immediately thereafter." The deputy responded, "Correct."

These facts are, for all practical purposes, identical to the facts in *Schultz* because Viessman changed his mind immediately after his refusal. Furthermore, the facts of this

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submitted to the district court after the implied-consent hearing. In her responsive memorandum, the commissioner objected to the untimeliness of Viessman's argument in one sentence in a footnote. The commissioner devoted more attention to the substance of Viessman's argument, which occupied more than four pages of her responsive memorandum. The district court thoroughly discussed the issue raised belatedly by Viessman, without even noting the commissioner's objection. Because the district court considered and resolved the issue on the merits, it is apparent that the district court deemed the issue to have been adequately raised and tried. *See* Minn. R. Civ. P. 15.02 (providing that issues not pleaded may be tried by implied consent); *LaBeau v. Commissioner of Pub. Safety*, 412 N.W.2d 777, 780 (Minn. App. 1987) (stating that "an issue not raised in the petition may be tried by consent"). Thus, the issue has been adequately preserved. Furthermore, the commissioner may not challenge the district court's decision to consider and resolve the merits of Viessman's change-of-mind argument because she did not file a notice of related appeal. *See* Minn. R. Civ. App. P. 103.02, subd. 2; *Aase v. Wapiti Meadows Cmty. Tech. & Servs., Inc.*, 832 N.W.2d 852, 857 n.1 (Minn. App. 2013); *see also Arndt v. American Family Ins. Co.*, 394 N.W.2d 791, 793 (Minn. 1986) (applying Minn. R. Civ. App. P. 106, since repealed, which provided for notice of review).

case are materially different from the facts of cases in which this court applied the general rule because a driver's change of mind occurred minutes or hours after an initial refusal. *See Palmer*, 291 Minn. at 304, 191 N.W.2d at 189 (1 hour and 15 minutes); *Ekong*, 498 N.W.2d at 321 (1 hour and 15 minutes); *Anderson*, 379 N.W.2d at 681 (15 minutes); *Mossak*, 435 N.W.2d at 579 (5 to 10 minutes); *Lewis*, 737 N.W.2d at 592-93 (9 to 11 minutes); *Parsons*, 488 N.W.2d at 501 (9 minutes). Thus, under a straightforward application of our binding precedent, the facts of this case are within the exception for "an 'almost immediate' change of mind." *See Lewis*, 737 N.W.2d at 593.

The district court erred by seizing on the word "tentative" in this court's *Mossak* opinion. The relevant caselaw does not focus on whether a driver's initial refusal was tentative. Rather, the relevant caselaw is focused on how quickly the driver changed the initial refusal. The applicable rule is that "a subsequent change of heart does not revoke an initial refusal . . . *except for an 'almost immediate' change of mind*." *Lewis*, 737 N.W.2d at 593 (emphasis added). This is the inquiry even if a driver's initial refusal is unequivocal. For example, in *Lewis*, the officer gave the driver two or three opportunities to consent, but the driver refused each time, saying, "Charge me." *Id.* at 592. We resolved the appeal by measuring the time between the initial refusal and the subsequent attempt to consent to testing. *Id.* at 592-93. In this case, the record indicates clearly that Viessman changed his mind immediately after the deputy deemed him to have refused. Thus, Viessman did not refuse chemical testing.

Reversed.

HALBROOKS, Judge (dissenting)

I respectfully dissent from the majority's conclusion that the district court erred in its determination that Viessman refused to take a breath test. I am not persuaded that Viessman's "eleventh hour offer to submit a sample" came almost immediately after his initial refusal, or that his three belligerent refusals can be characterized as "tentative."

My first concern with the majority's reversal on this issue is that the district court record is devoid of meaningful testimony or other evidence on this point. The record is undeveloped because Viessman failed to raise in his petition for judicial review the issue of whether he validly withdrew his refusal. A person petitioning for judicial review of a driver's license revocation must "state with specificity the grounds upon which the petitioner seeks rescission of the order of revocation." Minn. Stat. § 169A.53, subd. 2(b)(3) (2012).

Viessman stated the following three grounds for rescission in his petition for judicial review:

> a. The peace officer that arrested [Viessman] did not have probable cause to believe that he was driving, operating or in physical control of a motor vehicle or commercial vehicle in violation of Minn. Stat. § 169A.20 (driving while impaired).
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> b. [Viessman] was not lawfully placed under arrest for violation of Minn. Stat. § 169A.20.
>
> c. [Viessman]'s refusal to permit an [I]ntoxilyzer test was based upon reasonable grounds, particularly that [Viessman] was not driving, operating, or in physical control of a motor vehicle in violation of Minn. Stat. § 169A.20 (driving while impaired).

At the hearing, the following exchange between the district court and Viessman's counsel occurred:

> THE COURT: And the issues on the consent case—in your petition you indicate no probable cause to believe that the person was driving, you essentially delineate the grounds for challenge under the statute not lawfully placed under arrest, reasonable refusal, so those three are all on the table, is that right?
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> VIESSMAN'S COUNSEL: Correct, your Honor.

Viessman's refusal to test was also explicitly conceded, when the district court directly asked counsel, "So, was there a refusal?" and Viessman's counsel responded, "Yes, your Honor."

Following the hearing and the close of evidence, Viessman raised in a letter memorandum to the district court the issue of whether he withdrew his refusal by consenting after his third refusal to test. Although the commissioner objected to the issue being raised post-hearing for the first time, the district court chose to consider it in its subsequent order.

The general rule in Minnesota is that a person cannot cure an initial refusal to submit to testing by subsequently agreeing to be tested. *Lewis v. Comm'r of Pub. Safety*, 737 N.W.2d 591, 593 (Minn. App. 2007). "If a person refuses to permit a test, then a test must not be given." Minn. Stat. § 169A.52, subd. 1 (2012). Minnesota has a nearly absolute rule against withdrawing refusals in order to preserve dissipating evidence, promote police efficiency, protect the public from drunk drivers, encourage testing, and compel prompt decisions about whether to take a test. *Palme v. Comm'r of Pub. Safety*,

541 N.W.2d 340, 344 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996); *Ekong v. Comm'r of Pub. Safety*, 498 N.W.2d 319, 322 (Minn. App. 1993); *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992). Except for an "almost immediate" change of mind, a refusal cannot be withdrawn even if a relatively short amount of time has passed between the initial refusal and reconsideration. *Lewis*, 737 N.W.2d at 593.

This court first recognized the "almost immediate" exception to the general rule against withdrawn refusals in *Schultz v. Comm'r of Pub. Safety*, 447 N.W.2d 17, 19 (Minn. App. 1989). We held in that case that the driver should have been allowed to take the test despite his refusal because his "change of mind was almost immediate, and was not separated from his initial response by any substantial time, place, or a telephone call to counsel or a friend" and because the officer had only marked a refusal on the implied-consent form by the time the driver changed his mind, had not finished processing the driver's case, and went on to administer field sobriety tests to the driver. *Id.* Although this exception has not applied in any case since *Schultz*, we have continued to encourage officers "to be flexible and to disregard a refusal which is promptly withdrawn." *Parsons*, 488 N.W.2d at 503; *see also Palme*, 541 N.W.2d at 344 ("[O]fficers are encouraged to allow a driver to cure an initial refusal when appropriate.").

The record here does not persuade me that this case fits the almost-immediate exception because, based on the few relevant facts that we do have, it is distinguishable from *Schultz*. While Schultz was determined to have refused because he stated that he did not understand the implied-consent advisory, 447 N.W.2d at 18, there is no evidence here that Viessman was confused. To the contrary, Viessman repeatedly disrupted

multiple advisory readings. *See State v. Ferrier*, 792 N.W.2d 98, 102 (Minn. App. 2010) (holding that "refusal to submit to chemical testing includes any indication of actual unwillingness to participate in the testing process"), *review denied* (Minn. Mar. 15, 2011). From the time of his arrival at the law-enforcement center until his change of mind, Viessman was uncooperative and argumentative. He refused to get out of the squad car, had to be removed from the squad car by the arm, threatened the deputy, and, in response to the third reading of the implied-consent advisory, said that he "didn't have to tell [the deputy] sh-t" and "didn't have to do anything for [him]." There was nothing tentative about Viessman's refusal, by any definition of the word. *See Mossak v. Comm'r of Pub. Safety*, 435 N.W.2d 578, 580 (Minn. App. 1989) (stating that "law enforcement officers serve minimum public expectations by being flexible in disregarding a *tentative* refusal which is promptly withdrawn" (emphasis added)), *review denied* (Minn. Apr. 10, 1989). As Deputy Marcinkowski testified, Viessman "was very unreasonable, he would not allow me to do my work." Viessman did not refuse because he did not understand; he was simply belligerent and unwilling to do what the deputy requested or the law required. *See Sigfrinius v. Comm'r of Pub. Safety*, 378 N.W.2d 124, 126 (Minn. App. 1985) (stating that "[a] driver has a duty to comply reasonably with the administration of a test").

In the 24 years since this court in *Mossak* adopted an absolute rule against withdrawn refusals and expressly rejected a more flexible approach, we have applied that rule in every case but one. *See Schultz*, 447 N.W.2d at 19. In my opinion, this case does

not warrant a divergence from that long line of decisions. Accordingly, I dissent from the majority's reversal on the withdrawal-of-refusal issue. I would affirm the district court.