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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-257

State of Minnesota,
Respondent,

vs.

Robert Karl Hohenstein,
Appellant.

Filed December 15, 2009
Affirmed
Peterson, Judge

Washington County District Court
File No. 82-CR-08-1945

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Connolly, Judge.

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

PETERSON, Judge

In this appeal from his conviction of second-degree refusal to submit to chemical testing, appellant argues that the test-refusal statute violates the Fourth Amendment and his right to substantive due process. We affirm.

FACTS

At approximately 9:45 p.m., a police officer stopped appellant Robert Hohenstein after seeing his truck weave in and out of its lane on the freeway. The officer noticed a strong odor of alcohol coming from appellant's truck. Appellant's speech was slurred and mumbled, and his eyes were bloodshot and watery. The officer administered a field sobriety test, which appellant failed. The officer then administered a preliminary breath test, which indicated an alcohol concentration of .175. The officer arrested appellant for driving while impaired and transported him to the police station, where the officer read appellant the implied-consent advisory. After appellant unsuccessfully attempted to reach his attorney and declined the officer's invitation to contact another attorney, the officer requested that appellant take a breath test. Appellant said that he would not take a test because he could not reach his attorney, and the officer deemed this response to be a refusal to submit to a test. Appellant was charged with one count of second-degree driving while impaired, in violation of Minn. Stat. §§ 169A.20, subd. 2, .25, subd. 1(b) (2006) (refusal to submit to chemical testing); one count of third-degree driving while impaired, in violation of Minn. Stat. §§ 169A.20, subd. 1, .26, subd. 1(a) (2006) (under influence of alcohol); and one count of driving in violation of a restricted driver's license,

in violation of Minn. Stat. § 171.09, subd. 1(d)(1) (2006) (restriction related to consumption of alcohol).

Appellant moved to dismiss the test-refusal charge on the ground that the test-refusal statute is unconstitutional. The district court denied the motion. The parties then entered into an agreement under which appellant pleaded guilty to driving in violation of a restricted driver's license, the third-degree driving-while-impaired charge was dismissed, and appellant waived his right to a jury trial and submitted the test-refusal charge to the district court on stipulated evidence. *See* Minn. R. Crim. P. 26.01, subd. 4 (setting forth procedure for stipulating to prosecution's evidence in trial to the court). Appellant preserved for appeal the issue of the constitutionality of Minn. Stat. § 169A.20, subd. 2. The district court found appellant guilty of refusing to submit to a chemical test of his blood, breath, or urine and convicted appellant of second-degree refusal to submit to testing. This appeal followed.

D E C I S I O N

Appellant challenges the constitutionality of Minnesota's criminal test-refusal statute, Minn. Stat. § 169A.20, subd. 2. Whether a statute is constitutional is a question of law that we review de novo. *Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720, 722 (Minn. 1999). Minnesota statutes are presumptively constitutional, and the power to declare a statute unconstitutional is one to "be exercised with extreme caution." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293 299 (Minn. 2000). The party challenging a statute's constitutionality "bears the very heavy burden of

demonstrating beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990).

Under Minnesota's implied-consent law, "[a]ny person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol." Minn. Stat. § 169A.51, subd. 1 (2006). The test-refusal statute makes it "a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51." Minn. Stat. § 169A.20, subd. 2.

Appellant argues that Minn. Stat. § 169A.20, subd. 2, violates his substantive due process rights by making it a crime for him to refuse to voluntarily provide potentially inculpating evidence of another crime. Appellant contends that in enacting Minn. Stat. § 169A.20, subd. 2, the legislature has made it a crime for him to exercise his constitutional right to withhold consent to a search. But under the facts of this case, appellant has not shown that he possessed a constitutional right to withhold consent to the alcohol-concentration test.

Taking and analyzing a biological specimen under Minn. Stat. § 169A.51, subd. 1, is a search under the Fourth Amendment to the United States Constitution. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 618, 109 S. Ct. 1402, 1413 (1989) ("the collection and subsequent analysis of the requisite biological samples must be deemed Fourth Amendment searches"). The Fourth Amendment and Article I, section 10, of the Minnesota Constitution prohibit unreasonable searches and seizures. U.S. Const. amend.

IV; Minn. Const. art. I, § 10. "[T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2032 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514 (1967)).

In *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966), the United States Supreme Court explained the role of the Fourth Amendment when the state directs that a biological specimen be taken from a person and analyzed. *Schmerber* involved a defendant who was arrested at a hospital while receiving treatment for injuries that he suffered when the automobile that he apparently had been driving was involved in an accident. 384 U.S. at 758, 86 S. Ct. at 1829. A police officer directed that a blood sample be drawn from the defendant by a physician at the hospital, and a chemical analysis of the sample indicated intoxication. *Id*. at 758-59, 86 S. Ct. at 1829. At the defendant's trial for driving an automobile while under the influence of intoxicating liquor, the report of the chemical analysis was admitted into evidence over the defendant's objection that the blood had been drawn without his consent. *Id*. at 759, 86 S. Ct. at 1829. The defendant contended that in that circumstance, the withdrawal of the blood and the admission of the report denied him his right not to be subjected to unreasonable searches and seizures in violation of the Fourth Amendment. *Id*.

In considering whether administering the blood test without the defendant's consent violated the Fourth Amendment, the Supreme Court explained that

> the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner. In other words, the questions we must decide in this case are whether the police were justified in requiring [the defendant] to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness.

Id. at 768, 86 S. Ct. at 1834.

The Supreme Court acknowledged that there was plainly probable cause for the officer to arrest the defendant and charge him with driving an automobile under the influence of alcohol. *Id*. But the Court determined that the considerations that ordinarily permit a search of a defendant incident to an arrest

> have little applicability with respect to searches involving intrusions beyond the body's surface. The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.
>
> Although the facts which established probable cause to arrest in this case also suggested the required relevance and likely success of a test of [the defendant's] blood for alcohol, the question remains whether the arresting officer was permitted to draw these inferences himself, or was required instead to procure a warrant before proceeding with the test. Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out

> crime." The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

Id. at 769-70, 86 S. Ct. at 1835 (quoting *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S. Ct. 367, 369 (1948) (citation omitted)).

But the Supreme Court then recognized that the officer who directed the physician to draw the defendant's blood might reasonably have believed that the delay necessary to obtain a warrant threatened the destruction of the evidence because the amount of alcohol in the blood begins to diminish shortly after drinking stops. *Id*. at 770, 86 S. Ct. at 1835-36. Given the fact that the evidence could disappear during the time that it would take to seek out a magistrate and obtain a search warrant, the Supreme Court held that the officer's attempt to secure evidence of blood-alcohol content was an appropriate incident to the defendant's arrest. *Id*. at 771, 86 S. Ct. at 1836.

The significant principle to be drawn from *Schmerber* with respect to appellant's argument that Minn. Stat. § 169A.20, subd. 2, made it a crime for him to exercise his constitutional right to withhold consent to a search is that under the circumstances of his stop and arrest, appellant did not have a constitutional right to prevent the search by withholding his consent. Like the arresting officer in *Schmerber*, the officer who arrested appellant had reason to believe that appellant's body contained evidence of alcohol that could disappear during the time that it would take to seek out a magistrate and obtain a search warrant. Consequently, under *Schmerber*, the Fourth Amendment did not require the officer to obtain either a warrant or appellant's consent before collecting the evidence. *See State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009) (holding that Minn. Stat.

§ 169A.20, subd. 2, "does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense").

However, although evidence of alcohol concentration could have been collected without violating the Fourth Amendment, the officer who arrested appellant could not administer a test without appellant's consent because Minnesota's implied-consent law provides that "[i]f a person refuses to permit a test, then a test must not be given[.]" Minn. Stat. § 169A.52, subd. 1 (2006). Admittedly, this statutory scheme placed appellant in the difficult position of choosing whether to refuse a test and violate Minn. Stat. § 169A.20, subd. 2, or permit a test and possibly provide incriminating evidence. But because appellant's arguments are based on the incorrect premise that he had a constitutional right to refuse to permit a test, appellant has not addressed whether the legislature may create a statutory right to refuse to permit a test and also make exercising that right a crime. Therefore, appellant has not met his very heavy burden of demonstrating beyond a reasonable doubt that Minn. Stat. § 169A.20, subd. 2, is unconstitutional.

Affirmed.