STATE OF MINNESOTA

IN SUPREME COURT

A17-1705

Court of Appeals — Lillehaug, J.

Jason Maurice Fagin,

Respondent,

vs.

Filed: October 2, 2019
Office of Appellate Courts

State of Minnesota,

Appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, Saint Paul, Minnesota, for respondent.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Peter Orput, Washington County Attorney, Nicholas Hydukovich, Assistant Washington County Attorney, Stillwater, Minnesota, for appellant.

S Y L L A B U S

1. On a petition for postconviction relief under Minn. Stat. ch. 590 (2018) asserting the invalidity of a test-refusal conviction under *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016), and *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018),

the petitioner bears the burden to allege and prove there was neither a warrant nor an applicable exception to the warrant requirement.

2. In a *Birchfield*/*Johnson* postconviction proceeding, a heightened pleading standard applies. Under this standard: (a) the petitioner must affirmatively allege that no search warrant was issued and that no warrant exception was applicable; and (b) if the State wishes to controvert those allegations, it must plead specifically the existence of the warrant or exception relied on and the grounds therefor in sufficient detail to give the petitioner adequate notice of the State's position.

Reversed and remanded.

O P I N I O N

LILLEHAUG, Justice.

This case requires that we decide whether, on a petition for postconviction relief under Minn. Stat. ch. 590 (2018) asserting the invalidity of a test-refusal conviction under *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016), and *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018), the petitioner bears the burden to allege and prove that no applicable exception to the warrant requirement applies. *Johnson* made retroactive the rule announced in *Birchfield* that, in the absence of a warrant or an exception to the warrant requirement, refusal to submit to a blood or urine test cannot be criminalized. The district court denied respondent Jason Fagin's request for postconviction relief because he failed to prove there was no applicable exception to the warrant requirement. Concluding that the district court erred by placing the burden of proof on Fagin instead of the State, the court of appeals reversed and remanded for further proceedings. Because the district court

properly placed the burden of proof on Fagin, we reverse the decision of the court of appeals. We also announce a heightened pleading standard for *Birchfield*/*Johnson* postconviction proceedings. We remand to the district court to allow supplemental pleadings under this standard and reconsideration of Fagin's request for postconviction relief.

FACTS

Around 2:00 a.m. on March 22, 2012, the Washington County Sheriff's Department received a report of a car stopped across two lanes of traffic on a rural road. When deputies arrived, they found two unconscious men. The deputy who walked up to the driver's side of the car noticed that the driver's left shoe was off, his left sock was pulled down, and his left foot was placed over his right knee. The deputy immediately suspected that the driver had injected himself with a narcotic and become unconscious.

The deputies woke up the men. As he awakened, the driver sped away. The car stopped about 30 seconds later. The deputies ordered the men out of the car and took them into custody. A pat search of the driver, later identified as respondent Jason Fagin, produced a plastic bag that the deputies believed contained methamphetamine. They described Fagin as "extremely impaired." In the car, the deputies found several needles, syringes, spoons, and other items often used with narcotics.

Fagin was booked into the Washington County Jail. A deputy read Fagin the implied-consent advisory, and asked him whether he understood. Fagin did. The deputy asked Fagin whether he would like to speak with an attorney. Fagin declined. The deputy asked if he would take a urine test. Fagin declined. Fagin also declined a blood test. Fagin

later told deputies that he would take a urine test, but then changed his mind. Then he again declined a blood test. There is no evidence in the record that deputies sought a warrant or offered Fagin a breath test.

The Washington County Attorney charged Fagin with first-degree test-refusal,[1] Minn. Stat. § 169A.20, subd. 2 (2010), and fifth-degree possession of a controlled substance, Minn. Stat. § 152.025, subd. 2(b)(1) (2010). On July 30, 2012, by plea agreement, Fagin pleaded guilty to the test-refusal charge and the possession charge was dismissed. The district court sentenced him to 65 months in prison and imposed a five-year term of conditional release. Fagin did not appeal.

On July 29, 2014, Fagin filed a timely postconviction petition in which he argued that *Missouri v. McNeely*, 569 U.S. 141 (2013), had rendered Minnesota's test-refusal statute unconstitutional, and sought to withdraw his guilty plea. Fagin's petition was denied without a hearing. Fagin filed and then voluntarily dismissed a notice of appeal.

On May 23, 2017, Fagin filed a second postconviction petition in which he argued that our decisions in the companion cases of *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016), rendered his test-refusal conviction unconstitutional. The State responded that Fagin's second petition was barred on three procedural grounds. First, Fagin had waived his claims when he pleaded guilty. Second, his claims were barred by the rule announced in *State v. Knaffla*, 243 N.W.2d 737,

[1] This was Fagin's fourth qualifying impaired-driving incident within 10 years; he had previously pleaded guilty to driving while impaired (DWI) in 2006 and had two test-refusal convictions in June 2005.

741 (1976), because they could have been raised in his 2014 postconviction petition. Third, Fagin's claims were untimely under Minn. Stat. § 590.01, subd. 4 (2018). On the merits, the State argued that the *Birchfield* rule, as applied in *Trahan* and *Thompson*, was procedural and therefore not retroactive. Finally, the State argued that Fagin had not met his burden to prove the absence of a warrant exception. Specifically, the State contended that Fagin had "not met his burden of showing that exigent circumstances did not exist."

The postconviction court denied Fagin's second petition without a hearing on August 30, 2017. The court concluded that Fagin had waived his constitutional claims by pleading guilty, that he failed to establish that the *Birchfield* rule applied retroactively to him, and that, even if the *Birchfield* rule was retroactive, Fagin failed to prove the absence of exigent circumstances.

Fagin appealed. The court of appeals stayed the appeal pending our decision in *Johnson v. State*, 916 N.W.2d 674 (Minn. 2018), which involved the question of whether the *Birchfield* rule applied retroactively to postconviction proceedings. After our opinion in *Johnson* was released, the State conceded that Fagin had not waived his claim by pleading guilty and that the *Birchfield* rule applied retroactively.

This left for the court of appeals the issues of whether, as the district court held, Fagin had the burden of proof to show the absence of exigent circumstances and had failed to meet it. The court of appeals concluded that the district court erred by placing the burden of proof regarding the absence of exigent circumstances on Fagin instead of the State. *Fagin v. State*, No. A17-1705, 2018 WL 6034962, at *2 (Minn. App. Nov. 19, 2018). The court reasoned that *Trahan* conclusively allocated the burden to the State. Therefore, the

court of appeals reversed and remanded for an evidentiary hearing on the issue of exigent circumstances, at which the burden would be on the State. *Id.*

We granted the State's petition for review. For the reasons that follow, we conclude that the district court properly placed the burden of proof on Fagin, and, therefore, the court of appeals erred when it reversed the district court's decision.

ANALYSIS

We review denial of a petition for postconviction relief for an abuse of discretion. *Johnson*, 916 N.W.2d at 678. Reversal is required if the district court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings. *Id.*

To set the stage for our discussion of the burden of proof in postconviction proceedings involving DWI-test-refusal convictions, a brief overview of the relevant law is necessary. In 2016, the Supreme Court consolidated three cases, including one from Minnesota,[2] regarding whether state statutes criminalizing chemical-test refusal violated the Fourth Amendment. *Birchfield v. North Dakota*, 579 U.S. ___, ___, 136 S. Ct. 2160, 2170–72 (2016). The cases concerned statutes criminalizing blood and breath test refusal. *Id.* The Court held that, although a breath test was permissible as a search incident to arrest (consistent with our decision in *Bernard*), a blood test did not fall within this exception to the Fourth Amendment warrant requirement. 579 U.S. at ___, 136 S. Ct. at 2185. Therefore, refusal to give a blood sample by a person suspected of driving under the

[2] *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *aff'd sub nom. Birchfield*, 579 U.S. at ___, 136 S. Ct. at 2186 (2016).

influence could only be criminalized if (a) the police had a valid warrant, or (b) some other exception to the warrant requirement applied. *See* 579 U.S. at ___, 136 S. Ct. at 2185–86.

Four months later, we decided companion cases applying *Birchfield*: *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016). The former was a postconviction petition arising out of a guilty plea to first-degree test refusal for refusing to submit to a warrantless blood test. *Trahan*, 886 N.W.2d at 219. The latter was a direct appeal from a conviction for second-degree test refusal for refusing to submit to warrantless blood or urine tests. *Thompson*, 886 N.W.2d at 227. We decided that the State may not criminalize refusal of a blood or a urine test absent a search warrant or an applicable exception to the warrant requirement. *Johnson*, 916 N.W.2d at 679. Therefore, Minn. Stat. § 169A.20, subd. 2 (2014) was unconstitutional as applied to Trahan and Thompson because both attempted searches were warrantless and no exceptions to the warrant requirement applied. *Johnson*, 916 N.W.2d at 679.

Nearly two years later, we decided *Johnson*, a postconviction petition challenging two chemical-test-refusal convictions entered before *Birchfield*, *Trahan*, and *Thompson*. *Id.* at 677–78. Johnson argued that the *Birchfield* rule was a new, substantive rule of federal constitutional criminal law that was retroactively applicable to his convictions. *Id.* at 678.

We agreed, deciding that the *Birchfield* rule "placed a category of conduct outside the State's power to punish." *Id.* at 683. Therefore, the rule was substantive and applied retroactively to Johnson's convictions.[3] *Id.* at 684. We also held that, because the

[3] The Supreme Court denied the State's petition for a writ of certiorari on the issue of retroactivity on June 24, 2019. ___ U.S. ___, 139 S. Ct. 2745 (2019).

Birchfield rule is essentially a challenge to the subject-matter jurisdiction of the convicting court, a guilty plea was not a bar to bringing an as-applied Fourth Amendment challenge to convictions like Johnson's. *Id.* at 680–81. We remanded to the district court to determine whether the test-refusal statute was unconstitutional as applied to Johnson due to the lack of an exception to the warrant requirement. *Id.* at 684. We did not comment on which party—Johnson or the State—had the burden to prove, or disprove, the applicability of an exception.

I.

Against that backdrop, we turn now to the burden of proof. In putting the burden on the State to demonstrate a warrant exception, the court of appeals relied heavily on our statement in *Trahan* that "[t]he government has the burden to show that exigent circumstances existed." 886 N.W.2d at 222. In so stating, we did not intend to—and did not—answer the question presented squarely here. Our statement was part of a general discussion of the exigent-circumstances exception to the warrant requirement. *See id.* Specifically, we cited *Welsh v. Wisconsin*, a case involving a direct appeal, not a postconviction proceeding. 466 U.S. 740, 749–50 (1984). And, most litigation about exceptions to the warrant requirement occurs in the context of pretrial suppression hearings, where it is black-letter law that the State bears the burden on exceptions. *See, e.g.*, 6 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 11.2(b) at 50 (5th ed. 2012) ("[M]ost states follow the rule utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution."); *see*

also State v. Morales, 176 N.W.2d 104, 106 (Minn. 1970) ("[W]hen a warrantless arrest for a felony claimed to have been made on probable cause is challenged, it is obligatory upon the state not only to fully and fairly disclose all the facts and surrounding circumstances of the arrest but also to sustain the burden of proving compliance with Fourth Amendment rights." (citation omitted)).

Although we ultimately determined that the exigent-circumstances exception did not apply in *Trahan*, we did so without assigning the burden to either party. 886 N.W.2d at 221 ("We need not remand this issue to the district court . . . because even if we accept the State's version of the facts, there was no exigency in this case."). We said in *Johnson* that reversal of chemical-test-refusal convictions under *Birchfield* is not automatic. 916 N.W.2d at 684. There must be "case-by-case determinations to assess whether there was a warrant or an exception to the warrant requirement . . . ." *Id.* But we did not elaborate on the burdens in those case-by-case determinations. Thus, we have never decided which party bears the burden to demonstrate the applicability of an exception to the warrant requirement in a postconviction proceeding.

But both the postconviction statute and our case law make clear that, as a general matter, the petitioner has the burden of proof in postconviction proceedings. Minnesota Statutes § 590.04, subd. 3, states that, "[u]nless otherwise ordered by the court, the burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence." *See Williams v. State*, 910 N.W.2d 736, 742 (Minn. 2018) ("[T]he postconviction statute makes clear that the defendant, the party bringing the petition, generally bears the burden of proof [at an evidentiary hearing].");

Tscheu v. State, 829 N.W.2d 400, 403 (Minn. 2013) ("A petitioner bears the burden to establish by a preponderance of the evidence that facts exist that warrant postconviction relief.").

Nothing in the postconviction statute or in our case law suggests that we should write a different rule here. Indeed, the portion of the statute Fagin invokes, Minn. Stat. § 590.01, subd. 4(b)(3) (2018), signals that the burden remains on the petitioner. Subdivision 4(b)(3) allows petitions to be filed outside the two-year time bar established by subdivision 4(a) if "the petitioner asserts a new interpretation of federal . . . constitutional . . . law by . . . a Minnesota appellate court and the petitioner *establishes* that this interpretation is retroactively applicable to the petitioner's case." (Emphasis added.) In other words, a petitioner who invokes a new interpretation of law bears the burden to prove the facts required for retroactive application of the interpretation to the petitioner's case. Here, that burden includes alleging and proving there was neither a warrant nor an applicable exception to the warrant requirement. Because the district court properly placed the burden of proof on Fagin, we reverse the decision of the court of appeals.

II.

In reaching our conclusion that the burden of proof in a *Birchfield*/*Johnson* postconviction proceeding is on the petitioner, we acknowledge that the petitioner must prove two negatives: no warrant and no exception. Proving the lack of a warrant is easy enough; if a warrant was issued, usually it can be found in the public record. But proving the lack of a warrant exception may be more difficult, particularly if the State stands silent —not alleging the applicability of a particular exception—or invokes an exception with no

explanation whatsoever. Allowing the State to stand silent in this unusual context would be contrary to our longstanding jurisprudence that "equity is an important component of postconviction relief." *Carlton v. State*, 816 N.W.2d 590, 606 (Minn. 2012).

Our supervisory power over the administration of justice allows us to adopt rules that ensure the fairness of judicial proceedings. *See State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (adopting a new rule that all custodial interrogations be recorded); *State v. Borst*, 154 N.W.2d 888, 894 (Minn. 1967) (adopting a new rule that indigent defendants, including those charged with misdemeanors, are entitled to appointed counsel at trial if they face incarceration). To ensure the fairness of judicial proceedings in this context—a new interpretation of federal constitutional law that is retroactive depending on the facts of each case—we adopt a heightened pleading requirement for *Birchfield*/*Johnson* postconviction proceedings.

In filing a *Birchfield*/*Johnson* petition, the petitioner must comply with Minn. Stat. § 590.02, subd. 1(1), which requires "a statement of the facts and the grounds upon which the petition is based and the relief desired." The petitioner must affirmatively allege that no search warrant was issued and that (at least upon information or belief) no warrant exception was applicable. The obligation to plead then shifts to the State under Minn. Stat. § 590.03, which provides that the State "shall respond to the petition by answer or motion." Should the State wish to controvert the petitioner's allegations of lack of a warrant or the lack of an exception, it shall do so in its responsive answer or motion, or the argument will

be deemed waived.[4] The pleading shall admit or deny the existence of a warrant and, if a warrant exists, preferably the State should attach a copy. If no warrant issued, the pleading shall admit the lack of an exception or, alternatively, state specifically the exception relied on and the grounds for the State's reliance. The exception and its grounds must be pleaded in sufficient detail to give the petitioner adequate notice of the State's position.

The rule we announce today gives both the petitioner and the State sufficient information for motion practice or an evidentiary hearing under section 590.04, and reduces the likelihood of evidentiary hearing by ambush. Moreover, the rule is limited to the context of *Birchfield*/*Johnson* postconviction proceedings and does not alter the general pleading requirements for postconviction proceedings. *See, e.g.*, *Rickert v. State*, 795 N.W.2d 236, 241 (Minn. 2011) (stating that a petition need not include specific citation to a subdivision 4(b) exception to invoke the exception because petitions must be liberally construed under Minn. Stat. § 590.03 (2018)); *Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010) (same).

Having announced a heightened pleading standard for a *Birchfield*/*Johnson* postconviction proceeding, we conclude that a remand to the district court is required to allow the parties to comply with the new heightened standard. On remand, the district court should allow the parties to file supplemental pleadings that comply with the standard. With the supplemental pleadings in hand, the district court can then apply section 590.04,

[4] Our approach here is not dissimilar to the one we took in *Carlton*, in which we held that the State's failure to plead that a petition was untimely waived the postconviction statute's time limitation. 816 N.W.2d at 606.

which requires that, unless the record shows that the petitioner is entitled to no relief, an evidentiary hearing be held, following which the court shall grant or deny relief. *See Andersen v. State*, 913 N.W.2d 417, 423 (Minn. 2018) (holding that a district court may not resolve disputed facts without first holding an evidentiary hearing to assess the affiants' credibility).

CONCLUSION

For the foregoing reasons, we reverse the decision of the court of appeals and remand to the district court to allow supplemental pleadings and reconsideration of Fagin's request for postconviction relief.

Reversed and remanded.