STATE OF MINNESOTA

IN SUPREME COURT

A19-1147

Court of Appeals — Gildea, C.J.

Mark Jerome Johnson,

Respondent,

vs.

Filed: March 24, 2021
Office of Appellate Courts

State of Minnesota,

Appellant.

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica May Surges, Assistant State Public Defender, Saint Paul, Minnesota, for respondent.

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant Ramsey County Attorney, Saint Paul, Minnesota, for appellant.

S Y L L A B U S

The rule announced in *Missouri v. McNeely*, 569 U.S. 141 (2013), is procedural and does not apply retroactively on collateral review of final test-refusal convictions.

Reversed and remanded.

O P I N I O N

GILDEA, Chief Justice.

In this case, we are asked to decide whether the United States Supreme Court's decision in *Missouri v. McNeely*, 569 U.S. 141 (2013), applies retroactively on collateral review of a conviction for test refusal. In 2010, Johnson was convicted of first-degree test refusal. In 2016, Johnson filed a petition for postconviction relief, arguing that his conviction for refusing to submit to a warrantless blood and urine test violated the Constitution and must be reversed. On remand from a prior decision by this court, *see Johnson v. State (Johnson I)*, 916 N.W.2d 674, 685 (Minn. 2018), the district court determined that Johnson was entitled to postconviction relief regardless of whether *McNeely* applied. After the State appealed, the court of appeals concluded that *McNeely* is substantive in the context of a test-refusal conviction and therefore applied retroactively to Johnson's conviction. *Johnson v. State (Johnson II)*, No. A19-1147, 2020 WL 3409773, at *2–3 (Minn. App. June 22, 2020). Because we hold that the rule announced in *McNeely* is procedural and does not apply retroactively to test-refusal convictions on collateral review, we reverse the court of appeals and remand to the district court.

FACTS

In 2009, a police officer stopped Johnson while he was driving. During this stop, Johnson admitted he had been drinking and showed signs of impairment. Johnson was arrested on suspicion of driving while impaired (DWI) and was asked to take a urine and blood test. Johnson refused to answer and was charged with first-degree test refusal, Minn.

Stat. §§ 169A.20, subd. 2, 169A.24 (2016). Johnson was convicted of first-degree test refusal in 2010.

At the time of Johnson's conviction, we had not yet interpreted the Fourth Amendment as requiring a warrant or a warrant exception to sustain a test-refusal conviction. *See Johnson I*, 916 N.W.2d at 681–82.[1] And even if a warrant or warrant exception had been required at that time, we considered the natural dissipation of alcohol in a DWI suspect's blood stream to be a single factor, *per se* exigent circumstance that justified an exception to the warrant requirement. *See State v. Shriner*, 751 N.W.2d 538, 546 (Minn. 2008), *abrogated by McNeely*, 569 U.S. at 165; *State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009), *abrogated in part by McNeely*, 569 U.S. at 165. A "single-factor" exigent circumstance is "one in which 'the existence of *one fact alone* creates exigent circumstances.' " *Shriner*, 751 N.W.2d. at 542 (quoting *In re Welfare D.A.G.*, 484 N.W.2d 787, 791 (Minn. 1992)). In short, our precedent at the time of Johnson's conviction said that an exigency existed whenever an officer had probable cause to believe that a defendant committed "a crime in which chemical impairment is an element of the offense." *Netland*, 762 N.W.2d at 214.

Two Supreme Court cases have since altered Fourth Amendment jurisprudence in the DWI and test-refusal context. The first of these cases is *McNeely*, which involved a driver who was charged with DWI after a warrantless, nonconsensual blood sample was

[1] In *Johnson I*, we addressed both Johnson's 2010 and 2014 test-refusal convictions. 916 N.W.2d at 677–78. In this appeal, however, only Johnson's 2010 conviction is before us.

taken from him. 569 U.S. at 146. The Supreme Court held that alcohol dissipation does not present a *per se* exigent circumstance justifying a warrantless blood test of a DWI suspect. 569 U.S. at 150–51, 165. The Court explained that the exigent circumstances exception requires examination of the "totality of the circumstances." *Id.* at 150–51. While one of those circumstances certainly is alcohol dissipation when a driver is suspected of DWI, alcohol dissipation, by itself, is not "an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 150–51, 165. Instead, the Court concluded that:

> [W]hile the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, . . . it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Id. at 156.

The second Supreme Court case is *Birchfield v. North Dakota*, 579 U.S. ___, 136 S. Ct. 2160 (2016), which was decided after *McNeely*.[2] A more detailed analysis of the *Birchfield* rule may be found in *Johnson I*. *See* 916 N.W.2d at 679. In sum, the *Birchfield* rule says that test refusal by a suspected impaired driver may be criminalized consistent with the Fourth Amendment only when there is a warrant for the test or a warrant exception applies. *Birchfield*, 579 U.S. at ___, 136 S. Ct. at 2186; *see also Johnson I*, 916 N.W.2d at 679.

---

[2] We followed *Birchfield* in *State v. Trahan*, 886 N.W.2d 216, 221 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224, 234 (Minn. 2016). We refer to the rule of law set forth in these three cases as "the *Birchfield* rule."

After *Birchfield* was announced, Johnson petitioned for postconviction relief, arguing that the *Birchfield* rule applied retroactively to his 2010 conviction. The district court denied relief, and the court of appeals affirmed. *Johnson v. State*, 906 N.W.2d 861, 867 (Minn. App. 2018). We reversed, holding that the *Birchfield* rule applied retroactively to Johnson's conviction because *Birchfield* announced a substantive rule. *Johnson I*, 916 N.W.2d at 684–85. Specifically, we said that the *Birchfield* rule "placed a category of conduct outside the State's power to punish. Now, a suspected impaired driver may only be convicted of test refusal if that person refused a breath test or refused a blood or urine test that was supported by a warrant or a valid warrant exception." *Id.* at 683. When remanding the case to the district court with instructions to apply the *Birchfield* rule, we expressly declined to address whether *McNeely* also applied retroactively. *Id.* at 684 n.8.

On remand, the district court likewise declined to resolve whether *McNeely* applied retroactively. Under either standard—the pre-*McNeely per se* approach or the post-*McNeely* totality-of-the-circumstances approach—the district court determined that Johnson was entitled to postconviction relief. The State appealed.

The court of appeals reversed but held in relevant part that *McNeely* applied retroactively. *Johnson II*, 2020 WL 3409773, at *2.[3] We granted the State's petition for review.

[3] Relying on *Fagin v. State*, 933 N.W.2d 774 (Minn. 2019), the court of appeals held that the district court erroneously placed the burden of proof on the State to show exigent circumstances existed to justify a warrantless search of Johnson's blood and urine and, on that basis, remanded to the district court. *Johnson II*, 2020 WL 3409773, at *3. Neither party challenged this portion of the court of appeals' decision and so that issue is not before us.

ANALYSIS

The only issue before us is whether *McNeely* applies retroactively to Johnson's petition for postconviction relief. We review de novo whether a rule of federal constitutional law has retroactive effect. *Johnson I*, 916 N.W.2d at 681. Before turning to the parties' arguments, a brief discussion of our retroactivity framework is needed.

A.

To determine whether a rule of constitutional law applies retroactively, we apply the framework articulated in *Teague v. Lane*, 489 U.S. 288 (1989). *Danforth v. State*, 761 N.W.2d 493, 498–99 (Minn. 2009). Under *Teague*, the first step is to determine whether a case announces a "new" rule. 489 U.S. at 301. New rules retroactively apply only on direct review and generally do not apply on collateral review of convictions that were final before the new rule was announced. *Id.* at 305–10. The parties agree that *McNeely* is a new rule. To apply retroactively in Johnson's postconviction challenge, then, *McNeely* must fall into a *Teague* exception. There are two such exceptions: a new rule may be applied retroactively first, if it is substantive, as compared to procedural, or second, if it is a "watershed" rule of criminal procedure. *See Schriro v. Summerlin*, 542 U.S. 348, 351–52 (2004). The parties agree that *McNeely* is not a watershed rule, and therefore the only question is whether *McNeely* falls under the first *Teague* exception.

The first *Teague* exception applies only to substantive rules, as opposed to procedural rules. *Id.* New substantive rules include those that "narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish."

Id. (internal citation omitted). A rule that "modifies the elements of an offense is normally substantive rather than procedural." *Id.* at 354.

Substantive rules apply retroactively on collateral review because a defendant may "stand[] convicted of an act that the law does not make criminal or face[] a punishment that the law cannot impose upon him." *Id.* at 352 (citation omitted) (internal quotation marks omitted). In *Penry v. Lynaugh*, the Court clarified that the first *Teague* exception covers "not only rules forbidding criminal punishment of certain primary conduct but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." 492 U.S. 302, 330 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304 (2002).

By contrast, a rule is procedural if it "regulate[s] only the *manner of determining* the defendant's culpability." *Schriro*, 542 U.S. at 353. Procedural rules "do not produce a class of persons convicted of conduct the law does not make criminal, but merely raise the possibility that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Id.* at 352. These rules include those that "alter[] the range of permissible methods for determining whether a defendant's conduct is punishable." *Id.* at 353.

B.

We now address the parties' arguments. The parties dispute whether *McNeely* retroactively applies to Johnson's 2010 test-refusal conviction. Johnson concedes that *McNeely* is procedural in the *DWI* context, but in the *test-refusal* context, he argues,

McNeely is substantive. Essentially, Johnson's position is that a rule can be both procedural and substantive depending on the context in which it is applied.

The State responds that a rule cannot be both substantive and procedural under *Teague*. *McNeely* must be one or the other, not both, says the State. In the alternative, even if Johnson is correct that a rule's classification under *Teague* can change depending on the context, the State contends that *McNeely* is still procedural in the test-refusal context. We agree with the State's alternative argument.[4]

McNeely is the same rule regardless of whether the underlying crime is test refusal or DWI. In both cases, *McNeely* controls the "manner of determining" whether an exigency exists. *See Schriro*, 542 U.S. at 353. Specifically, it requires that the exigent circumstances exception be examined by looking at the totality of the circumstances instead of treating it as a categorical, *per se* exception by looking only at the fact of alcohol dissipation. *McNeely*, 569 U.S. at 156. In other words, exigent circumstances was a valid exception to the warrant requirement both before and after *McNeely*. The Court in *McNeely* simply clarified how the State proved that exception.

This analysis does not change in the test-refusal context. In test-refusal cases, *McNeely* "alter[s] the range of permissible methods for determining whether a defendant's [refusal of a test] is punishable," *Schriro*, 542 U.S. at 353, because states may no longer

---

[4] The State's primary argument asks us to broadly hold that a rule may not be both procedural and substantive under *Teague* depending on the context in which the rule is applied. But because we hold that *McNeely* is procedural in the test-refusal context, we need not address that argument. *See Lipka v. Minn. Sch. Emps. Ass'n, Local 1980*, 550 N.W.2d 618, 622 (Minn. 1996) ("[J]udicial restraint bids us to refrain from deciding any issue not essential to the disposition of the particular controversy before us.").

rely on alcohol dissipation alone but must now look to the totality of the circumstances to determine whether a test refusal is criminal in the absence of a warrant. Far from placing "certain kinds of primary, private individual conduct beyond the power" of the State to proscribe, *Teague*, 489 U.S. at 307, *McNeely* simply alters the facts that must be considered to determine whether the exigent circumstances exception applies to a warrantless blood or urine test. And because that exception merely regulates the manner of determining whether a test refusal is punishable under the *Birchfield* rule, we hold that the rule announced by *McNeely* is procedural and therefore does not apply retroactively to final convictions on collateral review.

In urging us to hold otherwise, Johnson essentially argues that the *consequences* of exigency differ from the DWI context to the test-refusal context. In his view, whether the exigent circumstances exception applies in a test-refusal case goes to whether a defendant's conduct is punishable at all because, under the *Birchfield* rule, a person's refusal of a test may not be criminalized absent a warrant or warrant exception. *Birchfield*, 579 U.S. at ___, 136 S. Ct. at 2186. Johnson therefore concludes that *McNeely* does more than alter the manner in which a test refusal is proven because it "narrow[s] the scope" and "modifie[s] the elements of the offense" of test refusal itself. *Schriro*, 542 U.S. at 351–52, 354. We are not persuaded.

In the test-refusal context, just as in the DWI context, *McNeely* requires that the totality of the circumstances be considered when determining whether an exigency exists. In examining the totality of the circumstances instead of just the fact of alcohol dissipation, Johnson is correct that the State may sometimes be required to obtain a warrant to secure

a blood or urine test in instances when it was previously not required to do so.[5] And Johnson is further correct that, in a smaller subset of those instances—those in which the State actually fails to obtain a warrant—the *Birchfield* rule says that the test refusal cannot be criminalized.

But Johnson is wrong in concluding that *McNeely* operates substantively in a test-refusal case. Johnson's error is that he conflates the *Birchfield* rule with *McNeely*. In the instances that Johnson describes, it is the *Birchfield* rule, not *McNeely*, that places the test refusal beyond the power of the State to criminalize. *McNeely* identifies what the court is to examine—the totality of the circumstances—in deciding whether an exception to the warrant requirement is met. But *Birchfield* provides the rule that places conduct outside the power of the State to criminalize. For this reason, we reject Johnson's argument that *McNeely* functions substantively in the test-refusal context.

Johnson further argues that *McNeely* must be substantive, and therefore retroactive, because it is similar to rules that were found to be substantive in *Montgomery v. Louisiana*,

---

[5] To prove exigency under our former test, it was sufficient to show that the officer had probable cause to believe that a driver was operating a vehicle while under the influence of alcohol. *See Netland*, 762 N.W.2d at 214. That one fact alone constituted exigent circumstances based on the rapidly dissipating alcohol concentration evidence. *See id.* After *McNeely*, to determine if exigent circumstances justify a warrantless, nonconsensual blood test of a suspected drunk driver, the inquiry is whether "it was objectively reasonable for the officer to conclude that he or she was faced with an emergency, in which the delay necessary to obtain a warrant would significantly undermine the efficacy of the search" based on all of the facts "reasonably available to the officer at the time of the search." *State v. Stavish*, 868 N.W.2d. 670, 676–77 (Minn. 2015) (citing *McNeely*, 569 U.S. at 152). There may be instances, then, when an exigency would have existed under the pre-*McNeely* standard but not under the post-*McNeely* standard.

577 U.S. ___, 136 S. Ct. 718 (2016), *Welch v. United States*, 578 U.S. ___, 136 S. Ct. 1257 (2016), and *Bousley v. United States*, 523 U.S. 614 (1998). We disagree.

In *Montgomery*, the Court addressed whether *Miller v. Alabama*, 567 U.S. 460 (2012), applied retroactively on collateral review. 577 U.S. at ___, 136 S. Ct. at 725. *Miller* held that "the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders." 567 U.S. at 479. The *Montgomery* Court concluded that *Miller* put certain defendants beyond the State's power to punish, and was therefore substantive, because it rendered life in prison without the possibility of parole "an unconstitutional penalty for 'a class of defendants because of their status'—that is, juvenile offenders whose crimes reflect the transient immaturity of youth," as opposed to the "rare juvenile offender whose crimes reflect irreparable corruption." 577 U.S. at ___, 136 S. Ct. at 734 (first quoting *Penry*, 492 U.S.at 330, then quoting *Miller*, 567 U.S. at 479–80).

Johnson suggests that *McNeely*, as applied by *Birchfield*, similarly places a group of defendants beyond the State's power to punish. According to Johnson, *McNeely* renders immune from punishment persons who refused a warrantless blood test when the only fact indicating that a warrant exception might apply is the fact of alcohol dissipation. Because *Montgomery* held *Miller* to be substantive due to its placement of certain defendants beyond the power of the state to punish, and because *McNeely*, in conjunction with the *Birchfield* rule, similarly results in defendants being placed beyond the power of the State to punish, Johnson concludes that *McNeely* is substantive.

This argument is unpersuasive because it conflates *McNeely* with the *Birchfield* rule. As we explain above, *McNeely* does not place test refusers beyond the power of the State to punish; it is the *Birchfield* rule that does so.[6]

Welch and *Bousley* are also distinguishable. The issue in *Welch* was whether *Johnson v. United States*, 576 U.S. ___, 135 S. Ct. 2551 (2015), applied retroactively on collateral review. 578 U.S. ___, 136 S. Ct. at 1260–61. *Johnson* held that the residual clause of the Armed Career Criminal Act ("ACCA") was void for vagueness under the Fifth and Fourteenth Amendments' Due Process Clauses. 576 U.S. at ___, 135 S. Ct. at 2556, 2563. The Court in *Welch* explained that, before *Johnson*, an offender would be sentenced to a 15-year prison sentence if even one of their three prior offenses fell under the ACCA's residual clause. 578 U.S. at ___, 136 S. Ct. at 1265. But after *Johnson*, an offender engaging in the exact same conduct could not be so sentenced. *Id.* *Johnson* was therefore substantive because it limited the scope of the ACCA. *Id.*

In *Bousley,* the Court addressed whether *Bailey v. United States*, 516 U.S. 137 (1995), was substantive. 523 U.S. at 617–18. *Bailey* stated that the mere possession of a firearm was inadequate to satisfy the "use of a firearm" requirement under 18 U.S.C. § 924(c)(1). 516 U.S. at 144. Instead, the government needed to prove "active employment," such as "brandishing, displaying, bartering, striking with, and, most

---

[6] *Montgomery* relied on *Penry*, 492 U.S. at 330, which stated that substantive rules include those that "prohibit[] a certain *category of punishment* for a class of defendants because of their status *or offense*." *See Montgomery* 577 U.S. at ___, 136 S. Ct. at 728 (quoting *Penry*, 492 U.S. at 330) (emphasis added). *McNeely* does not prohibit a category, or type, of punishment for any criminal offense. Accordingly, *McNeely* is not substantive under the reasoning used in *Penry*.

obviously, firing or attempting to fire a firearm." *Id.* at 148. In *Bousley*, the Court explained that *Bailey* announced a substantive rule because *Bailey* held "that a substantive federal criminal statute does not reach certain conduct," putting that conduct " 'beyond the power of the criminal law-making authority to proscribe.' " 523 U.S. at 620 (quoting *Teague*, 489 U.S. at 311).

McNeely is different from the rules examined in *Johnson*, *Welch* and *Bousley*. Unlike *Johnson*, *McNeely* renders no part of a statute void for vagueness. And unlike *Bailey*, *McNeely* does not interpret the terms of a criminal statute, narrowing the type of conduct that is criminally punishable. In short, both of those decisions "narrow[ed] the scope of a criminal statute" and thus were substantive. *Schriro* 542 U.S. at 351–52 (citing *Bousley*, 523 U.S. at 620–21). *McNeely* does not similarly narrow the scope of a criminal statute and is thus distinguishable.

In sum, *McNeely* simply requires consideration of the totality of the circumstances in determining whether the exigent circumstances exception applies to a warrantless blood test. 569 U.S. at 150–51, 156. In the test-refusal context, then, it governs the manner of determining whether a test refusal may be criminalized. We therefore hold that the rule announced by *McNeely* is procedural in the test-refusal context and does not apply retroactively to Johnson's postconviction challenge.

C.

Turning to the disposition, the State suggests that the district court applied the wrong standard to assess exigency. We agree. The district court reasoned that the State needed to show "time wasting behavior, misusing attorney time, extreme illness, evading arrest, or

dangerous behavior" to show that "there were, in fact, exigent circumstances with regard to the dissipation of alcohol necessitating a warrantless search."

The district court erroneously applied our pre-*McNeely* precedent. Under that precedent, we had expressly rejected the argument that exigent circumstances did not exist if "the State did not show that concerns" regarding the dissipation of alcohol content evidence "motivated" the officer to obtain a blood test without a warrant. *Netland*, 762 N.W.2d at 214; *see also Shriner*, 751 N.W.2d at 540 (concluding that exigent circumstances existed even though "[t]he officer who transported Shriner to the hospital for the blood draw admitted that he was not worried that Shriner was 'about to slip under the legal limit' "). Our precedent was clear that "*one fact alone* creates exigent circumstances." *Shriner*, 751 N.W.2d at 542 (quoting *D.A.G.*, 484 N.W.2d at 791). And the one fact that created exigent circumstances was "the rapidly dissipating blood-alcohol evidence." *Netland*, 762 N.W.2d at 214; *see also id.* (holding that "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").

Because *McNeely* does not apply retroactively to Johnson's test-refusal conviction and because the district court did not properly articulate the pre-*McNeely* standard for exigent circumstances, we once again remand to the district court to determine if the test-refusal statute was unconstitutional as applied to Johnson.

CONCLUSION

For the above reasons, we reverse the court of appeals and remand to the district court for further proceedings consistent with this opinion.

Reversed and remanded.