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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1058**

State of Minnesota,
Appellant,

vs.

Peter James Rappe,
Respondent.

**Filed February 10, 2014
Reversed and remanded
Chutich, Judge**

Rice County District Court
File No. 66-CR-10-701

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

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Considered and decided by Larkin, Presiding Judge; Hudson, Judge; and Chutich,
Judge.

UNPUBLISHED OPINION

CHUTICH, Judge

The state appeals the district court's pretrial ruling to suppress evidence of a
breath test and to dismiss a charge of driving while impaired against respondent Peter

Rappe, arguing that the district court incorrectly interpreted the Supreme Court's holding in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). Because of the recent holding in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), we reverse the district court's suppression of the breath test and dismissal of the charge and remand for trial.

FACTS

On March 6, 2010, State Trooper Ricardo Magana responded to a call concerning a pickup truck stuck in snow in the median of Interstate 35. Rappe was driving the truck when it left the freeway. Rappe's friend was also at the scene, and he told Magana that Rappe consumed four or five beers that day. Magana discovered that Rappe was driving with a restricted license, which prohibited any use of alcohol.

Magana called a tow-truck, and after the tow-truck came, Magana spoke to Rappe for the first time. Rappe admitted to Magana that he had been drinking alcohol. Magana noticed that Rappe was chewing gum and smelled strongly of body spray. After Rappe removed his gum, Magana noticed an intense smell of alcohol.

Magana then asked Rappe to submit to a preliminary breath test (PBT), and Rappe agreed. The PBT showed an alcohol concentration of .206. Magana also did a horizontal gaze nystagmus test on Rappe and observed six clues of impairment. Because Magana believed he had probable cause to arrest Rappe for driving while impaired, Magana arrested Rappe and took him to the Rice County Law Enforcement Center in Faribault.

After arriving at the center, Magana read the Minnesota implied-consent advisory to Rappe while they were still in the trooper's car. The advisory stated that refusal to take the test is a crime under Minnesota law. Magana also told Rappe that he had the

right to consult with an attorney, as long as it did not cause an unreasonable delay in administering the test.

Rappe asked to contact an attorney, and, once inside the jail, Rappe made two phone calls and actually spoke to an attorney on the phone. While Rappe was searching for an attorney, Magana observed Rappe to make sure that Rappe did not belch, vomit, or put anything in his mouth because doing these things could affect the accuracy of the breath test. After getting advice from an attorney, Rappe agreed to take the test. The breath test revealed an alcohol concentration level of 0.19. As a result, in addition to four other counts, Rappe was charged with one count of driving while impaired. *See* Minn. Stat. §§ 169A.20, subd. 1(5), .24, subd. 2 (2008).

On April 24, 2013, the district court conducted a contested omnibus hearing to determine whether, under a recently issued decision of the United States Supreme Court, Rappe's breath test was admissible. *See Missouri v. McNeely*, 133 S. Ct. 1552 (2013). At the hearing, Magana testified about his interaction with Rappe, noting that Rappe "had been extremely cooperative" and that Rappe never said that he refused to take a blood, breath, or urine test. Magana did not obtain a warrant to administer the breath test to Rappe.

The district court ruled that the breath test was inadmissible under *McNeely* and dismissed the charge of driving while impaired. *See* Minn. Stat. §§ 169A.20, subd. 1(5), .24, subd. 2. The state now appeals the district court's ruling.

DECISION

The state contends that the district court “erroneously construed Minnesota’s Implied Consent Law when it found that criminalizing refusal amounted to extracting consent from appellant.” It also asserts that because Rappe voluntarily consented to the breath test based on the totality of the circumstances, a warrant was not necessary to obtain his breath sample. Based on the Minnesota Supreme Court’s recent ruling in *State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013), we agree.

To prevail in a pretrial appeal from an order dismissing criminal charges, the state must clearly and unequivocally show that the district court erred “and that, unless reversed, the error will have a critical impact on the outcome of the prosecution.” *State v. Gradishar*, 765 N.W.2d 901, 902 (Minn. App. 2009) (quotation omitted). The standard for critical impact is that “the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution.” *State v. Kim*, 398 N.W.2d 544, 551 (Minn. 1987). Because the district court dismissed a charge against Rappe after suppressing evidence of his breath test, the critical-impact requirement has been satisfied. *See State v. Trei*, 624 N.W.2d 595, 597 (Minn. App. 2001), *review dismissed* (Minn. June 22, 2001).

Minnesota’s implied-consent statute requires that police officers tell drivers who are suspected of driving while impaired that “Minnesota law requires [them] to take a test” to determine whether they are “under the influence of alcohol,” that “refusal to take a test is a crime,” and that they have a right to talk to an attorney, but this right is “limited to the extent that it cannot unreasonably delay administration of the test.” Minn. Stat. § 169A.51, subds. 1, 2 (2008). It is a crime to refuse to take this test. Minn. Stat.

§ 169A.20, subd. 2 (2008). The police may not administer the test if the person does not agree to take a test. Minn. Stat. § 169A.52, subd. 1 (2008).

In *State v. Brooks*, the Minnesota Supreme Court applied the Supreme Court's holding in *McNeely*, 133 S. Ct. 1552, when it stated that "exigency created by the dissipation of alcohol in the body" alone is not enough to justify a warrantless search under Minnesota's implied-consent law. 838 N.W.2d 563 at 567. But the Minnesota Supreme Court noted that a warrant is not necessary for police officers to test someone's breath, blood, or urine if the person voluntarily consents to the search. *Id.* at 568. Consent must be given "freely and voluntarily" based on the preponderance of the evidence. *Id.* The supreme court then held that "a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Id.* at 570.

The *Brooks* court further explained that, to determine whether someone has voluntarily consented to a search in the implied-consent context, we must consider the totality of the circumstances, "including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Id.* at 569 (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)). When a police officer reads a person the implied-consent advisory, the officer makes it clear that the person has "a choice of whether to submit to testing." *Id.* at 572. "While an individual does not necessarily need to know he or she has a right to refuse a search for consent to be voluntary, the fact that someone submits to the search after being told that he or she can say no to the search supports a finding of voluntariness." *Id.*

The district court did not have the benefit of the *Brooks* decision when it ruled that Rappe's "consent was 'extracted' and not given freely and voluntarily." Under *Brooks*, however, the implied-consent advisory by itself does not coerce consent, and the issue of consent must be evaluated based on the totality of the circumstances. *Id.* at 569–70.

"When reviewing pretrial orders on motions to suppress evidence, we 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). Applying the *Brooks* totality-of-the-circumstances analysis to the undisputed facts here, the record shows that Rappe voluntarily consented to the breath test. The facts of this case are almost identical to those in *Brooks*. In *Brooks*, the appellant was arrested three different times for driving under the influence, was read the implied-consent advisory each time, spoke with an attorney each time, and consented to testing each time. *Id.* at 569–70. Based on these facts, the supreme court held that the appellant's consent was voluntary in each instance. *Id.* at 572.

Similarly, "the nature of the encounter, the kind of person [Rappe] is, and what was said and how it was said" show that Rappe voluntarily consented to the breath test here. *See id.* at 569 (quotation omitted). Officer Magana came to suspect that Rappe was driving under the influence when he responded to a call about a truck being stuck in the ditch on Interstate 35 and then noticed a strong smell of alcohol on Rappe's breath when he spoke with Rappe. After discovering that Rappe was driving with a restricted license, Magana arrested Rappe for driving while impaired and took him to the Rice County Law Enforcement Center. Magana then properly read the implied-consent advisory to Rappe,

which explained that Minnesota law required him to submit to a test, that refusing the test was a crime, and that he had the right to speak with an attorney. After arriving at the jail, Rappe made two phone calls and actually spoke to an attorney. Rappe agreed to take the breath test after being read the implied-consent advisory and after consulting with his attorney. That Rappe “consulted with counsel before agreeing to take [the] test reinforces the conclusion that his consent was not illegally coerced.” *See id.* at 571.

In sum, the totality of the circumstances shows, as a matter of law, that Rappe voluntarily consented to the breath test. No evidence suggests that Rappe was coerced to consent to the breath test, and the record reflects that Magana properly followed all of the procedures established under the implied-consent law. Because Rappe’s consent was given voluntarily, Magana did not need a warrant to give a breath test to Rappe. We hold, therefore, that the results of the breath test are admissible at Rappe’s trial. Accordingly, we reverse the district court’s decision and remand to the district court for trial.

Reversed and remanded.