

A05-1604

Case No. A05-1553

A05-1604

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Daniel Joseph Melde,

Appellant.

**RESPONDENT'S BRIEF
AND APPENDIX**

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SUPPLEMENTAL PROCEDURAL HISTORY

In this case, the Court of Appeals reversed the trial court, determining that “when an Implied Consent Advisory is administered to a person under Minn. Stat. § 169A.51, Subd. 2 (2004), failing to inform the person that test refusal is a gross misdemeanor that may result in harsher penalties than a test failure does not violate the person’s due process. *State v. Melde*, No. A05-1553 (Minn. App. March 14, 2006) at 4. (A-30). This appeal follows. (It should be noted that the Court of Appeals released its opinion in *State v. Myers*, 711 N.W.2d 113 (Minn. App. 2006) the same day it released its opinion in this case, holding that the implied consent advisory administered did not actively mislead the driver and did not violate his due process rights.)

LEGAL ANALYSIS

THE MINNESOTA IMPLIED CONSENT ADVISORY PROVIDES SUFFICIENT NOTICE OF THE CRIMINAL CONSEQUENCES OF REFUSING TO TAKE A CHEMICAL TEST TO SATISFY FUNDAMENTAL FAIRNESS PRINCIPLES INHERENT IN DUE PROCESS.

I. Burden of proof and standard of review.

The Court of Appeals reversed the trial court's decision granting Respondent's Motion to Dismiss in this case determining that the Minnesota Implied Consent Advisory does not violate due process where it informs drivers asked to submit to chemical tests under the Implied Consent Law only that refusal to take a test is a crime, without informing them that such refusal to submit to testing will result in a gross misdemeanor charge with possibly harsher criminal penalties than failure of the test. Appellant challenges the determination. This claim is in effect a challenge to the constitutionality of MINN. STAT. § 169A.51, subd. 2 (2004). That statute, in relevant part, provides that a person asked to take a test must first be informed:

- (1) that Minnesota law requires the person to take a test:
 - (i) to determine if the person is under the influence of alcohol, controlled substances, or hazardous substances;
 - ...
- (2) that refusal to take a test is a crime;
- (3) if the peace officer has probable cause to believe the person has violated the criminal vehicular homicide and injury laws, a test will be taken with or without the person's consent; and

- (4) that the person has the right to consult with an attorney, but that right is limited to the extent that it does not unreasonably delay administration of the test.

See MINN. STAT. § 169A.51, subd. 2, 1- 4 (2004).

The statute, is presumed constitutional, and is to be construed so as to give effect to all of its provisions, if possible. See MINN. STAT. § 645.17 (2004). A party challenging the constitutionality of a statute bears a heavy burden of demonstrating beyond a reasonable doubt that it is unconstitutional. See *State v. Benniefield*, 678 N.W.2d 42, 45 (Minn. 2002). “Every presumption is invoked in favor of the constitutionality of the statute.” *Miller Brewing Co. v. State*, 284 N.W.2d, 353, 356 (Minn. 1979). A court’s “power to declare a statute unconstitutional should be exercised with extreme caution and only when absolutely necessary.” *Benniefield*, 678 N.W.2d at 45. The judicial branch “must give great deference to an act of the legislature and interpret a statute, if possible, in such a way as to up hold its constitutionality.” *St. Paul Cos., Inc. v Hatch*, 449 N.W.2d 130, 137 (Minn. 1989). This Court reviews the constitutionality of a statute *de novo*. *State v. Grossman*, 636 N.W.2d, 545, 548 (Minn. 2001).

II. Federal and Minnesota precedent.

The issue of the constitutional adequacy or necessity of prior Implied Consent warnings came before the United States Supreme Court in the case of *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916 (1983). That case addressed the use of evidence of

test refusals in DWI prosecutions. The Supreme Court ruled that it did not violate due process to permit the use of such evidence in the absence of a specific advisory or warning. *Id.*, 459 U.S. at 565, 103 S.Ct. at 923. After recognizing that the testing of DWI suspects may be compelled by the state and that a suspect has no constitutional right to refuse testing, the court noted that it was sufficient that the general warning given to suspects “made it clear that refusing the test was not a “safe harbor” free of adverse consequences.” *Id.* 459 U.S. at 566, 103 S.Ct. at 824. The court went on to state “that a state does not violate the fundamental fairness inherent to due process by choosing not to advise individuals of all of the possible consequences they could face in refusing a breath test.” *Id.* 459 U.S. at 566, 103 S.Ct. at 924. Minnesota case law has followed that line of reasoning.

In *State v. Abe*, 289 N.W.2d 158 (Minn. 1980), this court dealt with a claim that MINN. STAT. § 169.127 (1976) violated “due process” because it did not require drivers, who were advised that test refusal would result in license revocation, to also be advised that submitting to a test and failing it would result in license revocation. The statute was changed in 1978 to provide that drivers be advised that failing the test would result in a 90 day license revocation. The *Abe* court rejected the argument that the statutory change should be applied retroactively to his case, and held that the statute applicable at the time of the arrest did not require any such warning. As to claim that “due process” required such a warning, the court stated that:

“*Abe* contends that failure to give him a 90-day warning violated his due process rights because he should have been given all relevant information about the consequences of consenting to the blood test before he decided whether to consent to it. In our recent decision, *State Dept. of Pub. Safety v. Wiehle*, 287 N.W.2d 416 (Minn. 1979), we held that the implied consent laws established a driver’s continuing consent to testing. Further, we specifically decline to confer any “rights” on the driver to withdraw his consent. Since *Abe* had already consented to taking the blood test, he could only prevent the test by withdrawing his consent. In this regard, he received the information which the legislature required to be given concerning the withdrawal of consent. The information was accurate and relevant. It also promoted peaceful submission to the blood test. *Abe* did not withdraw his consent. There is nothing in the statutory procedures which were followed in this case that involved any violation of due process. We find no merit in *Abe*’s claim.

Id., 289 N.W.2d at 160-61.

This court similarly rejected a claim that failure to give a Miranda Warning prior to a test request under the implied consent law required suppression of breath test results. *State v. Gross*, 335 N.W.2d 509 (Minn. 1983). That opinion confirmed that the only advisory that peace officers are required to give under the implied consent law is the advisory mandated by statute. *Id.* at 510. The Minnesota Court of Appeals considered several cases thereafter, reiterating that police officers are not required to provide more advice to a driver under the implied consent law than required by statute. *Holtz v. Commissioner of Public Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983); *State v. Vonbank*, 341 N.W.2d 894, 895 (Minn. App. 1984).

In *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991), this court determined that there was a constitutional right to pre-testing consultation with counsel. This court directed that officers advise drivers of this right. The Minnesota

Court of Appeals heard two post-*Friedman* cases challenging the advisory as directed by the *Friedman* opinion. In *Sommers v. Commissioner of Public Safety*, 482 N.W.2d 826 (Minn. App. 1992), a driver challenged the Implied Consent Advisory form in part, on the ground that it was invalid because the advice regarding pre-testing consultation with counsel was not mandated by the Minnesota legislature. The Court of Appeals rejected that challenge. A challenge was also brought to the post-*Friedman* advisory on the basis that it did not conform to the statute requiring officers to inform drivers that after submitting to testing there was a right to call an attorney for advice. The Court of Appeals concluded that the revised advisory sufficiently complied with due process and rejected the challenge. *Dufloth v. Commissioner of Public Safety*, 492, N.W.2d 277 (Minn. App. 1992), *review denied* (Minn. Dec. 15, 1992).

In *McDonnell v. Commissioner of Public Safety*, 473 N.W.2d 848 (Minn. 1991) this court considered whether the statutory advisory as applied to first-time offenders violated due process, due to language included in the advisory indicating that refusal may result in a criminal charge at a time when refusal was not a crime for first offenders. This court concluded that the form threatened first offenders with a criminal charge which could not be brought, and thus violated due process as the statement was inaccurate and “actively misleading.” *Id.* at 853. This court also recognized in *McDonnell* that as long as the advisory language is accurate, the state “does not violate the fundamental fairness

inherent to due process by choosing not to advise individuals of all of the possible consequences they could face in refusing a breath test.” *Id.* at 853.

After the *Friedman* decision was issued, the Minnesota legislature amended the Implied Consent statute to require inclusion of advice regarding pre-testing right to counsel in the advisory, and eliminating advice about post-testing right to counsel and warnings about license revocations and advice regarding the right to additional testing. Claims that the eliminations of the warnings about the consequences of testing or refusal and of the advice regarding the right to additional testing violated “due process” were rejected by the Court of Appeals in *Davis et al. v. Commissioner of Public Safety*, 509 N.W.2d 380, 387 (Minn. App. 1993). On review, this court also held that “due process” did not require that the advisory contain the deleted information. *Davis v. Commissioner of Public Safety*, 517 N.W.2d 901, 903 (Minn. 1994). The advisory at issue in *Davis* is the same advisory administered in this case.

Davis was also consistent with *McDonnell v. Commissioner of Public Safety*, 473 N.W.2d at 853 (Minn. 1991), where the Court reiterated the principle enunciated in *South Dakota v. Neville*, 459 U.S. 553, 566, 103 S.Ct. 916, 924 (1983) “that a state does not violate the fundamental fairness inherent to due process by choosing not to advise individuals of all the possible consequences they could face in refusing a breath test.”

The Court of Appeals considered and rejected similar due process challenges to the advisory. For example, in *Ruffenach v. Commissioner of Public Safety*, 528 N.W.2d

254 (Minn. App. 1995), the driver asserted that the advisory's failure to inform him of his right to an independent test denied him the opportunity to obtain exculpatory evidence. The Court recognized that the driver's claim was the same due process argument rejected in *Davis*, despite the driver's attempt to reframe the issue. *Id.* at 255-57. And consistent with *Davis*, the Court held that due process does not require that a driver be notified of his right to additional independent testing. *Id.*

The Court of Appeals rejected another due process challenge to the Implied Consent Advisory in *Moe v. Commissioner of Public Safety*, 574 N.W.2d 96 (Minn. App. 1998). In that case, two drivers who had been offered a blood test and urine test, respectively, argued that the advisory violated due process because it did not advise them that action could be taken against them for refusing such tests only if an alternative was offered. *Moe*, 574 N.W. 2d at 98. Noting that the advisory was neither inaccurate nor misleading, this Court relied on *Neville* and *Davis* and rejected the constitutional challenge, stating again that due process does not require that individuals asked to take a test be advised of all possible consequences of their decision. *Id.* citing *Neville*, 459 U.S. at 564-66; *Davis*, 517 N.W.2d at 904. The Court added that “[d]ue process does not require an Implied Consent Advisory to explain every potentially unclear application of the law.” *Moe*, 574 N.W.2d at 98.

In *Fehler v. Commissioner of Public Safety*, 591 N.W.2d 752 (Minn. App. 1999), *rev. denied*, (Minn. July 28, 1999), the Court of Appeals rejected a challenged virtually

identical to that brought in this case by Respondent. The driver in *Fehler* argued that his due process rights were violated because the advisory informed him only of the standard consequences of refusing or failing a test, where, because of his prior alcohol-related convictions, additional consequences might follow. *Id.* At 754. Once again, the Court held that “it is not a violation of due process for an officer to fail ‘to advise individuals of all of the possible consequences they could face in refusing a breath test.’ ” *Fehler*, 591 N.W.2d at 754 (quoting *McDonnell*, 473 N.W.2d at 853).¹ Even though *Fehler* faced greater penalties than a driver with no prior convictions, the standard advisory satisfied due process. *Id.* The Court of Appeals also acknowledged that due process is violated if an officer *actively misleads* an individual about the statutory obligation to submit to testing. *Id.* (citing *McDonnell*, 473 N.W.2d at 853). In *Fehler*, however, the information the officer provided was accurate and therefore satisfied due process. *Id.*

Finally, in *State v. Magnuson*, 703 N.W.2d 557, (Minn. App. 2005), the Court of Appeals held that the implied consent advisory did not violate due process because it

¹See also *Mueller v. Commissioner of Public Safety*, No. C1-02-1070 (Minn. Ct. App. Feb. 4, 2003)(unpublished opinion)(holding that advisory does not violate due process simply because it fails to inform a driver that a test refusal is not a crime if the refusal is reasonable); *Haeger v. Commissioner of Public Safety*, No. CO-99-1808 (Minn. Ct. App. June 6, 2000) (unpublished opinion) (holding that there was no due process violation when officer informed driver of the consequences of refusing to take a breath test, but not the consequences of taking and failing the test); *State v. Erickson*, No. A04-527 (Minn. Ct. App. February 15, 2005)(unpublished opinion) (holding that advisory does not violate due process because it fails to advise that refusal to test could constitute a felony). Pursuant to Minn. Stat. § 480A.08, subd.3 (2002), copies of these opinions are attached as RA-1 through RA-24.

failed to advise driver that submitting to a test demonstrating an alcohol concentration of .20 or more may increase the possible penalty.

Neville, Davis, McDonnell, Moe and Fehler, and numerous other cases, establish a number of principles and guidelines that apply in evaluating whether the information provided to drivers before they are asked to take a chemical test comports with due process. First, because an Implied Consent Advisory is statutory and not constitutionally required, fundamental fairness inherent in due process does not require that the driver be advised of all potential rights and consequences of taking or refusing a test. See *Neville*, 459 U.S. at 564-66, 103 S. Ct. at 923-24; *McDonnell*, 473 N.W.2d at 853. Once a state undertakes to provide notice of potential consequences, however, the adequacy of the information provided is subject to due process review. *Id.* To satisfy due process, peace officers must provide the information required by the statute, must provide accurate information, and cannot mislead drivers as to their rights or the consequences of their decision. See *Abe*, 289 N.W. 2d at 161. At the same time, as stated above, officers are not required to advise drivers of every potential consequence. See *Neville*, 459 U.S. at 564-66; 103 S. Ct. at 923-24; *McDonnell*, 473 N.W.2d at 853.

Appellant points to the balancing test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976) and applied in *Wilkinson v. Austin*, 125 S. Ct. 2384 (2005) as the framework for reviewing the issue of the information required to be included in the Implied Consent Advisory to pass due process analysis. This reliance is misplaced. The

principles to be applied are those of *Neville*, *Davis*, *McDonnell* and others cited herein.

A reading of the opinions in *Mathews* and *Wilkinson* reveals that the balancing test relied on by Appellant applies to issues of whether a hearing is required before the government terminates social security disability benefits (*Mathews*) or transfers a prisoner to a “supermax” prison (*Wilkinson*) or whether an administrative “paper” review is adequate. That is not the procedural posture of this case.

In evaluating the constitutionality of an advisory, it is relevant that drivers are granted a limited right to counsel before making a decision about testing. See *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991). This right strengthens the fairness of the process. After all, as the *Friedman* court held, “an attorney, not a police officer, is the appropriate source of legal advice.” *Friedman*, 473 N.W.2d at 833; see also *Davis v. Commissioner of Public Safety*, 517 N.W.2d 901, 901-03 (Minn. 1994).

III. Application to the instant case.

Applying these principles to this case leaves no doubt that Respondent’s due process rights were satisfied. Respondent was informed of all of the information required by the implied consent law. The information provided was accurate and complete. There is no claim that the police officer misled Respondent about the consequences of taking or refusing a test in any way. Respondent also was provided with the opportunity to consult with counsel and he took advantage of that opportunity, albeit by calling a friend rather than legal counsel. It should not be overlooked in this

case that Appellant was a “repeat offender.” With a “qualified prior impaired driving incident,” MINN. STAT. § 169A.03, Subd. 22 on his record from a prior driving under the influence conviction, he would have been charged with a gross misdemeanor violation under these facts had he submitted to the required test as the law requires.

There is a significant practical dimension in evaluating the adequacy of the Implied Consent Advisory. The precise criminal and civil consequences of taking or refusing a test vary depending upon a number of factors including whether a driver has prior convictions or implied consent revocations, whether those priors are considered qualified prior impaired driving incidents, and whether aggravating factors are present. Therefore, it would be difficult to accurately inform drivers in a uniform and concise way regarding all of the precise consequences that apply to them in the criminal court. There would be no reason that a driver could not claim that “due process” would require that he be given an individualized advice as to the exact consequences that submission or refusal would cause his or her individual case outside of the criminal realm, including such things as the duration of license revocation, the availability of a limited license and the waiting period that may or may not be involved, the amount of driver’s license reinstatement fees, consequences such as cancellation as “inimical to public safety” for repeat offenders, details as to the rehabilitation requirements for reinstatement of driving privileges, license plate impoundment, or vehicle forfeitures. Likewise, a driver could make similar claims in the criminal realm regarding issues of mandatory holds for court

and possible sentencing consequences, including statutory minimum sentences. The limits to which this list could be expanded is limited only by the creativity of defense counsel. This would also place an extra burden on police officers who are not expected to be legal experts. As the courts repeatedly observe, attorneys are the best source of this type of information. *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991).

CONCLUSION

Due process did not require that the officer inform Respondent of the criminal consequences of a refusal beyond the statutory requirement that “Refusal to take a test is a crime.” That statement was entirely accurate. That statement did not suggest or imply that a gross misdemeanor charge was not possible. That statement made clear the seriousness of the situation. That statement “made it clear that refusing the test was not a ‘safe harbor,’ free of adverse consequences.” See *Neville*, 459 U.S. at 566, 103 S. Ct. at 924. This is all that fundamental fairness requires. Therefore, Respondent’s due process rights were satisfied.

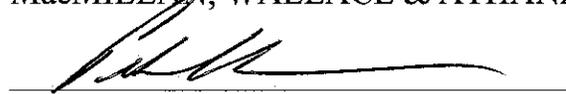
As specifically applied to this case, whether Appellant tested or refused is of no practical difference. As a repeat offender he faced gross misdemeanor charges either way.

Based upon the foregoing, the state respectfully requests that the decision of the Court of Appeals in this case be affirmed.

Dated this 22nd day of June, 2006.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).