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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1547**

State of Minnesota,
Appellant,

vs.

Troy Edward Porter,
Respondent.

**Filed May 5, 2014
Reversed and remanded
Cleary, Chief Judge**

Stearns County District Court
File No. 73-CR-12-6542

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for appellant)

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Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

The state challenges the district court's suppression of the results of respondent Troy Edward Porter's breath test, arguing that the district court erred in concluding that Minnesota's implied-consent statute is unconstitutional and that respondent did not voluntarily consent to the test. Because, under the totality-of-the-circumstances analysis, we determine that respondent consented to the breath test, we reverse and remand.

FACTS

On July 12, 2012, the Sauk Centre Police Department received a complaint of a possible drunk driver, and Officer Nick Diederich responded to the call. Officer Diederich stopped the reported vehicle after observing it cut off another vehicle and identified respondent as the driver. Respondent presented Officer Diederich with a cancelled license.

Officer Diederich then administered field sobriety tests and a preliminary breath test to respondent. Because of respondent's performance, Officer Diederich placed respondent under arrest on suspicion of driving while impaired (DWI). Officer Diederich read respondent the implied-consent advisory, and, after contacting his attorney, respondent agreed to submit to a breath test. The breath test results indicated an alcohol concentration of .174.

Respondent was charged with two felonies and one gross misdemeanor: (1) felony first-degree driving while under the influence of alcohol, in violation of Minn. Stat.

§ 169A.20, subd. 1(1) (2010); (2) felony first-degree driving with an alcohol concentration of .08 or more, in violation of Minn. Stat. § 169A.20, subd. 1(5) (2010); and (3) gross misdemeanor driving after license cancellation-inimical to public safety, in violation of Minn. Stat. § 171.24, subd. 5 (2010). On June 6, 2013, Respondent moved to suppress the results of his breath test on the ground that the test was administered in violation of the Fourth Amendment of the U.S. Constitution and the U.S. Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). The district court issued an order suppressing the breath-test results after holding that Minnesota's implied-consent statute is unconstitutional and that respondent did not voluntarily consent to the test. This appeal follows.

D E C I S I O N

The state argues that the district court erred in suppressing the results of respondent's breath test after concluding that Minnesota's implied-consent statute is unconstitutional and determining that respondent did not voluntarily consent to the test. The record does not reflect that the parties stipulated to the facts. Nevertheless, respondent does not challenge the district court's factual findings on appeal. "When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quotation omitted). On appeal from a pretrial order, the state must show "clearly and unequivocally (1) that the district court's ruling was erroneous and (2) that the ruling will

have a critical impact on the [s]tate's ability to prosecute the case." *State v. Underdahl*, 767 N.W.2d 677, 683 (Minn. 2009) (quotation omitted).

I.

To prove critical impact, the state must show 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). When determining critical impact, the state's evidence "will be viewed as a whole to determine what impact the pretrial order will have on the prosecution's case." *Underdahl*, 767 N.W.2d at 683. Additionally, "[e]vidence unique in nature and quality is more likely to satisfy the critical impact requirement." *Id.* "Critical impact is a threshold showing that must be made in order for an appellate court to have jurisdiction." *State v. Baxter*, 686 N.W.2d 846, 850 (Minn. App. 2004).

Respondent was charged with violating Minn. Stat. § 169A.20, subd. 1(5), which makes it a crime for a person to drive when "the person's alcohol concentration at the time, or as measured within two hours of the time, of driving . . . is 0.08 or more." Preliminary breath-test results are not available to the state in seeking a conviction under this section. *See* Minn. Stat. § 169A.41, subd. 2 (2012) (stating that results of a preliminary screening test may not be used in any court action except in certain circumstances). Because the breath-test results are the only evidence that the state may introduce as to respondent's alcohol concentration within two hours of driving, the district court's suppression of the breath-test results has a critical impact on the state's ability to prosecute the case.

II.

The Fourth Amendment to the U.S. Constitution and Article I, Section 10 of the Minnesota Constitution guarantee people the right to be free from unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Testing a person's breath constitutes a search under the Fourth Amendment and generally requires a warrant. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (1989); *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (2013), *as recognized in State v. Brooks*, 838 N.W.2d 563, 567 (Minn. 2013), *cert. denied* (U.S. Apr. 7, 2014). However, one exception to the warrant requirement is consent. *Brooks*, 838 N.W.2d at 568. "For a search to fall under the consent exception, the [s]tate must show by a preponderance of the evidence that the defendant freely and voluntarily consented." *Id.* In determining whether consent is voluntary, we 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 568-69 (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)). The nature of the encounter in implied-consent cases includes whether the driver had the right to consult with an attorney, whether the driver was read the implied-consent advisory, and how the police came to suspect the driver was under the influence. *Id.* at 569.

The district court issued the suppression order before the supreme court's decision in *Brooks*. In *Brooks*, the court held that a driver's consent is not per se coerced simply because it is a crime to refuse consent for testing. *Id.* at 570. We are bound by that

holding. The proper inquiry is the totality-of-the-circumstances analysis. *Id.* at 568-69. Contrary to the rule announced in *Brooks*, the district court held that “[t]he implied consent statute, in its current state, does not allow for sufficiently voluntary consent required by Fourth Amendment case law.” The district court also concluded that the consent exception to the warrant requirement did not apply, and it did not undergo a totality-of-the-circumstances analysis. In light of *Brooks*, it was error for the district court to hold that the implied-consent statute is unconstitutional in violation of the Fourth Amendment and to conclude that respondent did not consent to the test.

In *Brooks*, the court determined whether a driver had consented to testing in three separate incidents of arrest for DWI. *Id.* at 569-72. Brooks did not argue that the police lacked probable cause to believe he had been driving under the influence, and he did not contend that the police failed to follow the proper procedures under the implied-consent law. *Id.* at 569-70. The court noted that Brooks was read the implied-consent advisory. *Id.* at 570. The court further observed that Brooks was not subject to repeated police questioning and did not spend days in custody before being asked for consent. *Id.* at 571. After consulting with his attorney, Brooks agreed to take the tests in all three incidents. *Id.* The supreme court held that Brooks’s consent was voluntary under these circumstances. *Id.* at 572.

Here, the circumstances of respondent’s arrest and breath test indicate that he freely and voluntarily consented to the test. Respondent asserts that he only consented “after his ability to say no was compromised by a show of authority.” Respondent also

distinguishes Brooks's multiple DWI incidents from his own experience with law enforcement. Respondent's attempts to distinguish *Brooks* are unpersuasive. Respondent does not identify a specific "show of authority" that demonstrates he was coerced. The record indicates that respondent was subject to a routine DWI stop and concomitant police procedure. The supreme court has held that the fact that respondent was informed of the illegality of refusing the breath test does not constitute coercion. *See id.* at 570. Brooks's multiple DWI incidents do not distinguish the circumstances in *Brooks* from the present case. Respondent has a prior conviction for criminal vehicular homicide while under the influence of alcohol. Respondent's past experience with DWI procedures does not suggest that he was subject to coercion at the time of his verbal consent to a breath test.

Respondent has conceded that Officer Diederich had reasonable articulable suspicion to stop his vehicle. The record indicates that respondent showed signs of intoxication, and a preliminary breath test indicated respondent had an alcohol concentration of more than two times the legal limit. Like Brooks, respondent was able to contact an attorney before taking the breath test. He verbally agreed to submit to the breath test after being read the implied-consent advisory. Nothing in the record indicates that respondent was subjected to coercion.

In light of the supreme court's decision in *Brooks*, it was error for the district court to hold that the implied-consent statute is unconstitutional in violation of the Fourth Amendment. Under the totality-of-the-circumstances analysis, respondent voluntarily

consented to the breath test. As a result, the district court erred in suppressing the results of respondent's breath test.

Reversed and remanded.