STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0842
A17-0883

Mark Jerome Johnson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

Filed January 2, 2018
Affirmed
Toussaint, Edward, Judge[*]

Ramsey County District Court
File Nos. 62-CR-14-4557, 62-CR-10-1150

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and Toussaint, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

S Y L L A B U S

The new rules of procedure announced in *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016), do not apply retroactively on collateral review of a final conviction.

O P I N I O N

TOUSSAINT, Judge

Appellant challenges the district court's denial of his motion for postconviction relief and argues the that district court erred by determining that *State v. Trahan* and *State v. Thompson* announced a new procedural rule without retroactive effect on appellant's final convictions. We conclude that *Trahan* and *Thompson* announced a new procedural rule of law without retroactive effect, and we affirm the district court's denial of appellant's petition for postconviction relief. Because we conclude *Trahan* and *Thompson* announced a new procedural rule, we will not consider respondent's waiver and forfeiture arguments.[1]

FACTS

In 2009, law enforcement stopped appellant Mark Jerome Johnson's vehicle for having expired tabs. During the stop, appellant showed indicia of alcohol impairment.

[1] Respondent argues that postconviction relief for appellant's 2010 conviction has been forfeited because appellant petitioned the court more than two years after his conviction became final. *See* Minn. Stat. § 590.01, subd. 4(a)(1) (2016) ("No petition for postconviction relief may be filed more than two years after the . . . entry of judgment of conviction or sentence if no direct appeal is filed. . . ."). Respondent also argues that postconviction relief on Fourth Amendment grounds for appellant's 2015 conviction was waived by his knowing, counseled guilty plea. *See State v. Ford*, 397 N.W.2d 875, 878 (Minn. 1986) ("A guilty plea by a counseled defendant has traditionally operated, in Minnesota and in other jurisdictions, as a waiver of all nonjurisdictional defects arising prior to the entry of the plea.").

Appellant then failed field sobriety tests and refused a preliminary breath test. The officer placed appellant under arrest. The arresting officer read appellant Minnesota's Implied Consent Advisory, to which appellant was nonresponsive. Appellant refused to submit to blood or urine testing. Appellant was charged with one count of first-degree driving while impaired, refusal to submit to chemical test (test refusal), under Minn. Stat. § 169A.20, subd. 2(2) (2008). Appellant was not offered a breath test. At the time of the incident, appellant had three or more qualified prior impaired-driving incidents within a ten-year period. Appellant pleaded guilty with the assistance of counsel. As part of the plea colloquy, appellant waived his rights to contest probable cause for the charge and the admissibility of the state's evidence. On June 29, 2010, the district court sentenced appellant to a stayed 48-month prison term. The district court then placed appellant on supervised probation for up to seven years.

On June 20, 2014, while still on supervised probation, appellant was pulled over for improper turn-signal use and erratic driving. Officers questioned appellant, and he admitted he had been drinking alcohol. Officers transported appellant to jail, and a preliminary breath test showed appellant had a 0.109 blood alcohol level. Officers read appellant Minnesota's Implied Consent Advisory and provided a telephone for him to contact an attorney. Appellant refused to take a blood or urine test, and appellant was charged with one count of test refusal. Appellant was not offered a breath test. During the plea colloquy, appellant was made aware of "some cases that were on appeal to the Minnesota Supreme Court." Nonetheless, after conferring with counsel, appellant pleaded guilty to test refusal. Appellant's failure to abstain from alcohol constituted a violation of

his probation for his 2010 conviction for test refusal, so the district court executed his 48-month prison sentence.

On April 23, 2015, pursuant to the plea agreement, the district court convicted appellant of test refusal and sentenced him to 51 months in prison with five years of conditional release following confinement. On December 7, 2016, appellant filed two petitions for postconviction relief, arguing that recent cases *State v. Trahan* and *State v. Thompson* created a substantive rule with retroactive effect, and that his convictions should be vacated. Respondent argued that those cases created only a procedural rule with no retroactive effect, and that appellant was not entitled to relief. On March 29, 2017, the district court denied appellant's first petition for postconviction relief, reasoning that the cases created a procedural rule that did not have a retroactive effect on appellant's 2015 conviction. On April 7, 2017, the district court denied appellant's second petition for postconviction relief, similarly deciding that *Trahan* and *Thompson* created only a procedural rule that did not apply retroactively to appellant's 2010 conviction.

These consolidated appeals follow.

ISSUE

Did *Trahan* and *Thompson* create a substantive rule that applies retroactively to appellant's collateral attack on his final convictions for test refusal?

ANALYSIS

We review the denial of postconviction relief for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). We review legal issues de novo, and will reverse an order denying postconviction relief only if the postconviction court based its ruling on

an erroneous view of the law, exercised its discretion in an arbitrary or capricious manner or made clearly erroneous factual findings. *Id.*

Appellant's case arises from recent developments in Minnesota and federal caselaw regarding the criminalization of refusing a warrantless blood or urine test. In *Birchfield v. North Dakota*, the United States Supreme Court determined that refusal of a warrantless blood test cannot be prosecuted due to the intrusive nature of a blood draw. 136 S. Ct. 2160, 2184 (2016). Because defendant Birchfield refused a warrantless blood test, the Court vacated his conviction. *Id.* at 2186. Following *Birchfield*, the Minnesota Supreme Court issued opinions in *State v. Trahan* and *State v. Thompson*, applying the *Birchfield* ruling to Minnesota cases involving warrantless test refusals.

In *Trahan*, a suspected drunk driver was taken to jail, where he submitted to a warrantless urine test after being read the Minnesota Implied Consent Advisory. *Trahan*, 886 N.W.2d at 219. The officer suspected Trahan of tampering with the urine sample, so he asked Trahan to submit to a warrantless blood test. *Id.* Trahan refused to submit to the test. *Id.* Trahan pleaded guilty to test refusal and was convicted under Minn. Stat. § 169A.20, subd. 2 (2014). *Id.* at 220. On appeal, Trahan moved for a stay of his direct appeal to seek postconviction relief and argued that his guilty plea was invalid because the test refusal statute was unconstitutional. *Id.* The Minnesota Supreme Court determined that, under the guidance of *Birchfield*, the state could not prosecute Trahan for refusing to submit to an unconstitutional blood test, and that the test refusal statute was unconstitutional as applied. *Id.* at 224.

In *Thompson*, a suspected drunk driver was taken to jail, where he refused warrantless blood and urine tests. 886 N.W.2d at 227. After a stipulated-facts trial, Thompson was found guilty of test refusal. *Id.* This court reversed Thompson's conviction, concluding that a conviction for test refusal violates a fundamental right and the statute is not narrowly tailored to serve a compelling government interest. *Id.* On review, the Minnesota Supreme Court applied *Birchfield* and ruled that a warrantless urine test may not be administered as a search incident to a lawful arrest of a suspected drunk driver. *Id.* at 233. The court also held, in accordance with *Trahan*, that "Thompson cannot be prosecuted for refusing to submit to an unconstitutional warrantless blood or urine test," and that the test-refusal statute was unconstitutional as applied. *Id.* at 234.

I.

Appellant argues that *Trahan* and *Thompson* created a substantive rule of law, and that this court should use that rule to retroactively vacate his final convictions for test refusal. When a new rule is announced by a court, the rule generally does not apply retroactively to final convictions. *Teague v. Lane*, 489 U.S. 288, 295, 109 S. Ct. 1060, 1067 (1989); *Danforth v. State*, 761 N.W.2d 493, 496 (Minn. 2009) (stating that if a "conviction is already final at the time the new rule is announced, then the criminal defendant ordinarily may not avail himself of the new rule"). *Teague* provides two exceptions whereby a new rule will apply retroactively to a final conviction. *Teague*, 489 U.S. at 311, 109 S. Ct. at 1075-76. A rule may be applied retroactively if it is: (1) substantive or (2) a new "watershed" rule of criminal procedure. *Id.* The parties agree that the rule is new, and the appellant does not argue that the rule is a new "watershed" rule of

criminal procedure. The question, then, is whether the new rule is substantive or procedural.

A substantive rule "narrow[s] the scope of a criminal statute by . . . [placing] particular conduct . . . beyond the State's power to punish. . . ." *Schriro v. Summerlin*, 542 U.S. 348, 351-52, 124 S. Ct. 2519, 2522-23 (2004). This doctrine exists to prevent a person from facing a punishment for conduct that is no longer criminalized. *See Montgomery v. Louisiana*, 136 S. Ct. 718, 730 (2016) (noting that a conviction is invalid where "the conduct being penalized is constitutionally immune from punishment"); *Schriro*, 542 U.S. at 352, 124 S. Ct. at 2522-23. A rule that "modifies the elements of an offense" is normally substantive, because new elements alter the "range of conduct the state punishes." *Schriro*, 542 U.S. at 354, 124 S. Ct. at 2522. "Substantive rules, then, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery*, 136 S. Ct. at 729. A crime thus barred by the Constitution "is, by definition, unlawful." *Id.* at 729-30. By establishing the test for substantive retroactivity, "*Teague* sought to balance the important goals of finality and comity with the liberty interests of those imprisoned pursuant to rules later deemed unconstitutional." *Id.* at 736.

In contrast, a procedural rule "regulate[s] only the *manner of determining* the defendant's culpability." *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (emphasis in original) (quotation omitted). "Such rules alter the range of permissible methods for determining whether a defendant's conduct is punishable." *Id.* (quotation omitted) Procedural rules do not have retroactive effect, because they "merely raise the possibility

that someone convicted with use of the invalidated procedure might have been acquitted otherwise." *Schriro*, 542 U.S. at 352, 124 S. Ct. at 2523. Though a procedural error may affect the outcome of a trial, the conviction may still be accurate, and the resulting confinement may still be lawful. *Montgomery*, 136 S. Ct. at 730. "For this reason, a trial conducted under a procedure found to be unconstitutional in a later case does not, as a general matter, have the automatic consequence of invalidating a defendant's conviction. . . ." *Id.*

Appellant argues that *Trahan* and *Thompson* created a new substantive rule by placing a category of conduct—refusing a warrantless chemical test absent exigent circumstances—beyond the state's power to punish. We disagree. Considering the present case under the *Teague* framework, the rule declared by *Trahan* and *Thompson* is a procedural rule, and it does not apply retroactively to appellant's convictions.

The rule announced by *Trahan* and *Thompson* modified the procedure that law enforcement must follow before administering a chemical test. *See Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523 ("[R]ules that regulate only the *manner of determining* the defendant's culpability are procedural." (emphasis in original)). *Trahan* and *Thompson* now require law enforcement to obtain a search warrant or establish exigent circumstances before administering a chemical test, else they violate the Fourth Amendment. *Trahan*, 886 N.W.2d at 222; *Thompson*, 886 N.W.2d at 229; *see also Missouri v. McNeely*, 569 U.S. 141, 150, 133 S. Ct. 1552, 1559 (2013) (describing how courts view the totality of the circumstances when determining whether exigent circumstances exist). In reaching its decisions, the Minnesota Supreme Court in *Trahan* and *Thompson* relied on an individual's

Fourth Amendment right to be free from unreasonable searches and seizures, and the Fourth Amendment does not limit the range of conduct the state may criminalize. *See Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523 (describing how a rule was not substantive because "it rested entirely on the Sixth Amendment's jury-trial guarantee, a provision that has nothing to do with the range of conduct a State may criminalize").

Trahan and *Thompson* did not prohibit all prosecutions for test refusal, and test refusal remains punishable under Minnesota law. *See* Minn. Stat. § 169A.20, subd. 2 (Supp. 2017). Only in certain circumstances are blood and urine tests unconstitutional—either when law enforcement does not have a search warrant or exigent circumstances do not exist. Indeed, the test-refusal statute was deemed unconstitutional as applied, not unconstitutional on its face. *See Trahan*, 886 N.W.2d at 224; *Thompson*, 886 N.W.2d at 234. Test refusal is still a crime where the actions of law enforcement comport with the Fourth Amendment, and *Trahan* and *Thompson* did not place this category of conduct outside the state's power to punish.

A case that "modifies the elements of an offense is normally substantive rather than procedural." *Schriro*, 542 U.S. at 354, 124 S. Ct. at 2524. But *Trahan* and *Thompson* did not modify the elements of test refusal. The range of punishable conduct remained the same before and after *Trahan* and *Thompson*. A person is still guilty of test refusal by refusing to submit to a chemical test. *See* Minn. Stat. § 169A.20, subd. 2 (Supp. 2017). The rule is procedural because *Trahan* and *Thompson* only altered the range of acceptable police conduct relating to chemical tests, and the range of criminalized conduct remains the same.

Appellant argues the rule is substantive because it added two elements to the crime of test refusal: (1) the chemical tests are warrantless; and (2) no exigent circumstances exist. These proposed elements involve case-by-case analysis, so *Trahan* and *Thompson* cannot be said to have created a "class of persons convicted of conduct the law does not make criminal," because the proposed class would vary depending on the circumstances of the case. *Schriro*, 542 U.S. at 352, 124 S. Ct. at 2523. Furthermore, appellant's proposed elements involve law enforcement procedures, which also supports the conclusion that the rule is procedural, not substantive. In sum, the new rule does not change the elements of the test-refusal statute. Instead, it simply modifies the methods that police must follow before administering a chemical test that does not violate a driver's constitutional rights.

D E C I S I O N

We conclude that *Trahan* and *Thompson* established a new rule of procedure that does not apply retroactively to appellant's collateral attack on his final convictions for DWI test refusal. Accordingly, the district court did not err by denying his petitions for postconviction relief.

Affirmed.