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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1892**

State of Minnesota,  
Respondent,

vs.

Wendy Ann Birk,  
Appellant.

**Filed March 31, 2014  
Affirmed  
Peterson, Judge**

Isanti County District Court  
File No. 30-CR-11-359

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

Jeffrey R. Edblad, Isanti County Attorney, Timothy C. Nelson, Assistant County Attorney, Cambridge, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

**UNPUBLISHED OPINION**

**PETERSON**, Judge

On remand from the Minnesota Supreme Court, this court was directed to address appellant's challenge to her warrantless breath test. Because the record is sufficiently

developed as to the circumstances of appellant's breath test and establishes that appellant consented to the test, we affirm.

## FACTS

On June 30, 2011, appellant Wendy Ann Birk's vehicle was stopped for a traffic violation, and she was arrested and later charged with two gross-misdemeanor driving-while-impaired offenses and a misdemeanor violation of the open-bottle statute. She agreed to a trial under Minn. R. Crim. P. 26.01, subd. 4, and stipulated to the prosecution's evidence in order to preserve for appellate review the district court's pretrial ruling that the deputy who executed the traffic stop had a reasonable, articulable suspicion that she was involved in illegal activity at the time of the stop. Based on the stipulated evidence, which included the law-enforcement investigative file and video recordings of the stop and appellant's booking, the district court found appellant guilty of the three offenses charged.

In the factual findings supporting appellant's convictions, the district court stated that appellant "was read the Minnesota Implied Consent Advisory" and "exercise[d] her right to contact an attorney and did speak with an attorney" before "submitt[ing] to a breath test." This finding is supported by the investigative report, which states that appellant was transported to the Isanti County sheriff's office, read the implied-consent advisory, contacted an attorney, and provided a sample that resulted in a .180 reading. The stipulated evidence also includes an implied-consent-advisory form, which shows that appellant consented to the breath test.

Appellant sought further review in this court. This court rejected appellant's only argument on appeal, which was that the stop of her vehicle was not supported by reasonable, articulable suspicion of criminal activity, and affirmed appellant's convictions. *State v. Birk*, No. A12-1892 (Minn. App. Aug. 5, 2013) (*Birk I*). Appellant petitioned for further review to the supreme court. On October 15, 2013, the supreme court granted the petition but stayed proceedings pending its decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), which was released on October 23, 2013. After issuing *Brooks*, the supreme court lifted the stay, vacated this court's decision "as to the affirmance of [appellant's] conviction," and remanded to this court "to address [appellant's] challenge to her warrantless breath test in light of *Missouri v. McNeely*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1552 (2013)[(plurality)] [<sup>1</sup>] and *State v. Brooks* . . . ." This court reinstated the appeal and permitted the parties to submit supplemental briefs.

## DECISION

The Fourth Amendment protects the "right of people to be secure . . . against unreasonable searches and seizures." U.S. Const. amend. IV; accord Minn. Const. art. I, § 10. This right extends to people who are detained by police on suspicion of drunk driving and asked to submit to chemical testing for the presence of alcohol. *McNeely*, 133 S. Ct. at 1558 (blood testing); see also *Brooks*, 838 N.W.2d at 568-69 (applying *McNeely* to blood and urine testing). A warrant is necessary for such a search unless an exception to the warrant requirement applies. *McNeely*, 133 S. Ct. at 1558.

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<sup>1</sup> *McNeely* was decided on April 17, 2013.

In *McNeely*, the Supreme Court held that “natural metabolization of alcohol in the bloodstream [does not] present[] a per se exigency that justifies an exception to the Fourth Amendment’s warrant requirement for nonconsensual blood testing in all drunk-driving cases.” 133 S. Ct. at 1556. Instead, “exigency in this context must be determined case by case based on the totality of the circumstances.” *Id.* *McNeely* had been stopped for speeding, was arrested on suspicion of being under the influence, and refused to provide a blood sample even after being told that his refusal to submit to testing could result in his license revocation. *Id.* at 1556-57. *McNeely* claimed that his warrantless blood draw was a violation of his Fourth Amendment rights. *Id.* at 1557. The Court ruled that, in evaluating the reasonableness of a warrantless blood test, courts must look to “the totality of circumstances.” *Id.* at 1563.

In *Brooks*, the Minnesota Supreme Court addressed how *McNeely* applied to three warrantless searches of Brooks’s blood and urine following traffic stops. 838 N.W.2d at 567.<sup>2</sup> In the first incident, after Brooks was stopped for an apparent traffic violation, he showed signs of intoxication, was read the implied-consent advisory, sought advice of counsel, and agreed to provide a urine sample. *Id.* at 565. In the second incident, after Brooks was stopped because sparks were flying underneath his vehicle, he showed signs of intoxication, was read the implied-consent advisory, sought advice of counsel, and agreed to take a blood test. *Id.* In the third incident, Brooks was stopped while asleep behind the steering wheel of a running vehicle, showed signs of intoxication, was arrested

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<sup>2</sup> The United States Supreme Court granted certiorari review of *Brooks*, but vacated the original judgments and remanded for further review following issuance of *McNeely*. *Brooks v. Minnesota*, 133 S. Ct. 1996 (2013).

and read the implied-consent advisory, sought advice of counsel, and agreed to a urine test. *Id.* at 565-66.

The supreme court noted that, consistent with *McNeely*, the warrantless searches of Brooks could not be upheld solely under the theory that the rapid dissipation of alcohol in the body created exigent circumstances that permitted the warrantless searches. *Id.* at 567. The court also noted that the state had argued that the searches were valid because Brooks consented to them and because the searches were supported by exigent circumstances, were incident to Brooks's arrests, and "were independently reasonable as minimal intrusions into Brooks's privacy." *Id.* at 567 (quotation marks omitted). But the supreme court addressed only the consent issue and applied the preponderance-of-evidence standard to determine whether Brooks consented to the warrantless search in each incident. *Id.* at 568-69. The supreme court rejected Brooks's claim that, because test refusal is a crime in Minnesota, his consent was coerced. *Id.* at 570. The supreme court analyzed the totality of the circumstances in each of the three incidents and held "that Brooks voluntarily consented to the searches . . . ." *Id.* at 569-70, 572.<sup>3</sup>

Appellant did not challenge the constitutionality of her warrantless breath test in the district court, and appellate courts "ordinarily do not consider issues raised for the first time on appeal, even when those issues are constitutional questions of criminal procedure or are challenges to the constitutionality of a statute." *State v. Williams*, 794 N.W.2d 867, 874 (Minn. 2011). We may make an exception to this rule "when the

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<sup>3</sup> Justice Stras concurred in the judgment, urging the supreme court to adopt a good-faith exception to the exclusionary rule. *Brooks*, 838 N.W.2d at 575.

interests of justice require their consideration and when doing so would not work an unfair surprise on a party.” *Id.*; see also Minn. R. Crim. P. 28.02, subd. 11 (permitting appellate review of any criminal matter “as the interests of justice may require”). But appellate courts have declined to set aside this procedural bar when “the record was insufficiently developed as to the particular concern the defendant raised on appeal” or when the validity of the defendant’s claim is dependent “entirely on highly technical facts which were never raised before the district court.” *State v. McLaughlin*, 725 N.W.2d 703, 713 (Minn. 2007) (quotation omitted). When the factual record developed in the district court is insufficient to support a decision on an issue raised on appeal, it does not serve the interests of justice for an appellate court to consider the issue. *Id.*

Appellant’s failure to raise the warrantless-search issue in the district court deprived the state of an opportunity to fully establish the facts surrounding her consent to the breath test for purposes of analyzing that issue under *McNeely* and *Brooks*. But the evidence to which the parties stipulated establishes that appellant consented to the search—she was read the implied-consent advisory, consulted with an attorney, and consented to a breath test.

Similar evidence was examined by the supreme court in *Brooks* and was found sufficient to uphold the warrantless searches. 838 N.W.2d at 569-70, 572. Although appellant now argues that the record is insufficient to apply the totality-of-the-circumstances test mandated by *McNeely* and *Brooks* without the testimony of the officer who read the implied-consent advisory and testimony “about the circumstances surrounding the taking of her breath test,” appellant agreed when she submitted her case

to the district court on stipulated evidence “that appellate review will be of the pretrial issue, but not of [her] guilt, or of other issues that could arise at a contested trial.” Minn. R. Crim. P. 26.01, subd. 4(f). *Compare State v. Busse*, 644 N.W.2d 79, 89 (Minn. 2002) (stating, that “as we have developed [rule 26.01, subd. 4,] procedure so far, it is for obtaining appellate review of pretrial decisions”), *with* Minn. R. Crim. P. 26.01 cmt. (stating that Minn. R. Crim. P. 26.01, subd. 3, should be used when the identified pretrial ruling is not dispositive “and if the defendant wishes to have the full scope of appellate review, including a challenge to the sufficiency of the evidence”).

For the reasons stated in *Birk I* and because the district court record establishes by a preponderance of evidence that appellant consented to the breath test, we affirm.

**Affirmed.**