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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1998**

Samuel Thomas Sonsalla, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

**Filed June 9, 2014
Reversed
Larkin, Judge**

Stearns County District Court
File No. 73-CV-13-5208

Samuel Thomas Sonsalla, Browerville, Minnesota (pro se respondent)

Lori Swanson, Attorney General, Jeffrey S. Bilcik, Assistant Attorney General, St. Paul,
Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Willis,
Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant commissioner of public safety challenges the district court's order rescinding the revocation of respondent's driver's license, arguing that the district court erred by granting respondent's motion to suppress the results of his breath test. Because the collection of respondent's breath sample was reasonable under the consent exception to the warrant requirement, we reverse.

FACTS

At approximately 2:00 a.m. on June 9, 2013, Stearns County Sheriff's Deputy Jamie Florek investigated a vehicle in a ditch. He identified the driver as respondent Samuel Thomas Sonsalla. Sonsalla informed Deputy Florek that he had "had too much to drink that evening" and had "messed up." Deputy Florek observed that Sonsalla's eyes were watery and bloodshot and that he had a hard time forming words. A preliminary breath test indicated that Sonsalla's alcohol concentration was .157.

Deputy Florek arrested Sonsalla, transported him to the police department, read him an implied-consent advisory, and advised him that he had the right to consult with an attorney. Sonsalla elected not to consult with an attorney. He agreed to take a breath test, which returned an alcohol-concentration reading of .16. Deputy Florek did not obtain a search warrant before administering the breath test. Based on the results of the breath test, appellant commissioner of public safety revoked Sonsalla's driver's license.

Sonsalla petitioned for judicial review of the license revocation and moved the district court to suppress the results of his breath test, arguing that the collection of his

breath sample without a search warrant was unconstitutional under *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). The district court granted Sonsalla's motion, reasoning that "the consent exception does not justify warrantless chemical tests obtained pursuant to Minnesota's implied consent law." The district court therefore rescinded the revocation of Sonsalla's driver's license but stayed its order pending the supreme court's decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). The commissioner appeals.

D E C I S I O N

The United States and Minnesota Constitutions prohibit the unreasonable search and seizure of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. The collection of a breath sample is a search under the Fourth Amendment. *Mell v. Comm'r of Pub. Safety*, 757 N.W.2d 702, 709-10 (Minn. App. 2008). Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). The state bears the burden of establishing the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001). "When the facts are not in dispute, the validity of a search is a question of law subject to de novo review." *Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004).

The commissioner contends that the collection of Sonsalla's breath sample was lawful under the consent exception to the warrant requirement and argues that the district court's suppression order should be reversed under *Brooks*. We agree that *Brooks* is dispositive here. On three separate occasions, Brooks was arrested for driving while

impaired, was read an implied-consent advisory, and submitted to either blood or urine testing. *Brooks*, 838 N.W.2d at 565-66. Brooks argued that “under *McNeely*, the warrantless searches of his blood and urine cannot be upheld solely because of the exigency created by the dissipation of alcohol in the body.” *Id.* at 567. The supreme court agreed that the searches were not justified based on exigent circumstances but noted that the “police do not need a warrant if the subject of the search consents.” *Id.* at 567-68. The supreme court described the consent exception to the warrant requirement as follows:

For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented. Whether consent is voluntary is determined by examining the totality of the circumstances. Consent to search may be implied by action, rather than words. And consent can be voluntary even if the circumstances of the encounter are uncomfortable for the person being questioned. An individual does not consent, however, simply by acquiescing to a claim of lawful authority.

. . . .
. . . This analysis requires that 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 (quotations and citations omitted).

The supreme court explained that “the nature of the encounter includes how the police came to suspect Brooks was driving under the influence, their request that he take the chemical tests, which included whether they read him the implied consent advisory, and whether he had the right to consult with an attorney.” *Id.* at 569. The supreme court concluded that Brooks voluntarily consented to all three searches because he did not

dispute that the police had probable cause to believe he had been driving under the influence; he did not “contend that police did not follow the proper procedures established under the implied consent law”; the police read “the implied consent advisory before asking him whether he would take all three tests, which makes clear that drivers have a choice of whether to submit to testing”; the “police gave Brooks access to telephones to contact his attorney and he spoke to a lawyer”; and “[a]fter consulting with his attorney, Brooks agreed to take the tests in all three instances.” *Id.* at 569-70. The supreme court further noted that although Brooks was in custody, he “was neither confronted with repeated police questioning nor was he asked to consent after having spent days in custody.” *Id.* at 571.

In this case, Sonsalla does not dispute that Deputy Florek had probable cause to arrest him for driving while impaired. He does not contend that the police failed to follow the proper implied-consent procedures. Deputy Florek read Sonsalla the implied-consent advisory, which made it clear that Sonsalla could refuse the test. And although Sonsalla elected not to consult with an attorney, he did so after Deputy Florek advised him that he had the right to consult with an attorney and that a telephone and directory would be available to him for that purpose. When Sonsalla agreed to take a breath test, he had not been confronted with repeated police questioning or held in custody for days. This record does not suggest that Sonsalla was coerced into providing a breath sample. *See id.* (“[N]othing in the record suggests that Brooks was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired.”

(quotation omitted)). We therefore conclude that Sonsalla consented to the collection of his breath sample for chemical analysis.

The commissioner also argues that *McNeely* did not invalidate Minnesota's implied-consent law, no warrant was required to collect Sonsalla's breath sample because chemical testing under the implied-consent law is reasonable, and application of the exclusionary rule is not appropriate in this case. Because the collection of Sonsalla's breath sample was reasonable under the consent exception to the warrant requirement, it is not necessary to consider these arguments.

In sum, because the collection of Sonsalla's breath sample was reasonable under the consent exception to the warrant requirement, we reverse the district court's order rescinding the revocation of respondent's driver's license.

Reversed.