

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2014).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A14-1279**

State of Minnesota,
Respondent,

vs.

Bryan John Rusco,
Appellant.

**Filed July 13, 2015
Affirmed
Peterson, Judge**

St. Louis County District Court
File No. 69VI-CR-13-470

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

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota; and

Leah A. Stauber, Assistant County Attorney, Virginia, Minnesota (for respondent)

Gordon C. Pineo, Deal & Pineo, P.A., Virginia, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

Appellant challenges his conviction of third-degree driving while impaired (refusal to submit to chemical test), in violation of Minn. Stat. §§ 169A.20, subd. 2, .26,

subd. 1(b) (2012), arguing that Minnesota's test-refusal statute is unconstitutional. We affirm.

FACTS

When appellant Bryan John Rusco was stopped for speeding, a strong smell of alcohol came from his vehicle, and his eyes were red and glassy. After he performed field sobriety tests, and took a preliminary breath test (PBT), Rusco was arrested for driving while impaired. At the police station, a police officer read the Minnesota implied-consent advisory to Rusco. The advisory informed Rusco that Minnesota law required him to take a test to determine whether he was under the influence of alcohol, that refusing to take a test was a crime, and that he had the right to consult with an attorney before making his decision about testing. Rusco stated that he understood the implied-consent advisory and that he did not wish to consult with an attorney.

The officer asked Rusco whether he would take a breath test, and Rusco responded that he had already taken a breath test and that he would not take another test. The officer showed Rusco the breath-test machine in the police station and explained that Rusco was being asked to take a different test than the roadside PBT. Rusco continued to refuse to take a breath test.

Rusco was charged with third-degree driving while impaired (refusal to submit to chemical test). He moved for dismissal of the charge, arguing that the criminalization of a refusal to submit to a warrantless search is unconstitutional. When the district court denied the motion, Rusco waived his right to a jury trial and agreed to submit the issue of

his guilt to the district court based on stipulated facts. The district court found Rusco guilty of the charged offense, and this appeal follows.

D E C I S I O N

Under Minn. Stat. § 169A.20, subd. 2, “[i]t is a crime for any person to refuse to submit to a chemical test of the person’s blood, breath, or urine.” Rusco argues that the criminalization of a refusal to submit to a warrantless chemical test is unconstitutional. The constitutionality of a statute is a question of law that is reviewed de novo. *State v. Ness*, 834 N.W.2d 177, 181 (Minn. 2013). A court’s power to declare a statute unconstitutional is exercised “with extreme caution and only when absolutely necessary,” and a statute will be upheld “unless the challenging party demonstrates that it is unconstitutional beyond a reasonable doubt.” *Id.* at 182 (quotations omitted).

The United States and Minnesota Constitutions guarantee the right to be secure against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Taking a blood, breath, or urine sample is an intrusion on the expectation of privacy that constitutes a search. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (1989). Generally, a search is unreasonable unless conducted pursuant to a warrant issued upon probable cause. *Id.* at 619, 109 S. Ct. at 1414. But there are established exceptions to the warrant requirement, one of which is a search incident to a lawful arrest. *Arizona v. Gant*, 556 U.S. 332, 338, 129 S. Ct. 1710, 1716 (2009).

The Minnesota Supreme Court recently rejected a driver’s argument that Minnesota’s test-refusal statute, Minn. Stat. § 169A.20, subd. 2, violated the driver’s

right to substantive due process because it criminalized the exercise of his Fourth Amendment right to refuse to submit to a warrantless search. *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *petition for cert. filed*, No. 14-1470 (U.S. June 15, 2015). In *Bernard*, the supreme court held that a warrantless breath test of a driver arrested on suspicion of driving while impaired “would have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment’s warrant requirement.” *Id.* at 772. The supreme court then found that when the test-refusal statute was applied to the arrested driver, no fundamental right was at issue because the driver did not have a fundamental right to refuse a constitutional search. *Id.* at 773. Because the test-refusal statute did not implicate a fundamental right, the supreme court used rational-basis review to assess the statute’s constitutionality. *Id.* The supreme court concluded that “criminalizing the refusal to submit to a breath test relates to the State’s ability to prosecute drunk drivers and keep Minnesota roads safe” and, therefore, held “that the test refusal statute is a reasonable means to a permissive object and that it passes rational basis review.” *Id.* at 774.

Like the driver in *Bernard*, 859 N.W. 2d at 764-65, Rusco was lawfully arrested for driving while impaired, was read the implied-consent advisory, was offered a breath test, and refused to take the test. Under the analysis in *Bernard*, a warrantless breath test would have been constitutional as a search incident to arrest, Rusco did not have a fundamental right to refuse the constitutional search, and the criminalization of Rusco’s

refusal to take the test did not violate his right to due process and was not unconstitutional.

Affirmed.