STATE OF MINNESOTA
IN COURT OF APPEALS
A11-646

State of Minnesota,
Respondent,

vs.

David Leland Zortman,
Appellant.

Filed February 13, 2012
Affirmed
Johnson, Chief Judge

Kanabec County District Court
File No. 33-CR-09-156

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

Amy R. Brosnahan, Kanabec County Attorney, Reese Frederickson, Assistant County Attorney, Mora, Minnesota (for respondent)

Carson J. Heefner, Heefner Nelson Law, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Schellhas, Judge; and Crippen, Judge.*

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

U N P U B L I S H E D O P I N I O N

JOHNSON, Chief Judge

David Leland Zortman was convicted of third-degree driving while impaired based on the results of a urine test. Zortman challenges the district court's denial of his pretrial motion to suppress evidence of the urine test. He argues that law-enforcement personnel obtained a urine sample from him in violation of his constitutional rights because his consent to the urine test was not voluntary but, rather, was coerced by the implied-consent advisory, which informed him that he was required to submit to a chemical test or be charged with a crime. We conclude that, regardless whether Zortman's consent was voluntary or coerced, the warrantless urine test was reasonable. Therefore, we affirm.

FACTS

On April 5, 2009, Deputy Justin Frisch of the Kanabec County Sherriff's Department arrested Zortman for driving while impaired. Deputy Frisch transported Zortman to the Kanabec County Detention Center, escorted him to the booking room, and read him the implied-consent advisory, which states that Minnesota law requires an arrestee to submit to a chemical test to determine impairment and that "refusal to take a test is a crime." Minn. Stat. § 169A.51, subd. 2 (2008). Deputy Frisch allowed Zortman one hour and sixteen minutes to contact an attorney. Zortman contacted an attorney, who advised him to consent to a chemical test. Zortman consented to a urine test, which revealed an alcohol concentration of 0.12.

The state promptly charged Zortman with third-degree driving while impaired, a violation of Minn. Stat. §§ 169A.20, subd. 1, .26 (2008). In June 2010, Zortman moved to suppress the results of the urine test. He argued that his consent was coerced and that the exigent-circumstances exception to the Fourth Amendment does not apply to urine tests. The district court denied the motion, finding that Zortman's consent was not coerced.

In January 2011, Zortman was tried in a stipulated-case trial pursuant to Minn. R. Crim. P. 26.01, subd. 4. The district court found Zortman guilty of the offense charged. Zortman appeals.

D E C I S I O N

Zortman argues that the district court erred by denying his motion to suppress the results of the urine test because he did not give valid consent to the test. Specifically, Zortman contends that, even though he communicated his consent to Deputy Frisch, his consent was invalid because it was not voluntary but, rather, was coerced by the implied-consent advisory, which informed him that he was required to submit to a chemical test or be charged with a crime. We apply a *de novo* standard of review to the constitutionality of a search. *State v. Davis*, 732 N.W.2d 173, 176-77 (Minn. 2007); *Haase v. Commissioner of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004).

Zortman's argument is based on the Fourth Amendment to the United States Constitution, which prohibits "unreasonable searches and seizures." U.S. Const. amend. IV. The collection of a urine sample constitutes a search for purposes of the Fourth Amendment. *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402,

1413 (1989); *Ellingson v. Commissioner of Pub. Safety*, 800 N.W.2d 805, 807 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). A search conducted without a warrant is presumed to be unreasonable. *State v. Shriner*, 751 N.W.2d 538, 541 (Minn. 2008); *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Shriner*, 751 N.W.2d at 541 (quotation omitted). One exception to the warrant requirement is the consent of the person searched. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). Another exception to the warrant requirement is the existence of exigent circumstances. *Shriner*, 751 N.W.2d at 541.

Zortman's argument fails as a matter of law because it is foreclosed by the supreme court's opinion in *Netland*, which analyzed and rejected an argument that is essentially the same argument that Zortman makes in this case. In *Netland*, the appellant argued that a breath test administered pursuant to the implied-consent statute, which criminalizes refusal to submit to chemical testing, was an unreasonable search because the statute impermissibly conditioned her driving privileges on an unconstitutional search. 762 N.W.2d at 211. The supreme court referred to the unconstitutional conditions doctrine, which has been applied by some courts in some circumstances to limit the state's ability to "coerce waiver of a constitutional right [if] the state may not impose on that right directly." *Id.* The supreme court explained that the unconstitutional conditions doctrine might operate but only if, at a minimum, a person established two prerequisites: first, that the state infringed on a valid constitutional right and, second, that

the state coerced a waiver that deprived the person of the valid constitutional right. *See id.* at 211-12.

The supreme court ultimately declined to decide whether the unconstitutional conditions doctrine applies in these circumstances because Netland was unable to establish the first prerequisite described above, that the state infringed on a valid constitutional right. *Id.* at 212. The supreme court concluded that a driver in Netland's circumstances does not have a constitutional right to refuse to submit to chemical testing. *Id.* at 214. The supreme court reached this conclusion by reasoning that a warrantless search of a driver's breath is not unreasonable, and thus not unconstitutional, because of the exigent-circumstances exception to the warrant requirement. *Id.* at 212-14. The exigent-circumstances exception always justifies a warrantless search because of "the evanescent nature of the evidence," *id.* at 213, regardless whether the investigating officer was motivated by a concern for dissipating evidence, *id.* at 214. Thus, "the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures" in the Fourth Amendment to the United States Constitution or in article I, section 10, of the Minnesota Constitution. *Id.* at 214. Because Netland could not establish the first prerequisite described above, it was unnecessary for the supreme court to determine whether the implied-consent statute actually coerced her waiver, or whether the unconstitutional conditions doctrine applies to the rights protected by the Fourth Amendment or article I, section 10, of the Minnesota Constitution. *Id.* at 212 & n.8.

Since the supreme court's opinion in *Netland*, this court has held that the exigent-circumstances exception also justifies a warrantless *urine* test conducted under the

implied-consent statute. *Ellingson*, 800 N.W.2d at 807. In light of *Netland* and *Ellingson*, the warrantless taking of a sample of Zortman's urine and its subsequent testing did not violate Zortman's right to be free of an unreasonable search. For that reason, Zortman is unable to establish the first prerequisite of the unconstitutional conditions doctrine, that the state infringed on a valid constitutional right. Thus, it is irrelevant whether Zortman's consent to the urine test was voluntary or coerced, and it is unnecessary to determine whether the unconstitutional conditions doctrine applies to this type of case. *See Netland*, 762 N.W.2d at 212 & n.8.

At oral argument, Zortman's counsel argued that this court may not apply the exigent-circumstances exception in this appeal because the state did not invoke it in its responsive brief but, rather, focused on the issue of consent. Contrary to Zortman's argument, our analysis is confined to the doctrine of consent. It is undisputed that Zortman communicated his consent to the urine test. He argues, however, that his consent is invalid on the ground that it was coerced. As demonstrated by the supreme court's opinion in *Netland*, a proper analysis of Zortman's coerced-consent argument must consider whether the state infringed on a valid constitutional right, and that issue, in turn, depends on whether the urine test was reasonable despite the absence of a warrant. The *Netland* opinion directs us to resolve the reasonableness issue by determining whether the exigent-circumstances exception justified chemical testing so as to preclude any finding that Zortman had a valid constitutional right to withhold his consent. In other words, the reasonableness of the urine test in this case is not, strictly speaking, premised on the exigent-circumstances exception to the warrant requirement; rather, the

reasonableness of the urine test in this case is premised on the consent exception to the warrant requirement, and Zortman's attempt to invalidate his consent fails because the exigent-circumstances exception prevents him from successfully invoking the unconstitutional conditions doctrine.

In sum, the district court did not err by denying Zortman's motion to suppress the evidence of the results of his urine test.

Affirmed.