STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0006

Nicholas William Solorz, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed July 23, 2012
Affirmed
Stauber, Judge

Wright County District Court
File No. 86CV114765

Joseph P. Tamburino, Caplan & Tamburino Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, Paul R. Kempainen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Stauber, Judge; and Rodenberg, Judge.

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

STAUBER, Judge

In this implied-consent appeal, appellant argues that the district court erred by determining that (1) the necessity defense does not apply in an implied-consent proceeding and (2) if it did apply, appellant failed to establish the defense. We affirm.

FACTS

On July 10, 2011, at about 6:45 a.m., a Wright County Deputy Sheriff received a call from dispatch about a possibly intoxicated individual at the Buffalo Hospital emergency room. The deputy responded and spoke to appellant Nicholas William Solorz, who told him that he had been at a party with a friend and that they had consumed beer. Appellant stated that he and his friend left the party with appellant driving his friend's car. He stated that, while he was driving, his friend opened the car's passenger-side door and fell out, receiving an injury under his arm and scratches on the back of his head. Appellant drove his friend to the emergency room at Buffalo Hospital, which was approximately ten miles from where the incident occurred. The closest ambulance was about five miles from the area; appellant did not use his cell phone to call 911.

The deputy arrested appellant for driving while under the influence (DWI). He read appellant the implied-consent advisory and asked him to submit to a test for alcohol concentration, which revealed that appellant had a .10 alcohol concentration. Later that day, the deputy interviewed appellant's friend at the hospital where he had been transferred for surgery. He corroborated appellant's story. Appellant's driver's license was revoked under the implied-consent law.

Appellant filed an implied-consent petition asserting a necessity defense. At the implied-consent hearing, appellant's friend testified that he was, in fact, the driver of the car before the accident. He testified that he and appellant drove to a church parking lot where he drove the vehicle around in circles at about five miles per hour. He testified that appellant rode in the passenger seat and later on the hood and roof of the car.

Appellant's friend testified that while he was driving, he opened the driver's-side door and hung out of the car. As he was doing so, the car clipped a parked car and he fell out, hit his head on the parked car, and landed on the parked car's trailer hitch. He testified that the trailer hitch penetrated his skin in his right armpit. He lost a large amount of blood and appellant had to pull him off the hitch. Appellant's friend testified that he was in and out of consciousness after the accident. Appellant videotaped the entire incident, and the district court admitted the videotape into evidence.

Appellant corroborated his injured friend's testimony about the incident. Appellant admitted that he had his cell phone with him, but explained that he did not call 911 because he thought he could get his friend to a hospital faster than it would take for the ambulance to arrive. Appellant testified that he knew that he should not drive the car, but he felt he had no other alternative.

The district court denied appellant's petition for reinstatement of his driver's license and sustained the license revocation. The district court noted that "an argument can be made that the necessity defense should be available in implied consent proceedings," but that "appellate courts have . . . never expressly stated that the necessity defense is available in implied consent proceedings." The district court determined that, even if the necessity defense was available, appellant had not established the defense.

This appeal follows.

D E C I S I O N

The availability of the necessity defense in implied-consent cases is a question of law which this court reviews de novo. *See Boland v. Comm'r of Pub. Safety*, 520 N.W.2d

487, 488 (Minn. App. 1994). "Due regard is given the district court's opportunity to judge the credibility of witnesses, and findings of fact will not be set aside unless clearly erroneous." *Snyder v. Comm'r of Pub. Safety*, 744 N.W.2d 19, 22 (Minn. App. 2008).

Revocation of an individual's driver's license under the implied-consent law is civil in nature. *State, Dep't of Pub. Safety v. Mulvihill*, 303 Minn. 361, 368, 227 N.W.2d 813, 818 (1975). While the Minnesota Supreme Court has recognized that implied-consent proceedings have criminal implications, it has declined to recognize them as criminal or de facto criminal proceedings. *See Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 836-37 (Minn. 1991) (holding that an individual has the constitutional right to consult with an attorney "within a reasonable time before submitting to" blood alcohol testing); *cf. Davis v. Comm'r of Pub. Safety*, 517 N.W.2d 901, 905 (Minn. 1994) (concluding that the court of appeals properly rejected appellant's argument that implied-consent proceedings are de facto criminal proceedings), *superseded by statute*, Minn. Stat. § 171.30 (1998), *as recognized in Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720 (Minn. 1999).

Appellant argues that the district court erred when it failed to recognize the availability of the necessity defense in implied-consent proceedings. Minnesota appellate courts have recognized the availability of an affirmative defense of necessity in criminal cases. *See State v. Johnson*, 289 Minn. 196, 201, 183 N.W.2d 541, 544 (1971); *State v. Rein*, 477 N.W.2d 716, 717 (Minn. App. 1991), *review denied* (Minn. Jan. 30, 1992). But appellate courts have not applied the necessity defense in implied-consent proceedings. *See Weierke v. Comm'r of Pub. Safety*, 578 N.W.2d 815, 816 (Minn. App. 1998) (stating

that "it has not been determined that the necessity defense is available in implied consent cases"). As appellant acknowledges, this court is an error-correcting court that does not create new defenses. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987) (stating that "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court"). We decline to extend to civil implied-consent proceedings an affirmative defense that courts have only applied in criminal cases.

Appellant contends that a necessity defense can be raised at an implied-consent hearing even though it is not specifically enumerated in the implied-consent statute. *See* Minn. Stat. § 169A.53, subd. 3(b) (2010) (limiting the scope of an implied-consent hearing to specific issues). But the statute specifically provides that a petitioner may assert a different affirmative defense. *See* Minn. Stat. § 169A.53, subd. 3(c) (2010) ("It is an affirmative defense for the petitioner to prove that, at the time of the refusal, the petitioner's refusal to permit the test was based upon reasonable grounds."). It is a well-established canon of statutory interpretation that "[t]he doctrine expressio unius est exclusio alterius means that the expression of one thing is the exclusion of another. *Expressio unius* generally reflects an inference that any omissions in a statute are intentional." *State v. Caldwell*, 803 N.W.2d 373, 383 (Minn. 2011) (citations omitted); *see also* Minn. Stat. § 645.19 (2010) (codifying the doctrine of expressio unius). Here, the legislature's failure to include the affirmative defense of necessity in the implied-consent statute indicates that it did not intend for the defense to be available to petitioners in implied-consent proceedings.

Appellant argues that constitutional issues and the affirmative defense of post-driving consumption may be raised even though they are not set forth in the statute. *See Davis v. Comm'r of Pub. Safety*, 509 N.W.2d 380, 386-90 (Minn. App. 1993) (considering whether the implied-consent advisory violates due process), *aff'd*, 517 N.W.2d 901 (Minn. 1994); *Dutcher v. Comm'r of Pub. Safety*, 406 N.W.2d 333, 336 (Minn. App. 1987) (allowing the post-driving consumption affirmative defense). But the necessity defense is a common-law affirmative defense, not a constitutionally-based defense. The post-driving consumption affirmative defense is also distinguishable. As the district court found, the purpose of the post-driving consumption defense is to protect truly innocent drivers. *See Dutcher*, 509 N.W.2d at 336 (stating that "[i]f the respondent establishes that the reading of .18 was due to post-accident drinking, and that her reading would have been less than .10 at the time of the accident, such evidence is certainly germane to the proceeding," and that "[a] contrary result could revoke the license of one entirely sober at the time of accident"). Unlike the post-driving consumption defense, a driver who asserts the necessity defense is admitting that he broke the law by driving while under the influence.

Thus, because the affirmative defense of necessity is not specifically enumerated in the implied-consent statute, and Minnesota appellate courts have not applied the necessity defense in civil implied-consent proceedings, the district court did not err in declining to extend the necessity defense to implied-consent proceedings. As a result, we need not consider whether appellant proved the defense.

Affirmed.