STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0164

James Louis Peppin, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 3, 2012
Affirmed
Collins, Judge[*]

Kanabec County District Court
File No. 33-CV-11-313

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Appellant challenges the revocation of his driver's license under the implied-consent law on two grounds. First, appellant argues that the warrantless collection of his urine was impermissible because no exception to the warrant requirement applied. Second, appellant contests the analysis of his urine sample, arguing that even if the collection of the sample was permissible the subsequent warrantless analysis is unconstitutional. We affirm.

FACTS

On April 18, 2011, Kanabec County Deputy Lance Herbst arrested appellant James Peppin on suspicion of driving while impaired. Deputy Herbst read Peppin the standard implied-consent advisory. Peppin acknowledged his understanding of the advisory, waived his right to consult with an attorney, and provided a urine sample.

The urine sample, analyzed only for drugs, revealed the presence of amphetamine and methamphetamine. On August 16, 2011, the Minnesota Department of Public Safety revoked Peppin's driving privileges. Peppin moved to challenge the warrantless seizure of his urine sample and the subsequent analysis of that sample. An implied-consent hearing was held, and on December 5, 2011, the district court issued its order sustaining Peppin's license revocation. This appeal followed.

D E C I S I O N

Under Minnesota's implied-consent law, any person who drives a motor vehicle within the state consents to have his or her blood, breath, or urine chemically tested for the purpose of determining the presence of a controlled substance or its metabolite. Minn. Stat. § 169A.51, subd. 1(a) (2010). An officer may require a person to submit to chemical testing following a probable-cause arrest for driving under the influence of alcohol or drugs. *Id.*, subd. 1(b)(1) (2010). Before requesting the test, an implied-consent advisory must be read to the person.[1] This advisory satisfies the requirement that, when a test is requested, a person must be informed that (1) Minnesota law requires the person to take a test and (2) refusal to take a test is a crime. *Id.*, subd. 2(1)-(2) (2010). A person who refuses to submit to the test is subject to both civil and criminal consequences. Minn. Stat. §§ 169A.52, subd. 3(a) (revoking driving privileges for test refusal), .20, subd. 2 (making test refusal a crime), .25-.26 (penalizing criminal test refusal as gross misdemeanor) (2010).

"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). "When reviewing a pretrial order on a motion to suppress evidence, we may independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Askerooth*, 681 N.W.2d 353, 359 (Minn. 2004).

[1] Peppin concedes that probable cause existed to support the reading of the implied-consent advisory following his arrest.

Peppin asserts two challenges. First, he argues that the warrantless seizure of his urine sample is unsustainable under any recognized exception to the warrant requirement. Second, he argues that, even if the collection of his urine was permissible, the subsequent warrantless analysis of the sample is unconstitutional.

I.

The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "[W]arrantless searches are generally unreasonable." *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009). "[I]ndividuals have a legitimate privacy interest protecting searches involving intrusions beyond the body's surface." *State v. Hardy*, 577 N.W.2d 212, 215 (Minn. 1998) (quotation omitted). The taking of blood, breath, or urine implicates the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (1989). However, a warrantless search to determine whether a person was driving under the influence does not necessarily violate an individual's Fourth Amendment rights. *Schmerber v. California*, 384 U.S. 757, 771-72, 86 S. Ct. 1826, 1836 (1966). "[B]ecause the ultimate touchstone of the Fourth Amendment is reasonableness, the warrant requirement is subject to certain exceptions." *State v. Shriner*, 751 N.W.2d 538, 541 (Minn. 2008) (quotation omitted). These exceptions include consent of the person searched, *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011), and exigent circumstances, *Netland*, 762 N.W.2d at 212. Peppin argues that neither exception applies to the collection of his urine sample. We disagree.

A. Constitutional challenge

Before considering the exceptions to the warrant requirement, we address an inconsistency in Peppin's argument regarding the implied-consent law and the consent exception to the warrant requirement. Peppin states that he is in "no way" challenging the constitutionality of Minn. Stat § 169A.20, subd. 2 (statute criminalizing the refusal to submit to chemical testing). Indeed, in his brief and at oral argument to this court, Peppin conceded the constitutionality of both the implied-consent law and the test-refusal statute. Instead, Peppin asserts that consent in implied-consent circumstances is inherently coercive. This argument calls into question the validity of an exception to the Fourth Amendment. *See Diede*, 795 N.W.2d at 846 (consent is an exception to the warrant requirement for Fourth Amendment searches). Peppin's argument thus implicates a constitutional challenge.

"We are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations." *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). We reject Peppin's argument that Minnesota law could constitutionally criminalize test refusal on the one hand and simultaneously stand for the proposition that submitting to chemical testing in accordance with the implied-consent law is inherently coercive and compels evidence suppression on the other.[2] In practical terms, such a holding would place the implied-consent law and

[2] Accepting such a proposition would run afoul of the well-established principle to avoid interpreting statutes in a way that implicates constitutional problems. *See State v. Gaiovnik*, 794 N.W.2d 643, 648 (Minn. 2011).

test-refusal statute in direct conflict with a recognized exception to the Fourth Amendment.

The Minnesota Supreme Court has considered constitutional challenges to the implied-consent law and discussed the application of the unconstitutional-conditions doctrine. *See Netland*, 762 N.W.2d at 211-12 (doctrine limits state's ability to coerce waiver of a constitutional right but appellant must establish that statute authorized unconstitutional state action). However, if a seizure of evidence is constitutionally valid, there is no need to reach the constitutionality question or analyze the unconstitutional-conditions doctrine. *Id*. Such is the case here, where we determine that the warrantless collection of urine is justified on both the consent and exigent-circumstances exceptions to the warrant requirement.

B. Consent exception

If Peppin's consent to the collection of his urine sample was proper, then no warrant was required under the Fourth Amendment. *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973)). To qualify as an exception to the general rule that warrantless searches are impermissible, the state must show by a preponderance of the evidence that consent was "given freely and voluntarily." *Diede*, 795 N.W.2d at 846. Voluntariness is a question of fact varying from case to case. *Bustamonte*, 412 U.S. at 249, 93 S. Ct. at

2059. We will not reverse the district court's finding that consent was voluntary unless it was clearly erroneous. *State v. Alayon*, 459 N.W.2d 325, 330 (Minn. 1990).[3]

In this case, the commissioner met her burden of proof by presenting the implied-consent-advisory form. This document demonstrates that Peppin acknowledged his rights and waived his opportunity to consult with counsel before he consented to provide a urine sample. Peppin's assertion that consent in this context is inherently coercive is not novel:

> [T]he statutory phrase "implied consent" is a misnomer . . . . When the requirements of probable cause and exigent circumstances are met, *consent* is not constitutionally necessary to administer a warrantless chemical test, nor is *consent* the basis for the search. Indeed, the implied consent advisory required by Minnesota law . . . does not seek a person's consent to submit to a warrantless chemical test; rather, it advises a person that Minnesota law requires the person to take a chemical test and that refusal to submit to a chemical test is a crime.

State v. Wiseman, 816 N.W.2d 689, 693-94 (Minn. App. 2012), *review denied* (Minn. Sept. 25, 2012). *But see Prideaux v. State, Dep't of Pub. Safety*, 310 Minn. 405, 408-09, 247 N.W.2d 385, 388 (1976) (concluding that for purposes of the right to counsel, the obvious and intended nature of implied-consent law is to coerce the driver to consent to chemical testing); *State v. Netland*, 742 N.W.2d. 207, 214 (Minn. App. 2007), *aff'd in*

[3] While it is not clear error prejudicial to Peppin, it is nonetheless troubling that the district court expressly "adopt[ed] by reference the legal reasoning" contained in the commissioner's memorandum as the court's conclusions of law. District courts should heed the supreme court's repeated admonition that this practice is hardly commendable and calls into question the independent assessment of the evidence by the district court. *See Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002); *Dukes v. State*, 621 N.W.2d 246, 259 (Minn. 2001).

part, reversed on other grounds, 762 N.W.2d 202 (Minn. 2009) (refusing to address whether implied-consent law is coercive due to application of exigent-circumstances exception).[4] We adopt the *Wiseman* distinction that the implied-consent law is not seeking a person's consent to a warrantless test but rather advising a person that refusal to submit is a crime. 816 N.W.2d at 693-94. The *Wiseman* holding clarifies dicta contradictions in earlier cases and forecloses the argument that the implied-consent law is inherently coercive. *Id.* The implied-consent advisory informs the person of all of their rights under the law, including the right to counsel, and that refusing to take the test is a crime. *See* Minn. Stat. § 169A.51, subd. 2(1)-(2) (2010) (outlining implied-consent-advisory requirements). We conclude that the district court did not err in determining that Peppin knowingly and voluntarily submitted to testing. Therefore, the collection of the urine sample did not violate Peppin's Fourth Amendment rights.

C. Exigent circumstances exception

Exigent circumstances provide another exception to the warrant requirement of the Fourth Amendment. *Netland*, 762 N.W.2d at 212. When determining the existence of exigent circumstances, this court recognizes two tests: "single factor" and "totality of the circumstances." *State v. Gray*, 456 N.W.2d 251, 256 (Minn. 1990). In certain situations

[4] The commissioner suggests in her primary brief that, because the record contains no evidence of coercion, Peppin lacks standing to raise this issue. This suggestion is misplaced. *See Anderson v. Cnty. of Lyon*, 784 N.W.2d 77, 83 (Minn. App. 2010) (standing requires sufficient stake in outcome and injury to a cognizable legal interest), *review denied* (Minn. Aug. 24, 2010). Peppin's stake in the outcome is linked to the fact that his license was revoked. The revocation, if wrongful, would constitute harm. This combination is sufficient to sustain standing. Peppin's argument regarding coercion is his theory of the case.

a single factor alone can create exigent circumstances, including the imminent destruction or removal of evidence. *Id.*

Peppin seeks to distinguish this case from those that previously applied the single-factor-exigency exception to testing for alcohol concentration. *See Shriner*, 751 N.W.2d at 549-50 (establishing that single-factor exigency exists in alcohol-concentration testing due to the "rapid, natural dissipation of alcohol"); *Ellingson v. Comm'r of Pub. Safety*, 800 N.W.2d 805, 807 (Minn. App. 2011) (concluding that single-factor exigency justifies warrantless collection of blood, breath, or urine samples in blood-alcohol cases to prevent destruction of evidence). Peppin argues that his case is distinguishable from alcohol-concentration situations. He points to the fact that he was tested only for drugs, not alcohol, and that the presence of drugs theoretically remains in the bloodstream much longer than alcohol. Peppin concludes that this eliminates the evanescent nature and therefore the exigency. We disagree, taking guidance from the Supreme Court:

> [A]lcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible. Although the metabolites of some drugs remain in the urine for longer periods of time and may enable . . . estimat[ation of] whether [an individual] was impaired by those drugs at the time of a covered accident, incident, or rule violation, the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence.

Skinner, 489 U.S. at 623, 109 S. Ct. at 1416 (citations omitted). Peppin would have us distinguish *Skinner* as stemming from a Federal Railroad Administration case. But *Skinner*'s reasoning is nonetheless applicable to the safety requirements of driving on

Minnesota roads. We share the concern that the delay necessary to obtain a warrant, even though metabolites of drugs may remain in a person's bloodstream for a longer period of time, is an unreasonable risk. Holding otherwise would place law enforcement officers in the untenable position of having to speculate regarding the substance influencing a person and how long it would take for the particular substance to dissipate. Therefore, on this record, we decline to distinguish the evanescent quality of drugs from that of alcohol. The evanescent quality of drug metabolites in this case justified the warrantless seizure of evidence. *See Shriner*, 751 N.W.2d at 542 (outlining the well-established principle that a single fact can create an exigent circumstance).[5] Because the collection of Peppin's urine is justified by a single-factor exigency, we need not discuss the totality-of-the-circumstances test. *See In re Welfare of D.A.G.*, 484 N.W.2d 787, 791 (Minn. 1992) (presence of single-factor exigency forecloses need to proceed to totality analysis).

II.

Peppin challenges the warrantless analysis of the urine sample, even if it was properly collected. The Supreme Court has found a privacy interest in the passing of urine and recognized that the analysis of urine constitutes a search under the Fourth Amendment. *Skinner*, 489 U.S. at 617, 109 S. Ct. at 1402. The Fourth Amendment

[5] Peppin also asserted that the commissioner failed to meet her burden of proof regarding the application of the exigency exception to the warrant requirement. *See id.* (burden of demonstrating the necessity of a warrantless search under exigent circumstances rests with the state). We disagree. Although the practice is discouraged, the district court's express adoption of respondent's legal reasoning as its conclusions of law includes adoption of *Skinner*'s guidance regarding the evanescent quality of drug metabolites. In doing so, the district court implicitly found that the commissioner met her burden of proving single-factor exigency.

protects against only unreasonable searches, but even when a search "may be performed without a warrant[, it] must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law." *Id.* at 624, 109 S. Ct. at 1417. Peppin concedes that probable cause existed to support the invocation of the implied-consent law following his arrest. His challenge is whether there was sufficient time to obtain a warrant before the sample was analyzed.

Peppin's assertion that there was adequate time to obtain a warrant prior to the analysis is irrelevant. The Supreme Court has held that the Fourth Amendment does not require a warrant to analyze toxicology samples. "[I]n light of the standardized nature of the [chemical] tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Id.* at 622, 109 S. Ct at 1416.

This court has previously decided that a person who provides a sample for chemical testing under the implied-consent law has lost any legitimate interest of privacy in the sample's analysis. *See Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 921 (Minn. App. 2010) (no privacy interest in knowing the alcohol concentration derived from a blood-alcohol analysis). Because we have adopted the rationale that drug metabolites are similar to alcohol in the implied-consent context, it follows that Peppin did not have a legitimate expectation of privacy in the urine analysis. We have repeatedly addressed the diminished expectation of privacy that a driver has when utilizing roadways. "The right of the public to be free from the unwarranted dangers posed by drinking drivers far outweighs any interest any individual may have in the

continued unrestricted operation of motor vehicles." *Szczech v. Comm'r of Pub. Safety*, 343 N.W.2d 305, 307 (Minn. App. 1984). We agree that the protections of the warrant process diminish when government action is minimally intrusive and lacks discretion. In circumstances, as here, where a warrantless search is minimally intrusive and supported by an important government interest, it follows that the search is reasonable for Fourth Amendment purposes. We thus decline to require a warrant for chemical testing of a lawfully collected sample.

We conclude that both the warrantless collection and subsequent analysis of Peppin's urine sample were constitutionally permissible under the implied-consent law.

Affirmed.