STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0069

Joseph M. Sand, Jr., petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 19, 2013
Affirmed
Ross, Judge

Scott County District Court
File No. 70-CV-12-10292

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

Lori Swanson, Attorney General, Joan M. Eichhorst, Assistant Attorney General, Natasha M. Karn, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Willis, 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

ROSS, Judge

A state trooper arrested Joseph Sand for drunk driving and obtained a urine sample from Sand without first having him empty his bladder. The sample was tested, revealing Sand's alcohol concentration was 10 grams per 67 milliliters of urine, and the commissioner of public safety revoked his license to drive. In this appeal, Sand challenges the district court's decision to sustain the revocation. He argues that the implied-consent law is ambiguous and unconstitutionally void for vagueness for failing to define specific urine-testing procedures. He also contends that the implied-consent law unconstitutionally delegates legislative authority to administrative bodies and that the commissioner and the Bureau of Criminal Apprehension violated the Minnesota Administrative Procedures Act. Because Sand's ambiguity and constitutional arguments rest on the rejected theory that urine-alcohol concentration must correlate with blood-alcohol concentration in breath analyses, and because the testing procedure does not violate the administrative procedures act, we affirm.

FACTS

In April 2012, a state patrol officer arrested appellant Joseph Sand under suspicion of driving while impaired. Sand submitted to what has become known as "first-void urine testing," or, alcohol-concentration testing that involves obtaining a urine sample without first having the tested individual empty his bladder. *See State v. Edstrom*, 792 N.W.2d 105, 108 (Minn. App. 2010). The test results indicated that Sand's alcohol concentration was 10 grams per 67 milliliters of urine, which exceeds the *per se* violation limit. *See*

Minn. Stat. § 169A.20, subd. 1(5) (2012). The state charged Sand with driving while impaired and the commissioner of public safety revoked his driver's license.

Sand petitioned for judicial review of his license revocation. He argued that the results of his urine test should be suppressed or, in the alternative, that he is entitled to a *Frye-Mack* hearing. Sand added during the hearing on his motion that the testing statutes are ambiguous, unconstitutionally vague, and violate the Minnesota Administrative Procedures Act (APA). The commissioner moved to exclude expert testimony about the nature of urine testing, and the district court granted the motion but invited briefs addressing Sand's constitutional and APA arguments.

The district court sustained the revocation. It determined that Sand was not entitled to a *Frye-Mack* hearing and concluded that the implied-consent law is not ambiguous or void for vagueness for failure to specify whether first- or second-void testing should be used. The district court also concluded that the implied-consent law does not violate the APA because the department of public safety lawfully delegated certification of testing procedures to the BCA. Sand appeals.

D E C I S I O N

I

Sand contends that Minnesota Statutes section 169A.03, subdivision 2 (2012), renders the implied-consent law ambiguous and unconstitutionally vague by identifying three different alcohol-concentration ratios for a *per se* violation of the statute. The challenge raises questions of law, which we review de novo. *See SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007) (constitutionality of a statute); *Johnson v. Comm'r of*

Pub. Safety, 756 N.W.2d 140, 143 (Minn. App. 2008) (statutory interpretation), *review denied* (Minn. Dec. 16, 2008).

Sand's statutory interpretation and constitutional arguments rest on the premise that an alcohol-concentration result obtained from a first-void urine test does not scientifically correlate with an individual's blood-alcohol concentration. Sand contends that the statute is ambiguous because it does not define whether an officer should test a sample collected from first-void urination or from a subsequent urination (what we will call second-void testing). He urges that the legislature intended that the testing procedures should correlate blood-alcohol concentration, breath-alcohol concentration, and urine-alcohol concentration. Second-void urine testing, he maintains, better satisfies that legislative intent. In other words, he suggests that a person's intoxication level in relation to the *per se* impairment level should, under the statute, be relatively equivalent regardless of which of the three body substances are tested and that second-void testing satisfies this objective while first-void testing does not.

Similarly, Sand contends that the statute is unconstitutionally vague because it does not expressly define whether the test administrator should draw the sample from first- or second-void urine. He insists that this raises a constitutional concern because first-void urine testing exaggerates alcohol concentration by comparison to second-void urine testing, and that the results of second-void testing correlate more closely to a person's blood-alcohol concentration. This disparity illuminates the unconstitutional vagueness of the statute, he contends, because failing to specify the urine-testing process encourages the allegedly arbitrary conduct of officers requiring drivers to submit to urine

tests, which, when compared with blood tests or breath tests, overstate the person's alcohol concentration.

The primary difficulty with Sand's correlation argument (that the statute demands that alcohol-concentration results obtained from a urine test must correlate to alcohol-concentration results obtained from a breath test or blood test) is that it has already essentially been rejected by the supreme court. The supreme court in *State v. Tanksley* answered "whether evidence regarding the correlation between the results of first-void urine testing and blood alcohol concentration is relevant to the alcohol-concentration offense." 809 N.W.2d 706, 709 (Minn. 2012). The *Tanksley* court answered no, because "[t]he presence or absence of a correlation between urine alcohol concentration using the first-void method and blood alcohol concentration does not make the existence of a 0.08 or higher alcohol concentration in [appellant's] urine any more or less probable." *Id.* at 710. The supreme court reasoned that section 169A.03, subdivision 2, defines alcohol concentration as measured directly from blood, or from breath, or from urine. *Id.* at 710. A person violates the impaired driving law if his alcohol concentration in urine is equal to or more than 0.08 within two hours of driving regardless of how his alcohol concentration might be otherwise measured. *Id.* at 709–10. The court explained:

> [E]ven if we were to assume that the correlation between first-void urine test results and blood alcohol concentration is weak . . . evidence of that fact would have no effect on the determination of whether the State proved beyond a reasonable doubt that [appellant's] *urine* alcohol concentration was at or above 0.08 grams per 67 milliliters of urine within 2 hours of driving, operating, or physically controlling a motor vehicle.

Id. at 710.

Sand asks that we look beyond the plain language of the statute in support of his contention that the legislature actually intends a different approach, one that tightly correlates the three testing methods. Even if we were inclined to look beyond the letter of the law for the spirit behind it (a temptation the legislature has specifically asked us not to indulge, *see* Minn. Stat. § 645.16 (2012)), Sand's argument would fare no better.

The notion that the legislature intends an approach that correlates the three testing methods is not without reason in the abstract, but the legislature's lengthy, knowing inaction is strong evidence that the abstract notion is false. This court began upholding the practice of first-void urine testing as early as 1999. *See Genung v. Comm'r Pub. Safety*, 589 N.W.2d 311, 313 (Minn. App. 1999), *review denied* (Minn. May 18, 1999). And in the nearly fifteen years since then, we have decided at least ten cases involving first-void testing, each affirming the results, and therefore the use, of the testing method. Despite the consistent published (and unpublished) caselaw, including the recent supreme court decision in *Tanksley*, the legislature has not reacted to amend the testing statutes in the way that Sand insists would reflect its legislative intent. "We presume that the legislature acts with full knowledge of . . . existing caselaw." *State v. Fleming*, 724 N.W.2d 537, 540 (Minn. App. 2006). The legislative inaction in the wake of caselaw informs us that Sand misses the mark, and it reaffirms our understanding that the use of first-void urine testing does not offend the statute either in letter or spirit.

Sand also argues that the statute is unconstitutionally vague because it does not allow a driver to choose the type of test utilized. The argument has constitutional and

statutory problems. The constitutional problem is that Sand fails to demonstrate that a driver has a constitutional right to select the test method utilized, especially since the statute does not require correlation of the testing methods. And the statutory problem is that the statutes indeed appear to empower drivers to effectuate a second-void urine test at their choice. Although an officer directs which substance will be tested initially, "[t]he person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer," subject to minimal limitations. Minn. Stat. § 169A.51, subd. 7(b). So after the officer-initiated first-void urine test, Sand or a similarly situated driver could, under the statute, opt for a blood test or a breath test or even a second-void urine test.

Sand's contention that this court should effectively prohibit first-void testing or require second-void testing principally because this would reflect sound logic and good policy is a request best suited for the policy-making branches of government, not the judiciary. *See State ex rel. Coduti v. Hauser*, 219 Minn. 297, 303, 17 N.W.2d 504, 507–08 (1945) (declaring that the legislature is free to "ignore logic and perpetrate injustice so long as it does not" violate the Constitution and that, absent ambiguity in the challenged statute, the remedy is legislative amendment not judicial reconstruction) (quotation omitted)). Because the testing statute is unambiguous and not unconstitutional, we hold that the district court did not err by upholding Sand's license revocation.

II

Sand also argues that Minnesota Statutes section 169A.75 (2012) is an unconstitutional delegation of legislative power to the public safety department to

authorize testing methods. Again, the constitutionality of a law presents a question we review de novo. *SooHoo*, 731 N.W.2d at 821.

The legislature may not delegate purely legislative power to a board or commission. *Lee v. Delmont*, 228 Minn. 101, 112, 36 N.W.2d 530, 538 (1949). Legislative power is "the authority to make a complete law—complete as to the time it shall take effect and as to whom it shall apply—and to determine the expediency of its enactment." *Id.* But discretionary power delegated to a board or commission is not legislative if the law furnishes a reasonably clear policy or standard of action that controls and guides administrative officers. *Id.* at 113, 36 N.W.2d at 538–39.

The challenged statute states in relevant part as follows:

> (a) The commissioner [of public safety] may adopt rules to carry out the provisions of this chapter. The rules may include the format for notice of intention to revoke that describe clearly the right to a hearing, the procedure for requesting a hearing, and the consequences of failure to request a hearing; the format for revocation and notice of reinstatement of driving privileges . . . ; and the format for temporary licenses.
>
> (b) Rules adopted pursuant to this section are subject to the procedures in chapter 14 (Administrative Procedure Act).
>
> (c) Additionally, the commissioner may adopt rules indicating the commissioner's approval of instruments for preliminary screening or chemical tests for intoxication.

Minn. Stat. § 169A.75 (2012). The statute does not unconstitutionally delegate legislative power. As we have discussed, the underlying implied-consent law specifies the prohibited alcohol concentration ratios and directs officers to test one of three body substances: blood, breath, or urine. It announces a clear standard that an individual

violates the implied-consent law if his alcohol concentration exceeds a defined limit in any of the three substances. Section 169A.75 in turn delegates to the commissioner rulemaking authority to carry out the implied-consent law, including the authority to approve testing procedures. This limited delegation does not exceed the legislature's constitutional authority as it has been explained by the supreme court:

> [W]here the act relates to the administration of a police regulation which is necessary to protect the general health, welfare, and safety of the public—it is not essential that a specific prescribed standard be expressly stated in the legislation. This is so because it is impossible for the legislature to deal directly with the many details in the varied and complex conditions on which is legislates, but must necessarily leave them to the reasonable discretion of administrative officers.

Anderson v. Comm'r of Highways, 267 Minn. 308, 311–12, 126 N.W.2d 778, 781 (1964) (footnotes omitted). Sand does not persuade us that section 169A.75 unconstitutionally delegates law-making authority to an administrative body.

III

Sand maintains alternatively that the commissioner has improperly delegated rulemaking authority to the BCA, that neither the BCA nor the commissioner has published urine-testing standards and procedures, and that the BCA engaged in unpromulgated rulemaking.

The commissioner has not improperly delegated rulemaking authority to the BCA. In 1969, the legislature created the public safety department to be supervised and controlled by the commissioner of public safety. *See* 1969 Minn. Laws. ch. 1129, art. 1, § 1, at 2313. The law transferred to and vested in the commissioner "all the powers and

duties now vested in or imposed upon the Bureau of Criminal Apprehension or the superintendent of the Bureau of Criminal Apprehension," Minn. Stat. § 299C.01, subd. 1 (2012), and created a BCA division in the public safety department to be subject to the "supervision and control of the superintendent of criminal apprehension, *who shall be appointed by the commissioner and serve at the commissioner's pleasure* . . . [and] to whom shall be assigned the duties and responsibilities described in this section," *id.*, subd. 2 (emphasis added). The BCA division performs "such functions and duties as relate to statewide and nationwide crime information systems *as the commissioner may direct*." *Id.*, subd. 4 (emphasis added). The BCA superintendent may make rules and adopt measures necessary to efficiently operate the bureau, but only with the commissioner of public safety's approval. Minn. Stat. § 299C.03 (2012). The statutes indicate that the BCA is subject to the supervision and control of the commissioner, that the legislature created a division within the public safety department to focus on duties assigned by the commissioner, and that whatever rulemaking the BCA engages in is subject to the approval of the commissioner. The department has not exceeded its statutory authority by delegating duties to the BCA.

Sand's argument that the BCA and commissioner have failed to publish urine-testing standards and procedures arises from his argument on unpromulgated rulemaking. The argument does not persuade us. An agency statement that implements or specifies an agency-enforced or agency-administered law for future effect and general application is a rule. Minn. Stat. § 14.02, subd. 4 (2012). All agency rules are subject to the rulemaking requirements of the APA. *Good Neighbor Care Ctrs., Inc. v. Minn. Dept. of Human*

Servs., 428 N.W.2d 397, 402 (Minn. App. 1988), *review denied* (Minn. Oct. 19, 1988). Interpretive rules, like the policy allowing first-void urine samples, are those that are promulgated to specify the law enforced or administered by the agency. *St. Otto's Home v. Minn. Dept. of Human Servs.*, 437 N.W.2d 35, 42 (Minn. 1989). But an interpretive rule that has not been properly promulgated may nonetheless be valid if the agency's interpretation of a statute corresponds with the statute's plain meaning. *In re PERA Salary Determinations Affecting Retired & Active Emps. of City of Duluth*, 820 N.W.2d 563, 570 (Minn. App. 2012). The policy not prohibiting first-void testing is consistent with the plain meaning of the implied-consent law, which directs an officer to test blood, breath, or urine. Minn. Stat. § 169A.51, subd. 3. The BCA's apparent endorsement of first-void testing does not conflict with the statute, and, therefore, the commissioner and BCA have not violated the APA.

Affirmed.