STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0726

Chad Michael Webb, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed April 28, 2014
Affirmed
Cleary, Chief Judge

Anoka County District Court
File No. 02-CV-12-6129

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

Lori Swanson, Attorney General, Jeffrey S. Bilcik, Kristi A. Nielsen, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Johnson, Judge.

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

CLEARY, Chief Judge

Appellant's driver's license was revoked after a breath test revealed that he was driving while impaired (DWI). A district court sustained the revocation, and appellant

challenges the district court's order, arguing that the breath test was an unreasonable search in violation of his constitutional rights when no warrant was obtained and no exception to the warrant requirement existed. Based on the totality of the circumstances, appellant consented to the breath test, and we therefore affirm.

FACTS

On August 30, 2012, an officer with the Fridley Police Department stopped appellant Chad Michael Webb's vehicle for traffic violations. During the traffic stop, the officer observed an odor of alcohol and appellant's bloodshot, watery eyes and slurred speech. Appellant failed a preliminary breath test and admitted that he had been drinking, and the officer arrested him for DWI. At the police station, the officer read appellant the implied-consent advisory. Appellant was informed that Minnesota law required him to take a test to determine if he was under the influence of alcohol; that refusal to take a test was a crime; and that he had the right to consult with an attorney before making a decision about testing. Appellant stated that he understood the advisory, did not wish to consult with an attorney, and would take a breath test. The breath test revealed an alcohol concentration of .13.

Respondent commissioner of public safety revoked appellant's driver's license, and appellant challenged the revocation. At an implied-consent hearing, the parties stipulated to the facts in the record and agreed that the only issue was the constitutionality of the breath test. The district court subsequently held that the breath test was constitutional and sustained the revocation of appellant's driver's license. This appeal follows.

D E C I S I O N

A challenge to a license revocation based on an assertion of a violation of the right to be free from unreasonable searches is reviewed de novo. *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 920 (Minn. App. 2010); *see also Haase v. Comm'r of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004) ("When the facts are not in dispute, the validity of a search is a question of law subject to de novo review.").

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. I, § 10. The taking of a blood, breath, or urine sample is a physical intrusion that constitutes a search. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (1989). A search is generally unreasonable unless it is 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 them being consent to the search. *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992).

Valid consent to search must be voluntarily given, and whether consent is voluntary is determined based on the totality of the circumstances. *See State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041 (1973)). Voluntary consent is that given without coercion, such that a reasonable person would feel free to decline the police officer's requests or otherwise terminate the encounter. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994) (citing *Florida v. Bostick*, 501 U.S. 429, 111 S. Ct. 2382 (1991)); *see also Schneckloth*, 412 U.S. at 225-26, 93 S. Ct. at 2047 (stating that a suspect is coerced when "his will has been

overborne and his capacity for self-determination critically impaired"). In an implied-consent case, the commissioner of public safety has the burden of proving by a preponderance of the evidence that a search was constitutional. *See Johnson v. Comm'r of Pub. Safety*, 392 N.W.2d 359, 362 (Minn. App. 1986).

The Minnesota Supreme Court recently held in *State v. Brooks* that a driver may validly consent to testing even if informed that refusal to submit to testing is a crime in Minnesota. 838 N.W.2d 563, 570 (Minn. 2013), *cert. denied* (U.S. Apr. 7, 2014). In *Brooks*, the defendant was arrested for DWI on three separate occasions and on each occasion was read the implied-consent advisory, spoke with an attorney by telephone, and agreed to submit to testing. *Id.* at 565-66. In response to the defendant's argument that he was coerced into agreeing to testing because he was told that test refusal was a crime, the supreme court held that "a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Id.* at 570-71 (explaining that a decision to submit to testing is not coerced just because the choice is a difficult one and involves a consequence). Rather, whether consent is voluntary or coerced must be determined by examining "the totality of the circumstances, including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Id.* at 569 (quotation omitted). Moreover, the language of the implied-consent advisory makes clear that a person has a choice of whether to submit to testing, and "the fact that someone submits to the search after being told that he or she can say no to the search supports a finding of voluntariness." *Id.* at 572. The *Brooks* court concluded that nothing in the record suggested that the defendant

"was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired." *Id.* at 571 (quotation marks omitted).

Similarly, despite appellant's contention that respondent did not satisfy the burden of proof, nothing in the record suggests that appellant's will was overborne and that his capacity for self-determination was critically impaired. The record indicates that appellant was read the implied-consent advisory, understood the advisory, did not wish to consult with an attorney, and agreed to take a breath test. Appellant contends that this case is factually distinguishable from *Brooks*, where the defendant spoke with an attorney by telephone on each occasion that he was arrested before agreeing to submit to testing. *See id.* at 565-66. The *Brooks* court stated that the fact that the defendant "consulted with counsel before agreeing to take each test reinforces the conclusion that his consent was not illegally coerced." *Id.* at 571. But the record in this case indicates that appellant chose not to contact an attorney, and appellant does not argue that his waiver of the right to consult with an attorney before making the testing decision was coerced, involuntary, or invalid in any way. Appellant also points out that he was under arrest when he made the testing decision, and he urges this court not to underestimate the coercive nature of an in-custody environment. The defendant in *Brooks* was also under arrest on each occasion that he agreed to submit to testing, and the court stated that this fact was "not dispositive" even though "we have been less willing to find that a defendant voluntarily consented to a search after he or she has been arrested because someone in custody becomes more susceptible to police duress and coercion." *Id.* at 571 (quotation omitted). As in *Brooks*, there is no indication that appellant was "confronted with repeated police questioning" or

"asked to consent after having spent days in custody." *See id.* Based on the totality of the circumstances as indicated by the facts in the record, appellant voluntarily consented to the breath test. The officer was not required to obtain a warrant prior to the test, and the test did not violate appellant's constitutional rights.

Affirmed.