STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0998

State of Minnesota,
Respondent,

vs.

Kenneth Audie Leason,
Appellant.

Filed June 16, 2014
Affirmed in part and reversed in part
Chutich, Judge

Anoka County District Court
File No. 02-CR-12-1797

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

Dawn E. Speltz, Spring Lake Park City Attorney, Brooklyn Center, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellant Kenneth Audie Leason appeals his convictions of second-degree test refusal, driving while impaired, and violation of a restricted license. Because we hold

that prosecuting Leason for refusing to submit to a chemical test is not unconstitutional under these circumstances and the evidence is sufficient to support the driving-while-impaired conviction, we affirm those convictions. Because the evidence is insufficient to support the conviction of violation of a restricted license, we reverse only that conviction.

FACTS

On March 11, 2012, at approximately 3:20 a.m., Officer Bradley Kenneth Baker observed a small car with a missing tail light lens. As the car made a right-hand turn, Officer Baker activated his lights to stop the car. The driver continued to drive on the road for one-and-a-half blocks, then turned into an apartment parking lot and "slowly continued through the parking lot until it found a parking [spot] . . . ." Officer Baker identified the driver as Leason and noted that a female passenger was in the car.

Officer Baker testified that "[i]mmediately upon getting up to the vehicle, I could smell a strong odor like that of an alcoholic beverage coming from inside the car." After speaking with Leason and his passenger, Officer Baker noticed a nearly empty liquor bottle on the passenger-side floor. He testified that while he was talking with the passenger, Leason was "kind of fumbling to get his license out" and that "[h]e was very slow and methodical." He also testified that Leason's "speech appeared to be slightly slurred," and that Leason and the passenger gave contradictory stories about where they had been that evening. When Officer Baker asked Leason if he had been drinking, Leason stated that he had not.

Officer Baker then asked Leason to get out of the car because he wanted "to perform some field sobriety testing on him and also to get him away from the passenger

in case the alcohol smell was coming from the passenger." Officer Baker then instructed Leason to remain by the back of Leason's car while Officer Baker turned off his emergency lights. Officer Baker testified that Leason did not follow his instruction and instead began walking toward the front of Leason's car. Officer Baker then performed the horizontal gaze nystagmus test and testified that in doing so, Leason "was very uncooperative," and that "it took several attempts to get [Leason] to stand in front of [him] and view [his] pen . . . ." On multiple occasions, Officer Baker had to instruct Leason to stop leaning on his car. Leason "continued to look, turn around, face away from" Officer Baker and attempted to look at the passenger. "He kept indicating concerns for the passenger. He would at times stare straight up into the sky mumbling stuff that [Officer Baker] couldn't understand." Officer Baker detected four out of six clues when administering the horizontal gaze nystagmus test.

Officer Baker then asked Leason to recite the alphabet, starting at C and ending at Q. Officer Baker testified that he "had difficulty doing that. He starting by stating C, D, E and then he paused and then slowly and methodically went through the rest of the alphabet until he eventually stopped on Q." Officer Baker next requested that Leason perform a dexterity test. While doing so, Leason sighed deeply, and Officer Baker smelled a "strong odor of alcohol" on his breath. Officer Baker then asked Leason how long it had been since his last drink; Leason told him that it had been approximately 45 minutes. Officer Baker administered a preliminary breath test, and Leason registered at .152.

Officer Baker arrested Leason, and while Leason was in the back seat of the police car, Officer Baker read him the implied-consent advisory. When asked if he understood the advisory, Leason stated that he did not. Officer Baker read the advisory again, and Leason stated that he understood. Officer Baker then transported Leason to the Spring Lake Park Police Department where Leason told Officer Baker that he was going to refuse a blood-alcohol test, but that it was not an official refusal. Leason made multiple phone calls, including attempts to contact an attorney.

About 30 minutes later, Officer Baker asked Leason to take a blood or a urine test. Leason asked for a few minutes to consider the question. Officer Baker waited and then asked again. Leason agreed to take the urine test, but requested that he go to Unity Hospital to have the test done. When told that the police department's general practice is to complete urine tests at the station, Leason then stated that he wanted to take a blood test at Unity Hospital. After being transported to Unity Hospital, however, Leason refused to take the blood test and told Officer Baker that he now wanted to take the urine test. Because Leason had already refused to take the urine test, Officer Baker informed Leason that he was charging him with test refusal. When Leason resisted Officer Baker's attempts to escort him from the hospital, the officer used force to return Leason to the police car.

Leason was charged with second-degree test refusal; second-degree driving while impaired with two or more aggravating factors; and violation of a driver's license restriction. *See* Minn. Stat. §§ 169A.20, subds. 1(1), 2 (2010); 171.09, subd. 1(f)(1) (2010). At trial, Leason stipulated to the two aggravating factors for counts one and two

based on two previous driving-while-impaired convictions. Leason also stipulated that a restriction existed on his driving record on the date these charges arose. Leason did not stipulate, however, that he knew that he had a restriction on his driver's license. Officer Baker testified to his encounter with Leason and that, based on his experience and observations of Leason, he believed that Leason was under the influence of alcohol.

After a two-day bench trial, Leason was convicted on all three charges. This appeal followed.

ANALYSIS

I. Constitutionality of the Test-Refusal Statute

Leason asserts that Minnesota's test-refusal statute is unconstitutional under the United States Supreme Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), because the statute violates the doctrine of unconstitutional conditions. The state responds that, because no search actually took place, *McNeely* and the doctrine of unconstitutional conditions do not apply. Because we hold that, under the circumstances present here, the state is not constitutionally precluded from criminalizing a suspected drunk driver's refusal to submit to a chemical test, we affirm Leason's conviction. *See State v. Bernard*, 844 N.W.2d 41, 46 (Minn. App. 2014), *review granted* (Minn. May 20, 2014).

We review the constitutionality of a statute de novo. *SooHoo v. Johnson*, 731 N.W.2d 815, 821 (Minn. 2007). "Minnesota statutes are presumed constitutional[,] and . . . our power to declare a statute unconstitutional must be exercised with extreme caution and only when absolutely necessary." *Hamilton v. Comm'r of Pub. Safety*, 600

N.W.2d 720, 722 (Minn. 1999). Although we generally will not consider constitutional challenges raised for the first time on appeal, we "may deviate from this rule when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Because *McNeely* was not released until after Leason was convicted and consideration of this legal question will not prejudice the state, we address the merits of Leason's appeal in the interests of justice.

Leason was convicted of felony test refusal, which is defined as "refus[ing] to submit to a chemical test of the person's blood, breath, or urine." Minn. Stat. § 169A.20, subd. 2. The test-refusal statute criminalizes refusal to submit to testing authorized under the implied-consent statute, which states that anyone who drives a motor vehicle consents "to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol." Minn. Stat. § 169A.51, subd. 1(a) (2010). The implied-consent and test-refusal statutes only take effect when police officers have probable cause to believe a person was driving while impaired and the person has been lawfully arrested for driving while impaired. *See id.*, subd. 1(b) (2010).

The federal and state constitutions protect citizens against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Blood, breath, and urine tests are searches under the Fourth Amendment. *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616–17, 109 S. Ct. 1402, 1412–13 (1989); *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). We have interpreted Minnesota's implied-consent statute as criminalizing only refusal to cooperate with

searches that are constitutionally reasonable. *State v. Wiseman*, 816 N.W.2d 689, 694–95 (Minn. App. 2012), *cert. denied*, 133 S. Ct. 1585 (2013). The state does not violate a person's due process rights by criminalizing refusal to submit to a chemical test if it obtains a warrant or demonstrates that an established exception to the warrant requirement applies. *Id.* at 695.

Before *McNeely*, our state supreme court held that a warrantless blood draw was constitutionally reasonable because the natural dissipation of alcohol in the blood created a single-factor exigent circumstance. *See, e.g.*, *State v. Netland*, 762 N.W.2d 202, 213–14 (Minn. 2009), *abrogated in part by McNeely*, 133 S. Ct. 1552; *State v. Shriner*, 751 N.W.2d 538, 549–50 (Minn. 2008), *abrogated by McNeely*, 133 S. Ct. 1552; *Wiseman*, 816 N.W.2d at 693. In *McNeely*, however, the United States Supreme Court held that the natural dissipation of alcohol in the bloodstream does *not* present "a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 133 S. Ct. at 1556. The Court concluded that "exigency . . . must be determined case by case based on the totality of the circumstances." *Id.*

Leason contends that because the natural dissipation of alcohol can no longer be used to justify Minnesota's test-refusal statute, the statute is unconstitutional under the doctrine of unconstitutional conditions. Contrary to Leason's argument, however, *McNeely* does not necessarily cast doubt upon the constitutionality of Minnesota's test-refusal statute. In fact, a plurality of the Supreme Court described implied-consent laws as part of a state's "broad range of *legal tools* to enforce [its] drunk-driving laws and to

secure [blood-alcohol-concentration] evidence without undertaking warrantless nonconsensual blood draws." *Id.* at 1566 (emphasis added).

Moreover, in interpreting *McNeely*, our supreme court noted that this description of implied-consent laws as "legal tools" is inconsistent with the argument that Minnesota's implied-consent statute is unconstitutional. *Brooks*, 838 N.W.2d at 572 ("By using this 'legal tool' and revoking a driver's license for refusing a test, a state is doing the exact thing Brooks claims it cannot do—conditioning the privilege of driving on agreeing to a warrantless search."). *Brooks* held that, although *McNeely* eliminated the single-factor exigency exception to the warrant requirement, a warrantless extraction of breath, urine, and blood was still permissible under the Fourth Amendment when Brooks, under the totality of the circumstances, freely and voluntarily consented to testing. *Id.* at 568–69, 572. The supreme court further held that the effect of Minnesota's implied-consent statute, which makes it a crime to refuse a test, is not so coercive as to invalidate a driver's consent. *Id.* at 571–72.

In addition, this court has recently rejected Leason's argument that because exigent circumstances did not exist when the officer asked him to submit to a chemical test, prosecuting him for refusing to consent is unconstitutional. *See Bernard*, 844 N.W.2d at 45. In *Bernard*, we upheld the constitutionality of an appellant's conviction for test refusal, concluding that "[t]he Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test." *Id.* at 42. We reasoned that penalizing the driver's decision to forego taking a chemical test is not

unconstitutional when "the circumstances establish[] a basis for the officer to have alternatively pursued a constitutionally reasonable nonconsensual test." *Id.*

The *Bernard* court explained, "Because the officer indisputably had probable cause to believe that Bernard was driving while impaired . . . , the officer also indisputably had the option to obtain a test of Bernard's blood by search warrant." *Id.* at 45. "In other words, the officer had a lawful option to require Bernard to submit to a chemical test, based on a search warrant, and he instead gave Bernard the choice to voluntarily submit to warrantless testing." *Id.* at 46. Because the officer had a "constitutionally viable alternative" to obtain a warrant when he asked Bernard to voluntarily take a breath test, penalizing Bernard's decision to refuse to submit to the test did not implicate any fundamental due-process rights because "the consequent testing under either approach would have been constitutionally reasonable." *Id.*

We note that neither our analysis in *Bernard* nor the test-refusal statute authorizes police to actually conduct a warrantless search if the suspected drunk driver refuses to provide a chemical test on request.[1] *Bernard* recognizes the state's constitutional

[1] We also note that the hypothetical warrant analysis used in *Bernard* is applicable only to the unique circumstances presented under the test-refusal statute. The crime of refusal arises in a context involving the compelling public safety concern of preventing drunk driving balanced against the intrusion of asking a driver to take a breath, urine, or blood test based on reasonable suspicion for the stop, probable cause for an arrest, and an opportunity to consult with counsel about the testing decision. Consistent with established authority, *Bernard* does *not* endorse the application of a hypothetical "constitutionally reasonable police search" in other contexts involving the validity of searches under the Fourth Amendment. *See, e.g., Katz v. U.S.*, 389 U.S. 347, 356–57, 88 S. Ct. 507, 514 (1967) ("Searches conducted without warrants have been held unlawful notwithstanding facts unquestionably showing probable cause, for the Constitution

authority to *punish* test refusal; it does not acknowledge or endorse any constitutional authority under which the state may force a warrantless test. *See* 844 N.W.2d at 45–47.

Because *Bernard* is directly applicable and we follow the published opinions of this court, we apply *Bernard* to this case. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). We hold that Officer Baker had probable cause to believe that Leason was driving while impaired. Leason did not immediately stop his car when Officer Baker turned on his emergency lights. Officer Baker smelled a "strong odor of alcohol like that of an alcoholic beverage" immediately as he approached the driver's side of Leason's car and smelled alcoholic beverages on Leason's breath when he was attempting to perform field-sobriety tests. Leason's "speech appeared to be slightly slurred." And Leason was uncooperative when Officer Baker attempted to perform the field-sobriety tests. Officer Baker administered a preliminary breath test, and Leason registered at .152. *See* Minn. Stat. § 169A.41, subd. 2(4) (2010) (authorizing the use of preliminary breath tests in the prosecution of test refusal). When Officer Baker asked Leason when he had last consumed alcohol, Leason stated that he had a drink 45 minutes before the stop.

Based on these facts, Officer Baker properly arrested Leason and read him the implied-consent advisory according to the implied-consent statute. *See* Minn. Stat. § 169A.51, subd. 2 (2010).

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requires that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police. . . .") (quotations and citation omitted).

Because Officer Baker "indisputably" had probable cause to suspect Leason of driving while impaired, he "also indisputably had the option to obtain a test of [Leason's] blood by search warrant." *See Bernard*, 844 N.W.2d at 45. As in *Bernard*, we hold that Leason's prosecution under the test-refusal statute did not violate his constitutional rights.

Given this determination, we need not decide Leason's argument that the criminal test-refusal statute places an unconstitutional condition on his license. The doctrine of unconstitutional conditions is "properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement." *Netland*, 762 N.W.2d at 211. In *Netland*, for example, the supreme court declined to determine whether the doctrine "applies to Fourth Amendment rights or whether it should be applied to violations of the Minnesota Constitution" because Netland failed to show that a "warrantless search for her blood-alcohol content would have been unconstitutional." *Id.* at 212.

Here, the implied-consent statute does not authorize an unconstitutional government infringement because, under its terms, the police may not search without a driver's express, valid consent. *See* Minn. Stat. §§ 169A.51–.52 (2010). Although a driver may be prosecuted for refusing a test, as here, the United States Supreme Court and the Minnesota Supreme Court have concluded that such penalties are not unduly coercive as a matter of law. *McNeely*, 133 S. Ct. at 1566; *South Dakota v. Neville*, 459 U.S. 553, 559–60, 103 S. Ct. 916, 920–22 (1983); *Brooks*, 838 N.W.2d at 570; *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855–56 (Minn. 1991).

II. Driving While Impaired

Leason next argues that the evidence is insufficient to support his conviction of driving while impaired. When considering a challenge to the sufficiency of the evidence, we conduct a "painstaking analysis of the record," viewing the evidence in the light most favorable to the verdict and assuming the trier of fact believed the state's witnesses and evidence and disbelieved the evidence to the contrary. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted).

To sustain a conviction for driving while impaired, the state must prove that Leason (1) operated a motor vehicle (2) while under the influence of alcohol. Minn. Stat. § 169A.20, subd. 1(1). Leason does not deny that he was driving. Rather, he claims the state did not prove that he was under the influence while he was driving. A person is "under the influence" when the person does not "possess that clearness of intellect and control of himself that he otherwise would have." *State, City of Eagan v. Elmourabit*, 373 N.W.2d 290, 293 (Minn. 1985) (quotation omitted). A conviction of driving while impaired may be upheld when the "state shows that the driver had drunk enough alcohol so that the driver's ability or capacity to drive was impaired in some way or to some degree." *State v. Shepard*, 481 N.W.2d 560, 562 (Minn. 1992).

Leason compares his case to *Elmourabit*. In that case, a police officer stopped defendant Elmourabit for speeding. *Elmourabit*, 373 N.W.2d at 291. The officer smelled alcoholic beverages and observed that Elmourabit's eyes were "glassy and bloodshot" and that he had an "unsteady gait" while walking to the police car. *Id.* At the police station, Elmourabit performed normally on the relevant dexterity tests, but suddenly "fell

to the floor, moaning and groaning," while talking on the telephone with an attorney. *Id.* When placed in the ambulance, he became "physically aggressive, trying to bite and kick." *Id.* The supreme court found that the state had presented insufficient evidence of Elmourabit's intoxication because the evidence was in an "uneasy equilibrium." *Id.* at 293–94.

The supreme court noted the lack of direct proof of Elmourabit's consumption of alcohol (except for his admission of drinking one beer plus a few sips) and that "the state relied primarily on outward manifestations of intoxication observed after the defendant was stopped." *Id.* at 293. These outward manifestations, the supreme court concluded, did not necessarily show that Elmourabit was impaired. *Id.* The court explained that speeding was "not uncommon for sober drivers too"; that the smell of alcoholic beverages could have come from the one bottle of beer that Elmourabit admitted to drinking; that English was not Elmourabit's native language, which could account for his allegedly slurred speech; and that neither the officers nor the paramedics could "say authoritatively that [Elmourabit] had no medical problems or was not experiencing pain" which would explain his odd behavior. *Id.* Even when viewed in the light most favorable to the prosecution, the supreme court held that this was the "rare" case wherein the "unique facts and circumstances" required the conclusion that the state did not meet its burden. *Id.* at 294.

Leason's case is distinguishable from *Elmourabit*. Leason did not immediately stop his car when Officer Baker turned on his emergency lights. As Officer Baker approached the driver's side of the car, he immediately smelled a strong odor of alcoholic

beverages and saw an open liquor bottle on the floor of the car. He also smelled a "strong odor of alcohol" on Leason's breath when Leason was attempting to perform field-sobriety tests. Leason's "speech appeared to be slightly slurred," and nothing in the record suggested that English was not Leason's native language. And Officer Baker testified that Leason was uncooperative when Officer Baker was attempting to perform the field-sobriety tests. Leason was wavering on his feet and unstable, looking to the sky and mumbling incoherently. In addition, the officer noted four out of six clues in the horizontal gaze nystagmus test, which indicates impairment. Finally, Officer Baker testified that based on his experience and observations of Leason, he believed that Leason was under the influence of alcohol.

Viewing these facts in the light most favorable to the verdict, sufficient evidence in the record supports the district court's finding that Leason was driving while impaired.

III. Violation of a Restricted Driver's License

Leason contends that the state failed to prove beyond a reasonable doubt that he willfully violated the restriction on his driver's license. We agree.

Under Minnesota law,

> (f) A person who drives, operates, or is in physical control of a motor vehicle while in violation of the restrictions imposed in a restricted driver's license issued to that person under this section is guilty of a crime as follows:
>
> (1) if the restriction relates to the possession or consumption of alcohol or controlled substances, the person is guilty of a gross misdemeanor[.]

Minn. Stat. § 171.09, subd. 1(f)(1).

To prove that a defendant violated a driver's-license restriction under this section, the state must show "proof of willfulness." *State v. Rhode*, 628 N.W.2d 617, 619 (Minn. App. 2001). In *Rhode*, the defendant argued that the state did not provide evidence that he was aware of the no-alcohol restriction on his license. *Id.* The state countered that the defendant "was aware of the no-alcohol restriction because (1) he had three prior DWIs and (2) he previously had his driving privileges revoked and did not have them restored until he completed rehabilitation and passed a driving test." *Id.* at 619–20. The state also offered the defendant's driving record into evidence, but did not offer evidence that the defendant ever saw his driving record. *Id.* at 619. Upon that record, this court held that the state failed to prove that the defendant willfully violated the restrictions on his license. *Id.* at 620.

The issuance of a "B card" to a defendant provides sufficient notice of the no-alcohol restriction on his license, however. *State, City of Loretto v. Tofte*, 563 N.W.2d 322, 325 (Minn. App. 1997). The *Tofte* court explained, "The 'B card' has been construed to mean that the license is conditioned on abstention from alcohol or drugs, and any violation of that condition is a ground for cancellation and denial of driving privilege." *Id.* at 324.

Applying these authorities, we conclude that the record here was insufficient to show that Leason knew that he had a restricted license at the time he was arrested. To be sure, Leason stipulated that he "had a driver's license restriction, a no use of alcohol restriction on [his] driving record." But, unlike the appellant in *Tofte* who knew that she had restrictions on her license, but merely argued that they were not sufficiently clear to

put her on notice of what conduct was prohibited, s*ee id.* at 325, no evidence was presented that Leason was issued a "B Card" or that he knew that his driver's license showed an alcohol restriction. Officer Baker did not testify as to whether Leason had a restriction noted on his driver's license, whether Leason had a "B card," or whether Leason ever saw his driving record. As in *Rhode*, the evidence is insufficient to show that Leason willfully violated the statute because "the state presented no evidence that [Leason] was issued a B card or a driver's license showing a total-abstinence restriction." *See Rhode*, 628 N.W.2d at 619.

The state argues that Leason only contested whether he was drinking alcohol at the time of the offense, and "any error in the fact that the willfulness was not specifically stated on the record does not require reversal." We disagree. It is well-established that "[d]ue process requires that every element of the offense charged must be proven beyond a reasonable doubt by the prosecution." *State v. Cross*, 577 N.W.2d 721, 726 (Minn. 1998).

In sum, we hold that the state failed to prove that Leason willfully violated the restrictions on his driver's license. No evidence shows that Leason was aware of the restriction on his driver's license at the time he was arrested and the district court made no such finding of knowledge. Therefore, we conclude that the evidence is insufficient to support the conviction of violation of a restricted license.

Affirmed in part and reversed in part.