STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2020

Benjamin Robert DeMaris, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent

Filed June 9, 2014
Affirmed
Worke, Judge

Carver County District Court
File Nos. 10-CV-13-670, 10-CR-13-393

Eric J. McCloud, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Kristi Nielsen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

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

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

WORKE, Judge

Appellant challenges the district court's order sustaining the implied-consent revocation of his driver's license, arguing that his breath-test results were inadmissible because officers failed to obtain a warrant prior to collecting the sample. Because appellant consented to testing, we affirm.

FACTS

In the morning of May 4, 2013, appellant Benjamin Robert DeMaris was found near his vehicle, which was in a ditch. DeMaris told a responding deputy that he had fallen asleep while driving and ended up in the ditch. DeMaris admitting to drinking wine the night before. DeMaris's eyes were glassy, watery and bloodshot, his speech was slow and slurred, and he smelled of an alcoholic beverage

DeMaris performed poorly on field sobriety tests and a preliminary breath test indicated a result of .12. He was placed under arrest for driving while intoxicated (DWI) and transported to the jail. At the jail, a deputy read DeMaris the implied-consent advisory, which included the warning that refusal to take a chemical test is a crime. DeMaris was also advised that he had the right to consult with an attorney before deciding whether to submit to a chemical test. DeMaris indicated that he understood the advisory and declined his opportunity to contact an attorney. DeMaris's breath test resulted in a reading of .11.

Following revocation of his driver's license, DeMaris petitioned for judicial review, arguing that officers were required to obtain a search warrant to collect his breath sample. The district court sustained the revocation of DeMaris's driver's license, concluding that he voluntarily consented to testing. This appeal followed.

D E C I S I O N

DeMaris argues that the breath test was an unconstitutional search. The underlying facts are undisputed. "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). In reviewing the constitutionality of a search, "we independently analyze the undisputed facts to determine whether evidence resulting from the search should be suppressed." *Id.* A district court's conclusions of law are not overturned "absent erroneous construction and application of the law to the facts." *Id.*

The United States and Minnesota Constitutions guarantee people the right to be free from unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Taking a sample of a person's breath is a search under the Fourth Amendment and requires a warrant. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (1989); *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009), *abrogated in part by Missouri v. McNeely*, 133 S. Ct. 1552 (2013), *as recognized in State v. Brooks*, 838 N.W.2d 563, 567 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014).

But consent is an exception to the warrant requirement. *Brooks*, 838 N.W.2d at 568. "For a search to fall under the consent exception, the [s]tate must show by a preponderance of the evidence that the defendant freely and voluntarily consented." *Id.* In determining whether consent is voluntary, this court considers 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 568-69 (quotation omitted).

In the implied-consent context, the nature of the encounter includes why police suspected that the driver was driving under the influence, how the request to submit to chemical testing was made, including whether the driver was read the implied-consent advisory, and whether the driver had the right to consult with an attorney. *Id.* at 569. The supreme court held in *Brooks* that the driver voluntarily consented to testing because

he did not challenge the probable cause that he had been driving under the influence, he was properly read the implied-consent advisory, he was not subject to repeated police questioning nor did he spend days in custody before consenting, and he consulted with an attorney before he consented to testing. *Id.* at 571-72.

DeMaris does not challenge that there was probable cause to arrest him for DWI. And he does not argue that he was not read the implied-consent advisory or asked whether he would submit to testing. DeMaris was not subject to police questioning and he was not held in custody for any prolonged period of time. DeMaris argues only that his consent was not voluntary because he was advised that test refusal is a crime. But *Brooks* clarified that the criminality of test refusal does not render consent involuntary. *Id.* at 571-72 (stating that "the fact that someone submits to the search after being told that he . . . can say no to the search supports a finding of voluntariness," and that although test refusal comes with criminal penalties and choosing whether to submit to testing is difficult or unpleasant, the criminal process is replete with difficult and unpleasant choices). DeMaris also did not speak with an attorney. But *Brooks* stated only that the driver should have the ability to consult with an attorney. *Id.* at 572 (stating that "the ability to consult with counsel about an issue supports the conclusion that a defendant made a voluntary decision"). DeMaris declined the opportunity to consult with an attorney. DeMaris voluntarily consented to submit to a breath test. The district court did not err by declining to suppress the breath-test results, and sustaining the revocation of DeMaris's driver's license.

Affirmed.