STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2036

Joseph Robert Veilleux, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed April 14, 2014
Affirmed
Cleary, Chief Judge

Carver County District Court
File No. 10-CV-13-767

Steven J. Meshbesher, David R. Lundgren, Meshbesher & Associates, P.A., Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, James E. Haase, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Cleary, Chief Judge; and Klaphake, 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

CLEARY, Chief Judge

Appellant Joseph Robert Veilleux appeals a district court order sustaining the revocation of his driver's license and the impoundment of his license plates. On appeal, appellant argues that the district court erred in failing to exclude the results of a breath test as the product of an unconstitutional warrantless search. Specifically, appellant argues that the circumstances of his breath test were coercive since he did not consult legal counsel and was not told that he would not be forced to take a breath test. We affirm.

FACTS

On the evening of May 31, 2013, Deputy Christopher Curtis was in his marked squad car watching for seatbelt violations when he observed the driver of a black car without his seatbelt fastened. Deputy Curtis followed the vehicle into a parking lot and conducted a traffic stop.

Deputy Curtis identified the driver of the vehicle as appellant. While speaking with appellant, Deputy Curtis smelled the odor of alcohol and observed that appellant's eyes were bloodshot and watery. He also observed several empty beer bottles on the front-passenger-side floorboard. Deputy Curtis later confirmed that there were six empty beer bottles in appellant's car. After being questioned by Deputy Curtis as to his recent alcohol consumption, appellant replied that he had consumed four or five beers at his residence. Deputy Curtis informed appellant that he wanted to conduct field sobriety

tests, and appellant agreed. Appellant displayed multiple signs of impairment during the field sobriety tests. He also took a preliminary breath test resulting in a reading of .148. Deputy Curtis then placed appellant under arrest for driving while impaired (DWI), handcuffed him, and placed him in the back of the squad car.

Appellant was transported to Carver County Jail where Deputy Curtis read him the implied-consent advisory. The implied-consent-advisory form Deputy Curtis read to appellant had one warning crossed off.[1] Unlike the other questions on the advisory, there is no mark indicating that the warning was read to appellant. Appellant stated that he understood the advisory, and, when asked if he wanted to consult with an attorney, he replied that he did not. Deputy Curtis asked if appellant would take a breath test, and he responded that he would. The breath test was then administered and returned a value of .15.

Appellant was issued an order of license revocation and order of license plate impoundment. He appealed the license revocation and license plate impoundment, and on August 16, 2013, an implied-consent hearing was held, at which the parties stipulated to the facts contained in the peace officer's certificate, implied-consent-advisory form, breath-test result, and arresting officer's narrative report. The district court issued an order sustaining appellant's driver's license revocation and plate impoundment on September 2, 2013. This appeal follows.

[1] The crossed off warning states, "Because I also have probable cause to believe you have violated the criminal vehicular homicide or injury laws, a test will be taken with or without your consent."

D E C I S I O N

Appellant argues that the breath test constituted an unreasonable search under the U.S. and Minnesota Constitutions. "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 Fourth Amendment to the U.S. Constitution and Article I, Section 10 of the Minnesota Constitution 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 constitutes 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* (U.S. Apr. 7, 2014). However, one exception to the warrant requirement is consent. *Brooks*, 838 N.W.2d at 568. "For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented." *Id.* In determining whether consent is voluntary, we consider 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 (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994)). The nature of the encounter in implied-consent cases includes how the police came to suspect the driver was under the influence, whether the driver was read the implied-consent advisory, and whether the driver had the right to consult with an attorney. *See id.* at 569. As recently clarified in *Brooks*, the criminality of the refusal to consent to testing is not coercion per se. *Id.* at 570.

In *Brooks*, the supreme court determined whether a driver had consented to testing in three separate incidents of arrest for DWI by applying the totality-of-the-circumstances analysis. *Id.* at 569-72. Brooks did not assert that police lacked probable cause to believe he had been driving under the influence, and he did not argue that the police failed to follow the proper procedures under the implied-consent law. *Id.* at 569-70. The court noted that Brooks was read the implied-consent advisory before he was asked to take the tests. *Id.* at 570. The court further observed that Brooks was not subject to repeated police questioning and did not spend days in custody before he was asked for consent. *Id.* at 571. After consulting with his attorney, Brooks agreed to take the tests in all three incidents. *Id.* The supreme court held that Brooks's consent was voluntary under these circumstances. *Id.* at 572.

Although some of the circumstances of appellant's arrest and breath test differ from the circumstances in *Brooks*, there is no indication that appellant did not voluntarily consent to his breath test. Like Brooks, appellant does not refute that Deputy Curtis had probable cause to arrest him or that he was read the implied-consent advisory. As was

the case in *Brooks*, appellant was not subject to repeated police questioning and was not detained for a prolonged period of time before giving his consent. In distinguishing the circumstances of his consent with those in *Brooks*, appellant maintains that three differences demonstrate his consent was not voluntary: (1) he did not speak with an attorney, (2) he was not expressly told that he would not be forced to take a breath test if he refused, and (3) his personal history and conduct demonstrate he is a different person than Brooks.

In *Brooks*, the court stated that "[t]he fact that Brooks consulted with counsel before agreeing to take each test reinforces the conclusion that his consent was not illegally coerced." *Id.* at 571. The court further noted that "the ability to consult with counsel about an issue supports the conclusion that a defendant made a voluntary decision." *Id.* at 572. Appellant cites *Davis v. Comm'r of Pub. Safety* for the proposition that suspects who cannot or do not reach counsel have a basis to challenge a deficient implied-consent advisory. 517 N.W.2d 901, 904 (Minn. 1994), *superseded by statute*, Minn. Stat. § 169A.51, subd. 2 (2004), *as recognized in State v. Melde*, 725 N.W.2d 99, 104-05 (Minn. 2006).

Davis is not controlling. In *Davis*, the supreme court determined whether the implied-consent advisory in force at the time violated state due process because it did not warn that test refusal would result in license revocation. *Id.* at 902-04. The court stated that "[t]hose who do not or cannot reach counsel have a practical basis for arguing that if they had been given a proper advisory they might have taken the test." *Id.* at 904. As the

supreme court later concluded, the addition of a warning in the implied-consent advisory stating that refusal to submit to testing is a crime eliminated this concern. *Melde*, 725 N.W.2d at 104-05.

Although appellant did not consult with an attorney prior to receiving the breath test, he was afforded the opportunity to do so and declined. *Brooks* did not hold that a suspect must consult with an attorney in order for consent to be voluntary. Consultation with an attorney is only one factor in the totality-of-the-circumstances analysis. *See Brooks*, 838 N.W.2d at 568. Appellant's assertion that his decision not to speak with an attorney "was most likely the result of the coercive atmosphere he was subjected to" is not supported by the record.

Appellant also asserts that he did not voluntarily consent because he was not informed that he would not be forced to submit to a breath test. Minn. Stat. § 169A.52, subd. 1 (2012) states that "[i]f a person refuses to permit a test, then a test must not be given." He further argues that the only portion of the implied-consent advisory that would have informed him of his ability to effectively refuse testing was not read to him. The warning that appellant points to reads, "Because I also have probable cause to believe you have violated the criminal vehicular homicide or injury laws, a test will be taken with or without your consent." A peace officer may obtain a test despite an individual's refusal if the officer has probable cause to believe the individual violated section 609.21, which defines criminal vehicular homicide and injury. Minn. Stat. § 169A.52, subd. 1. Appellant argues that it was implied from the surrounding

circumstances—he was in custody and was told that it was a crime to refuse testing—that he could be forced to submit to testing even if he refused. Conversely, respondent Commissioner of Public Safety asserts that *Brooks* held that the advisory makes clear to the driver that there is a choice as to whether to submit to testing.

At several points in the *Brooks* opinion, the supreme court stated that the implied-consent advisory adequately informs drivers of their choice in whether to submit to testing. The court stated that the advisory "makes clear that drivers have a choice of whether to submit to testing." *Brooks*, 838 N.W.2d at 570. The court later reiterated this point, stating that "by reading Brooks the implied consent advisory police made clear to him that he had a choice of whether to submit to testing." *Id.* at 572. Additionally, it is not clear whether Brooks was read the warning that appellant maintains would have informed him that he would not be forced to submit to testing if he refused. There was not probable cause to believe criminal vehicular homicide or injury laws had been violated in any of the DWI incidents in *Brooks*. *See id.* at 565-66. Although not detailed in the opinion, presumably Brooks was also not read this warning since it pertains to suspected violations of vehicular homicide or injury laws. The court in *Brooks* determined that the advisory adequately informs drivers of their choice as to whether to submit to a test. Appellant's assertion that he was not given a proper warning is unpersuasive.

Lastly, appellant argues that he is a much different person than Brooks, citing Brooks's criminal history, consultations with his attorney, failure to perform a field

sobriety test, and otherwise uncooperative actions. Appellant points to Deputy Curtis's observations that appellant was polite and cooperative as evidence that appellant possibly believed he had no other options but to follow the deputy's directives.

Appellant's personal history and his conduct during the DWI incident do not indicate he did not give voluntary consent. Although appellant suggests that his cooperativeness "could have" originated from his belief that he had no other options, this is not reflected anywhere in the record. Similarly, although appellant alleges that he is "unfamiliar with the DWI process," appellant does have a prior DWI conviction. Nothing about Deputy Curtis's initial stop of appellant or the subsequent events indicate that appellant was coerced and did not give voluntary consent.

Because, under the totality of the circumstances, appellant voluntarily consented, the district court did not err in failing to exclude the results of his breath test and sustaining the revocation of his driver's license and impoundment of his license plates.

Affirmed.