STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2252

State of Minnesota,
Appellant,

vs.

Gary James Johnson,
Respondent.

Filed June 9, 2014
Reversed and remanded
Schellhas, Judge
Concurring specially, Klaphake, Judge[*]

Anoka County District Court
File No. 02-CR-13-3623

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

Kurt B. Glaser, Smith & Glaser, LLC, Minneapolis, Minnesota (for appellant)

Jeffrey S. Sheridan, Strandemo, Sheridan & Dulas, P.A., Eagan, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, 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

SCHELLHAS, Judge

Appellant challenges a pretrial dismissal of its test-refusal charge against respondent, arguing that the district court erred by concluding that the test-refusal statute is unconstitutional. We reverse and remand for further proceedings consistent with this opinion.

FACTS

Appellant State of Minnesota charged respondent Gary Johnson with numerous offenses, including third-degree driving while impaired (DWI) (refusal to submit to a chemical test) under Minn. Stat. §§ 169A.20, subd. 2, .26, subd. 1(b) (2012). In its complaint, the state alleged that, in Anoka County shortly before 3:00 a.m. on May 27, 2013, Officer Matthew Giese observed a truck traveling 39 miles per hour in a 30-mile-per-hour speed zone and pursued the truck with his vehicle's emergency lights activated. The truck quickly turned right and stopped in a handicapped parking space, and a man, whom Officer Giese later identified as Johnson, stumbled out of the truck, almost falling over. Johnson had an alcohol-related restriction on his license and could not produce proof of insurance. He had difficulty standing, a strong smell of alcohol on his breath, and red and watery eyes.

Officer Giese administered three field sobriety tests to Johnson, who displayed 15 indicia of intoxication. Johnson's preliminary breath-test result was .173. Officer Giese arrested Johnson for DWI, transported him to the Centennial Lakes Police Department, and read him the implied-consent advisory. Johnson stated that he understood the

advisory and wanted to speak to an attorney. Officer Giese provided Johnson with a telephone and phone books, but Johnson repeatedly stated that he would not try to call his attorney or another attorney. When Officer Giese asked Johnson if he would submit to a breath test, Johnson said no. The state charged Johnson with a test-refusal crime. In reliance on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), Johnson moved to dismiss the complaint, arguing that the test-refusal statute was unconstitutional on its face and as applied to Johnson because it "criminalizes a person's exercise of his constitutionally protected interest in remaining free from unreasonable searches and seizures."

The district court dismissed the state's test-refusal charge, reasoning that Johnson refused to submit to a constitutionally unreasonable breath test and that the test-refusal statute violated Johnson's "constitutional right to refuse to submit to an unreasonable search." The court stated that "[i]f the exercise of a constitutional right is criminalized, the right loses all meaning" and concluded that "[t]he good faith exception" did not apply because no search occurred.

This appeal follows.

D E C I S I O N

We have jurisdiction to review pretrial orders appealed by the state that, unless reversed, will critically impact the trial's outcome. *See State v. Williams*, 842 N.W.2d 308, 311 n.2 (Minn. 2014) (citing Minn. R. Crim. P. 28.04, subd. 1(1) (granting prosecutor right to appeal to this court "any pretrial order")); *State v. Zais*, 805 N.W.2d 32, 35 (Minn. 2011) (stating that state may appeal pretrial orders that, unless reversed, will critically impact trial's outcome). To satisfy the critical-impact test, the state must

show "clearly and unequivocally (1) that the district court's ruling was erroneous and (2) that the ruling will have a critical impact on the State's ability to prosecute the case." *Zais*, 805 N.W.2d at 36 (quotations omitted).

By dismissing the test-refusal charge and declaring the test-refusal statute unconstitutional, the district court critically impacted the state's ability to prosecute Johnson for the charge because, "[w]hen a statute is unconstitutional, it is not a law and it is as inoperative as if it had never been enacted," *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 349 (Minn. 2005); "district court judges recognize that it is not their function to overrule their colleagues' legal rulings[;] and it is therefore highly unlikely that a prosecuting attorney could reinstate a case dismissed solely on a question of law," *State v. Dunson*, 770 N.W.2d 546, 550 (Minn. App. 2009), *review denied* (Minn. Oct. 20, 2009), *cert. denied*, 559 U.S. 1012 (2010).

We conduct a de novo review of the district court's conclusion that the test-refusal statute is unconstitutional. *See State v. Wenthe*, 839 N.W.2d 83, 87 (Minn. 2013) ("Whether a statute is unconstitutional is a question of law we review de novo."); *State v. Wicklund*, 589 N.W.2d 793, 797 (Minn. 1999) (rejecting argument that "standard governing a state's appeal of a pretrial order should be whether the trial court's findings are clearly and unequivocally erroneous," and concluding that "our standard of review is de novo" because district court's challenged conclusions were "clearly determinations of law"); *accord State v. Schmidt*, 612 N.W.2d 871, 875 (Minn. 2000); *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992).

The test-refusal statute, Minn. Stat. § 169A.20, subd. 2, criminalizes "refus[al] to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license)." *See also* Minn. Stat. § 169A.26, subd. 1(b) ("A person who violates section 169A.20, subdivision 2 . . . , is guilty of third-degree driving while impaired."). "Minnesota statutes are presumed constitutional . . . ." *Wenthe*, 839 N.W.2d at 87. Appellate courts "exercise [their] authority to declare a statute unconstitutional with extreme caution and only when absolutely necessary," *id.* (quotation omitted), and "will uphold a statute unless the challenging party demonstrates that it is unconstitutional beyond a reasonable doubt," *State v. Ness*, 834 N.W.2d 177, 182 (Minn. 2013) (quotation omitted).

In its order dismissing the test-refusal charge against Johnson, the district court reasoned that a defendant has a "constitutional right to passively refuse to submit to" constitutionally unreasonable searches as a part of the defendant's "exercise of [the d]efendant's [federal and state] constitutional right to be free of unreasonable searches." The state argues that the test-refusal statute does not violate Johnson's right to be free from unreasonable searches. Johnson counters that the issue is not whether the test-refusal statute violated his right to be free from unreasonable searches but, rather, whether the test-refusal statute violated his right to substantive due process under the United States Constitution. We conclude that, under either legal framework, the district court erred by concluding that the test-refusal statute is unconstitutional.

The United States and Minnesota Constitutions protect "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV; *see* Minn. Const. art. I, § 10 (same); *Bailey v. United States*, 133 S. Ct. 1031, 1037 (2013) (noting that "[t]he Fourth Amendment[is] applicable through the Fourteenth Amendment to the States"). The United States and Minnesota Constitutions also prohibit a state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; *accord* Minn. Const. art. I. § 7; *see also State v. Pass*, 832 N.W.2d 836, 841 n.1 (Minn. 2013) ("The due process protection provided under the Minnesota Constitution is identical to the due process guaranteed under the Constitution of the United States." (quotation omitted)). Those prohibitions "include substantive components prohibiting 'certain arbitrary, wrongful government actions, regardless of the fairness of the procedures used to implement them.'" *State v. Netland*, 762 N.W.2d 202, 208 (Minn. 2009) (quoting *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 983 (1990)) (other quotation omitted), *abrogated on other grounds 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).

Before *McNeely*, our supreme court held in *State v. Shriner* that "[t]he rapid, natural dissipation of alcohol in the blood creates a single-factor exigent circumstance that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation." 751 N.W.2d 538, 539 (Minn.

2008), *abrogated by Missouri v. McNeely*, 133 S. Ct. 1552 (2013). In *Netland*, our supreme court relied on *Shriner* to hold that "Minnesota's criminal test-refusal statute does not violate the constitutional prohibition against unreasonable searches because exigent circumstances created by rapidly dissipating evidence of blood-alcohol concentration justify the warrantless search." 762 N.W.2d at 204, 212–13.

In *State v. Wiseman*, quoting *Shriner*, 751 N.W.2d at 549–50, and citing *Netland*, 762 N.W.2d at 212–13, this court stated that "[a] warrantless chemical test is constitutionally reasonable if the police have probable cause to believe that the person was driving, operating, or in physical control of a motor vehicle while chemically impaired because of the exigent circumstances created by '[t]he rapid, natural dissipation of alcohol in the blood.'" 816 N.W.2d 689, 694 (Minn. App. 2012), *abrogated by Missouri v. McNeely*, 133 S. Ct. 1552 (2013) *and cert. denied*, 133 S. Ct. 1585 (2013). We held in *Wiseman* that "Minnesota's chemical-test-refusal statute does not violate an individual's substantive-due-process rights because an individual does not have a fundamental right under the due-process clauses of the United States Constitution and Minnesota Constitution to passively or nonviolently refuse to submit to a constitutionally reasonable police search." *Id.* at 691. In *McNeely*, the Supreme Court abrogated the natural dissipation of alcohol in the blood as a single-factor exigent circumstance, holding that "the natural metabolization 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 ("[E]xigency . . . must be determined case by case based on the totality of the circumstances.").

I.

In *State v. Bernard*, 844 N.W.2d 41, 42, 46 (Minn. App. 2014), *review granted* (Minn. May 20, 2014), we recently held that "Bernard's [test-refusal] prosecution did not implicate any fundamental due process rights" and we also held that "[t]he Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test for alcohol content when the circumstances established a basis for the officer to have alternatively pursued a constitutionally reasonable nonconsensual test by securing and executing a warrant." We concluded that "[t]he state is not constitutionally precluded from criminalizing a suspected drunk driver's refusal to submit to a chemical test under circumstances in which the requesting officer had grounds to have obtained a constitutionally reasonable nonconsensual chemical test by securing and executing a warrant requiring the driver to submit to testing." *Bernard*, 844 N.W.2d at 47. We also concluded that,

> [b]ecause the officer indisputably had probable cause to believe that Bernard was driving while impaired (he was identified by witnesses as the driver, he was holding the truck keys, and his wardrobe, instability, and odor indicated that he was intoxicated), the officer also indisputably had the option to obtain a test of Bernard's blood by search warrant.

Id. at 45.

In this case, the facts show that Officer Giese had probable cause to believe that Johnson was driving while impaired.[1] Under *Bernard*, the state was not constitutionally precluded from criminalizing Johnson's refusal to submit to a chemical test because Officer Giese had grounds to obtain a constitutionally reasonable nonconsensual chemical test by securing and executing a warrant requiring Johnson to submit to testing. *See also Brooks*, 838 N.W.2d at 571 ("Although refusing the test comes with criminal penalties in Minnesota, the Supreme Court has made clear that while the choice to submit or refuse to take a chemical test 'will not be an easy or pleasant one for a suspect to make,' the criminal process 'often requires suspects and defendants to make difficult choices.'" (quoting *S. Dakota v. Neville*, 459 U.S. 553, 564, 103 S. Ct. 916, 922–23, (1983))); *State v. Mellett*, 642 N.W.2d 779, 781, 785 (Minn. App. 2002) (holding that "Minn. Stat. § 169A.20, subd. 2 (2000) does not violate the United States or Minnesota constitutions" and that it "does not violate appellant's Fourth Amendment rights"), *review denied* (Minn. July 16, 2002). We therefore conclude that the district court erred by dismissing the test-refusal charge against Johnson on the basis that the test-refusal statute is unconstitutional.

II.

Regardless of *Bernard*, we are unpersuaded by Johnson's constitutional challenge to the test-refusal statute. In district court, Johnson presented only an unreasonable-search-and-seizure challenge to the test-refusal statute. Relying on *McNeely*, he argued

[1] Before the district court, the parties stipulated to the facts in the complaint and their briefs.

that the statute is unconstitutional because it "criminalizes a person's exercise of his constitutionally protected interest in remaining free from unreasonable searches and seizures." He cited only two constitutional provisions: the Fourth Amendment and its counterpart in the Minnesota Constitution. Although he cited *Wiseman*, a substantive-due-process case, 816 N.W.2d at 691, he did so only to argue that *Wiseman* is no longer good law. By failing to even mention substantive due process, he waived raising that issue on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that an appellate court "generally will not decide issues which were not raised before the district court").

In *Camara v. Mun. Court*, the Supreme Court applied a Fourth Amendment analysis to a housing-ordinance scheme that criminalized refusal to consent to an inspection authorized by an ordinance. 387 U.S. 523, 526–27 & n.2, 87 S. Ct. 1727, 1729–30 & n.2 (1967). The Court applied a Fourth Amendment analysis even though no search occurred because Camara "refused to allow the inspection because the inspector lacked a search warrant," concluding in part that he "may not constitutionally be convicted for refusing to consent to the inspection."[2] *Id.* at 526, 540, 87 S. Ct. at 1729, 1737, *cited in United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) ("The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime."). *But cf. Nikolas v. City of Omaha*, 605 F.3d 539, 543 (8th Cir. 2010) (citing *Camara* as example of proposition that, "[i]f action taken pursuant

[2] Johnson does not argue that *Camara* requires a conclusion that the test-refusal statute is unconstitutional.

to . . . authority violates Fourth Amendment warrant requirements, the resulting criminal prosecution may be tainted, *but that does not render the authorizing statute unconstitutional*" (emphasis added)); *Wiseman*, 816 N.W.2d at 693 (stating that test-refusal-statute challenge "[did] not implicate a specific constitutional provision").

In this case, Johnson's argument that his right to be free from unreasonable searches and seizures has been violated is unpersuasive. Johnson relies on the Minnesota Supreme Court's decisions in *Dezso* and *George* in which the court discussed a right to say no to a requested search. *See State v. George*, 557 N.W.2d 575, 579 (Minn. 1997) ("'[A]n officer has a right to ask to search and an individual has a right to say no.'" (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994))); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 229–30, 93 S. Ct. 2041, 2048–49 (1973) (referring to defendant's "right to refuse consent"). But the court explained in *Dezso* and *George* that "'[i]t is at the point *when an encounter becomes coercive*, when the right to say no to a search is compromised by a show of official authority, that the Fourth Amendment intervenes.'" *George*, 557 N.W.2d at 579 (emphasis added) (quoting *Dezso*, 512 N.W.2d at 880); *see also State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011) (almost identical); *cf. Bustamonte*, 412 U.S. at 227, 93 S. Ct. at 2047–48 (stating that "knowledge of the right to refuse consent is one factor to be taken into account" when considering "whether a consent to a search was in fact 'voluntary' or was the product of duress or coercion").

Johnson impliedly argues that the test-refusal statute coerces consent by arguing that it "eliminate[ed] . . . the right [that the supreme court] recognized in *George*—the 'right to say no.'" But that argument is unpersuasive under *Brooks*, in which the supreme

court held that, "based on our analysis of the totality of the circumstances, . . . Brooks voluntarily consented to the searches at issue in this case," even though a police officer read to Brooks an advisory that refusing to take a chemical test is a crime. 838 N.W.2d at 564, 572. The court reasoned in part that, under United States Supreme Court and Minnesota Supreme Court caselaw, "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"; "by reading Brooks the implied consent advisory police made clear to him that he had 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 570, 572. We conclude that, because the implied-consent statue does not render a driver's consent to a chemical test coerced, the statute does not, through coercion, eliminate a driver's right to say no to a chemical test.

Even if we were to address Johnson's challenge on substantive-due-process grounds, we note that it would be unpersuasive. In *Wiseman*, we stated,

> Wiseman has not demonstrated the existence of a fundamental right, recognized under either federal or Minnesota law, to passively or nonviolently refuse to submit to a constitutionally reasonable police search. Indeed, neither United States nor Minnesota constitutional law has ever recognized the existence of a fundamental right to engage in such conduct, and we decline to do so here.

816 N.W.2d at 695. And we held that "the imposition of criminal penalties for refusing to submit to a properly requested chemical test is a reasonable means to a permissible state objective." *Id.* at 691, 693 ("If the legislative enactment does not implicate a fundamental right, substantive due process requires only that the law is not arbitrary or capricious or

that it reflects a reasonable means to a permissible state objective."). Johnson asserts that *McNeely* and *Brooks* entirely abrogated *Wiseman*. We disagree. *McNeely* and *Brooks* are based on Fourth Amendment analyses; nothing in *McNeely* and *Brooks* supports the existence of a fundamental right to passively or nonviolently refuse to submit to a constitutionally reasonable police search, nor that the imposition of criminal penalties for refusing to submit to a properly requested chemical test is not a reasonable means to a permissible state objective. *McNeely*, 133 S. Ct. at 1552–68; *Brooks*, 838 N.W.2d at 564–73.

Because our analyses above resolve this appeal, we decline to address the state's argument that a search of a defendant's breath is constitutionally reasonable on the basis that the state's interest in regulating state roadways and protecting citizens from drunk drivers outweighs a defendant's minimal expectation of privacy in the defendant's breath.

III.

Johnson also argues that the test-refusal statute violates the unconstitutional-conditions doctrine and that, regardless of the statute's constitutionality, evidence of Johnson's refusal to submit to chemical testing must be suppressed. But Johnson waived those arguments because, based on the record before us, he failed to raise them in district court. *See Roby*, 547 N.W.2d at 357 (stating that an appellate court "generally will not decide issues which were not raised before the district court"). The record before us does not include a transcript of the district court hearing, a request for a transcript, or any indication that Johnson raised his suppression and unconditional-conditions-doctrine arguments at the hearing. *See Noltimier v. Noltimier*, 280 Minn. 28, 29, 157 N.W.2d 530,

531 (1968) (noting an appellant's "burden to provide an adequate record and preserve it in a settled case to enable us to review questions he desires to raise on appeal"); *see also Netland*, 762 N.W.2d at 211 (stating that "[t]he [unconstitutional-conditions] doctrine is properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement," citing *Council of Indep. Tobacco Mfrs. of Am. v. State*, 713 N.W.2d 300, 306 (Minn. 2006) ("[T]o invoke this 'unconstitutional conditions' doctrine, appellants must first show the statute in question in fact denies them a benefit they could otherwise obtain by giving up their First Amendment rights.")).

Reversed and remanded.

KLAPHAKE, Judge (concurring specially)

Because respondent failed to raise the issue of substantive due process before the district court, thereby waiving that issue, I concur specially in the result, while continuing to maintain grave doubts about the constitutionality of Minnesota's test-refusal statute.