STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1193

State of Minnesota,
Appellant,

vs.

John Roy Drum,
Respondent.

Filed January 27, 2014
Reversed and remanded
Worke, Judge

Anoka County District Court
File No. 02-CR-12-8640

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

Wilbur F. Dorn, Jr., Blaine, Minnesota (for appellant)

Paul Peter Sarratori, Mesenbourg & Sarratori Law Offices, P.A., Coon Rapids, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Hudson, Judge; and Worke, Judge.

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

WORKE, Judge

The state challenges the suppression of evidence from respondent's breathalyzer test, arguing that respondent voluntarily consented to the search. We hold that respondent consented to the search, and reverse and remand to the district court.

FACTS

This case arises from the following undisputed facts. In the early morning of October 13, 2012, respondent John Roy Drum was pulled over for driving with broken taillights. The officer on the scene suspected Drum of driving while impaired (DWI) because Drum had watery eyes and breath smelling of alcohol, mumbled his speech, and refused to maintain eye contact. Drum admitted that he had had a "couple of beers" before driving. The officer ordered Drum to get out of the vehicle and administered various field sobriety tests. Drum failed a preliminary breathalyzer test and was arrested.

While Drum was under arrest, the officer began reading him Minnesota's Motor Vehicle Implied Consent Advisory, which instructs DWI suspects that, once an officer has probable cause to believe a person was driving while impaired, it is a crime for that person to refuse to take a sobriety test. The officer stopped reading when Drum requested an attorney, but finished after Drum declined to follow through with the request. At the jail, Drum submitted to a breath exam, which he failed with a reading of .14.

Drum was charged with operating a motor vehicle under the influence of alcohol, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2012), and driving with an alcohol concentration in excess of .08, in violation of Minn. Stat. § 169A.20, subd. 1(5). Drum made a pretrial motion to suppress evidence on a number of theories, including that the officer's failure to seek a warrant before subjecting Drum to the breathalyzer test violated the Fourth Amendment. In the same motion, Drum requested that the district court dismiss both counts for insufficient evidence.

The district court held that the police's failure to obtain a warrant before administering the breathalyzer exam violated Drum's Fourth Amendment rights. The district court relied on *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) to reject the state's arguments that a warrant exception applied. Specifically, the district court found (1) that the mere fact that blood dissipates in the body does not present the exigent circumstances required to bypass the warrant requirement; (2) that respondent did not voluntarily consent to the exam; and (3) that the good-faith exception to the warrant requirement did not apply.

This appeal followed. We stayed the appeal pending the Minnesota Supreme Court's decision in *Brooks*, 838 N.W.2d at 563, and allowed the parties to file supplemental briefs.

D E C I S I O N

The Fourth Amendment guarantees the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. A breathalyzer test is a search that implicates the Fourth Amendment. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989).

The parties do not contest that police, without obtaining a warrant, administered a breathalyzer test to Drum. A warrantless search is generally unreasonable unless it falls into a recognized exception. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). Under one such exception, police do not need a warrant when the subject of the search consents to it. *Davis v. United States*, 328 U.S. 582, 593-94, 66 S. Ct. 1256, 1261-62 (1946). For a search to fall under the consent exception, the state must show by a

preponderance of the evidence that the subject of the search freely and voluntarily consented. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). If police action is "coercive," consent is no longer voluntarily given, and the consent exception does not apply. *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999). We examine 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," to determine whether consent was voluntary. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994).

It is uncontested that police complied with all statutory requirements, and that Drum gave verbal consent for the search. But Drum argues that his consent was not voluntary because the implied-consent law, which criminalizes test refusal, Minn. Stat. § 169A.51, subd. 2 (2012), is coercive. The district court held that Drum did not consent voluntarily because the criminal test-refusal penalty led Drum to believe that his "only true choice was to take the test."

In *Brooks*, 838 N.W.2d at 570-72, the Minnesota Supreme Court held as a matter of law that the criminal test-refusal penalty in the implied-consent law is not coercive. Although we look to the totality of the circumstances to determine consent, *Dezso*, 512 N.W.2d at 880, nothing in this record reveals further circumstances that would lead us to conclude that Drum's consent was coerced. We therefore hold that Drum voluntarily consented to the breathalyzer test at issue in this case, and reverse and remand for proceedings consistent with this opinion and Minnesota law.

Further, we find it troubling that respondent's counsel resorted to grossly inappropriate arguments in his supplemental briefing. We would think that the

impropriety of characterizing our supreme court's approach as "cavalier" and "based upon political motives," and the added impropriety of telling this court that applying settled principles of law would be "disingenuous" (a close cousin of "dishonest"), is so obvious as not to require comment. But because that is clearly not the case, we point counsel to the Minnesota Professionalism Aspirations IV.A.1, which states that attorneys "will speak and write civilly and respectfully in all communications with the court," and ask that counsel remember this basic tenet of professionalism when submitting written materials to this court.

Reversed and remanded.