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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1871**

Michael Neil Labrasca, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed January 14, 2019
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge**

Becker County District Court
File No. 03-CV-15-1727

Max A. Keller, Keller Law Offices, Minneapolis, Minnesota (for appellant)

Keith M. Ellison, Attorney General, Dominic J. Haik, Assistant Attorney General, St. Paul,
Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and Jesson,
Judge.

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

RODENBERG, Judge

Appellant Michael Labrasca challenges the district court's order sustaining the revocation of his driving privileges. He argues that his due-process rights were violated by his being read an inaccurate implied-consent advisory and that the warrantless search of his urine was unconstitutional under the Fourth Amendment. Appellant is not entitled

to reversal based on his due-process argument, but we reverse and remand to the district court to reconsider the voluntariness of appellant's consent to the seizure of his urine under the Fourth Amendment.

FACTS

Appellant was arrested by Officer Streibel of the Detroit Lakes Police Department for driving while intoxicated (DWI). Officer Streibel transported appellant to jail and read him the implied-consent advisory which said, among other things, that refusal to take a test is a crime. Appellant said that he understood the advisory. Officer Streibel provided appellant an opportunity to consult with an attorney. Appellant made telephone contact with an attorney and, on his own initiative, indicated that he was done using the telephone 13 minutes later. Officer Streibel then asked appellant if he would supply a urine sample. Appellant agreed to do so. Officer Streibel testified that, during the reading of the implied-consent advisory and requesting that appellant supply a urine sample, he spoke to appellant in a monotone voice, did not brandish his weapon or threaten appellant at any point, and was sitting approximately six feet away from appellant who was not handcuffed.

Appellant's license to operate a motor vehicle was revoked based on the results of the urine test, which showed an alcohol concentration of 0.16 or more. Appellant timely challenged revocation of his driver's license by filing an implied-consent petition. An implied-consent hearing was held, where appellant argued both that his constitutional rights were violated when he was told he could be charged with a crime for test refusal during the implied-consent advisory, and that the implied-consent advisory was seriously misleading on its face. The district court found that, under the totality of the circumstances,

the commissioner of public safety met its burden of proving that appellant freely and voluntarily consented to the seizure of his urine. The district court also determined that the implied-consent advisory was not misleading on its face, nor was it misleading as applied to appellant, because informing appellant that “refusal to take a test is a crime” was not misleading at the moment those words were read to him because appellant could have been prosecuted for refusing to take a breath test had that test been offered.

This appeal followed.¹

DECISION

Due-Process

Appellant argues that his due-process rights were violated when he was read an inaccurate implied-consent advisory. “We review due-process challenges de novo.” *Thole v. Comm’r of Pub. Safety*, 831 N.W.2d 17, 19 (Minn. App. 2013), *review denied* (Minn. July 16, 2013). In *McDonnell v. Comm’r of Pub. Safety*, the Minnesota Supreme Court held that an implied-consent advisory that threatens criminal charges the state is not actually authorized to impose violates a driver’s constitutional due-process rights and requires rescission of the order revoking the driver’s driving privileges. 473 N.W.2d 848, 855 (Minn. 1991). In a recent opinion, the supreme court explained that a due-process

¹ This appeal was initially stayed pending the supreme court’s decision in *State v. Phillips*, No. A16-0129 (Minn. App. Aug. 29, 2016), *review dismissed* (Minn. May 18, 2017). Following Phillips’s death and the supreme court’s dismissal of the case, the matter was again stayed pending final dispositions in *Morehouse v. Comm’r of Pub. Safety*, 911 N.W.2d 503 (Minn. 2018), and *Johnson v. Comm’r of Pub. Safety*, 911 N.W.2d 506 (Minn. 2018). After the supreme court issued its decisions in *Morehouse* and *Johnson*, we reinstated this appeal.

violation under *McDonnell* does not exist “solely because a driver had been misled” by the implied-consent advisory. *Johnson v. Comm’r of Pub. Safety*, 911 N.W.2d 506, 508 (Minn. 2018). Rather, it concluded that a due-process violation under *McDonnell* requires three elements:

A license revocation violates due process when: (1) the person whose license was revoked submitted to a breath, blood, or urine test; (2) the person prejudicially relied on the implied consent advisory in deciding to undergo testing; and (3) the implied consent advisory did not accurately inform the person of the legal consequences of refusing to submit to the testing.

Id. at 508-09.

In *Morehouse v. Comm’r of Pub. Safety*, a companion opinion to *Johnson*, the supreme court held that all three elements must be present to entitle an appellant to relief from a district court’s license-revocation order. 911 N.W.2d 503, 505 (Minn. 2018). The supreme court rejected Morehouse’s due-process-violation argument and reasoned that, “[b]ecause Morehouse did not even claim, much less establish, that he prejudicially relied on the implied consent advisory, Morehouse is not entitled to a rescission of his license revocation under *McDonnell*.” *Id.*

Here, the first element of *Johnson* is satisfied. Appellant submitted to a urine test. Appellant concedes that he “has never shown prejudice or prejudicial reliance upon the inaccurate and misleading advisory read to him, because until May 2, 2018, he was never required to show prejudice to prevail on his *McDonnell* claim.” Appellant nevertheless asks that we remand to the district court to afford appellant the opportunity to establish prejudicial reliance because prejudicial reliance was not an element of a due-process

violation until the supreme court's *Morehouse* and *Johnson* opinions. But the supreme court in *Johnson* analyzed its decision in *McDonnell* as having always required prejudicial reliance on an inaccurate implied-consent advisory in order to establish a due-process violation. 911 N.W.2d at 508-09. And in *Morehouse*, the supreme court declined to provide the driver an opportunity to develop the record regarding such prejudicial reliance, where the claim was not made initially. 911 N.W.2d at 505. *See also Windsor v. Comm'r of Pub. Safety*, ___ N.W.2d ___, ___, 2018 WL 5780410, at *4 (Minn. App. Nov. 5, 2018) (holding that appellant is not entitled to a remand under *Morehouse* to develop record to establish prejudicial reliance). Accordingly, appellant has not shown a *McDonnell* due-process violation. Therefore, appellant is not entitled to a remand on this issue.

Fourth Amendment

Appellant argues that the warrantless seizure of his urine violated the Fourth Amendment because caselaw requires either a warrant or an exception to the warrant requirement, appellant did not validly consent to the seizure, and the good-faith exception to the exclusionary rule does not apply.

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Seizure of a driver's urine is a search for Fourth Amendment purposes. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). "Searches conducted without a warrant, outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *State v. Thompson*, 886 N.W.2d 224, 228 (Minn. 2016) (quotation omitted).

One such recognized exception to the constitutional warrant requirement is the consent exception, where “the subject of the search consents.” *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.* “Whether consent was voluntary is determined by examining 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.” *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999) (quotation omitted). If the circumstances indicate that the encounter was coercive, then consent is involuntary and evidence must be suppressed. *Id.* Whether consent was voluntary is a question of fact that is reviewed for clear error. *State v. Diede*, 795 N.W.2d 836, 846-47 (Minn. 2011).

Here, Officer Streibel read appellant the implied-consent advisory, informed him that refusal to take a test is a crime, and requested that appellant provide a urine sample for testing. The district court concluded that appellant voluntarily consented to the urine search based on the totality of the circumstances, including the nature of the encounter, the kind of person appellant is, and what was said and how it was said. But the district court did not take into account that, in the context of a urine test, the implied-consent advisory inaccurately advised appellant that refusal to take a test is a crime.

The United States Supreme Court considered a similar issue in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). Defendant Beylund was arrested in North Dakota for driving while impaired and “submitted to a blood test after police told him that the law required his submission.” *Id.* at 2186. Because the blood test results revealed Beylund was intoxicated at the time, he had his license “suspended for two years after an

administrative hearing.” *Id.* at 2172. Beylund appealed, “arguing that his consent to the blood test was coerced by the officer’s warning that refusing to consent would itself be a crime.” *Id.* The North Dakota Supreme Court affirmed the license suspension, “emphasiz[ing] that North Dakota’s implied consent advisory was not misleading because it truthfully related the penalties for refusal.” *Id.* After concluding that states may not compel warrantless blood tests, the Supreme Court remanded to the North Dakota Supreme Court to “reevaluate Beylund’s consent given the partial inaccuracy of the officer’s advisory [in light of the Supreme Court’s decision].” *Id.* at 2186. For purposes of a Fourth Amendment analysis, the Supreme Court gave Beylund the benefit of the *Birchfield* decision by characterizing the implied-consent advisory as inaccurate despite it having been correct at the time of its reading. *Id.* (“[M]otorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.”).

Following *Birchfield*, the Minnesota Supreme Court examined Minnesota’s implied-consent law in *Thompson*. 886 N.W.2d 224. The supreme court concluded that a urine test given under that law implicated privacy rights under the Fourth Amendment and ordinarily requires a warrant; it held that “a warrantless urine test does not qualify as a search incident to a valid arrest of a suspected drunk driver.” *Thompson*, 886 N.W.2d at 230, 233.

We agree with appellant that the implied-consent advisory read to him was inaccurate because he was threatened with a criminal charge if he declined to supply a urine sample. Although it is true that the advisory would have been accurate had a breath test been sought, that is not what happened. Appellant was asked to supply a urine sample after

having been told that refusal would be a crime. But we note that, at the time the district court determined that appellant voluntarily consented to the warrantless urine search, the district court did not have the benefit of the supreme court's decisions in *Thompson*, *Johnson*, or *Morehouse*. It therefore did not consider whether the inaccuracy of the implied-consent advisory might have rendered appellant's consent to the urine test involuntary. Accordingly, we reverse and remand to the district court to reconsider whether, in light of *Thompson*, *Johnson*, and *Morehouse*, the totality of the circumstances indicates that appellant's consent to the urine test was voluntarily given.

Appellant asks us to reverse the district court, without remanding the case, and hold that appellant's consent was not voluntary as a matter of law. The inquiry concerning whether appellant voluntarily consented to the warrantless urine search is a factual one that is properly resolved by the district court.² See *Fontaine v. Steen*, 759 N.W.2d 672, 679 (Minn. App. 2009) (stating that it is not within the province of appellate courts to determine issues of fact on appeal).

The state argues that even if appellant's consent was not voluntary, the good-faith exception to the exclusionary rule applies. See *State v. Lindquist*, 869 N.W.2d 863, 876 (Minn. 2015) (holding that the "exclusionary rule does not apply to violations of the Fourth Amendment to the U.S. Constitution, or Article I, Section 10, of the Minnesota

² Our remand for reconsideration of the voluntariness of appellant's consent is no indication of how the district court should resolve the issue. Because consent is a fact-dependent issue, see *Brooks*, 838 N.W.2d at 568-69; *Harris*, 590 N.W.2d at 104, the district court must assess all evidence available to it. This is uniquely the district court's proper role. Whether the record should be reopened on remand is left to the district court's discretion.

Constitution when law enforcement acts in objectively reasonable reliance on binding appellate precedent”). This argument would only be relevant if the district court finds a constitutional violation. We therefore decline to address it as premature.³

Affirmed in part, reversed in part, and remanded.

³ We also note that this issue was not raised to the district court. We therefore have no occasion to opine concerning that issue now. *See State v. Lemmer*, 736 N.W.2d 650, 656 (Minn. 2007) (stating that appellate courts will not “decide issues that have not been first addressed by the district court and are raised for the first time on appeal”).