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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0102**

State of Minnesota,
Respondent,

vs.

Brandyn Lee Hulsebus,
Appellant.

**Filed January 22, 2019
Reversed and remanded
Bratvold, Judge**

Redwood County District Court
File No. 64-CR-15-702

Keith M. Ellison, Attorney General, St. Paul, Minnesota; and

Jenna M. Peterson, Redwood County Attorney, Rudolph P. Dambeck, Assistant County Attorney, Redwood Falls, Minnesota (for respondent)

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Considered and decided by Halbrooks, Presiding Judge; Bratvold, Judge; and
Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this direct appeal from a judgment of conviction for fourth-degree driving while impaired by a controlled substance, appellant argues that the district court erred in failing to suppress the results of a warrantless chemical test of his urine because (1) the misleading advisory invalidated his consent under the Fourth Amendment and (2) the reading of the inaccurate implied-consent advisory violated his right to due process. The state opposes relief on either claim on several grounds including the good-faith exception to the exclusionary rule. We reverse and remand to the district court for proceedings consistent with this opinion and for the court to make necessary factual findings on both the Fourth Amendment and due-process issues.

FACTS

At approximately 4:00 p.m. on July 3, 2015, a concerned driver, C.E., called 911 about a truck traveling on highway 71. C.E. informed the 911 dispatcher that he saw the truck fail to stop at a stop sign, nearly hit a motorcycle, and drive into oncoming traffic before entering a ditch and returning to the highway. The dispatcher contacted a deputy, who saw the truck cross over the center and fog lines at around 4:20 p.m.

The deputy stopped the truck and identified the driver as appellant Brandyn Lee Hulsebus. After observing “what he considered signs of impairment,” the deputy asked Hulsebus to perform field sobriety tests and a preliminary breath test (PBT). Hulsebus blew a 0.00 on the PBT, but because of “the driving conduct reported and observed” by the deputy and Hulsebus’s “performance and demeanor,” the deputy suspected that Hulsebus

was under the influence of other substances. The deputy placed Hulsebus under arrest for driving under the influence.

After transporting Hulsebus to jail, the deputy read Hulsebus the implied-consent advisory and told Hulsebus that “[r]efusal to take a test is a crime.” The deputy asked Hulsebus if he would like to contact an attorney, and Hulsebus said yes. Hulsebus’s cellphone was returned to him and he used his phone for 20 minutes and talked to several people.¹ After Hulsebus ended his phone time, the deputy asked Hulsebus if he would take a urine test. Hulsebus asked, “Yeah, it’s a crime not to, right?” and the deputy stated, “As I said before, refusal to take a test is a crime.” Hulsebus then provided a urine sample.

The urine sample was sent to the Bureau of Criminal Apprehension (BCA) for analysis. The BCA report stated that 11-nor-9-carboxy-delta-9-tetrahydrocannabinol (a metabolite of THC), alprazolam, and alpha-hydroxyalprazolam (a metabolite of alprazolam) were present at the time of testing. “All three substances detected in the sample are identified by statute as controlled substances.” Hulsebus was charged with fourth-degree driving while impaired (controlled substance) (“DWI”). Minn. Stat. § 169A.20, subd. 1(2) (2016).

Before the omnibus hearing, Hulsebus moved to suppress the urine test results and dismiss the DWI charge, arguing that (1) the deputy lacked probable cause to stop Hulsebus, (2) Hulsebus’s right to counsel was not vindicated, and (3) under *Trahan/McNeely*, police did not have exigent circumstances to support a warrantless urine

¹ The district court did not specifically find, and the stipulated facts do not indicate, whether Hulsebus actually spoke to an attorney.

search. Additionally, Hulsebus argued that (4) he “was informed that Minnesota law *required* him to submit to testing; further, that refusal to do so would be a *crime*. Thus, any ‘consent’ to testing by [Hulsebus] was not genuine Fourth Amendment consent, but instead was forced/coerced.”

At the omnibus hearing, it appears that only issues (1)-(3) were argued.² In a written decision on December 9, 2015, the district court denied Hulsebus’s motion to suppress the urine test results, finding that the deputy had probable cause for the stop, that Hulsebus’s right to an attorney was vindicated, and that the urine test was permissible as a search incident to an arrest. The district court did not address the voluntariness of Hulsebus’s consent.

On December 28, 2015, this court released *State v. Thompson*, 873 N.W.2d 873 (Minn. App. 2015), *aff’d*, 886 N.W.2d 224 (Minn. 2016), *cert. denied*, 137 S. Ct. 1338 (2017), and Hulsebus moved to reopen the omnibus hearing, arguing that, under *Thompson*, “the urine test result obtained by law enforcement must be suppressed.” The district court denied the suppression motion after determining that *Thompson* was distinguishable because it was a test-refusal conviction and no searches actually occurred. Additionally, the district court ruled that the good-faith exception precluded application of the exclusionary rule.

² A transcript for the November 23, 2015 hearing is not in the record. After Hulsebus filed this appeal, he also filed a letter stating that he would “not be ordering or filing a trial transcript. There was no trial, and thus no transcript exists.” The appellant bears the burden of providing an adequate record for an appellate court. *State v. Heithecker*, 395 N.W.2d 382, 383 (Minn. App. 1986). Without a hearing transcript in the record, our review of the omnibus hearing is necessarily constrained.

In October 2016, Hulsebus waived his right to a jury trial, stipulated to facts, and submitted the case for a bench trial under Minn. R. Crim. P. 26.01, subd. 3(a). In a written order issued October 17, 2016, the district court found Hulsebus guilty of operating a motor vehicle under the influence of a controlled substance in violation of Minn. Stat. § 169A.20, subd. 1(2). The district court specifically stated that “[b]ased upon the urine test results, there is no reasonable doubt that [Hulsebus] had consumed a controlled substance.” The district court also returned to its decision to deny Hulsebus’s motion to suppress the urine test results and recognized that *Thompson* “effectively excluded the urine sample without another valid exception to the warrant requirement.” The district court then reiterated that it “found the good-faith exception applicable” to the “warrantless collection of [Hulsebus’s] urine sample.” The district court also determined “that nothing within either [*Trahan* or *Thompson*] . . . affects [its] . . . decision to apply the good-faith exception to the warrantless collection of [Hulsebus’s] urine.”

After the district court rendered its verdict, but before sentence was imposed, Hulsebus moved to amend the conclusions of law to conform to *Johnson v. Comm’r of Pub. Safety*, 887 N.W.2d 281 (Minn. App. 2016), *rev’d*, 911 N.W.2d 506 (Minn. 2018), a decision of this court that was released after the district court’s verdict on November 7, 2016. In his motion to amend, Hulsebus argued that he had “repeatedly contended that the Minnesota [implied-consent advisory (“ICA”)] violates due process.” Because the deputy told Hulsebus that he could be charged with refusal to take a urine test, “pursuant to an ICA which misinformed, misled and effectively coerced [Hulsebus’s] submission, [the urine sample] was inadmissible and should have been suppressed when raised as an issue

at omnibus hearing(s).” The district court denied Hulsebus’s motion to amend after addressing the argument on its merits and concluding that the good-faith exception was applicable.

This appeal followed. After briefing but before oral argument, the state requested and was granted a stay of appeal pending the supreme court’s decision in *State v. Phillips*, No. A16-0129, 2016 WL 4497355 (Minn. App. Aug. 29, 2016), *review granted* (Minn. Nov. 15, 2016) *and appeal dismissed* (Minn. May 18, 2017) (dismissed for death of appellant). The stay was continued pending the supreme court’s 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*, this court reinstated the appeal and directed the parties to submit informal briefs addressing the application of those cases.

D E C I S I O N

In considering Hulsebus’s appeal, we first address his claim that the district court erred in failing to suppress the urine test results under the Fourth Amendment. Second, we address whether Hulsebus’s due-process rights were violated by the deputy’s reading of an inaccurate implied-consent advisory. Third, we consider the state’s contention that the district court correctly rejected both claims based on the good-faith exception to the exclusionary rule.

I. Suppression of the urine test results under the Fourth Amendment

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. *See* U.S. Const. amend. IV; Minn. Const. art. I, § 10. The Minnesota Supreme

Court has held that, under the Fourth Amendment, taking a urine sample constitutes a search. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). Generally, a search conducted without a warrant is “per se unreasonable,” unless an exception applies. *State v. Rohde*, 852 N.W.2d 260, 263 (Minn. 2014). If a search is conducted without a warrant or a valid exception to the warrant requirement, the district court will suppress evidence under the exclusionary rule, which functions “as a remedy for Fourth Amendment violations.” *State v. Lindquist*, 869 N.W.2d 863, 868 (Minn. 2015); *see also United States v. Calandra*, 414 U.S. 338, 347, 94 S. Ct. 613, 619 (1974) (noting that under the exclusionary rule, “evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure”).

Here, the state obtained Hulsebus’s urine without a warrant and the only relevant exception is consent. Under the consent exception to the warrant requirement, the state must demonstrate by a preponderance of the evidence that a defendant “freely and voluntarily consented” to the search. *Brooks*, 838 N.W.2d at 568. A district court determines voluntariness of consent by taking into consideration “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 district court determines that a defendant’s acquiescence to a search was coerced, then the defendant’s consent was involuntary and evidence from that search must be suppressed. *Id.* Consent is a fact-intensive question, the resolution of which we review for clear error. *State v. Diede*, 795 N.W.2d 836, 846-47 (Minn. 2011).

Hulsebus argues that he did not voluntarily consent to give a urine sample because he was coerced by the inaccurate implied-consent advisory. In his suppression motion, Hulsebus argued that he “was informed that Minnesota law *required* him to submit to testing; further, that refusal to do so would be a *crime*. Thus, any ‘consent’ to testing by [Hulsebus] was not genuine Fourth Amendment consent, but instead was forced/coerced.”

Here, the district court never discussed or made any specific findings about the voluntariness of Hulsebus’s consent. In its omnibus order, the district court did not address Hulsebus’s argument that his consent was coerced by the reading of an implied-consent advisory and made no findings regarding the totality of the circumstances of Hulsebus’s consent. Instead, the district court summarily noted that Hulsebus “agreed to submit a urine sample.” Similarly, in the stipulated facts, both parties agreed that Hulsebus “consented to providing a urine sample. His ‘consent’ was pursuant to the reading of the standard Minnesota Implied Consent Advisory.” The district court’s written verdict also did not analyze the voluntariness of Hulsebus’s consent but only noted that Hulsebus “consented to a urine test.”

The closest the district court came to making *any* findings about voluntariness was in its order denying Hulsebus’s motion to amend, where the court wrote that, “[e]ven if [Hulsebus] can’t be said to have ‘consented’ to the urine test under *Brooks*, and that by providing the inaccurate advisory, the state misinformed [Hulsebus] regarding the potential penalty for refusing to submit to a urine test and violated his right to due process, as established in *McDonnell*,” the state would be entitled to the good-faith exception. As analyzed below, however, the district court erred by relying on the good-faith exception.

In the absence of any consent findings by the district court, we cannot determine whether the district court erred in failing to suppress the urine test results. Thus, we reverse and remand for the district court to determine whether, under the totality of the circumstances, Hulsebus's consent to the urine test was voluntary.

II. Due-process violation

Hulsebus argues that his procedural due-process rights were violated because the deputy read and Hulsebus relied on an inaccurate implied-consent advisory. When law enforcement reads an implied-consent advisory that “permit[s] police to threaten criminal charges the state was not authorized to impose,” a defendant may establish a violation of due process. *McDonnell v. Comm’r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991). Recently, the supreme court held that a due-process violation in this context has three elements:

- (1) the person . . . 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.

Johnson v. Comm’r of Pub. Safety, 911 N.W.2d 506, 508-09 (Minn. 2018). All three elements must be present to demonstrate a due-process violation. *Id.* at 509. We review procedural due-process challenges de novo. *See Bendorf v. Comm’r of Pub. Safety*, 727 N.W.2d 410, 413 (Minn. 2007).

Here, the first element of *Johnson* is satisfied because Hulsebus submitted to a urine test. Turning to the second element in *Johnson*, the state contends that Hulsebus has not established that he prejudicially relied on the implied-consent advisory. Caselaw informs

us that an appellant must both claim and establish prejudicial reliance during district court proceedings. In *Morehouse v. Comm’r of Pub. Safety*, the supreme court rejected appellant’s due-process claim because he “did not even claim [in the district court], much less establish, that he prejudicially relied on the implied consent advisory.” 911 N.W.2d at 505. In *Windsor v. Comm’r of Pub. Safety*, we refused to remand an appellant’s due-process claim because he had not, during district court proceedings, presented evidence to establish prejudicial reliance on an inaccurate implied-consent advisory. ____ N.W.2d ____, ____ (Minn. App. 2018) (reasoning that “Windsor concedes that the record does not contain evidence sufficient to establish such a finding” on prejudicial reliance).

In contrast to the appellants in *Windsor* and *Morehouse*, Hulsebus argued to the district court that the implied-consent advisory violated his right to due process under *McDonnell* and that the advisory “misinformed, misled and effectively coerced [Hulsebus’s] submission.” Hulsebus also submitted evidence sufficient to determine whether he prejudicially relied on the implied-consent advisory. Specifically, the district court, in its omnibus order, stated it had viewed the implied-consent video of the deputy’s conversation with Hulsebus. As previously summarized, the video includes not only the implied-consent advisory and Hulsebus’s opportunity to contact an attorney, but also the deputy’s inquiry whether Hulsebus would consent to urine testing. Hulsebus responded, “Yeah, it’s a crime not to, right?” The deputy reiterated that it was a crime to not provide a sample and Hulsebus then provided a urine sample. The district court, however, did not determine whether Hulsebus prejudicially relied on the implied-consent advisory in agreeing to submit to testing.

The third element of *Johnson* is satisfied because the implied-consent advisory misled Hulsebus about his legal obligations to submit to urine testing and the consequences of not complying with those obligations. *See McDonnell*, 473 N.W.2d at 854 (holding that due process “does not permit those who are perceived to speak for the state to mislead individuals as to either their legal obligations or the penalties they might face should they fail to satisfy those obligations.”). The state contends that the implied-consent advisory was accurate when read. We are not persuaded.

Recently, the Minnesota Supreme Court described the *Birchfield* rule as meaning, “in the DWI context, the State may not criminalize refusal of a blood or a urine test absent a search warrant or a showing that a valid exception to the warrant requirement applies.” *Johnson v. State*, 916 N.W.2d 674, 679 (Minn. 2018); *see also Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016) (concluding that a similar implied-consent advisory given in 2013 was inaccurate in light of the United States Supreme Court’s determination that blood tests could not be compelled without a warrant or an exception to the warrant requirement); *Thompson*, 886 N.W.2d at 233-34 (holding that the state cannot criminalize refusal to submit to a warrantless urine test). The Minnesota Supreme Court also held that the *Birchfield* rule has retroactive effect. *See Johnson*, 916 N.W.2d at 684 (directing case-by-case review to determine whether a warrant or an exception to the warrant requirement will sustain a test-refusal conviction). Based on the retroactive effect of the *Birchfield* rule, we conclude that the implied-consent advisory was inaccurate when it was given because it misled Hulsebus that refusal to take a urine test is a crime.

Without a determination of whether Hulsebus prejudicially relied on the implied-consent advisory, however, we cannot determine whether the district court erred in denying his due-process claim. Thus, we reverse and remand for the district court to determine whether Hulsebus prejudicially relied on the implied-consent advisory.

III. Good-faith exception

The state argues in response to both the Fourth Amendment and due-process claims that the district court correctly relied on the good-faith exception to the exclusionary rule and urges this court to hold that the exception “should apply and prevent suppression of the urine [test] results.”

In *State v. Lindquist*, the supreme court adopted the good-faith exception to the exclusionary rule. 869 N.W.2d at 871. The supreme court initially “identified deterrence of police misconduct as the central purpose of the exclusionary rule.” *Id.* Next, the supreme court held that the good-faith exception applies only when “law enforcement acts in objectively reasonable reliance on binding appellate precedent.” *Id.* The supreme court specifically “note[d] the narrowness of [the] holding,” which required binding appellate caselaw that *explicitly authorized* a police practice. 869 N.W.2d at 876-79 (“[N]othing in our opinion should be construed as authorizing the application of exceptions we have not explicitly adopted.”).

First, we consider the application of the good-faith exception to Hulsebus’s Fourth Amendment claim. The district court reasoned that, because law enforcement conducted a warrantless search while “acting in objectively reasonable reliance on binding appellate precedent that did not prohibit searches like the one conducted,” the good-faith exception

applied and Hulsebus's urine sample would not be suppressed. We conclude that the district court inappropriately applied the good-faith exception after its review of the law showed that case law "did not prohibit" the search conducted of Hulsebus. The district court's reasoning contradicts the supreme court's decree in *Lindquist* that binding caselaw must explicitly authorize a search for the exception to apply. *Id.* at 876-79. Moreover, neither the district court nor the state cite any case law authorizing a warrantless urine search in the absence of any exception to the warrant requirement. Because binding appellate precedent did not authorize a warrantless search of Hulsebus's urine absent his consent, we reject the state's claim that the good-faith exception applies.

Next, we consider the application of the good-faith exception to Hulsebus's claim of a due-process violation. In *Lindquist*, the supreme court recognized the good-faith exception solely with regard to the exclusionary rule's application to violations of Fourth Amendment rights. *Id.* at 868-70; *see also Davis v. United States*, 564 U.S. 229, 236-37 131 S. Ct. 2419, 2426-28 (2011) (noting that the purpose of the exclusionary rule is to "deter future Fourth Amendment violations"). Based on existing caselaw, we conclude that the good-faith exception applies to violations of Fourth Amendment rights, but has no application to a claim for a due-process violation. *See Thompson*, 873 N.W.2d at 880 (noting that the good-faith exception "applies only to Fourth Amendment violations").

We conclude, therefore, that the district court erred in applying the good-faith exception to both Hulsebus's Fourth Amendment and due-process claims.

Because we conclude that the district court failed to determine the voluntariness of Hulsebus's consent, and that it was error to apply the good-faith exception, we reverse and

remand the Fourth Amendment issue for the district court to determine the voluntariness of Hulsebus's consent. Similarly, because we conclude that Hulsebus claimed a due-process violation during district court proceedings and presented evidence regarding his prejudicial reliance on the implied-consent advisory, we reverse and remand for the district court to determine whether Hulsebus prejudicially relied on the implied-consent advisory in consenting to provide a urine sample.

Reversed and remanded.