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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-0276**

State of Minnesota,  
Respondent,

vs.

Jeffrey Scott Hammers,  
Appellant.

**Filed September 18, 2017  
Affirmed  
Ross, Judge**

Carver County District Court  
File No. 10-CR-16-236

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

Mark A. Metz, Carver County Attorney, Kelly J. Small, Assistant County Attorney,  
Chaska, Minnesota (for respondent)

Richard L. Swanson, Chaska, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Connolly,  
Judge.

**UNPUBLISHED OPINION**

**ROSS, Judge**

Jeffrey Hammers heard the implied-consent advisory and agreed to submit a breath  
sample after police arrested him for driving drunk. His breath sample registered an alcohol

concentration more than three times the per se intoxication limit. The state charged Hammers with two counts of driving while impaired, which Hammers moved to dismiss. The district court denied his motion twice and later found him guilty. Hammers now challenges the district court's denial of his motion, arguing that the deputy's failure to advise him about his warrant rights under the implied-consent statute violated his due process rights. Because Minnesota Statutes section 169A.51, subdivision 2 (2016), does not require a warrant advisement and the advisory was not misleading, we affirm.

### **FACTS**

Carver County Deputy Charles Possert stopped Jeffrey Hammers after he saw Hammers drive his car over the fog and center lines. The deputy noticed that Hammers's eyes were watery and bloodshot. Hammers also had difficulty shifting the car into park and retrieving his license. After Hammers failed field-sobriety tests, the deputy arrested him and took him to the county jail.

The deputy read Hammers the implied-consent advisory, which informed him that Minnesota law required him to take an alcohol concentration test, that refusal to test was a crime, and that he had the right to consult with an attorney before deciding whether to submit to the test. Hammers stated that he understood the advisory and he declined to speak to an attorney. He took a breath test, which revealed an alcohol concentration of 0.29.

The state charged Hammers with two counts of driving while impaired (one based on his behavior and the other on his breath test). Hammers unsuccessfully moved the district court to dismiss the charges. The parties stipulated to the state's evidence under Minnesota Rule of Criminal Procedure 26.01, subdivision 4, to preserve Hammers's right

to appeal the pretrial issue. Hammers asked the district court to reopen the omnibus hearing, arguing that the implied-consent advisory was misleading and violated his right to due process. The district court reopened the omnibus hearing but again denied the motion to dismiss. The district court later found Hammers guilty of both counts of driving while impaired. Hammers appeals.

## D E C I S I O N

Hammers argues that the implied-consent advisory was misleading and violated his due process rights. “[A]n implied consent advisory that contains no misleading assurances would not violate federal due process.” *State v. Melde*, 725 N.W.2d 99, 103 (Minn. 2006). We review de novo the district court’s legal conclusions, including whether the implied-consent advisory is inaccurate and misleading. *Magnuson v. Comm’r of Pub. Safety*, 703 N.W.2d 557, 561 (Minn. App. 2005).

Hammers’s challenge to the constitutionality of the implied-consent advisory does not lead us to reverse. A police officer with probable cause to believe that a person was driving while impaired must read that person the implied-consent advisory before verifying his consent to submit to chemical testing to determine the presence of alcohol in his system. Minn. Stat. § 169A.51, subds. 1(a), 1(b)(1), 2 (2016). The officer must warn him that Minnesota law requires him to take the test, that refusing to take the test is a crime, and that he has the right to consult with an attorney. *Id.*, subd. 2. Hammers maintains unconvincingly that the implied-consent advisory must also inform drivers that Minnesota law allows officers to seek a search warrant to obtain a chemical test. He cites *Birchfield v. North Dakota* for the notion that the advisory defined by statute is inadequate because it

lacks a warrant advisement. *See* \_\_\_ U.S. \_\_\_, 136 S. Ct. 2160 (2016). The *Birchfield* Court held that a breath test is a permissible search incident to a person’s drunk-driving arrest and that the state may therefore criminally prosecute the person for refusing a warrantless breath test. *Id.* at \_\_\_, 136 S. Ct. at 2186. We read nothing in *Birchfield* to require the state’s implied-consent advisory to contain a warrant advisement for breath tests.

We are not persuaded otherwise by Hammers’s reliance on *McDonnell v. Comm’r of Pub. Safety*, which Hammers believes is “indistinguishable” from this case. 473 N.W.2d 848 (Minn. 1991). *McDonnell* actually does not resemble this case. In *McDonnell*, police arrested a woman for driving while impaired and read her an implied-consent advisory. *Id.* at 851. The advisory inaccurately explained that she could be prosecuted for refusing to take a breath test, because, at that time, the law prohibited her prosecution for test refusal unless her license had been previously revoked. *Id.* at 851. By contrast here, current Minnesota law would not have permitted police to obtain a warrant to test Hammers if he refused testing after he received the implied-consent advisory. *See* Minn. Stat. § 169A.52, subd. 1 (2016) (“If a person refuses to permit a test, then a test must not be given.”); *see also State v. Scott*, 473 N.W.2d 375, 377 (Minn. App. 1991) (explaining that police may not compel driver to submit to test after driver refuses test). *McDonnell* does not advance Hammers’s contention that the advisory was unconstitutionally misleading.

Because neither the statute nor any caselaw requires a warrant advisement, the advisory was not misleading and did not violate Hammers’s due process rights. The district court did not err by denying Hammers’s motion to dismiss.

**Affirmed.**