STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0674

State of Minnesota,
Respondent,

vs.

John Duane Fairbanks,
Appellant.

Filed April 2, 2018
Reversed and remanded
Jesson, Judge

Beltrami County District Court
File No. 04-CR-15-3394

Lori Swanson, Attorney General, Cory Beth Monnens, Assistant Attorney General, St. Paul, Minnesota; and

David Hanson, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Reyes, Judge; and Jesson, Judge.

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

JESSON, Judge

While driving his maroon pickup truck, appellant John Duane Fairbanks nearly collided with a car driven by a Bureau of Criminal Apprehension agent. When law enforcement officers attempted to stop Fairbanks, he fled and officers gave chase.

Fairbanks eventually pulled over and was arrested, charged, and later convicted of fleeing police and felony driving while impaired (DWI). Fairbanks appeals his conviction of felony DWI, challenging the district court's admission of the results of a urine test he gave after his arrest, arguing that he did not provide adequate consent in part because he was inaccurately informed that if he failed to take the urine test, he could be charged with a crime. We reverse and remand for a new trial.

FACTS

On Saturday October 24, 2015, appellant John Duane Fairbanks was driving a maroon pickup truck when he almost collided with a car driven by an agent from the Bureau of Criminal Apprehension (BCA). Following this near collision, the agent noted that Fairbanks's car drifted into different lanes several times and onto the shoulder of the highway. The agent activated his car's lights and sirens and attempted to pull the pickup over. At multiple points Fairbanks seemed as if he would stop, but then sped away. Eventually, he pulled into a driveway and additional law enforcement officers arrived to assist. Officers approached Fairbanks and noticed he smelled of alcohol, had bloodshot and watery eyes, and slurred his speech.

Officers transported Fairbanks to the Beltrami County jail. There, Fairbanks informed officers that he was diabetic and had not eaten much that day, that he had consumed alcohol but "not a lot," and he was unsure when his last drink was. An officer asked Fairbanks to complete field sobriety tests including the horizontal gaze test, the walk and turn, and the one-legged stand. Fairbanks failed each test. Fairbanks was arrested for driving under the influence of alcohol.

The officer read Fairbanks the implied consent advisory, stating that he was required to take a test to determine if he was under the influence of alcohol. The advisory warned that Fairbanks's refusal to take a test would be a crime. He was advised he could speak to an attorney before consenting to a test, but Fairbanks declined. The officer then asked if he would provide a urine test and Fairbanks responded yes. Officers offered no other type of test.

Approximately fifteen minutes passed between Fairbanks's original agreement to take the test and when he actually took the test. During this time, as captured on video, Fairbanks's behavior deteriorated. He often sobbed and struggled to stand and sit on his own. While standing, he began to fall and needed assistance from officers to sit in a chair. Once in the chair, he slid onto the floor where he cried and repeatedly told officers "I don't want to fall over" and "I don't want to feel stupid right now." He needed to be lifted off the floor and back into a chair, continuing to cry and state "I don't want to feel stupid right now." He fell out of the chair again, despite officers attempting to hold him in place, and sobbed as he rolled around on the floor. Again officers lifted Fairbanks off the floor and back into the chair.

Officers told Fairbanks three times during this fifteen-minute period that he could be charged with a crime for refusal to take the urine test. They stated "if this is unreasonably delayed you are going to be charged with a refusal," that "refusal or unreasonably delaying the test is a crime," and that "if we keep doing this and we don't get the test it will be unreasonably delayed." They also told him they did not want him "to get in more trouble." Officers then attempted to get Fairbanks to the toilet twice, but had to

have him sit back down because Fairbanks could not walk. Officers told Fairbanks, due to his inability to walk to the toilet, "you're going to be charged with refusal to take a test." But officers tried one more time and were able to get Fairbanks to the toilet. Fairbanks had trouble sitting on the toilet and when sitting, continued to tell officers "help me walk." An officer had to remind Fairbanks to stay awake while on the toilet. Eventually, Fairbanks provided urine for the test. After doing so, Fairbanks asked about the test and seemed unclear that he had already provided the sample. The test results showed an alcohol concentration of 0.149 per 67 milliliters of urine.

Fairbanks was charged with Count I—Felony First-Degree DWI[1] and Count II—Fleeing a Police Officer.[2] Fairbanks filed a motion to suppress the urine test results and to dismiss the DWI charge for lack of probable cause. Fairbanks argued the district court should suppress the urine because that test required a warrant, and he did not provide consent, in part, because officers provided him with inaccurate information when they told him he could be charged with a crime for refusing to take the urine test. At the time of Fairbanks's arrest, the law in Minnesota allowed such prosecution, but while his case was pending, this court decided such prosecution would be unconstitutional. *State v. Thompson*, 873 N.W.2d 873, 880 (Minn. App. 2015), *aff'd*, 886 N.W.2d 224 (Minn. 2016) (holding the defendant's conviction for refusing to submit to a warrantless urine test violated his substantive due process rights). The district court denied Fairbanks's suppression motion. When the Minnesota Supreme Court affirmed this court's decision in

[1] In violation of Minn. Stat. §§ 169A.20, subd. 1(1), .24, subd. 1 (2014).
[2] In violation of Minn. Stat. § 609.487, subd. 3 (2014).

Thompson, Fairbanks filed a motion to reconsider, which was also denied. *State v. Thompson*, 886 N.W.2d 224, 234 (Minn. 2016), *cert. denied*, 137 S. Ct. 1338 (2017).

After Fairbanks's motion was denied, he agreed to a stipulated facts trial. Parties agreed to eleven exhibits, including law enforcement incident reports; squad video; video from the Beltrami County jail where Fairbanks was read the implied consent advisory, and struggled to but ultimately provided a urine test; the toxicology report on the urine; and a copy of Fairbanks's driver's license.

Following the stipulated facts trial, under Minnesota Rule of Criminal Procedure 26.01, subdivision 3, the district court found Fairbanks guilty on both counts and sentenced him on the most severe offense, felony DWI, to 70 months in prison.

Fairbanks appeals his DWI conviction.

D E C I S I O N

Officers informed Fairbanks multiple times that if he did not submit to a urine test he could be charged with a crime. When officers made these statements, they were consistent with Minnesota law, but while Fairbanks's case was pending, this changed. *Thompson* made it clear that prosecution for urine test refusal is unconstitutional. Fairbanks argues that the inaccuracy of information he received from officers, as well as his disorientation, physical limitations, and highly emotional state, demonstrate that he did not consent to the urine test. And because he did not consent, the search violated his Fourth Amendment rights and the district court erred in failing to suppress the test results. Fairbanks further argues that his DWI conviction was not surely unattributable to the admission of the test results and he is entitled to a new trial. We address each issue in turn.

I. The district court clearly erred when it found Fairbanks freely and voluntarily consented to the urine test.

Fairbanks argues that the district court erred in failing to suppress the results of his urine test because he did not freely and voluntarily consent to the test and therefore the search violated his Fourth Amendment rights.[3] We agree.

Both the United States and Minnesota constitutions provide Fairbanks with a right to be free from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. A urine test is a search for the purposes of the Fourth Amendment. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). There was no warrant to test Fairbanks's urine. Warrantless searches are presumptively unreasonable unless an exception to the warrant requirement applies. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). Here, the exception at issue is consent—whether Fairbanks freely and voluntarily consented to the urine test. *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.").

The district court found that Fairbanks consented to the test and made brief findings stating "[n]othing in the record suggests that [Fairbanks] was coerced in the sense that his

[3] Fairbanks also argues that officers violated his due process rights by inaccurately informing him he could be charged with a crime for refusing to take the urine test, when the Minnesota Supreme Court has since determined this is not in fact the case. *See Thompson*, 886 N.W.2d at 234 (stating a person cannot be prosecuted for refusing to submit to an unconstitutional, warrantless urine test); *see also Johnson v. Comm'r of Pub. Safety*, 887 N.W.2d 281, 295 (Minn. App. 2016), *review granted* (Minn. May 30, 2017) (holding an inaccurate advisory that misinformed the defendant "regarding the potential penalty for refusing to submit to a urine test" violated his right to due process). Because we decide this case on Fourth Amendment grounds, we do not reach this due process argument.

will had been overborne and his capacity for self-determination critically impaired." We review a district's determination on consent for clear error. *Diede*, 795 N.W.2d at 845. In doing so, we subject the claim of consent to "careful appellate review" and examine the totality of the circumstances surrounding the encounter. *State v. George*, 557 N.W.2d 575, 580-81 (Minn. 1997). Consent can be voluntary, even when a situation is uncomfortable. *Brooks*, 838 N.W.2d at 569. But an individual does not consent simply by "acquiescing to a claim of lawful authority." *Id.* In our careful appellate review of a consent claim, we examine the totality of the circumstances, which includes the nature of the encounter, the kind of person Fairbanks is, and what was said and how it was said. *State v. Harris*, 590 N.W.2d 90, 102 (Minn. 1999) (internal citations omitted).

We begin our examination by looking at the nature of the encounter. Fairbanks fled police, eventually stopped, was arrested by officers and brought to jail. He failed field sobriety tests and struggled to stand on his own. He was placed under arrest for DWI. While in custody and under arrest, he was asked to take a urine test and initially agreed. *See Brooks*, 838 N.W.2d at 571 (stating that agreeing to something after arrest is not dispositive as to valid consent and noting that someone in custody becomes more susceptible to police duress and coercion). But before he actually took the urine test, Fairbanks became increasingly distraught and unable to control his basic motor skills. He could not remain seated in a chair, falling out of it twice, and succumbed to rolling on the floor and crying. He repeated the same phrases over and over in response to officers assisting and instructing him to get up, sit in the chair, and walk to the bathroom. Officers repeatedly reminded Fairbanks that if he failed to provide a urine sample, he would be

charged with refusal. And officers attempted three different times to get Fairbanks to the bathroom. Once there, Fairbanks struggled to sit on the toilet seat, was unclear as to what he was supposed to do once seated on the toilet seat, and after he provided the urine sample, he did not seem to understand that he had provided it.

Next, we look at the type of person Fairbanks is. Fairbanks informed officers that he is diabetic and had not consumed much food that day. We also note that Fairbanks was in a highly emotional and disoriented state throughout much of his interaction with officers.

And as to what was said and how, an officer read Fairbanks the implied consent advisory and asked him to take a urine test. Fairbanks agreed, but then struggled to provide that sample. While struggling, officers told him multiple times that if he did not take the test, or caused unreasonable delay, he would be charged with a crime. This information was inaccurate since the Minnesota Supreme Court has since determined it is unconstitutional to prosecute an individual for refusing to submit to a warrantless urine test. *Thompson*, 886 N.W.2d at 254. And the fact that the officer's statements were inaccurate, warning of what would be an unconstitutional prosecution is a relevant consideration in the totality of the circumstances surrounding consent. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016) (remanding case to the state court to reevaluate consent given an inaccurate implied consent advisory).

We determine that because Fairbanks was already in custody when he agreed to a urine test, he was disoriented and had to be helped to the toilet and reminded not to fall asleep, he was highly distraught and emotional, and he was provided inaccurate information from officers regarding the consequences for failing to take the test, the totality

of the circumstances here demonstrate that Fairbanks did not freely and voluntarily consent to a urine test.[4]

The state's argument that Fairbanks consented to the urine test focuses primarily on his initial, verbal agreement to that test. But consent is more than mere verbal agreement. When we consider whether consent is properly given, we do not view a snapshot moment, rather we view both words and *actions*, in light of surrounding circumstances. *Diede*, 795 N.W.2d at 847-48. And it is Fairbanks's actions here, as well as the circumstances under which he agreed to the urine test, that give us pause. It is, after all, the state's burden to prove that the *totality* of circumstances surrounding that agreement supports free and voluntary consent. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). Fairbanks's initial verbal agreement to the test is not enough to support that burden.

We acknowledge that many suspected of driving under the influence and related crimes may be disoriented but may still provide free and voluntary consent. But the totality of the specific facts of this case—where disorientation was severe, coupled with physical

[4] Both parties compare this case to *Brooks*, the seminal recent case where the Minnesota Supreme Court determined the defendant voluntarily consented to warrantless blood and urine tests to determine alcohol concentration. 838 N.W.2d at 568. But *Brooks* was decided prior to *Thompson*, 873 N.W.2d 873 and *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016) (holding it is unconstitutional to prosecute a defendant for refusing a warrantless blood test), and those cases do not apply retroactively. *State v. Brooks*, 897 N.W.2d 811, 816 (Minn. App. 2017). Because *Thompson* was decided while this case was pending, it is appropriate that we consider its holding, and thus that the officers provided Fairbanks inaccurate information, in the totality of the circumstances. Additionally, the facts in *Brooks* and the facts here are distinguishable. Brooks was arrested for DWI three different times, was read the implied consent advisory each time, contacted an attorney prior to taking each of the blood and urine tests, and his emotional state never rose above agitation. *Id*. at 565-67. Here, Fairbanks did not contact an attorney, was provided inaccurate information by officers, and was disoriented and emotional, beyond that of mere agitation.

limitations and repeated inaccurate information from officers—demonstrates that Fairbank could not provide free and voluntary consent.

As a result, the district court's finding that there was consent is clearly erroneous. And because Fairbanks did not consent to the urine test, the test violated his Fourth Amendment right to be free from an unreasonable, warrantless search. The general remedy for a constitutional violation is suppression; therefore, the urine test results should have been suppressed. *State v. Jackson*, 742 N.W.2d 163, 178 (Minn. 2007).[5]

II. Failure to suppress the urine test results was not harmless beyond a reasonable doubt and Fairbanks is entitled to a new trial.

Having determined that the district court erred by failing to suppress the urine test results, the question now becomes whether this error was harmless beyond a reasonable doubt. *State v. Horst*, 880 N.W.2d 24, 37 (Minn. 2016). This standard requires that the

[5] There are exceptions that apply to the suppression remedy, including the good-faith exception, which the state urges us to apply. The good-faith exception could allow for the admission of the urine test results, even though officers misled Fairbanks as to the consequences of not taking the test, because officers relied on what was good law at the time. *State v. Lindquist*, 869 N.W.2d 863, 871 (Minn. 2015) (declining to suppress evidence from a search "conducted in reasonable reliance on binding appellate precedent"). But the state did not raise the good-faith exception at the district court level. Fairbanks brought a motion to reconsider suppression of the urine test results, specifically citing the Minnesota Supreme Court's decision in *Thompson*, and the court heard arguments. This provided a clear opportunity for the state to argue good faith, and it failed to do so. While the state argues we could still address the exception under Minnesota Rule of Criminal Procedure 29.04, subdivision 6, which permits "a party, without filing a cross-petition, to defend a decision or judgment on any ground that the law and record permit that would not expand the relief that has been granted to the party," this rule generally applies to parties before the Minnesota Supreme Court. The subdivision begins by stating, "[a] party cross-petitioning for review to the *Supreme Court*. . ." *Id*. (emphasis added). While we have, on occasion, allowed parties to raise alternative arguments under this rule, we decline to do so here because the state had ample opportunity and should have raised the good-faith exception to the district court. *See Ries v. State*, 889 N.W.2d 308, 316 (Minn. App. 2016).

guilty verdict for DWI in this case is surely unattributable to the admission of the test, otherwise Fairbanks is entitled to a new trial. *Id.*; *State v. Roberts*, 296 Minn. 347, 353, 208 N.W.2d 744, 748 (1973). *State v. Al-Naseer* sets out the factors this court considers when determining whether a verdict is surely unattributable to error. 690 N.W.2d 744, 748 (Minn. 2005). Those factors include "the manner in which the evidence was presented, whether it was highly persuasive, whether it was used in closing argument, and whether it was effectively countered by the defendant." *Id*. We address each factor in turn.

Looking first at how the evidence was presented, the BCA report on the alcohol content of Fairbanks's urine was one of eleven exhibits submitted. While the state argues this was just one of many pieces of evidence, the Minnesota Supreme Court has previously held that a BCA report is not likely lost "among a plethora of other evidence" in a short court trial that included testimony of four witnesses, in addition to the report. *State v. Caulfield*, 722 N.W.2d 304, 307, 314 (Minn. 2006). Just as the test in *Caulfield* was not lost in the plethora of evidence, neither was the test here. Second, the test results are highly persuasive as they provided the only scientific proof that Fairbanks's alcohol content was well over the legal limit. In fact, the results were so persuasive that the court's order finding Fairbanks guilty of first-degree felony DWI cited *only* that single piece of evidence.[6]

There were no closing arguments in the case, therefore the third *Al-Naseer* factor does not apply. And looking at the fourth element, how effectively Fairbanks countered the evidence here, he arguably could not. While Fairbanks strongly objected to the

[6] The court did mention Fairbanks's failed sobriety tests in its memo accompanying the order.

admission of the test results, he was unable to produce evidence to refute the scientific results.

Thus, while there is significant circumstantial evidence that Fairbanks was under the influence of alcohol, including his failed field sobriety tests, slurred speech, and emotionally unstable state, the urine test results provided critical evidence of Fairbanks's alcohol concentration level. This evidence is particularly important since Fairbanks told the officers he is diabetic and had not eaten much that day, which could have affected his behavior. As stated in *Caulfield*, "we do not have a single case where we have held that the admission of direct and persuasive evidence on an element of the crime is harmless because other less direct and less persuasive or largely circumstantial evidence is strong." 722 N.W.2d at 317; *see also State v. Wright*, 726 N.W.2d 464, 469, 476-79 (Minn. 2007) (holding that the trial court's error in admitting statements victims made to police officers during their field investigation was not harmless); *State v. Weaver*, 733 N.W.2d 793, 801-02 (Minn. App. 2007) (holding that the error in admitting test results through expert's testimony was not harmless but rather warranted new trial), *review denied* (Minn. Sept. 18, 2007). Similarly, we are not persuaded here that the admission of the urine test results was harmless beyond a reasonable doubt. Fairbanks is entitled to a new trial that does not include his urine test results.

Reversed and remanded.