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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0799**

Daryll Christian Strom, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 19, 2018
Affirmed
Johnson, Judge
Dissenting, Hooten, Judge**

Cook County District Court
File No. 16-CR-12-185

Cathryn Middlebrook, Chief Appellate Public Defender, Shawn Michael Leggitt, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Molly Hicken, Cook County Attorney, Grand Marais, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

In 2013, Daryll Christian Strom pleaded guilty to a charge of third-degree refusal to submit to chemical testing based on the undisputed facts that he was arrested for driving

while impaired and refused to submit to a urine test. In 2016, Strom petitioned for post-conviction relief based on *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016), in which the supreme court held that a person may not be criminally punished for refusing to submit to a warrantless blood test or a warrantless urine test. The post-conviction court denied Strom's petition on the ground that *Thompson* does not apply retroactively. We affirm.

FACTS

On July 27, 2012, an employee of the Cascade River State Park reported that a man had driven his car over a curb, which resulted in a flat tire, and that the man appeared to be drunk. Two Cook County deputy sheriffs responded to the report, identified the driver as Strom, observed signs of impairment, and administered field sobriety tests. A deputy arrested Strom for driving while impaired. The deputy read Strom the implied-consent advisory and requested that he submit to a urine test or a blood test. Strom initially agreed to a urine test but later refused to provide a urine sample. During the booking process, the deputies found controlled substances on Strom's person. A deputy also found controlled substances and drug paraphernalia while conducting an inventory search of Strom's vehicle.

In August 2012, the state charged Strom with four offenses, including third-degree refusal to submit to chemical testing, in violation of Minn. Stat. § 169A.26, subd. 1(b) (2010). In January 2013, Strom pleaded guilty to that charge. In August 2013, the district court sentenced Strom to 365 days of jail on the test-refusal charge but stayed execution of the sentence for two years. Strom did not pursue a direct appeal from his conviction and sentence.

In October 2016, the supreme court held in *Thompson* that a warrantless blood test or urine test violates the Fourth Amendment to the United States Constitution and, accordingly, that a person may not be criminally punished for refusing to submit to such a test. 886 N.W.2d at 233-34.

In November 2016, Strom filed a post-conviction petition in which he asked the post-conviction court to vacate his test-refusal conviction for the reasons stated in *Thompson*. Strom argued that *Thompson* applies retroactively because it announced a new substantive rule of law. In response, the state argued that Strom's petition is untimely and that he cannot satisfy an exception to the two-year statute of limitations because *Thompson* does not apply retroactively. In March 2017, the post-conviction court agreed with the state's position and denied Strom's petition. Strom appeals.

D E C I S I O N

Strom argues that the post-conviction court erred by denying his petition. He contends that the district court erred on the ground that *Thompson* applies retroactively to his 2013 conviction.

A person seeking post-conviction relief must file a post-conviction petition within two years of “(1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court’s disposition of petitioner’s direct appeal.” Minn. Stat. § 590.01, subd. 4(a) (2016). If the two-year limitations period has expired, the post-conviction court may consider the untimely petition if the petitioner satisfies any one of five exceptions. *Id.*, subd. 4(b). For example, a post-conviction petitioner may be heard on the merits of a post-conviction petition if “the petitioner asserts a new interpretation of federal or state

constitutional or statutory law by either the United States Supreme Court or a Minnesota appellate court and the petitioner establishes that this interpretation is retroactively applicable to the petitioner's case." *Id.*, subd. 4(b)(3). This court applies a *de novo* standard of review to a post-conviction court's determination that a new interpretation of the constitution applies retroactively. *Danforth v. State*, 761 N.W.2d 493, 495 (Minn. 2009).

As a general matter, if the United States Supreme Court announces a new rule of federal constitutional criminal procedure, a criminal defendant "is entitled to benefit from that new rule" if his case is pending in the district court or on direct appellate review. *Id.* at 496 (quoting *O'Meara v. State*, 679 N.W.2d 334, 339 (Minn. 2004)). "But if the defendant's conviction is already final at the time the new rule is announced, then the criminal defendant ordinarily may not avail himself of the new rule." *Id.* (quoting *O'Meara*, 679 N.W.2d at 339-40). There are, however, two recognized exceptions to the general rule of non-retroactivity: a new rule may apply to convictions that have become final if

(1) the rule "place[d] an entire category of primary conduct beyond the reach of the criminal law," or "prohibit[ed] imposition of a certain type of punishment for a class of defendants because of their status or offense"; or (2) the new rule was a "watershed" rule of criminal procedure that was "necessary to the fundamental fairness of the criminal proceeding."

Id. at 496-97 (quoting *O'Meara*, 679 N.W.2d at 340 n.3); see also *Sawyer v. Smith*, 497 U.S. 227, 241-42, 110 S. Ct. 2822, 2831 (1990).

In this case, the parties agree that the supreme court announced a new rule of federal constitutional criminal procedure in *Thompson* and that Strom's conviction was final before the *Thompson* opinion was issued. Accordingly, Strom may invoke *Thompson* retroactively only if he can satisfy one of the two exceptions to the general rule of non-retroactivity. See *Danforth*, 761 N.W.2d. at 496-97. In his appellate brief, Strom relies solely on the first exception.

The first exception to Minnesota's general rule of non-retroactivity is borrowed from federal law. See *id.* at 500 (adopting retroactivity principles of *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989)). The Supreme Court has explained the first exception by distinguishing between new substantive rules and new procedural rules. See *Schriro v. Summerlin*, 542 U.S. 348, 351-53, 124 S. Ct. 2519, 2522-23 (2004). A new substantive rule is a new rule that places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or accords "constitutional protection to [a] primary activity." *Teague*, 489 U.S. at 311, 109 S. Ct. at 1075-76. By contrast, a new procedural rule is a new rule that "'regulate[s] only the manner of determining the defendant's culpability.'" *Chambers v. State*, 831 N.W.2d 311, 326 (Minn. 2013) (quoting *Schriro*, 542 U.S. at 353, 124 S. Ct. at 2523). The Supreme Court has elaborated as follows:

New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish. Such rules apply retroactively because they necessarily carry a significant risk that a defendant stands convicted of an act that the law

does not make criminal or faces a punishment that the law cannot impose upon him.

Schriro, 542 U.S. at 351-52, 124 S. Ct. at 2522-23 (quotations and citations omitted).

This court recently considered and resolved the question whether *Thompson* applies retroactively to convictions that became final before *Thompson* was issued. Two days before oral arguments in this case, this court issued an opinion in *Johnson v. State*, 906 N.W.2d 861 (Minn. App. 2018), *review granted* (Minn. Feb. 28, 2018). In *Johnson*, we held that *Thompson* established a new procedural rule that does *not* apply retroactively. *Id.* at 867.

At oral argument, Strom's appellate counsel conceded that *Johnson* is both indistinguishable from this case and dispositive of Strom's appeal. Strom's appellate counsel urged us to overrule *Johnson*. But we are bound by *Johnson* because it is a published opinion and, therefore, precedential. *See, e.g., State v. Peter*, 825 N.W.2d 126, 129 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013); *State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010).

Thus, the post-conviction court did not err by denying Strom's post-conviction petition on the grounds that it is untimely and that he cannot establish the exception in section 590.01, subdivision 4(b)(3), because *Thompson* does not apply retroactively.

Affirmed.

HOOTEN, Judge (dissenting)

Having concluded in *Ullrich v. State*, No. A17-0589, 2018 WL 492630 (Minn. App. Jan. 22, 2018) (Hooten, J., dissenting), that the new rules announced in *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016), and *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016), are substantive as applied to the criminalization of test refusal, Minn. Stat. § 169A.20, subd. 2 (2016), and for the reasons fully explained in *Ullrich*, I respectfully dissent.

If a new rule of law “alters the range of conduct or the class of persons that the law punishes,” by placing “particular conduct or persons covered by the statute beyond the State’s power to punish,” the rule applies retroactively to cases on collateral review. *Welch v. United States*, 136 S. Ct. 1257, 1264–65 (2016) (quotation omitted). *Trahan* and *Thompson* held that a defendant “cannot be prosecuted for refusing to submit to an unconstitutional warrantless blood” or urine test. *Thompson*, 886 N.W.2d at 234; *Trahan*, 886 N.W.2d at 224. Thus, the state could not criminalize Strom’s refusal to submit to chemical testing, absent valid police authority to require such testing, creating a class of persons that the state could not punish. Before *Trahan* and *Thompson*, a person refusing a warrantless blood or urine test, absent exigent circumstances, could be prosecuted. After *Trahan* and *Thompson*, the same person can no longer be prosecuted, and even “impeccable factfinding procedures” would not legitimate a conviction. *See Welch*, 136 S. Ct. at 1265 (quotation omitted).

Finally, while recognizing the importance of precedent, “[w]e will overrule our own precedent if provided with a compelling reason to do so.” *State ex rel. Pollard v. Roy*, 878 N.W.2d 341, 348 (Minn. App. 2016), *review granted* (Minn. June 29, 2016) *and order*

granting review vacated (Minn. Dec. 27, 2016). Strom was convicted of a crime for exercising his constitutional right to refuse a warrantless blood or urine test. United States Supreme Court precedent, and the Minnesota Supreme Court’s articulation of these new rules, require that the new rules have retroactive effect. Accordingly, I would reverse and remand for the district court’s consideration of whether, because Strom pleaded guilty,¹ he can receive the retroactive effect of the new substantive rule, and any appropriate remedy.

¹ The United States Supreme Court recently held that a guilty plea does not, by itself, bar a direct appeal that “call[s] into question the Government’s power to constitutionally prosecute” an individual. *Class v. United States*, No. 16-424, 2018 WL 987347, at *6 (U.S. Feb. 21, 2018) (quotation omitted).