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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0913**

In the Matter of the Welfare of: T. D. B., Juvenile

**Filed January 22, 2018
Affirmed in part, reversed in part, and remanded
Bratvold, Judge**

Chisago County District Court
File No. 13-JV-15-142

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Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this second appeal from a juvenile petty offender adjudication, appellant argues that (1) the juvenile court lacked jurisdiction to issue the final order because the clerk of the appellate courts had not yet entered judgment in his first appeal when the juvenile court entered the order that is on review in this appeal; (2) the juvenile court erred by denying his motion to dismiss because the court lost jurisdiction after he turned 19 years old; and

(3) the preliminary breath test (PBT) administered by the police officer at appellant's high school was an illegal search in violation of appellant's constitutional rights. We affirm in part, reverse in part, and remand.

FACTS

On May 4, 2015, a high-school teacher in Chisago County informed Ryan Minke, the school's "behavior tech," that appellant T.D.B. smelled of alcohol. T.D.B. was 17 years old. Minke went to T.D.B.'s classroom and, while talking to T.D.B., smelled alcohol coming from him. Minke brought T.D.B. to his office. T.D.B. told Minke that he had consumed alcohol at a party over the weekend and had last consumed alcohol early Sunday morning. T.D.B. claimed the alcohol odor was coming from his clothes, which were the same clothes he had worn over the weekend.

Minke, with the authorization of Assistant Principal Glen Stevens, asked T.D.B. to take a breath test usually used at school dances. Based on the test results,¹ Minke and Stevens decided to impose a one-day suspension, informed T.D.B., and called T.D.B.'s father to pick him up.² Stevens explained at trial that the suspension was appropriate because students under the influence of alcohol pose a "safety and security issue."

¹ In the juvenile court's order finding T.D.B. guilty beyond a reasonable doubt, it disregarded the school-administered breath test because it determined that there was "insufficient foundation for its use or operation." Minke was asked when the testing device was last calibrated, and he testified that he "ha[d] no idea. . . . I don't know how often they get calibrated."

² During this phone call, T.D.B.'s father told Minke that no one was to question T.D.B., nor was he to take a PBT.

Next, Minke called the school resource police officer, Tim Olson, and told him that they suspected T.D.B. of consuming alcohol. Minke testified that at this point, they “referr[ed]” T.D.B. to Officer Olson. Olson came to the school about 15 to 20 minutes later and joined Minke, Stevens, and T.D.B. in the office. Olson was wearing plain clothes, but had his gun and badge. Olson detected an “odor of alcohol” coming from T.D.B. Olson then performed a “horizontal gaze nystagmus test” on T.D.B., which indicated that T.D.B. “had been consuming alcohol or had alcohol on him.”

Olson brought T.D.B. to his office at the school; Stevens and Minke did not accompany them. T.D.B. told Olson that he had been drinking in Wisconsin over the weekend. Olson asked T.D.B. to take a PBT, T.D.B. did, and he received a result of 0.034. Olson testified that he did not obtain a warrant, but acknowledged he could have. The entire interaction between T.D.B. and Olson lasted about five to seven minutes.

T.D.B. was cited for underage consumption of alcohol in violation of Minn. Stat. § 340A.503, subd. 1(a)(2) (2014). The juvenile court denied T.D.B.’s motion to suppress the PBT result. The court determined that the PBT result was admissible under Minn. Stat. § 169A.41, subd. 2(5) (2014), because, contrary to T.D.B.’s assertion, that statute was not limited to traffic stops.³ In a bench trial, the court found T.D.B. guilty and adjudicated him a juvenile petty offender.

³ Minn. Stat. § 169A.41, subd. 2, limits the use of PBT results in court actions where the PBT was administered pursuant to an investigation for driving while impaired. Subdivision 2(5) permits the use of PBT results in juvenile court proceedings concerning, “a violation of section 169A.33 (underage drinking and driving), or [section] 340A.503, subdivision 1, paragraph (a), clause (2) (underage alcohol consumption).”

T.D.B. appealed and argued that the PBT result was not admissible because the search was conducted without a warrant. In a decision filed on April 3, 2017, this court reversed in part, holding that the PBT was not admissible under Minn. Stat. § 169A.41, subd. 2(5), because there was no evidence that T.D.B. “drove, operated, or was in physical control of a motor vehicle,” and therefore that statute did not apply. *In re T. D. B.*, No. A16-0944, 2017 WL 1208755, at *2 (Minn. App. Apr. 3, 2017). This court declined to further consider T.D.B.’s argument that the PBT result should have been suppressed, and remanded for the juvenile court “to determine whether the PBT was a search and, if it was, whether a search warrant was required.” *Id.*⁴

T.D.B. turned 19 years old on May 1, 2017. On May 4, 2017, T.D.B. filed a motion to dismiss in juvenile court, arguing that the court lacked jurisdiction because he was 19 years old.

Neither party petitioned for further review in the first appeal. The clerk of appellate courts entered judgment on May 31, 2017.

Before entry of judgment in the first appeal, the juvenile court issued a new order on May 10, 2017, denying T.D.B.’s suppression motion without a hearing, and stating that

⁴ In his first appeal, T.D.B. raised two additional challenges that were rejected by this court. First, T.D.B. contended that his statements to Olson should have been suppressed because he was not given a *Miranda* warning; second, T.D.B. argued that the underage consumption statute did not apply because he had consumed alcohol in another state. *Id.* at *3-5; *see also* Minn. Stat. § 340A.503, subd. 1(a)(2). This court concluded that the juvenile court properly denied T.D.B.’s motion because T.D.B. was not in custody, therefore, no *Miranda* warning was required. *T. D. B.*, 2017 WL 1208755, at *4-5. This court also held that Minnesota had authority under Minn. Stat. § 340A.503 to prosecute T.D.B., even though he had consumed alcohol in Wisconsin. *Id.* at *5.

the order was pursuant to a remand by the Minnesota Court of Appeals. The juvenile court first determined that the PBT was a search for which reasonable-articulable suspicion was required. The juvenile court then found that reasonable, articulable suspicion supported administration of the PBT in this case, and denied T.D.B.'s suppression motion. Because the PBT result was admissible, and the court had previously determined T.D.B.'s guilt beyond a reasonable doubt, the juvenile court adjudicated T.D.B. a juvenile petty offender. The juvenile court's May 10 order did not expressly discuss T.D.B.'s motion to dismiss for lack of jurisdiction. This appeal follows.

D E C I S I O N

I. A decision that follows remand instructions from the appellate court is within the juvenile court's jurisdiction if the decision is filed at least 30 days after the appellate court's decision has become final.

The narrow issue presented is whether the juvenile court had authority to follow this court's remand instructions after our decision became final, but before the clerk of the appellate courts had entered judgment. T.D.B. argues because jurisdiction "ha[d] not yet been returned" to the juvenile court, the May 10 order is "null and void."

It is true that a district court's authority is suspended, in large part, during an appeal. Minnesota Rule of Civil Appellate Procedure 108.01, subd. 2, provides, "the filing of a timely and proper appeal suspends the trial court's authority to make any order that affects the order or judgment appealed from."⁵ The district court's jurisdiction raises a question of

⁵ An appeal divests the district court of jurisdiction over the matters appealed, which includes matters "necessarily involved" in the order or judgment appealed from. *See Spaeth v. City of Plymouth*, 344 N.W.2d 815, 824 (Minn. 1984). The district court retains

law, subject to de novo review. *City of Waite Park v. Minn. Office of Admin. Hearings*, 758 N.W.2d 347, 352 (Minn. App. 2008), *review denied* (Minn. Feb. 25, 2009). Because jurisdiction goes to the authority of the district court to hear the case, “lack of subject matter jurisdiction may be raised at any time, including for the first time on appeal.” *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 432 (Minn. App. 1995), *review denied* (Minn. May 31, 1995).

This court disposes of appeals by written decisions that are filed and then transmitted to the parties by the clerk of the appellate courts. Minn. R. Civ. App. P. 136.01. The clerk shall enter judgment “not less than 30 days after the filing of the decision or order.” Minn. R. Civ. App. P. 136.02. The judgment is “not [to] be entered for 30 days after the filing of a decision or order to allow the filing of a petition for review to, or rehearing in the Supreme Court.” Minn. R. Civ. App. P. 136.02 cmt. If a petition for further review or rehearing is filed, entry of judgment is stayed until denial of the petition. Minn. R. Civ. App. P. 136.02. Upon entry of judgment by the clerk of appellate courts, the clerk transmits the judgment to the trial court administrator; this process is referred to as “remittitur.” Minn. R. Civ. App. P. 136.03, subd. 1.

We reject T.D.B.’s jurisdictional challenge for two reasons. First, the juvenile court issued the May 10 order more than 30 days after this court filed its decision in the first appeal. Because no petition for review was filed, our decision was final at the time the juvenile court filed the May 10 order. *Hoyt Inv. Co. v. Bloomington Commerce & Trade*

jurisdiction over matters collateral to or supplemental to the order or the judgment. Minn. R. Civ. App. P. 108.01, subd. 2.

Ctr. Assocs., 418 N.W.2d 173, 176 (Minn. 1988) (holding decisions from this court become final after the period for a petition for further review has passed or the petition for further review is denied); *see also State v. Grose*, 396 N.W.2d 874, 875 (Minn. App. 1986) (“[T]he trial court did not have jurisdiction and could not obtain it until thirty days from the filing of the court of appeals decision.”). Second, T.D.B. conceded at oral argument that the May 10 order followed this court’s remand instructions. *Halverson v. Vill. of Deerwood*, 322 N.W.2d 761, 766 (Minn. 1982) (holding trial court must follow instructions on remand). Because the juvenile court followed this court’s instructions on remand, and waited to act until after the 30-day period for the supreme court review had passed, we conclude that the juvenile court had jurisdiction to issue the order on May 10.

II. The juvenile court had jurisdiction on remand to adjudicate T.D.B. a juvenile petty offender.

In his motion to dismiss, T.D.B. argued that the juvenile court lacked jurisdiction because he turned 19 years old before the court issued its May 10 order. While the juvenile court’s order did not expressly reject T.D.B.’s motion, the juvenile court’s resolution of the case on remand includes an implicit denial. T.D.B. renews this jurisdictional challenge on appeal. “When a statute provides the basis for the juvenile court’s jurisdiction over the juvenile, the issue of jurisdiction is a question of law subject to de novo review.” *State v. J.E.S.*, 763 N.W.2d 64, 67 (Minn. App. 2009).

With a few exceptions, “the juvenile court has original and exclusive jurisdiction in proceedings concerning any child who is alleged to be delinquent, a juvenile traffic offender, a juvenile petty offender, and in proceedings concerning any minor alleged to

have been a delinquent, a juvenile petty offender, or a juvenile traffic offender prior to having become 18 years of age.” Minn. Stat. § 260B.101, subd. 1 (2016). Unless a juvenile qualifies for a statutory exception, none of which are applicable here, the juvenile court’s jurisdiction “shall continue until the individual becomes 19 years of age;” the juvenile court may terminate its jurisdiction on its own motion or the motion of a party. Minn. Stat. § 260B.193, subd. 5(a); *In re Welfare of V.D.M.*, 623 N.W.2d 277, 279 (Minn. App. 2001), *review denied* (Minn. May 15, 2001). None of the statutory provisions extending juvenile court jurisdiction apply in this case.

But this court has previously held that the juvenile court retains jurisdiction to “complet[e] an adjudication on the allegations of delinquency” if the alleged offenses occurred before the child turned 19 years old. *In re Welfare of C.A.N.*, 370 N.W.2d 438, 442-43 (Minn. App. 1985). In *C.A.N.*, this court considered whether the juvenile court retained jurisdiction to adjudicate a delinquency petition after the child had turned 19 years old. *Id.* at 439-40. *C.A.N.*’s offense allegedly occurred when she was 17 years old and a delinquency petition was filed 13 months later. *Id.* Because the relevant statute defined “child” to include “any minor alleged to have been delinquent . . . prior to having become age 18,” this court held that juvenile court jurisdiction “continues over an individual 18 years of age or older where the alleged offense occurred before that individual was 18 years old.” *Id.* at 440-41 (citing Minn. Stat. § 260.015, subd. 2 (1984) (defining child));⁶ *see also*

⁶ Although Minn. Stat. § 260.015, subd. 2, has since been repealed, we find *C.A.N.* persuasive because Minn. Stat. § 260B.101, subd. 1, provides a definition of “[c]hildren who are delinquent” that is similar to the repealed statute relied upon in *C.A.N.* *See* Minn. Stat. § 260B.101, subd. 1 (“[T]he juvenile court has original and exclusive jurisdiction in

State v. Fleming, 302 Minn. 61, 64, 223 N.W.2d 397, 399-400 (1974) (holding that juvenile court jurisdiction is based on the juvenile age's when the alleged violation occurred).

While T.D.B.'s case is a juvenile petty offender adjudication, and not a delinquency case like *C.A.N.*, we are persuaded that *C.A.N.*'s reasoning applies. T.D.B. was 17 years old when the offense occurred and the petty citation was issued. Thus, the juvenile court acted within its authority under *C.A.N.*, and we conclude that the juvenile court had jurisdiction to adjudicate T.D.B., even after he turned 19 years old. We, therefore, affirm the juvenile court's implicit denial of T.D.B.'s motion to dismiss for lack of jurisdiction.

III. Because law enforcement administered the PBT to advance its own investigation, probable cause and a warrant, or an exception to the warrant requirement, were required.

The juvenile court denied T.D.B.'s suppression motion after concluding that a "search warrant was not required to administer the PBT because Officer Olson had a reasonable articulable suspicion to believe that [T.D.B.] had engaged in the underage consumption of alcohol." T.D.B. argues that the PBT results must be suppressed because the PBT was a search under the Fourth Amendment, which requires probable cause and a warrant, or an exception to the warrant requirement. T.D.B. also argues that because Olson did not obtain a warrant, and the search did not fall into any exception to the warrant requirement, the evidence must be suppressed.

In reviewing pretrial orders on motions to suppress evidence, appellate courts will independently examine the facts and determine de novo whether the district court's

proceedings concerning any child who is alleged to be delinquent . . . prior to having become 18 years of age.").

determination was in error. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). In addition, appellate courts “review de novo a district court’s ruling on constitutional questions involving searches and seizures.” *State v. Anderson*, 733 N.W.2d 128, 136 (Minn. 2007).

The United States Constitution protects against unreasonable searches and seizures by law enforcement. U.S. Const. amend. IV. Generally, under the Fourth Amendment, warrantless searches are “presumptively unreasonable” unless there are exigent circumstances present or the search falls under an exception to the warrant requirement. *State v. Milton*, 821 N.W.2d 789, 798-99 (Minn. 2012) (quotation omitted).

In T.D.B.’s case, the state does not contend that there were exigent circumstances or that an exception to the warrant requirement applies.⁷ Instead, the state urges us to affirm because the PBT is a field sobriety test for which, in the DWI context, courts have required reasonable articulable suspicion, a lesser standard than probable cause. We disagree.⁸ As we previously held, the impaired-driving statutes and related caselaw that have permitted

⁷ The state raised the consent exception in response to T.D.B.’s motion to suppress and in the first appeal. But the state did not raise consent in this appeal. Issues not argued in the briefs are deemed waived and will not be considered. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982). Even so, the state elicited no testimony that T.D.B. consented to the PBT either at the suppression hearing or during the trial. Officer Olson testified that he “gave [T.D.B.] the [preliminary breath] test” and did not testify that T.D.B. consented to the PBT.

⁸ To be clear, recent precedent indicates that a PBT is a search. For example, the Supreme Court has recently held that the “taking of a blood sample or the administration of a breath test is a search.” *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016); *see also Mell v. Comm’r of Pub. Safety*, 757 N.W.2d 702, 709 (Minn. App. 2008). In addition, this court has held that field sobriety tests do not include PBTs; therefore, the standard applicable to field sobriety tests is not relevant. *See Vondrachek v. Comm’r of Pub. Safety*, __ N.W.2d __, __ No. 17-0462, slip op. at 7-8 (Minn. App. Dec. 18, 2017).

warrantless PBTs for drivers is not applicable to law enforcement's administration of a PBT to a student who is at school. In the first appeal, this court determined that there was no evidence T.D.B. "drove, operated, or was in physical control of a motor vehicle." *T. D. B.*, 2017 WL 1208755, at *2.

Students in school are protected from unreasonable searches and seizures under the Fourth Amendment. *New Jersey v. T.L.O.*, 469 U.S. 325, 333-34, 105 S. Ct. 733, 738 (1985). Because of the special need to maintain order and protect student safety in public schools, the United States Supreme Court has held that school officials need not strictly adhere to the requirement that searches be supported by probable cause and a warrant. *T.L.O.*, 469 U.S. at 341, 105 S. Ct. at 742. Instead, the Court established a two-part inquiry to determine the reasonableness of a search conducted by school officials: (1) whether the search was "justified at its inception; (2) whether the search "was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, 105 S. Ct. at 742-43 (quotations omitted.) In *T.L.O.*, the Court explicitly declined to decide "the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." 469 U.S. at 341-42 n.7, 105 S. Ct. at 743 n.7

Since *T.L.O.*, few courts have considered what standard applies to student searches conducted by law enforcement on school grounds. Those that have considered the issue have held that a "reasonableness" standard applies in three circumstances: when school officials initiate the search, police are only minimally involved, or police conduct the search at the direction of the school officials. *See, e.g., Shade v. Farmington*, 309 F.3d

1054, 1061 (8th Cir. 2002) (police searched students for weapons after school officials had initiated investigation and requested police assistance to conduct search); *Cason v. Cook*, 810 F.2d 188, 191-93 (8th Cir. 1987) (school liaison police officer completed pat-down search for stolen items in conjunction with school official); *In re Angelia D.B.*, 564 N.W.2d 682, 688-90 (Wis. 1997) (police officer conducted search at request of school official who suspected student possessed a weapon).

Here, school officials administered a breath test to T.D.B., decided to impose a one-day suspension because of the safety concerns related to students under the influence at school, called T.D.B.'s father to drive him home, and then "referr[ed]" T.D.B.'s case to law enforcement. Officer Olson initially spoke to T.D.B. in the principal's office where T.D.B. admitted to drinking over the weekend, Olson smelled alcohol on T.D.B.'s breath and completed a sobriety test, finding "nystagmus in his eyes." Olson then brought T.D.B. to his separate office at the school; the school officials did not accompany Olson and T.D.B. Olson administered the PBT, which detected an alcohol concentration of 0.034. Olson testified that he performed the PBT on T.D.B. to further his own investigation.

Based on these undisputed facts, the PBT was not administered by school officials, nor did police administer the PBT to T.D.B. at the school officials' request. In fact, the school had completed its investigation of T.D.B., and law enforcement conducted the PBT to advance its own investigation. Based on this record, we conclude that the PBT was a search under the Fourth Amendment and required probable cause and a warrant, or an exception to the warrant requirement, before Officer Olson could administer a PBT to T.D.B.

The juvenile court erroneously relied on caselaw upholding the use of PBTs without a warrant in other settings. It is true that the administration of PBTs has not been limited to cases involving traffic stops, but the cases relied on by the juvenile court have no applicability to the use of PBTs in schools. *See, e.g., Mell*, 757 N.W.2d at 709 (considering PBTs administered by correctional facilities in the inmate-booking process). We also reject the juvenile court's reliance on underage consumption case law that merely mentions PBT evidence, and does not address the legality of the search. *See, e.g., State v. Abu-Shanab*, 448 N.W.2d 557, 558 (Minn. App. 1989).⁹

We conclude that Officer Olson's administration of the PBT to T.D.B. was a search that required probable cause and a warrant, or an exception to the warrant requirement. Olson did not obtain a warrant to administer the PBT and the state does not assert that any exigency or exception to the warrant requirement applies. Because Olson did not obtain a warrant and no exception applies, the PBT result must be suppressed and the juvenile court erred in denying T.D.B.'s suppression motion. The parties have not asked for a particular remedy in this case; thus, we remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

⁹ The juvenile court also relied on an unpublished decision, which is not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c) (2016); *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 n.2 (Minn. 2009).