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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0095**

State of Minnesota,
Respondent,

vs.

Daniel Richard LeBre,
Appellant.

**Filed January 14, 2019
Reversed and remanded
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CR-15-10774

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Melissa Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges his conviction of driving while impaired (DWI), arguing that the district court erred in denying his motion to suppress evidence resulting from a

warrantless urine test because he did not validly consent to the test. We reverse and remand.

FACTS

On February 19, 2015, Bloomington Police Officer Christopher Wegner responded to a report of a possible traffic accident. The collision was minor, and when Officer Wegner arrived at the scene, one of the vehicles was already leaving. Officer Wegner spoke with appellant Daniel Richard LeBre, the driver of the remaining car, who had caused the collision. While speaking with LeBre, Officer Wegner observed that his speech was “slow and lethargic.” LeBre’s vehicle was equipped with an ignition-interlock system, so Officer Wegner asked him to turn off the vehicle and restart it. LeBre was able to restart the vehicle, which indicated that the system did not register a reading of any alcohol on his breath. Because LeBre did not have a valid license, Officer Wegner issued him a citation for driving without a license and instructed him to park his car in a nearby lot. Officer Wegner followed LeBre until he turned into the parking lot and then resumed patrol.

When LeBre turned into the parking lot, he struck a parked car. The owner of the parked vehicle called 911, and Officer Wegner responded to the call. He again observed that LeBre’s speech was slow and lethargic. Additionally, LeBre “seemed unsteady on his feet.” Based on these observations, Officer Wegner decided to administer field sobriety tests. When asked if he had any physical limitations, LeBre responded that he did not. But he informed Officer Wegner that he had prescriptions for Oxycodone and Ativan and had taken both that morning. After administering field sobriety tests, Officer Wegner arrested LeBre on suspicion of DWI.

Officer Wegner transported LeBre to the police department. While there, Officer Wegner read LeBre the implied-consent advisory, which states that refusal to submit to chemical testing is a crime. After being read the implied-consent advisory, LeBre agreed to take a urine test. The test revealed the presence of Oxycodone and Oxymorphone. Because LeBre took a urine test, rather than a blood test, the analyst was not able to quantify the amount of Oxycodone in the sample.

Respondent State of Minnesota charged LeBre with one count of DWI under Minn. Stat. § 169A.20, subd. 1(2) (2014). LeBre moved to suppress the evidence resulting from the warrantless urine test. LeBre argued that his consent to the test was not voluntary because it was obtained under the threat of additional criminal penalties. The district court denied the motion. The district court determined that the warrantless urine test could be requested as a search incident to arrest and that LeBre voluntarily consented to the test.

The district court held a jury trial. The jury found LeBre guilty. The district court sentenced LeBre to 51 months in prison. This appeal follows.

D E C I S I O N

When reviewing a pretrial order on a motion to suppress evidence, we independently review the facts and determine, as a matter of law, whether the district court erred by denying the motion. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). When the facts are not in dispute, our review is de novo, and we must determine whether the police articulated an adequate basis for the search or seizure. *Id.* This court will not reverse the district court's factual findings unless they are clearly erroneous. *State v. Ruoho*, 685 N.W.2d 451, 458 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

The Fourth Amendment protects against unreasonable searches and seizures. *State v. Stavish*, 868 N.W.2d 670, 674-75 (Minn. 2015). The collection of a urine sample constitutes a search under the Fourth Amendment. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). A search is presumptively unreasonable when police do not have a warrant. *Stavish*, 868 N.W.2d at 675. Evidence collected through an illegal search may be excluded. *State v. Lindquist*, 869 N.W.2d 863, 868-69 (Minn. 2015). A warrantless search is reasonable only if it falls within a defined exception to the warrant requirement. *Stavish*, 868 N.W.2d at 675.

Consent is one exception to the warrant requirement. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011). The state bears the burden of establishing that the defendant “freely and voluntarily” consented to the search. *Brooks*, 838 N.W.2d at 568. “Whether consent was voluntary is determined by examining 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.” *Harris*, 590 N.W.2d at 102 (quotation omitted). Whether consent was voluntary is a question of fact that is reviewed for clear error. *Diede*, 795 N.W.2d at 846-47.

LeBre argues that the district court erred by determining that he voluntarily consented to the urine test. In determining that LeBre voluntarily consented to the urine test, the district court first acknowledged that the supreme court has held that the criminal penalties attached to test refusal do not render the defendant’s consent invalid. *Brooks*, 838 N.W.2d at 570. The supreme court observed that “[a]lthough refusing the test comes with criminal penalties in Minnesota” and “the choice to submit or refuse to take a chemical test will not be an easy or pleasant one . . . the criminal process often requires suspects and

defendants to make difficult choices.” *Id.* at 571 (quotations omitted). Based on this reasoning, the district court determined that “[s]imply because none of the options offered were attractive to [LeBre] does not mean that [LeBre] did not have a choice.” The district court also observed that LeBre had been lawfully stopped and arrested and that the implied-consent advisory made it clear that if he refused to take a test, no test would be administered. Based on these circumstances, the district court determined that LeBre voluntarily consented to the urine test.

LeBre argues that the district court’s reliance is misplaced because the defendant in *Brooks* was read an accurate implied-consent advisory, while he was not. At the time of the district court’s order, the supreme court had decided *State v. Bernard*, which held that a breath test following an arrest for suspicion of DWI was a valid search incident to arrest. 859 N.W.2d 762, 767 (Minn. 2015). The supreme court determined that because a search of the defendant’s breath would be permissible as a search incident to arrest, the criminal penalties attached to test refusal did not offend due process. *Id.* at 773-74. But the supreme court explicitly declined to reach the issue of whether a urine test qualified as a search incident to arrest. *Id.* at 768 n.6.

Here, the district court determined that urine testing was analogous to breath testing, and therefore the reasoning in *Bernard* applied. But the supreme court has since decided *State v. Thompson*, which held that “a warrantless urine test does not qualify as a search incident to a valid arrest of a suspected drunk driver.” 886 N.W.2d 224, 233 (Minn. 2016). Therefore, a driver cannot be prosecuted for refusing to submit to a urine test. *Id.* at 234. Accordingly, LeBre was read an inaccurate implied-consent advisory. He argues that

because the advisory inaccurately informed him that he could be prosecuted for test refusal, the district court erred in determining that his consent was valid.

The United States Supreme Court addressed a similar issue in *Birchfield v. North Dakota*. 136 S. Ct. 2160 (2016). Defendant Beylund was arrested in North Dakota for DWI and read an implied-consent advisory that informed him that test refusal was a crime. *Id.* at 2172. Beylund agreed to take a blood test, which revealed an alcohol concentration above the legal limit. *Id.* As a result, his license was suspended. *Id.* Beylund appealed and argued that his consent to the blood test was invalid because the officer instructed him that refusal to submit to the test was a crime. *Id.* The North Dakota Supreme Court affirmed the license suspension, “emphasiz[ing] that North Dakota’s implied consent advisory was not misleading because it truthfully related the penalties for refusal.” *Id.*

The United States Supreme Court determined that the state could not compel warrantless blood tests and consequently could not attach criminal penalties to test refusal. *Id.* at 2185-86. Therefore, the implied-consent advisory inaccurately advised Beylund that he could be prosecuted for refusing a blood test. *Id.* at 2186. The Supreme Court remanded to the North Dakota Supreme Court to “reevaluate Beylund’s consent given the partial inaccuracy of the officer’s advisory [in light of the Supreme Court’s decision].” *Id.* (footnote omitted).

Here, LeBre was similarly told that refusal to submit to a urine test was a crime. But in *Thompson*, the Minnesota Supreme Court determined that because a urine test did not qualify as a search incident to arrest, the state could not attach criminal penalties to refusal to take a urine test. 886 N.W.2d at 234. The district court did not have the benefit

of the supreme court's decision in *Thompson* when it determined that LeBre voluntarily consented to the urine test. The district court was therefore unable to consider the partial inaccuracy of the implied-consent advisory as a circumstance when evaluating the voluntariness of LeBre's consent. Based on *Birchfield*, this is a relevant circumstance that must be considered when evaluating consent. 136 S. Ct. at 2186.

The state argues that the good-faith exception to the warrant requirement applies and therefore the results of the urine test do not need to be suppressed. The good-faith exception provides that the "exclusionary rule does not apply to violations of the Fourth Amendment to the U.S. Constitution, or Article I, Section 10, of the Minnesota Constitution when law enforcement acts in objectively reasonable reliance on binding appellate precedent." *Lindquist*, 869 N.W.2d at 876. This issue was presented to, but not decided by, the district court. Accordingly, this court cannot review it. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also Welch v. Comm'r of Pub. Safety*, 545 N.W.2d 692, 694 (Minn. App. 1996) ("A remand may be required if the trial court fails to make adequate findings.").

Finally, the state argues that any error in the admission of the result of the urine test was harmless beyond a reasonable doubt. When an error implicates a constitutional right, "a new trial is required unless the [s]tate can show beyond a reasonable doubt that the error was harmless." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009). An error is harmless beyond a reasonable doubt if the "verdict was surely unattributable to the error." *Id.* The state argues that because the analyst was unable to quantify the amount of Oxycodone and Oxymorphone in LeBre's system, the result was merely cumulative to LeBre's own

admission that he had taken Oxycodone that morning. But the state was required to prove that LeBre was under the influence of a controlled substance at the time he was operating the vehicle. Minn. Stat. § 169A.20, subd. 1(2). LeBre admitted he had taken Oxycodone earlier that morning, but at trial argued that he was no longer under the influence of the substance at the time he was operating the vehicle. The test results confirmed that there was Oxycodone in LeBre’s system while he was operating the vehicle; his own admission did not provide such evidence. Thus, the jury verdict was not “surely unattributable” to the admission of the test results.

Accordingly, we reverse and remand to the district court to reconsider whether LeBre’s consent was voluntary in light of the inaccuracy of the implied-consent advisory. The district court may also consider whether the good-faith exception applies.¹

Reversed and remanded.

¹ We express no opinion on how the district court should resolve these issues. Whether the record should be reopened on remand is left to the district court’s discretion.