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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1100**

State of Minnesota,
Respondent,

vs.

Dennis Dean Blumke,
Appellant.

**Filed July 8, 2019
Affirmed
Cochran, Judge**

Swift County District Court
File No. 76-CR-14-345

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

Danielle H. Olson, Swift County Attorney, Allison T. Whalen, Assistant County Attorney,
Benson, Minnesota (for respondent)

John D. Ellenbecker, St. Cloud, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Smith, Tracy M., Judge; and
Cochran, Judge.

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

COCHRAN, Judge

Appellant Dennis Dean Blumke challenges the district court's conclusion that he
freely and voluntarily consented to the collection of a sample of his blood. Because the
facts support the district court's conclusion, we affirm.

FACTS

In June 2014, a Swift County deputy sheriff was called to a vehicle that appeared to have veered off the road into a ditch. The deputy sheriff could smell the odor of an alcoholic beverage coming from the vehicle. The deputy sheriff identified Blumke as the driver and conducted field sobriety tests. After Blumke failed field sobriety tests, the sheriff's deputy arrested Blumke for driving while impaired (DWI). The sheriff's deputy transported Blumke to the Swift County jail, where he read Blumke the Minnesota implied-consent advisory. The deputy sheriff told Blumke that "Minnesota law requires you to take a test to determine if you are under the influence of alcohol" and that "refusal to take a test is a crime." The deputy sheriff did not specify at that time what type of test would be required.

Blumke then asked to speak to an attorney. After Blumke spoke with an attorney, the deputy sheriff asked him, "Will you take the breath test?" Blumke responded, "I am requesting a blood test." Blumke clarified that he was not refusing a breath test, but that he was requesting a blood test instead. The deputy sheriff agreed to allow a blood test rather than a breath test and transported Blumke to the hospital where a blood sample was drawn. Blumke's blood sample was sent to the Minnesota Bureau of Criminal Apprehension where a forensic scientist determined that Blumke's alcohol concentration was 0.104.

The state charged Blumke with one count of third-degree DWI. Blumke moved to suppress the results of the blood test on constitutional grounds, arguing that his consent to the blood test was coerced. The district court denied Blumke's motion. The parties then

submitted the case to the district court for a trial by stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 3, and the district court found Blumke guilty.

Shortly after the district court found Blumke guilty, the United States Supreme Court issued its decision in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). In *Birchfield*, the Supreme Court examined how the search-incident-to-arrest doctrine applies to breath tests and blood tests incident to DWI arrests. 136 S. Ct. 2160 at 2183-85. The Supreme Court held that the Fourth Amendment permits the administration of warrantless breath tests as a search incident to arrest for DWI offenses but does not permit the administration of warrantless blood tests as a search incident to arrest for DWI offenses. *Id.* at 2185. Applying this rule, the Supreme Court upheld a conviction for refusing a warrantless breath test following an arrest for DWI, but reversed a conviction for refusing a warrantless blood test following an arrest for DWI. *Id.* at 2186-87; *see also Johnson v. State*, 916 N.W.2d 674, 682 (Minn. 2018) (explaining that under *Birchfield*, individuals may be convicted of the crime of test refusal for refusing to submit to a breath test, but may only be convicted for refusing a blood or urine test if the police have a search warrant or a valid exception to the warrant requirement applies).

Blumke requested a new trial in light of the *Birchfield* decision. The district court denied Blumke's request, and he appealed to this court. *State v. Blumke*, No. A16-1840, 2017 WL 4105194 (Minn. App. Sept. 18, 2017). This court held that "the district court erred by declining to consider [Blumke's] case in light of *Birchfield*," and reversed and remanded for additional factual findings on the voluntariness of Blumke's consent to the blood test. *Id.* at *2.

In February 2018, the district court held an evidentiary hearing during which the deputy sheriff testified that Blumke clearly and unequivocally requested a blood test. The deputy sheriff testified that he did not suggest the possibility of a blood test as an option and that the blood test was Blumke's idea. The deputy sheriff further testified that Blumke was not subject to intensive questioning and never appeared emotional during questioning. Following the hearing, the district court found that Blumke freely and voluntarily consented to a blood test, denied Blumke's motion to suppress evidence, and reinstated Blumke's conviction and sentence.

This appeal follows.

D E C I S I O N

The Fourth Amendment protects against unreasonable searches and seizures. U.S. Const. amend. IV. The collection of a blood sample constitutes a search under the Fourth Amendment. *State v. Stavish*, 868 N.W.2d 670, 674-75 (Minn. 2015). A warrantless search of a person is per se unreasonable unless it falls within a limited exception to the warrant requirement. *Id.* 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. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013). "Whether consent is voluntary is determined by examining the totality of the circumstances." *Id.* (quotation omitted); see also *Birchfield*, 136 S. Ct. at 2186.

When reviewing a pretrial order on a motion to suppress evidence, appellate courts 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, appellate courts review the issue de novo. *Id.* Reversal of the district court's factual findings is not warranted unless they are clearly erroneous. *State v. Ruoho*, 685 N.W.2d 451, 458 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

Blumke argues that his consent to a blood test was not voluntary in light of *Birchfield's* holding that states may not criminalize an individual's refusal to submit to a warrantless blood test following an arrest for DWI. Blumke contends that, post-*Birchfield*, the implied-consent advisory that Blumke received was inherently coercive and does not survive the totality-of-the-circumstances analysis. Blumke's argument is without merit.

In this case, the deputy sheriff asked Blumke for a breath test after telling him that refusal to consent to the test would be a crime. Under Minnesota law and the Supreme Court's decision in *Birchfield*, the state could legally charge Blumke with a crime for refusing to submit to a breath test. Minn. Stat. § 169A.20, subd. 2 (2018);¹ *Birchfield*, 136 S. Ct. at 2186-87; *Johnson*, 916 N.W.2d at 682. The deputy sheriff did not request a blood test or tell Blumke that refusing to submit to a blood test would be a crime. The deputy sheriff accurately advised Blumke about his rights and the consequences for refusing to submit to a breath test. As the Minnesota Supreme Court held in *Brooks*, accurately

¹ We note that under Minnesota's test refusal law in place at the time of Blumke's arrest, refusal to submit to a blood or urine test was also a crime. Minn. Stat. § 169A.20, subd. 2 (2012). The law was amended after the *Birchfield* decision, and now refusal to submit to a blood or urine test is only a crime if the blood or urine test is required by a search warrant. Minn. Stat. § 169A.20, subd. 2. Refusal to submit to a breath test remains a crime. *Id.*

advising an individual of the consequences of refusing a chemical test does not constitute coercion. 838 N.W.2d at 572.

After consulting with an attorney, Blumke himself requested a blood test in place of a breath test. Blumke not only freely and voluntarily consented to a blood test, he affirmatively asked for a blood test in place of a breath test, which the state was constitutionally permitted to require.

Blumke argues that his consent was nonetheless involuntary, noting that the Supreme Court stated in *Birchfield* that “motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.” 136 S. Ct. at 2186. Blumke’s argument reads that language out of context. The statement comes from a section of *Birchfield* examining whether a motorist’s consent to a blood test can be inferred “by virtue of a decision to drive on public roads.” *Id.* at 2185-86. The quoted language deals with implied consent, not express consent, as Blumke suggests. Furthermore, the Supreme Court did not hold in *Birchfield* that a driver’s voluntary and express consent to a blood test after being read a lawful implied-consent advisory violates the Fourth Amendment’s prohibition against unreasonable searches. Rather, the Supreme Court recognized that “a search is reasonable when the subject consents.” *Id.* at 2185. The Supreme Court stated that “voluntariness of consent to a search must be determined from the totality of all the circumstances.” *Id.* at 2186 (quotation omitted).

Birchfield dealt with three consolidated cases. *Id.* One of the three cases involved an individual who submitted to a blood test after being advised by a police officer that the law required his submission to the test. *Id.* at 2186. After determining that the state could

not compel a blood test, the Supreme Court remanded that case to state court to reevaluate whether the individual's consent was voluntary in light of the partial inaccuracy of the police officer's advisory. *Id.* Thus, the Supreme Court declined to adopt a per se rule that a defendant cannot give voluntary consent to a blood test after hearing even an inaccurate implied-consent advisory. This court followed the Supreme Court's procedure and remanded Blumke's case after his first appeal. *Blumke*, 2017 WL 4105194 at *2 (remanding "for additional factual findings on the voluntariness of [Blumke's] consent to the warrantless blood test under the totality of the circumstances, and in a manner consistent with the *Birchfield* ruling").

Applying the "totality of all the circumstances" test to this case, we conclude that Blumke freely and voluntarily consented to a blood test. Because the deputy sheriff only requested a breath test, his statement that Blumke could be charged with a crime for refusing the test was accurate. Blumke does not cite to any circumstances beyond the reading of the implied-consent advisory that would support a finding that his consent was not voluntary. Blumke freely and voluntarily consented to a blood test, in place of a breath test, after the deputy sheriff accurately advised him as to the criminal penalties for refusing a breath test.

Affirmed.