

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1254**

Brian Allen Platt, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed April 29, 2019
Affirmed
Kalitowski, Judge***

Beltrami County District Court
File No. 04-CV-18-151

Brian Steele, Steele Law, PLLC, St. Louis Park, Minnesota (for appellant)

Keith Ellison, Attorney General, Stephen D. Melchionne, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Bratvold, Judge; and
Kalitowski, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Brian Allen Platt challenges the district court's refusal to rescind the revocation of his driver's license following his failure to produce a urine sample in response to a warrant. Platt argues that the revocation should have been rescinded because: (1) the arresting officer violated Minn. Stat. § 171.177, subd. 1 (Supp. 2017) by failing to inform him that test refusal is a crime; (2) the failure to inform him that test refusal is a crime violated his right to due process; and (3) he was not given the opportunity to consult an attorney. We affirm.

FACTS

Platt was arrested on suspicion of driving under the influence. The arresting officer obtained a warrant for a blood or urine sample and informed Platt of the warrant. Platt refused to submit to blood testing and said that he would submit to urine testing, but demanded time and water in order to provide the sample. Over the next hour, the officer would check in to see if Platt was prepared to give the sample, but Platt repeatedly indicated that he needed more time. In all of his interactions with the officer, Platt was insulting and profane, frequently shouting over the officer. The officer determined that Platt's conduct amounted to test refusal, and so informed the commissioner of public safety, leading the commissioner to revoke Platt's license. Platt filed an action against the commissioner, seeking to have the district court rescind the revocation of his license. The district court found that Platt's conduct prevented the arresting officer from speaking to Platt. It refused to rescind the revocation.

DECISION

I. The arresting officer's failure to inform Platt that test refusal is a crime does not require rescission of the revocation of Platt's driver's license.

In the context of implied-consent breath tests, a driver's license cannot be revoked if the driver is not read the statutorily mandated advisory. *See* Minn. Stat. § 169A.52, subd. 2 (2018) (creating the implied-consent advisory); *Tyler v. Comm'r of Pub. Safety*, 368 N.W.2d 275, 281 (Minn. 1985) (holding that a driver's license could not be revoked pursuant to the implied-consent law because police did not read the implied-consent advisory to the driver). But drivers who are directed to submit to blood or urine testing pursuant to a warrant are to be given a more limited advisory. Minn. Stat. § 171.177, subd. 1 (“[T]he person must be informed that refusal to submit to a blood or urine test is a crime.”). Platt argues that *Tyler* applies to testing pursuant to a warrant, and that rescission is required because the arresting officer never informed him that refusal to submit to a test is a crime. The district court found that the officer failed to comply with Minn. Stat. § 171.177, subd. 1, but ruled that the failure did not require rescission because the legislature did not identify any consequences for noncompliance, indicating that subdivision 1 is directory rather than mandatory.

We need not decide whether strict compliance with Minn. Stat. § 171.177, subd. 1, is a mandatory step in driver's license revocation proceedings, because on this record we would affirm whether subdivision 1 is mandatory or directory. *See Williams v. Nat'l Football League*, 794 N.W.2d 391, 395 (Minn. App. 2011) (“Appellate courts are free to affirm for reasons other than those on which a decision is based.”), *review denied* (Minn.

Apr. 27, 2011). Platt asserts that cases holding that Minn. Stat. § 169A.51 (2018) requires the reading of the implied-consent advisory apply to the warrant-advisory from Minn. Stat. § 171.177, subd. 1. But even if Platt is correct that cases interpreting section 169A.51 apply to section 171.177 (Supp. 2017), on this record, implied consent caselaw defeats Platt's claim.

Drivers who are arrested on suspicion of driving while intoxicated have a duty to avoid frustrating the implied-consent testing process. *State v. Collins*, 655 N.W.2d 652, 658 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003). When a driver's conduct prevents officers from completing the implied-consent procedure, the driver is deemed to have waived his or her rights under that process. *See State v. Busch*, 614 N.W.2d 256, 259 (Minn. App. 2000) (holding that a driver who frustrated the implied consent process by his silence had waived his right to an attorney). Thus, where a driver prevented an officer from reading the implied-consent advisory by "screaming, swearing, making accusations of rape, and insisting that she would not listen," the driver could be convicted for test refusal even though the implied-consent advisory was not read and she was never provided with an opportunity to contact an attorney. *Collins*, 655 N.W.2d at 658. Although *Collins* and *Busch* address the limited right to counsel, their rationale applies here. *See id.*; *Busch*, 614 N.W.2d at 259-60; *see also Sigfrinius v. Comm'r of Pub. Safety*, 378 N.W.2d 124, 126 (Minn. App. 1985) (holding that a driver's conduct frustrates administration of the test where his conduct is "calculated to avoid any 'suspension' of his license"). Accepting Platt's argument that implied consent cases also apply to Minn. Stat. § 171.177, a driver

receiving a warrant advisory may not frustrate the advisory and then contest the revocation because the advisory was not given.

Here, the district court found that Platt's conduct—talking over the officer, yelling, screaming, using obscenities, and allowing the officer “very little opportunity to speak”—to be “obstructive, disrespectful, and abusive.” By preventing the officer from speaking, Platt frustrated his attempts to comply with Minn. Stat. § 171.177, subd. 1. And Platt cannot benefit from the officer's failure to comply with subdivision 1 because Platt's conduct was the reason for the officer's noncompliance. We conclude that Platt has failed to show that the district court erred in refusing to rescind the revocation based on the statutory warrant-advisory requirement.

II. Platt's right to due process was not violated when he was not informed that refusal to submit to testing is a crime.

Platt argues that the revocation of his license based on his refusal to submit to testing violated his right to due process because he was not told that refusal to submit to testing is a crime. We disagree.

The commissioner contends that this issue is procedurally barred because Platt did not provide a transcript of the hearing before the district court, leaving this court unable to review whether it was properly raised to the district court, and because the district court did not address the argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (“A reviewing court must generally consider only those issues that the record shows were presented and considered by the [district] court”); *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 492 (Minn. App. 1995) (holding that, in the absence of a transcript, this

court's review is limited to whether the district court's conclusions of law are supported by its findings of fact). But Platt did raise his constitutional argument in his memorandum of law to the district court. And the district court addressed it briefly, stating that "noncompliance with Minn. Stat. § 171.177 is not a violation of [Platt's] constitutional rights." Thus, Platt's due process argument is properly before this court.

Nonetheless, his argument fails. Platt contends that revocation of his license after failing to comply with Minn. Stat. § 171.177, subd. 1, violated his right to due process under *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991). In *McDonnell*, a driver was told that she would be charged with a crime if she refused to submit to testing. *McDonnell*, 473 N.W.2d at 851. She then submitted to testing in order to avoid criminal penalties. *Id.* But, the law did not criminalize her refusal. *Id.* The supreme court held that it violated due process "to threaten criminal charges the state was not authorized to impose." *Id.*

The supreme court recently had the opportunity to re-examine *McDonnell*, and extracted from it a three-part test:

- (1) the person whose license was revoked submitted to a breath, blood, or urine test; (2) the person prejudicially relied on the implied consent advisory in deciding to undergo testing; and (3) the implied consent advisory did not accurately inform the person of the legal consequences of refusing to submit to the testing.

Johnson v. Comm'r of Pub. Safety, 911 N.W.2d 506, 508-09 (Minn. 2018). All three prongs are necessary for a revocation to violate due process under *McDonnell*. *See id.* at 509 (rejecting the appellant's claim because he could not establish the first or second element).

Here, Platt cannot establish the first or second elements of the test because he did not submit to a breath, blood, or urine test, and therefore did not rely on anything in deciding to submit. Both *Johnson* and *McDonnell* indicate that due process forbids the use of unenforceable threats to compel a driver to submit to a search. *Johnson*, 911 N.W.2d at 507; *McDonnell*, 473 N.W.2d at 854-55. Here, Platt was merely left uninformed of one possible consequence of refusal. He was not falsely threatened with unenforceable consequences if he took the test. Thus, because Platt did not submit to an alcohol-concentration test, under *McDonnell* and *Johnson* his right to due process was not violated.

Platt attempts to distinguish *McDonnell* and *Johnson* because he was not advised as to the consequences of refusal. But the Supreme Court has held that failure to warn a driver of the consequences of refusing to submit to an alcohol-concentration test does not deprive the driver of his or her right to due process. *South Dakota v. Neville*, 459 U.S. 553, 565-66, 103 S. Ct. 916, 923-24 (1983). In *Neville*, a driver was informed that test refusal would result in revocation of his license, but was not told that the refusal could be used against him in court. *Id.* The Court held that there was no due process violation because it had been made clear to the driver that “refusing the test was not a ‘safe harbor,’ free of adverse consequences.” *Id.* at 566, 102 S. Ct. at 924. Here, the record indicates that Platt was told that the district court had issued a warrant for an alcohol-concentration test, and that his conduct would “be considered a test refusal.” The officer here made it clear that test refusal was not a “safe harbor.” *See Neville*, 459 U.S. at 565-66. We conclude that Platt’s right to due process was not violated.

III. The limited right to an attorney does not attach when a driver is directed to submit to urine testing pursuant to a warrant.

Platt argues that the district court erred by holding that he was not entitled to consult with an attorney under *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). Under *Friedman*, drivers have a right “to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing.” 473 N.W.2d at 835. This right derives from the Minnesota Constitution, not the United States Constitution. *Id.* at 833-34. Cases after *Friedman* have construed the right narrowly. *See, e.g., State v. Melde*, 725 N.W.2d 99, 104 (Minn. 2006) (“*Friedman* held that . . . DWI arrestees have a limited right to . . . counsel before complying with implied consent testing or refusing to do so.”); *State v. Stoskopf*, 644 N.W.2d 842, 846 (Minn. App. 2002) (refusing to hold that the right to counsel under *Friedman* extends to preliminary breath tests).

Platt argues that the testing process pursuant to a warrant under Minn. Stat. § 171.177 is sufficiently analogous to the implied-consent process that *Friedman* should apply. But “the limited right to counsel recognized by *Friedman* is triggered only when the implied-consent advisory is read.” *State v. Hunn*, 911 N.W.2d 816, 820 (Minn. 2018). Here, the officer’s acquisition of a warrant meant that there was no implied-consent advisory; the advisory would have been a warrant advisory. Minn. Stat. § 171.177, subd. 1. Thus, the limited right to counsel does not attach for purposes of a search pursuant to a warrant. And because Platt did not receive any advisory, even if a warrant advisory is analogous to an implied-consent advisory, Platt’s argument fails under *Hunn*.

Further, the duty of a driver to cooperate with the testing process is relevant to the *Friedman* right to counsel. *Busch*, 614 N.W.2d at 259-60. If a driver's non-cooperation frustrates the testing process, it amounts to a refusal to test and implicitly waives the limited right to an attorney. *Collins*, 655 N.W.2d at 658; *Busch*, 614 N.W.2d at 259-60. Here, because Platt's conduct frustrated the officer's attempt to give the advisory, even if Platt did have a right to counsel under *Friedman*, he waived it by his conduct.

Affirmed.