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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1609**

Kevin Robert Miller, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed June 24, 2019
Affirmed
Florey, Judge**

Dakota County District Court
File No. 19AV-CV-18-894

Valeria Camboni Miller, Camboni Miller Law Office, P.C., Apple Valley, Minnesota (for appellant)

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

Considered and decided by Florey, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant Kevin Robert Miller appeals the district court's order sustaining the revocation of his driving privileges. He argues that the district court erred by finding that

he voluntarily consented to a breath test, and that it erred in concluding that the way in which the breath test was administered did not violate his due-process rights. We affirm.

FACTS

In the spring of 2018, appellant was arrested on suspicion of driving while impaired (DWI). The arresting officer, Officer Sean Marben, transported appellant to the Apple Valley Police Department where he read appellant the “Breath Test Advisory” (BTA). Pursuant to the BTA, Officer Marben informed appellant that state law required him to take a test to determine whether he was under the influence of alcohol, that refusal to take a breath test constituted a crime, that appellant had the right to consult with an attorney before making a decision, and that unreasonable delay or refusal to make a decision constituted test refusal. *See* Minn. Stat. § 169A.51, subd. 2 (Supp. 2017). Appellant stated that he understood his rights and that he wished to consult with an attorney.

Appellant phoned his wife, who he stated was also his attorney. During his phone call, appellant asked Officer Marben what would happen if he did not take the test. Pursuant to the department’s policy to hold someone on a gross misdemeanor third-degree test-refusal charge, Officer Marben told appellant that he would be held at the county jail pending a hearing before a judge. Appellant continued to converse with his attorney and, shortly thereafter, stated to Officer Marben that he was done with his call and agreed to take the test.¹

¹ The district court’s order states that appellant asked, *after* he ended his call with his attorney, what would happen if he refused to take the breath test. However, based on our review of the record, it appears that appellant was still on the phone when he asked his

In accordance with his training, Officer Marben conducted a 15-minute observation period to ensure appellant did not burp, belch, or vomit prior to taking the breath test. Officer Marben did not observe any of these behaviors, nor did he observe appellant put anything in his mouth or do anything that would otherwise interfere with the test.

Officer Peter Meuwissen, a certified DataMaster DMT-G with Fuel Cell Option (DMT) operator, administered the breath test. Prior to administering the test, Officer Meuwissen ensured the DMT instrument was in proper working condition and passed all diagnostic testing. In order to obtain an adequate breath sample, Officer Meuwissen had to ensure that four criteria were met: (1) the breath sample must be provided at a rate greater than 3 liters per minute; (2) the breath sample must be a minimum of 1.5 liters of breath;² (3) the test must achieve “level slope”; and (4) the breath sample must drop below 3 liters per minute. Officer Meuwissen explained to appellant how the testing process would work.

Due to facial injuries, appellant was unable to form a tight seal with his lips around the straw. So, appellant used both hands to form a seal instead. Officer Meuwissen instructed appellant to “keep blowing.” Appellant blew into the device for approximately 16 seconds and provided a sample of 4.41 liters of breath. He provided the sample at a rate of 16 liters per minute, which was, as the district court found, “far exceeding the minimum threshold of three liters per minute.” However, as Officer Meuwissen later testified,

question to Officer Marben, and after Officer Marben responded, appellant continued to consult with his attorney.

² A screen on the DMT device shows a graph which indicates when the breath sample crosses the threshold of 1.5 liters. Officer Meuwissen testified that, while the graph appears on the screen, “that’s not what we’re watching.”

officers are not trained to stop a test on their own, nor are they able to override the machine or force it to accept a sample. Rather, the machine determines when a sample is acceptable, and as soon as “all the criteria are met, the test automatically stops.” Because officers are not trained “to police” the DMT, they are not trained or equipped with calculators to perform calculations independent of the DMT, and because officers are unable to tell “the exact instant when all of the sample criteria [are] met,” a suspect must continue blowing until the DMT accepts the breath sample. Appellant’s final alcohol concentration measured at 0.08. Officer Meuwissen found no indication that appellant’s test results were not accurate.

Appellant was cited with three counts of misdemeanor DWI, and respondent Commissioner of Public Safety (the commissioner) revoked his driving privileges. *See* Minn. Stat. § 169A.52, subd. 4 (2016) (stating the commissioner must revoke the driver’s license of an individual who submits to a test when the test results indicate an alcohol concentration of 0.08 or more, and the officer certifies there was probable cause to believe the individual was driving the motor vehicle while impaired). Appellant sought judicial review of his license revocation.

An implied-consent hearing was held in district court. Appellant narrowed the scope of the hearing to two issues: (1) whether he voluntarily consented to the breath test and (2) whether the way in which the test was administered violated his due-process rights. The district court heard testimony from Officers Marben and Meuwissen. The district court also accepted, without any objection, the BTA that was read to appellant on the night of the offense, as well as appellant’s breath-test results.

The district court sustained the revocation of appellant's driving privileges. The district court found that appellant's consent was given freely, knowingly, and voluntarily, and that appellant failed to provide sufficient evidence that the way in which the test was administered interfered with the accuracy of the test results. This appeal followed.

D E C I S I O N

I. The district court did not err by finding that appellant freely, knowingly, and voluntarily consented to the breath test.

Appellant contends that Officer Marben coerced his consent to taking a breath test, and that, in doing so, Officer Marben violated his due-process rights. Minnesota's Implied Consent Law governs the administration of breath, blood, and urine tests to drivers who are suspected of being under the influence of alcohol or hazardous or controlled substances. Minn. Stat. §§ 169A.50-.53 (2016 & Supp. 2017); *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506, 507 (Minn. 2018). While a blood or urine test generally requires law enforcement to procure a search warrant prior to administration, a breath test does not. See Minn. Stat. § 169A.51, subds. 2, 3; see also *State v. Hunn*, 911 N.W.2d 816, 819 n.2 (Minn. 2018) ("Today, only breath tests can be required under the implied-consent statute.").

Prior to administering a breath test, an officer must inform the driver that such a test is required by state law, that refusal to submit to a breath test is a crime, and that the driver has the right to consult, first, with an attorney. Minn. Stat. § 169A.51, subd. 2. This information is known as a breath-test advisory. *Id.* "Whether an implied-consent advisory violates a driver's due-process rights is a question of law, which this court reviews de novo." *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 561 (Minn. App. 2005).

In *McDonnell v. Comm’r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991), the supreme court held that an implied-consent advisory that threatens criminal charges the state is not authorized to impose violates an individual’s constitutional guarantee of due process and requires rescission of the order revoking the individual’s driving privileges. The supreme court has since clarified that a due-process violation under *McDonnell* does not occur “solely because a driver ha[s] been misled.” *Johnson*, 911 N.W.2d at 508. Rather, as the supreme court held in *Johnson*, an implied-consent advisory violates due process when:

(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.

Id. at 508-09.

In *Morehouse v. Comm’r of Pub. Safety*, an opinion filed contemporaneously with *Johnson*, the supreme court held that, in order to satisfy the second element of the *McDonnell* test, a driver must demonstrate “that he prejudicially relied on the implied consent advisory in deciding to submit to the test.” 911 N.W.2d 503, 505 (Minn. 2018). The supreme court concluded that, because the driver “did not even claim, much less establish, that he prejudicially relied on the implied consent advisory, [he] [wa]s not entitled to a rescission of his license revocation under *McDonnell*.” *Id.* The supreme court declined to address whether the third element was established. *Id.* n.4. In a recent opinion, *Windsor v. Comm’r of Pub. Safety*, we held that, absent sufficient evidence establishing

the three elements of the *McDonnell* due-process test, a claimant is not entitled to a remand to further develop the record. 921 N.W.2d 71, 75-76 (Minn. App. 2018).

As a preliminary matter, we note the inconsistency between the argument appellant briefed and the one appellant’s counsel presented at oral argument before our court. In his appellate brief, appellant argued that his consent to the administration of the breath test was not freely, knowingly, or voluntarily given because Officer Marben’s response to his question—that, if appellant refused to take a breath test, he would be held at the county jail pending a hearing before a judge—was a misstatement of the law. Appellant cited to Minn. Stat. § 169A.40, subd. 3 (2018), which provides that, “[n]otwithstanding rule 6.01 of the Rules of Criminal Procedure,” if an officer has reason to believe an individual committed a prescribed DWI offense, the officer must “take the person into custody, and the person must be detained until the person’s first court appearance.”³ Appellant argued that section 169A.40, subdivision 3, was inapplicable because he did not commit a prescribed DWI

³ The prescribed DWI offenses include the following:

- (1) under the circumstances described in section 169A.24 (first-degree driving while impaired) or 169A.25 (second-degree driving while impaired);
- (2) under the circumstances described in section 169A.26 (third-degree driving while impaired) if the person is under the age of 19;
- (3) in the presence of an aggravating factor described in section 169A.03, subdivision 3, clause (2) or (3); or
- (4) while the person’s driver’s license or driving privileges have been canceled under section 171.04, subdivision 1, clause (10) (persons not eligible for drivers’ licenses, inimical to public safety).

Minn. Stat. § 169A.40, subd. 3.

offense. Thus, argued appellant, Officer Marben misinformed him that he would be detained if he refused to take a breath test, and, consequently, his consent to the test was coerced. According to appellant, Officer Marben's advisory constituted a violation of his due-process rights.

At oral argument, however, appellant's counsel argued that Officer Marben's advisory was a misstatement, *not* because it was an inaccurate portrayal of the law, but because Officer Marben did not advise appellant that he could provide a blood or urine sample as an alternative to performing a breath test. Appellant's counsel argued that her client "would have consented" to providing a urine sample. Appellant's counsel asserted that her client's due-process rights were violated because, despite his disability, officers did not give appellant the option of choosing a different testing method.

We reject this argument for several reasons. First, while appellant's reply brief introduced this argument to some degree—stating, because appellant is "disabled under the law," due to "evident physical injuries that he suffered to his face and mouth," appellant "should have been offered a different testing method"—arguments appearing for the first time in a reply brief are not properly before us. *See Braith v. Fischer*, 632 N.W.2d 716, 724 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001); *see also Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. App. 2007) (stating a party who inadequately briefs an issue waives it).

Second, whether appellant's due-process rights were violated because officers failed to accommodate his alleged disability was not presented to nor considered by the district court. In his reply brief, and through his counsel at oral argument, appellant appears to

suggest that his due-process claim relating to his disability was presented, even if inadequately, to the district court. He argues that references to his physical injuries were made in both Officer Meuwissen's testimony and the district court's order. We are not persuaded.

While the record contains references to appellant's facial injuries, there is no indication that the issue of whether appellant's due-process rights were violated on the basis of those injuries was adequately presented to or considered by the district court. We do not typically consider constitutional issues that are raised for the first time on appeal. *St. Aubin v. Burke*, 434 N.W.2d 282, 284 (Minn. App. 1989), *review denied* (Minn. Mar. 29, 1989); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Indeed, during appellant's oral argument before this court, his counsel conceded that the district court did not make a ruling on whether his constitutional rights were violated on the basis of his disability.

Third, before making the decision to provide a breath sample, appellant consulted with an attorney. As this court has stated before, "an attorney, not a police officer, is the appropriate source of legal advice to clear up confusion because an attorney functions as an objective advisor who could explain the alternative choices to the confused driver." *Maietta v. Comm'r of Pub. Safety*, 663 N.W.2d 595, 599 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003). And lastly, appellant never indicated an inability to submit to the breath test, and, in fact, provided an adequate sample.

We also reject appellant's argument that he was coerced into consenting to the breath test, and that Officer Marben's advisory was a misstatement of the law. Under state

law, a person who has been lawfully arrested for driving while impaired is required to submit to a chemical test for the purpose of determining the presence of alcohol. *See* Minn. Stat. § 169A.51, subds. 1, 2. Appellant does not dispute that he was lawfully arrested on suspicion of driving while impaired. Because appellant's arrest was lawful, as it was based on the officer's probable cause to believe he had been driving while impaired, appellant was required by statute to submit to a chemical test of his blood, breath, or urine. *See id.*, subd. 1(b)(1). Had appellant not agreed to take a test, appellant would have been subject to a criminal charge of third-degree test refusal. *See* Minn. Stat. §§ 169A.20, subd. 2 (Supp. 2017), .26, subd. 1(b) (2016).

It follows then, that Officer Marben's statement that, if appellant refused to submit to a test, he would be held in county jail pending a hearing before a judge was neither inaccurate nor misleading. As Officer Marben testified, it was his department's policy to hold someone on a gross-misdemeanor third-degree test-refusal charge. While rule 6.01, subdivision 2, permits an officer to release an individual arrested without a warrant for a gross misdemeanor, it does not mandate that result. *See* Minn. R. Crim. P. 6.01, subd. 2.

Furthermore, appellant was on the phone with an attorney during the time that Officer Marben addressed appellant's inquiry about potential consequences. After Officer Marben responded to appellant's question, appellant continued discussions with his attorney. "[I]t is the responsibility of the attorney, not a police officer, to clear up any confusion on the part of a driver concerning the legal ramifications of test refusal." *Maietta*, 663 N.W.2d at 598. This is because "an accurate assessment of the precise consequences of alcohol-concentration test refusal involves a degree of legal analysis that

is the domain of the attorney and is beyond the scope of the law enforcement officer's function." *Id.* at 599.

Lastly, assuming *arguendo* that Officer Marben's advisory was a misstatement of the law, appellant's due-process claim still fails because he has not established that he "prejudicially relied on the implied consent advisory in deciding to undergo testing." *Johnson*, 911 N.W.2d 508-09. *Morehouse* emphasized that, in order to establish the second element under *McDonnell*, a driver must establish, and the district court must find, prejudicial reliance. 911 N.W.2d at 505. Appellant did not testify at the implied-consent hearing, nor did he offer any evidence in his defense to show prejudicial reliance. And, it should go without saying that, any factual assertions made by appellant's counsel in a brief do not constitute evidence presented to the district court. *See State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004) (stating attorneys' arguments "are not evidence"). Because the record is void of prejudicial reliance, appellant's due-process claim fails and he is not entitled to a remand on the issue. *See Windsor*, 921 N.W.2d at 75-76.

II. The district court did not err by finding that the way in which the officer administered the breath test did not violate appellant's due-process rights.

Appellant also argues that the district court erred by finding that the way in which Officer Meuwissen administered the breath test did not violate his rights to due process. "This court will uphold the [district] court's decision unless it erroneously applied the law to the facts." *Weierke v. Comm'r of Pub. Safety*, 578 N.W.2d 815, 816 (Minn. App. 1998).

"The legislature through the implied consent law and the commissioner through promulgated rules have carefully specified how [a breath] test result is to be obtained."

Brooks v. Comm’r of Pub. Safety, 584 N.W.2d 15, 17 (Minn. App. 1998), *review denied* (Minn. Nov. 24, 1998). The type of instrument used to administer appellant’s breath test, the DMT device, has been “approved by the commissioner for the purpose of determining the alcohol concentration of a breath sample.” Minn. R. 7502.0425 (2017). A breath test administered by the DMT consists of “one adequate breath-sample analysis, one control analysis, and a second, adequate breath-sample analysis.” Minn. Stat. § 169A.51, subd. 5(a). A sample is deemed “adequate if the instrument analyzes the sample and does not indicate the sample is deficient.” *Id.*, subd. 5(b).

“Once the state makes a *prima facie* showing of the test’s reliability, the burden shifts to the driver to introduce evidence of the test’s unreliability.” *State v. Rader*, 597 N.W.2d 321, 324 (Minn. App. 1999). The driver also has the burden of demonstrating that the way in which the test was administered was not fair. *Brooks*, 584 N.W.2d at 19. The state meets its initial burden by showing that the device was administered by a certified operator, and the device, as well as the chemicals, were in proper working condition. *See Zern v. Comm’r of Pub. Safety*, 371 N.W.2d 82, 83 (Minn. App. 1985); *see also* Minn. Stat. § 634.16 (2016) (“In any civil or criminal hearing or trial, the results of a breath test, when performed by a person who has been fully trained in the use of an infrared or other approved breath-testing instrument . . . are admissible in evidence without antecedent expert testimony that . . . [such] instrument provides a trustworthy and reliable measure of the alcohol in the breath.”).

We have consistently rejected the argument that a license revocation should be rescinded if the testing device measured a sample exceeding the minimum amount required

by law. See *Rader*, 597 N.W.2d at 324 (“[T]he state is not required to prove that a defendant’s alcohol concentration is indicated to be .10 or more at the *precise moment* the machine registers an adequate sample,” rather, it must only show that “the directions of the legislature are followed”) (emphasis in original)); *Brooks*, 584 N.W.2d at 20 (“The implied consent statute permits testing of a sample that is greater than the minimum adequate sample indicated by the [breath test device] and is silent on the issue of a maximum standard for an adequate breath sample.”); *Weierke*, 578 N.W.2d at 816 (“The implied consent statute does not require testing at the precise point at which a minimum adequate breath sample is provided and it permits testing of a sample that is greater than the minimum adequate sample indicated by the [breath test] machine.”).

In *Patten v. Comm’r of Pub. Safety*, we rejected the driver’s argument that his due-process rights were violated by the way in which the officer administered the breath test. No. A16-0546, 2016 WL 7337099, at *2 (Minn. App. Dec. 19, 2016). *Patten* involved a fact-pattern similar to the case at hand, and, coincidentally, the same officer, Officer Meuwissen. *Id.* at *2. Similar to appellant, the driver in *Patten* argued that his due-process rights were violated when Officer Meuwissen ordered him “to continue to blow well past what he could see was an adequate breath sample, and that additional breath pushed [his] alcohol concentration above 0.08.” *Id.* Citing to our decisions in *Brooks* and *Rader*, we explained that the driver’s argument “was rejected by this court almost 20 years ago.” *Id.* And, we were not persuaded by the driver’s argument that *Brooks* and *Rader* were distinguishable merely because they involved a testing device different from the DMT. *Id.* at *3.

Citing to the implied-consent statute, we explained in *Patten* that the legislature has directed how a DMT is to be administered and what constitutes an adequate breath sample. *Id.* Because the record in *Patten* demonstrated “that the directives set forth by the legislature in Minn. Stat. § 169A.051, subd. 5, were followed,” the state had met its initial burden and the driver was required to present evidence of the test’s unreliability. *Id.* While we noted that “there may be some merit to [the driver’s] claim that an increase in breath volume could cause the alcohol concentration to increase,” we determined that the driver had “failed to provide any scientific evidence beyond speculation that a quantity of breath volume greater than the minimum adequate sample inaccurately reflects the actual alcohol concentration in the subject’s body.” *Id.* We concluded that the driver “provided no evidence that the manner in which the test was administered to him was manipulated or any different than the manner in which the test was administered to others,” and consequently, we held that his due-process claim failed. *Id.*

In the instant case, appellant contends that the way in which Officer Meuwissen administered the breath test violated his rights to due process.⁴ He argues that the administration of the breath test violated his due-process rights because, despite having

⁴ Appellant also argues that the district court’s reliance on *Patten*, an unpublished opinion, was a violation of his due-process rights. We reject this argument outright. First, the district court’s order makes clear that its decision was not based merely on *Patten*. Second, other than citing to our decision in *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993), which stands for the proposition that unpublished opinions of this court are not binding precedent, appellant fails to support his position with legal authority accompanied by a coherent argument. *See, e.g., Brodsky*, 733 N.W.2d at 479. Despite appellant’s inadequate briefing on the issue, we hold that the district court’s consideration of *Patten* as having persuasive value to its decision was appropriate under the circumstances and far from violating appellant’s rights.

visible facial injuries, he “was treated exactly the same way as everyone else is treated.” Further, he argues that Officer Meuwissen instructed him to continue blowing “longer than the average driver,” which resulted in a test result above the legal limit. In his reply brief, appellant cites to two secondary sources to support his argument that his due-process rights were violated when he was ordered to blow past the minimum of 1.5 liters of breath. Appellant’s arguments are without legal merit.

First, as stated above, appellant failed to present his due-process claim on the basis of his disability to the district court for consideration. At oral argument before us, appellant’s counsel conceded that appellant failed to present evidence to the district court that the way in which he performed the breath test—by using his hands instead of his lips to form a seal around the straw—adversely impacted the test results. Indeed, appellant’s counsel conceded in her argument before us that appellant’s strongest arguments were not raised in district court. Because the issues regarding appellant’s disability were neither raised nor argued in district court, we, as an error-correcting court, decline to address them on appeal. See *Weierke*, 578 N.W.2d at 816 (declining to address appellant’s due-process claim because “it was not raised or argued” in district court).

Second, there is no indication that the directives set forth in the state’s implied-consent legislation were not followed. The commissioner presented evidence, through Officer Meuwissen’s testimony, that a certified operator administered the breath test. The commissioner also demonstrated, through Officer Meuwissen’s testimony and the admission of appellant’s test results, “that the machine was in working order and the chemicals used were in proper condition.” At oral argument before us, appellant’s counsel

conceded that the machine was working properly and that Officer Meuwissen was qualified to administer it. Further, there is no indication that the proper procedures were not followed in the administration of the test in terms of the sequence of breath samples and control samples.

And lastly, similar to the driver in *Patten*, appellant in the instant case has “failed to provide any scientific evidence *beyond speculation* that a quantity of breath volume greater than the minimum adequate sample inaccurately reflects the actual alcohol concentration in the subject’s body.” 2016 WL 7337099, at *3 (emphasis added). In his reply brief, appellant offers for the first time two secondary sources with allegedly scientific evidence to support his argument that his due-process rights were violated when he was ordered to blow past the minimum of 1.5 liters of breath. In effect, appellant is asking us to engage in fact finding. We are not a fact-finding court. See *Michaels v. First USA Title, LLC*, 844 N.W.2d 528, 532 (Minn. App. 2014) (“Because we are not a fact-finding court, issues brought to us on review must have been identified, argued fully, and entered into the record at the district court level.”). Further, arguments not raised in a principal brief cannot be raised in the party’s reply. See *Braith*, 632 N.W.2d at 724.

Affirmed.