

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0285**

State of Minnesota,
Respondent,

vs.

Brian Allen Platt,
Appellant.

**Filed March 8, 2021
Affirmed
Bratvold, Judge**

Beltrami County District Court
File No. 04-CR-17-4085

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

David L. Hanson, Beltrami County Attorney, Hannah M. Hanlon, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal from a final judgment of conviction for driving while impaired (DWI)—refusal to submit to testing, appellant argues that he is entitled to reversal for three

reasons: (1) the district court erred by denying his motion to suppress, (2) the state violated his due-process rights, and (3) the record evidence is insufficient to support his conviction. Because caselaw and the record support the district court's determination that appellant's conduct frustrated the testing process, the officer informed appellant of adverse consequences of test refusal, and the record evidence is sufficient to sustain a conviction of test refusal, we affirm.

FACTS

The following summarizes the district court's factual findings on the motion to suppress as well as the officer's testimony at the contested omnibus hearing.

On December 22, 2017, at about 10:45 p.m., a police officer in Bemidji conducted a stop of a minivan with an inoperable brake light. When speaking with the driver, appellant Brian Allen Platt, the officer observed that Platt was talking fast and had dilated pupils, which the officer believed were signs of impairment. The officer asked Platt to do field sobriety testing. During testing, the officer observed additional signs that Platt may have been under the influence of a controlled substance, specifically, that he lost his balance, skipped numbers when counting, and had eye tremors.

The officer arrested Platt and drove him to an emergency room. Platt was uncooperative. Platt swore, insulted the officer, yelled, and banged his head on the inside of the squad car. The officer obtained a search warrant to collect a blood or urine sample. The officer testified that Platt "advised me numerous times very clearly that he was not going to give a blood sample." The officer then transported Platt to the county jail.

The district court received an audio recording detailing the discussion between Platt and the officer at the jail. The officer gave Platt a copy of the search warrant and tried to explain it to him. The district court found that Platt tried to slap the search warrant off the table and “continuously yelled over [the officer] to drown out the directions.” The officer testified that he had “a very hard time even getting a sentence out” over Platt’s yelling, and that he had to repeat himself a number of times while trying to tell Platt about the search warrant. Just after midnight, Platt told the officer that he would not provide a blood sample, but also stated, “I’ll give a piss test mother--ker, get the f--k outta here.” Platt said that he could not give a urine sample at that time.

According to the audio recording, the officer informed Platt, “[i]f you’re gonna (inaudible) act like this then you’re gonna be considered a test refusal.” Platt replied, “No you’re not gonna give me a test refusal, I ain’t refused sh-t yet, I need to drink some water first f--kface.” Platt then was placed in a holding cell where he was given water and fell asleep. The officer woke Platt “four times total” over forty minutes to ask if he was willing to provide a urine sample. During the first three times, according to the officer, Platt yelled at the officer “to get out of his cell,” yelled “vulgaritys” and swore at the officer, and told the officer “to leave.”

After the officer’s fourth attempt to wake Platt and ask about the urine sample, Platt took the specimen bottle and turned his back to the officer. The officer “leaned back” so he could observe and verify the validity of the sample. Platt “became irate,” called the officer “every name under the sun,” and threatened the officer. Platt then “handed the bottle back to [the officer] refusing to give a urine sample.” The officer testified that he again

tried to explain that a sample was required and that refusal was a crime, but that he was unable to do so over Platt's yelling. The officer also testified that based on his training and experience, he did not feel it was safe to remain in Platt's jail cell. The officer told Platt that he considered Platt's conduct to be a test refusal.

The state charged Platt with third-degree DWI--refusal to submit to testing, Minn. Stat. § 169A.26, subd. 1(b) (2016). Platt moved to suppress evidence of Platt's refusal, arguing the officer failed to inform Platt that refusal to submit to testing is a crime. After an evidentiary hearing, the district court denied the motion and the case went to trial. The officer testified similarly to his testimony at the omnibus hearing. Platt testified that he started to provide a urine sample, but was interrupted by the officer. A jury found Platt guilty. The district court sentenced Platt to one year in the county jail, with credit for 243 days.

This appeal follows.

DECISION

I. The district court did not err by denying Platt's motion to suppress.

Platt argues the district court erred by failing to suppress evidence of his test refusal because the officer did not advise him that refusal to submit to testing was a crime. The state contends that the district court correctly denied the motion based on its determination that Platt frustrated the testing process.

When reviewing a district court's pretrial order on a motion to suppress evidence, appellate courts review the district court's factual findings for clear error and the district court's legal determinations de novo. *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008)

(quoting *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007)). On appeal, Platt does not challenge the district court’s factual findings from the omnibus hearing. Rather, Platt challenges the district court’s legal determination that Platt’s “behavior completely frustrated the implied consent procedure” and suppression was not required.

When served with a search warrant under Minn. Stat. §§ 626.04 to 626.18 that directs a driver to provide a sample for a blood or urine test, “the person must be informed that refusal to submit to a blood or urine test is a crime.” Minn. Stat. § 171.177, subd. 1 (Supp. 2017). This test advisory is part of the implied-consent process and is often called “the implied-consent advisory.” *See, e.g., State v. Mike*, 919 N.W.2d 103, 107 (Minn. App. 2018), *review denied* (Minn. Aug. 20, 2019). Compliance with the test advisory is required in a criminal DWI prosecution. *Id.* at 110. The purpose of the advisory is “to inform a driver of the serious consequences of refusal in an effort to compel the driver to take the test.” *Id.* at 113. Here, it is undisputed that the officer did not provide the test advisory to Platt.

We have recognized that “the implied-consent law imposes on a driver a requirement to act in a manner so as not to frustrate the testing process.” *Busch v. Comm’r of Pub. Safety*, 614 N.W.2d 256, 259 (Minn. App. 2000). When a driver’s conduct prevents an officer from completing the implied-consent process, the driver is deemed to have waived his or her rights under that process. *See id.* (holding that a driver who frustrated the implied-consent process by failure to respond had retracted his request for an attorney).

In *State v. Collins*, we considered the driver’s behavior when deciding whether the state violated a driver’s limited right to counsel by failing to read the implied-consent

advisory, which includes an instruction about the right to counsel. 655 N.W.2d 652, 656 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003). There, a police officer tried to read the advisory, but was “unable to do so because [the driver] began screaming, swearing, making accusations of rape, and insisting that she would not listen.” *Id.* at 658. The driver appealed her refusal-to-test conviction, arguing that her limited right to counsel had been violated. *Id.* at 654. We affirmed the driver’s conviction after determining that, even though the implied-consent advisory was not read, the driver had “completely frustrated the implied consent procedure,” which amounted to refusal to test. *Id.* at 658. Stated slightly differently, we concluded that the driver’s conduct “frustrated the implied-consent procedure and amounted to a retraction of her request to contact an attorney.” *Id.*

While Platt is not claiming that his limited right to counsel was violated, the reasoning from *Collins* is instructive. Like the driver’s conduct in *Collins*, Platt’s hostile behavior—yelling, swearing, interrupting, and threatening the officer—“completely frustrated” the testing process, and the officer’s attempts to explain the search warrant and consequences of test refusal. The district court found that Platt was “belligerent and uncooperative to an extreme degree [so that] [t]he implied-consent advisory could not be given.”

This determination finds ample support in the officer’s testimony. The officer testified that he was unable to communicate with Platt because Platt yelled, talked over him, cut him off, swore, and threatened him. The officer testified that he was unable to inform Platt that refusal to take the test is a crime. Under *Collins*, Platt frustrated the testing process and forfeited his right to be advised of the consequences of refusal.

Still, Platt contends that *Collins* is “readily distinguishable” for two reasons. First, Platt argues that he never refused to listen, as did the driver in *Collins*. We disagree. Platt’s behavior—yelling, swearing, interrupting, and threatening the officer—amounted to a refusal to listen. As the district court found, “[t]he implied-consent advisory could not be given.”

Second, Platt argues that the officer made “no such attempt” to advise Platt, as did the officer in *Collins*, because the officer testified that he did not need to give the advisory until after Platt refused. We are not persuaded, in part, because Platt’s behavior frustrated the testing and advisory process throughout the four separate opportunities Platt had to comply. Also, Platt’s argument assumes that the test advisory must be given at a particular time. Minn. Stat. § 171.177, subd. 1 says the advisory must be given “at the time a blood or urine test is directed pursuant to a search warrant” While the purpose of the test advisory—driver compliance—is perhaps often served by giving the advisory early in the process, there is no statutory requirement to do so. Here, the officer repeatedly tried to advise Platt, but was unable to complete the advisory.

Finally, we disagree with Platt’s assertion that the officer made *no* attempt to advise Platt of the consequences of refusal. The audio recording shows that the officer warned Platt that his refusal had consequences: “If you’re gonna (inaudible) act like this then you’re gonna be considered a test refusal.” Also, Platt’s statements show that he understood the consequences: “No you’re not gonna give me a test refusal, I ain’t refused sh-t yet.” Thus, we conclude that the district court correctly denied the motion to suppress under *Collins*.

II. The state did not violate Platt's due-process rights.

Platt contends that the state violated his due-process rights under *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991). Platt argues that the officer's "failure to provide [him] with any advisory mandated by Minn. Stat. § 171.177, subd. 1" was "akin to the misleading advisory read in *McDonnell*." In response, the state argues that Platt's right to due process was not violated because he had sufficient notice of the consequences for test refusal even though the officer did not specifically inform him that refusal to submit to testing is a crime. "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) (citing *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005)).

In *McDonnell*, police arrested a driver suspected of DWI and told her that she could be charged with a crime if she refused to submit to chemical testing. 473 N.W.2d at 853. "Concluding that she would be subject to criminal penalties if she refused to submit to testing," the driver submitted to testing and her license was revoked. *Id.* at 851. The driver challenged her license revocation because the advisory was erroneous in her case under then-existing law. *Id.* The district court rescinded the revocation after determining that the implied-consent advisory given was "a misstatement of the applicable law." *Id.* The commissioner of public safety appealed the district court's decision to the court of appeals and we reversed. *Id.* The Minnesota Supreme Court granted review and reinstated the district court's decision, holding that the state had violated due process because the officer "threaten[ed] criminal charges the state was not authorized to impose." *Id.* at 855.

The Minnesota Supreme Court recently re-examined *McDonnell*, and recognized a three-part test for determining whether a driver's due-process rights for license revocation were violated by an inaccurate implied-consent advisory. *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506, 508-09 (Minn. 2018).

A license revocation 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. A driver must satisfy all three elements to establish a due-process violation under *McDonnell*. *Id.* Like the driver in *Johnson*, Platt fails to satisfy both the first and second element. *See id.* at 509 (rejecting the appellant's claim because he refused testing and could not establish the first or second element). Thus, Platt's claim under *McDonnell* fails.

More fundamentally, the state's failure to warn a driver of the exact consequences of refusing to submit to testing does not deprive the driver of due process where the driver is informed of adverse consequences. In *South Dakota v. Neville*, an officer informed a driver arrested for DWI that test refusal would lead to revocation of his license, but the officer did not tell the driver that his refusal could be used as evidence against him in court. 459 U.S. 553, 565-66, 103 S. Ct. 916, 923-24 (1983). The driver refused to take the test. 459 U.S. 553. The district court granted the driver's motion to suppress evidence of his test refusal based on the incomplete advisory. *Id.* at 556, 103 S. Ct. at 918. The South Dakota Supreme Court affirmed, and the United States Supreme Court granted certiorari. *Id.* The Supreme Court reversed and held that there was no due-process violation because the driver

was informed that “refusing the test was not a ‘safe harbor,’ free of adverse consequences.” *Id.* at 566, 103 S. Ct. at 924.

Neville guides our analysis in this case. The officer repeatedly tried to inform Platt about the consequences of test refusal and Platt’s behavior thwarted the officer from giving a test advisory. Moreover, the officer *did* inform Platt that he would be charged with test refusal if he did not provide a urine sample, and Platt’s response showed that he understood. Thus, we conclude that the state did not violate Platt’s due-process rights.¹

III. The record evidence is sufficient to support Platt’s conviction for test refusal.

Platt argues that the state failed to prove that he refused to submit to chemical testing because he said he would provide a urine sample, and “doubtlessly would have done so if not for the fact that his privacy was interrupted” by the officer observing him. The state argues that Platt’s “conduct did not comport” with his statement that he would provide a sample.

When reviewing a challenge to the sufficiency of the evidence, appellate courts conduct a “painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989) (citing *State v. Martin*, 293 N.W.2d 54, 55 (Minn. 1980)). During sufficiency review, the appellate courts assume that “the jury believed the state’s witnesses and disbelieved any

¹ This court reached the same conclusion in Platt’s due-process challenge to his license revocation. *See Platt v. Comm’r of Pub. Safety*, No. A18-1254, 2019 WL 1890585, at *2-3 (Minn. App. Apr. 29, 2019).

evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The appellate court “will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and [the requirement of] proof beyond a reasonable doubt, could reasonably conclude [the] defendant was proven guilty of the offense charged.” *State v. Alton*, 432 N.W.2d 754, 756 (Minn. 1988).

Platt argues that the state failed to prove that his test refusal was a “volitional act” done with an “actual unwillingness to participate in the testing process, as determined from the driver’s words and actions in light of the totality of the circumstances,” as required by *State v. Ferrier*, 792 N.W.2d 98, 101-02 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). Platt contends that he expressed willingness to submit to testing by stating he was “going” to give a urine sample, and so he did not affirmatively refuse.

A driver’s conduct may establish test refusal. *See Busch*, 614 N.W.2d at 259. When viewed favorably to the jury verdict, Platt’s conduct contradicted his verbal statement that he was willing to submit to chemical testing. According to the officer’s trial testimony, after taking the specimen bottle, Platt “exploded” by screaming and yelling, “shoved the bottle back” in the officer’s hand, and threatened the officer. Finally, Platt insisted that the officer immediately leave his cell when “[h]e said that I needed to leave the cell or he was going to rip my head off and throw it down the hallway and screamed at me some more.” Our review of the record reveals that the jury, acting with due regard for the presumption of innocence, had sufficient evidence to find Platt’s conduct was a refusal to submit to a test. Thus, we affirm Platt’s conviction.

Affirmed.