

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0500**

State of Minnesota,
Respondent,

vs.

Troy James Bonkowske,
Appellant.

**Filed March 15, 2021
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge**

Washington County District Court
File No. 82-CR-18-4952

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

Michael A. Welch, Forest Lake City Attorney, Hebert & Welch, P.A., Forest Lake, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and Hooten, Judge.

SYLLABUS

Entering judgments of conviction for both driving while impaired (DWI) and test refusal, when the offenses are committed during a single behavioral incident, is barred by Minn. Stat. § 609.04, subd. 1 (2018), because the offenses are set forth in the same criminal statute.

OPINION

SEGAL, Chief Judge

In this direct appeal from the judgment of conviction, appellant argues that he did not knowingly and intelligently waive his right to counsel, and that the district court erred by entering judgments of conviction and sentences for both DWI and test refusal. In a pro se supplemental brief, appellant argues that he was denied his right to an omnibus hearing and that law enforcement was required to obtain a warrant before entering his apartment and requesting that he submit to a breath test. We affirm in part, reverse in part, and remand.

FACTS

At approximately 11:00 p.m. on November 29, 2018, a woman called 911 to report that a man she believed to be intoxicated had just left a bar and driven away. The woman provided dispatch with the color, model, and license-plate number of the car the man was driving. Dispatch relayed the information to law-enforcement officers, who identified the car as belonging to appellant Troy James Bonkowske. The officers located the car in the parking lot at Bonkowske's listed address. One of the officers touched the hood of the car and discovered that it was still warm.

The officers knocked on Bonkowske's door and he answered. While speaking with the officers, Bonkowske struggled to stand still, swayed back and forth, had slurred speech and bloodshot eyes, and emitted a strong odor of alcohol. Based on these observations, the officers believed that Bonkowske was under the influence of alcohol. The officers asked Bonkowske if he had just arrived home, and he responded that he had been home for several

hours. The officers also inquired whether he had been drinking. He first told the officers that he had consumed approximately two glasses of wine in the last 15 minutes, but a few minutes later told them that he had consumed three “big beers” at a restaurant. He ultimately admitted to being at the bar identified by the 911 caller. During this interaction, Bonkowske refused the officers’ requests to perform field sobriety tests.

The officers placed Bonkowske under arrest for suspicion of DWI and transported him to the police department. The officers then read Bonkowske the breath-test advisory. After Bonkowske indicated that he wished to consult with an attorney, the officers provided him with access to a telephone and directories with the phone numbers of attorneys who handle DWI cases. Bonkowske briefly flipped through the directories but did not otherwise make any attempt to contact an attorney. The officers repeatedly informed Bonkowske that, if he was not going to attempt to contact an attorney, then they would continue with the breath-test-advisory process, but Bonkowske still made no attempt to contact an attorney. An officer then asked Bonkowske if he would consent to a breath test, and Bonkowske refused. When asked why he would not submit to a breath test, Bonkowske responded, “‘cuz I don’t like you.”

Respondent State of Minnesota charged Bonkowske with DWI, test refusal, and driving after suspension of his license. Bonkowske was appointed counsel, but later filed a petition to proceed pro se. The petition was granted following an omnibus hearing and Bonkowske represented himself at trial. A jury found Bonkowske guilty of all charges. The district court entered judgments of conviction and sentenced Bonkowske for each of the three offenses. Bonkowske now appeals.

ISSUES

- I. Did Bonkowske validly waive his right to counsel?
- II. Did the district court err by entering judgments of conviction and imposing sentences for both DWI and test refusal?
- III. Do Bonkowske's pro se arguments entitle him to relief?

ANALYSIS

I. Bonkowske validly waived his right to counsel.

A criminal defendant's right to counsel is guaranteed under the United States and Minnesota Constitutions. U.S. Const. amends. VI, XIV; Minn. Const. art. 1, §§ 6, 7. A defendant may waive that right, but such waiver must be knowing and intelligent. *State v. Rhoads*, 813 N.W.2d 880, 885 (Minn. 2012) (citing *Faretta v. California*, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975)). If a defendant knowingly and intelligently waives the right to counsel, the defendant "must be allowed to represent himself despite his lack of the legal ability to conduct a good defense." *State v. Thornblad*, 513 N.W.2d 260, 262 (Minn. App. 1994). We review a finding that a defendant validly waived his right to counsel for clear error. *State v. Worthy*, 583 N.W.2d 270, 276 (Minn. 1998).

The Minnesota Rules of Criminal Procedure provide different waiver requirements based on the level of the charged offense. Here, Bonkowske was charged with two gross misdemeanors and one misdemeanor. Pursuant to Minn. R. Crim. P. 5.04, subd. 1(3):

Defendants charged with a misdemeanor or gross misdemeanor punishable by incarceration who appear without counsel, do not request counsel, and wish to represent themselves, must waive counsel in writing or on the record. The court must not accept the waiver unless the court is satisfied that it is voluntary and has been made by the

defendant with full knowledge and understanding of the defendant's rights.

By contrast, when a defendant who has been charged with a felony wishes to waive the right to counsel, the district court may not accept the waiver before advising the defendant of the following:

- (a) nature of the charges;
- (b) all offenses included within the charges;
- (c) range of allowable punishments;
- (d) there may be defenses;
- (e) mitigating circumstances may exist; and
- (f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

Minn. R. Crim. P. 5.04, subd. 1(4).

Bonkowske filed a petition with the court to proceed pro se, having personally filled out the form provided by the state courts for that purpose. The form is five pages long and sets forth a summary of rights, responsibilities, and acknowledgments of the consequences applicable to waiving the right to counsel. As part of the petition, Bonkowske acknowledged that he had the opportunity to consult with counsel, understood the rights he was waiving, and that Bonkowske wished to waive his right to counsel and represent himself. At the omnibus hearing on the petition, the following exchange occurred between the district court and Bonkowske:

THE COURT: So here we are at this hearing. You filled out the standard petition to proceed pro se. He has the right to represent himself; is this how you wish to proceed, sir?

THE DEFENDANT: It is.

THE COURT: So you would represent yourself going forward. I would terminate the representation of the public defender and

it's unlikely they would ever get reappointed. Usually, when someone makes this decision to terminate, that means that's what they want to do going forward because we try to keep things on a tight timeframe and in this case you remain in custody and remain requesting speedy hearings that are coming up pretty quick, we have trial dates coming up in a hurry.

THE DEFENDANT: I understand.

THE COURT: You did fill out the petition; did you fully understand the entire petition? Do you read and understand the English language?

THE DEFENDANT: Yes.

THE COURT: . . . I'm going to discharge [counsel] unless there is any further comment from the State that would preclude me from doing that.

PROSECUTOR: I believe he has the right to proceed pro se provided that he understands he has to comply with all of the rules.

THE COURT: All right. [Counsel], you're discharged.

Bonkowske challenges the validity of his waiver, arguing that the district court erred by failing to conduct a sufficiently comprehensive on-the-record inquiry before granting the petition. The rules of criminal procedure, however, do not require a comprehensive on-the-record inquiry where, as here, the defendant was charged with gross-misdemeanor and misdemeanor-level offenses, not felonies. As set forth above, rule 5.04 permits a waiver of the right to counsel "in writing or on the record," and requires only that the district court be "satisfied that [the waiver] is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights." Minn. R. Crim. P. 5.04, subd. 1(3). The more specific advisements required in rule 5.04, subdivision 1(4), apply only to cases involving felony charges.

Moreover, "[a] district court's failure to conduct an on-the-record inquiry regarding waiver . . . does not require reversal when the particular facts and circumstances of the case

demonstrate a valid waiver.” *Rhoads*, 813 N.W.2d at 886.¹ Rather, “whether [a waiver of the right to counsel] is valid depends upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.” *Id.* at 889 (quotations omitted). In assessing the validity of a waiver, the court may consider the defendant’s familiarity with the criminal justice system and whether he was represented by counsel prior to the waiver. *Worthy*, 583 N.W.2d at 276; *State v. Garibaldi*, 726 N.W.2d 823, 828 (Minn. App. 2007).

Here, Bonkowske filled out the petition himself. On the form he indicated that he understood the charges and potential consequences, had discussed the issue with his counsel, and understood his trial rights. At the omnibus hearing, the district court confirmed that Bonkowske wished to proceed pro se and asked him whether he understood the entire petition before accepting the waiver. Bonkowske responded that he still wished to proceed pro se, understood the petition, and he did not ask any questions. In addition, Bonkowske was represented by counsel from the beginning of the case through the omnibus hearing and, because he had been involved in numerous prior criminal cases that resulted in him being sentenced to jail time, had some level of familiarity with criminal justice proceedings. These circumstances support the district court’s conclusion that Bonkowske’s waiver of the right to counsel was knowing and intelligent.

¹ We note that *Rhoads* involved a defendant who was charged with a felony-level offense and was therefore subject to the requirements of Minn. R. Crim. P. 5.04, subd. 1(4). 813 N.W.2d at 883.

Bonkowske, however, asserts “that he did not understand what it means for the police to have probable cause to arrest and for the state to have probable cause to file charges,” and that his lack of understanding undermines the validity of the waiver. But the petition submitted and signed by Bonkowske contained a specific paragraph where he acknowledged:

I understand that if the Court grants my petition to represent myself, I will be responsible for preparing my case for trial and trying my case. I understand that I will be bound by the same rules as an attorney. I understand that if I fail to do something in a timely manner, or make a mistake because of my unfamiliarity with the law, I will be bound by those decisions and must deal with them myself.

And, as noted above, if a defendant knowingly and intelligently waives the right to counsel, the defendant “must be allowed to represent himself despite his lack of the legal ability to conduct a good defense.” *Thornblad*, 513 N.W.2d at 262. On this record, we discern no clear error in the district court’s determination that Bonkowske validly waived his right to counsel.

II. The district court erred by entering judgments of conviction and imposing sentences for both DWI and test refusal.

Bonkowske contends that the district court erred by entering judgments of conviction and imposing sentences for both DWI and test refusal because the offenses are set forth in different sections of the same criminal statute and arose from a single behavioral incident. The state agrees. We are also in accord.

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1. The

Minnesota Supreme Court has interpreted Minn. Stat. § 609.04 (2018) to “bar[] multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Whether a conviction violates section 609.04 is a legal question that this court reviews de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Bonkowske was convicted of DWI under Minn. Stat. § 169A.20, subd. 1(1) (2018), and test refusal under Minn. Stat. § 169A.20, subd. 2(1) (2018). He argues that because these offenses are set forth in the same criminal statute, Minn. Stat. § 169A.20 (2018), judgments of conviction cannot be entered for both offenses. Bonkowske compares his case to *State v. Clark*. 486 N.W.2d 166, 170-71 (Minn. App. 1992). In *Clark*, a jury found the defendant guilty of “driving while under the influence of alcohol and driving with a blood alcohol concentration of .10 or more.” *Id.* at 169. The district court entered judgments of conviction for both offenses and imposed a sentence for the DWI offense. *Id.* at 170-71. This court held that, under *Jackson*, one of the convictions must be vacated because both convictions were based on different subsections of the same criminal statute and the offenses were committed during a single behavioral incident. *Id.*

Bonkowske acknowledges that his argument appears to be inconsistent with this court’s decision in *State v. St. John*. 847 N.W.2d 704, 709 (Minn. App. 2014). In *St. John*, the defendant pleaded guilty to second-degree test refusal and third-degree driving under the influence. *Id.* at 706. The district court determined that the defendant could not be convicted of both offenses and entered a conviction for test refusal after determining that the DWI offense was a lesser-included offense. *Id.* This court reversed, concluding that

because it was possible to commit one of the offenses, without necessarily committing the other, the third-degree DWI offense was not a lesser-included offense of second-degree test refusal. *Id.* at 707-08.

The court in *St. John*, however, did not analyze the issue in light of the supreme court's holding in *Jackson*. Rather, the determination was limited to a lesser-included-offense analysis. *Id.* Because Bonkowske does not base his argument on the assertion that one of the offenses is a lesser-included offense of the other, but on the decision in *Jackson*, we are persuaded that the holding in *St. John* does not bind our decision here.

In *Jackson*, the defendant was convicted of aggravated forgery and uttering a forged instrument under subdivisions one and three of Minn. Stat. § 609.625 (1982). 363 N.W.2d at 760. The supreme court ruled that, because the convictions were for offenses arising under different sections of the same statute and were committed as part of a single behavioral incident, the formal adjudication of the multiple convictions was in violation of Minn. Stat. § 609.04, subd. 1. *Id.* The court therefore held that “one of the two formal adjudications of conviction for violating section 609.625 must be vacated.” *Id.* While the present case involves convictions for DWI and test refusal, instead of forgery and forged instruments, we nevertheless determine that *Jackson* is the controlling precedent and governs our analysis in this case.²

² We note that this holding is also consistent with recent nonprecedential decisions of this court. See, e.g., *State v. Londo*, No. A19-1296, 2020 WL 3957275, at *4 (Minn. App. July 13, 2020); *State v. Skinaway*, No. A19-1324, 2020 WL 1910179, at *5 (Minn. App. Apr. 20, 2020).

The *Jackson* rule consists of two parts: first, the convictions must be for offenses that arise under different sections of the same statute and, second, the offenses must have been committed as part of a single behavioral incident. *Id.* at 759-60. Here, the first part of the rule is satisfied because Bonkowske’s convictions for DWI and test refusal arise under different sections of the same criminal statute—Minn. Stat. § 169A.20.

The second part of the rule, whether the offenses arose out of a single behavioral incident, is also satisfied. Within hours, Bonkowske drove from the bar to his house while intoxicated, was arrested and, while in custody, committed the offense of test refusal. The supreme court and numerous decisions of this court have held that DWI and test refusal committed as part of a continuous course of conduct, as occurred here, arise out of a single behavioral incident. *See State v. Simon*, 493 N.W.2d 528 (Minn. 1992) (mem.) (the offense of test refusal, committed after a DWI arrest and test-refusal advisory, is part of the same behavioral incident as the preceding DWI offense); *accord State v. Olson*, 887 N.W.2d 692, 701 (Minn. App. 2016); *State v. Fichtner*, 867 N.W.2d 242, 246, 253-54 (Minn. App. 2015), *review denied* (Minn. Sept. 29, 2015); *St. John*, 847 N.W.2d at 708.

Consequently, pursuant to *Jackson*, the entry of judgments of conviction for the two offenses violates Minn. Stat. § 609.04 and one of the convictions must be vacated. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (stating “the proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only,” retaining the guilty verdicts on the remaining charges, but not formally adjudicating those charges).

III. Bonkowske's pro se arguments do not entitle him to relief.

In a pro se supplemental brief, Bonkowske argues that he was denied the right to an omnibus hearing and that law enforcement was required to obtain a warrant before entering his apartment and requesting that he submit to a breath test. We address each in turn.

Omnibus Hearing

Bonkowske argues that he was denied the right to an omnibus hearing. Minnesota Rule of Criminal Procedure 11.01 provides that an omnibus hearing must be held in gross misdemeanor cases unless the defendant has pleaded guilty. The scope of the hearing includes challenges to probable cause for the charged offenses. Minn. R. Crim. P. 11.02(a).

The district court held an initial omnibus hearing at which the district court granted Bonkowske's petition to proceed as pro se counsel and indicated that an additional omnibus hearing would be held. The district court asked Bonkowske what arguments he would be raising, and Bonkowske responded that he would be challenging probable cause. Bonkowske subsequently filed a motion to dismiss the complaint based on a lack of probable cause, and a contested omnibus hearing was held to address the motion. The police officers involved in Bonkowske's arrest testified at the hearing, and he was able to cross-examine them and present his argument. At the conclusion of the hearing, Bonkowske indicated that he did not have any witnesses and, when asked if he wanted additional time to submit anything in writing, he responded, "You can just take it under advisement. I have no further written motions." The district court denied the motion and found that the state had satisfied its burden of establishing probable cause.

Bonkowske later filed an additional motion to dismiss, and a different district court judge considered the motion. That judge was uncertain whether the record remained open following the contested omnibus hearing and initially scheduled another omnibus hearing. The prosecutor requested that the omnibus hearing be canceled, however, on the grounds that the motion raised no new arguments and that an additional hearing was not necessary. The district court agreed and canceled the hearing.

On this record, we conclude that Bonkowske was not denied his right to an omnibus hearing. The district court held a contested omnibus hearing, Bonkowske meaningfully participated, and the district court inquired whether Bonkowske wished to have the record remain open before ultimately denying his motion to dismiss for lack of probable cause. Bonkowske explicitly stated that he did not have any additional motions and that the district court could take the matter under advisement. Bonkowske has therefore not established any basis to support his assertion that he was entitled to an additional omnibus hearing.

Failure to Obtain Warrants

Bonkowske asserts that the police officers impermissibly entered his apartment without a warrant and illegally obtained evidence that was used against him. But as the state notes, Bonkowske never filed a motion to suppress any evidence based on the warrantless entry to his residence. See Minn. R. Crim. P. 11.02(b) (stating evidentiary issues are within the scope of an omnibus hearing). In *State v. Roby*, the Minnesota Supreme Court observed that the court “do[es] not decide issues which are not first addressed by the trial court and are raised for the first time on appeal even if the issues involve constitutional questions regarding criminal procedure.” 463 N.W.2d 506, 508

(Minn. 1990) (quotation omitted). “This is especially true when the record is not fully developed.” *State v. Hill*, 871 N.W.2d 900, 903 n.1 (Minn. 2015). But we may, at our discretion, “deviate from this rule when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal.” *State v. Verdon*, 757 N.W.2d 879, 882 (Minn. App. 2008), *review denied* (Minn. Feb. 25, 2009).

When a motion to suppress evidence is filed, the defendant “bears the threshold burden of proving that he or she has a right protected by the constitution.” *State v. Edstrom*, 916 N.W.2d 512, 517 (Minn. 2018). The state then “bears the burden of establishing that the challenged evidence was obtained in accordance with the constitution.” *Id.* Bonkowske argues that the state failed to establish that the warrantless entry into his apartment was justified by an exception to the warrant requirement. The state argues that Bonkowske gave consent for the officers to enter his apartment. Whether an individual gave voluntary consent for law enforcement to enter his residence is a question of fact “based on all relevant circumstances.” *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). Because Bonkowske did not file a motion to suppress, the district court did not make findings of fact relating to the relevant circumstances or an ultimate finding whether Bonkowske gave consent for the officer to enter the apartment. The record is therefore not fully developed, and we decline to exercise our discretion to address the issue for the first time on appeal.

Bonkowske’s final argument is that the guilty verdict for breath-test refusal must be overturned because the police did not first obtain a search warrant for the test. He bases this argument on *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185-86 (2016), and

subsequent Minnesota cases holding that it is unconstitutional to criminalize the refusal to submit to blood and urine testing unless a warrant has been obtained. *State v. Trahan*, 886 N.W.2d 216, 224 (Minn. 2016); *State v. Thompson*, 886 N.W.2d 224, 233-34 (Minn. 2016). The warrant requirement does not, however, extend to breath tests and this argument is thus also without merit. *See, e.g., Birchfield*, 136 S. Ct. at 2186 (noting that states may criminalize the refusal to submit to a warrantless breath test because a person under arrest has no right to refuse a breath test).

DECISION

The district court did not clearly err by determining that Bonkowske validly waived his right to counsel. But the district court erred by entering judgments of conviction and imposing sentences for both DWI and test refusal because the offenses are set forth in different sections of the same criminal statute and arose during a single behavioral incident. We therefore affirm in part, reverse in part, and remand for the district court to vacate one of Bonkowske's convictions and the related sentence.

Affirmed in part, reversed in part, and remanded.