

*This opinion is nonprecedential except as provided by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
A21-1556**

State of Minnesota,
Respondent,

vs.

Molandas Dionne Johnson,
Appellant

**Filed October 3, 2022
Affirmed
Bratvold, Judge**

Beltrami County District Court
File No. 04-CR-20-1700

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

David L. Hanson, Beltrami County Attorney, Wesley Van Ert, Assistant County Attorney,
Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and
Wheelock, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal from a final judgment of conviction for second-degree refusal to submit to a chemical test under Minn. Stat. § 169A.25, subd. 1(b) (2020), appellant requests reversal because, he argues, his right to counsel was not vindicated despite his

repeated requests for an attorney. Because the record supports the district court's determination that appellant's behavior frustrated the implied-consent process, appellant is deemed to have retracted his request for counsel and to have refused testing. Thus, we conclude appellant's limited right to counsel was not violated, and we affirm.

FACTS

The following facts are taken from the district court's findings of fact in a written order following a contested omnibus hearing and are supplemented by the record when helpful to the issues on appeal.

On June 16, 2021, around 8:30 p.m., Bemidji police officers responded to the site of a vehicle crash. Two officers arrived on the scene and found appellant Molandas Dionne Johnson lying "on the ground behind a bush" in a nearby field.¹ The first officer spoke with Johnson, who was cooperative. Johnson said that "he was driving too fast, lost control of his motor vehicle, and crashed." Johnson also said he "was hiding because he did not have a valid driver's license." As they walked back to the car, the officer observed indicia of impairment. Johnson failed field sobriety tests and submitted to a preliminary breath test. After a few attempts, Johnson's breath sample yielded a reading of 0.105. The officer arrested Johnson, who "became upset" and "started yelling and cursing at the officers."

¹ The first officer turned on his body-worn camera as he arrived at the scene, and the camera recorded the officer's interaction with Johnson both at the scene and at the jail. The recording was received as an exhibit during the omnibus hearing.

At the jail, the officer tried to read the implied-consent advisory² to Johnson at 9:02 p.m. Johnson, however, “screamed” and yelled the following many times: “‘take me upstairs,’ ‘I am not going through this,’ ‘take me to my cell,’ ‘la, la, la, la take me to my cell,’ . . . ‘take me to the bail hearing officer,’” and, “get me a lawyer or take me to a cell, period.” The officer asked Johnson to let him “explain the process,” but Johnson repeatedly screamed over, swore at, and refused to respond to the officer.

Still, the officer loudly read the implied-consent advisory to Johnson, informing Johnson that he had a limited right to counsel and that a phone would be made available to him should he wish to consult counsel. Johnson “screamed and yelled every time” the officer spoke. The officer asked Johnson to respond to the advisory questions, but Johnson continued to yell and refused to respond. The officer told Johnson that unreasonably delaying the test was a refusal to test, and “Johnson continued to yell and scream.” The officer noted on the written advisory that Johnson “[r]efused to answer” whether he wanted an attorney and “refused to let [the o]fficer speak, screaming [and] acting belligerent,” and that Johnson said, “[B]ring me to jail, I don’t wanna hear none of that s—t.”

Respondent State of Minnesota charged Johnson with one count of gross-misdemeanor second-degree refusal to submit to a chemical test under Minn. Stat. § 169A.25, subd. 1(b), and one count of misdemeanor fleeing a peace officer under Minn. Stat. § 609.487, subd. 6 (2020).

² The breath-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), *rev. denied* (Minn. Aug. 20, 2019).

Johnson moved to dismiss the complaint, arguing, among other issues, that his limited right to counsel was violated. The district court held a contested omnibus hearing, during which the state submitted a “*Florence* packet”³ that included the recording from the officer’s body-worn camera, the police report, the written implied-consent advisory, and photographs. Neither party presented testimony. The district court allowed the parties to submit briefs after the hearing. In Johnson’s brief, he argued the officer did not provide Johnson with a phone or otherwise help vindicate his right to counsel despite Johnson’s many requests for counsel. The state contended that Johnson “clearly frustrated the process.”

The district court denied Johnson’s motion after determining that Johnson’s “limited right to counsel during the implied consent process was not violated” because his conduct “frustrated the implied-consent process and amounted to a retraction of any request to contact an attorney.”

Johnson later waived his right to a jury trial and stipulated to the state’s case under Minn. R. Crim. P. 26.01, subd. 4, the state dismissed count two of the complaint, and the case proceeded to a stipulated-evidence trial that same day. The district court found Johnson guilty of second-degree refusal to submit to a chemical test and sentenced him to 365 days in jail, 311 of which were stayed for two years. This appeal follows.

³ When a defendant moves to dismiss, the district court “will make the critical determination based on all the information contained in the files and records as of [the omnibus hearing], including reliable hearsay in whole or in part.” *State v. Florence*, 239 N.W.2d 892, 900 (Minn. 1976) (quotation omitted). The “*Florence* packet” refers to the complaint, files, and other records the state submitted at the omnibus hearing.

DECISION

“A driver who has been stopped for a possible DWI violation and has been asked to submit to a chemical test” has a limited right to counsel. *Friedman v. Comm’r of Pub. Safety*, 473 N.W.2d 828, 833 (Minn. 1991). Whether that limited right to counsel was vindicated is a mixed question of law and fact. *Hartung v. Comm’r of Pub. Safety*, 634 N.W.2d 735, 737 (Minn. App. 2001), *rev. denied* (Minn. Dec. 11, 2001). “An appellate court reviews the district court’s factual findings under the clearly erroneous standard, but independently reviews the district court’s legal determination.” *Id.*; *see also State v. Slette*, 585 N.W.2d 407, 409 (Minn. App. 1998) (stating appellate courts review de novo whether a defendant’s right to counsel was violated).

Johnson argues he “unequivocally requested an attorney” and was not provided with means to contact an attorney, so the district court “erred by denying [his] motion to dismiss because his right to counsel was not vindicated.” The state contends the district court did not err because Johnson’s behavior “completely frustrated the [implied-consent] process, and it was by his own defiance that he did not consult with an attorney despite the offer and opportunity.”

Minnesota’s implied-consent law states that any person who drives a motor vehicle within the state “consents . . . to a chemical test of that person’s blood, breath, or urine for the purpose of determining the presence” of alcohol. *State v. Rosenbush*, 931 N.W.2d 91, 95 (Minn. 2019) (quotation omitted); Minn. Stat. § 169A.51, subd. 1(a) (2020). An officer may require a breath test when they have probable cause to believe the person drove a

vehicle while impaired, and the person has been lawfully arrested for violating Minn. Stat. § 169A.20. Minn. Stat. § 169A.51, subd. 1(b)(1) (2020).

The United States and Minnesota constitutions guarantee the right to counsel. U.S. Const. amend VI; Minn. Const. art. I, § 6. During the implied-consent process, Minnesota law provides individuals with “the right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing.” *Friedman*, 473 N.W.2d at 835. At the time of a breath test, the driver must be informed that they have “the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the [breath] test.” Minn. Stat. § 169A.51, subd. 2(3) (2020).

“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.” *State v. Collins*, 655 N.W. 2d 652, 658 (Minn. App. 2003), *rev. denied* (Minn. Mar. 26, 2003). When a driver requests an attorney before or after the implied-consent advisory is read, and the driver’s behavior frustrates the implied-consent process, the driver’s request for an attorney is considered retracted. *Id.*; *Busch v. Comm’r of Pub. Safety*, 614 N.W.2d 256, 259-60 (Minn. App. 2000).

Here, the district court determined Johnson’s “conduct frustrated the implied-consent process.” The district court found that Johnson “repeatedly yell[ed], ‘get me a lawyer or take me to a cell, period.’” The district court also found that the officer “informed” Johnson “of his right to consult with an attorney,” but Johnson “continued yelling and didn’t respond.” Relying on *Busch*, 614 N.W.2d at 260, and *Collins*,

655 N.W.2d at 658, the district court reasoned that Johnson’s behavior of yelling and swearing at the officer “before the implied-consent process even started” and “yell[ing] and scream[ing] throughout the entire advisory” hampered the implied-consent process and thus “amounted to a retraction” of his request for counsel.

Johnson argues that the district court erred because his limited right to counsel was not vindicated when he “repeatedly stated that he wanted ‘my lawyer,’” and “alternated between requesting an ‘attorney,’ ‘lawyer,’ and ‘public defender’” during the implied-consent process. The state disagrees, arguing that the district court’s decision adheres to caselaw.

In *Busch*, we affirmed the revocation of Busch’s driver’s license because his “behavior frustrated the implied consent process and amounted to a retraction of his request for an attorney and a refusal to test.” 614 N.W.2d at 260. There, Busch requested an attorney before the implied-consent advisory was read. *Id.* at 257. After an officer read the implied-consent advisory, the officer inquired three times if Busch wished to consult an attorney, but Busch refused to respond to the officers. *Id.* Busch also rolled “his head away while [the officer] read the advisory.” *Id.* at 259.

Johnson attempts to distinguish his case because the appellant in *Busch* “never once said during the reading of the implied-consent advisory that he wanted to consult with an attorney.” Johnson argues that, in contrast, he displayed an explicit “desire to consult with an ‘attorney,’ a ‘lawyer,’ or a ‘public defender’ throughout the reading of the implied-consent advisory” and said, “Give me an attorney,” after he was advised of his right to counsel. We disagree. Like Busch, Johnson refused to meaningfully respond to or

communicate with the police during or after the implied-consent advisory. When the officer tried to read the implied-consent advisory, Johnson “screamed over” the officer, yelling for the officer to take him to a cell, a bail hearing, or a lawyer. When the officer tried to reason with Johnson, Johnson continued to scream over the officer and swear. When the officer shouted the advisory, Johnson kept yelling and screaming and turned his back to the officer. The body-worn-camera recording shows that the officer made many attempts to communicate with Johnson but received no meaningful response.

In *Collins*, this court affirmed Collins’s conviction for test refusal, holding that her limited right to counsel was not violated because her “belligerent conduct functioned as a retraction of her request for counsel.” 655 N.W.2d at 661. There, Collins told officers she would not cooperate until her attorney was present, and the officer tried to read the implied-consent advisory but could not complete it. *Id.* at 655. Collins “began screaming, swearing, making accusations of rape, and insisting that she would not listen,” and Collins “attempted to leave the jail and was physically restrained.” *Id.* at 658. In response to Collins’s claim that she invoked her right to counsel amid this commotion, we reasoned that “from the beginning of the process to the end, Collins was extremely uncooperative, and her actions completely frustrated the implied consent procedure.” *Id.* We explained that “[i]f we found the defendant’s *silence* in *Busch* frustrated the testing process, then certainly the belligerent shouts and threats of Collins also frustrated the testing process.” *Id.*

Johnson tries to distinguish his case from *Collins* because there, the officer was unable to read the implied-consent advisory. Johnson argues that while he was “agitated

and yelling throughout the [implied-consent] process,” the officer was still “*able* to and in fact *did* read the entire implied-consent advisory to Johnson,” and therefore Johnson’s behavior did not frustrate the implied-consent process. We are not persuaded. Like Collins, Johnson screamed and yelled, and he even turned his back to the officer and yelled at the wall. Johnson yelled things like “‘take me upstairs,’ ‘I am not going through this,’ ‘take me to my cell,’ ‘la, la, la, la take me to my cell,’ . . . ‘take me to the bail hearing officer,’” and “get me a lawyer or take me to a cell, period.” While the officer completed the implied-consent advisory by shouting over Johnson’s yelling, Johnson persisted in yelling and screaming throughout the process. Johnson’s behavior, therefore, frustrated the implied-consent process and retracted any request for counsel, as did Collins’s behavior.

Johnson’s case is unlike *Slette*, which Johnson cites in his brief to this court. In *Slette*, we reversed a DWI conviction and remanded because the police violated Slette’s limited right to counsel. 585 N.W.2d at 410. Officers read Slette the implied-consent advisory and asked if he wanted to consult an attorney; he declined. *Id.* at 408. Officers then began to explain Slette’s rights before testing, and Slette questioned the officers, asking, “You know, maybe I should get an attorney before I take that test; think so?” *Id.* The officers told Slette that they could not give him legal advice and that talking to an attorney would not “change the outcome of what [they’re] going to do tonight.” *Id.*

On appeal, we concluded that Slette’s request for counsel was not vindicated because the officers “tried to talk [Slette] out of consulting with an attorney,” which “coerced [Slette] into testing” without consulting an attorney. *Id.* at 409-10. Unlike Slette, Johnson did not have any meaningful conversation with the officer because Johnson

continually yelled over the officer. Johnson’s incessant yelling about jail, bail, or an attorney is not comparable to Slette’s question about getting an attorney before taking a breath test.

Johnson makes two more arguments that we address in turn.⁴ First, Johnson contends that “the premise on which *Collins* and *Busch* are based has been abrogated” by *State v. Hunn*, 911 N.W.2d 816, 820 (Minn. 2018). We disagree because *Hunn* did not rule or comment on a defendant’s behavior frustrating the implied-consent process. In *Hunn*, the supreme court held that the limited right to counsel recognized in *Friedman* applies only if the implied-consent advisory is read. 911 N.W.2d at 820. There, Hunn consented to a urine test, and the officers did not read him the implied-consent advisory. *Id.* at 817-18. The supreme court upheld the district court’s decision that Hunn’s limited right to counsel was not triggered—and therefore, was not violated—when he consented to and complied with testing without any attorney. *Id.* at 820. In contrast, the officers in *Collins* and *Busch* read, or tried to read, the implied-consent advisory. *Collins*, 655 N.W.2d at 658; *Busch*,

⁴ Johnson also suggests in a footnote in his brief to this court that he disputes the accuracy of the transcript of the recording from the officer’s body-worn camera because the transcript was not prepared by a court reporter under Minnesota Rule of Criminal Procedure 28.02, subdivision 9(b). Johnson’s suggestion misunderstands the appellate rules.

No transcript was submitted to the district court at the contested omnibus hearing. Along with his notice of appeal, Johnson requested that a transcript of the recording be included as part of the appellate record. Rule 28.02, subdivision 9(b), permits the district court clerk to request preparation of a transcript by the party that produced the evidence. Upon receiving Johnson’s request, the district court clerk requested that the state provide a transcript of the recording. Thus, the transcript was prepared in accordance with the applicable rule. If Johnson disputes the accuracy of the transcript, the proper procedure is to move to correct or modify the record under Minnesota Rule of Civil Appellate Procedure 110.05, not through a footnote in a brief.

614 N.W.2d at 257. So *Hunn* does not undercut the legal analysis or holding in either *Collins* or *Busch*.

Second, while Johnson does not directly argue the district court's factual findings are erroneous, his brief implies as much. Johnson claims that after hearing the implied-consent advisory, he replied, "Give me an attorney," and, "[P]ublic defender or jail." Johnson's brief to this court also tries to undermine the district court's factual findings by contending that he "acknowledges that he was agitated and yelling throughout the process, [but] absolutely nothing he said" prevented the reading of the implied-consent advisory.

Our review of the record shows the district court's factual findings are fully supported. The recording shows, as the district court found, that "Johnson screamed over" the officer, "repeatedly yell[ed]," and "didn't respond" when the officer informed him of his limited right to counsel and asked whether he wanted to consult an attorney. Johnson's conduct persisted throughout the implied-consent process, which the officer completed, even though Johnson kicked the door in the holding area, paced, and refused to move toward the officer, who invited Johnson to sit while the advisory was read.

Under applicable caselaw, "the implied consent law imposes on a driver a requirement to act in a manner so as not to frustrate the testing process." *Busch*, 614 N.W.2d at 259. Johnson did not cooperate with the implied-consent process, and in fact, Johnson frustrated the implied-consent process. Thus, Johnson's behavior amounted to a retraction of his request for counsel. *See Collins*, 655 N.W.2d at 661 (holding an appellant's repeated yelling and refusal to listen to officers "functioned as a retraction of

her request for counsel”); *Busch*, 614 N.W.2d at 260 (holding an appellant’s refusal to answer an officer’s questions “frustrated the implied consent process and constituted a retraction of his request for an attorney and a refusal to test”). For that reason, the district court’s decision is affirmed.

Affirmed.