STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0801

Chad Harold Dyrdahl, petitioner,
Respondent,

vs.

Commissioner of Public Safety,
Appellant.

Filed February 11, 2019
Reversed
Connolly, Judge

Clearwater County District Court
File No. 15-CV-17-509

Peter J. Timmons, Sieben Edmunds, PLLC, Mendota Heights, Minnesota (for respondent)

Keith Ellison, Attorney General, William J. Young, Assistant Attorney General, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

CONNOLLY, Judge

Appellant challenges the district court's rescission of the revocation of respondent's license to drive after respondent was arrested for driving under the influence of alcohol

(DUI). Appellant argues that the district court erred by granting relief under the due-process theory set forth in *McDonnell*. *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 853-55 (Minn. 1991). Because respondent did not establish the three elements of a *McDonnell* due-process claim and was not prejudiced by the implied-consent advisory, we reverse.

FACTS

On November 19, 2017, a Minnesota State Patrol trooper stopped a vehicle driven by respondent Chad Harold Dyrdahl after observing the vehicle weaving within its lane and touching the fog line and center line multiple times. The trooper observed Dyrdahl to have blood shot and watery eyes, and detected a moderate odor of alcohol coming from the vehicle. Dyrdahl admitted he had "a little bit" of alcohol to drink that evening. Based on the smell of alcohol, blood shot and watery eyes, poor performance during field sobriety testing, and preliminary breath test results, the trooper arrested Dyrdahl for DUI. After being transported to the Clearwater County Jail, the trooper read Dyrdahl the implied-consent advisory as follows:

> Minnesota law requires you to take a test to determine the presence of alcohol. Refusal to take a test is a crime. Before making your decision about testing you have the right to consult with an attorney. . . . Do you understand what I have just explained?

Dyrdahl indicated he understood and wished to consult with an attorney. After consulting with an attorney, Dyrdahl agreed to take a breath test, which indicated an alcohol concentration of 0.14. Appellant Commissioner of Public Safety (the commissioner) revoked Dyrdahl's driver's license, and Dyrdahl petitioned for judicial review.

At the combined omnibus and implied-consent hearing, Dyrdahl limited the issues to (1) whether there was sufficient suspicion of criminal activity to initiate the traffic stop, (2) whether the field sobriety tests and preliminary breath test were illegal searches, and (3) whether the implied-consent advisory violated Minnesota statutes or his due-process rights. The parties did not dispute the facts or present testimony and agreed that the state's exhibits, which included the patrol vehicle's dash cam video and an audio recording of the implied-consent advisory and Miranda warnings, were the entirety of the record.

The district court rescinded the revocation of Dyrdahl's driving privileges, concluding that the implied-consent advisory violated both Minnesota statutes and his due process rights. The district court concluded that the traffic stop and field sobriety tests given were lawful, which is not challenged on appeal. This appeal follows.

D E C I S I O N

I.

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 (2018); *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506, 507 (Minn. 2018). If a driver refuses to permit a test, the commissioner of public safety revokes that driver's license. Minn. Stat. § 169A.52, subd. 3. If a driver submits to testing, and the test results show an alcohol concentration of 0.08 or more, the commissioner also revokes the driver's license. *Id.*, subd. 4.

The commissioner challenges the district court's ruling that Dyrdahl was entitled to rescission of his driver's license revocation on due-process grounds under *McDonnell*.

"Whether an implied-consent advisory violates a driver's due-process rights is a question of law," which we review de novo. *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 561 (Minn. App. 2005).

The supreme court established the test for determining whether a due-process violation has occurred in the context of a driver's-license revocation in *McDonnell*. Under that test, a license revocation violates due process when: (1) the driver submitted to a breath, blood, or urine test; (2) the driver prejudicially relied on the implied-consent advisory in consenting to the test; and (3) the advisory failed to accurately inform the driver of the legal consequences of test refusal. *Johnson*, 911 N.W.2d at 508-09 (citing *McDonnell*, 473 N.W.2d at 853-55). The supreme court noted that a due-process violation is not established under *McDonnell* "solely because a driver [has] been misled" by an implied-consent advisory. *Id.* at 508. We recently held that a district court errs when it grants relief under *McDonnell* without first determining that the three elements of a due-process claim have been established. *Windsor v. Comm'r of Pub. Safety*, 921 N.W.2d 71, 74 (Minn. App. 2018).[1] We also concluded that a remand is unnecessary if the record does not show evidence sufficient to establish all three elements. *Id.* at 75-76.

Here the district court concluded:

> [The trooper] misstated the law to [Dyrdahl] by stating that refusal to submit to a chemical test is a crime because the term "chemical test" includes blood and urine tests. Because the advisory was misleading, [Dyrdahl's] right to due process

[1] *Windsor* acknowledged that two recent supreme court opinions overruled *Olinger v. Comm'r of Pub. Safety*, 478 N.W.2d 806, 808 (Minn. App. 1991), which had held that the mere misstatement of the law entitled drivers to rescission of their license revocations without a showing of actual prejudice. 921 N.W.2d at 71.

> was violated. His later consent to the breath test is irrelevant. *See Steinolfson v. Comm'r of Pub. Safety*, 478 N.W.2d 808 (1991). . . . Under a due process analysis, [Dyrdahl's] breath test results must be suppressed.

This is both an erroneous interpretation of the law and factually incorrect. The district court's use of the word "chemical" here contradicts its own findings of fact and is not supported by the audio recording of the implied-consent advisory. The trooper did not state that refusal to submit to a *chemical* test is a crime; he stated that "refusal to take a test is a crime."

Additionally, the district court erred because it granted relief without determining that the three elements of a due-process claim under *McDonnell* had been established. *See Windsor*, 921 N.W.2d. at 74. Its conclusion that there was a due-process violation solely because Dyrdahl had been misled is an erroneous application of the law. *See Johnson*, 911 N.W.2d at 508 ("[I]n *McDonnell* we did not recognize a due-process violation solely because a driver had been misled."). Although Dyrdahl satisfies the first element of a *McDonnell* claim because he submitted to a breath test, he cannot satisfy the other two elements.

To establish the third element of a *McDonnell* claim, the implied-consent advisory must have failed to accurately inform Dyrdahl of the legal consequences of test refusal.

> At the time a breath test is requested, the person must be informed:
>
> (1) that Minnesota law requires the person to take a test:
>
> (i) to determine if the person is under the influence of alcohol; and
>
> (ii) if the motor vehicle was a commercial motor vehicle, to determine the presence of alcohol;

> (2) that refusal to submit to a *breath test* is a crime; and
>
> (3) that the person has the right to consult with an attorney, but that this right is limited to the extent that it cannot unreasonably delay administration of the test.

Minn. Stat. § 169A.51, subd. 2 (emphasis added).

The trooper stated that "refusal to take a test is a crime" as opposed to "refusal to submit to a breath test is a crime." Based on this, the district court concluded that the implied-consent advisory was misleading. But the implied-consent advisory did not misinform Dyrdahl of the legal consequences of his test refusal. As he was only asked to submit to a breath test and refusing to submit to a breath test *is* a crime, the advisory accurately informed him of the legal consequences of such test refusal. Minn. Stat. § 169A.51, subd. 2(2); *see State v. Thompson*, 886 N.W.2d 224, 229 (Minn. 2016) ("[T]he Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving.").

Even if we were to conclude that the advisory failed to accurately inform Dyrdahl of the legal consequences of test refusal, Dyrdahl cannot establish the second element of a *McDonnell* claim. In *Morehouse*, the supreme court emphasized that the driver must establish, and the district court must find, prejudicial reliance in order to establish the second factor under *McDonnell*. *Morehouse v. Comm'r of Pub. Safety*, 911 N.W.2d 503, 505 (Minn. 2018). The record here is limited because the parties stipulated to the facts and did not present testimony. Dyrdahl admits, and the record shows, that "no specific evidence was introduced to show [he] prejudicially or detrimentally relied on the language of the [implied-consent advisory] in deciding whether or not to submit to a breath test."

As Dyrdahl did not establish, nor did the district court find, that he prejudicially relied on the implied-consent advisory when he decided to take the breath test, he cannot establish the second element of a *McDonnell* claim. Consequently, Dyrdahl is not entitled to a rescission of his license revocation under *McDonnell*. *Windsor*, 921 N.W.2d at 74. As the record does not show evidence sufficient to establish all three elements, a remand is unnecessary. *See id.* at 75-76. Therefore, we reverse the district court's order rescinding the revocation of Dyrdahl's driver's license.

Dyrdahl argues that *Johnson* and *Morehouse* changed the law on due process and prejudicial reliance, and therefore, we should remand so he can develop the record with regard to those issues. *Windsor* recently clarified that *Johnson* and *Morehouse* did not create "a new standard for establishing a *McDonnell* due-process violation [but rather] reiterated the standard embodied in *McDonnell*." *Id.* In *Windsor*, we did not see fit to order a remand as the supreme court in *Morehouse* did not do so under similar circumstances. *See id.* (concluding that a remand is unnecessary if the record does not show evidence sufficient to establish all three elements). The circumstances here are similar to *Morehouse* and *Windsor* except Dyrdahl submitted only to a breath test, which further weighs against remand. Accordingly, we decline to remand for development of the record.

II.

Dyrdahl argues that the implied-consent advisory also violated Minn. Stat. §§ 169A.50-.53 because the trooper stated that "refusal to submit to a test is a crime" as

opposed to "breath test."[2] When the facts are undisputed in an implied-consent case, we review questions of law de novo. *Harrison v. Comm'r of Pub. Safety*, 781 N.W.2d 918, 920 (Minn. App. 2010).

Although "[u]niformity in giving the implied consent advisory is highly encouraged," a driver's license may still be revoked despite nonconformity with the statute if the driver is not prejudiced. *Hallock v. Comm'r of Pub. Safety*, 372 N.W.2d 82, 83 (Minn. App. 1985). As discussed above, Dyrdahl did not establish he was prejudiced by the implied-consent advisory in consenting to the breath test. Therefore, revocation of Dyrdahl's driver's license is proper.

Reversed.

[2] Dyrdahl also argues that the trooper violated the statute by stating "presence of alcohol" as opposed to "under the influence of alcohol." Although Dyrdahl presented a statutory violation argument to the district court, his contention with the "presence of alcohol" language is being raised for the first time on appeal. As this was not presented to and considered by the district court, we do not consider it. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (noting that a reviewing court must only consider issues presented to and considered by the district court).