2017 DWI Update

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DWI CASE LAW UPDATE

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Additional Testing

1. Right to additional chemical test is not prevented or delayed when an officer provides Driver with a county-issued medical-grade specimen cup to collect urine sample.

Willits v. Comm'r of Pub. Safety, 891 N.W.2d 79 (Minn. Ct. App. March 6, 2017)

Driver was arrested for DWI, read an implied consent advisory, and submitted to a breath test. Driver also requested an independent test and made a phone call to arrange it. When Driver's ex-wife arrived at the station with a Tupperware container to collect a urine sample, Officer offered Driver a county-issued urine-specimen cup to provide his sample. Driver accepted and used the county-issued container. At the implied consent hearing, Driver argued his right to an additional test was denied as the Officer ordered him to use the specimen cup and interfered with his right to an additional test. The court disagreed and sustained the revocation.

The court of appeals held that the Officer did not prevent or delay Driver's right to an additional chemical test and affirmed the revocation.

Blood Testing

1. Minnesota's test refusal statute violated Driver's right to substantive due process to the extent it criminalizes refusal to submit to a warrantless blood test.

State v. Trahan, 886 N.W.2d 216 (Minn. 2016)

Driver was arrested on suspicion of DWI. Officer read the implied consent advisory to Driver and asked if he would take a urine test. Driver agreed, but could not produce a sample. Officer then asked Driver if he would submit to a blood test, which he refused. Driver was charged with first-degree test-refusal. Driver pleaded guilty but later moved to withdraw his guilty plea. The district court denied the motion, and the court of appeals upheld the conviction. The Supreme Court granted further review but stayed its review pending *Bernard*. The Supreme Court then remanded back to the court of appeals for reconsideration of the constitutional issue considering the *Bernard* decision.

On remand, the court of appeals held that the search-incident-to-arrest exception does not apply to warrantless blood testing and the test-refusal statute violates a driver's right to due process by criminalizing the refusal to submit to a warrantless blood test. The conviction was reversed.

On appeal, the supreme court applied *Birchfield* and held: 1) Driver could not be prosecuted under the test refusal statute when refusing a blood test absent a warrant or exigent circumstances, 2) no exigent circumstance existed, 3) a good-faith exception to the exclusionary rule did not apply, and 4) the test refusal statute is unconstitutional as applied to blood and urine testing.

Breath Testing

1. District court may take judicial notice that the commissioner of public safety has approved the DataMaster for use by law enforcement.

State v. Norgaard, 2017 WL 2414832, 2017 WL 2414832 (Minn. Ct. App. Jun. 5, 2017) (unpublished opinion)

Driver was arrested on suspicion of DWI and consented to a breath test. At trial, the officer testified that he administered the DataMaster test, was trained to operate the device, and was a certified operator. The state introduced the results of the DataMaster and the pro se driver objected, arguing the state failed to produce evidence regarding reliability of the DataMaster. The district court then took judicial notice of the fact that the commissioner of public safety approved the DataMaster and the driver objected to the court taking judicial notice in a criminal proceeding. The district court found driver guilty of driving with an alcohol concentration of 0.08 or more and he appealed.

The court of appeals affirmed and held the district court may take judicial notice of legislative facts (the DataMaster was approved by the commissioner) and that the trial court did not abuse its discretion in admitting the test results.

2. PBT results used to investigate underage drinking are not admissible under Minn. Stat. §169.41 if there is no reason to believe the test subject had been driving.

Matter of T. D. B., A16-0944, 2017 WL 1208755 (Minn. Ct. App. Apr. 3, 2017) (unpublished opinion)

T.B.D., a 17-year-old high school student smelled of alcohol on Monday morning and was questioned. He admitted drinking in Wisconsin over the weekend and alleged the smell was coming from his clothes. The school resource officer brought T.B.D. to his office and administered a PBT which showed an alcohol concentration of 0.34. T.B.D. was cooperative with questioning and did not request a parent or attorney. Officer was in plain clothes, carried a badge and a gun, and did not tell T.B.D. he was under arrest. T.B.D. was charged with underage consumption of alcohol and found guilty.

On appeal, T.B.D. challenged the admissibility of the PBT under Minn. Stat. § 169.41 since there was no evidence of driving and no search warrant was obtained prior to administration of the PBT. The court of appeals agreed that the PBT was not admissible under Minn. Stat. § 169.41 and remanded the search issue to the district court.

T.B.D. also argued that his statement to police should be suppressed as he was not given a *Miranda* warning and that Minnesota did not have jurisdiction since the alcohol consumption occurred in Wisconsin. The court of appeals relied on the brevity of the encounter with the officer (5-7 minutes) and found the totality of the circumstances indicated T.B.D. was not in custody during questioning. The court also found that since evidence of his consumption was observed in Minnesota, jurisdiction was proper.

3. Instructing Driver to "keep blowing" until they provide over four times the breath volume required by the DataMaster does not constitute a violation of Driver's due process rights.

Patten v. Comm'r of Pub. Safety, A16-0546, 2016 WL 7337099 (Minn. Ct. App. 2016) (unpublished opinion)

Driver was arrested on suspicion of DWI, was read the implied consent advisory, and agreed to take a breath test. Driver provided the 1.5 liters of air required by the DataMaster after about five seconds of blowing, at which point he was well below the legal limit. Officer encouraged Driver to keep blowing for an additional 15 seconds, which caused him to provide four times the required amount of breath and raised his test result above the legal limit. Driver argued his due process rights were violated when the officer manipulated the test by requiring a sample greater than what was required by law. The district court determined Driver failed to establish the test results were inaccurate or that his due process rights were violated.

The court of appeals rejected the due process claim and sustained the revocation as Driver failed to provide evidence the test administration was manipulated or any different from than the way the test was administered to others.

4. Warrantless breath test and statutorily implied consent to investigate boating while intoxicated are not automatic under Iowa state constitution.

State v. Pettijohn, 14-0830, 2017 WL 2823027 (Iowa June 30, 2017)

Officer observed a passenger's feet hanging off a moving boat near the area of the motor. Officer stopped the boat to inform the occupants of the danger as careless, reckless or

negligent operation is a misdemeanor offense. Officer then developed suspicion Driver was intoxicated, which was beyond his authority to investigate. Officer called a conservation officer to investigate, issued a warning for negligent operation, and instructed Driver to proceed to a dock to await the conservation officer's arrival. Driver was arrested, read an implied consent advisory, and consented to a breath test. Driver failed to suppress evidence obtained after the Officer stopped the boat. He was convicted of operating a motorboat while under the influence of alcohol and appealed to the Supreme Court, pending the *Birchfield* decision.

On appeal, the Supreme Court determined the Officer had a reasonable articulable suspicion of criminal activity at the time of the stop and considering *Birchfield*, the Fourth Amendment of the U.S. Constitution permitted administration of a warrantless breath test to investigate boating while intoxicated. However, they also held that the evanescent nature of blood alcohol evidence did not justify a warrantless breath test incident to arrest under the state constitution. This is due, in part, to the fact that an officer with probable cause should be able to complete and submit an electronic warrant application within minutes. Further, Driver did not validly consent to the breath test as he was intoxicated at the time and had not been adequately advised of his right to withhold consent. The Supreme Court reversed the district court and remanded for a new trial as there was not valid consent to the warrantless breath test nor an exception to the warrant requirement of the state constitution.

Criminal Vehicular Operation

1. Intoxicated passenger who grabs the steering wheel is considered "operating" a motor vehicle under CVO statute.

State v. Henderson, 890 N.W.2d 739, (Minn. Ct. App. 20147) *rev. granted* (Apr. 26, 2017)

Defendant was the intoxicated passenger in a vehicle driven by a sober driver. The driver testified that following an argument regarding directions, defendant grabbed the steering wheel and pulled it toward himself. This caused an accident which injured the occupants and defendant was charged with one count of CVO under Minn. Stat. § 609.21, subd. 1(1), and three counts of CVO under Minn. Stat. § 609.21, subd. 1(2)(i). Defendant gave conflicting testimony of his recollection of the event but denied grabbing the steering wheel. The trial court found defendant guilty of four counts of criminal vehicular operation. The defendant appealed and argued that even if he grabbed the wheel, that constituted only physical control as opposed to operation, and was insufficient to support a CVO conviction.

The court of appeals found that manipulation of the steering wheel of a moving motor vehicle by a passenger constitutes "operation" under Minn. Stat. § 609.21 and affirmed the CVO convictions. The court of appeals reversed and remanded count one as it arose out of the same behavioral incident and involved the same victims as the other three CVO convictions.

Due Process

1. Implied consent advisory which inaccurately states refusal to take urine test is a crime violated due process and the remedy is rescission of revocation.

Johnson v. Comm'r of Pub. Safety, 887 N.W.2d 281 (Minn. Ct. App. 2016) *rev. granted* (May 30, 2017)

Driver was arrested following an accident on suspicion of driving while impaired by narcotics or medication. Driver was read the implied consent advisory at the hospital. The officer informed Driver that refusal to take a urine test was a crime. Driver spent over an hour attempting to contact an attorney, at which time the officer offered a blood test. Driver once again indicated that he wanted to consult an attorney. A breath test was not offered since the officer did not believe driver was under the influence of alcohol. Driver did not submit to a blood or urine test, and his license was revoked based on refusal. Driver argued his right to due process was violated when the officer informed him refusal to take a urine test was a crime, and he successfully petitioned for rescission of the revocation.

The court of appeals found there was no search-incident-to-arrest or exigent circumstance exception to the warrant requirement for a urine test and that the implied consent advisory inaccurately informed driver that refusal to take a urine test was a crime. The inaccurate advisory misinformed the driver regarding the potential penalty for refusing to submit to a urine test. This violated his right to due process as established in *McDonnell* and the order rescinding the revocation was affirmed.

2. Driver not entitled to rescission of revocation when he failed to show a violation of unconstitutional-conditions doctrine and failed to raise a procedural due process claim.

Erickson v. Comm'r of Pub. Safety, A16-0587, 2017 WL 164415 (Minn. Ct. App. January 17, 2017) (unpublished opinion)

Driver was in an accident and arrested on suspicion of DWI at the hospital. Officer read Driver the implied consent advisory and Driver refused both blood and urine tests. As a

result, Driver's license was revoked. Driver petitioned for judicial review of the license revocation and argued that his due process rights were violated since the revocation was based on refusal to consent to an unconstitutional search. The district court rescinded the revocation. Commissioner appealed and Driver did not file an appellate brief.

The court of appeals reversed the rescission, indicating Driver failed to show a violation of the unconstitutional-conditions doctrine and failed to make a procedural due process claim.

3. Driver's due process rights are violated when the implied consent advisory is misleading and inaccurate. Subsequent consent to testing does not remedy the due process violation.

Gangestad v. Comm'r of Pub. Safety, A16-0729, 2016 WL 7438720 (Minn. Ct. App. Dec. 27, 2016) (unpublished opinion)

Driver was arrested on suspicion of DWI, read the implied-consent advisory, and submitted to a urine test. As a result, Driver's license was revoked. Officer did not obtain a warrant prior to requesting the urine sample. Driver petitioned for reinstatement of his driver's license arguing: 1) the urine test was obtained in violation of his Fourth Amendment rights, 2) the advisory was misleading and violated his right to due process by threatening criminal charges the state was unauthorized to impose.

The Commissioner argued that Driver consented to the warrantless urine test. The district court agreed that Driver consented to the urine test but the advisory misstated Minnesota law and was, therefore, a due process violation despite Driver's consent. The court of appeals affirmed the rescission on due-process grounds.

4. Driver's due process rights are violated when implied consent advisory is inaccurate and misinforms driver of the penalties for refusal.

Hendrickson v. Comm'r of Pub. Safety, A16-0581, 2016 WL 7337100 (Minn. Ct. App. May 30, 2017) (unpublished opinion)

Driver was arrested on suspicion of DWI and read an implied consent advisory. Officers suspected he was under the influence of a controlled substance. Driver refused blood and urine tests. As a result, his license was revoked. Driver challenged the revocation and argued the advisory violated his due process rights because it materially misstated the law. The district court denied the petition and sustained the revocation.

On appeal, commissioner argued that since *Birchfield*, *Trahan*, and *Thompson* had not been decided at the time the advisory was read, it was in fact accurate at that time. The court of appeals cited *Johnson* and held that since the test-refusal charge would have been unconstitutional the advisory was inaccurate and misinformed driver of the penalties he would face if he refused, in violation of his due process rights. The revocation was rescinded.

5. Misleading implied consent advisory violated Driver's due process rights and entitles Driver to rescission of license revocation.

Jirik v. Comm'r of Pub. Safety, A16-0710, 2016 WL 6826298 (Minn. Ct. App. May 30, 2017) (unpublished opinion)

Driver was arrested on suspicion of DWI and read the implied consent advisory, including "refusal to take a test is a crime." Driver was then offered a urine test and agreed. Officer did not obtain a warrant for a search of Driver's urine. Driver's license was subsequently revoked and Driver petitioned for rescission, arguing the advisory was inaccurate regarding the penalties for refusal, violated their due process rights, and that consent was, therefore, not valid. The district court agreed and rescinded the revocation.

On appeal, the commissioner argued the warrantless search did not violate Driver's Fourth Amendment rights because the implied consent statute is not unconstitutional, Driver validly consented to the search, Driver was not criminally prosecuted for refusal, and a good-faith exception applied to the exclusionary rule. The court of appeals disagreed and sustained the rescission.

6. Driver entitled to rescission of license revocation when due process rights are violated by inaccurate implied consent petition.

Susa v. Comm'r of Pub. Safety, A16-0569, 2006 WL 7188703 (Minn. Ct. App. 2016) (unpublished opinion)

Driver was arrested on suspicion of DWI, read the implied consent advisory, and asked to provide either a blood or urine sample. Driver provided a urine sample and their license was subsequently revoked. The district court concluded the warrantless collection of Driver's urine was unconstitutional and rescinded the revocation.

On appeal, the commissioner argued the district court erred as the collection was performed pursuant to Minnesota's Implied Consent law and was permissible under the Fourth Amendment since *Birchfield*, *Trahan*, and *Thompson* had not been decided at the time the advisory was read. Driver argued that under *McDonnell* his due process rights

were violated because the implied consent advisory incorrectly informed him refusal to take a test was a crime. The court of appeals determined that there is no reason to differentiate between criminal and administrative proceedings when considering a due process challenge and upheld the rescission.

7. Accuracy of breath test result indicating a 0.16 alcohol concentration may be challenged at an implied consent proceeding.

Janssen v. Comm'r of Pub. Safety, 884 N.W.2d 424 (Minn. Ct. App. 2016)

Driver was arrested for DWI and breath samples showed alcohol concentrations of 0.174 and 0.167. Driver's license was revoked for one year and his license plates were impounded because his alcohol concentration was over twice the legal limit. Driver sought to challenge the test result at the implied consent hearing as a test result over 0.16 was dispositive of both the length of the revocation and plate impoundment. The district court concluded the issue was not properly before it as Minn. Stat. §169A.53, subd. 3(b)(8)(i) provides whether alcohol concentration is over 0.08, not over 0.16, is within the scope of an implied consent hearing.

The court of appeals reversed and remanded, holding that whether driver's alcohol concentration was twice the legal limit was dispositive of his penalties. Failure to provide a meaningful review of his revocation and impoundment penalties was a denial of due process.

Enhanceability

1. A uncounseled, uncontested implied consent license revocation may be used to enhance a DWI charge to the felony level when the Driver was acquitted in the companion test-refusal case.

State v. Vaughn, A16-0817, 2017 WL 1214479, (Minn. Ct. App. Apr. 3, 2017) (unpublished opinion)

Driver was charged with two DWI offenses in 2014 which were enhanced to felonies based in part on a 2011 implied consent license revocation. Driver prevailed in the companion criminal case on the test refusal charge and claimed that a combination of traumatic brain injury, indigence, and lack of right to appointed counsel in the license revocation proceeding foreclosed the opportunity for him to challenge the 2011 revocation. The district court disagreed and used the 2011 conviction as a qualified prior impaired incident in finding him guilty of felony DWI.

The court of appeals reaffirmed its position that the indigent are not entitled to appointed counsel in an implied consent proceeding and rejected the argument that Driver's TBI rendered him incompetent to challenge the 2011 revocation. Driver argued that based on his 2012 acquittal in the companion refusal case, he would likely have prevailed in the implied consent proceeding on the same legal theory if he would have been provided counsel. The court of appeals "declined to speculate" as to the possible outcome of that case and affirmed the felony conviction.

2. Criminal Vehicular Operation conviction under previous statute, which is not listed under the first-degree DWI statute, is a predicate felony for purposes of enhanceability.

State v. Boecker, 893 N.W.2d 348 (Minn. 2017)

Driver was charged with first degree DWI based on a prior CVO conviction from a year not specifically listed in the current first degree DWI statute. Driver challenged whether there was probable cause to sustain a first-degree charge when the prior CVO conviction was under a statute not specifically listed as a predicate felony under the first-degree DWI statute. The district court denied the motion, and Driver pleaded guilty to first-degree DWI. Driver appealed and argued that he was entitled to withdraw his guilty plea.

The court of appeals affirmed and held that a prior felony CVO conviction was a predicate felony under the first-degree DWI statute because the relevant portion of the prior CVO statute was identical to the current statute referenced in the first-degree DWI statute and the Supreme Court affirmed.

3. Criminal Vehicular Operation cannot be treated as a qualified prior incident to enhance a DWI charge when it is not specifically listed as a qualified offense.

State v. Smith, A15-0570, 2017 WL 3045517 (Minn. July 19, 2017)

Driver was convicted of first-degree DWI after the district court ruled his three prior impaired driving convictions could be used to enhance the charge. One of the three predicate prior convictions included a CVO, which is not specifically included in the list of offenses found in Minn. Stat. §169A.03, subd. 22. The court of appeals agreed CVO is not included in the list of qualifying offenses but upheld the conviction since excluding the CVO conviction would lead to an absurd result regardless of the statute's plain language.

The supreme court pointed out the absurdity canon has only been permitted to override the plain and unambiguous language of a statute once in the history of the court, for a tax

case. The supreme court held the CVO conviction was not a qualified prior impaired driving incident for enhancing the current charged and reversed the court of appeals.

Exigent Circumstances

1. 15-20 minute window to collect a blood sample before driver is transported to another hospital is a sufficiently exigent circumstance which absolves officers of warrant requirement.

State v. Trousil, A16-0831, 2017 WL 1316112 (Minn. Ct. App. June 28, 2017) (unpublished opinion)

Law enforcement responded to an ATV rollover accident. Upon arrival, they found Driver injured and lying in a ditch. Driver smelled of alcohol and had difficulty remaining conscious. Officers contacted the county attorney's office regarding a warrant and were advised to get a warrant if Driver would stay at a local hospital, but to draw blood if Driver would be flown to another hospital. One officer left the scene to obtain a warrant and another went to the hospital. Shortly after arriving at the local hospital, officers were advised Driver would be flown to another hospital in 15-20 minutes and requested a warrantless blood draw. Driver was charges with second and third degree DWI.

Prior to trial, Driver moved to suppress the evidence from the warrantless blood draw and the court concluded exigent circumstances absolved the officers of the warrant requirement. Driver appealed the pretrial suppression-motion ruling and argued the blood draw was unconstitutional since the officers had sufficient time to obtain a telephonic warrant.

The court of appeals applied *Stavish* factors to determine if an exigent circumstance exception to the warrant requirement existed and determined the 15-20 minute window provided by medical personnel constituted an exigency sufficient to absolve the officers of the warrant requirement.

Expungement

1. DWIs are eligible for expungement under the newly enacted expungement statute, and the court is required to perform a case-specific analysis.

State v. J.E.H., A15-1948, 2016 WL 3659290 (Minn. Ct. App. July 11, 2016) (unpublished opinion)

Driver petitioned for expungement of all records related to his 2008 DWI conviction. The prosecuting agencies opposed the petition and argued that because a DWI conviction is enhanceable for ten years, it "would be very difficult to use this prior offense for enhancement" if the record was sealed. The referred denied the petition and concluded that Driver had not met his burden.

The court of appeals reversed and remanded finding that the referee committed clear error in his analysis. Although the need for complete and accurate records is significant, there is nothing to suggest that a sealed record would be inaccessible to interested government agencies. The statute specifically allows agencies to share expunged records with one another.

The court of appeals also noted that the referee's analysis with respect to the nature of severity of the crime appeared related to DWIs generally, as opposed to a case-specific analysis. Because the legislature enacted the new expungement statute, which provides that expungement is available to DWI offenders, the district court erred in its analysis of the nature and severity of the underlying crime.

Good Faith Exception to Exclusionary Rule

1. Minnesota's test-refusal statute violated Driver's right to substantive due process to the extent it criminalizes refusal to submit to a warrantless blood test.

State v. Trahan, 886 N.W.2d (Minn. 2016)

Driver was arrested on suspicion of DWI. Officer read the implied consent advisory to Driver and asked if he would take a urine test. Driver agreed, but could not produce a sample. Officer then asked Driver if he would submit to a blood test, which he refused. Driver was charged with first degree test refusal. Driver pleaded guilty but later moved to withdraw his guilty plea. The district court denied the motion, and the court of appeals upheld the conviction. The Supreme Court granted further review but stayed its review pending *Bernard*. The Supreme Court then remanded back to the court of appeals for reconsideration of the constitutional issue in light of *Bernard*.

The court of appeals held that the search-incident-to-arrest exception does not apply to warrantless blood testing. The test-refusal statute violates a driver's right to due process by criminalizing the refusal to submit to a warrantless blood test.

On appeal, the supreme court applied *Birchfield* and held Driver could not be prosecuted for violating the test refusal statute for refusing a blood test absent a warrant or exigent

circumstances, no exigent circumstance existed, a good-faith exception to the exclusionary rule did not apply, and the test refusal statute is unconstitutional as applied relative to blood and urine testing.

Hazardous Substances

1. 1, 1-difluoroethane (DFE) is a hazardous substance under Minnesota Statutes §169A.

State v. Carson, 884 N.W.2d 917 (Minn. Ct. App. 2016) *rev. granted* (Nov. 23, 2016)

Driver was arrested under suspicion of DWI after officers found her parked at the drive-thru of a restaurant with a can of gas duster between her right arm and body. Her behavior indicated inhalant abuse and a blood test was positive for DFE and clonazepam. Two similar incidents occurred within the next three months and driver was charged with multiple counts of DWI. Drive moved to dismiss all three complaints, arguing there was insufficient evidence she was under the influence of a hazardous substance. The district court denied driver's motion after it heard testimony from the BCA and found DFE is a hazardous substance under Minnesota Statutes §169A.

The court of appeals concluded DFE is a hazardous substance under the Minnesota Impaired Driving Code and affirmed the district court.

Implied Consent Advisory

1. Implied consent advisory which inaccurately states refusal to take urine test is a crime is a due process violation, and the remedy is rescission of revocation.

Johnson v. Comm'r of Pub. Safety, 887 N.W.2d 281 (Minn. Ct. App. 2016) *rev. granted* (May 30, 2017)

Driver was arrested following an accident on suspicion of driving while impaired by narcotics or medication and was read the implied consent advisory at the hospital. Officer informed driver refusal to take a urine test was a crime. Driver spent over an hour attempting to contact an attorney, at which time Officer offered a blood test. Driver once again indicated that he wanted to consult an attorney. A breath test was not offered since the officer did not believe driver was under the influence of alcohol. Driver did not submit to a blood or urine test and his license was revoked based on his refusal. Driver argued his right to due process was violated when the officer informed him refusal to take a urine test was a crime, and he successfully petitioned for rescission of the revocation.

The court of appeals found there was no search-incident-to-arrest or exigent circumstance exception to the warrant requirement for a urine test and that the implied consent advisory inaccurately informed driver that refusal to take a urine test was a crime. The inaccurate advisory misinformed the driver regarding the potential penalty for refusing to submit to a urine test. This violated his right to due process as established in *McDonnell.* The order rescinding the revocation was affirmed.

Implied Consent Proceedings

1. Accuracy of breath test result indicating a 0.16 alcohol concentration may be challenged at an implied consent proceeding.

Janssen v. Comm'r of Pub. Safety, 884 N.W.2d 424 (Minn. Ct. App. 2016)

Driver was arrested for DWI and breath samples showed alcohol concentrations of 0.174 and 0.167. Driver's license was revoked for one year and his license plates were impounded because his alcohol concentration was over twice the legal limit. Driver sought to challenge the test result at the implied-consent hearing as a test result over 0.16 was dispositive of both the length of the revocation and plate impoundment. The district court concluded the issue was not properly before it as Minn. Stat. §169A.53, subd. 3(b)(8)(i) provides whether alcohol concentration is over 0.08, not over 0.16, is within the scope of an implied-consent hearing.

The court of appeals reversed and remanded, holding that whether driver's alcohol concentration was twice the legal limit was dispositive of his penalties. Failure to provide a meaningful review of his revocation and impoundment penalties was a denial of due process.

Jurisdiction

1. Accuracy of breath test result indicating a 0.16 alcohol concentration may be challenged at an implied consent proceeding.

Janssen v. Comm'r of Pub. Safety, 884 N.W.2d 424 (Minn. Ct. App. 2016)

Driver was arrested for DWI and breath samples showed alcohol concentrations of 0.174 and 0.167. Driver's license was revoked for one year and his license plates were impounded because his alcohol concentration was over twice the legal limit. Driver sought to challenge the test result at the implied-consent hearing as a test result over 0.16

was dispositive of both the length of the revocation and plate impoundment. The district court concluded the issue was not properly before it as Minn. Stat. §169A.53, subd. 3(b)(8)(i) provides whether alcohol concentration is over 0.08, not over 0.16, is within the scope of an implied-consent hearing.

The court of appeals reversed and remanded, holding that whether driver's alcohol concentration was twice the legal limit was dispositive of his penalties. Failure to provide a meaningful review of his revocation and impoundment penalties was a denial of due process.

Postconviction Relief

1. The rules announced in *Birchfield, Thompson,* and *Trahan* regarding the search-incident-to-arrest exception are new rules of federal constitutional criminal procedure that generally do not apply retroactively.

Brooks v. State, 897 N.W.2d 811 (Minn. Ct. App. 2017)

Driver petitioned for postconviction relief following lengthy appeal processes for three DWI convictions. He relied on *Birchfield*, *Thompson*, and *Trahan* to argue his consent to testing was involuntary because it was based on inaccurate and misleading implied consent advisories. He also asserted ineffective assistance of counsel relative to both his trial and appellate attorneys as trial counsel did not obtain an independent blood alcohol test or object to deficient waivers of his right to testify and his appellate counsel failed to raise the ineffectiveness of trial counsel.

The court of appeals indicated *Teague v. Lane* provides the standard for determining retroactive applicability of a new rule of federal constitutional criminal procedure and found the postconviction courts did not err by refusing to retroactively apply *Birchfield, Thompson,* and *Trahan* as there was no contention that either of the *Teague* exceptions applied.

The court of appeals also determined the post-conviction courts did not err by denying the claims of ineffective assistance of trial or appellate counsel as there was no support for the assertion that trial counsel's failure to challenge the waivers was ineffective or that failing to obtain independent blood alcohol tests was anything other than unreviewable, investigative strategy.

2. Driver not entitled to withdraw guilty plea when the district court imposed a five-year conditional release term after he accepted a plea deal that did not include the conditional release term.

Smith v. State, A15-1740, 2016 WL 3223210 (Minn. Ct. App. June 13, 2016) (unpublished opinion)

Driver pleaded guilty to first-degree DWI and received a stayed 42-month sentence, but the mandatory conditional release period for first-degree DWI offenders was not imposed at the time his sentence was pronounced. Driver's probation was later revoked, and his sentence was executed. At that time, the court informed Driver for the first time that he was subject to the conditional release term. Driver then moved to withdraw his guilty plea, arguing that the court erred in imposing the conditional release term when it was not pronounced. The court disagreed and denied Driver's motion.

The court of appeals upheld the lower court's ruling after finding the Driver was aware of the conditional release term since it was included on Driver's plea petition and the plea was intelligently made.

3. The court properly revoked Driver's probation and imposed the mandatory five-year conditional-release term for felony DWI.

State v. Wilczek, A16-1247, 2017 WL 563306, (Minn. Ct. App. Feb. 13, 2017) (unpublished opinion)

Driver challenged imposition of a five-year conditional-release term and revocation of probation for felony DWI in 2009. The signed plea petition stated, "I understand I am subject to a five-year conditional release period." After two probation violations, the district court executed his 48-month sentence to be followed by five years of conditional release. Driver appealed and alleged the court erred by imposing the mandatory conditional-release term when executing the stayed sentence and by revoking probation.

The court of appeals affirmed and found the district court did not err by imposing the mandatory conditional-release term when executing the sentence and did not abuse its discretion by revoking probation.

Prosecutorial Misconduct

1. There is no requirement that a prosecutor act in good faith when voluntarily dismissing charges and later re-indicting.

State v. Olson, 884 N.W.2d 395 (Minn. 2016)

Driver was charged with DWI. The state was unprepared on the date of trial as their only witness, the arresting officer, failed to appear in court. The state's request for a continuance was denied and the charge was dismissed under rule 30.01 despite Driver's request that the court dismiss the case with prejudice. The state refiled the case less than two weeks later, and Driver unsuccessfully moved for dismissal. Driver was found guilty following a stipulated fact trial and appealed denial of the motion to dismiss. The court of appeals reversed the district court's decision and characterized the state's tactics as a "do-it-yourself continuance" and an act of bad faith. The state appealed.

The Supreme Court held there is no requirement that a prosecutor act in good faith when voluntarily dismissing charges and re-indicting and that the district court acted within its discretion when it denied Driver's motion to dismiss the refiled charges.

2. A motion to reopen may be granted after the state has rested, failed to prove an element of its prima facie case, and the defense moved for judgment of acquittal.

State v. Thomas, 891 N.W.2d 612 (Minn. 2017)

Driver was found sleeping in a running vehicle and charged with second degree DWI based on enhancements from two prior convictions. Driver refused to stipulate to the prior convictions and the state presented its case-in-chief, eliciting testimony from two officers. After the testimony, the state rested without offering certified copies of the prior convictions. Driver moved for a judgment of acquittal since the state failed to offer proof of the two aggravating factors needed to prove second-degree DWI. The district court denied the motion for judgment of acquittal and allowed the state to reopen their case to submit the certified conviction records. Driver was found guilty and appealed.

The court of appeals, in an issue of first impression, held the district court has discretion to grant or deny a motion to re-open even after the state has rested, failed to prove an element of its prima facie case, and the defense had moved for judgment of acquittal. In affirming the court of appeals, the Supreme Court held that the district court is not required to rule on a motion for judgment of acquittal before ruling on the state's motion to re-open its case in chief, even when the motion for acquittal was brought first.

Reasonable Articulable Suspicion

1. Officer does not have reasonable articulable suspicion of criminal activity when they observe a vehicle travel down a narrow dirt road that leads only to a closed business.

Schlicher v. Comm'r of Pub. Safety, A16-1200, 2017 WL 1376704 (Minn. Ct. App. Apr. 17, 2017) (unpublished case)

Officer observed Driver turn down a narrow dirt road in the early morning hours. Officer knew the road led only to a commercial business which was closed, so followed driver. As Officer drove down the road, Driver's car came toward him, and Officer backed up to the end of the road. Another squad arrived at that time. Officer exited his car while Driver's car was still moving and approached Driver's car. After an investigation, driver was arrested for DWI. Driver refused a breath test and his license was revoked. Driver challenged the revocation and argued Officer did not have a reasonable, articulable suspicion of criminal activity for the stop. The district court found turning on to a road the Officer knew led to a closed business constituted a reasonable, articulable suspicion and sustained the revocation.

On appeal Driver argued the revocation should be rescinded since: 1) Officer's actions constituted a seizure, and 2) he did not possess RAS at the time of the seizure. The court of appeals agreed Driver was seized and Officer did not have RAS at the time of the seizure. The revocation was rescinded.

2. Warrantless breath test and statutorily implied consent to investigate boating while intoxicated are not automatic under Iowa state constitution.

State v. Pettijohn, 14-0830, 2017 WL 2823027 (Iowa June 30, 2017)

Officer observed a passenger's feet hanging off a moving boat near the area of the motor. Careless, reckless or negligent operation is a misdemeanor offense, so Officer stopped the boat to inform the occupants of the danger. Officer then developed suspicion Driver was intoxicated, which was beyond his authority to investigate. Officer called a conservation officer to investigate, issued a warning for negligent operation, and instructed Driver to proceed to a dock to await the conservation officer's arrival. Driver was arrested, read an implied consent advisory, and consented to a breath test. Driver failed to suppress evidence obtained after the Officer stopped the boat. He was convicted of operating a motorboat while under the influence of alcohol and appealed to the Supreme Court, pending the *Birchfield* decision.

On appeal, the Supreme Court determined the Officer had a reasonable articulable suspicion of criminal activity at the time of the stop and considering *Birchfield*, the Fourth Amendment of the U.S. Constitution permitted administration of a warrantless breath test to investigate boating while intoxicated. However, they also held that the evanescent nature of blood alcohol evidence did not justify a warrantless breath test incident to arrest under the state constitution. This is due, in part, to the fact that an

officer with probable cause should be able to complete and submit an electronic warrant application within minutes. Further, Driver did not validly consent to the breath test as he was intoxicated at the time and had not been adequately advised of his right to withhold consent. The Supreme Court reversed the district court and remanded for a new trial as there was not valid consent to the warrantless breath test nor an exception to the warrant requirement of the state constitution.

Timely Filing

1. Statute of limitations for filing an implied consent petition does not begin if notice of order and revocation is given to emergency personnel, driver is asked to sign an electronic version, or driver is verbally informed of revocation.

Johnson v. Comm'r of Pub. Safety, 889 N.W.2d 36 (Minn. Ct. App. 2016)

Driver was arrested on suspicion of DWI and did not submit to a test. Driver refused to electronically sign a copy of the notice and order and revocation. While an officer was preparing paperwork for driver's signature, driver developed an acute medical condition which required emergency transportation via ambulance. The officer did not hand driver the notice and order of revocation as driver was unresponsive on the floor of the station, but believed he placed the notice and order of revocation with driver's personal belongings prior to transport to the hospital. Driver denied receiving the paperwork.

Driver filed an implied consent petition well after the 30-day deadline and the district court dismissed it as he had been properly served with the notice and order of revocation. The district court concluded the officer effectively notified Driver through a combination of three events: 1) placing the notice with driver's personal belongings to be taken by paramedics to the hospital, 2) asking driver to sign an electronic copy of the notice, which driver refused to sign, and 3) informing driver his license would be revoked.

The court of appeals reversed and remanded as the record was insufficient to support Driver's receipt of a complete notice and order of revocation by document or other means. Simply verbally informing him of the revocation was insufficient.

Test Refusal

1. Warrantless breath tests are permitted incident to lawful arrest and test refusal convictions are constitutionally valid.

State v. Olson, 887 N.W.2d 692 (Minn. Ct. App. Dec. 5, 2016)

Driver was arrested on suspicion of DWI following a car chase. Driver repeatedly told the arresting trooper that he wished the trooper would be killed and refused a breath test after being read the implied consent advisory. He was charged and convicted of fleeing, terroristic threats, test refusal, fourth degree DWI, obstruction, failure to obey an officer, and fifth degree assault.

Driver appealed and argued his statements were not threats to terrorize, the test refusal statute is unconstitutional, insufficient evidence to support DWI conviction, and that he could not be sentenced for both test refusal and DWI as they arose out of the same incident. The court of appeals reversed the terroristic threats conviction, finding that expressing hope something would happen to the trooper in the future did not constitute a threat within the meaning of the statute. The test refusal conviction was upheld since warrantless breath tests are permitted incident to arrest, as was the sufficiency of evidence for the DWI conviction. The court of appeals reversed the fourth degree DWI sentence and remanded for sentencing on the test refusal since it was the more serious crime.

Urine Testing

1. Minnesota's test refusal statute is unconstitutional to the extent it criminalizes refusal to submit to a warrantless blood or urine test.

State v. Thompson, 886 N.W.2d 224 (Minn. 2016)

Driver was arrested on suspicion of DWI. Officer read the implied consent advisory to Driver and asked if he would take a blood or urine test. Driver refused and was charged with second degree test refusal. Driver challenged the constitutionality of the test-refusal statute at an omnibus hearing. District court found the statute to be constitutional, and the issue proceeded under Minn. R. Crim. P. 26.01, subd. 4. Driver was convicted of second-degree test-refusal.

The court of appeals reversed and held that Driver's substantive due process rights were violated when he was charged with refusing to submit to a warrantless blood or urine test. The search-incident-to-arrest exception does not apply to blood and urine testing.

The Supreme Court applied *Birchfield* and held that warrantless urine testing is not a search incident to arrest, the Fourth Amendment does not allow the state to prosecute for a violation of the test refusal statute based on refusal of a blood test, and that the test refusal statute is unconstitutional as applied to warrantless blood or urine tests.

Vehicle Forfeiture

1. Owner of vehicle must claim vehicle is not subject to forfeiture in timely civil complaint. Forfeiture does not include right to insurance proceeds arising from a crash.

Briles v. 2013 GMC Terrain, 892 N.W.2d (Minn. Ct. App. Mar. 13, 2017) *rev. granted* (May 30, 2017)

Driver/son used father's vehicle without permission while father was on a camping trip. Driver was observed speeding and led police on a high-speed chase culminating in an accident, which totaled the vehicle. Son had five prior alcohol-related driving incidents, was charged with second-degree impaired driving, and the vehicle was seized. The Notice of Seizure and Intent to Forfeit did not indicate the department planned to seize or forfeit insurance proceeds related to the accident. Briles received the notice of forfeiture on the same day a letter was also sent to his insurer indicating they were not to disburse insurance proceeds until the forfeiture matter resolved. Briles was not copied on that letter.

Briles filed a civil complaint seeking a judicial determination of the forfeiture after the 60-day deadline expired. The district court found Briles's complaint was not timely and that insurance proceeds were subject to forfeiture. The court of appeals affirmed that Briles's claims were forfeited as the complaint was not timely but reversed the district court's finding that insurance proceeds arising from a crash are subject to forfeiture.

Unpublished opinions may be cited only if the conditions of Minn. Stat. § 480A.08, subd. 3 have been met.

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