STATE OF MINNESOTA
COUNTY OF HENNEPIN

IN DISTRICT COURT
FOURTH JUDICIAL DISTRICT

FILED
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HENN CO. DISTRICT
COURT ADMINISTRATOR
BY _____ DEPUTY

Case No. 27-CV-10-6820

J[redacted] R[redacted] B[redacted],

Petitioner,

vs.

Commissioner of Public Safety,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-entitled matter came before the undersigned Judge of District Court on October 18, 2011. Petitioner appeared through Ryan Garry, Esq., and the Respondent appeared through Assistant Attorney General, J[redacted] B[redacted]. The matter was submitted to the Court without testimony on the basis of written submissions.

The issue in this case was limited to the following question: is the rescission of the Commissioner's revocation of Petitioner's driving privileges the appropriate remedy for the government's destruction of Petitioner's urine sample after the government had received notice of Petitioner's request for the sample for the purposes of independent retesting?

Based upon the files and records herein, the evidence offered at the hearing, the arguments of counsel and applicable law, the Court makes the following:

FINDINGS OF FACT

1. On February 13, 2010, Petitioner was lawfully stopped by police in the City of Orono, Hennepin County, Minnesota. As a result of this stop, Police formed probable cause to arrest Petitioner on suspicion of D.W.I.

2. Petitioner was transported from the scene of the arrest to the Orono Police Department, where he was read the implied consent advisory and agreed to take a urine test for alcohol.

3. On February 23, 2010, the Minnesota Bureau of Criminal Apprehension (BCA) analyzed the Petitioner's sample and issued a report (received as part of the record in this case). The report indicated that BCA analysis showed Petitioner's blood alcohol content at .09, slightly but measurably higher than the legal limit of .08. The BCA report also indicated that the sample was to be destroyed "twelve months following the date of this report. Please notify the BCA Forensic Science Laboratory if you would like evidence returned to your agency." BCA report, 02/23/2010.

4. On April 5, 2010 Petitioner filed this implied consent action. This matter was continued pending the October 19, 2010 resolution of parallel DWI criminal proceedings against Petitioner. On December 1, 2010, Petitioner's attorney sent a letter to the Attorney General's Office and the BCA requesting production of Petitioner's urine sample for retesting by Petitioner's retained expert. Likewise on December 1, 2010, Petitioner retained an expert at his own expense to retest the Petitioner's urine sample from the night of the arrest analyzed and preserved by the BCA. Petitioner's retained expert followed up the letter request with phone calls to the BCA requesting the sample.

5. Neither the BCA, nor the Attorney General's Office took any action in response to Petitioner's request for the urine sample. According to the BCA Chain of Custody Report of October 24, 2011, Petitioner's urine sample was preserved and in the custody of the BCA from February of 2010 until it was destroyed by the BCA on March 1, 2011.

From the above Findings of Fact, the Court makes the following:

CONCLUSIONS OF LAW

1. Petitioner was entitled to discovery of the urine sample. Under the rules of Civil Procedure, which govern civil implied consent cases, parties "may obtain discovery of any matter, not

privileged, that is relevant to a claim or defense of any party," including "physical (including blood) [...] examinations." Minn. R. Civ. P. 26.02(a), 26.01(a). Here, the matter sought was physical evidence in the form of a urine sample which had been subject to examination by a government expert –the results of such examination were used as evidence against the Petitioner in the Commissioner's decision to revoke his license. The relevance of such evidence to Petitioner's "claim or defense" is manifest: the results of the analysis of the sample gave Respondent to legal authority to revoke Petitioner's license. If such results could be refuted by the Petitioner's own expert, as was Petitioner's manifest intent in retaining such expert, the very basis for the revocation would be undone. Hence, the Court concludes that the urine sample was properly subject to discovery by Petitioner for the purposes of analysis by Petitioner's expert.

2. Respondent makes the argument that Petitioner simply did not make enough effort to acquire the requested sample, and that Petitioner's urine sample was "available for release" to Petitioner between the dates of December 1, 2010 and March 1, 2010. Aff. Jody Nelson, 11/14/2011. Respondent's argument is essentially that if Petitioner wanted the sample, Petitioner or his agent would physically have to appear at the BCA to request and retrieve it. Resp. Memorandum, at 1. The Court finds this interpretation of Petitioner's duty unsupported by the BCA's own instructions in its report. The BCA report indicates that the evidence will be destroyed in 12 months and states: "please **notify** BCA forensic Science Laboratory if you would like the evidence returned" BCA report, 02/23/2010 (emphasis added). The Court finds that Petitioner's lawyer and expert did indeed "notify" the BCA of their request for the sample by letter and phone call as directed by the report. Certainly, the BCA was under no obligation to pay to ship the sample to Petitioner or his expert as a result of this notice, but Petitioner was entitled to some response from the BCA as to how he could go about obtaining it (for instance, by appearing personally at the BCA office, or pre-paying for shipment).

3. Having determined that the sample was properly subject to discovery by Petitioner, the Court next turns to the question of the appropriate sanction to Respondent for not only ignoring Petitioner's discovery request, but also destroying the evidence so requested. The implied consent statute itself recognizes the arrestee's interest in having an independent determination of his or her blood alcohol concentration determined. Relevantly, the statute provides:

> The person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test sample on behalf of the person is obtained at the place where the person is in custody, after the test administered at the direction of a peace officer, and at no expense to the state. The failure or inability to obtain an additional test or tests by a person does not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer.

Minn. Stat. § 169A.51, subd. 7(b). The Supreme Court has interpreted this provision as giving a D.W.I. suspect the right to an independent BAC test after the suspect submits to the police-administered test. *State v. Larivee*, 656 N.W.2d 226, 230-1 (Minn. 2003) Here, Petitioner has not requested a separate **sample** be tested (as was his right while in custody after his submission to police testing), but simply requested that the same sample the police took and the government tested be provided to him so that he could potentially refute the government's analysis by testing this sample again with his own expert. The Court sees no principled difference between the government's actions in this case ignoring Petitioner's legitimate request to retest the government's sample and destroying this sample, and the case contemplated by the statute, in which the government ignores an arrestee's request to take an independent test at his own expense and choosing after complying with government testing. In both cases, the result is clear: if the additional test was prevented or denied by the government, the initial government-directed test is rendered inadmissible. Minn. Stat. § 169A.51, subd. 7(b); *Umphlett v. Comm'r. Pub. Safety*, 533 N.W.2d 636, 638 (Minn. App. 1995). As the Court finds that the government did practically and intentionally deny Petitioner's lawful and

timely request to retest the urine sample, I conclude that such denial renders the government's own analysis of this test inadmissible.

Based on the above Findings of Fact and Conclusion of Law, the Court makes the following:

ORDER

IT IS ORDERED that the Commissioner's revocation of Petitioner's driving privileges is hereby **rescinded.**

BY THE COURT

Dated: 12/2/11

[redacted]
Judge of District Court