State of Minnesota
Hennepin County

District Court
Fourth Judicial District

Court File Number:
Case Type: Implied Consent

Mailing Label for All Files

RYAN PATRICK GARRY
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M. B. D. **vs Commissioner of Public Safety**

Please find enclosed, documents from Hennepin County Court Administration.

If you have any questions, please call 612-348-3164.

Dated: March 26, 2007

Court Administrator
Hennepin County District Court
300 South Sixth Street, C-12
Minneapolis MN 55487-0421

cc: Commissioner of Public Safety

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Petitioner,

vs.

Commissioner of Public Safety,

Respondent.

FINDINGS OF FACT AND ORDER

Case type: Implied Consent
Court File:

The above-entitled matter came duly on before the Honorable on February 12, 2007, in District Court, Hennepin County, Minnesota, upon Petitioner's request for judicial review under Minn. Stat. § 169A.53.

Petitioner was represented by Ryan P. Garry, Esq..

Respondent was represented by Assistant Attorney General.

The following issue was identified for the court as remaining in dispute:

Whether Petitioner was competent to refuse an alcohol screening test and therefore properly subject to a charge of refusal to submit to an alcohol screening test, citing *Stiles v. Commissioner of Public Safety*, 369 N.W.2d 347 (Minn. Ct. App. 1985).

The parties were given leave to submit briefs and the matter was taken under advisement.

Based upon all the files, records, argument of counsel, and proceedings herein, the court makes the following:

FINDINGS OF FACT

1. On August 5, 2006, Petitioner ("Petitioner") was involved in a motorcycle accident in the City of Minneapolis to which the Minneapolis Police Department responded. The police were responding to a 911 call that a motorcycle driver appeared to be on fire.

2. The police, including Officer arrived at the scene of the accident. Officer saw no signs of the driver on fire nor were there any signs that he had been on fire. Instead, the Petitioner, the driver of the motorcycle, appeared to have hit a parked car and been thrown from his motorcycle sustaining injuries. He injured his toes, including having one of the bones in one toe fully exposed, and suffered shoulder and scalp injuries. Given his injuries, Petitioner was taken by ambulance to North Memorial Hospital.

3. Officer rode with the Petitioner in the ambulance to the hospital. The implied consent advisory was not administered at that time but Officer did converse with the Petitioner during the ride. According to the officer, the Petitioner responded to his questions and spoke coherently about the events leading up to the accident.

4. At the hospital, another officer, Officer , administered the implied consent advisory to the Petitioner while he was in the emergency room receiving emergency medical treatment. Officer was also present.

5. Officer did not testify at the February 12, 2007 hearing. However, Officer was present and testified at the hearing.

6. According to Officer Petitioner was in "quite a bit of pain" during the implied consent advisory. The Petitioner, who testified at the hearing, had extremely limited recall of the entire event. During the advisory, the Petitioner did not answer all of the questions put to him but when he did the audible responses were responsive and sensible.

7. The compact disc ("CD") of the implied consent advisory was received into evidence as Exhibit 1 ("Ex. 1"). A transcript of the CD was received into evidence as Exhibit 2 ("Ex. 2"). Portions of the CD are inaudible, including many of Petitioner's responses to Officer Wieland's questions.

8. A close review of the poor quality CD fails to establish that Petitioner refused to submit to an alcohol screening test. Instead, the evidence more strongly suggests that Petitioner consented to two different forms of screening – a breathalyzer and a urine test.

9. A critical portion of the interview is recorded about five minutes into the CD when Petitioner is asked several times to take a blood test. Given the totality of his responses, it does not appear that he refused to take a blood test. The first time he responds with "What for?" Ex. 2 at pg. 5, lines 5-8. The second time he is asked, at first the response is unintelligible, but then he states "Is it required?" Ex. 2 at pg. 5, lines 9-13. Officer then describes that blood would need to be drawn from the Petitioner's arm. Here, the transcript states that Petitioner states "No" – however the court's review of the CD does not confirm this transcription. Moreover, Officer does not accept his response as a "No" because she asks him, for the third time, whether he will give a blood test. Interestingly, at this time an unidentified

voice instructs Petitioner to put his hand down. Ex. 2 at pg. 5, lines 18-19. It is plausible that Petitioner was offering his arm to have blood drawn.

10. The fourth time Petitioner is asked whether he will give a blood test, he states that he will take a breathalyzer. Ex. 2 at pg. 5, line 24- to pg. 6, line 3. Although the transcript captures only one of those statements, the court's review of the CD concludes that Petitioner agreed to take a breathalyzer twice.

11. Then, Officer explains to Petitioner that he cannot have a breathalyzer because of the hospital setting and proceeds to tell him he can have either a urine test or a blood test. It is important to note that she gave him a choice of a urine test at this point.

12. Petitioner agrees to take a urine test. At pg. 6, line 7 of Ex. 2 it states that Petitioner's response to the above statement is "Unintelligible". However, the court's review of the CD reveals that the response is intelligible and audible and Petitioner agrees to a urine test, stating "I'll take a urine test." Ex. 1.

13. Moreover, Officer 's response confirms that Petitioner agreed to a urine test because she then tells him, "I don't know if we can get a urine test the proper way, so I need you to keep – so it's going to have to be a blood test. Will you take a blood test?" Ex. 1. Moreover, while she is telling him she does not think a urine test can be taken and asking about a blood test, there is a voice in the background that repeatedly states that a catheter could be used. Ex. 1.

14. Before waiting for the Petitioner's response to her question, "Will you take a blood test?", and after telling Petitioner he could not have a urine test and must have a blood test, Officer drops the topic of a blood test altogether and asks again if

Petitioner will take a urine test. Ex. 2 at pg. 6, lines14-15. The transcript states that his response is "(Unintelligible) No." However, the court's review of the CD cannot confirm a "No" at that point.

15. Shortly thereafter, Officer stops the tape, never having gotten any response to whether Petitioner would be willing to take a blood test, and with no apparent refusal to have a urine test, which is the final method presented to him.

16. The record, taken as a whole, reveals a man who, while in the very first stages of emergency treatment for a traumatic accident, is presented with a confusing and disjointed array of options.

17. First, he is offered only a blood test. When he suggests a breathalyzer, without conclusively refusing a blood test at all, he is offered a choice between a blood test and a urine test. When he agrees to a urine test he is told, somewhat vaguely[1], that a urine test is not possible and is asked again to take a blood test. Then, without awaiting an answer, and contrary to her last statement, Officer drops the issue of a blood test and returns to asking about a urine test! Despite the changing demands, Petitioner nevertheless agrees twice to a breathalyzer, agrees to a urine test at least once, and never conclusively refuses to take a blood test.

18. The entire conversation with the Petitioner in which Officer presents the implied consent advisory takes less than 7 minutes. The entire CD, which includes numerous gaps of time during which no one appears to be speaking, takes 7 minutes.

19. The police concluded from Petitioner's responses to the advisory that he refused to submit to an alcohol screening test.

[1] Vaguely because the Officer only states that she does not know if she can get a urine test and at the same time persons are talking about being able to use a catheter.

20. Petitioner was charged with misdemeanor driving while under the influence and gross misdemeanor for refusal to submit to testing.

21. The criminal case was resolved as an underage drinking and driving violation.

Analysis

Pursuant to Minn. Stat. §169A.51, Subd. 6, if a person is "unconscious or . . . is otherwise in a condition rendering the person incapable of refusal" then the officer may not presume that consent has been withdrawn and should instead assume that consent remains implied. Minn. Stat. §169A.51, Subd. 6 (2004). In such a case, a criminal charge of refusal would be improper. Petitioner argues that he was incapable of refusal and therefore, his words or actions should not have been interpreted as refusal.

A determination of incapacity is a question of fact given the totality of the circumstances. *Thornton v. Commissioner of Public Safety*, 384 N.W.2d 606, 608 (Minn. Ct. App. 1986). Here, there is conflicting evidence. The Petitioner's injuries stemmed from a severe accident in which the Petitioner's motorcycle caught on fire and he was apparently thrown from it. Such an event could very well be extremely traumatizing. Petitioner was injured and was receiving emergency medical treatment at the time of the implied consent advisory. However, he was not unconscious at any time nor were there reported injuries to the brain. Officer testified that he believed Petitioner answered questions coherently despite his injuries. Moreover, the CD does confirm that when Petitioner did respond, his answers were coherent and responsive. Petitioner himself could not recall the event well enough to testify regarding his capacity at the time he was given the advisory. Given the totality of the circumstances, including Petitioner's

sensible responses to questions as well as the officers' opportunity to observe his condition, the court concludes that Petitioner was capable of withdrawing his consent.

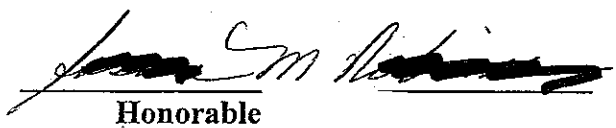
However, that conclusion does not end the inquiry. Indeed, it would be irresponsible to end the inquiry at this point because based upon the record the court cannot conclude that Petitioner refused to submit to an alcohol screening test. In fact, the greater weight of the evidence establishes that Petitioner indeed consented to an alcohol screening test more than once. First, he volunteered to submit to a breathalyzer not once but twice. Then, when he was informed that a breathalyzer was not possible in the emergency room setting, he was given the choice of a urine or blood test. He agreed to a urine test. However, that option was taken away from him, and replaced with a demand for a blood test. Then, before he could respond, that option was pulled away as well and, inexplicably, a urine test was re-offered to him ignoring his earlier consent to the urine test. Finally, before the Petitioner could answer, the advisory was altogether halted by the officer.

This case is distinguishable from both *Lindemann* and *Thornton* where the Petitioners were ultimately found to be capable of refusal and to have refused. In *Lindemann, Lindemann v. Commissioner of Public Safety*, 404 N.W.2d 909 (Minn. Ct. App. 1987, the Petitioner either remained completely silent or said he did not want to think about it. *Id.* at 911. Here, in contrast, Petitioner affirmatively agreed to being tested. In *Thornton,* unlike here, the Petitioner explicitly refused. 384 N.W.2d at 607.

ORDER

1. That the revocation of the privileges of the Petitioner under authority of Minn. Stat. § 169A.53 (2006), be and hereby is **RESCINDED**.

Date: March 23, 2007



Honorable
Judge of District Court