STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Court File No.: 27-CR-10-30345

State of Minnesota,

Plaintiff,

vs.

MEMORANDUM IN SUPPORT OF MOTION TO SUPPRESS URINE TEST AND DISMISS COUNT I

P[redacted] B[redacted] C[redacted],

Defendant.

TO: THE HENNEPIN COUNTY DISTRICT COURT, CRIMINAL DIVISION; THE MINNEAPOLIS CITY ATTORNEY'S OFFICE.

INTRODUCTION

The above-titled matter was scheduled for an omnibus hearing on **November 2, 2010 at 9:00 a.m.** Mr. C[redacted] seeks an order from the Court suppressing the chemical test in this case because Officer N[redacted] actively mislead him about the nature of his obligation to provide a chemical test and thus violated due process. Defendant is charged with Count I, *Fourth Degree Driving While Under the Influence of Alcohol* in violation of Minn. Stat. § 169A20, Subd 1(1) and 169A.27.

PREVIOUSLY FILED MOTION

Pursuant to *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991), *Winfrey v. Comm'r of Pub. Safety*, Slip Op. No. A04-1550 (Minn. Ct. App. Apr. 12, 2005) (unpublished), *State v. Thesing*, 485 N.W.2d 734 (Minn. Ct. App. 1992), *Olinger v. Comm'r of Pub. Safety*, 478 N.W.2d 806 (Minn. Ct. App. 1991), Mr. C[redacted] filed a motion to suppress the urine test in this case prior to the omnibus hearing.

FACTS

On or about July 3, 2010, Mr. C[redacted] was driving in Minneapolis. As he approached another car at a red light in the Washburn neighborhood, Mr. C[redacted] "slightly hit" the vehicle in front of him. The accident was a "minor" rear-end collision with no vehicle damage. No one from either car was harmed or injured, but there was "minor paint transfer" between the bumpers of the two cars. All parties refused medical attention.

Officers N[redacted] and P[redacted] of the Minneapolis Police Department arrived on the scene. As Officer Novak spoke with Mr. C[redacted], he noticed a "faint odor of alcohol" and thereafter arrested Mr. C[redacted] for DWI. After he was arrested, Officer N[redacted] took Mr. C[redacted] to the police station for alcohol testing. Officer N[redacted] read the implied-consent advisory to Mr. C[redacted]. Instead of skipping the third paragraph of the advisory, Officer N[redacted] read to Mr. C[redacted]:

> Because I also have probable cause to believe you have violated the criminal vehicular homicide or injury laws, a test will be taken with or without your consent.[1]

On November 2, 2010, at a contested omnibus hearing, Officer N[redacted] testified that did not suspect Mr. C[redacted] of violating the CVO laws. Rather, he testified that he arrested Mr. C[redacted] for *Driving While Under the Influence of Alcohol (DWI)* and not *Criminal Vehicular Operation*. Moreover, and most surprisingly, Officer N[redacted] testified that he did not have probable cause for *Criminal Vehicular Operation* and that he "made a mistake" by reading paragraph 3 of the Minnesota Motor Vehicle Implied Consent Advisory. He testified that the alleged victims of the accident refused medical attention and that they never sought medical attention.

1. The parties stipulated to the introduction of 2 exhibits. The first was a copy of the implied consent advisory and the second was a CD of the reading of the implied consent advisory at the police station. Both exhibits are attached.

Mr. C[redacted] also testified at the contested omnibus hearing. He testified credibly that he specifically remembered being read the implied consent advisory and that Officer N[redacted] told him that "a test will be taken with or without his consent." Mr. C[redacted] remembered the specifics of the police station and particularly the room he was read the Implied Consent Advisory. Mr. C[redacted] testified that he declined to call an attorney because he understood the officer's statements to mean that a test would be forced no matter whether he agreed with it or not. He also testified that there was no point in calling in an attorney, because "if I would have said 'no' they would have done it [taken the test] anyway." Mr. C[redacted] stated that he had never been charged with a DWI before, that he was not familiar with DWI law and that he was not aware of his right to refuse testing or of affirmative defenses such as "reasonable refusal." He testified credibly and was not impeached by the government. Officer N[redacted] then requested a urine sample, and due to the coercion, Mr. C[redacted] complied.

ARGUMENT

I. OFFICER N[redacted] COMMITTED A DUE PROCESS ERROR BY READING THE CRIMINAL VEHICULAR OPERATION PARAGRAPH OF THE ADVISORY.

Officer N[redacted] should not have read the *Criminal Vehicular Operation* section of the implied consent advisory to Mr. C[redacted]. By doing so, he misled Mr. C[redacted] to believe that there was no meaningful testing choice. Officer N[redacted] told Mr. C[redacted] that a "test will be taken with or without your consent." This violated Mr. C[redacted]'s Due Process rights.

The Minnesota Constitution prohibits the State from denying any person "liberty or property without due process of law." MINN. CONST. art. I, § 7. As part of this prohibition,

"those who are perceived to speak for the state [may not] mislead individuals as to either their legal obligations or the penalties they might face should they fail to satisfy those obligations." *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 854 (Minn. 1991) In the implied-consent context, police must "not mislead individuals with respect to their obligation to undergo blood alcohol content testing." *Id.* at 853. The testing decision "may be a meaningful one to an individual driver." *Prideaux v. Dep't of Pub. Safety*, 247 N.W.2d 385, 390 (Minn. 1976). In *McDonnell*, a driver was arrested for DWI and read the implied-consent advisory. *McDonnell*, 473 N.W.2d at 851. At that time, the advisory overstated the test-refusal penalty for some drivers. *Id.* The supreme court ordered reinstatement of the driver's license, holding that the erroneous advisory was ineffective and violated due process. *Id.* at 855.

In *Winfrey v. Comm'r of Pub. Safety*, an officer made the same error Officer N[redacted] made in this case. Slip. Op. No. A04-1550 (Minn. Ct. App., Apr. 12, 2005). There, a driver crashed into a tree and was taken to a hospital. A police officer, having probable cause that the driver was drunk, read the implied-consent advisory. *Id.* The officer mistakenly read the *Criminal Vehicular Operation* paragraph. *Id.* During the advisory, the driver was unconscious and unable to respond to the officer. The court of appeals decided that the officer had committed an error by reading the misleading paragraph. *Id.* However, the court ruled that because the driver was not conscious to hear the error, there was no Due Process violation. *Id.*

Similar concerns arose under different facts in *State v. Scott*, 473 N.W.2d 375 (Minn. Ct. App. 1991). There, an officer read the advisory to a suspected drunk driver, but the officer intended to administer a test regardless of whether the driver agreed. *Id.* at 376.

After the driver refused testing, the officer forced a blood draw. *Id.* The court of appeals suppressed the test results. *Id.* at 378. The court noted that, though officers can skip the advisory and take a nonconsensual blood draw, once the advisory is read, police must adhere to it. The "fundamental principles of fairness inherent in due process must prevent" an officer from misstating whether a nonconsensual test will be taken. *Id.* at 377.

Here, Officer N's reading of the CVO paragraph was a due process error identical to the error in *Winfrey* and analogous to the errors in *McDonnell* and *Scott*. Officer N misstated the driver's testing obligations in a misleading and confusing way. He committed the variation of the error in *Scott*. In *Scott*, the officer asked the driver to make a testing decision but then disregarded that decision. Here, Officer N asked Mr. C to make a testing decision but then said any decision would be futile.

After Officer N told him that the test would be administered with or without his consent, Mr. C became resigned. Mr. C testified that he understood the advisory, heard that the officer told him that a test would be taken with or without his consent, and decided not to call a lawyer because he was told that a test would be taken whether or not he refused to take the test. Mr. C testified that calling a lawyer would be futile if the test was going to be administered anyway. Mr. C was cooperative and he complied when Officer N told him to take the test.

Had Officer N not misinformed Mr. C, Mr. C might have been able to take strategic steps to safeguard his privacy and right to counsel. The Legislature gives arrested drivers the right to choose between a urine test and a blood test. MINN. STAT. § 169A.51, subd. 3. The difference between these tests, and the right to choose between

them, is one of the factors making the testing decision "meaningful to the individual driver." *Prideaux*, 247 N.W.2d at 390.

Beyond the personal and privacy implications, there are legal consequences when a driver declines to call a lawyer due to perceived futility. A driver who agrees to a urine test may be charged with test refusal if he is unable to urinate. If Mr. C had called an attorney, he could have been warned of this problem. He also could have asked an attorney about the possibility of reasonable refusal or more importantly his right to take an independent chemical test from a private company.

Officer N violated Mr. C's Due Process rights when he read the *Criminal Vehicular Operation* paragraph. He misled Mr. C to believe that there was no meaningful testing decision. Because of the due process violation, Mr. C lost his opportunity to speak to a lawyer, and consequently to choose between blood and urine or reasonable opportunities for refusal and thereafter independent testing.

II. THE DUE PROCESS ERROR REQUIRES SUPPRESSION OF THE TEST EVEN IF IT DID NOT AFFECT MR. C'S TESTING DECISION.

The State may argue that, though Officer N may have erred, the Court should not suppress the test because the error did not prejudice the Mr. C. Mr. C disagrees with this characterization because he was prejudiced, particularly because Officer Novak's error dissuaded him from calling an attorney. But regardless of which argument is correct, case law calls for the suppression of the test, even if Mr. C cannot show actual prejudice.

In *Olinger v. Comm'r of Pub. Safety*, the court of appeals addressed whether the *McDonnell* line of cases required a showing of actual prejudice. 478 N.W.2d 806 (Minn. Ct. App. 1991). The Commissioner argued "that a due process violation [should] be found

only if the driver establishes prejudice from the inaccurate advisory." *Id.* at 807. He urged that relief should be "limited to cases where the driver testifies that but for the advisory, he or she would have refused testing." *Id.* The court rejected this argument outright and held flatly that "no showing of actual prejudice is required." *Id.* at 808.

State v. Nelson was the criminal complement to *Olinger*. 479 N.W.2d 436 (Minn. Ct. App. 1992). There, the State argued that the defendants should have to show reliance on or prejudice by the inaccurate advisory. *Id.* at 437. The court again rejected the argument. A *McDonnell* argument arises "regardless of whether there has been testimony of actual prejudice." The court reached the same result in *State v. Thesing*, 485 N.W.2d 734 (Minn. Ct. App. 1992).

Similarly, in *Scott*, the court did not limit relief to a showing of actual prejudice. There, the officer could have taken a nonconsensual blood draw without reading the advisory. But because he erroneously read the advisory, the court suppressed the test. *Scott*, 473 N.W.2d at 376. In other words, the driver was not prejudiced because the nonconsensual blood draw would have happened either with or without the error.

Though there was actual prejudice in this case, the prejudice does not need to be shown to suppress the results of the test. Where an officer misleads a driver as to his legal rights and obligations, a due-process violation is established even if the driver does not show actual prejudice.

III. **STATE V. WIKMAN, 1996 WL 70098 DOES NOT APPLY TO THIS CASE**.

The government relies on a *State v. Wikman*, 1996 WL 70098, a 1996 unpublished Minnesota Court of Appeals case to support its argument that even though the facts in the instant case meet a due process violation, the Court should not grant Mr. C[redacted]'s motion

and suppress urine test and dismiss the applicable charges. The government's reasoning is flawed because one important distinction.

In *Wikman*, like the instant case, the arresting officer had probable cause only to arrest the defendant for DWI, not Criminal Vehicular Operation. The officer made a mistake by reading the CVO section of the implied consent advisory, telling the defendant that a test would be taken with or without his consent. However, after in Wikman made the mistake, he corrected his mistake and explained to the defendant that that paragraph did not apply to him. The Court of Appeals explained:

> At an omnibus hearing, the officer stated that, even though he had read the "criminal vehicular homicide and injury laws" paragraph of the advisory, he had explained to Wikman that it did not apply to him.

Wikman at 1.

The Court of Appeals in *Wikman* reversed the trial court, stating, "most compelling is the fact that Wikman did not deny that the officer had explained to him that the 'vehicular homicide or injury' paragraph was not applicable." *Id*. at 1. This distinction is the critical element that makes *Wikman* inapplicable to Mr. C[redacted]'s case. Here, not only did the officer not explain to Mr. C[redacted] that paragraph 3 would not apply to him, he testified that "he made a mistake" and that he only had probable cause to arrest Mr. C[redacted] for DWI and not Criminal Vehicular Operation. Unlike the officer in *Wikman*, Officer N[redacted] did not re-read the advisory or correct his mistake, and explain to Mr. C[redacted] that the paragraph did not apply to him. Consequently, *Wikman* is of little value to this Court and should not be persuasive.

CONCLUSION

Officer N[redacted] committed a due-process error when he read the *Criminal Vehicular Operation* paragraph of the implied-consent advisory. There was no cause to believe that Mr. C[redacted] committed *Criminal Vehicular Operation*, and the reading of this paragraph confused and misled Mr. C[redacted]. The error prejudiced Mr. C[redacted] by making him believe that his right to call an attorney was futile and dissuaded him from exercising his right to choose between a blood test and a urine test, or more importantly to exercise his right to refuse the test. This Court should suppress the results of the urine test.

Respectfully submitted,

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Dated: _____

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