State of Minnesota
Stearns County

District Court
Seventh Judicial District

Court File Number: [redacted]
Case Type: Crim/Traf Mandatory

Notice of Filing of Order

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State of Minnesota vs [redacted]

You are notified that an order was filed on this date.

Dated: July 10, 2013

Court Administrator
Stearns County District Court
725 Courthouse Square Room 134
St. Cloud MN 56303
320-656-3620

cc: [redacted]

STATE OF MINNESOTA | **IN DISTRICT COURT**

COUNTY OF STEARNS | **SEVENTH JUDICIAL DISTRICT**

State of Minnesota, Plaintiff, vs. [redacted], Defendant.	Court File No.: [redacted] **ORDER**

The above-entitled matter came before the Honorable [redacted], Judge of District Court, on May 3, 2013, on Defendant's Motion for Reconsideration of his motion to suppress. Assistant St. Cloud City Attorney [redacted] represented the State. Elizabeth Duel represented Defendant who was also present.

NOW, having duly considered the arguments of the parties, the documents and proceedings herein together with the applicable law, this Court **ORDERS**:

THAT, Defendant's Motion for Reconsideration of his motion to suppress is **GRANTED**. Consequently, count two, having a blood alcohol concentration of 0.08 or greater within two hours of operating a motor vehicle, is **DISMISSED**. Minn. Stat. § 169A.20, subd. 1(5) (2012).

THAT, the attached memorandum is made a part of this **ORDER**.

Dated: July 10, 2013

[redacted]
JUDGE OF DISTRICT COURT

7-10-13
Stearns County
District Court

MEMORANDUM

The matter before the Court is Defendant's Motion for Reconsideration of his motion to suppress a breath test as an unlawful search following *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). Both parties submitted memoranda supporting their arguments. Because Defendant's breath test was a warrantless search without an exception, his Motion is granted.

I. BACKGROUND

On October 16, 2011 at approximately 12:28 a.m., St. Cloud Police Officer [redacted] stopped Defendant for speeding. Officer [redacted] made contact with Defendant and observed his glassy, watery eyes, slurred speech, and an odor of alcohol. Defendant admitted to consuming alcoholic beverages that evening, failed the horizontal gaze nystagmus test, and provided a breath sample to the PBT which measured his BAC at 0.12. Officer [redacted] arrested Defendant, transported him to the Stearns County Jail, and read him the Implied Consent Advisory at approximately 12:55 a.m. After speaking with an attorney, Defendant agreed to take a breath test at approximately 1:31 a.m. The Intoxilyzer 5000 measured Defendant's BAC at 0.10, and Officer [redacted] issued Defendant a citation for two counts of fourth-degree DWI.

II. ANALYSIS

Taking a breath sample constitutes a search. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616–17 (1989). The United States and Minnesota Constitutions prohibit unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are presumptively unreasonable unless an exception applies. *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003). The two relevant exceptions are exigent circumstances and consent.

A. The Exigent Circumstances Exception Does Not Justify Defendant's Warrantless Breath Test.

Exigent circumstances provide an exception to the warrant requirement. *State v. Mollberg*, 246 N.W.2d 463, 469 (Minn. 1976). Until recently, Minnesota law held that "[t]he rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular homicide or operation." *State v. Shriner*, 751 N.W.2d 538, 549–50 (Minn. 2008), *abrogated by Mo. v. McNeely*, 133 S. Ct. 1552 (2013).

In *McNeely*, the Supreme Court resolved a split in authority regarding whether alcohol in the bloodstream is a single-factor exigent circumstance. 133 S. Ct. at 1558 & n.2. The Court held that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 1568. Instead, the reasonableness of an exigency exception depends upon the totality of the circumstances on a case-by-case basis. *Id.* at 1563. Officers must obtain a warrant before conducting a blood test when it is reasonable to do so and the delay will not "significantly undermin[e] the efficacy of the search." *Id.* at 1561.

Defendant's warrantless breath test no longer fits within the exigent circumstances exception to the warrant requirement. *McNeely* clearly rejects Minnesota's use of a single-factor exigency. Further, the totality of the circumstances does not support the exigent circumstances exception in this case. Approximately an hour elapsed between the time Officer Xxxxxx stopped Defendant and when he agreed to take a breath test at the Stearns County Jail. Officer Xxxxxx would not have been unreasonably delayed in seeking a warrant because he was not investigating an accident or attending to a medical emergency. He also did not claim that he lacked the means

to obtain a warrant as he transported Defendant to jail or as Defendant spoke with an attorney. To be sure, Officer Tyhotki followed the law when he had Defendant tested, but *McNeely* has since rejected the single-factor exigency exception upon which he relied. And while the State asks the Court to apply the good faith exception to the exclusionary rule, Minnesota appellate courts have not officially adopted the good faith exception and the Court declines to do so now. *See State v. Jackson*, 742 N.W.2d 163, 180 n.10 (Minn. 2007).

B. The Consent Exception Does Not Justify Defendant's Warrantless Breath Test.

Consent provides another exception to the warrant requirement. *State v. Gilbert*, 262 N.W.2d 334, 340 (Minn. 1977). Consent must be "freely and voluntarily" given. *State v. George*, 557 N.W.2d 575, 579 (Minn. 1997). "[I]t is at the point when an encounter becomes coercive, when the right to say no to a search is compromised by a show of official authority, that the Fourth Amendment intervenes. Consent must be received, not extracted." *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994). Until *McNeely*, consent remained a settled, albeit regularly contested, exception despite test refusal's criminal consequences under Minnesota's implied consent law. *State v. Mellett*, 642 N.W.2d 779, 785 (Minn. Ct. App. 2002); *see* Minn. Stat. § 169A.20, subd. 2.

Nevertheless, potential problems arising from criminalizing test refusal did not go unnoticed. The Minnesota Court of Appeals reasoned that "[b]ecause an individual does not have the right to say no to a chemical test and, indeed, is subject to criminal penalties for doing so, the 'consent' implied by law is insufficiently voluntary for Fourth Amendment purposes." *State v. Netland*, 742 N.W.2d 207, 214 (Minn. Ct. App. 2007), *rev'd in part on other grounds*, 762 N.W.2d 202 (Minn. 2009). However, the court concluded that drivers do not surrender their Fourth Amendment rights upon driving because the probable cause necessary to require an

implied consent test justifies a warrantless search under the single-factor exigent circumstances, and drivers do not have the right to refuse a search supported by the exigent circumstances exception. *Id.* The court mentioned that its decision "clarifies [its] implicit reasoning in *Mellett*." *Id.* at 214 n.2.

Recently, the Minnesota Court of Appeals heard two cases in which Wesley Brooks challenged multiple DWI convictions. In one appeal, Mr. Brooks challenged a warrantless urine test by arguing that exigent circumstances did not provide an automatic exception because alcohol was present in his body. *State v. Brooks*, A11-1042, 2012 WL 1570064, at *3 (Minn. Ct. App. May 7, 2012). Because the United States Supreme Court had not yet decided *McNeely*, the evanescent nature of alcohol in the body was a well-established single-factor exigency in Minnesota. *Id.* Therefore, the court upheld the test. *Id.* In the other appeal, Mr. Brooks challenged a warrantless blood test by arguing that his consent was coerced because refusing consent is a crime. *State v. Brooks*, A11-1043, 2012 WL 1914073, at *2 (Minn. Ct. App. May 29, 2012). The court of appeals discussed consent but upheld the search because exigent circumstances provided an independent exception. *Id.*

The Minnesota Supreme Court consolidated the two appeals but denied the petition for review. The United States Supreme Court granted Mr. Brooks's petition for a writ of certiorari, vacated the judgments, and remanded the cases to the Minnesota Court of Appeals "for further consideration in light of *Missouri v. McNeely*." *Brooks v. Minn.*, No. 12-478, 2013 WL 1704706 (Apr. 22, 2013).

The State argues that Minnesota's implied consent law, and implied consent laws generally, have been consistently upheld as an effective and reasonable means to combat drunk

driving. In any event, the State argues that Defendant consented to the breath test and has not shown coercion.

The State's reliance on *State v. Wiseman* for the validity of Minnesota's implied consent law is misplaced. *See* 816 N.W.2d 689, 696 (Minn. Ct. App. 2012). *Wiseman* was decided before *McNeely*, so an officer's probable cause to believe that a driver was impaired established the single-factor exigent circumstances exception to the warrant requirement. In these situations, exigent circumstances, not consent, provided the basis for the warrantless search. *Wiseman* explicitly recognized that the implied consent advisory did not seek the driver's consent for a chemical test—it merely informed the driver that he was legally required to take a chemical test. *Id.* at 694. The court acknowledged that "implied consent" is a "misnomer" in this context because consent is neither required for nor the basis of the chemical test. *Id.*

Defendant's warrantless breath test no longer fits within the consent exception to the warrant requirement. For over a decade, *State v. Mellett* supported the constitutional validity of implied consent despite the criminal consequences for refusal. However, the Minnesota Court of Appeals' reasoning in *State v. Netland* provides the contrary view that "the 'consent' implied by law is insufficiently voluntary for Fourth Amendment purposes." That *Netland* claims to clarify *Mellett* strongly suggests that the Minnesota Court of Appeals will find that consent under Minnesota's implied consent law is coerced in the remanded *State v. Brooks*. Because Defendant was told that refusal to consent to a breath test was a crime, his consent was not freely and voluntarily given. Put another way, because Defendant's right to say no was compromised by criminal consequences, his consent was extracted rather than received. Consent remains a valid exception to the warrant requirement, but implied consent is consent in name only.

C. The Breath Test's Suppression Results in the Dismissal of Count Two, but Count One Remains.

While Defendant's Motion for Reconsideration of his motion to suppress is granted, Officer XXXXXX still had probable cause to believe Defendant was driving while impaired because he observed Defendant's glassy, watery eyes, slurred speech, and the odor of alcohol. Additionally, Defendant admitted to consuming alcoholic beverages and failed a field sobriety test. Finally, Officer XXXXXX's PBT reported Defendant's BAC at 0.12. For these reasons, count one for fourth-degree driving while impaired remains. Minn. Stat. § 169A.20, subd. 1(1).

III. CONCLUSION

The State stresses the damage caused by impaired drivers and Minnesota's interest and responsibility in protecting its citizens. The Court appreciates "the magnitude of the drunken driving problem [and] the States' interest in eradicating it," but "the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." *McNeely*, 569 U.S. at 1565.

Defendant's breath test was an unlawful search because it was performed without a warrant or an exception to the warrant requirement. Therefore, Defendant's Motion for Reconsideration of his motion to suppress is granted and count two is dismissed.

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