

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

vs.

A [REDACTED] D [REDACTED] W [REDACTED],

Case No. 27-CR-15-[REDACTED]

Defendant.

The above-entitled matter came before the Honorable Bev Benson, Judge of District Court for a *Rasmussen* hearing on December [REDACTED], 2015 at Hennepin County Government Center, Minneapolis, Minnesota.

APPEARANCES

Defendant appeared with Ryan Garry and Elizabeth Duel, 333 South 7th St., Ste. 2350, Minneapolis, MN 55402.

Kerri Kovalesky, Assistant Minneapolis City Attorney, appeared on behalf of the State.

Based upon the arguments of counsel, and all files, records and proceedings, the Court makes the following:

ISSUES:

1. Whether based upon *State v. Trahan*, 870 N.W.2d 396, 399 (Minn. Ct. App. 2015), appeal docketed, NO. A13-0931 (Minn. Nov. 25, 2015), this case should be dismissed; and,
2. Whether there was a reasonable articulable suspicion to administer the preliminary breath test.

FINDINGS OF FACT:

1. A [REDACTED] W [REDACTED], Defendant herein, is charged as follows: Count I Second Degree Refusing to Submit to Chemical Testing under Minn. Stat. § 169A.25.1 (b); Count II – Third Degree DWI Driving While Under the Influence of Alcohol under Minn. Stat. § 169A.20.1(1); and, Count III - Careless Driving under Minn. Stat. § 169.13.2 for her conduct alleged to have occurred on or about April 14, 2015.
2. On December 1, 2015, the Parties appeared before the undersigned for a contested *Rasmussen* hearing. Defendant moved the Court to suppress the evidence, arguing that (i) the recent case should be dismissed in light of *State v. Trahan*, 870 N.W.2d 396, 399 (Minn. Ct. App. 2015), appeal docketed, NO. A13-0931 (Minn. Nov. 25, 2015); and, (ii) there was not a reasonable articulable suspicion to administer the preliminary breath test.
3. During the *Rasmussen* hearing, the Court heard testimony from Minnesota State Trooper McClure ("McClure").
4. The parties stipulated to the admissibility of the Minnesota State Trooper DWI Arrest Report and Supplements Case Control Number 15503885, State of Minnesota Department of Public Safety Accident Report, Implied Consent Advisory, Implied Consent Advisory Extended Notes, Implied Consent Peace Officer's Certificate and Extended Notes, Notice and Order of Revocation and Notice of License Plate Impoundment marked and received into evidence as ("*Rasmussen* Exhibit 1").
5. The State, Defense Counsel and Defendant, stipulated that at no time did State Trooper McClure either try to obtain a search warrant authorizing him to seize a sample of Defendant's blood or possess a search warrant authorizing him to seize a sample of defendant's blood.
6. The Defendant waived her right to testify at the *Rasmussen* hearing on the record.

Trooper McClure's Testimony

7. At the hearing, McClure testified to the following:
 - a. He has been a trooper employed by the State of Minnesota for three years and is a certified peace officer.
 - b. He has received training on how to determine when people are under the influence of alcohol, including an advanced 40-hour field sobriety training provided by the State.
 - c. Based upon his training and experience in law enforcement, some of the signs of intoxication can include: odor of an alcoholic beverage, red bloodshot watery eyes, slurred speech, poor balance and slow decision-making abilities.
 - d. Not all signs of impairment need be present for a person to be intoxicated.

- e. He commonly works from 9:30 PM to 7:30 AM and usually observes a person under the influence about one time per shift when working.
- f. On April 14, 2015, he was on-duty working the overnight shift. His duties included: responding to service calls and enforcing Minnesota's traffic laws.
- g. At 11:00 p.m. he responded to a call of a property crash on southbound 35W in the area of 26th Street, located in Hennepin County.
- h. Upon arriving at the crash location, he went to the first vehicle (V1) that he determined was involved in the crash and spoke with the driver. The driver told him that while he had been rear-ended by another vehicle (V2) and that just prior to the crash he looked in his rearview mirror and observed that V2 was approaching at a very fast speed.
- i. He moved on to V2 which was located more southbound from V1. He observed a female on the ground with people standing around here. The bystanders identified this female as being involved in the crash.
- j. He checked the inside of V2's vehicle observed that the driver's side seatbelt pretensioner had been activated and locked which meant that the seatbelt had been used during the time of the crash. The seatbelt for the passenger side had not been activated which meant it had not been in use at the time of the crash.
- k. He made contact with the female who identified herself verbally as A██████ W██████, Defendant herein. Trooper McClure positively identified the female he observed on the ground in court as Defendant. Trooper McClure testified that Defendant "asked him where her mom was" and also said "that her mom was driving the vehicle." Defendant identified her mother as "R██████ W██████" and gave the trooper her (W██████) phone number. Defendant admitted that she had consumed "three Coronas earlier that night."
- l. He later contacted Defendant's mother by phone and was told that she (W██████) had been sleeping when the collision occurred and that she (W██████) was not the driver of V2 at the time of the collision.
- m. Trooper McClure observed that the Defendant had red, bloodshot watery eyes and slurred speech. He also smelled a strong odor of an alcoholic beverage coming from her person.
- n. He administered the Horizontal Gaze Nystagmus (HGN) test and observed a lack of smooth pursuit, maximum deviation onset before 45 degrees and Vertical Nystagmus.
- o. Based on Defendant's poor performance of the HGN test, he believed Defendant was impaired and administered a Portable Breath Test (PBT). The PBT test yielded a .214 blood alcohol concentration.
- p. An ambulance transported Defendant to the Hennepin County Medical Center.
- q. On cross-examination, McClure confirmed that he observed V2 stopped and did not observe any driving conduct. When he arrived at the scene nobody was in V2.
- r. He also acknowledged that Defendant was crying and agitated when he approached her and that could have caused her to have watery and bloodshot eyes.
- s. He was trained in administering the HGN test by the National Highway Traffic Safety Administration. He knew there are other factors, other than alcohol, that could affect

the results of an HGN test or Vertical Nystagmus test. He was unaware of whether seizures, certain medications or a brain injury could impact the test results.

- t. The witnesses he spoke to on scene indicated they did not see anyone leave V2.

Arrest Report (CCN: 15503885)

8. **Preliminary.** On Tuesday, April 14, 2015, McClure was working a regular Dog Watch shift from 2130-0730 hours in the West Metro District. The weather was clear skies, temperature was in the upper 50s, 10 mile visibility with SSE winds around 8-10 MPH. The traffic at the time was light and the road conditions were dry.
9. **Initial Observation.** At approximately 23:21 hours, McClure was dispatched to a blocking crash on SB 35W in the area of 26th Street. Upon his arrival, he observed numerous vehicles in the area and quickly learned that there were only two vehicles involved in the crash. He first made contact with one of the drivers, S [REDACTED] J [REDACTED] R [REDACTED] (dob [REDACTED]). R [REDACTED] stated that he was rear-ended by another vehicle. He said that just prior to the crash he looked in his rearview mirror and observed the vehicle that hit him approaching at a very fast speed. Trooper Hibbard arrived on scene. After confirming R [REDACTED] was not injured, McClure drove up to the other vehicle involved. The vehicle was a black 2005 Lincoln Continental sedan bearing the MN license plate of WD7108.
10. **Stop.** As McClure got to the second vehicle he observed multiple people standing around a female who was sitting on the ground and identified by bystanders as being involved in the crash. McClure made contact with the female who was identified verbally (confirmed by DVS photo) as A [REDACTED] D [REDACTED] W [REDACTED] (dob [REDACTED]).
11. **Face-to-Face Contact.** W [REDACTED] was yelling that her mom had been driving and she wondered where her mom was now. As McClure spoke with W [REDACTED] he observed her to have red, bloodshot watery eyes and slurred speech. He could smell a strong odor of beverage alcohol coming from her person. HCMC ambulance arrived on scene and began checking on W [REDACTED]. While medics were speaking with W [REDACTED], McClure spoke with two witnesses.

First, he spoke with K [REDACTED] A. [REDACTED] who stated he had observed the crash in his mirror and had pulled over to check on those involved. I [REDACTED] parked on the shoulder just north of the Lake Street bus ramp and walked back to W [REDACTED] vehicle. As he walked back to the crash he stated he did not see anyone walking away from the crash. McClure then spoke with another witness, S [REDACTED] I [REDACTED] D [REDACTED]. She said she observed the crash in front of her and pulled over to the shoulder. She walked up to the crash and did not observe anyone walking away from the crash.

In this area there is a concrete media wall on the east side of the SB lanes and a tall highway wall on the west side. McClure observed the vehicle and observed both front airbags had been deployed. He checked the front set seatbelts and found the driver's side seatbelt pre-tensioner had been activated and the seatbelt was locked. The passenger side seatbelt had not been activated which told McClure that it had not been in use at the time of the crash.

McClure then spoke with W [REDACTED] again in the ambulance. W [REDACTED] stated that she had been wearing her seatbelt and identified her mom as R [REDACTED] W [REDACTED] - phone [REDACTED] (he later made contact via phone with R [REDACTED] who stated she had been in bed and not driving with her

daughter). McClure asked W [REDACTED] how much she had to drink tonight and she said she had three Coronas.

12. **Pre-Arrest Screening (SFT's/PBT).** Based on McClure's observations and conversations with W [REDACTED], he asked if she would exit the ambulance so he could check her eyes. The testing surface was dry pavement clear of debris. W [REDACTED] was wearing pants, a shirt and socks. He asked W [REDACTED] some general health questions to which she replied she did not have any physical disabilities or speech difficulties. She also stated she was not injured today and was not on any medications. Prior to the test, he explained the instructions. After the explanation W [REDACTED] stated she understood the instructions and did not have any questions.

HGN. Prior to the test, McClure checked for equal tracking and equal pupil size. He observed both. He observed W [REDACTED] to have a lack of smooth pursuit in both eyes. W [REDACTED] had distinct and sustained nystagmus at maximum deviation in both eyes. W [REDACTED] also had the onset of nystagmus prior to 45 degrees in both eyes. He did observe vertical nystagmus. A total of six clues were observed during the test. Based on his observations and W [REDACTED] performance on the tests, he believed she was impaired. He asked W [REDACTED] to take a PBT test, PBT #104789 was used and the result was 0.214% BAC.
13. **Arrest.** W [REDACTED] was transported by ambulance to Hennepin County Medical Center (Run #15022812). Miller Towing responded to the scene and took possession of the vehicle (Trp Hibbard completed a tow sheet).
14. **Implied Consent/Testing.** I responded to HCMC and observed W [REDACTED] had been restrained to the hospital bed as a result of her behavior. At approximately 0015 hours, at HCMC, McClure read W [REDACTED] her Motor Vehicle Implied Consent Advisory. The conversation was digitally recorded. W [REDACTED] stated she understood the advisory and wished to speak with an attorney. Due to the fact W [REDACTED] was restrained to the hospital bed, McClure got a phone directory and turned the pages until W [REDACTED] advised him of which number to call. After calling the number she requested McClure held the phone for her while she had her conversation. After stating she was finished with the phone, McClure asked W [REDACTED] to take a blood test in which she said no. He then asked if she would take a urine test and she did not respond. After asking for the third time and not getting any response, McClure advised W [REDACTED] she was refusing by conduct. He then asked why she refused and W [REDACTED] said, "I didn't get a full investigation."
15. **Miranda/Statement.** Due to the fact W [REDACTED] was getting medical treatment, McClure did not read W [REDACTED] her Miranda rights. He also did not ask any further questions.
16. **Final Disposition.** McClure ran W [REDACTED] via his squad computer. He observed a prior DWI Convictions/Implied Consent Advisories on 5/19/14. He also observed W [REDACTED]' license was revoked. Since W [REDACTED] was not taken to jail, a formal complaint was requested for the charges listed below. McClure had dispatch contact Miller Towing and take W [REDACTED]' vehicle to the District Office for the forfeiture process.
17. **MISC.** W [REDACTED] was issued a Notice and Order of Revocation, Notice and Order of License Plate Impoundment, a temporary registration and forfeiture paperwork. These forms were explained to her and the copies were left with her hospital property.
18. **Charges.** The following charges were requested against A [REDACTED] D [REDACTED] W [REDACTED]:
 - (i) GMSD DWI Refusal – 169A.20.2; 169A.25.1(b); 169A.25.2
 - (ii) 3rd Degree DWI – 169A.20.1(1); 169A.26.1(a); 169A.26.2
 - (iii) Driving after Revocation – 171.24.2

19. State of Minnesota –Department of Public Safety Accident Report: In this report, Trooper McClure indicates: that the driver of Vehicle 2, identified as a 2005 Black Lincoln LS, Minnesota License Plate [REDACTED], was A [REDACTED] D [REDACTED] W [REDACTED] DEFENDANT HEREIN, and the driver of Vehicle Number 1, a 2007 Black Hyundai SFE, Minnesota License Plate [REDACTED], was J [REDACTED] R [REDACTED] S [REDACTED]. He reports, "Veh. 2 rear ended Veh 1 at high rate speed causing it to crash into the guardrail. Drv of Veh 2 was intoxicated (PBT test of .214% BAC) and transported to the hospital where she refused testing. DRV of Veh 1 stated he obv. Veh. 2 coming behind him at a very high rate of speed right before it crashed into him. No other injuries were reported. Both veh were towed.
20. In the DWI Arrest Written Report, Trooper McClure further described Defendant in the following manner: strong odor of an alcoholic beverage, watery/glassy, bloodshot and marked reddening of her eyes, her pupils as normal, her speech as slurred, her coordination as an unsteady gait, her attitude as showing: profanity, excited, loud and upset/emotional and her unusual actions as "crying"; as to the Horizontal Gaze Nystagmus (HGN), he writes, left and right eyes showed a lack of smooth pursuit, distinct Nystagmus at Maximum Deviation and onset of Nystagmus prior to 45 degrees; unable to perform the walk and turn test; unable to perform the one leg stand as she was transported to the hospital; and PBT Test result of .21, and "stated she had two coronas." He further described the two witnesses he spoke to at the scene, K.I. and S.D., as "sober."
21. In the Implied Consent Advisory Extended Notes, Trooper McClure states, "Asked for blood test three times. Asked for urine test three times. Blood test she stated no. Urine test she refused to answer."
22. In the Implied consent Peace Officer's Certificate, Trooper McClure indicates the following:
- reason for the initial contact: accident and vehicle already stopped: just involved in crash
 - Probable cause that person was driving, operating or in physical control: Other see notes page. The Court references the "Implied Consent Peace officer's Certificate Extended Notes" which provides: "One person observed getting out of vehicle: witnesses observed to other occupants."
 - Probable cause that person was under influence (In addition to other information): odor of alcoholic beverage, bloodshot eyes, watery eyes, and slurred speech.
 - Check at list one of the following: Accident and PBT with AC of .08;
 - The Person has refused to submit to a test pursuant to the provision of the Minnesota Statutes Sections 169A.50-53. And was read the Implied Consent Advice by Officer Lee McClure, Minnesota State Patrol (Golden Valley).
 - The Person (Defendant) refused to provide a test sample to determine the presence of alcohol or hazardous or controlled substance or its metabolite.
 - This was electronically signed by Lee McClure, Minnesota State Trooper, on April 15, 2015, at 12:49 a.m.

CONCLUSIONS OF LAW:

- There was a reasonable articulable suspicion to administer the preliminary breath test.
- The Court concludes that a warrantless search of Defendant's blood would not have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment and there is no exception that applies to the Fourth Amendment based upon the record in this case. (*See State v. Trahan*, 870 N.W.2d 396 (Minn. 2015).

3. The Court concludes that a warrantless search of Defendant's urine would not have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment and there is no exception that applies to the Fourth Amendment based upon the record in this case (*State v. Thompson*, 2015 WL 9437538 (Minn. Ct. App. Dec. 28, 2015)).
4. The Court finds that the Defendant's test refusal in this case, that is, refusing to provide a blood and a urine sample, criminalizes her refusal to submit to a warrantless blood and urine test and therefore, the test-refusal as applied violated the Defendant's fundamental right to substantive due process by criminalizing her right to refuse a warrantless search of her blood and urine.
5. The Court finds that Trooper McClure, at the time of this incident, was operating in good faith, by requesting the Defendant provide a blood or urine sample, since *Trahan* and *Thompson*, had not been decided.

ORDER

1. The Court finds that there was a lawful basis to administer the Portable Breath Test;
2. The Court grants Defense Counsel's motion to dismiss Count 1-Second Degree Refusal pursuant to Minn. Stat. Minn. Stat. § 169A.25.1 (b); and,
3. The parties are scheduled to appear 1-21-2016, at 8:45 a.m. before this Court on a return for the *Rasmussen* rulings and at that time, will either resolve the case or set this case for trial on Counts II and III of the complaint.

Let the judgement be entered accordingly.

COURT'S MEMORANDUM OF LAW

- I. There is a reasonable articulable basis to administer the PBT in this case.

Although the Trooper never observed Defendant inside the vehicle and Defendant did not make any incriminating statements that she had been driving, operating or in physical control of the vehicle and in fact, told the State Trooper, "her mother had been the driver," given the "totality of the circumstances" in this case, based upon the record, it was reasonable for the officer to conclude that it was the Defendant, who was the driver of the vehicle that caused the collision in this case. Defendant was found near the car on the side of the road; via cell phone conversation with the Trooper, the Defendant's mother denied being at the collision scene and nobody at the scene observed any other people leave the scene. Moreover, Trooper McClure observed that the Defendant had red, bloodshot watery eyes and slurred speech and further, he smelled a strong odor of an alcoholic beverage coming from Defendant's person. The Trooper administered the Horizontal Gaze Nystagmus (HGN) test and observed a lack of smooth pursuit, maximum deviation onset before 45 degrees and Vertical Nystagmus. Based upon the Defendant's poor performance on the HGN test, the Trooper believed the Defendant was impaired and administered a Portable Breath Test (PBT) which yielded a result of .214 alcohol concentration.

Based upon the Fourth Amendment, acting under reasonable suspicion that a driver is impaired, an officer may request the driver to perform field sobriety tests or to submit to a preliminary screening test, or PBT. *State v. Klamar*, 823 N.W.2d 687, 696 (Minn. Ct. App. 2012); *State v. Sellers*, 350 N.W.2d 460 (Minn. Ct. App. 1984); see also Minn. Stat. Sec. 169A/41, Subd. 1.

- II. The Court concludes that a warrantless search of Defendant's blood and urine would not have been constitutional under the search-incident-to-arrest exception to the Fourth Amendment and there is no exception that applies to the Fourth Amendment based upon the record in this case *State v. Trahan*, 870 N.W.2d 396 (Minn. 2015) and (*State v. Thompson*, 2015 WL 9437538 (Minn. Ct. App. Dec. 28, 2015)).

Since the parties submitted this case to the Court, *State v. Thompson*, 2105 WL 9437538 (Minn. Ct. App. Dec. 28, 2015) was decided by the Minnesota Court of Appeals. Both *Trahan* and *Thompson* decisions are directly applicable to Defendant's case. Since Defendant had a legal right to refuse to provide a blood or a urine test absent a warrant secured by the Trooper, the test-refusal as applied violated the Defendant's fundamental right to substantive due process by criminalizing her right to refuse a warrantless search of her blood and urine.

In *Trahan*, the Court of Appeals concluded:

criminalizing the refusal to submit to a warrantless blood test "relates to the state's ability to prosecute drunk drivers and keep Minnesota roads safe," *Bernard*, 859 N.W.2d 774, But it is not precisely tailored to serve that compelling state interest. It therefore fails strict-Scrutiny review.

In *Thompson*, the Court of Appeals concluded:

"As noted in *Bernard* and *Trahan*, the state has a compelling interest in keeping impaired driver's off its roads. See *Bernard*, 859 N.W.2d at 773; *Trahan*, 870 N.W.2d at 404. But in *Trahan*, we determined that criminalizing the refusal of a warrantless blood test was not narrowly tailored because the state had "other viable options to address drunk driving," including (1) offering a breath test and charging a driver with refusing that test (2) prosecuting the driver without measuring the alcohol concentration; and (3) securing a search warrant. 870 N.W. 2d at 404; see *Missouri v. McNeely*, 133 S.Ct. 1552, 1562 (2013) (suggesting that, today, search warrants are often easy to obtain via telephone or electronic communications). Because there alternatives are similarly available in the context of a warrants urine test, we conclude that the test-refusal statute is not narrowly tailored to serve the state's compelling interest in keeping its roads safe. See *Trahan*, 970 N.W.2d at 404. The test-refusal statues therefore fails strict scrutiny as applied to *Thompson*, and *Thompson's* right to substantive due process under the United States and Minnesota Constitution was violated. See *id.*

Date: 1/1/2016

BY THE COURT:



Bev Benson
Judge of District Court