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Filed in Fourth Judicial District Court
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Hennepin County, MN

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

[redacted]

Defendant.

Case No. [redacted]

ORDER GRANTING MOTION TO SUPPRESS EVIDENCE

This matter came before Judge [redacted] of District Court on Defendant's motion to suppress evidence. [redacted] Esq., appeared for the State of Minnesota ("State"). Elliot J. Nickell, Esq., appeared on behalf of Defendant [redacted] ("Defendant").

The parties stipulated to admit one exhibit ("Exhibit 1"), a [redacted] Robbinsdale Police Department report ("Police Report") detailing the stop and search of Defendant. The parties did not offer any additional evidence into the record by exhibit or through sworn testimony. After hearing the motion, the Court reserved time for the parties to submit memoranda of law, after which the Court took the matter under advisement.

Based upon the file, record, and proceedings, the Court issues the following:

ORDER

1. Defendant's motion to suppress evidence of the warrantless urine test is GRANTED. The evidence obtained as a result of the urine test, hereby, suppressed.

2. The attached Memorandum is incorporated as part of this Order.

[redacted]

Judge of District Court

MEMORANDUM

This matter came before the Court on Defendant's motion to suppress evidence of police's warrantless urine test of Defendant. Defendant argues the officer made an inaccurate statement of Minnesota's implied consent law as it applies to urine tests and that Defendant statements are not valid consent to a warrantless search of her urine. The search of the urine, Defendant continues, was unreasonable and the evidence obtained must be suppressed under *State v. Thompson.* 873 N.W.2d 873 (Minn. Ct. App. 2015). The state argues the urine test was a valid search under *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013) and that Defendant's statements were consent for the search.

As set forth more fully below, the Court concludes that the State does not establish Defendant's consent to a urine test was free and voluntary. A urine test is materially different than a breath test as to the invasion of personal privacy. Although a correct statement for a breath test, the police's statement that "refusal to take a test is a crime" is not accurate for a urine test. Therefore the in-custody Defendant was not provided an accurate statement of the refusal law regarding the request for a urine test or given the opportunity to consult with an attorney.

I. Summary of Facts from the Stipulated Record.

The parties submitted the issue of consent for the search of Defendant's urine to the Court stipulating to the facts as set forth in the stipulated exhibit (Exhibit 1). A summary of relevant facts from the stipulated record is set forth, below.

On November 1, 2015 around 1:11 a.m., Robbinsdale Police Officer [redacted] noticed a car traveling in the opposite direction which he believed was travelling faster than the posted speed limit of 30 miles per hour. Using his squad car radar unit to measure the car's speed, he clocked the car's speed as 38 miles per hour, made a U-turn and followed the car.

Filed in Fourth Judicial District Court
8/31/2016 3:44:01 PM
Hennepin County, MN

Following the car, and as the cars approached an intersection, the officer saw the car drift to the right and begin to drive over the solid white fog lines. Next, as the lane split into two lanes, the car drove over a dotted white line for about two seconds. Officer [redacted] turned on his siren and lights and stopped the car.

Officer [redacted] approached the car and asked the driver for her driver's license and proof of insurance. The Minnesota Driver's License identified the driver as Defendant. While speaking with Defendant at the car, the Officer smelled the odor of alcohol coming from inside the car and from Defendant. Officer [redacted] questioned Defendant, who responded she consumed three mixed drinks that night, the last of which about forty-five minutes ago. Officer [redacted] subsequently asked Defendant to step out of her car and stand at the front of the squad car, after which he performed tests to determine if Defendant was impaired. The tests were a "HGN" test of the eyes, a "walk and turn," a "one leg stand," and a preliminary breath test. After the tests, Officer [redacted] arrested and transported Defendant to the Robbinsdale Police Department ("Police Department"). Defendant does not contest the validity of the stop or the arrest.

After arresting Defendant, the Officer performed a vehicle inventory search of Defendant's car. Officer [redacted] found an open bottle of alcohol in the center console. At some point, the car was towed and impounded.

At the Police Department around 1:50 a.m., Officer [redacted] read to Defendant Minnesota's implied consent advisory. Part of the advisory provides that Minnesota law requires the person take the test and that "refusal to take a test is a crime." The advisory also provides for a right to consult with an attorney. Officer [redacted] asked Defendant if she would like to consult with an attorney, and Defendant said "no." When the Officer asked if Defendant would take a

Filed in Fourth Judicial District Court
8/31/2016 3:44:01 PM
Hennepin County, MN

breath test, she said "yes." Defendant does not contest that she consented to take the offered breath test.

After Defendant agreed to take the breath test, Officer [redacted], a different police officer, administered the test. As it turned out, however, the station's breathalyzer, known as the DataMaster machine ("DMT machine"), malfunctioned. The reason was the DMT turned off because of daylight savings time. In short, the machine stopped working at 2:00 a.m. and would not work again for another hour. Officer [redacted] who stopped and arrested Defendant, then asked Defendant if she would take a urine test instead. Police did not re-read to Defendant the Implied Consent Advisory or inform Defendant that if she refused the urine test, they would be required to obtain a warrant for her refusal could be considered a crime.[1] Police did not provide Defendant an opportunity to talk to an attorney about taking a urine test rather than a breath test. The Implied Consent Advisory Form was not amended to address a urine test and documents only a request a breath test.

On being asked if she would take the urine test, Defendant responded, "whatever we can do to make this process go faster." Officer [redacted] explained the procedure for a urine test which Defendant said she understood and Defendant took the urine test.

II. Validity of Defendant's Consent as Exception to Warrant Requirement.

Defendant seeks suppression of the evidence obtained through the urine test, arguing that police did not obtain a warrant and Defendant's consent was not free and voluntary. Defendant argues that, although her words and actions suggested compliance with the officer's request, her

[1] The date of the events, November 1, 2015, is prior to the Minnesota Court of Appeals decision in *State v. Thompson*, 873 N.W.2d 873 (Minn. 2015) (dated Dec. 28, 2015).

Filed in Fourth Judicial District Court
8/31/2016 3:44:01 PM
Hennepin County, MN

consent was obtained without correct information and through coercion. The State argues Defendant's consent to the urine test was valid and that results of the test should be admitted.

The United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amend. IV; *see also* Minn. Const. art. I, § 10 (guaranteeing the same). The taking of a urine sample from someone is a "search." *State v. Brooks*, 838 N.W.2d 563, 569 (Minn. 2013) (citing *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 616–617 (1989); *State v. Thompson*, 873 N.W.2d 873, 877 (Minn. Ct. App. 2015) (citing *Skinner*, 489 U.S. at 616–617). Warrantless searches are per se unreasonable unless an exception to the warrant requirement applies. *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994).

A search warrant is not required if the subject of the search consents to the search. *Brooks*, 838 N.W.2d at 568. In order to constitute an exception to the warrant requirement, the State must prove by preponderance of the evidence that the consent was free and voluntary. *Id.* "Whether consent was voluntary is determined by examining the totality of the circumstances, including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011) (quotation omitted); *Brooks*, 838 N.W.2d at 569 (applying same factors). A person, however, does not consent simply by acquiescing to a claim of lawful authority. *Brooks*, 838 N.W.2d at 569 (citing *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968). Consent to a "search obtained subsequent to an arrest will be less readily inferred than consent obtained prior to an arrest since, once arrested, a person becomes more susceptible to police duress and coercion." *State v. High*, 287 Minn. 24, 27, 176 N.W.2d 637, 639 (1970).

Filed in Fourth Judicial District Court
8/31/2016 3:44:01 PM
Hennepin County, MN

The State argues *State v. Brooks* sets forth the controlling law and that Defendant validly consented to the urine test. In *Brooks*, the Minnesota Supreme Court held that a police officer's reading of Minnesota's implied consent advisory to a defendant arrested for DWI was not coercive, and that the defendant's subsequent consent to blood and urine tests was valid. 838 N.W.2d at 565.

The *Brooks* Decision relies, in part, on analysis of provisions of Minnesota's implied consent law, which provides that drivers impliedly agree to alcohol testing by virtue of driving on Minnesota's roads. The implied consent law provides that anyone who drives a motor vehicle in Minnesota consents "to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol" when certain conditions are met. Minn. Stat. § 169A.51, subd. 1(a). In addition, police can require a person to take a test when an officer has probable cause to believe the person committed the offense of driving while impaired and was lawfully arrested for driving while impaired. *Id.* § 169A.51, subd 1(b).

The implied consent law also mandates police advise drivers of their rights and obligations under the law, which in *Brooks* and in this case was achieved by reading out loud from a form called the "Implied Consent Advisory." The statute requires police alert a driver suspected of DWI that Minnesota law requires he or she take a test, that "refusal to take a test is a crime," and that the driver has a right to an attorney. *Id.* § 169A.51, subd 2. Police, however, cannot conduct a test if the driver does not agree to take a test. *Id.* § 169A.52, subd. 1. The Minnesota Supreme Court's decision in *Brooks* found consent was voluntary in part because the defendant did not contest that police correctly advised him of his rights and obligations under the implied consent law. 838 N.W.2d at 569. In other words, the *Brooks* decision is based partly on

Filed in Fourth Judicial District Court
8/31/2016 3:44:01 PM
Hennepin County, MN

the fact that police read to the defendant the implied consent advisory and there was no dispute about the advisory's accuracy.

Defendant does not dispute that police read her the implied consent advisory. However, unlike *Brooks,* she disputes the accuracy of the statement in the advisory in light of developments in case law regarding the need for search warrants for certain types of tests. Since the *Brooks* decision, the Minnesota Court of Appeals issued *State v. Thompson* 873 N.W.2d 873 (Minn. Ct. App. 2015). In *Thompson,* a driver refused to take a warrantless urine test after he was arrested on suspicion of DWI, driven to the police station, and read the implied consent advisory. *Id.* at 876. The Minnesota Court of Appeals concluded that, unlike breath tests and like blood tests, warrantless urine tests cannot be justified under the search-incident-to-arrest exception to the warrant requirement of the United States or Minnesota Constitutions. *Id.* at 878; *see also State v. Trahan,* 870 N.W.2d 396, 399 (Minn. Ct. App. 2015) (concluding a warrantless blood test also could not be justified under the search-incident-to-arrest exception after test refusal); *State v. Bernard,* 859 N.W.2d 762, 772, 768 n.6 (Minn. 2015) (concluding warrantless search of driver would have been reasonable under search-incident to arrest exception after test refusal and declining to address issue of urine and blood tests).[2] The Minnesota Court of

[2] The United States Supreme Court upheld *Bernard*'s holding in *Birchfield v. North Dakota,* concluding "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." --- U.S. ---, 136 S. Ct. 2160, 2184 (2016). The *Birchfield* decision also holds "that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." --- U.S. ---, 136 S. Ct. 2160, 2186 (2016). *Birchfield* does not address urine tests. *Id.* at 2168. However, the Court's reasoning for concluding that consent cannot be compelled on pain of a criminal offense parallels *Thompson.* The *Birchfield* decision concludes a warrantless search of blood is not reasonable as a search-incident-to-arrest. *Id.* at 2185. Also like in *Thompson,* the *Birchfield* decision considers the reasonableness of a warrantless search "in light of the availability of the less invasive alternative of a breath test." *Id.* at 2184 (noting alternatives of obtaining a breath test without a warrant, getting a warrant for the blood test, or justifying the warrantless search under the exigency exception). *See infra* note 3.

Filed in Fourth Judicial District Court
8/31/2016 3:44:01 PM
Hennepin County, MN

Appeals further concluded Minnesota's implied consent law's test-refusal provisions are unconstitutional as-applied to the facts in *Thompson* for violating substantive due process. 873 N.W.2d at 880 (finding a urine test for alcohol content implicates a fundamental right and that Minnesota's test refusal statute was not narrowly-tailored to serve the state's compelling interest of keeping impaired drivers off the road).[3]

In this case, Defendant validly consented to a breath test. She was later asked to if she would take a urine test, without further reading of the advisory or provision of an opportunity to consult with an attorney. A urine test necessarily involves the subject engaging in what are otherwise private activities under the direction and observation of law enforcement personnel. It is more invasive of the individual's bodily functions and invokes privacy issues that are distinct from a breath test and more consistent with conditions present in a request for a blood test.

Defendant argues that, under *Thompson*, the statement read to Defendant in the implied consent advisory stating her refusal to take a test is a crime was not an accurate reflection of the law related to a urine test because a warrant for the test would be required before she could have been charged with a crime for refusing the test. Although the words of the Implied Consent Advisory have not changed, the case law surrounding the need for a warrant for blood or breath tests has changed. In all three cases, *Brooks*, *Thompson*, and this case, police told the defendant that test refusal was a crime. In *Brooks*, the advisory was an accurate statement of law. Under

[3] Following its reasoning in its *Trahan* decision, a case that makes similar findings as to warrantless blood tests, the Minnesota Court of Appeals concluded that the state has other viable options other than criminalization of refusal to address drunk driving, such as "(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." *Id.* at 880 (citing *Trahan*, 870 N.W.2d at 404). Accordingly, the court of appeals held, "[t]he test-refusal statute therefore fails strict scrutiny as applied to Thompson, and Thompson's right to substantive due process under the United State and Minnesota Constitution was violated. *Id.*

Filed in Fourth Judicial District Court
8/31/2016 3:44:01 PM
Hennepin County, MN

Thompson, that same advisory is not accurate as applied to warrantless urine tests. The Court's reading of all of the cases leads the court to conclude that absent free and voluntary consent, a urine test required a warrant and refusal would not be a crime unless the police first obtained a warrant. The implied consent advisory in this case did not accurately state the law regarding refusal being a crime on the substitute request for a urine test.

Because Defendant was incorrectly informed that refusal is a crime and was not given an opportunity after the substitution of the urine test to consult with an attorney, the State fails to produce sufficient evidence that Defendant's statements were voluntary and not the result of coercion based on the statement that refusal was a crime. In *Bumper v. North Carolina*, the United State States Supreme Court held that warrantless search of a woman's home after incorrectly stating that police had a warrant invalidated that woman's consent to the search. 391 U.S. 543, 546, 88 S. Ct. 1788, 1791–92 (1968). The Court concluded "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.* at 550, 88 S. Ct at 1792. Here, police made a statement that refusal to take a test was a crime, a statement that was not correct regarding the urine test. Police's misstatement of law effectively announced to Defendant that she had no right to refuse the urine test without that refusal constituting a crime.[4]

[4] The *Brooks* decision distinguishes *Bumper* on the basis that Minnesota law allows drivers to refuse the test. *See* 838 N.W.2d at 571. However, the state of Minnesota's implied consent law has changed. The analysis in *Brooks* does not address the inaccuracy of the statement. Relying on *Thompson*, this Court concludes that *Bumper* now applies to the circumstances in this case specifically because the statement that refusal of a warrantless urine test is a crime is now not legally accurate.

Filed in Fourth Judicial District Court
8/31/2016 3:44:01 PM
Hennepin County, MN

In addition to the issue of correctly advising arrestees about their rights and obligations under Minnesota's implied consent law, the *Brooks* decision also looked to other factors to conclude consent was voluntary. These factors were that police afforded the defendant knowledge of the right to refuse by reading the implied consent advisory; that the defendant's custody was recent, having just been arrested; that police did not repeatedly question defendant; and that the defendant consulted with counsel prior to the consent to the urine test. *Id.* at 571–72. Neither party presented any additional evidence as to these factors.

Looking to the totality of the circumstances on the very sparse record, this Court concludes Defendant did not voluntarily consent to the urine test. The police did not re-read Defendant the implied consent advisory after the breath test malfunctioned in relation to the request for a urine test. Neither did Police inform Defendant that a warrant was needed to obtain a urine test or otherwise alter or amend their previous representations regarding test refusal being a crime. *See Bernard*, 859 N.W.2d at 768 n.6 (noting the decision did not address blood and urine tests); *Trahan*, 870 N.W.2d at 401–02, 404 (holding blood tests cannot fall under search-incident-to arrest and that criminalizing test refusal is a violation of substantive due process). Police also did not notify Defendant she had a right to attorney with regard to the urine test as opposed to the breath test.[5] Considered in their totality, these factors support the Court's determination that consent was not voluntary.

[5] Unlike in *Brooks*, Defendant did not speak to an attorney prior to consenting to either the breath test or to the urine test. *See Brooks*, 838 N.W.2d at 564–566. Defendant in this case declined the right to speak with an attorney when the first test was offered. This means, unlike in *Brooks*, Defendant's consent is not bolstered by virtue of the benefits presumably afforded an individual when speaking with an attorney. *Id.* at 571–72.

Filed in Fourth Judicial District Court
8/31/2016 3:44:01 PM
Hennepin County, MN

III. Conclusion.

The State has not met its burden of proving by preponderance of the evidence that Defendant's consent was voluntary. Police's statement regarding test refusal was coercive and did not make any effort to correct the reading of the Advisory with regard to the warrantless urine test as opposed to the warrantless breath test. Defendant did not speak with an attorney, nor did police re-affirm Defendant had a right to an attorney regarding consent to the urine test. Defendant's subsequent consent to the warrantless urine test, therefore, was not voluntary. Because Defendant's consent was not voluntary, the consent is not valid for purposes of the search under *Thompson.* The State's evidence of Defendant's blood alcohol levels obtained through the urine test are suppressed.[6]

[6] The Minnesota Court of Appeals issued *Thompson* on December 28, 2015. Meanwhile, the events at issue in this case took place on December 3, 2015. In *State v. Lindquist*, the Minnesota Supreme Court issued a (self-proclaimed) narrow holding that the exclusionary rule does not apply "when law enforcement acts in objectively reasonable reliance on binding appellate precedent." 869 N.W.2d 863, 876 (Minn. 2015). The State did not assert this as a basis for upholding the search of Defendant's urine and did not provided any briefing or evidence as to *Lindquist's* application in this case.