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Ramsey County Criminal, MN

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

The State of Minnesota,

Plaintiff,

vs.

John Alvin Lindquist,

Defendant.

Court File No. 62SU-CR-09-2153

ORDER

The above-entitled matter came before the Honorable Jeffrey M. Bryan, Judge of District Court, upon Defendant's Motion to Suppress and Dismiss, filed July 13, 2013.

Robb L. Olson, White Bear Lake City Prosecutor, represents the State.

Sharon R. Osborn represents Defendant.

Based upon the files, records, and proceedings herein, **IT IS HEREBY ORDERED THAT**:

1. Defendant's Motion to Suppress the results of the evidentiary breath test on the grounds that Defendant did not voluntarily consent to the evidentiary breath test is **GRANTED.**

2. Defendant's remaining Motions to Suppress and Dismiss are **DENIED**.

The attached Memorandum is incorporated into this Order.

February 25, 2014

BY THE COURT:

Jeffrey M. Bryan
Ramsey County District Court Judge

MEMORANDUM

Defendant John Alvin Lindquist stands accused of driving while intoxicated, in violation of Minnesota Statute 169A.20, subdivisions 1(1) and (5). During hearings held on December 18, 2013, and January 17, 2014, the Parties raised several issues, including the voluntariness of Defendant's consent to submit to an evidentiary breath test at the White Bear Lake Police Station.[1] The Court grants Defendant's Motion to Suppress the results of the evidentiary breath test because the record is silent as to the particular circumstances surrounding Defendant's consent.

FINDINGS OF FACT

On February 22, 2009, at 5:10 a.m., White Bear Lake Police received a 911 call reporting a theft in progress. (Dec. 18, 2013, Burth Test.) The caller gave a description of the individuals involved (one with a bald head and black jacket), a description of the items being stolen (including a ladder and car ramps), and a description of the vehicles involved (a white van and a

[1] Defendant also contested the following issues: (1) the propriety of the initial vehicle stop; (2) the basis to detain Defendant for theft; (3) the basis to expand the stop beyond its initial purpose; (4) the basis to request a preliminary breath test; (5) the basis to invoke the Implied Consent Advisory and request that Defendant submit to chemical testing. Defendant also moved to dismiss the charges on the grounds that the preliminary breath test was illegally obtained, and cannot be used to support probable cause in the complaint. Based on the record, and the facts above, the Court concludes that law enforcement officers conducted a valid vehicle stop. In addition, the observations of the arresting officer, together with the proximity in time and place of the vehicle to the site of the reported theft, constitute sufficient probable cause that Defendant committed the theft offense under investigation. Officers, therefore, had probable cause to detain Defendant at the time of the vehicle stop. The Court also finds that the testimony of the arresting officer established valid reasonable and articulable suspicion to expand the investigation from theft to driving while intoxicated. Moreover, this officer's testimony also established valid reasonable and articulable suspicion to request that Defendant submit to a preliminary breath test, even in the absence of field sobriety testing and even though the investigating officer's observations of intoxication (odor of alcohol, slurred speech, watery eyes) occurred after Defendant's detention for theft. Given the Court's decision to grant the Motion because the record before it is insufficient to support a finding that Defendant voluntarily consented to the evidentiary breath test, the Court need not analyze the other issues raised at this time.

white pick-up truck) and their license plate numbers. (*Id.*) Multiple officers responded to the call, including Officer Andrew Burth and Sergeant Steve Clark of the White Bear Lake Police Department. (*Id.*) A few miles north of the location of the theft, Officer Burth located the two vehicles matching the caller's description. (*Id.*) Officer Burth observed a metal ladder in the back of the pick-up truck and initiated a vehicle stop of the truck. (*Id.*) Officer Burth had no reason to suspect the driver of driving while intoxicated as he made no observations that would indicate impaired driving. (*Id.*) The driver of the white pick-up truck, later identified as Defendant herein, immediately pulled his vehicle to the side of the road and complied with Officer Burth's other requests. (*Id.*) Officer Burth approached the vehicle and noticed that the driver matched the description of one of the two suspects described by the caller. (*Id.*) He asked Defendant to exit the vehicle and conducted a pat-down search of Defendant before placing Defendant in the rear of his squad car. (*Id.*) Up to this point, Officer Burth still had no reason to suspect Defendant of driving while intoxicated. (*Id.*)

After placing Defendant in the rear of the squad car, Officer Burth questioned Defendant about the theft. (*Id.*) During this interview, Officer Burth noticed the odor of alcohol coming from Defendant and at this point also observed Defendant's eyes to be red and watery. (*Id.*) Officer Burth also testified that Defendant's speech was slurred. (*Id.*) Officer Burth asked Defendant whether he had had anything to drink, to which Defendant answered "a few beers." (*Id.*) Officer Burth did not ask Defendant when he consumed the beers, how long it had been since he consumed these beverages, or over what time period he had consumed them. (*Id.*) Officer Burth did not administer any field sobriety tests or ask any additional questions. (*Id.*) Instead, Officer Burth asked Defendant to take a preliminary breath test. (*Id.*) Defendant's preliminary breath test resulted in a blood alcohol concentration reading of 0.178. (*Id.*) Officer

Burth did not read the Implied Consent Advisory to Defendant and did not perform the evidentiary breath test of Defendant. (*Id.*)

The State also introduced the testimony of Sergeant Clark, who was present at the White Bear Lake Police Station with Officer (now Sergeant) Phil Henry when Defendant arrived there. (Dec. 18, 2013, Clark Test.) Sergeant Clark read the *Miranda* warning to Defendant and questioned him about the theft. (*Id.*) Sergeant Clark had little recollection of the statements made to or by Defendant and could not definitively testify as to the circumstances surrounding the reading of the Implied Consent Advisory or Defendant's consent to provide an evidentiary breath sample. (*Id.*) Likewise, Sergeant Clark did not perform the evidentiary test of Defendant and did not recall the circumstances surrounding the test. (*Id.*) In fact, Sergeant Clark was not present when Officer Henry gave the Implied Consent Advisory. (*Id.*) Instead, Sergeant Clark was in a different room, the dispatch center, and although he had access to a monitor showing video footage of the interview room in which Officer Henry met with Defendant, Sergeant Clark could not recall anything specific about the content or the tone of the meeting between Officer Henry and Defendant. (*Id.*) He could not recall whether there was any physical contact between the two or how long the meeting lasted. (*Id.*) He could not specifically remember whether any of the doors to the interview room were open or closed, locked or unlocked. (*Id.*) Sergeant Clark did not know how many officers were in the room with Defendant, whether the officer or officers were standing or sitting, or how close to Defendant the officer or officers were while interacting with him. (*Id.*) The State requested that the Court keep the hearing open in order to present the testimony of Sergeant Henry. Over the objection of Defendant, the Court agreed and scheduled a continued hearing one month later.

At the hearing on January 17, 2014, the State presented Sergeant Henry's testimony. Sergeant Henry recalled reading the Implied Consent Advisory but could not remember what, if any, additional comments he might have made to Defendant during their encounter. (Jan. 17, 2014, Henry Test.) Sergeant Henry also recounted that Defendant requested to speak to an attorney and did so for approximately five minutes. (*Id.*) The Parties also stipulated to the admissibility of the Implied Consent Advisory prepared by Sergeant Henry. (Ex. 1.)

LEGAL ANALYSIS

The Court confines its opinion to the singular issue that compels suppression of the contested evidence: whether Defendant's consent was voluntarily given or coerced. The record does not contain sufficient facts for the Court to conclude that Defendant voluntarily consented to submit to a chemical test. The Court first considers the applicable law regarding valid consent outside of the implied consent context. Next, the Court turns to the recent developments in Minnesota's Implied Consent Law. Finally, applying this law, the Court grants Defendant's Motion.

I. Voluntariness of Consent

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation. . . ." U.S. CONST. amend. IV. This guarantee establishes the right to privacy "as one of the unique values of our civilization," and "with few exceptions, stays the hands of the police unless they have a search warrant." *McDonald v. United States*, 335 U.S. 451, 453 (1948). The taking of breath, blood, or urine samples from someone constitutes a

"search" under the Fourth Amendment. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17 (1989). However, police do not need a warrant if the subject of the search consents. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (hereinafter *Bustamonte*).

The State bears the burden of proving voluntary consent by a preponderance of the evidence. *State v. Harris*, 590 N.W.2d 90, 102-03 (Minn. 1999); *see also United States v. Quintero*, 648 F.3d 660, 667 (8th Cir. 2011). "[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). Furthermore, "[f]ailure to object is not the same as consent." *Id.*; *see also State v. Howard*, 373 N.W.2d 596, 599 (Minn. 1985) ("Mere acquiescence on a claim of police authority or submission in the face of a show of force is, of course, not enough.").

When evaluating the coercive effect of police conduct, courts have to balance competing values and weigh any indicia of coercion that may be present against any indicia of voluntariness. On one hand, as a means to preserve the safety and security of the community, police must be able to seek the cooperation and ask questions of individuals. *Dezso*, 512 N.W.2d at 880. On the other hand, individuals have a constitutionally protected liberty interest against unreasonable prying into their personal affairs. *Bustamonte*, 412 U.S. at 224-25. While questioning by the police can be an intimidating experience, even under benign circumstances, "reasonable persons understand that this is part of the 'accommodation of the complex of values' involved in police questioning." *Dezso*, 512 N.W.2d at 880 (quoting *Bustamonte*); *see also State v. Brooks*, 838 N.W.2d 563, 568-69 (Minn. 2013) ("consent can be voluntary even if the circumstances of the encounter are uncomfortable for the person being questioned") (citing *State*

v. Diede, 795 N.W.2d 836, 848 (Minn. 2011)). In addition, courts apply an objective standard rather than a subjective one, asking "whether a reasonable officer would believe consent was given and can be inferred from works, gestures, or other conduct," *United States v. Pena-Ponce*, 588 F.3d 579, 584 (8th Cir. 2009) (citation omitted), and asking "whether a reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter," *Florida v. Bostick*, 501 U.S. 429, 436 (1991), *cited in Dezso,* 512 N.W.2d at 880.

To assist in balancing these interests and answering these inquiries, appellate courts have listed several relevant factors, including:

> (1) the individual's age and mental ability; (2) whether the individual was intoxicated or under the influence of drugs; (3) whether the individual was informed of [her] *Miranda* rights; and (4) whether the individual was aware, through prior experience, of the protections that the legal system provides for suspected criminals. It is also important to consider the environment in which an individual's consent is obtained, including (1) the length of the detention; (2) whether the police used threats, physical intimidation, or punishment to extract consent; (3) whether the police made promises or misrepresentations; (4) whether the individual was in custody or under arrest when consent was given; (5) whether the consent was given in public or in a secluded location; and (6) whether the individual stood by silently or objected to the search.

United States v. Golinveaux, 611 F.3d 956, 959 (8th Cir. 2010) (citation omitted); *see also, e.g.*, *Harris*, 590 N.W.2d at 102-03 (quoting *Dezso* and concluding that voluntariness is a question of fact that depends on "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.").

Therefore, even though some of these factors indicate that police conduct was coercive, a person can nevertheless consent to a warrantless search if sufficient countervailing factors indicate voluntariness. For example, in *United States v. McKinney*, the court found that the defendant's consent to a search was voluntary even though there were four officers present, all

were in uniform and armed, the defendant was physically uncomfortable and cold, dressed only in his boxers, his physical and mental conditions were impaired due to fatigue caused by his medications, and none of the officers informed defendant of his right to refuse consent. 470 F. Supp. 2d 1226, 1233 (D. Kan. 2007) *aff'd*, 363 F. App'x 665 (10th Cir. 2010).

I. Minnesota's Implied Consent Law

In *Brooks*, the Minnesota Supreme Court recently considered whether or not Minnesota's Implied Consent Law operates in such a manner that it effectively overbears a defendant's will, thereby rendering invalid the defendant's choice to provide an evidentiary blood, urine, or breath sample. 838 N.W.2d at 567. Directing its attention to the totality of the circumstances surrounding Brooks' choice to provide evidentiary samples of his urine and blood, the court highlighted such factors as "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Id.* at 569 (quoting *Dezso*, 512 N.W.2d at 880).

The *Brooks* court addressed the central question of whether in light of these factors, "the existence of a consequence for refusing to take a chemical test rendered the driver's choice involuntary." *Brooks*, 838 N.W.2d at 570; *see South Dakota v. Neville*, 459 U.S. 553, 562-63 (1983), *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855-56 (Minn. 1991). In answering this question, the court held that "[b]ased on the analysis in *Neville* and *McDonnell*, a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Brooks*, 838 N.W.2d at 570. The court specifically noted that the criminal penalties attached to a driver's refusal to take a chemical test do not render that choice involuntary. *Id.* at 571.

Although several indicators of coercion were present (for example, law enforcement officers had detained Brooks, placed him in hand cuffs, transported him in a police squad car to

the police station, and read the Implied Consent Advisory, among others), the court still maintained that other indicators of voluntariness sufficiently outweighed these factors, compelling the court to find that Brooks voluntarily submitted to the chemical test. *Id.* at 571. Despite the indicators of coercion, Brooks' will had not been overborne, nor his capacity for self-determination critically impaired. *Id.* Therefore, neither the conduct of the officers nor the operation of Minnesota's Implied Consent Law violated Brooks' Fourth Amendment rights.

III. Circumstances Surrounding Defendant's Consent

In this case, Defendant argues that his consent to take a breath test was coerced. The Court is guided by the extensive case law discussed above regarding indicia of consent, or alternatively, of coercion, to determine whether or not the circumstances in this case and the conduct of the law enforcement officers overbore Defendant's will. Specifically, the Court is concerned with the following factors:

1. Defendant's age and mental ability;
2. whether Defendant had sufficient capacity to provide consent, including whether he was so intoxicated that he did not comprehend time and place;
3. whether Defendant was adequately informed of rights, including the Implied Consent Advisory;
4. Defendant's awareness and familiarity with the legal system through prior experience;
5. whether Defendant had counsel present or available;
6. the length of Defendant's detention;
7. the number of police officers present while speaking with Defendant before obtaining his consent;
8. whether the officer(s) present were in uniform or civilian clothes;

9. whether the officer(s) were armed, and if so, how they were armed;

10. whether the police used threats, physical intimidation, yelling or pounding, or actual force to obtain consent;

11. the complete content of what the officer(s) present said to Defendant;

12. whether the police made promises or misrepresentations in speaking with Defendant;

13. the manner and tone in which the officer(s) spoke to Defendant;

14. whether Defendant stood by silently or objected to the search;

15. whether Defendant asked any questions before giving his consent;

16. whether Defendant was in custody or under arrest when consent was given;

17. whether the consent was given in public or in a secluded location;

18. whether the consent was given at a police station or a jail;

19. where the officer(s) were situated with respect to Defendant, including how close to Defendant the officers were when speaking to him;

20. any other factors showing voluntariness, or the lack thereof.

In the case at bar, the State's witnesses at the initial evidentiary hearing did not actually obtain Defendant's consent and did not actually perform the test. (Dec. 18, 2013, Clark Test.) Sergeant Clark either did not recall or did not know the particular circumstances surrounding Defendant's consent. (*Id.*) Likewise, Officer Burth took no part in the test or in reading Defendant the Implied Consent Advisory. (Dec. 18, 2013, Burth Test.) Even after continuing the hearing—over Defendant's objection—in order to present the testimony of the testing officer, the State did not inquire about the particular circumstances of Defendant's consent beyond the

most general aspects. (*See* Jan. 17, 2014, Henry Test.) The record shows that Sergeant Henry read the Implied Consent Advisory to Defendant verbatim, that Defendant had the opportunity to speak with an attorney, and that Defendant signed the Implied Consent Advisory. (*Id.*; Ex. 1: Motor Vehicle Implied Consent Advisory.) Sergeant Henry also testified that Defendant requested to speak to an attorney and did so for approximately five minutes. (Jan. 17, 2014, Henry Test.) The record shows that Sergeant Henry informed Defendant that refusing to consent to chemical testing constituted a crime (*Id.*; Ex. 1: Motor Vehicle Implied Consent Advisory) and that Sergeant Henry administered the evidentiary breath test (Jan. 17, 2014, Henry Test.).

Beyond that, the record contains few, if any, additional particulars. The record contains no additional facts regarding Defendant's awareness or familiarity with the legal system, the length of Defendant's detention, the number of police officers present while speaking with Defendant before obtaining his consent, whether all of the officers present were in uniform or civilian clothes, whether any of the officers were armed, and if so, how they were armed, whether any of the officers used threats, physical intimidation, yelling or pounding, or actual force to obtain consent, the complete content of what the officers present said to Defendant, whether the officers made promises or misrepresentations in speaking with Defendant, the manner and tone in which the officers spoke to Defendant, whether Defendant stood by silently or objected to the search, whether Defendant asked any questions before giving his consent, and where the officers were situated with respect to Defendant, including how close the officers were to Defendant when speaking to him.

In all likelihood, Sergeant Henry's answers to these questions would have bolstered the voluntariness of Defendant's consent. The State, however, did not ask any of these pertinent questions of its witness, and the Court must take the record as it finds it. Accordingly, in the

absence of additional facts necessary to understand the totality of the circumstances surrounding Defendant's consent, the Court cannot find that Defendant voluntarily consented to a search of his breath.

CONCLUSION

The State has the burden to prove voluntary consent by a preponderance of the evidence, *Harris*, 590 N.W.2d at 102-03, and failed to do so in this case. Defendant's Motion to Suppress the results of the evidentiary breath test is granted.

February 25, 2014

BY THE COURT:

Jeffrey M. Bryan
Ramsey County District Court Judge