STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RICE

THIRD JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,

vs.

Peter James Rappe,
Defendant.

Court File No. 66-CR-10-701

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

The above-entitled matter came before the undersigned Judge of District Court on April 24, 2013 for a Contested Omnibus Hearing. At the Hearing the State was represented by Nate Reitz, Assistant Rice County Attorney. The Defendant was represented by Carson Heefner, St. Paul, Minnesota.

The Defendant moved to dismiss the breath test used for his charge of Driving While Intoxicated, Alcohol Concentration 0.08 Within 2 Hours, in violation of Minn. Stat. §§ 169A.20 subd. 1(5) and 169A.24 subd. 2.

Based on the files and record the Court makes the following:

ORDER

1. The Defendant's motion to suppress evidence of the breath test in this case, is hereby **GRANTED.**
2. Count Two of the Complaint, for Driving While Intoxicated, Alcohol Concentration 0.08 Within 2 Hours, in violation of Minn. Stat. §§ 169A.20 subd. 1(5) and 169A.24 subd. 2, is hereby **DISMISSED.**
3. The attached memorandum of law is incorporated herein.

Dated: June 3, 2013

BY THE COURT:

Thomas M. Neuville
Judge of District Court

RICE COUNTY, MN
FILED
JUN 04 2013
COURT ADMINISTRATOR

RECEIVED
JUN 04 2013
Rice County Attorney

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MEMORANDUM

A. FACTUAL BACKGROUND

Based on the complaint and testimony at the Hearing, the Court makes the following findings of fact:

On March 6, 2010 around 11:50 p.m. Trooper Ricardo Magana (hereinafter "Magana") was called to the scene of a vehicle stuck in the median of Interstate Highway 35, just south of mile marker 62 in Rice County, Minnesota. Magana was the only State Patrol Officer on duty in his region. Upon arriving on the scene at about 12:00 a.m., Magana observed a pick-up truck stuck in the center median ditch and a car parked on the right shoulder of Highway 35. The driver of the pick-up truck was identified as the Defendant, Peter James Rappe. The other vehicle belonged to Terry Hausen, a friend of the Defendant.

Magana at first only spoke with Hausen, who said the Defendant had consumed about 4-5 beers that day and nothing more. Magana discovered that the Defendant was driving on a restricted license, where any use of alcohol invalidated the license. Magana observed the Defendant drinking a lot of Mountain Dew and moving between the driver's seat and the passenger's seat within the truck. Eventually Magana called a tow truck. The tow truck pulled the pick-up out of the ditch at around 12:30 a.m. on March 7, 2010. Once the pick-up truck was removed Magana spoke with the Defendant for the first time. Magana testified that when he was speaking with the Defendant he was chewing a large amount of gum and strongly smelled of body spray. Magana also observed the Defendant's eyes to be red and watery. Magana asked the Defendant to submit to a preliminary breath test (PBT). The Defendant consented to the test which resulted in an alcohol concentration of .206.

Magana performed the horizontal gaze nystagmus test on the Defendant and observed six clues of impairment. At this point the Defendant had disposed of his gum and Magana could smell a strong odor of alcohol coming from the Defendant. Magana then placed the Defendant under arrest and drove him to the Rice County Law Enforcement Center (LEC) in Faribault, Minnesota. Magana testified that he had probable cause to arrest the defendant around 12:30 a.m. He also testified that he had a radio and his personal cell phone with him at the time of the arrest. At 1:01 a.m. on March 7, 2010, Magana arrived at the law enforcement center in Faribault, MN and read the Defendant the Minnesota Implied Consent Advisory while still in the squad car.

The advisory included a warning to the Defendant that Minnesota law required him to take a test to determine if he was under the influence of alcohol and that refusal to take a test is a crime. At 1:02 a.m. the Defendant asked to speak with an attorney. The Defendant attempted to reach an attorney from 1:06 a.m. to 1:38 a.m. (total of 32 minutes). During the time the Defendant was trying to reach an attorney, Magana stood by and observed the Defendant to ensure he did not belch, vomit, or put anything in his mouth. Magana testified that a person suspected of DUI needs to be observed for at least 15 minutes to ensure the suspect does not belch, vomit, or put anything in their mouth, which could affect the accuracy of the breath test.

At 1:38 a.m. the Defendant said he would perform a breath test. The breath test was administered at 1:46 a.m. and revealed an alcohol concentration of 0.19.

Magana testified that he knew how to obtain a warrant, but had not done so in seven years as a Trooper. Magana also testified that he knew a telephonic warrant was possible, pursuant to Rule 36 of the Minnesota Rules of Criminal Procedure. The trooper testified that to execute a telephonic warrant he would need to call the on-duty lieutenant who would then contact the on-duty investigator. However, the trooper did not attempt to call either person, and did not try to obtain a telephonic search warrant himself.

B. LEGAL ANALYSIS

1. There Was No Voluntary Consent to the Breath Test

The Fourth Amendment of the United States Constitution and Article 1 § 10 of the Minnesota Constitution presume warrantless searches are unreasonable, unless there is a well-established exception to the warrantless search. The two exceptions applicable to this matter are consent and exigency[1].

In *State v. Netland*, 742 N.W.2d 207, 214 (Minn. App. 2007) the Court of Appeals held that for consent to be valid it must be given "freely and voluntarily." When a refusal of a test results in criminal sanctions, consenting to the search cannot be construed as "freely and voluntarily" and is a violation of the Fourth Amendment. *Id.* See also, *State v. Mellett*, 642

[1] Neither party argued that submitting to a breath test was valid as a search incident to arrest. Such an exception to the warrant requirement is not applicable here because the Defendant was not being searched for a weapon, and it was not possible for the Defendant to "destroy" evidence of his blood alcohol concentration after he was in custody. *See, Arizona v Gant 556 U.S. 332 (2009); State v Ture 632 N.W.2d 621,628 (Minn 2001).*

N.W.2d 779, 785 (Minn. App. 2002), where the court acknowledged that criminalizing refusal of a test is a "means of coercion."

Here, the Defendant was read the implied consent at 1:01 a.m. and then tried to reach an attorney until 1:38 a.m., after which he said he would take a breath test. The defendant submitted to the breath test with the understanding that his refusal would result in a criminal charges against him [2]. The court finds that Defendant's consent was "extracted" and not given freely and voluntarily. *See, State v Dezso 512 N.W.2d 877,880 (Minn.1994).*

2. The Warrantless Breath Test was not Justified by Exigent Circumstances.

In *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009), the Minnesota Supreme Court determined that the steady metabolization or evanescence of blood alcohol, created a single factor exigent circumstance which justified a warrantless taking of a blood, breath, or a urine sample from the defendant who had been charged with driving under the influence of alcohol.

Recently, the United States Supreme Court ruled that the natural metabolization of alcohol in the bloodstream does not create a *per se* exigency in every drunk driving case. See, *Missouri v. McNeely, 133 S. Ct. 1552, 1569 (2013).* Such cases must be dealt with case by case, in light of the totality of the circumstances. *Id.*

The ruling in *McNeely* overruled *Netland's* (supra) primary finding that probable cause to make a DUI arrest constitutes a *per se* exigent circumstance, which allows for a warrantless seizure of blood, breath, or urine. With *McNeely's* finding that each case must be determined on its own facts, the court must evaluate the relevant facts in this case to determine whether an exigency existed.

Magana obtained probable cause to arrest the Defendant for DUI at 12:30 a.m.. He drove the defendant to the LEC in Faribault, arriving at 1:01 a.m. Upon their arrival at the LEC the Implied Consent Advisory was read to the Defendant at 1:02 a.m.. The Defendant then used a telephone in an attempt to consult with an attorney until 1:38 a.m. After making several calls, the Defendant said he would perform a breath test. The test was administered at 1:46 a.m. Magana testified he was the only State Patrol Officer working in his region and in order to obtain a warrant he needed to call the on-duty lieutenant, who would then call the on-duty investigator.

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[2] Magana also admitted during his testimony that he would have charged the Defendant with criminal test refusal if Defendant had refused the breath test.

These facts, do not create an exigency. From the time probable cause to arrest existed at 12:30 a.m. until arriving at the LEC at 1:01 a.m. Magana had 30 minutes to contact his dispatch to request help from the on-call lieutenant. Magana had another 32 minutes to contact the on-duty lieutenant while he was observing the Defendant make phone calls at the LEC. Magana had at least *one full hour* after probable cause was first determined to contact his on-duty lieutenant to communicate facts supporting probable cause for a telephonic search warrant under Rule 36.

McNeely holds that the Fourth Amendment requires a warrant if one can be reasonably obtained without undermining the efficacy of the search. *McNeely 133 S. Ct. at 1561.* The efficacy of the search would not have been undermined had Magana contacted his on-duty lieutenant between 12:30 a.m. and 1:38 a.m. There was ample time to make the contact before the two-hour window for charging the defendant expired. Minnesota Rules of Criminal Procedure allow for a telephonic warrant[3]. *McNeely* holds that access to technological developments should be considered when making a determination of whether or not there is an exigency. *Id.* at 1562-1563. Therefore, Magana had sufficient time to obtain a search warrant, by telephonic means, in this case. The court finds seizure of the Defendant's breath, without a warrant, was not permitted due to exigent circumstances.

3. The Warrant Requirement is Not Limited to Blood Testing

The *McNeely* Court held that the physical intrusion of a needle going beneath the skin of a suspect violates a person's most deep-rooted expectation of privacy. *Id.* at 1558. The Court did not discuss the invasiveness of breath or urine testing, or the reasonableness of a person's expectation of privacy with respect to other forms of biological samples taken for alcohol testing.

The 4th Amendment is a personal right, the protection of which may be invoked by showing that a person "has an expectation of privacy in the place searched, and that his expectation is reasonable. *Minnesota v Carter, 525 U.S. 83,88 (1998); State v Heaton, 812 N.W.2d 904, 907 (Minn.App.2012).* The defendant here, had just as much expectation of privacy with respect to the air in his lungs, as he had with respect to the blood in his veins. Generally, when an intrusion is *into*, rather than *upon*, a person's body, a search warrant is required. *State v Campbell, 161 N.W.2d 47,54 (Minn.1968); Schmerber v California 384 U.S. 757, 769-70 (1966).*

[3] See, Rule 36 of the Mn.R.Crim.P.

A persuasive case on this point is *In Re Welfare of C.T.L.*, 722 N.W.2d 484 (Minn. App. 2006), where the Court of Appeals held that seizure of a biological specimen from a criminal suspect (pre-conviction), for DNA identification purposes, requires the full protection of the Fourth Amendment and Article 1, Section 10 of the Minnesota Constitution. [4] The person's reasonable expectation of privacy, weighed against the governmental interest in obtaining evidence, determines whether a search warrant is necessary. This court finds that the Defendant had a reasonable expectation of privacy which required a search warrant in order to obtain a breath sample to test for alcohol concentration.

In *State v Hardy, 577 N.W.2d 212 (Minn.1998),* the Court held that the simple act of asking a suspect to open his mouth to search for drugs, constituted a search under the 4th Amendment, which triggered the need for a search warrant, unless an exception to the warrant requirement existed. The court suppressed evidence of cocaine possession and vacated Hardy's conviction. Therefore, the search and seizure of lung air, for alcohol testing, without a warrant, violates a person's reasonable expectation of privacy just as much as the search and seizure of blood from beneath the skin. The bodily intrusion is not negligible, and is obtained solely for evidentiary purposes.

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[4] The court is aware of the U.S. Supreme Court decision filed today in the case of *Maryland v King, No.13-207, June 3, 2013,* which held that pre-conviction DNA testing, by buccal swab, and without a search warrant, is permissible under the 4th amendment. The court ruled that such testing is a search within the 4th amendment. However, such a search is reasonable because it is comparable to "fingerprinting", which is taken to identify a person as part of the booking process. Since the intrusion was negligible, and the promotion of a legitimate governmental interest was greater than the individual's expectation of privacy, the search was reasonable, even without a warrant.

However, *King (supra)* is distinguishable from this case. First, the breath test here was not requested for identification purposes. Police already knew the defendant's identity. Alcohol testing has no relevance to the "booking" process. Second, the breath test was not requested to assure the defendant's appearance at trial or to provide for public safety. Rather, the breath test was obtained to gather incriminating evidence against the defendant. The court finds that the Defendant's expectation of privacy is greater than the governmental interest in searching for and seizing biological evidence from the Defendant, without a search warrant.

Additionally, CTL (supra) was decided under Article 1, Section 10 of the State constitution as well as the 4th amendment. The Minnesota Supreme Court opinion is not affected to the extent it relies upon the State Constitution.

4. Conclusion.

The breath test taken from the Defendant in this case, was not obtained with defendant's free and voluntary consent. Trooper Magana had sufficient time to obtain a telephonic search warrant to take a sample of the Defendant's blood, breath or urine, under Rule 36 of the Minnesota Rules of Criminal Procedure. Therefore, no exigency existed to permit taking a breath sample from the Defendant without a search warrant. Evidence of the testing of Defendant's breath on March 7, 2010, must be suppressed. Therefore, Count 2 of the complaint against Defendant is dismissed.

TMN