

State of Minnesota
Washington County

District Court
Tenth Judicial District

District Court File Number: [REDACTED]

Case Type: Implied Consent

[REDACTED] PETITIONER,

vs.

Implied Consent Order

COMMISSIONER OF PUBLIC SAFETY
RESPONDENT,

That the above-entitled matter came before Court on 4/29/2013, upon the petitioner's request for a hearing under Minnesota Statute 169A 50 to 169A 53

The petitioner was represented by CHARLES ALAN RAMSAY.

The respondent was represented by JOAN MARIE EICHHORST, Assistant Attorney General

Upon the files, records and proceedings held herein, now, therefore,

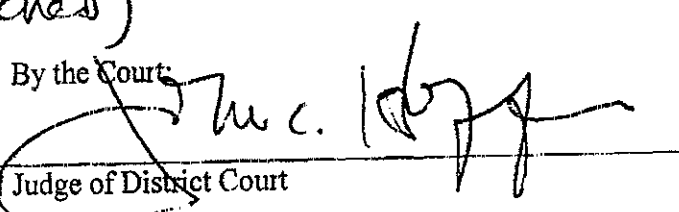
IT IS ORDERED:

That the revocation of the driving privileges of the Petitioner under Minnesota Statute 169A 50 to 169A53 be, and hereby is:

☐ Sustained

☒ Rescinded (see Attaches)

By the Court:


Judge of District Court

¹⁷
Dated: May 6, 2013

FILED
File # _____
WASHINGTON COUNTY
DISTRICT COURT
MAY 17 2013
COURT ADMINISTRATOR
By  Deputy
FILED

[REDACTED]

This case is presented based largely upon stipulated facts. The stipulated facts are as follows:

- Petitioner was properly arrested by the Washington County Sheriff's Department for DUI;
- Petitioner was properly read an implied consent advisory, waived her right to counsel and submitted to breath testing;
- No search warrant was obtained; and
- Petitioner's breath test was 0.16¹, Exhibits 2, 3

MEMORANDUM OF LAW

A. Seven Day Temporary License

The revocation of Petitioner's license arose out of an incident which occurred on February 9, 2013. Petitioner was arrested for driving while impaired. Petitioner consented to a breath test, which yielded an alcohol concentration of .16. As a result of this test, Petitioner's driving privileges were revoked for one year pursuant to Minn. Stat. § 169A 52, Subd. 4(a)(1).

Petitioner was given a Notice and Order of Revocation at 6:12 a.m. on February 9, 2013. She was also issued a temporary driver's license pursuant to Minn. Stat. § 169A 52, Subd. 7(c)(2), which requires a person whose license is revoked to be given a 7-day temporary license².

¹ Petitioner reports a reading .09g per 250 liters of breath which is contrary to Exhibit 3. The Court is unable to explain the difference.

² Subd. 7. Test refusal; driving privilege lost.

(a) On behalf of the commissioner, a peace officer requiring a test or directing the administration of a chemical test shall serve immediate notice of intention to revoke and of revocation on a person who refuses to permit a test or on a person who submits to a test the results of which indicate an alcohol concentration of 0.08 or more.

(c) The officer shall:

The temporary license issued to Petitioner states that it was issued on February 09, 2013 and says, "This temporary license is valid for 7 days from the date issued, indicated above" The Notice and Order of Revocation states "As of 02/16/2013 you cannot drive in Minnesota!"

Petitioner claims that her due process rights were violated because the Notice and Order of Revocation incorrectly stated the date on which Petitioner would no longer be allowed to drive. February 9, 2013 was only a partial day [Petitioner allegedly lost approximately 6 hours of potential driving time from midnight on February 8, 2013 to 6:12 a.m. on February 9, 2013³], Petitioner argues therefore that the first day of the 7-day license should have been February 10, 2012, and February 17, 2013 should have been the last day.

The Commissioner of Public Safety argues that (1) February 9, 2013 was the first day of the 7-day temporary license and that the Notice and Order of Revocation correctly stated that Petitioner was unable to drive on February 16, 2013; (2) that the receipt of a temporary license is not an appropriate issue for judicial review under the implied consent statute; (3) that Petitioner lacks standing to challenge the constitutionality of his revocation, and (4) that Petitioner's due process rights were not violated.

(1) invalidate the person's driver's license or permit card by clipping the upper corner of the card in such a way that no identifying information including the photo is destroyed, and immediately return the card to the person;

(2) Issue the person a temporary license effective for only seven days;, . (Emphasis Added)

³ The Court concludes that Petitioner had the right to drive all day on February 09, 2013 until February 15, 2013 [during that timeframe her status changed from a fully licensed driver to a temporarily permitted driver but she had the same rights and privileges of any driver during that same time period] Thereafter, Petitioner was prohibited from driving on February 16, 2013. The Rule of Civil Procedure as cited by the Petitioner in this Court's view would not add a day to the calculation as suggested by the Petitioner or overrule the subsequently enacted statute.

ANALYSIS

1. The first day of the 7-day temporary license was February 9, 2013.

Petitioner's temporary license was issued at 6:10 a.m. on February 9, 2013. This Court is aware of the argument that according to Minn. R. Civ. Pro. 6.05⁴, whenever a party has the right to do something within a prescribed time period, if the document triggering that right is served after 5:00 p.m. local time, then one day shall be added to the prescribed time period. In this specific case the Rule does not apply to the facts. Although this Court agrees that the Minnesota Rules of Civil Procedure apply to implied consent proceedings *Welch v. Commissioner of Public Safety*, 545 N.W.2d 692, 694 (Minn. App. 1996), it is also true that at the time of the stop or detention and the taking of the breath there is no "implied consent proceeding" that is pending.

Assuming that the language of Rules 6.05⁵ or 6.01 applies, the Court finds that the first day of Petitioner's temporary license was February 9, 2013. Therefore, she

⁴ Petitioner cites to:

6.01 Computation (a) Computation of Time Periods

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included.

However, the Legislature by specific and subsequent legislative enactment restricted the time frame to 7 days only, which supersedes the general Rule above. Minn. Stat. 169A.52, Subd. 7(c)(2).

⁵ There may be an argument about the applicability of the provision below to this proceeding:

6.05 Additional Time After Service by Mail or Service Late in Day

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon the party, and the notice or document is served upon the party by U.S. mail, three days shall be added to the prescribed period. If service is made by any means other than U.S. mail and accomplished after 5:00 p.m. local time on the day of service, one additional day shall be added to the prescribed period.

was not entitled to drive on February 16, 2013. The Notice and Order of Revocation did not deprive Petitioner of one day of driving to which he was entitled under Minn. Stat. § 169A.52, Subd. 7(c)(2).

The Notice and Order of Revocation is apparently a computer-generated form, and there was some suggestion at the hearing that the date listed on the Notice may have been the result of a programming error. The Court cannot find such an error in this case. Additionally, the Court has compared the old method of calculation of the time for the temporary license effective date [via paper a notice given by the officer] to the new calculation in the computer-generated form and finds that the calculated period is consistent. See, Exhibits A and B to Respondent's Memorandum of Law in Support of Sustaining Revocation. Therefore, this is not some type of error created by the fact that Washington County is accepting E-Charging and e-filings in the criminal/civil arena.

2. Receipt of a Temporary License is an appropriate issue for judicial review at an implied consent hearing.

The Commissioner of Public Safety argues that the issue of the receipt of a 7-day license is not a proper issue for judicial review at an implied consent hearing because that issue is not listed in Minn. Stat. § 169A.53, Subd. 3(b). However, the Commissioner does not suggest a more appropriate forum in which this alleged violation of Petitioner's constitutional rights would be addressed.

A review of case law shows that Minnesota courts have addressed the sufficiency of a Notice and Order of Revocation at implied consent hearings. See

This Court does not find that Rule 6.05 on its face to be applicable to this matter due to the fact that as of February 9, 2013 there is no action pending with regard to the event. Even if the Court is incorrect about the applicability of Rule 6.05 the language does not apply facially to the facts of this case.

McIntee v. State Dept. of Pub. Safety, 279 N.W.2d 817 (Minn. 1979) (superseded by statute on other grounds); *LeClair v. Comm'r of Pub. Safety*, 416 N.W.2d 209 (Minn. App. 1987); *Godderz v. Comm'r of Pub. Safety*, 369 N.W.2d 606 (Minn. App. 1985). Therefore, the Court finds that Petitioner's challenge regarding the Notice and Order of Revocation was an appropriate issue for judicial review.

3. Petitioner has standing to challenge the constitutionality of his revocation.

The Commissioner of Public Safety argues that Petitioner lacks standing to raise a violation of his constitutional rights. In order for a person to have standing to raise a constitutional question, the person must have suffered a direct and personal harm resulting from the alleged denial of constitutional rights. *City of Minneapolis v. Wurtele*, 291 N.W.2d 386, 393 (Minn. 1980).

Generally, this Court believes that a deprivation of driving privileges beyond what is permitted by specific statutory authority is harm per se; Petitioner does not need to prove that he suffered some monetary loss or legal prejudice by being unable to drive on February 16, 2013. Minn. Stat. § 169A.52, Subd. 7(c)(2) lays out the proper procedure for depriving an individual of his or her driving privileges, and any deviation from that procedure may be grounds for a due process challenge. This Court however concludes that there was no material deprivation of driving rights in this case.

4. Petitioner's due process rights were not violated.

Lastly, the Commissioner of Public Safety argues that Petitioner's due process rights have not been violated because a 7-day temporary license scheme is not required in order to make an implied consent law constitutional. The Commissioner

points to both United States and Minnesota case law upholding the constitutionality of implied consent statutes, including case law that holds an implied consent law constitutional even without any provision for a 7-day temporary license. See *Mackey v. Montrym*, 443 U.S. 1, 99 S.Ct. 2612 (1979). Since the Court has determined that in this particular case Petitioner's due process rights have not been violated there is no infirmity with the statute or its application in this case. Case law is in accord with this finding. See, *Rich vs. Commissioner of Public Safety*, 2012 WL 3553244 (Ct. of App. August 12, 2012). The Court recognizes that *Rich* is an unpublished opinion however, the Court finds *Rich* persuasive.

B. McNeely and Need for Search Warrant

Petitioner additionally moves the court for a rescission of the revocation of the Petitioner's driving privilege based upon Missouri vs. McNeely and the claim in this case that Petitioner's breath sample was not taken by a search warrant. This Court agrees that a search warrant was not used to secure Petitioner's breath sample⁶. Petitioner did not testify at the hearing. Therefore there is no evidence in the record that somehow the language in the Implied Consent Advisory overcame his verbal consent to take the test. There is no information in the record that Petitioner did not freely and voluntarily consent to testing⁷. Consent is one of the exceptions to the requirement of the need for

⁶ The Court also notes however that unlike *McNeely* this case did not involve the intrusive act of obtaining a blood sample by needle which are the facts of *McNeely* that the Supreme Court of the United States found needed at least an evaluation of whether or not there should be an application for a search warrant under a multifactor analysis. The Supreme Court in *McNeely* ruled that law enforcement must indeed abide by the Fourth Amendment. 569 U.S. ___, No. 11-1425, slip op. at 13.

⁷ This conclusion is also supported by the statutory scheme where all licensed drivers in Minnesota consent to testing as a condition of maintaining a driving privilege including:

169A.51 CHEMICAL TESTS FOR INTOXICATION.

Subdivision 1. Implied consent; conditions; election of test. (a) Any person who drives,

a search warrant to seize evidence under the Fourth Amendment under both the Federal and State Constitutions and is an established exception to the obligation of law enforcement to secure a search warrant. This court in the past has relied upon the concept of consent to determine that the State did not have an obligation to seek a search warrant in obtaining breath, blood or urine from a suspect/Petitioner in the implied consent arena. This Court in the past has also relied upon the statutory consent provisions to determine that the State did not have an obligation to seek a search warrant in obtaining breath, blood or urine from a suspect/Petitioner

Petitioner alleges that based upon McNeely which now calls into question prior determinations including *Shiner* and *Netland* this Court should be compelled to conclude that in the absence of a search warrant authorizing the taking of Petitioner's breath that the implied consent advisory procedure is inherently compulsive (due to the fact that the failure to voluntarily agree to testing is a crime – now a gross misdemeanor) and therefore breath testing results should be suppressed as the Respondent is unable to establish a voluntary decision to provide a sample of his breath for Fourth Amendment purposes

In *Netland*, the defendant argued that the Minnesota Implied Consent law is unconstitutional because it coerces a waiver of a defendant's constitutional rights to be free of unreasonable searches and seizures. 762 N.W.2d at 211–12. The *Netland* court

operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 169A.20 (driving while impaired), to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance. The test must be administered at the direction of a peace officer (Emphasis Added)

declined to reach the issue, however, holding that under *Shriner* and *Schmerber* the search and seizure of the defendant's blood-alcohol content was not unreasonable because the rapid dissipation of alcohol from the bloodstream creates a single-factor exigent circumstance allowing a warrantless chemical test *Id* at 212⁸

Minnesota courts after *Netland* have declined to reach the issue of whether the Implied Consent Advisory is coercive, leaving the voluntariness of an individual's consent obtained during the Implied Consent Advisory process unanswered. The courts that have been presented with this issue have fallen back upon the conclusion in *Netland* that dissipation of alcohol is an exigent circumstance, which, coupled with probable cause, allows for a warrantless search. See, e.g., *State v. Brooks*, No. A11-1043, 2012 WL 1914073, *2 (Minn. Ct. App. May 29, 2012) ("Because we uphold the constitutionality of the search and seizure on that ground [*Netland*], we decline to address whether the implied-consent advisory coerced Brooks's consent"); *Swanson v. Comm'r of Public Safety*, No. A11-1589, 2012 WL 1813431, *2 (Minn. Ct. App. May 21, 2012) ("We conclude that application of the supreme court's analysis in *Netland* precludes any determination that appellant retained a valid constitutional right to withhold his consent to testing"); *State v. Zortman*, No. A11-646, 2012 WL 426586, *3 (Minn. Ct. App. Feb. 13, 2012) (defendant argued that the Implied Consent advisory coerced his consent; the court said, "Zortman's attempt to invalidate his consent fails because the exigent-circumstances exception prevents him from successfully invoking the unconstitutional conditions doctrine"); *State v. DeNucci*, No. A09-2340, 2010 WL 4181148, *6 (Minn. Ct. App. Oct. 26, 2010) (the state is

⁸ The Minnesota Court of Appeals in *Netland* addressed consent and stated that "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) (citing *State v. Mellet*, 642 N.W.2d 779, 785 (Minn. Ct. App. 2002) (acknowledging that criminalizing refusal is a 'means of coercion'), review denied (Minn. July 16, 2002).

not precluded "from relying on an exception to the warrant requirement of the Fourth Amendment in response to DeNucci's argument that the Fourth Amendment requires the suppression of evidence of the result of his urine test "); *Ersfeld v. Comm'r of Public Safety*, No. A08-1856, 2009 WL 2595947 (Minn. Ct App Aug 25, 2009) ("Thus, with or without Ersfeld's valid consent, the warrantless search of his breath was not unreasonable because there was independent justification in the exigent circumstances presented by the dissipation of the evidence of Ersfeld's alcohol concentration "). Petitioner now alleges that *Netland* is no longer good law and the mandates of *McNeely* must be followed. In the current case there of course was not a search warrant sought or secured.

South Dakota v. Neville, 459 U S 553, 103 S Ct 916, 74 L Ed 2d 748 (1983), is often quoted by Minnesota courts as the leading case in whether Minnesota's Implied Consent law is constitutional regarding self-incrimination. See, e.g., *State v. Melde*, 725 N W 2d 99, 104 (Minn 2006) (due process is not violated by Minnesota's Implied Consent law because it contains no "misleading assurances of the relative consequences of a test-refusal, instead notifying the arrestee that refusal to submit to testing is a crime"); *McDonnell v. Comm'r of Public Safety*, 473 N W 2d 848, 855 (Minn. 1991) ("[w]e disagree with appellant that Minnesota's addition of potential criminal penalties for refusal requires a different conclusion than that reached in *Neville*;" there is still no coercion in the refusal); *State v. Myers*, 711 N W 2d 113, 118 (Minn. Ct App 2006) ("[a]pplying the Supreme Court's reasoning in *Neville* to the implied-consent advisory [administered here], we conclude that failing to inform respondent that a test refusal is a gross misdemeanor that may result in harsher penalties than a test failure comported with the fundamental fairness required by due process") The case does not,

however, address whether the threat of being charged with a crime is constitutional by coercing a consent from a suspect/Petitioner

In *South Dakota vs. Neville*, the United States Supreme Court took up the issue that was unresolved by *Schmerber*, the Court held that a defendant's test refusal may be offered into evidence without violating the defendant's right against self-incrimination. In *Neville*, the defendant was pulled over because he did not stop at a stop sign. *Id.* The officers noticed indicia of intoxication and the defendant admitted that his driver's license was revoked after his last DWI. *Id.* at 555. The defendant subsequently failed field sobriety tests, was arrested, read his *Miranda* rights. *Id.* The officers threatened that the defendant might lose his driver's license if he refused the test. *Id.* at 555-56. Similar to the recent *McNeely* case, the United States Supreme Court at that time granted cert in *Neville* to resolve the jurisdiction split regarding the potential Fifth Amendment violation. *Id.* at 558. The Court examined South Dakota's Implied Consent law, which gives an individual the right to refuse a chemical test, but if the individual exercises that right, his driver's license may be revoked for a year in addition to the fact that the defendant's refusal may be used against him at trial. *Id.* at 560. The Court concluded that an individual's refusal to take a chemical test is not coerced, so it does not violate the Fifth Amendment's right against self-incrimination. *Id.* at 564. Similarly, the admission of such refusal at trial as evidence of guilt does not violate the defendant's right to due process. *Id.* at 566. The *Neville* case did not answer the question of whether Minnesota's Implied Consent law is constitutional. Unlike South Dakota's law, Minnesota does not limit consequences to the loss of a driver's license

Currently, in Minnesota there are several consequences including a gross misdemeanor charge

This Court is aware that the case of Brooks v. State, a newly-remanded DWI case, from the United States Supreme Court, will appear before the Minnesota Court of Appeals. The remand directs that *Brooks* is to be decided in accordance with *McNeely*. *Brooks v. State* will require the Minnesota Appellate Courts to determine whether a warrantless urine test, in light of *McNeely*, is unconstitutional. In the first *Brooks* case, the defendant was pulled over, exhibited indicia of intoxication, submitted to a urine test, and was over the legal limit. *State v. Brooks*, No. A11-1042, 2012 WL 1570064, *1 (Minn. Ct. App. May 7, 2012) *cert. granted* (Apr. 22, 2013)⁹ *Id.* 14

The defendant moved to suppress the test results in both cases as the seizures were warrantless. *Id.* The motions were denied and the defendant was found guilty at a bench trial. *Id.* at *1-2. The defendant appealed. The Minnesota Court of Appeals ruled that the rapid dissipation of alcohol from the body is an exigent circumstance that justifies a warrantless search. *Id.* at *3. The United States Supreme Court on April 22, 2013, responded to the petition consolidating both cases, writing, "The petition for writ of certiorari is granted. The judgments are vacated, and the cases are currently remanded to the Minnesota Court of Appeals of Minnesota for further consideration in light of *Missouri v. McNeely*, 569 U.S. ____ (2013)." *Brooks v. Minnesota*, No. 12-478 (S. Ct. 2013).

Almost every State in the country, in the context of a driving while under the influence arrest, threatens some sort of administrative action, such as license suspension,

⁹ Approximately six months later, police found the same defendant passed out in his car. *Brooks* exhibited indicia of intoxication, submitted to a urine test, and was again over the legal limit. *Id.* 14. In the second *Brooks* case, the defendant exhibited indicia of intoxication, submitted to a urine test but could not urinate, then submitted to a blood test. *State v. Brooks*, No. A11-1043, 2012 WL 1914073, *1 (Minn. Ct. App. May 29, 2012) *review denied* (July 17, 2012).

license revocation, or fine¹⁰ Minnesota is in the minority of states that threaten a DWI Refusal Crime. Minnesota is one of only eleven States that makes refusing a chemical test a crime; further, Minnesota is only one of four States that makes refusal a crime on the first offense¹¹

In *McNeely* the United States Supreme Court cited to more than half of States' Implied Consent Laws, approving their limits on chemical tests 569 U.S. ___, No. 11-1425, slip op. at 19. Minnesota's Implied Consent law was not among those listed by the Supreme Court. As demonstrated by the survey of state's practices in the implied consent area noted above, Minnesota's law making refusal a crime on the first offense is the only one like it in the entire nation. The United States Supreme Court observed, "We are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them." 569 U.S. ___,

¹⁰ ALASKA STAT. § 28.35.032; ALA. CODE § 35-5-192(c); ARK. CODE ANN. § 5-65-205; ARIZ. REV. STAT. § 28-1321(D); CAL. VEH. CODE § 13353; COL. REV. STAT. §§ 42-2-126, 42-4-1301; CONN. GEN. STAT. ANN. § 14-227b; DEL. CODE ANN. §§ 21-2741, 2749; FLA. STAT. ANN. §§ 316.1932, 775.082; GA. CODE § 40-5-67.2; HAW. REV. STAT. § 291e-68; IA. CODE § 321J.9; IDA. CODE § 18-8002; ILL. STAT. § 625-5/6-208.1; IND. CODE ANN. § 9-30-6-7; KAN. STAT. ANN. § 8-1001; KY. REV. STAT. § 189A.105; LA. REV. STAT. ANN. §§ 32:661, 666; MASS. GEN. LAWS § 90-24(f); MD. TRANS. CODE ANN. § 16-205.1; ME. REV. STAT. ANN. § 29A-2521; MICH. COMP. LAWS § 257.625(f); MINN. STAT. §§ 169A.52, 169A.20, subd. 2; MO. REV. STAT. § 577.041; MISS. CODE § 63-11-21; MONT. CODE ANN. § 61-8-402(4), 409; N.C. GEN. STAT. § 20.16.2; N.D. CENT. CODE § 39-20-04; NEB. REV. STAT. §§ 60-6,211.02, 60-6,197; NEV. REV. STAT. § 484C-240; N.H. REV. STAT. ANN. § 265-A:14; N.J. STAT. ANN. § 39.4-50.4a; N.M. REV. STAT. § 66-8-11; N.Y. VEH. AND TRAF. LAW § 1194(2)(b); OHIO REV. CODE § 4511.191; OKLA. STAT. ANN. § 47-6-205.1; ORE. REV. STAT. §§ 813.130, 420; PA. VEH. CODE § 1547; R.I. GEN. LAWS § 31-27-2.1; S.C. CODE ANN. § 56-5-2951; S.D. COD. LAWS ANN. § 32-23-11; TENN. CODE ANN. § 55-10-406; TEX. TRANSP. CODE ANN. §§ 724.031-035; UTAH CODE ANN. § 41-6a-521; VT. STAT. ANN. §§ 23-1202, 1205; VA. CODE ANN. § 18.2-268.3; WA. REV. CODE ANN. §§ 46.61.502, 504; W.VA. CODE § 17C-5-7; WISC. STAT. ANN. § 343.305; WY. STAT. § 6-31-102.

¹¹ Of the eleven States, Alaska makes refusal a misdemeanor, ALASKA STAT. § 28.35.032, Arkansas makes refusal a strict liability offense, ARK. CODE ANN. § 5-65-205, Florida makes refusal a crime only if it is a second offense, FLA. STAT. ANN. §§ 316.1932, 775.082, Hawaii makes refusal a petty misdemeanor, HAW. REV. STAT. § 291e-68, Kansas makes refusal a crime only if it is a second offense, KAN. STAT. ANN. § 8-1001, Louisiana makes refusal a crime only if it is a third offense, REV. STAT. ANN. §§ 32:661, 666, Nebraska makes refusal a misdemeanor or traffic infraction, NEB. REV. STAT. §§ 60-6,211.02, 60-6,197, Rhode Island makes refusal a crime only if it is a second offense, R.I. GEN. LAWS § 31-27-2.1, Tennessee makes refusal a crime only in special circumstances, TENN. CODE ANN. § 55-10-406, and Virginia makes refusal a misdemeanor only if it is a second offense, VA. CODE ANN. § 18.2-268.3.

No 11-1425, slip op at 20 As noted above most States in comparison threaten more severe *administrative* penalties for refusal, which is less severe than the threat of criminal prosecution. As noted above the great majority of jurisdictions are inapposite from Minnesota where there is a risk of a criminal prosecution versus harsh administrative penalties as applied in other jurisdictions

Notwithstanding the arguments of the Minnesota Attorney General that the Petitioner has given a voluntary consent to testing in this case it appears to the undersigned given the above legal developments that reliance upon consent and/or a statutory provision that supplies consent is clearly no longer legally viable. This is specifically true in the case of an implied consent action that as a consequence results in the taking of blood without an exploration by law enforcement of the available options in seeking a search warrant and the factors that are weighed in that process. This Court notes that the facts of the *McNeely* case apply only to the taking of a blood sample absent consideration of factors that would lead to law enforcement's consideration of the need for application of a search warrant. It is the Court's observation that that the taking of breath or urine may be viewed in the end as a less intrusive invasion and therefore not a violation of the Fourth Amendment. However, the weight of the *McNeely* decision does not seem to point in that direction. Therefore, this Court has concluded that it is reasonable to await further appellate determinations in Minnesota with respect to the issue of taking breath and urine under the current implied consent statutory scheme.

Based upon the above, and all of the files, records and proceedings herein, the Court makes the following:

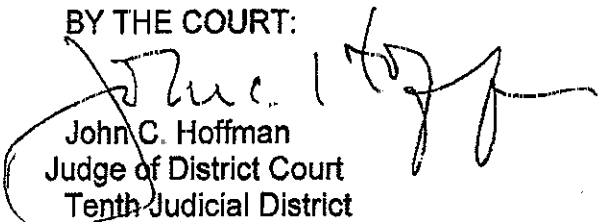
ORDER

1. Petitioner's alternative request to have this Court stay the proceeding until *State v. Brooks* is decided on remand from the United States Supreme Court to the Minnesota Court of Appeals A11-1043 (Minn. Ct App May 29, 2012), *rev. denied* (Minn July 29, 2012), *cert granted, vacated and remanded* (U S April 22, 2013) is **GRANTED** until any subsequent appellate decisions by the Minnesota Appellate Courts are issued
2. During this stay, if Petitioner has an implied consent revocation independent of this case, then this stay of proceedings is revoked and the matter shall be scheduled in front of the Honorable John C. Hoffman, Washington County District Court Judge.
3. The Commissioner of Public Safety's decision to revoke Petitioner's driving privileges is hereby temporarily **RESCINDED** in light of the above stay.
4. Petitioner's motion to rescind the revocation as a result of a violation regarding the issuance of the Seven Day Temporary Permit is **DENIED**.
5. The Washington County Court Administrator shall serve a true and correct copy of this Order and Memorandum of Law by U S Mail upon counsel for the above-named parties

Dated: May 17, 2013

Signed at Chambers
Stillwater, Minnesota

BY THE COURT:


John C. Hoffman
Judge of District Court
Tenth Judicial District