

STATE OF MINNESOTA
COUNTY OF REDWOOD

IN DISTRICT COURT
FIFTH JUDICIAL DISTRICT

STATE OF MINNESOTA,

Plaintiff,

File No 64-CR-08-820

vs

LORI A MATTHYS,

ORDER

Defendant

The above-entitled matter came before this Court on August 10, 2009, for an Omnibus Hearing. Defendant was present represented by Daniel J Koewler, Attorney at Law, Roseville, Minnesota. The State appeared through Amy M Busse, Assistant Redwood County Attorney.

Based upon all the files and records herein,

IT IS HEREBY ORDERED:

1. Defendant's motion to suppress the result of the urine test on the grounds that it was the product of an unreasonable search is DENIED.
2. Defendant's motion for a pretrial Frye-Mack hearing regarding the admissibility of the urine test results is GRANTED. Counsel for both the State and Defendant shall contact Court Administration to schedule a date for trial in this matter, with the understanding that the Frye-Mack hearing will occur on the morning of trial.

Dated: Sept 26, 2009

BY THE COURT:



David W Peterson
Judge of District Court

MEMORANDUM

Defendant is charged with two counts of Third Degree Driving While Impaired, in violation of Minn Stat § 169A 20, Subds 1(1) and 1(5). At issue before the Court is (1)

COURT ADMINISTRATOR
REDWOOD COUNTY MN
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whether the results of the urine test administered to Defendant were the product of a warrantless search in violation of Defendant's rights, and (2) whether a Frye-Mack hearing is necessary regarding the admissibility of the test results as scientific evidence. For the reasons outlined below, the Court denies the search-based suppression motion but grants the motion for a Frye-Mack hearing.

I Posture of the Case

Various related issues have been brought before the Court. The Court briefly outlines the posture of these issues.

On March 12, 2009, Defendant filed a motion in limine requesting an order: (1) suppressing the urine test result on the grounds that the testing method was not valid and reliable; (2) precluding admission of the test result on the grounds that urine testing fails the second prong under Frye-Mack; (3) precluding admission of the Preliminary Breath Test ("PBT") as not valid or reliable; (4) suppressing all field tests, observations, and the urine test for lack of foundation and scientific reliability; (5) precluding reference to the Horizontal Gaze Nystagmus Test ("HGNT") on the grounds that it was improperly administered; and (6) excluding any testimony regarding the HGNT and correlation to estimated alcohol level. On that same date, Defendant filed a supporting memoranda and other documentation.

On March 18, 2009, Defendant filed an amended motion requesting an order: (1) suppressing the urine test result on the grounds that administration of the test violated Defendant's equal protection and due process rights under the U.S. and Minnesota Constitutions inasmuch as the urine sample was obtained without Defendant "pre-voiding"; (2) suppressing the urine test result on the grounds that administration of the test did not comport with procedures

ensuring validity and reliability; and (3) suppressing the urine test result on the grounds that administration of the test violated Defendant's Fourth Amendment rights and Minn Stat § 169A 52, Subd 1 inasmuch as there was no warrant or voluntary consent

On June 29, 2009, Defendant filed a motion for a Frye-Mack hearing and an order requiring the State to demonstrate: (1) the urine test used in this case would be generally accepted within the scientific community; and (2) the proposed testimony "on the subjects listed above" has scientifically-reliable foundation

On July 21, 2009, a stipulation, signed by both Counsel, was filed The stipulation provides: (1) the State agrees that Defendant did not void her bladder before providing a urine sample; (2) Defense Counsel agrees there was no violation in the chain of custody after Defendant submitted the urine sample; and (3) Defense Counsel agrees that Amanda Jacobson, the Redwood County jailer who observed and collected the sample, followed procedures as laid out in Minnesota Rule 7502.0700 and followed by the BCA

At the hearing on August 10, 2009 (first in-chambers, and subsequently on the record), the Court clarified with the parties that (1) for the purposes of analyzing suppression of the urine test as a warrantless search without consent, the parties agreed to stipulate to the factual basis as outlined in the reports and evidence in the Court's file, and (2) the issue of whether a Frye-Mack hearing is necessary would also be submitted on the record.¹ The Court gave Defendant two weeks to submit a written brief and one week for the State to respond On August 25, 2009, the State filed its brief On August 27, 2009, Defendant's brief was filed, though it was dated

¹ The Court notes that Defense Counsel indicated that he had just become aware of the existence of a squad car video Counsel reserved any issue that viewing the video might raise The Court gave Counsel two weeks to notify the Court if there were any issues At this time, the Court has received no notice of any such issues, and, therefore, the Court considers any issues waived

August 24, 2009 and was sent via U S mail, and the Court does not consider it late. Having already submitted argument without the benefit of reviewing Defendant's brief, on August 31, 2009, the State filed a responsive brief

At this time, the sole issues before the Court are (1) whether the result of the urine test should be suppressed as the product of a warrantless search without consent, and (2) whether this Court should order a Frye-Mack hearing regarding the admissibility of the result of the urine test. The Court's understanding is that any of the other issues previously raised have been resolved and are not before the Court.

II. The Result of the Urine Test is Not the Product of an Unreasonable Search

The U S Constitution and the Minnesota Constitution prohibit unreasonable searches and seizures. U.S. Const. amend IV; Minn. Const. art I, § 10. Warrantless searches and seizures are, generally, per se unreasonable. See, e.g., State v. Iure, 632 N.W.2d 621, 627 (Minn. 2001). Defendant contends that the administration of a urine test is a "search" under constitutional law, there was no warrant, and no exception to the warrant requirement applies.

A warrant is not necessary when there is probable cause and there exist exigent circumstances requiring immediate action. State v. Mollberg, 246 N.W.2d 463, 468 (Minn. 1976). There are two types of exigent circumstances: (1) single factor exigent circumstances (hot pursuit of a fleeing felon, imminent destruction or removal of evidence, protection of human life, likely escape of the suspect, and fire), and (2) exigent circumstances under the "totality of the circumstances." State v. Gray, 456 N.W.2d 251, 256 (Minn. 1990). Only if a single-factor exigent circumstance is not implicated should a "totality of the circumstances" analysis be made. Id. A warrantless search is permissible "when the delay necessary to obtain a warrant might

result in the loss or destruction of the evidence.” State v. Richards, 552 N.W.2d 197, 203 (Minn. 1996). The existence of exigent circumstances is determined objectively, rather than on the basis of an officer’s subjective beliefs. Brigham City v. Stuart, 547 U.S. 398, 404-05 (2006).

The Minnesota Supreme Court has applied the single-factor exigent circumstance of imminent destruction of evidence in the same type of case as presented here. State v. Netland, 762 N.W.2d 202 (Minn. 2009). In Netland, the defendant challenged her conviction for Test Refusal, in violation of Minn. Stat. § 169A.20, Subd. 2, in part on the grounds that the statute violated her right to be free from unreasonable searches and seizures. Id. at 204-05. The primary claim was that the State impermissibly conditions driving privileges on an unconstitutional, warrantless search for blood-alcohol content. Id. at 211. To analyze that claim, the Court analyzed whether a warrantless search for Netland’s blood-alcohol content would have been unconstitutional. Id. Relying upon State v. Shriner, 751 N.W.2d 538, 548-50 (Minn. 2008), and case law regarding this exigent circumstance, the Court held “that the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense.” 762 N.W.2d at 214 (emphasis added).

Defendant’s analysis in this case (to the extent it addresses exigent circumstances) all but ignores the holding of Netland.² Defendant, instead, relies upon the statement in Shriner that the Court (in that case) expressed “no opinion on whether the evanescent nature of blood-alcohol content is sufficient, in and of itself, to create single-factor exigent circumstances that would justify the police taking a warrantless blood draw when they have probable cause to believe that

² Indeed, Defendant only mentions Netland once in a footnote.

a defendant has committed any other crime where blood-alcohol content would be highly probative evidence.” 751 N W 2d at 545 n 7 While the Supreme Court did not need to decide that question in Shriner, the Court did decide that question in Netland³ Despite accurately summarizing the holding of Netland, Defendant goes on to state, “[C]hemical tests taken under the aegis of the Implied Consent Law cannot rely on exigencies except in specific delineated circumstances, and ‘consent’ is the only valid exception that The State could prove to have Defendant’s test results admitted ” This is patently incorrect

This Court cannot and will not ignore Netland. The record outlines that Officer DeBlick observed substantial bad driving conduct, smelled alcohol on Defendant, and noted indicia of impairment during field sobriety testing, and Defendant failed the PBT There was “probable cause to suspect a crime in which chemical impairment is an element of the offense,” and, therefore, pursuant to Netland, a warrant was not necessary Defendant’s motion to suppress the urine test result on this basis is denied⁴

III. Defendant is Entitled to a Frye-Mack Hearing

Under Minnesota law, the admissibility of evidence obtained from scientific techniques is governed by the Frye-Mack standard See State v. Roman Nose, 649 N W 2d 815, 818-819 (Minn 2002) (outlining Frye-Mack standard and Minnesota’s continuing adherence to it)

³ This fact cannot have escaped Counsel’s notice, as Defense Counsel here also represented Ms Netland

⁴ Because this Court denies Defendant’s motion on the basis of exigent circumstances, this Court makes no ruling regarding Defendant’s argument that her consent, if any, was coerced See Netland, 762 N.W 2d at 212 n 8 The Court does, however, note that Defendant cites the Court of Appeals Netland decision in support of the coercion argument State v. Netland, 742 N W 2d 207, 214 (Minn. Ct App 2007) Not only was the Court of Appeals decision reversed in part, the Court of Appeals concluded, just as the Supreme Court did, that the search was a valid exigent circumstances search Id. at 214-15

“[T]he Frye-Mack standard asks first whether experts in the field widely share the view that the results of scientific testing are scientifically reliable, and second whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls ” Id. at 819 (citing State v. Jobe, 486 N W 2d 407, 419 (Minn. 1992))

The State contends that urine tests are not novel or emerging, as they have been used in Minnesota courts for decades. State cites State v. Moore, 485 N W 2d 90, 98-99 (Minn. 1990), for the proposition that the general acceptance of a scientific technique can be established by long acceptance in courts of this state, the country, judicial notice, or the reliability of its underlying principles. The Supreme Court noted, however, that Moore made no request for a Frye-Mack hearing, and there was testimony at the trial itself that the technique (blood splatter interpretation) was generally accepted in the scientific community. Id. at 97. This Court further notes that Moore was decided twelve years before the Supreme Court’s explicit instructions were laid out in Roman Nose.⁵

⁵ The State also cites State v. Delk, No. A07-1861, 2008 WL 5333757 (Minn. Ct. App. Dec. 23, 2008), for the proposition that scientific testing results (specifically, gunshot residue testing results) can be admitted without a Frye-Mack hearing when they have “been admitted in Minnesota courts for decades.” With no disrespect meant for the appellate panel, this Court finds Delk unpersuasive. First, Delk is an unpublished opinion. See Minn. Stat. § 480A.08, Subd. 3(c) (“Unpublished opinions of the Court of Appeals are not precedential.”); Vlahos v. R&I Const. of Bloomington, 676 N W 2d 672, 676 n.3 (Minn. 2004) (trial court citation to unpublished decisions as binding precedent is error). Second, the authority relied upon by the Delk panel is distinguishable. See Jacobson v. \$55,900 in U.S. Currency, 728 N W 2d 510, 528 (Minn. 2007) (technique of using trained dogs to detect drug orders is not scientific, therefore Frye-Mack is inapplicable); State v. Klawitter, 518 N W 2d 577, 579-84 (Minn. 1994) (trial court properly found Frye standard met after ten witnesses testified at a suppression hearing); State v. Hodgson, 512 N W 2d 95, 98 (Minn. 1994) (no objection was made at trial bite-mark comparison testimony). Third, as the Delk panel stated, “Delk’s quarrel is not with the science underlying GSR analysis but rather

Once the general acceptance of a scientific technique has been reviewed and confirmed, a trial court need not examine the first Frye-Mack prong regarding that technique. Roman Nose, 649 N.W.2d at 819. Roman Nose, however, made it clear that the determination on the first Frye-Mack prong can only be made after an evidentiary hearing. Id. at 820, n.5. In Roman Nose, the trial court denied the defendant's request for a Frye-Mack hearing regarding the general acceptance of the PCR-SIR method of testing DNA. Id. at 818. A jury then found the defendant guilty of first degree murder. Id. The Supreme Court noted that the general acceptance in the scientific community of the RFLP method of testing DNA had been evaluated by means of a Frye-Mack hearing and affirmed in State v. Schwartz, 447 N.W.2d 422, 425 (Minn. 1989). Id. at 820. The Supreme Court, however, stressed that the PCR-SIR method of testing DNA had never been reviewed by the Supreme Court. Id. at 820-21. Because the Supreme Court had never considered it, the PCR-SIR technique was "novel scientific evidence" within the meaning of Frye-Mack. Id. at 821. "Even if it appears likely that in the course of a Frye-Mack hearing on the PCR-SIR method of testing DNA the trial court will determine that the method has gained general acceptance within the relevant scientific community, the likelihood of such a determination should not be the basis for denying a Frye-Mack hearing." Id. at 822 (emphasis in original). The Supreme Court, therefore, remanded the case to the trial court to hold a hearing on the first Frye-Mack prong. Id. at 823.

This Court is not aware of any Minnesota case law establishing that urine testing has been generally accepted by the scientific community.⁶ Therefore, pursuant to Roman Nose, the

with the 'meaning and helpfulness' of the data derived" and, therefore, "Delk does not raise a Frye-Mack issue but rather a rule 702 issue."

⁶ As Defendant notes, the cases of Genung v. Commissioner of Public Safety, 589 N.W.2d 311 (Minn. Ct. App. 1999), and City of Springfield v. Anderson, 411 N.W.2d 292 (Minn. Ct. App. 1987), both address

testing in this case is “novel ” This Court, therefore, must hold a hearing on the first prong of Frye-Mack to determine whether the testing done here is generally accepted in the scientific community

Given that a hearing is needed on the first prong, it is axiomatic that the hearing must address the second prong: “whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls ”⁷ Id. at 819 This entails a two-part analysis demonstrating (1) what are the appropriate standards and controls, and (2) whether, in this case, administration of testing conformed to procedures State v. Traylor, 656 N W 2d 885, 894-97 (Minn 2003) The Court, therefore, grants Defendant’s motion for a Frye-Mack hearing, and that hearing shall address both prongs of the Frye-Mack standard

In order to most efficiently handle this issue, specifically to minimize the need for expert witnesses to appear multiple times in this case, the Frye-Mack hearing will be held on the morning of trial The Counsel will contact the scheduling clerk to set this matter for trial with

the use of urine testing In Genung, however, the issue was whether the commissioner met the burden of persuasion regarding the accuracy of the test result 589 N W 2d at 313 The Court of Appeals explicitly noted that Genung failed to object at trial to the admission of the test result, and, therefore, that issue was not appealable Id. at 313 n.2 In Anderson, the issue was whether the trial court erred in refusing to allow an expert to testify regarding the proper procedure for collecting a urine sample when there was no dispute that the sample was valid 411 N W 2d at 293-94 Both of these cases were analyzed under the rubric of State v. Dille, 258 N W 2d 565, 567-68 (Minn 1977) (commissioner or prosecutor has burden of showing that chemical testing for alcohol concentration was valid and reliable) While Defendant here raises those issues as well, the primary issue presently before this Court, however, is whether urine testing has been generally accepted by the scientific community within the meaning of the Frye-Mack standard These cases are not on point on that issue

⁷ Arguably, a hearing would always be necessary on the second prong See, Roman Nose, 649 N W 2d at 819 (citing State v. Jobe, 486 N W 2d 407, 420 (Minn 1992)) (“When the scientific technique that produces the scientific evidence is no longer novel or emerging, then the pretrial hearing should focus on the second prong of the Frye-Mack standard ”)

the understanding that potential jurors will not be summoned until later in the morning. The Court notes that, if the Court rules in Defendant's favor on either Frye-Mack prong, trial can still proceed on the "under the influence" charge. The Court expects both the State and Defendant to have any witnesses and evidence necessary to decide the Frye-Mack issues of (1) whether experts in the field widely share the view that the results of the scientific testing used here are scientifically reliable, (2) what are the appropriate standards and controls for the testing, and (3) whether, in this case, the administration of the test conformed with those procedures.

MP
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