STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF SHERBURNE | TENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

STATE OF MINNESOTA } SS.
COUNTY OF SHERBURNE
FILED
DEC 13 2007
PATRICIA A. AUKA
COURT ADMINISTRATOR
By [signature] Deputy

ORDER GRANTING MOTION TO SUPPRESS BLOOD TEST AND CERTIFYING QUESTION AS IMPORTANT AND DOUBTFUL

Mark R. Sickmann,

Defendant.

Court File No.: TX-04-8980

The above-entitled matter came on for decision before the Honorable Alan F. Pendleton on the 30th day of November at the Sherburne County Government Center, 13380 Highway 10, Elk River, MN, 55330, on the Motion of Defendant to Suppress the Blood Test upon retrial of the instant matter.

Plaintiff appeared by and through its attorney the Office of the Sherburne County Attorney, in the person of Sean C. Dillon, Assistant County Attorney.

Defendant appeared personally and through his attorneys, Ramsay, Devore and Benerotte, P.A. in the person of Charles Ramsay, Attorney at Law.

NOW THEREFORE after consideration of the files and memoranda in this matter, the sworn testimony, the arguments of counsel and the applicable law, the Court herewith makes the following:

ORDER GRANTING MOTION TO SUPPRESS BLOOD TEST AND CERTIFYING QUESTION AS IMPORTANT AND DOUBTFUL

I.

Defendant's Motion to Suppress the Blood Test upon retrial of the instant matter because the State's act of destroying the blood sample without notice to Defendant is violative of Defendant's Sixth Amendment right to confront his accusers, as the same has been interpreted by the holding in the decision of the United States Supreme Court in Crawford v. Washington 541 U.S. 36, 124 S.Ct. 1354 (2004) is herewith **GRANTED.**

II.

By mutual agreement of the parties and the Court, the question of whether the destruction of the Defendant's blood sample by the Minnesota Bureau of Criminal Apprehension (BCA) pursuant to office policy destroys testimonial evidence which the State will use in prosecution of Defendant and is therefore a violation of Defendant's Sixth Amendment right to confront his accusers, as the same has been interpreted by the holding in the decision of the United States Supreme Court in Crawford v. Washington 541 U.S. 36, 124 S.Ct. 1354 (2004) is herewith **CERTIFIED TO THE MINNESOTA COURT OF APPEALS AS IMPORTANT AND DOUBTFUL** pursuant to Minn.R.Crim.Proc. 28.03, and pursuant to said rule, further proceedings herein are **ORDERED STAYED** until decision of the Court of Appeals with respect to this question.

III.

All other issues raised by Defendant with respect to this matter, namely:

1. That admission of the blood test report violated Defendant's due process rights because the state intentionally destroyed the evidence, thereby denying Defendant the

opportunity to independently inspect, evaluate and test his alleged blood sample;

2. That the State violated the Minnesota Rules of Criminal Procedure and Defendant's Due Process rights by failing to provide Defendant with his blood sample as a part of his requested discovery;

3. Defendant's arguments that a blood test is a search and drivers are therefore subject to protection of the Fourth Amendment with respect thereto and all arguments made by Defendant which are derivative from this proposition, namely, that Defendant did not freely and voluntarily waive his Fourth Amendment rights, and that Defendant did not freely and voluntarily consent to extraction of his blood;

4. That the law of spoliation of evidence is inconsistent with the Minnesota Rules of Criminal Procedure and cannot be applied in light of the rights of Defendant to due process and confrontation;

ARE HEREWITH RESERVED pending decision of the Court of Appeals on the question herein certified as important and doubtful.

IV.

The attached Memorandum is hereby incorporated by reference as fully and completely as if set out word-for-word herein.

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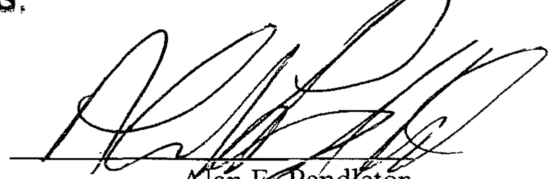
BY THE COURT



Alan F. Pendleton
Judge of District Court

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF SHERBURNE | TENTH JUDICIAL DISTRICT

State of Minnesota,

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MEMORANDUM

Court File No.: TX-04-8980

FACTUAL BACKGROUND AND PROCEDURAL POSTURE

On November 2, 2005, Defendant Mark Reuben Sickmann was found guilty by a jury of Fourth Degree Driving While Impaired, pursuant to a violation of Minn.Stat. §169A.20 Subd. 1(1) and §169A.20 Subd. 1(5). On January 23, 2007, his conviction was reversed by the Minnesota Court of Appeals and the matter remanded to this Court for retrial. In preparing for retrial, Defendant requested a sample of the blood the state used to determine his blood-alcohol concentration from the State. At the first prosecution, the State admitted that its agent, the Bureau of Criminal Apprehension (BCA) had destroyed the blood sample pursuant to an office policy requiring destruction of blood samples after a predetermined period of time. Since the predetermined period of time had passed, the State was unable to comply with Defendant's discovery request. Accordingly, Defendant was unable to exercise his right under Minn.R.Crim.Proc. 9.01 Subd 1(4) to have the blood sample independently examined.[1]

[1] Minn.R.Crim.Proc. 9.01 Subd. 1(4) provides in pertinent part:

"(4) *Reports of Examinations and Tests*. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of physical or mental examinations, scientific tests,

Defendant argues that since the blood sample has been destroyed, testimonial evidence which will be used to convict the Defendant at subsequent trial of the case has been destroyed by the State. Accordingly, Defendant argues that admission of the blood test report of the BCA violates Defendant's Sixth Amendment right to confront his accusers, as the same has been interpreted by the holding in the decision of the United States Supreme Court in Crawford v. Washington 541 U.S. 36, 124 S.Ct. 1354 (2004). It is this precise question that this Court has certified to the Minnesota Court of Appeals as being important and doubtful.

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." [2] The constitutional right to be confronted by one's accusers guarantees an opportunity for adequate and effective cross-examination of the state's witnesses.[3]

The state offers as evidence of Sickmann's alcohol concentration a blood test report prepared by the BCA. The blood test report is evidence that the United States Supreme Court in Crawford characterizes as "testimonial. [4] Accordingly, admission of the report has Confrontation Clause implications. To satisfy the Confrontation Clause concerns, the prosecutor must disclose the contents of a blood- or urine-test report to the defendant 20 days before trial. That disclosure

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experiments or comparisons made in connection with the particular case. The prosecuting attorney shall allow the defendant to have reasonable tests made. If a scientific test or experiment of any matter, except those conducted under Minnesota Statutes, chapter 169, may preclude any further tests or experiments, the prosecuting attorney shall give the defendant reasonable notice and an opportunity to have a qualified expert observe the test or experiment.

[2] United States. Constitution, Amendment VI. The Minnesota Constitution contains virtually identical language: "The accused shall enjoy the right . . . to be confronted with the witnesses against him." Minn. Const. art. 1, § 6.

[3] United States v. Owens, 484 U.S. 554, 559, 108 S. Ct. 838, 842 (1988).

[4] State v. Caulfield, 722 N.W.2d 304, 305 (Minn. 2006).

must also inform the defendant of his right to request that the person who prepared the test testify in person at trial. [5]

That disclosure did not happen in this case. But more importantly, even if Sickmann has the opportunity to confront those who prepared the blood test report, the effectiveness of that cross-examination must be considered in light of the fact that Sickmann was denied the right to reproduce the BCA's test results when the state failed to provide him with the blood sample.

Due process requires that a criminal defendant have the same access to information as the State when the State offers the result of a scientific test.[6] The State did not give Defendant an opportunity to stop destruction of this evidence. If the State offers into evidence the blood-test report, the State must also call the person who prepared the blood-test report, and a person who can testify as to the chain of custody. Without access to the blood sample, Sickmann is denied the right granted in the rules of discovery to reproduce the state's test results. The reproducibility of scientific test results is an important factor when considering the reliability of the test results.

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[5] Minn. Stat. § 634.15, subd. 1(c); subds. 1(c), 2(a)(2).

[6] State v. Schwartz 447 N.W.2d 422, 427 (Minn.,1989) ("Even if a laboratory has followed reliable procedures to ensure accurate test results, constitutional concerns may prevent the admissibility of such evidence. The fair trial and due process rights are implicated when data relied upon by a laboratory in performing tests are not available to the opposing party for review and cross examination. Under our broad discovery rules, defense counsel has the right 'to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connection with the particular case.' Minn.R.Crim.P. 9.01, subd. 1(4); *see also id.* 9.03, subd. 1 (discovery investigations not to be impeded). The prosecution has a similar right. *Id.* 9.02, subd. 1(2). These rules reflect an important presumption in favor of discovery. *Cf. Spencer II,* 238 Va. at --- - ---, 384 S.E.2d at 785, 791 (written scientific reports were discoverable by defendant but not the "work notes [or] memorandum" upon which the reports were based because such data was expressly excluded by the state's discovery rules)."). *See also* Caulfield, 772 N.W.2d 313 (holding that adequate notice must be given to a defendant of the contents of the report and the likely consequences of failure to request the testimony of the preparer or there is no reasonable basis to conclude that defendant's failure to request the testimony constituted a knowing, intelligent and voluntary waiver of his confrontation rights).

The BCA's policy of destroying the blood or urine sample, therefore, eliminates Sickmann's ability to reproduce the blood test results and limits the methods available to him to challenge the reliability of those results. The scope of the Sickmann's cross-examination of the witnesses who prepared the test report is unconstitutionally limited.

The Sixth Amendment's guarantee that an accused shall enjoy the right to be confronted by his accusers is vindicated only upon effective and adequate cross-examination of those witnesses. [7] The BCA's policy of destroying the blood sample after a predetermined period of time renders Sickmann's opportunity to cross-examine the state's witnesses inadequate and ineffective. Because Sickmann's cross-examination of the witnesses who prepared the blood test report is inadequate and ineffective in light of his inability to reproduce the results, his rights under the Confrontation Clause are violated and this violation precludes admission of the blood test report. [8]

Accordingly, this Court must conclude that at subsequent trial of this matter, the blood-test report of the BCA is inadmissible. However, since the admissibility of a blood-test report without Defendant having had the opportunity to perform an independent test on the sample from

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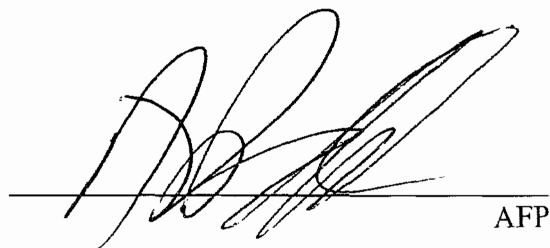
[7] *See Owens*, 484 U.S. at 559, 108 S. Ct. at 842.

[8] The State argues that it intends to call Joseph L. Yoch, the actual forensic scientist at the BCA who performed the analysis of the defendant's blood sample. By the State's argument, since defendant would then be afforded the opportunity to cross-examine Mr. Yoch, the Confrontation Clause does not prohibit the introduction into evidence of his observations and conclusions concerning the sample. The State thereby asserts that this case is distinguishable from the facts in Caulfield and those in State v. Weaver 733 N.W.2d 793 (2007), holding that laboratory test results offered to prove the cause of death in a murder trial are testimonial in nature and implicate the right to confrontation under Crawford and that it was error to admit laboratory test results through the testimony of an assistant medical examiner who had not performed the tests but had received the results and relied on them in reaching her opinion as to the cause of death. ("['T]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." United States v. Owens, 484 U.S. 554, 559, 108 S. Ct. 838, 842 (1988)."). State's Response to Defendant's Motion to Suppress the Blood Test Results, November 30, 2007, p. 2. (Internal quotation and citations omitted; emphasis in original). Since Defendant has been unable and will continue to be unable to prepare any meaningful cross-examination of Mr. Yoch because he has not

which it was derived has not been litigated post-Crawford, and since if the test report is not admitted, the State will be unable to proceed with retrial, the Court finds the question upon which it has rendered its decision to be one that is of statewide implication, and important and doubtful. For these reasons, this Court has certified its conclusion on the inadmissibility of the blood-test report to the Minnesota Court of Appeals for a decision pursuant to Minn.R.Crim.Proc. 28.03 Subd.1.



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Dated: 12/13/07

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[illegible] A. KUKA
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By [illegible] Deputy

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had any opportunity to independently examine and test the blood sample, the Court finds this argument not persuasive.