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STATE OF MINNESOTA

IN COURT OF APPEALS

OFFICE OF
APPELLATE COURTS

APR 28 2011

FILED

In Re: Source Code Evidentiary Hearings
in Implied Consent Matters.

ORDER

#A11-560

In Re: Source Code Evidentiary Hearings
in Criminal Matters.

Considered and decided by Johnson, Chief Judge; Minge, Judge; and Schellhas,
Judge.

**BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE
FOLLOWING REASONS:**

This is a petition for discretionary review of the final order in the “source code” case, consolidated by a special assignment order to be heard and decided by a single judge of district court. Counsel for the criminal defendants and implied-consent petitioners seek discretionary review of the March 8, 2011 order. Respondent Commissioner of Public Safety and liaison counsel for the prosecution have filed responses to the petition.

This court will grant discretionary review of a pretrial order in a criminal case if a “compelling reason” is shown. *See State v. Jordan*, 426 N.W.2d 495, 496 (Minn. App. 1988).

The supreme court consolidated multiple driving while impaired (DWI) and implied-consent cases for purposes of decision on the source code issue in a January 11,

2010 order. That order cites the need to “conserve the resources of the parties” and the judiciary, avoid inconsistent rulings, and “facilitate resolution of the cases.” If discretionary review were not granted, the cases would return to the respective district courts for resolution of individual cases, and multiple appeals following any criminal conviction or the sustaining of the driver’s license revocation. Because the source code challenges were consolidated before one judge for an efficient district court resolution, there is a “compelling reason” for prompt appellate review of that decision in a single appeal.

Because we conclude that a “compelling reason” to grant discretionary review has been shown, we need not decide whether, as the Department of Public Safety argues, the district court order is appealable as a matter of right as a final order in a special proceeding. *See* Minn. R. Civ. App. P. 103.03(g). We note that the supreme court’s January 11, 2010 order was an assignment order for cases from multiple districts raising the same issue. Minn. R. Gen. Pract. 113.03(a). A “special proceeding” is a proceeding whose “existence is not dependent upon the existence of any other action and ... therefore is not an integral part of the original action.” *In re GlaxoSmithKline PLC*, 699 N.W.2d 749,756 (Minn. 2005) (citation omitted). The source code determination is an “integral part” of a large number of criminal and implied-consent proceedings, which is the basis for this court’s granting discretionary review.

The parties have indicated that a petition for accelerated review of this matter in the supreme court will be filed. *See* Minn. R. Civ. App. P. 118. In order to avoid undue delay in scheduling this matter, however, liaison counsel for the criminal defendants and

implied-consent petitioners, who represent the appellants in this matter, should be required to promptly order any transcripts required for this appeal. *See* Minn. R. Crim. P. 28.02, subd. 9 (requiring that transcript be ordered within 30 days after the filing of the notice of appeal). Although this appeal involves both civil and criminal matters, the briefing period provided in the civil appellate rules is appropriate. *See* Minn. R. Civ. App. P. 131.01.

IT IS HEREBY ORDERED:

1. The petition for discretionary review is granted.
2. Petitioners criminal defendants and implied-consent petitioners shall be the appellants in this appeal.
3. Liaison counsel for appellants shall serve and file a written request for transcripts by May 26, 2011. *See* Minn. R. Crim. P. 28.02, subd. 9.
4. Briefing shall proceed under Minn. R. Civ. App. P. 131.01 upon delivery of the last transcript.
5. Liaison counsel for appellants shall serve and file a status letter, due on May 13, 2011, informing the court of the status of any petition for accelerated review or whether a petition for accelerated review will be filed.

Dated: April 27, 2011

BY THE COURT



Matthew E. Johnson
Chief Judge