

STATE OF MINNESOTA

IN COURT OF APPEALS

In re Minnesota Intoxilyzer 5000EN
Source Code Litigation in Implied
Consent Cases,

and

In re Minnesota Intoxilyzer 5000EN
Source Code Litigation in Criminal
Cases.

**RESPONDENT STATE OF
MINNESOTA- PROSECUTION
LIAISON COUNSEL'S RESPONSE
TO APPELLANTS' PETITION FOR
DISCRETIONARY REVIEW**

Appellate Court File No. A11-560

Master Court File Nos. 70-CV-09-19459
70-CR-09-19749

TO: The Minnesota Court of Appeals.

PROCEDURAL POSTURE

On March 28, 2011, defendants in the criminal driving while impaired ("DWI") cases in the above-captioned consolidated matter filed a Petition for Discretionary Review with the Minnesota Court of Appeals. In response to the criminal defendants' Petition, the undersigned, on behalf of the State of Minnesota and previously appointed prosecution liaison counsel, submits the following response pursuant to Minn. R. Crim. P. 28.02, subd. 3 and Minn. R. Civ. App. 105.02.

ARGUMENT

I. MINNESOTA RULES OF CRIMINAL PROCEDURE-APPEAL AS OF RIGHT

A defendant may obtain Court of Appeals review of district court orders and rulings only as these rules permit, or as permitted by the law for issuance of the extraordinary writs and for the Post-Conviction Remedy. Writs of error are abolished.

Minn. R. Crim. P. 28.02, subd. 1.

A criminal defendant may appeal a final judgment as of right to the Court of Appeals. A final judgment is defined as occurring "when the district court enters a judgment of conviction and imposes or stays a sentence." Minn. R. Crim. P. 28.02, subd. 2. Additionally, criminal defendants may only appeal district court orders under those circumstances provided for in Minn. R. Crim. P. 28.02, subd. 2(2); none of which apply to the matter now before the Court of Appeals.

On March 8, 2011, the Honorable Jerome B. Abrams issued his final Order concluding "the results of breath alcohol testing conducted on the Intoxilyzer 5000EN which express a numerical value for measured breath alcohol are reliable and unaffected by actual or alleged problems with the source code of the instrument." *See, Order 20-Order and Memorandum Following Final Evidentiary Hearing, In re Source Code Evidentiary Hearings in Criminal Matters, Master File No. 70-CR-09-19749 (Dist. Ct., March 8, 2011).* Given the district court's decision, the Court stated that the "four thousand plus cases pending in 69

counties throughout Minnesota [can] be returned to their home county for further proceedings.” *Id.* at 2. As a result, the criminal defendants are presented with the following options given the finding that the Intoxilyzer 5000EN breath testing instrument is reliable:

1. Dispose of the pending criminal matters pursuant to a plea agreement entered into by the State and criminal defendants;
2. Proceed pursuant to Minn. R. Crim. P. 26.01, subd. 3 and the case of *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980) by submitting the matter to the respective district court on stipulated facts with the appropriate waivers; thereby allowing the district court to make a finding of guilty or not guilty; or;
3. Exercise their right to a court or jury trial on the merits.

Depending on which option the criminal defendant chooses, an adequate appeal right exists under Minn. R. Crim. P. 28.02 for criminal defendants to effectuate an appeal to the Minnesota Court of Appeals. Given Judge Abrams’ Order, the matters are to be returned to the “home county for further proceedings.” Therefore, an adequate and fair process exists for appellants to seek further review of the District Court’s Order dated March 8, 2011.

II. DISCRETIONARY REVIEW

Minnesota Rules of Criminal Procedure 28.02, subd. 3 provides:

In the interests of justice and on petition of the defendant, the Court of Appeals may allow an appeal from an Order not otherwise appealable. . .

Then Chief Justice Magnuson appointed Judge Jerome B. Abrams to “administer, hear, and decide all pretrial matters concerning challenges to the reliability of the Intoxilyzer 5000EN results based on the source code of the instrument. . .” Order of Chief Justice Magnuson, *In re Minnesota Intoxilyzer Source Code Litigation 5000EN*, No. A09-2109 (Minn. January 11, 2010). As result, more than four thousand two hundred criminal DWI cases were assigned to Judge Abrams and consolidated into a single proceeding culminating in the district court’s order dated March 8, 2011.

Discretionary review is appropriate when the petitioner establishes a compelling reason for review. *State v. Smith*, 656 N.W.2d 420, 424 (Minn. App. 2003); *State v. Maslowsky*, 430 N.W.2d 7, 8-9 (Minn. Ct. App., 1988). In determining whether a petition for discretionary appeal should be granted as necessary in the interests of justice, the reviewing court may look at the statewide impact of the issue and the breadth of application of the ultimate decision. *See, State v. Henderson*, 706 N.W.2d 758, 760 (Minn. 2005) (Minnesota Supreme Court determined that interests of justice warranted discretionary appeal because of the importance of determining “an issue that affects numerous cases statewide”). Respondent, State of Minnesota, takes no position relative to the propriety of the Court’s exercise of this discretion.

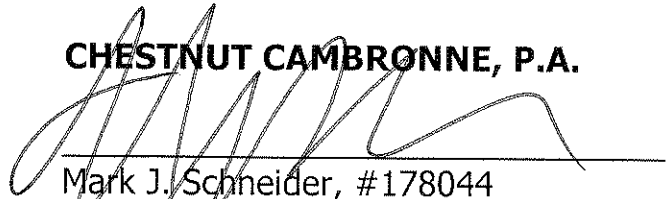
CONCLUSION

The Minnesota Rules of Criminal Procedure establish a procedure wherein criminal defendants may seek appellate review of a District Court's pretrial ruling after a stipulated facts trial, court trial or jury trial as appropriate. In the alternative, in the event the reviewing Court finds that the "interests of justice" require immediate review of an otherwise non appealable order, the reviewing Court may grant discretionary review of the District Court's Order pursuant to Minn. R. Crim. P. 28.02, subd. 3.

In the event the Minnesota Court of Appeals would grant discretionary review of Judge Abram's Order dated March 8, 2011, the State of Minnesota-Prosecution Liaison Counsel agree with the Commissioner of Public Safety that accelerated review to the Minnesota Supreme Court pursuant to Minn. R. Civ. App. P. 118 would be necessary and appropriate. Review by the Supreme Court would efficiently, finally and definitively resolve the issue of the reliability of the Intoxilyzer 5000EN given Judge Abram's detailed, fair and efficient processing of this matter.

Dated: April 4, 2011

CHESTNUT CAMBRONNE, P.A.



Mark J. Schneider, #178044
17 Washington Avenue North
Suite 300
Minneapolis, MN 55401-2048
612.339.7300

David Kendall, #0303859
LeVander, Gillen & Miller, P.A.
633 South Concord Street, Suite 400
South St. Paul, MN 55075

Bill Bernard, #0256699
Grannis & Hauge, P.A.
200 Town Center Professional Building
1260 Yankee Doodle Road
Eagan, MN 55121

Bill Lemons, #0295425
Minnesota County Attorney's
Association
100 Empire Drive, Suite 200
St. Paul, MN 55103

Pam Converse, #0134259
Scott County Joint Prosecution
Scott County Government Center
200 Fourth Avenue West
Shakopee, MN 55379

Sean McCarthy, #0262742
Fleugel Law Firm
999 Westview Drive
Hastings, MN 55033-2432

**ATTORNEYS FOR RESPONDENT-
STATE OF MINNESOTA
PROSECUTION LIAISON COUNSEL**