

Filed Olmsted County District Court

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STATE OF MINNESOTA
COUNTY OF OLMSTED

DISTRICT COURT
THIRD JUDICIAL DISTRICT
CIVIL DIVISION

██████████,

District Court File No. ██████████

Petitioner,

vs.

ORDER AND MEMORANDUM

Commissioner of Public Safety,

Respondent.

On October 7, 2016, the above-captioned matter came on for an Implied Consent Hearing before the Honorable Pamela A.W. King in Olmsted County District Court. **Charles A. Ramsay**, Attorney, appeared on behalf of Petitioner ██████████. **Peter Magnuson** appeared on behalf of Respondent Commissioner of Public Safety.

The Court, based on all of the files, records, proceedings, and arguments of counsel, hereby makes the following:

ORDER

1. In accordance with Minn. Stat. § 169A.53, the revocation of Petitioner's driving privileges is **RESCINDED**.
2. The attached Memorandum is incorporated and made part of this Order.

DATED: November 17, 2016

BY THE COURT:

 King, Pam
2016.11.17 16:56:53 -06'00'
Honorable Pamela A.W. King
Judge of District Court

cc: Charles A. Ramsay, Attorney for Petitioner
Peter Magnuson, Attorney for Respondent

MEMORANDUM

FACTS

On June 9, 2016, Officer Phonchai See arrested [REDACTED] on suspicion of driving while under the influence. At the time of her arrest, Ms. [REDACTED] was sixty-three years old. Officer See transported Ms. [REDACTED] to the Adult Detention Center, where she was read the implied consent advisory and consented to a breath test.

Officer [REDACTED] and certified DMT Operator [REDACTED] administered the DataMaster DMT breath test (herein "DMT") to Ms. [REDACTED]. Officer [REDACTED] has been a licensed peace officer in Minnesota for the last eighteen years. In 2000, Officer [REDACTED] became a Certified Intoxilyzer Operator, administering breath tests with the Intoxilyzer 5000. The Intoxilyzer 5000 required the subject to provide 1.1 liters of air. In the past number of years the Intoxilyzer 5000 breath testing devices have been replaced with the DMT. Five years ago, Officer [REDACTED] became a Certified DMT Operator. Unlike the Intoxilyzer 5000, the DMT requires a participant to provide 1.5 liters of air.

Officer Craig [REDACTED] first administered the DMT to Ms. Johnson at 7:50 p.m. Officer [REDACTED] testified that Ms. [REDACTED] partially exhaled before blowing into the tube and then blew around it. At the conclusion of the test, Ms. [REDACTED] failed to provide the 1.5 liters of air required for the DMIT to accept her breath sample and her sample was deemed deficient. The results of the first DMT show that Ms. [REDACTED] provided six puffs of air in the time allotted.¹ Each puff lasted between eight and ten

¹ Ex. 1.

seconds and exhibited the same pattern as demonstrated by the flow rate on the graph. In the first four to five, Ms. [REDACTED] provided air at a rate of 6.67 liters per minute. In the remaining seconds, Ms. [REDACTED] rate would plummet.

Officer [REDACTED] offered Ms [REDACTED] a second chance to complete the DMT. Prior to administering this test, Officer [REDACTED] testified he had Ms. [REDACTED] stand and “demonstrate” that she was able to blow air as required. During this time, he did not ask Ms. [REDACTED] if there were any medical reasons she was unable to provide a sample. Ms. [REDACTED] once again failed to provide a sufficient sample. The results from Ms. [REDACTED] second attempt show Ms. [REDACTED] exhibited the same breathing pattern (i.e.—six puffs lasting eight to ten seconds, starting at a rate above 6.67 liters per minute and then plummeting).²

Officer [REDACTED] testified that he saw Ms. [REDACTED] “blowing around the tube” and “exhaling” before beginning to blow. Also, in his experience subjects typically gasp and take an audible deep breath after providing an adequate breath sample. Ms. [REDACTED] did not. Based on Ms. [REDACTED] behavior during and after the test, Officer [REDACTED] believed Ms. [REDACTED] was being uncooperative and by her conduct refusing the test. He did not offer Ms. [REDACTED] an alternative test or ask whether she had any medical conditions or any reason she was unable to provide a breath sample.

Ms [REDACTED] medical records indicate she suffers from chronic bronchitis. She testified that along with being diagnosed with bronchitis, she is a smoker and her lungs are that of a 90-year-old woman. She states this causes her to lose her breath

² Ex. 2.

when doing every day activities like walking up stairs. On August 29, 2016, Ms. [REDACTED] performed a spirometer test, which measured her Forced Vital Capacity (FVC) and FEV (Forced Expiratory Volume). The results show Ms. [REDACTED]'s FVC at 1.65 and 1.56 liters, which is 55% and 50% of the amount expected. Ms. [REDACTED]'s FEV1 was measured at 1.15 and 1.17 liters respectively, which is 50% and 51% of the amount expected.

PROCEDURAL POSTURE

On June 21, 2016, Ms. [REDACTED] filed a Petition for rescission of the Order of License Revocation. At the Implied Consent Hearing on October 7, 2016, Ms. [REDACTED] limited the issues and argued rescission was proper because Ms. [REDACTED] was physically unable to provide a sufficient breath sample. After testimony and additional argument, the Court issued a briefing schedule and took this matter under advisement.

LEGAL ANALYSIS

1. THE PREPONDERANCE OF THE EVIDENCE PRESENTED SHOWS MS. [REDACTED] WAS UNABLE TO PROVIDE A SUFFICIENT BREATH SAMPLE.

Under Minnesota law, “any person who drives, operates, or is in physical control of a motor vehicle within the state or on any boundary water of this state consents . . . 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.”³ It is a crime for any person to refuse to submit to a breath

³ Minn. Stat. § 169A.51, subd. 1 (2016).

test.⁴ “[F]ailure of a person to provide two separate, adequate breath samples in the proper sequence constitutes a refusal.”⁵

“A driver has a duty to comply reasonably with the administration of a test, and failure to do so constitutes a refusal.”⁶ However, a driver’s physical inability to provide an adequate sample constitutes an affirmative defense.⁷ The driver has the burden to prove by a preponderance of the evidence that he or she was physically unable to provide an adequate breath sample.⁸ The trial court must make specific findings on the issue of whether the driver’s failure to provide two adequate breath samples resulted from his physical inability.⁹ “If the court finds that the driver was physically unable to provide the required samples, the trial court must then determine whether the driver refused to provide a urine or blood sample.”¹⁰

Here, Ms. [REDACTED] has presented a preponderance of the evidence to prove she was physically unable to provide an adequate breath sample. Ms. [REDACTED] testified that she suffers from bronchitis and has been prescribed medications, including an inhaler, to help her breathe. The Minnesota Court of Appeals has acknowledged the effect bronchitis can have on a suspect’s ability to provide a breath sample.¹¹ This was corroborated by Ms. [REDACTED]’s medical records. Though the description of Ms.

⁴ Minn. Stat. § 169A.20, subd. 2; *See also Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016)(Court held a breath test may be administered as a search incident to arrest.).

⁵ Minn. Stat. § 169A.51, subd. 5(c).

⁶ *Sigfrinius v. Comm’r of Pub. Safety*, 378 N.W.2d 124, 126 (Minn. Ct. App. 1985).

⁷ *Belille v. Comm’r of Pub. Safety*, 411 N.W.2d 589, 591 (Minn. Ct. App. 1987).

⁸ *Bale v. Comm’r of Pub. Safety*, 385 N.W.2d 870, 873 (Minn. Ct. App. 1986).

⁹ *Aunan v. Comm’r of Pub. Safety*, 361 N.W.2d 907, 909 (Minn. Ct. App. 1985).

¹⁰ *Swanke v. Comm’r of Pub. Safety*, 385 N.W.2d 403, 406 (Minn. Ct. App. 1986).

¹¹ *See Belille v. Comm’r of Pub. Safety*, 411 N.W.2d at 589 (court found a woman was physically unable to provide a sample where woman was diagnosed with bronchitis and was offered to take an alternative test).

██████████'s lung motion varies from "fair" to "poor", her bronchitis diagnosis and symptoms (i.e.—wheezing, crackles) are consistent throughout.

The results of the spirometer test further corroborate Ms. ██████████'s testimony. On August 29, 2016, the date of the test and a few months after the arrest, Ms. ██████████'s FVC was 1.65 liters and 1.56 liters respectively. These numbers are 55% and 50% of what is expected. Though these results indicate that Ms. ██████████'s lungs could hold that much air, these numbers measure total lung capacity not how much she could exhale. Erik Johnson, a forensic scientist with the BCA, testified that if Ms. ██████████ blew all the air out in her lungs she would die. Though Mr ██████████ testified it is possible for Ms. ██████████ to exhale 1.50 liters of air, the prospect of her being able to do so with .15 or .06 liters left seems less likely.

Ms ██████████ was also 63 years old at the time. Based on his previous training with the Intoxilyzer 5000, Officer ██████████ agreed both gender and age impact a subject's forced vital capacity and this capacity decreases with age. A chart of these values was even included in the Intoxilyzer manual.

Moreover, Ms. ██████████'s breathing was consistent during the first and second DMT attempts. Ms ██████████ provided six puffs of air during the two DMT tests. Each puff lasted between eight and ten seconds. Initially, Ms ██████████ was able to provide air at a rate over 6.67 liters per minute. However, after a few seconds, this rate plummeted. If, Ms. ██████████ was exhaling air prior to each of the tests and "blowing around the tube", doing so while still providing almost the exact same pattern of flow rate seems unlikely. The consistencies throughout these two tests does not suggest

Ms. [REDACTED] manipulated the test as asserted by the officer, but instead made good-faith effort to complete the DMT.

The State argues that Ms. [REDACTED] frustrated the process by exhaling before placing her mouth on the mouthpiece and then blowing air around the mouthpiece, relying on an unpublished case, *Londo v. Commissioner of Public Safety* is support of this argument. However, in *Londo*, the driver was “acting as if she were blowing into the intoxilyzer machine, covering the airway in the mouthpiece with her tongue” and “would quit as soon as the machine signaled it was receiving airflow.”¹² The district court found that the driver deliberately disrupted and pretended to submit to the breath test and there was no good faith effort on the driver to successfully complete the test. The driver had relied on the argument that she was willing to take a test and that the machine malfunctioned, not that she was physically incapable of providing a sample.

Here, Ms. [REDACTED] due to her physical limitations was unable to complete the test. However, the testimony about Ms. [REDACTED] exhaling before beginning the test and blowing air around the mouthpiece as previously discussed providing consistent attempts over two tests while supposedly intentionally being uncooperative given the facts presented is unlikely.

Based on the medical records and testimony presented, this Court finds Ms. [REDACTED] has proven by a preponderance of the evidence that she was physically unable to provide a breath sample. Since Officer [REDACTED] failed to request an

¹² *Londo v. Comm’r of Pub. Safety*, 2008 WL 5137152 at *4 (Minn. Ct. App. Dec. 9, 2008).

alternative test from Ms. [REDACTED], this Court finds her license revocation should be rescinded.

P.A.K.