

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF SCOTT

FIRST JUDICIAL DISTRICT

COURT FILE NO: [REDACTED]

[REDACTED]

Petitioner,

FINDINGS & ORDER

v.

COMMISSIONER OF PUBLIC SAFETY,
Respondent.

The above-entitled matter came on for Implied Consent Hearing before the Honorable [REDACTED], Judge of District Court, at the Scott County Justice Center, Shakopee, Minnesota on [REDACTED] 2016. The matter was taken under advisement upon the closing of the briefing deadline on September 9, 2016. Petitioner challenges the revocation of her driving privileges pursuant to Minn. Stat. §169A.50-53, the Implied Consent Law. Jay Adkins appeared with and on behalf of Petitioner. Cory Monnens appeared on behalf of Respondent. Having reviewed the testimony, and considering the arguments of the parties, the Court hereby makes the following:

FINDINGS & ORDER

1. The Revocation of Petitioner's driving privileges by Respondent is rescinded.
2. The attached Memorandum is incorporated herein.

DATED: September 23, 2016

BY THE COURT:

[REDACTED]

Judge of District Court

FILED

SEP 23 2016

SCOTT COUNTY COURTS

MEMORANDUM OF LAW

FACTS

On June 3, 2016 at approximately 11:00 p.m., Officer ██████████ stopped the vehicle Petitioner was driving for speeding. He noticed that an odor of alcohol was emanating from the vehicle. Petitioner admitted that she had consumed alcohol earlier in the evening. Officer ██████████ then administered field sobriety tests along the side of the road. He asked Petitioner if she had any medical conditions that would prevent her from performing field sobriety tests. She told him that she had asthma, fibromyalgia, and several other medical conditions. He then administered the horizontal gaze nystagmus test. Petitioner exhibited multiple indications of intoxication during this test. Officer ██████████ decided to skip the remaining standard field sobriety tests because of Petitioner's medical conditions and proceed directly to the preliminary breath test ("PBT"). Petitioner tried to provide a breath sample into the PBT machine multiple times, but failed to produce a sufficient sample. Officer ██████████ then utilized a "manual capture" method which obtained a sample that produced a reading of .089. While Petitioner was providing the insufficient samples, Officer ██████████ observed the mouthpiece moving around in her mouth. In his experience, this type of movement is consistent with someone placing their tongue in front of the mouthpiece and thereby blocking the flow of air.

After the PBT result Officer ██████████ placed Petitioner under arrest and transported her to the Savage Police Department. He read the implied consent advisory and Petitioner agreed to take a breath test. Officer ██████████ then brought Petitioner to the DMT machine and gave her instructions on how to complete the test. To provide valid sample she would need to provide two sufficient air samples within a period of three minutes. Petitioner

began blowing into the machine. She tried to provide breath samples for the full three minutes. Officer [REDACTED] coached her throughout the process. She did not provide a valid breath sample. Officer [REDACTED] testified that he observed the mouthpiece moving around in Petitioner's mouth during the test and he felt that she was blowing around the mouthpiece. This first attempt occurred at approximately 11:52 p.m. Officer [REDACTED] and Petitioner then talked about her medical issues. Petitioner asked if there was any other test she could take. Petitioner and the Officer then jointly agreed that Petitioner would try the DMT test again. Petitioner attempted the second test at approximately 12:03 a.m. She again failed to provide a valid sample. Officer [REDACTED] observed similar conduct during the second test. Petitioner was crying during the second test and asked more than once if there was any other test that she could take. Officer [REDACTED] did not observe any indications that Petitioner was struggling to breathe, although he did observe that she was quite upset.

Officer [REDACTED] concluded that Petitioner was frustrating the test and proceeded to charge her with refusal. He informed Petitioner that she was entitled to obtain an additional test at her own expense. He also told her that physical inability is a defense to a refusal charge. He told her that she could go to her doctor to try to obtain proof of physical inability. He wrote down the breath volume requirements for valid DMT sample and told her to show it to her doctor. When asked about why he did not allow Petitioner to take an official blood or urine test, Officer [REDACTED] indicated that he was just following the guidelines that had been provided to him. He had been told that once he started with one type of test he should not switch to another type of test. His demeanor and facial

expression when answering this question indicated to the Court that he probably thought that offering a different test would have been appropriate under the circumstances.

Petitioner called physician assistant Heidi Kimmel to testify. Ms. Kimmel has been Petitioner's primary care provider for the last six to seven years. She testified that Petitioner has had numerous medical problems over that time. Petitioner came to her two days after the DWI arrest. Petitioner was very upset about what had occurred. Ms. Kimmel diagnosed Petitioner with a sinus infection and inflamed asthma. Ms. Kimmel testified that with those conditions, Petitioner would have had a harder time providing a breath sample than other people. No testing was performed to document Petitioner's ability to provide a specific breath volume. Ms. Kimmel also noted that smoking aggravates Petitioner's breathing problems and that she has been warned repeatedly to stop smoking.

Petitioner testified that she tried her best on all of the breath tests. She testified that she was having a panic attack while trying to provide the DMT samples. She testified that she did not believe that she was intoxicated and that she wanted to prove it. After Officer [REDACTED] was done with all of the procedures related to the DWI arrest she contacted an independent testing company to obtain a blood test. She did this at a cost of \$320. The testing company came to the jail to take a blood sample. Petitioner had no control over when the testing company arrived. The independent sample was ultimately taken at 2:04 a.m., approximately three hours after Petitioner last drove. The parties stipulated that the result of this test was .018. The Court finds that this result is admissible but not very probative. With standard alcohol dissipation rates, it shows that Petitioner

was likely somewhere close to (either above or below) the legal limit while driving.

Petitioner also testified that she was smoking in the car just before she was pulled over.

ANALYSIS

When a police officer determines a driver is physically unable to provide a breath sample, an alternative test must be offered. If the alternative test is turned down, a refusal has occurred. *Belille v. Comm'r of Pub. Safety*, 411 N.W.2d 589, 591 (Minn. App. 1987). If the officer believes that the driver was physically able to provide a breath sample but failed to do so, the driver is charged with refusal and the driver may then present a physical inability defense. The burden of proof is on the driver when a physical inability defense is presented. *Carlson v. Commissioner of Public Safety*, 374 N.W.2d 791, 794 (Minn. App. 1985). “An offer to take an alternative test is not conclusive proof that a driver was physically unable to provide an adequate sample, although it strongly supports that position.” *Belille*, 411 N.W.2d at 592 (internal citations omitted).

The Court concludes that Petitioner was physically unable to provide an adequate breath sample due to a combination of her medical conditions and a panic attack. Her crying and repeated requests for the opportunity to take a different test are strong evidence that she was not attempting to frustrate the DMT test and that it was physical inability alone that prevented her from providing a valid sample. Her willingness to spend \$320 for an additional test also bolsters the credibility of her position. The DMT printouts (Exhibits 1 and 2) are also indicative of a good-faith effort. Petitioner provided eight breaths during the first test and five during the second test. The peaks indicate second and even third efforts on many of those attempts after the initial puff of breath trailed off.

This type of case raises the concern that a driver could fake a physical inability in order to delay so that either a second test can not be completed in time or so that their alcohol concentration can fall below the legal limit before the blood or urine test is administered. There are absolutely no indications that Petitioner had such an intention in this case. There is no evidence of any other attempts to delay. Petitioner was cooperative and honest with Officer [REDACTED]. See *Mossak v. Comm'r of Pub. Safety*, No. A03-1582, 2004 WL 1192089, at *3 (Minn. App. June 1, 2004). (Evidence of other dishonest conduct during the interaction with police can bolster the conclusion that a claimed physical inability is insincere.) If Petitioner had been informed of the .089 PBT result, she could have been motivated to delay testing so that there would be time for her alcohol concentration to fall slightly. The record does not establish whether or not Officer [REDACTED] informed Petitioner of the PBT result. Even if he had, this concern is lessened because Petitioner struggled to provide an adequate breath sample for the PBT, before she had any indication what her precise alcohol concentration level was.

Because Petitioner has met her burden of establishing physical inability to test, the revocation of her driving privileges for test refusal must be rescinded.