

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

[REDACTED]

Petitioner,

v.

Commissioner of Public Safety,

Respondent.

Court File No. [REDACTED]

The Honorable Bridget A. Sullivan

Case Type: Implied Consent

Order Rescinding Revocation

The above-entitled matter came before the Honorable Bridget A. Sullivan, Judge of District Court, on November 10, 2016, for a judicial review hearing on the revocation of [REDACTED] driver's license. Jay S. Adkins, Esq., appeared on behalf of [REDACTED] ("Petitioner"). Lindsay N. Lavoie, Assistant Attorney General, appeared on behalf of the Commissioner of Public Safety ("Respondent").

Based upon all the files, records, and proceedings, the Court makes the following:

ORDER

The revocation of Petitioner's driving privileges is **RESCINDED**. A memorandum of law in support of this Order is forthcoming.

BY THE COURT:

Bridget A. Sullivan

Dated: December 29, 2016

Bridget A. Sullivan
Judge of District Court

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

Court File No. [REDACTED]

The Honorable Bridget A. Sullivan

Case Type: Implied Consent

Petitioner,

V.

Commissioner of Public Safety,

Respondent.

**Memorandum of Law
in Support of
Order Rescinding Revocation**

The above-entitled matter came before the Honorable Bridget A. Sullivan, Judge of District Court, on November 10, 2016, for a judicial review hearing on the revocation of [REDACTED] [REDACTED] driver's license. Jay S. Adkins, Esq., appeared on behalf of [REDACTED] [REDACTED] ("Petitioner"). Lindsay N. Lavoie, Assistant Attorney General, appeared on behalf of the Commissioner of Public Safety ("Respondent").

The issues identified by the parties are: (1) whether the breath test results were reliable, accurate, and valid; and (2) whether Petitioner [REDACTED] blood alcohol concentration was at or above 0.16. At the hearing, Respondent called Crystal Police Officer Mason Barland to testify. Plaintiff called on Erik Johnson, a forensic scientist with the Minnesota Bureau of Criminal Apprehension for expert testimony. Two exhibits were entered into evidence—Exhibit 1: Petitioner [REDACTED] DataMaster DMT test results, and Exhibit 2: the BCA's DMT Certificate of Calibration of the device used on Petitioner [REDACTED]. At the close of the hearing, parties agreed to submit written memoranda, and the final submission was received by the Court on December 15, 2016. The Court then took this matter under advisement.

Based upon all the files, records, and proceedings herein, the Court makes the following:

FINDINGS OF FACTS

On March 9, 2016, Petitioner ██████ consented to a breath test after being arrested for driving while intoxicated (“DWI”). (Pet’r’s Mem. of Law, 5.) Crystal Police Officer Mason Barland, a certified DataMaster DMT-G with Fuel-Cell Option (“DMT”) Operator, administered a breath test. Petitioner ██████ gave two breath samples, as required. The first sample registered a blood alcohol concentration of 0.185 and the second registered 0.192, resulting in an average of 0.1885 blood alcohol concentration (“BAC”) level. The state practice is to drop the numbers after the first two significant numbers, and thus Petitioner’s results were adjusted to a 0.18 BAC. The proper observation period was held before administering the test. Additionally, Respondent testified that the DMT machine was calibrated using an internal diagnostic check, air blank, and control sample tests, all in the proper sequence. All results were within accepted limits. Based on the 0.1885 result, Petitioner ██████ was charged with a DWI and his driver’s license was revoked. (Pet’r’s Mem. of Law, 6.) Petitioner argues that the results are not accurate and requests the Court rescind the revocation, or, in the alternative, rescind the revocation at the 0.16 level, but sustain it at the 0.08 level.

Petitioner argues that DMT results can only be used if accurately reported, and the issue at hand is that the BCA does not know ██████ true alcohol concentration—the test results are merely estimates, subject to the uncertainty of measurement, margin of error and the machine’s unknown level of bias. Petitioner called Erik Johnson of the Bureau of Criminal Apprehension’s (“BCA”) Breath Alcohol Calibration Laboratory to testify.

Mr. Johnson explained that the BCA measures the bias of DataMaster devices. “Bias” in this context is a term used to express how consistently a DMT machine reads higher or lower

than a person's true alcohol concentration level. (Rep't's Mem. of Law in Supp. of Sustaining Revocation, 3.) Mr. Johnson testified that the BCA only calculates bias at the 0.08 level or lower, meaning bias at the 0.16 level is not measured. According to Exhibit 2, the DMT Certificate of Calibration, the bias percentage at the 0.08 level is 0.08 percent, and the bias at the 0.157 level is 0.56 percent, demonstrating a significant increase in the bias as the alcohol concentration level approaches 0.16. Furthermore, the BCA's data concerning uncertainty measurements is based on fleet-wide data rather than measurements of its individual DMT machines.

If the bias at the 0.157 level is 0.56, and the bias increases as it approaches the 0.16 level, that means at the 0.18 level, the bias is even higher. No testimony was offered as to how high the bias of the test can go at ever increasing levels of BAC. Indeed, the bias of the specific DMT machine that was used to measure Petitioner [REDACTED] alcohol concentration level is unknown. The Respondent provided no testimony or test results to establish this missing fact, and Mr. Johnson testified that he has not tested the bias of the DMT machine used for the Petitioner's test.

However, Mr. Johnson testified that he has not observed a bias over 0.005 percent, and that based on the calculation of uncertainty of the two subject samples, it is more than likely that the Petitioner's test result is over 0.16. (Resp't's Mem. of Law in Supp. of Sustaining Revocation, 3.)

ANALYSIS

The implied consent law authorizes the Commissioner of Public Safety to revoke a person's driver's license if the officer certifies that there was probable cause to believe the person was driving while under the influence of alcohol, and if test results indicate an alcohol

concentration of 0.08 or greater, and the testing method used was valid and reliable and the test results were accurately evaluated. Minn. Stat. § 169A.53, subd. 4, 10 (2014). The implied consent law authorizes a longer period of revocation if the person's blood alcohol concentration is twice the legal limit. Minn. Stat. § 169A.54.

The Respondent and the Petitioner's arguments are ships passing in the night.

Respondent argues that, while there is always a margin of error and uncertainty of measurement in any measurement, Mr. Johnson of the BCA testified that Petitioner's BAC was tested within a 99% confidence level, and therefore, "[T]his means that the likelihood that the result is over .16 is almost a guarantee." Respondent argues that the Court would have to speculate that it is more likely than not that the test result was below 0.16. But Respondent ignores the Petitioner's argument, the central focus of which is the bias of the specific DMT used to test Petitioner's BAC, the increasingly higher bias at higher blood alcohol concentrations, and not the margin of error. In short, Petitioner's argument is that it is unknown what the bias is for the DMT device used for his test, but what is known is that it was at least as high as 0.56 percent and almost certainly higher given Petitioner's high BCA.

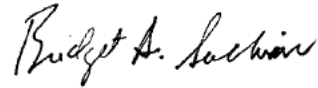
Petitioner's BAC readings averaged 0.1885. From Mr. Johnson's testimony, we know that the bias at 0.157 BAC is 0.56. That is significant bias. The bias at 0.16 is not known, but again, from Mr. Johnson's testimony, what is known is that bias increases 700% between BAC of 0.08 and 0.157. In addition, the bias at 0.16 could be much higher than the significant bias at 0.157. We do not know if the bias function is a curve or if it is linear. If it is a curve, perhaps it dramatically increases after BAC of 0.08, or of 0.10, or of 0.12, or of 0.15. Perhaps it does not. This data was not presented to the court. Simply put, the court cannot conclude that it is likelier than not that it does or does not, and therefore, the court cannot conclude that the State has

shown that it was more likely than not that his BAC was 0.16 or above. Accordingly, the revocation of Petitioner's license is rescinded at the 0.16 BAC level. It is sustained at the 0.08 level.

ORDER

For the reasons set forth above, the revocation of Petitioner's driving privileges is REVOKED.

BY THE COURT:

A handwritten signature in cursive script, reading "Bridget A. Sullivan".

Dated: January 4, 2017

Bridget A. Sullivan
Judge of District Court