State of Minnesota
Dakota County

District Court
First Judicial District
Court File Number: [redacted]
Case Type: Implied Consent

Notice of Filing of Order

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[redacted] **vs Commissioner of Public Safety**

You are notified that on August 02, 2011, the following was filed:

Order-Other
Order Rescinding Revocation

Dated: August 12, 2011

[redacted] M. Renn
Court Administrator
Dakota County District Court
One Mendota Road West, Suite 140
West St. Paul MN 55118
651-554-6200

cc: Commissioner of Public Safety

A true and correct copy of this notice has been served by mail upon the parties herein at the last known address of each, pursuant to Minnesota Rules of Civil Procedure, Rule 77.04.

STATE OF MINNESOTA
COUNTY OF DAKOTA

DISTRICT COURT
FIRST JUDICIAL DISTRICT

File No [redacted]

[redacted]

Petitioner,

vs.

ORDER RESCINDING REVOCATION

Commissioner of Public Safety,

Respondent

The above-entitled matter came before the Honorable Jerome B. Abrams, Judge of District Court, on June 21, 2011, at the Dakota County Courthouse, West St Paul, Minnesota Charles Ramsay, Attorney at Law, appeared as counsel for and on behalf of the Petitioner. Kristi Nielsen, Assistant Attorney General, appeared as counsel for and on behalf of the Commissioner of Public Safety.

This matter comes before the Court on the Petitioner's challenge to the Commissioner of Public Safety's decision to revoke her driver's license. Specifically, the Petitioner asserts she was unlawfully seized and there was no probable cause to believe she was driving, operating, or in physical control of a motor vehicle while impaired and there was no basis to lawfully arrest her for driving while impaired.[1] See Minn. Stat. § 169A.53, subds. 3(b)(1) (probable cause) and (2) (lawful arrest). The Commissioner opposes the Petitioner's challenge and asserts the Petitioner was lawfully seized and was under the influence of cocaine and alcohol while in driving, operating, or in possession of a motor vehicle.

[1] At the beginning of the hearing, the Petitioner also alleged vindication of her right to counsel was a possible issue. However, this issue was not fully developed during the testimony and is a moot point in light of the Court's decision.

The Court offered the parties the opportunity to submit post-hearing briefing on the issues raised in this matter The Court has received briefs from both parties. The last of these submissions was due on July 29, 2011 and the matter was taken under advisement at that time

Based upon the proceedings, this Court makes the following:

ORDER

1. The revocation of the Petitioner's driver's license is hereby rescinded.

2. The attached memorandum is incorporated herein by reference.

Dated: 8-2-11

BY THE COURT:

Jerome B. Abrams
Judge of District Court

MEMORANDUM

The events which gave rise to the revocation of the Petitioner's driver's license occurred on July 10, 2011 at approximately 6:45 p.m. Sergeant [redacted] of the Mendota Heights Police Department received a phone call from a Sergeant [redacted] who is also with the same department. Sergeant [redacted] who was off duty at the time, observed the Petitioner acting strangely in Bogey's bar. Sergeant [redacted] responded to the scene with Officer Chad [redacted].

Upon arriving at the scene, Sergeant [redacted] briefly spoke with Sergeant [redacted] outside the bar. Sergeant [redacted] provided a brief description of the Petitioner and reiterated that she was acting unusual. Sergeant [redacted] indicated to Sergeant [redacted] he "could not miss her." Sergeant [redacted] also initially testified that Sergeant [redacted] told him the Petitioner had only been present at the bar a short time. Upon cross examination, however, Sergeant [redacted] admitted that was an assumption he made based upon the nature and tone of the conversation. Sergeant [redacted] did not in fact know when the Petitioner arrived at the bar.

Sergeant [redacted] entered Boegey's and immediately identified the Petitioner sitting at the bar. Sergeant [redacted] described the Petitioner's appearance as disheveled. She was sweating, swaying, and talking to herself. Concerned for the Petitioner's welfare, Sergeant [redacted] approached her and engaged in conversation. The Petitioner was very fidgety and failed to track the conversation. Sergeant [redacted] described the Petitioner's behavior as they conversed as bizarre and uncooperative. He requested the Petitioner's identification to which the Petitioner complied. The Petitioner had one half full glass of wine in front of her and kept saying she only had one

and a half glasses of wine. The Petitioner also indicated she had driven to the bar and provided Sergeant [redacted] with her insurance card. As the conversation in the bar started to go in circles the group drew more attention so Sergeant [redacted] asked the Petitioner to step outside with him. The Petitioner initially resisted by indicating she needed to pay her bar tab. Sergeant [redacted] allowed her to pay her bill and then they stepped outside.

The Petitioner was still acting very jittery as Sergeant [redacted] continued to speak with her outside. She would reach into different pockets and move her hands in front of and behind her on a continual basis. Sergeant [redacted] repeatedly asked her to stop. When she would not, he began to fear for his safety and the safety of Officer [redacted] who was also outside, so he asked the Petitioner if he could pat her down. The Petitioner said that was okay and began pulling items out of her pockets and placing them on the trunk of the officers' squad car. Sergeant [redacted] asked her to stop putting items on the car when an item dropped to the ground and the Petitioner kicked backwards. Officer [redacted] retrieved the drop item, which appeared to be a crack pipe, while Sergeant [redacted] avoided the Petitioner's kick and pinned her up against the squad car. Officer [redacted] showed the pipe to Sergeant [redacted] and placed it on the trunk of the squad car. The Petitioner lunged at the pipe, trying to bat it onto the ground, and a small rock of crack cocaine was dropped by the Petitioner onto the squad car. The Petitioner also knocked the rock of crack cocaine onto the ground on her second attempt before she was finally subdued.

In response to the discovery of the crack pipe and crack cocaine, Sergeant [redacted] placed the Petitioner under arrest for possession of an illegal substance and

drug paraphernalia. Once the Petitioner was under arrest, Sergeant [redacted] also conducted an investigation into how she was impaired. He asked her to submit to a preliminary breath test. The Petitioner agreed. The result of the preliminary breath test was 0 05. Sergeant [redacted] also requested the Petitioner agree to provide a sample for a drug screen but the Petitioner refused after being read the implied consent advisory.

Trooper Ricardo [redacted] a drug recognition expert with the Minnesota State Highway Patrol, was also called to assist in the investigation. Trooper [redacted] determined through observations of the Petitioner that she was likely under the influence of a stimulant, such as cocaine or methamphetamine, and a depressant, such as alcohol. Despite these conclusions, Trooper [redacted] was unable to pinpoint the time when the Petitioner had ingested the alcohol or the drugs; although the effects of the stimulant which were observed would likely only last a couple of hours. Trooper [redacted] also could not eliminate a potential drug interaction between the alcohol and the Petitioner's prescription medication as a cause of her behavior. He did, however, indicate it was unlikely the Petitioner's behavior would be a consequence of an ordinarily prescribed does of any medication.

Petitioner Lawfully Seized

The Minnesota and United States Constitutions prohibit unreasonable searches and seizures U S. Const. amend. IV; Minn. Const., art 1, § 10. A seizure occurs when, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he or she was neither free to disregard the police questions nor free to terminate the encounter." State v. Cripps, 533 N.W.2d 388, 391 (Minn.

1995). See also Florida v. Bostick, 501 U.S. 429, 434-37 (1991). Generally, "a reasonable person would not believe that he or she has been seized when an officer merely approaches that person in a public place and begins to ask questions." Id. (citing Matter of Welfare of E.D.J., 502 N.W.2d 779, 782 (Minn. 1993)). A seizure also "does not result when a person, due to some 'moral or instinctive pressure to cooperate,' complies with a request to search because the other person to the encounter is a police officer." State v. Harris, 590 N.W.2d 90, 99 (Minn. 1999) (quoting E.D.J., 502 N.W.2d at 781 (quotation omitted)). Officers may also search someone's person in response to a medical emergency. State v. Auman, 386 N.W.2d 818,820-1 (Minn. App. 1986), rev. denied (Minn. 1986).

A request for identification coupled with some additional intrusion, such as questioning, amounts to a seizure for which police must be able to articulate a reasonable suspicion. Cripps, 533 N.W.2d at 391 (holding request for identification coupled with inquiry into age for alcohol consumption purposes a seizure); State v. Pfannenstein, 525 N.W.2d 587, 589 (Minn. App. 1994), rev. denied (Minn. Mar. 14, 1995) (performing "totality of the circumstances" analysis to determine how intrusive request for identification was); State v. Hickman, 491 N.W.2d 673, 675 (Minn. App. 1992) (citing Delaware v. Prouse, 440 U.S. 648, 663 (1979)) (requiring "articulable and reasonable suspicion that a motorist is unlicensed, that the vehicle is unregistered, or that the vehicle or any of its occupants are involved in illegal activity" before license can be requested); State v. Day, 461 N.W.2d 404, 407, 407 n. 1 (Minn. App. 1990), rev. denied (Minn. Dec. 20, 1990) (holding summoning to squad car to provide identification and respond to questioning a seizure but expressly avoiding deciding whether simple

request for identification amounts to seizure); Cobb v. Commissioner of Public Safety, 410 N.W.2d 902, 902 (Minn. App. 1987) (requiring "particularized and objective basis for the minimal intrusion" of requesting identification). However, "[t]he brief seizure of a person for investigatory purposes is not unreasonable if an officer has a 'particular and objective basis for suspecting the particular person [seized] of criminal activity.'" Harris, 590 N.W.2d at 99 (quoting State v. Johnson, 444 N.W.2d 824, 825 (Minn. 1989)) (internal quotation omitted). See also State v. Pike, 551 N.W.2d 919, 921-22 (Minn. 1996) (citing Terry v. Ohio, 392 U.S. 1, 21-22 (1968)) (requiring an articulable basis of suspecting person stopped is engaging in a crime). In forming a particular and objective basis for an investigatory seizure, an officer "may draw inferences and deductions that might elude an untrained person." Cripps, 533 N.W.2d at 391, quoted by Harris, 590 N.W.2d at 99. A mere hunch, whim, caprice, or idle curiosity, however, will not justify a seizure. Harris, 590 N.W.2d at 99 (citing Johnson, 444 N.W.2d at 825-26) (hunch); Pike, 551, N.W.2d at 921-22 (citing Terry, 392 U.S. at 21-22) (whim, caprice, or idle curiosity). Once a seizure is initiated, it may be continued only as long as the police officer continues to have a reasonable and articulable suspicion of criminal activity. State v. Wiegand, 645 N.W.2d 125, 135 (Minn. 2002), cited by State v. Fort, 660 N.W.2d 415, 418-19 (Minn. 2003) and State v. Pleas, 329 N.W.2d 329, 332-34 (Minn. 1983).

In this case, Sergeant [redacted] and Officer [redacted] originally responded to the scene because Sergeant [redacted] had reported the Petitioner was acting strangely. Upon arriving at the bar, the officers approached the Petitioner to ascertain whether something was wrong with her health thereby causing the unusual behavior. Sergeant [redacted] further contact with the Petitioner led him to believe something was not right

because the Petitioner was engaging in bizarre behavior. Sergeant [redacted] asked the Petitioner for identification to determine who she was and to avoid creating a greater disturbance and to limit the risk to other bar patrons, eventually decided to conduct further investigation outside This initial seizure was justified as a proper response to a possible emergency situation and did not violate the Petitioner's right to be free from unreasonable searches and seizures.

Furthermore, it was not until the Petitioner continued to reach inside her pockets after being repeatedly instructed not to, that Sergeant [redacted] decided to search the Petitioner. The Petitioner's unstable demeanor, erratic behavior, an unwillingness to refrain from reaching into her pockets presented a possible risk of danger to the officers Sergeant [redacted] decision to pat search or "frisk" the Petitioner to ensure she did not have any weapons on her which could injure the officers was objectively reasonable.

As part of the events surrounding the "frisk," the officers observed the Petitioner attempt to dispose of a cocaine pipe and cocaine. Upon making this observation, the officers had a reasonable articulable suspicion the Petitioner had and was committing a crime This allowed them to detain the Petitioner for further investigation and eventually contributed to the Petitioner's arrest. For all of these reasons, the seizure of the Petitioner was not unconstitutional.

No Probable Cause to believe Petitioner Operating Motor Vehicle while Impaired

The Commissioner of Public Safety is directed to revoke the driver's license of a person "[u]pon certification by [a] peace officer that there existed probable cause to believe [a] person had been driving, operating, or in physical control of a motor vehicle in violation of [Minnesota Statues] section 169A 20 (driving while impaired)[] and that

the person refused to submit to a test . . ." Minn. Stat. § 169A.52, subd. 3(a).

Minnesota Statute § 169A.20 provides that:

> It is a crime for any person to drive, operate, or be in physical control of any motor vehicle . . . when:
> (1) the person is under the influence of alcohol;
> (2) the person is under the influence of a controlled substance; [or]
> [3] the person is under the influence of a combination of any two or more of the elements named in clauses (1) to [2].

Sergeant [redacted] formulated a suspicion that the Petitioner had been operating a motor vehicle while under the influence of a controlled substance. As a consequence, the Petitioner was ultimately arrested for driving while impaired in addition to charges of drug possession and the Commissioner revoked her license.

A driver may seek review from a district court judge regarding whether "the peace officer ha[d] probable cause to believe the person was driving, operating, or in physical control of a motor vehicle [and] the person [was] lawfully placed under arrest" for doing so. Minn. Stat. § 169A.53, subd. (b)(1)-(2). In this case, these issues are intimately intertwined and revolve around whether there is a temporal nexus between the Petitioner's consumption of alcohol and possible consumption of a controlled substance and her driving. If there is no probable cause to believe the Petitioner was under the influence of alcohol or a controlled substance at the time she was driving, then the arrest for driving while under the influence would also be unlawful.[2]

Probable cause exists when "the totality of the facts and circumstances known would lead a reasonable officer to entertain an honest and strong suspicion that the suspect has committed a crime." State v. Koppi, 798 N.W.2d 358, 363 (Minn. 2011) (quotation and citation omitted). This is an objective inquiry into the reasonableness of

[2] This is not to say the Petitioner could not have been lawfully placed under arrest for another criminal act; such as possession of a controlled substance or drug paraphernalia.

the officer's suspicion. Id. at 362-3. Probable cause for driving while impaired will exist only when there is a reason to believe a person consumed alcohol or a controlled substance prior to operating or being in physical control of a motor vehicle. Delong v. Commissioner of Public Safety, 386 N.W.2d 296, 298-9 (Minn. App. 1986) (citing Hasbrook v. Commissioner of Public Safety, 374 N.W.2d 592, 594 (Minn. App. 1985) Foster v. Commissioner of Public Safety, 381 N.W.2d 512, 515 (Minn. App. 1986) (citing Hasbrook, 374 N.W.2d at 594; Dietrich v. Commissioner of Public Safety, 363 N.W.2d 801, 803 (Minn. App. 1985).

There is no question that the Petitioner drover herself to the bar. Although the Petitioner was not observed driving a vehicle, "[a]n officer need not personally observe the driving or operating of the vehicle." Delong, 386 N.W.2d at 298 (citing State v. Harris, 295 Minn. 38, 42, 202 N.W.2d 878, 880-81 (1972)). They may rely upon their experience and the totality of the circumstances to conclude someone had been driving or operating a vehicle. Id. The Petitioner readily admitted to Sergeant [redacted] that she had driven her vehicle to the bar. The Petitioner also provided proof of her vehicle insurance and identified herself with a driver's license. At some point, Sergeant [redacted] also apparently confirmed the Petitioner's vehicle was in fact at the bar Sergeant [redacted] had probable cause to believe the Petitioner had driven her motor vehicle to the bar.

There is also no question that the Petitioner had consumed alcohol prior to speaking with Sergeant [redacted]. When Sergeant [redacted] approached the Petitioner, she had a half filled glass of wine in front of her. The reasonable and probable conclusion from this observation was that the Petitioner had already consumed half of

the glass. In response to questioning, the Petitioner also admitted to having consumed approximately one and a half glasses of wine. Furthermore, a preliminary breath test indicated the Petitioner had an alcohol concentration of 0.05. Although the Petitioner obviously had consumed alcohol, all of the information available to Sergeant [redacted] suggested this consumption had occurred after the Petitioner drove. It therefore cannot provide a basis for probable cause to believe she was driving while impaired. In this case, the totality of the circumstances does not establish a time frame which provides probable cause to believe the Petitioner was operating her motor vehicle while impaired. The timing of the necessary events was reversed from that required by the statute.

Although the consumption of the wine cannot formulate the basis for probable cause, the Commissioner argues there was probable cause to believe the Petitioner was under the influence of a controlled substance when she drove to the bar. Trooper [redacted] special training and experience as a drug recognition expert combined with the other circumstances was sufficient to allow him to objectively develop a reasonable and strong suspicion about whether the Petitioner had consumed a controlled substance. Such a conclusion was rendered more difficult because Trooper [redacted] had to differentiate between multiple causes for the Petitioner's behavior; the effects of the alcohol, Petitioner's prescription medication, Petitioner's apparent mental illness, and possible signs of consumption of a controlled substance. Teasing out behavior which is strongly indicative of consumption of a controlled substance and not one of these other possible conflating causes was likely a difficult task without an actual biological test. It was assisted, however, by the fact that cocaine and drug paraphernalia associated with use of the cocaine was found on the Petitioner's person. As a consequence, the

officers involved were reasonably able to develop a strong suspicion the Petitioner was under the influence of cocaine at the time of her arrest.

Although there was probable cause to believe the Petitioner was under the influence of cocaine at the time of her arrest, there remains a temporal issue regarding when the Petitioner consumed the controlled substance. The Commissioner argues the officers could formulate an objectively reasonable and strong suspicion that the Petitioner had consumed the cocaine before she drove to the bar. The information available to the officers, however, was not sufficient to objectively reach such a conclusion. The information they had was sufficient to provide them with a hunch that the Petitioner had done so, but not probable cause.

The officers lacked any information which could provide a reference point regarding when the cocaine was consumed in relation to when the Petitioner drove. Trooper [redacted] testified the Petitioner had consumed a controlled substance of either cocaine or methamphetamine within a couple of hours prior to her arrest. He could not, however, narrow this timeframe down. No other information was available regarding when the Petitioner consumed the cocaine.

The officers also lacked information about how long the Petitioner had been at the bar. Sergeant [redacted] was originally under the impression that the Petitioner had only arrived at the bar just prior to his arrival. On cross examination, however, he admitted this was an assumption he made abased upon his conversation with Sergeant [redacted] who did not in fact know when the Petitioner had arrived at the bar. The officers also knew the Petitioner had been at the bar at least long enough to order, be served, and consume one and a half glasses of wine before their arrival. Furthermore,

Sergeant [redacted] only called the police to notify them of a problem when he noticed the Petitioner begin acting strangely. How long it had been since the Petitioner was driving or in physical control of a motor vehicle and when or where she may have consumed a controlled substance were all unknown. Without some information narrowing down the relative timing between when the Petitioner drove and when she consumed the cocaine, it is impossible to reasonably conclude she was driving while under the influence of the controlled substance. Under these facts it is as equally plausible that she consumed the cocaine after her arrival at bar as it is she did so prior to. Based upon this record, the Petitioner's request for rescission of her license revocation must be granted.