

A08-440

STATE OF MINNESOTA  
IN COURT OF APPEALS

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Travis Jonathan Schulz,

Appellant,

Vs.

Commissioner of Public Safety,

Respondent.

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APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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**LEGAL ISSUES**

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1. Was Appellant's Right To An Independent Test Vindicated?

## STATEMENT OF THE CASE

On June 9, 2007, Appellant was arrested in Sherburne County, State of Minnesota, for suspicion of driving while impaired. After being read the Minnesota Implied Consent Advisory, Appellant agreed to submit to a urine test. The test revealed an alcohol concentration of over .08, and Appellant's driver's license was subsequently revoked.

On August 14, 2007, Appellant filed a Petition for Hearing to challenge the revocation of his driver's license.

A hearing was held on January 18, 2008. At said hearing, Appellant challenged the admissibility of the urine test, arguing that his right to an independent test was not vindicated.

On January 23, 2008, The Honorable Robert B. Varco, Judge of District Court, sustained Appellant's driver's license revocation.

The Appellant filed a timely appeal.

## STATEMENT OF THE FACTS

On June 9, 2007, Appellant was operating a motor vehicle in Sherburne County. After being observed driving without a front license plate and weaving within its lane, Officer Todd Erickson stopped Appellant. After observing signs of intoxication, Appellant was arrested for driving while impaired.

While at the scene of the arrest, Appellant was read the Minnesota Implied Consent Advisory. After declining to speak with an attorney, Appellant agreed to submit to a urine test.

After reading Appellant the advisory, Appellant requested a blood test. See: Transcript P. 7. The Appellant asked at least twice, if not three times, for a blood test. The Appellant was never given a telephone or telephone books to obtain the blood test he requested.

## ARGUMENT

### I. Standard of Review

The trial court's findings of fact are entitled to the same weight as the verdict of a jury, and cannot be reversed if the court could reasonably have made those findings.

State v. Gardin, 86 N.W.2d 711 (Minn.1957). Conclusions of law can be overturned if it is demonstrated that the trial court erroneously applied the law to the facts. Berge v. Commissioner of Public Safety, 374 N.W.2d 730 (Minn.1985).

### II. Appellant's Right to an Independent Test Was Not Vindicated

Under Minnesota law, a driver has the right to have, "...someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer...The failure or inability to obtain an additional test or tests by a person does not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer". Minn.Stat. §169A.51, subd. 7(b); State v. Shifflet, 556 N.W.2d 224 (Minn.App.1996). An officer prevents a driver from obtaining an additional test if a telephone is not made available to the driver for purposes of obtaining the requested test. Schmidt v. Commissioner of Public Safety, 486 N.W.2d 473 (Minn.App.1992). Moreover, an officer is not required to advise a driver of the right to an independent test. Ruffenach v. Commissioner of Public Safety, 528 N.W.2d 254 (Minn.App.1995).

This case is not like Ruffenach, wherein the driver never requested a test, thereby negating any responsibility on the part of the arresting officer. Rather, in this case,

Appellant on three occasions requested a blood test. The arresting officer did absolutely nothing to vindicate Appellant's right to obtain the requested test. He did not allow Appellant to use a telephone, he did not tell Appellant he could use a telephone, and he did not relay to the jail staff that Appellant wanted a blood test. The following exchange took place on cross examination:

Q. Officer, when you initially asked him for a test, he said that he would like to do a blood test, is that correct?

A. When I read him the implied consent the first time?

Q. Yes.

A. Yes, sir.

Transcript P. 7. After a few more questions, the following took place:

Q. Then he asked, well, why couldn't he do a blood test because that's what he had on the last DWI; is that correct?

A. I don't know if he said that. **But he asked for a blood test.**

Transcript P. 7, *Emphasis Added*. After a few more questions, the following took place:

Q. During all this discussion, he asked you, at least as I understand your testimony, he asked you at least three times about a blood test, is that correct?

A. He asked on at the implied consent reading. I think he asked it maybe again during the implied consent reading. And then again it wasn't I would say it was a complaint about not being offered a blood test at the jail.

Q. All right. Now, at any time did you tell him that he could get his own test after you were done?

A. Did I offer him or state to him that he could go get another test?

Q. Yes.

A. No.

Q. Did you at any time tell the jailers or anybody that this kid wants another test, to help him out?

A. He didn't want another test, so, no, I didn't offer that information to him.

Q. He wanted a blood test, is that correct?

A. He wanted a blood test or mentioned that at the time I read him the implied consent initially.

Q. So, why didn't you feel it was appropriate to tell him that after the procedure was over with he could have a blood test, he'd have to get it on his own?

A. We're not required to advise an arrestee of their right or attempt to arrange an additional test.

As the record makes clear, Appellant asked three times for a blood test.

Furthermore, as the officer testified, Appellant complained that he wasn't getting a blood test. It would be entirely unfair to require a driver to say the magic words "alternative test" or "additional test" before the statutory mandate is triggered. No reasonable analysis of case law and statutory mandate would require a driver to state those words. All that is required is that the officer be placed on notice that a driver wants a test different to that which is being officially requested. In this case, Appellant placed the officer on notice.

The officer should have given access to a telephone. At the very least, the officer should have informed Appellant that he could obtain the test Appellant was requesting after the implied consent process had concluded. The officer also should have informed

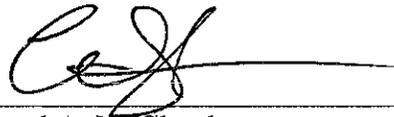
the jail staff that Appellant was requesting a blood test. If a driver requests a test that is different than that which is officially being offered, allowing the arresting officer to simply ignore the driver would defeat the intent and purpose of the statutory mandate that a driver be given the opportunity to obtain an additional test.

### CONCLUSION

Based on the record in this case, Appellant's right to an additional test was not vindicated. As a result, the District Court's Order sustaining Appellant's driver's license revocation must be reversed.

Dated: \_\_\_\_\_

5/9/08



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