STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1151

State of Minnesota,
Plaintiff,

vs.

Brent Ross Wicklund,
Defendant.

Filed May 27, 2008
Appeal dismissed
Toussaint, Chief Judge

Hennepin County District Court
File No. 06056716

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for plaintiff)

Faison T. Sessoms, Jr., 840 TriTech Office Center, 331 Second Avenue South, Minneapolis, MN 55401 (for defendant)

Considered and decided by Toussaint, Chief Judge; Halbrooks, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Chief Judge

Defendant Brent Ross Wicklund was charged with two counts of criminal vehicular homicide after the truck he was driving lost its brakes, jumped a center median, and struck a motorcyclist, who died 20 days later. Police obtained a urine sample from Wicklund that revealed Wicklund had both amphetamine and methamphetamine in his system at the time of the accident.

After denying Wicklund's motion to suppress the urine sample, the district court answered the following question in the affirmative and then certified it to this court:

> In the course of an investigation for vehicular homicide, may a law enforcement officer obtain a non-consensual blood or urine sample from a defendant when there [are] no indicia of intoxication exhibited by the defendant?

Because this question is not important or doubtful and because Wicklund has not shown sufficient reason for this court to grant discretionary review, we dismiss this appeal.

D E C I S I O N

The state argues that this appeal should be dismissed because the question certified by the district court is not "important or doubtful." The state asserts that the certified question has been answered by prior supreme court cases, that the district court failed to rule on alternative grounds raised by the state to allow admission of this evidence, and that the issue simply involves whether probable cause existed under the particular facts of this case.

A district court may certify questions of law to this court, if "in the opinion of the judge [the question] is so important or doubtful as to require a decision of the Court of Appeals." Minn. R. Crim. P. 28.03. But certification should not be used to circumvent a defendant's lack of a right to appeal a pretrial order. *State v. Kvale*, 352 N.W.2d 137, 140 (Minn. App. 1984).

Certified questions are questions of law that we review de novo. *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 344 (Minn. 2005). "A question that is doubtful need not be one of first impression, but it should be one on which there is substantial ground for a difference of opinion." *Id.* A question is important if it has "statewide impact" and if "many litigants await" its answer. *Id.*

The district court here determined that this case presents an important and doubtful question regarding application of two supreme court decisions, *State v. Speak*, 339 N.W.2d 741 (Minn. 1983), and *State v. Lee*, 585 N.W.2d 378 (Minn. 1998). In both cases, the supreme court concluded that in order to obtain a nonconsensual blood or breath sample from a defendant, police need to have "probable cause to believe that the crime of criminal negligence has been committed and probable cause to believe not that the defendant is intoxicated but that administration of the [blood alcohol] test will result in the discovery of evidence that will aid the prosecution of that crime." *Lee*, 585 N.W.2d at 381-82 (quoting *Speak*, 339 N.W.2d at 745). The court specifically rejected a rule that would require police to observe commonly known physical indicia of intoxication. *Lee*, 585 N.W.2d at 382.

As support for its decision to certify the question presented here, the district court explained: "Despite this broad rule as announced [in *Lee* and *Speak*], in both cases the Court analyzed a number of factors, while not traditional indicia of intoxication, could lead an officer to conclude that the defendant was under the influence of alcohol or a controlled substance." The district court concluded that this case presented a slightly different issue of law because the officer "testified that he observed no factors which could indicate that the Defendant was under the influence of alcohol or a controlled substance."

But the issue is "whether there was objective probable cause, not whether the officer[] subjectively felt that [he] had probable cause." *Speak*, 339 N.W.2d at 745. It is not indicia of intoxication or of being under the influence of a controlled substance that dictates whether probable cause exists: in *Speak*, the court concluded that the officers, "whether or not they knew it, had objective evidence of inattention," while in *Lee*, the evidence suggested negligent driving on the part of the defendant or the "sort of inattentive driving" and behavior on the part of the defendant that would be consistent with being under the influence. *Speak*, 339 N.W.2d at 745; *Lee*, 585 N.W.2d at 383.

Similarly, here, the issue is whether the particular facts and evidence provided the officer with probable cause to believe that a crime of criminal negligence was committed and probable cause to believe that a urine or blood test would result in evidence that would aid in the investigation. This issue involves application of the legal standards set out in *Lee* and *Speak* to the specific facts of this case; while this issue may appear important or doubtful to Wicklund, it is not an issue of statewide importance nor is it a

doubtful issue except in the confines of the facts of this case. Given the standards set out in *Speak* and *Lee*, we conclude that the question presented here was improperly certified.

This court may grant discretionary review of an improperly certified question when a case has been briefed, the record is adequately developed, and the evidence in question is critical to the prosecution's case. *See, e.g.*, *State v. Childs*, 269 N.W.2d 25, 26 n.1 (Minn. 1978); *see also State v. Metz*, 422 N.W.2d 754, 756 (Minn. App. 1988). But Wicklund has failed to present this court with sufficient reason to grant discretionary review. A defendant whose suppression motion is denied may expedite appellate review by waiving a jury trial, stipulating to the facts, and appealing from any judgment of conviction. *State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980). Wicklund has not shown why he could not proceed under *Lothenbach*. Nor has he shown that the district court has so misapplied the law or abused its discretion that this court should extend discretionary review. *See State v. Jordan*, 426 N.W.2d 495, 496-97 (Minn. App. 1988). We therefore decline to extend discretionary review in this case.

Appeal dismissed.