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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0533**

State of Minnesota,
Appellant,

vs.

Debbie Kay Kummer,
Respondent.

**Filed October 7, 2008
Appeal dismissed
Ross, Judge**

Washington County District Court
File No. KO-07-5044

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Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Harten, Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

This case arises from a district court order requiring the state to disclose the source code of the Intoxilyzer 5000EN, which police used to determine respondent Debbie Kay Kummer's alcohol concentration after she was arrested on suspicion of driving a boat while intoxicated. Because the state fails to meet the jurisdictional requirement of proving that the district court's order has a critical impact on the prosecution, we dismiss the interlocutory appeal.

FACTS

Washington County deputies Gribble and Thao were patrolling the St. Croix River at 8:00 p.m. on June 20, 2007, when they noticed a boat idling on the river. The boat lacked a required validation decal. The deputies approached and spoke with Debbie Kay Kummer, the boat's operator. Deputy Gribble smelled the odor of an alcoholic beverage and noticed that Kummer seemed somewhat excited, her eyes were bloodshot, and her face was flushed. Kummer's speech was slurred and she appeared to be confused. Gribble asked Kummer whether she had had anything to drink, and she told him that she had consumed one cocktail.

Gribble asked Kummer to perform several field sobriety tests, which she completed with mixed success. She recited the alphabet, but she had difficulty counting from 67 to 76 and performing a hand-dexterity test. She agreed to take a preliminary breath test. After twice performing the preliminary breath test, one indicating her alcohol concentration to be .18 and the second indicating a concentration of .17, Gribble arrested

Kummer for boating while intoxicated. At the Washington County jail, Gribble read Kummer an implied consent advisory and asked if she would take a breath test. She agreed, and a correctional officer administered the Intoxilyzer 5000EN test to Kummer. The Intoxilyzer determined that Kummer's alcohol concentration was .18, but Kummer maintained that she had consumed only one drink. The state charged Kummer with two counts of third-degree driving while impaired. Minn. Stat. § 169A.20, subds. 1(1); 1(5) (2006).

Kummer made a pretrial discovery motion requesting the court to require the state to disclose the computer source code and other specifications of the Intoxilyzer 5000EN. The district court opined that prosecuting the charge without disclosing the requested information may violate Kummer's constitutional rights of confrontation and due process. It reasoned that Kummer must be permitted to defend against the weight of the test results because the state would certainly offer the results at trial as direct evidence of Kummer's guilt. The court concluded that the source code might reveal information related to guilt or innocence, particularly because Kummer's alcohol concentration was found by the Intoxilyzer to be .18, which is inconsistent with her representation that she consumed only one alcoholic drink. The court granted Kummer's motion and ordered the state to disclose the source code for the Intoxilyzer 5000EN. The state requested the source code information from the manufacturer of the Intoxilyzer, CMI, Inc. CMI responded by sending the state the procedures to procure a controlled viewing of its source code, which requires a protective order, a nondisclosure agreement, and payment

for the printing and processing of the source code. The state then filed an interlocutory appeal from the district court's discovery order.

After the state filed its appeal, this court published a decision holding that a defendant must prove that the source code for the Intoxilyzer 5000EN is relevant to his guilt or innocence before a district court may order disclosure of the source code. *State v. Underdahl*, 749 N.W.2d 117 (Minn. App. 2008). The state did not file a reply brief, and neither party filed a citation of supplemental authority under Minn. R. Civ. App. P. 128.05, regarding the *Underdahl* decision.

DECISION

The state challenges the district court's pretrial discovery order requiring it to disclose the source code of the Intoxilyzer 5000EN to Debbie Kay Kummer. The rules of criminal procedure permit the prosecution to appeal a pretrial order in limited circumstances. Minn. R. Crim. P. 28.04. To prevail on appeal of a pretrial order, the state must clearly and unequivocally show that the order is erroneous and will critically impact the state's ability to prosecute the case. *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). The requirement that the state prove critical impact applies to pretrial discovery orders. *See State v. Rambahal*, 751 N.W.2d 84, 89 (Minn. 2008) (noting that the supreme court has not adopted the court of appeals' rule exempting the state from showing critical impact in discovery-related pretrial appeals, viewing the rule to be at odds with the supreme court's prior cases and Minn. R. Crim. P. 28.04). Critical impact is a threshold issue. *McLeod*, 705 N.W.2d at 784. The state makes a single reference to critical impact in its brief: "The State is unable to obtain the source code and disclose it to

the Respondent and therefore is unable to comply with the discovery order. Suppression of the test results would have a critical impact on the State's case."

A demanding standard, critical impact is also a "fair and workable rule." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995). The supreme court expounded on the critical impact standard after the Minnesota Attorney General challenged the standard as impossible to meet. *State v. Joon Kyu Kim*, 398 N.W.2d 544, 549 (Minn. 1987). The court explained that critical impact could be shown in cases where suppressing evidence completely destroys the prosecution's case, as well as in cases where the suppression significantly reduces the likelihood of a successful prosecution. *Id.* at 551. The court disagreed with the state that the critical impact test virtually forecloses any pretrial appeals by the state. *Id.* at 550. And it noted that in reviewing state's appeals, it makes a preliminary determination of whether the state has met the critical impact test. *Id.* "Had we not made such a preliminary determination, we would not have decided those appeals but would have dismissed them." *Id.*

This court followed that guidance in *State v. Jones*, 518 N.W.2d 67, 70 (Minn. App. 1994), when we dismissed the state's appeal because it was based on future anticipated evidentiary rulings. As in *Jones*, here the state appears to base its appeal on its expectation that the state's failure to comply with the discovery order would result in an order suppressing the Intoxilyzer test results. While this prediction may prove accurate, the anticipation of the state's failure to comply with the order and the anticipation of the hypothetical adverse ruling that may result is too attenuated to demonstrate actual critical impact. *See id.* (holding that the state cannot premise critical

impact on a series of evidentiary rulings that may or may not follow a ruling denying the state's motion to exclude evidence). Kummer correctly points out that critical impact must be established before we will decide that the pretrial discovery order was made in error. *State v. Scott*, 584 N.W.2d 412, 416 (Minn. 1998). Because the state does not meet the threshold requirement, we dismiss the appeal. *See Jones*, 518 N.W.2d at 71.

Appeal dismissed.