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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-254

State of Minnesota,
Respondent,

vs.

Brent Ross Wicklund,
Appellant.

Filed January 26, 2010
Reversed
Ross, Judge

Hennepin County District Court
File No. 27-CR-06-056716

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Deborah Lange Russell, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Faison T. Sessoms, Jr., Minneapolis, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Huspeni, 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

ROSS, Judge

We must decide whether evidence that a driver negligently caused an accident resulting in serious bodily injury alone establishes probable cause to test the driver's body fluids for alcohol or drugs. In an unvarying line of cases beginning with *Schmerber*, the United States Supreme Court, the Minnesota Supreme Court, and this court have held that before a police officer may take a driver's blood, breath, or urine specimen for chemical-content testing without a warrant, the officer must have an objective basis to believe that the test will prove that the driver has consumed alcohol or used drugs.

Appellant Brent Wicklund caused a fatal multi-vehicle accident after the brakes on his box truck failed and he attempted to stop by driving into a raised concrete median that separated the opposing lanes of a multi-lane highway. Wicklund's truck did not stop; it jumped the median, entered oncoming traffic, and struck and fatally injured a motorcyclist. Police arrived and, "[b]ased on the nature of this accident" and nothing more, compelled Wicklund to provide a urine sample for drug testing. The urine tested positive for amphetamine and methamphetamine, and Wicklund was charged with and convicted of criminal vehicular operation.

Wicklund appeals from the district court's denial of his motion to suppress the urine-test results, arguing that police lacked probable cause to require him to submit to the test. Under the force of the exclusionary rule, sometimes wrongdoers escape the full penalty of their destructive actions. Because Wicklund's allegedly negligent decision to

use the raised median to stop the truck does not alone create a reasonable belief that urine testing would reveal alcohol or drug use, police lacked probable cause to conduct the test and the test results therefore should not have been admitted as evidence. Police are restrained by constitutional precedent, and we must reverse.

FACTS

Brent Wicklund was driving his box truck eastbound on County Road 6 in Plymouth when he approached the Annapolis Lane intersection in the left-turn lane. There was a car in front of Wicklund waiting to turn left. Wicklund attempted to stop, but his front brakes locked and the truck began to skid. Thinking it would slow the truck, he drove into the raised concrete median that separated the eastbound and westbound lanes. But the truck instead rolled onto and across the median and entered the westbound lanes, where it collided with a motorcycle.

Officer David Anderson arrived and parked his squad car in the westbound lanes to keep traffic from the immediate accident scene. He observed the motorcyclist lying in the street, bleeding and apparently seriously injured. After other officers took over first aid, Officer Anderson approached Wicklund and briefly questioned him about the accident. Wicklund described the accident and stated that he had been having brake problems before the accident. The officer observed no sign of intoxication or drug use. He put Wicklund in the back seat of his squad car while his investigation continued.

Several minutes later, Officer Anderson told Wicklund that he intended to test him for alcohol and drug use. The officer later testified that it is his department's policy to test a driver whenever there is the possibility of criminal vehicular homicide. Officer

Anderson therefore drove Wicklund to the police station, where Wicklund submitted to a preliminary breath test. That test indicated no alcohol, and Wicklund then provided the officer with a urine sample on the officer's request and was released.

The motorcyclist died from his injuries, and Wicklund's urine tested positive for amphetamine and methamphetamine. The state charged Wicklund with two counts of criminal vehicular homicide under Minnesota Statutes section 609.21, subdivision 1(1) and 1(6). The statute provides in pertinent part,

> A person is guilty of criminal vehicular homicide . . . if the person causes the death of a human being . . . as a result of operating a motor vehicle:
>
> (1) in a grossly negligent manner; [or]
>
> . . .
>
> (6) in a negligent manner while any amount of a controlled substance listed in schedule I or II . . . is present in the person's body . . . .

Minn. Stat. § 609.21, subd. 1 (2004). Amphetamine and methamphetamine are schedule II controlled substances. Minn. Stat. § 152.02, subd. 3(3) (2004).

Wicklund moved the district court to suppress the urine test results, arguing that Officer Anderson lacked probable cause to direct him to provide the urine for testing. The district court held that the results were admissible because Officer Anderson had probable cause to believe that the crime of criminal vehicular operation had occurred and that obtaining a blood or urine sample would aid in the prosecution of that crime. The district court then certified the suppression issue to this court on interlocutory appeal. This court emphasized that certification is not a substitute for an appealable pretrial order. We therefore dismissed the appeal, holding that the legal question was not of statewide

importance and was not doubtful except possibly within the factual framework of the case.

After a bench trial based on stipulated facts, the district court found Wicklund guilty of driving negligently with a controlled substance in his body but not guilty of grossly negligent driving. Wicklund appeals his conviction by challenging the district court's refusal to suppress evidence of the urine test results.

D E C I S I O N

Wicklund argues that there was no probable cause to support the testing of his body fluids for evidence of alcohol or drug use. He asks this court to reverse his conviction and order that the results of the urine test be suppressed. Because the facts are undisputed, we review the district court's ruling on Wicklund's suppression motion de novo. *See State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). We independently determine from undisputed facts whether, as a matter of law, the district court erred by admitting the evidence. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

The United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches generally are unreasonable unless they fall within a recognized exception. *State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009). Taking a urine sample from a person is a search. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616−18, 109 S. Ct. 1402, 1412−14 (1989). Officer Anderson's obtaining Wicklund's urine sample without a

warrant was therefore a search that was unreasonable unless a recognized exception to the warrant requirement applies.[1]

The state can justify the warrantless testing of a driver's body fluids if the officer who took the sample had probable cause to believe both (1) that the driver committed the crime of criminal vehicular operation and (2) that the administration of the test would aid in the prosecution of that crime. *State v. Lee*, 585 N.W.2d 378, 381 (Minn. 1998) (citing *State v. Speak*, 339 N.W.2d 741, 745 (Minn. 1983)). We interpret the second prong narrowly and hold that the state's showing is insufficient.

The supreme court in *Speak* and *Lee* described the probable-cause standard for administering a blood-alcohol test as "probable cause to believe that administration of [the test] will result in the discovery of evidence relevant in the prosecution of a crime." *Lee*, 585 N.W.2d at 382; *accord Speak*, 339 N.W.2d at 745 (stating that the standard for administering a breath test is "probable cause to believe . . . that administration of the [test] will result in the discovery of evidence that will aid in the prosecution of [criminal vehicular operation]"). Looking only to this language apart from the restraint of other search-and-seizure caselaw, police might mistakenly conclude that they may test any driver involved in a bodily-injury traffic accident, because one might reason that in *every* case testing would be "relevant" and "aid in the prosecution" by either ruling out guilt or ruling in guilt. Because we do not interpret the *Speak-Lee* standard as overturning or

[1] We highlight that the state has not argued that Wicklund provided his sample by consent, and we therefore do not consider the validity of the urine test under that theory.

eroding the traditional probable-cause standard for police searches, however, we must also apply the traditional standard here.

Probable cause to search exists when, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotation omitted); *see also Schmerber v. California*, 384 U.S. 757, 770, 86 S. Ct. 1826, 1835 (1966) ("In the absence of a clear indication that [evidence of a crime] will be found, . . . officers [must] suffer the risk that such evidence may disappear [without] an immediate search."); *Lee*, 585 N.W.2d at 382 (stating that probable cause to search exists "where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found") (quotation omitted).

Applying this standard in a criminal-vehicular-operation case, the only evidence of a crime police could expect from searching a defendant's body fluids is the presence of drugs or alcohol. *See* Minn. Stat. § 609.21, subd. 1 (defining several versions of criminal vehicular operation that involve drug or alcohol use). The facts and circumstances known to the police to justify a warrantless extraction of body fluids, therefore, must support a reasonable belief that testing will disclose some amount of alcohol or drugs in the defendant's body. That amount need not be at a level of intoxication, *Lee*, 585 N.W.2d at 381–82, but the circumstances must be sufficient to indicate the likelihood of a positive test result.

Consistent with this understanding, the cases invariably hold that probable cause for testing exists only when police encounter circumstances that suggest that the driver

has consumed alcohol or drugs. *See, e.g.*, *Schmerber*, 384 U.S. at 768−69, 86 S. Ct. at 1835 (police smelled liquor on defendant's breath and noticed his "bloodshot, watery, sort of . . . glassy" eyes); *Lee*, 585 N.W.2d at 379−80 (police knew that defendant left a party where alcohol was served, tipped his motorcycle, righted it, and then drove off a known curve); *Speak*, 339 N.W.2d at 743 (defendant smelled of alcohol, slurred his speech, and admitted that he had been drinking); *State v. Hegstrom*, 543 N.W.2d 698, 700 (Minn. App. 1996) (defendant seemed distracted and drowsy with highly constricted pupils), *review denied* (Minn. Apr. 16, 1996).

By contrast, Officer Anderson was aware of no circumstances indicating even non-intoxicating levels of chemical consumption. He noticed no alcoholic odor or signs of physical impairment, and he was aware of no facts suggesting that Wicklund had recent access to drugs or alcohol. The preliminary breath test indicated no alcohol use. This does not end the inquiry, because in *Speak* and *Lee* the supreme court declined to hold that police *must* observe customary physical indicia of intoxication before testing a driver's body fluids. *Lee*, 585 N.W.2d at 382; *Speak*, 339 N.W.2d at 745. Those courts observed that "ingestion of alcohol in amounts less than those needed to cause gross outward symptoms of intoxication can have a substantial adverse effect on a driver's judgment." *Speak*, 339 N.W.2d at 745; *Lee*, 585 N.W.2d at 382. They indicate that evidence of extreme misjudgment alone might provide the probable-cause basis for testing a driver for drug or alcohol use.

But applying the *Speak* and *Lee* standard, we hold that this is not a case in which a defendant's driving is so irrational that it supports probable cause to believe that he has

consumed a mind-altering substance. The state argues that Wicklund's decision to try and stop his truck using the raised edge of the median was so irrational that it provided Officer Anderson with probable cause to test him for alcohol and drug use. But all Officer Anderson knew when he required Wicklund to provide a urine sample was that Wicklund had been having trouble with his brakes, which ultimately failed, leading Wicklund to make a split-second decision either to ram the vehicle stopped ahead in his lane or to attempt to slow his truck and avoid a collision by some other means. Wicklund decided to try to slow the truck using friction against the median. Although in hindsight we clearly see that this decision was flawed because it averted one crash only to cause another, it is not the kind of extremely irrational choice that demonstrates that alcohol or a controlled substance affected Wicklund's judgment or driving ability. Had Wicklund failed to recognize the stopped car, or to apply his brakes, or to take evasive action to avoid a collision with the car in front of him, he might have demonstrated the kind of inattentiveness or gross misjudgment that supports involuntary testing without the observable indicia of intoxication. At worst, his late response to traffic conditions created a dilemma leading to his deadly split-second decision.

At oral argument, the state pointed to only two factors that allegedly suggested the use of drugs or alcohol: Wicklund's driving his truck with faulty brakes and his swerving into a median that he should have known would not stop the truck. We observe a third factor: Wicklund, knowing that his brakes were imperfect, drove too fast to stop for a common traffic event. But these are familiar factors in accidents that are precipitated only by inattentiveness or poor decision-making apart from drug and alcohol use, and,

even in combination, they do not support a reasonable belief that Wicklund likely had alcohol or drugs in his system. The district court concluded that these facts did not rise even to the level of gross negligence, and we are left with a similar impression. If they do not indicate even gross negligence, they also do not constitute the kind of exceptional misjudgment that establishes probable cause that Wicklund had consumed chemicals.

That Wicklund was driving with faulty brakes and inadvertently drove into oncoming traffic while attempting to use friction against the median to avoid rear-ending another vehicle did not support a reasonable belief that he had alcohol or drugs in his system. Officer Anderson therefore lacked probable cause to believe that testing Wicklund's body fluids would uncover evidence of a crime, and his taking the urine sample was a warrantless search without an applicable exception. Although the state learned in retrospect that Wicklund in fact had consumed a controlled substance, we must consider only the circumstances known to Officer Anderson. On those circumstances, the district court was bound to exclude Wicklund's urine test results because the test was unconstitutional. The district court erred by denying Wicklund's motion to suppress the test results.

Reversed.