

# MINNESOTA

# POLICE BRIEFS

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## PART I

## RECENT MINNESOTA DECISIONS

### Arrest, Search & Seizure

#### Automobile Exception

A robbery by a man with a knife was reported to have occurred in an identified vehicle. Following a traffic stop of the vehicle, officers searched the vehicle and found a knife. The Court finds the officer had probable cause to believe the knife was in the car and the automobile exception to the warrant requirement justified a warrantless

search. The Court affirms the defendant's conviction, rejecting an ineffective assistance of counsel claim for failure to raise an issue about the reasonableness of the search. State v. Hersi, A10-0931 (Ct. App. Unpubl. 04/05/11)

#### Questioning About a Gun

Following a routine traffic stop, the trooper noticed that the defendant was shaking in a very noticeable manner. The defendant claimed that he had a lifelong medical condition that had never been diagnosed. A trainee trooper went back to the defendant's car and asked if there were any weapons or drugs in the car, whereupon defendant acknowledged that he had a handgun next to him. The Court finds that the questioning did not improperly expand the stop, commenting "we conclude that the single question posed to appellant did not expand the scope of the stop". State v. Brandon Smith, A10-0916 (Ct. App. Unpubl. 04/05/11)

#### Odor of Marijuana

Affirming a denial of the defendant's motion to suppress evidence, the Court finds that when an officer smelled the odor of marijuana in the defendant's car, that this provided probable cause in and of itself to search the vehicle under the automobile exception. State v.

McCurtis, A10-0754 (Ct. App. Unpubl. 04/05/11)

#### Stop Near Shooting

Defendant was found approximately one block away from the scene of a shooting and matched the race, height, gender and apparel of the suspect. Defendant was sweating excessively, which was inconsistent with his claim that he was on a casual bike ride. Affirming the District Court, the Court finds that the officers reasonably suspected the defendant of criminal activity and affirms a denial of the defendant's motion to dismiss. State v. Williams, A10-1298 (Ct. App. Unpubl. 04/12/11)

#### Collective Knowledge of Police

An officer observed two felony drug sales the same day of the stop in this case involving the occupants of the vehicle stopped. One of the sales occurred in the same vehicle immediately preceding the stop. The officer making these observations radioed a request to stop the vehicle. The Court finds that the collective knowledge of the police provided a reasonable articulable suspicion that the occupants of the vehicle were engaged in criminal activity. The stop and identification of the defendant were valid. State v. Aaron, A10-0682 (Ct. App. Unpubl. 04/19/11)

### **Misdemeanor Arrest**

The Court finds that police had a proper basis to arrest the defendant following an indecent conduct complaint where the officer found the defendant in a park wearing only a fishnet G-string and a jacket. The Court rejected the defendant's contention that since the officer admitted the defendant was covered and not indecent when the officer approached, that no offense was committed in the presence of the officer and a citation should have been issued instead of an arrest. State v. Hanson, A10-1627 (Ct. App. Unpubl. 04/26/11)

### **Confessions**

#### **Non-Custodial Interview at Station**

Two days after a partial interview of the defendant at a police station where the defendant terminated the interview and went home, police executed a search warrant on the home where the defendant was located in Sacramento, California. The defendant, the only individual home at the time, was handcuffed and placed in the kitchen for 15 minutes. Defendant was later permitted to walk around unrestrained and agreed to be interviewed. Defendant was driven to the police station unhandcuffed and was told that he was not under arrest. Defendant confessed to the murder and was allowed to leave the station without hindrance. The Court affirms the District Court and finds that the defendant's statement was given in a non-custodial setting, and it was not error to admit the statement in the absence of a Miranda warning. State v. Vue, A10-0453 (S. Ct. 04/27/11)

#### **Non-Custodial - Handcuffing**

Police officers executed a no-knock-entry search warrant at the defendant's home. When police entered, they handcuffed the occupants including the defendant, but told him he was not under arrest. Affirming the District Court, the Court finds that the defendant was

not in custody for purposes of determining whether a Miranda warning was required. The Court finds that defendant failed to show prejudice resulting from defense counsel's failure to move to suppress evidence discovered from statements made by the defendant. State v. Buchanan, A09-1890 (Ct. App. Unpubl. 04/12/11)

### **DWI**

#### **Peace Officer - Lower Sioux**

The Supreme Court finds that the Lower Sioux Indian community did not comply with Minn. Stat. § 626.91 regarding required liability insurance limits, and therefore the police officer working for the Lower Sioux tribe did not meet the definition of "peace officer" and therefore did not have the authority to request that the defendant take a test. The defendant's conviction for refusal to submit to testing is reversed. State v. Hester, A09-1784 (S. Ct. 04/27/11)

#### **Urine Test - Alternative Not Offered**

When defendant, arrested for DWI, was asked to submit a urine sample, she asked if it had to be a urine test. The officer never mentioned the right to an alternative test and the defendant submitted to a urine test. The Court reverses the District Court's ruling suppressing the test results and finds the officer did not have to mention the right to an alternative test unless the defendant refused to submit the urine test. State v. McGee, A10-2019 (Ct. App. Unpubl. 04/26/11)

### **Evidence**

#### **Evidence of Acquitted Crime**

Defendant was acquitted of two charges of second degree murder of one person but the jury was deadlocked on charges of attempted second degree murder and assault of another person as a part of the same series of events. The State appealed from a District Court order

precluding the State from mentioning the stabbing that related to the acquittal. The Court holds that the District Court order was too broad by precluding any reference to the stabbing at all, thus removing the entire factual context and background of the charged offense. The Court remands and indicates that the District Court may have to carefully review in advance through an offer of proof and motions in limine to determine what facts about the stabbing may be admitted without presenting evidence that the defendant committed the act for which he was acquitted. State v. Pass, A10-1134 (Ct. App. Unpubl. 04/05/11)

#### **Relationship Evidence and Social Services Findings**

The Court finds that certain relationship evidence of a prior domestic assault committed by the defendant was properly admitted, although testimony from numerous witnesses about the prior conduct became unnecessarily cumulative. The Court finds harmless error. The Court also finds no error in excluding evidence of the social services agency finding that maltreatment was not substantiated, noting there are differences between physical abuse for maltreatment purposes and criminal purposes. State v. Birts, A10-0322 (Ct. App. Unpubl. 04/12/11)

#### **Proving Venue - Evidence Disclosure**

The Court finds that various references to the location of the incident as being in the City of Hibbing were sufficient to prove the venue in St. Louis County. The state's failure to disclose certain evidence discovered during jury deliberations until a month after the conclusion of the trial did not warrant a reversal of the conviction because the defendant was not prejudiced by the failure to disclose. State v. Wenneson, A10-0675 (Ct. App. Unpubl. 04/12/11)

#### **Failure to Preserve 911 Recording**

Affirming the defendant's conviction for DWI where defendant

was asserting that she was not driving, the Court finds that there is no evidence that the failure to preserve the 911 recording was in bad faith and therefore there was no due process violation for failure to preserve it. Also, continuances did not prejudice the defendant's ability to present a defense where even though a witness moved out of state, it appeared the witness would not have been available anyway and would have been impeached by an earlier statement that the defendant was in fact driving. State v. Markowitz, A10-0617 (Ct. App. Unpubl. 04/19/11)

#### **Prior Police Contacts**

Affirming the defendant's convictions of criminal sexual conduct and kidnapping, the Court finds that some references by a police officer that defendant had prior contacts with police were brief and innocuous and, particularly given the strong evidence in the case, would not have affected the jurors' opinions of the case. State v. Sewell, A10-0083 (Ct. App. Unpubl. 04/19/11)

#### **Victim Drug Use**

In defendant's trial for 3<sup>rd</sup> degree criminal sexual conduct and domestic assault by strangulation, the Court did not allow the defendant to testify that he observed the victim smoking crack immediately before the incident. The Court finds that this limitation was error but harmless in light of other evidence of the victim's use of cocaine within two days of the incident and her admission of using alcohol on the night of the incident. State v. Roberts, A10-0790 (Ct. App. Unpubl. 04/26/11)

#### **Ammunition - Harmless Error**

In defendant's trial for possession of a firearm by an ineligible person, the Court finds that the admission of evidence of spent casings live ammunition that was not connected with the weapon the defendant was charged with possessing was not relevant and was improperly admitted. However, the Court finds that the error was harmless in light of eyewitness

testimony and corroborating evidence. State v. Drusch, A10-0987 (Ct. App. Unpubl. 04/26/11)

## ***Sentencing***

#### **Severity Level Determination**

Affirming the defendant's sentence on his conviction of aiding and abetting an offender after the fact for the benefit of a gang, the Court finds no error assigning a severity level 10 to the offense, finding the reasons offered by the District Court to be supported by the record. State v. Solorzano-O'Brien, A10-1514 (Ct. App. Unpubl. 04/05/11)

#### **Upward Durational Departure**

The Court affirms the defendant's upward departure in sentence based upon the two aggravating factors of a particularly vulnerable victim and that the defendant acted with particular cruelty in committing the offense of criminal sexual conduct in the first degree and related charges. State v. Thomas, A10-0974 (Ct. App. Unpubl. 04/05/11)

#### **Restitution Hearing - Counsel**

The Court reverses a restitution award over \$80,000.00 that was imposed at a hearing after the defendant's sentencing and where defendant appeared without counsel. The Court finds that the record failed to show a waiver of counsel for the hearing. State v. Sabby, A10-0825 (Ct. App. Unpubl. 04/12/11)

#### **\$25,000 Fine Upheld**

The Court finds no error in the District Court fining the defendant \$25,000.00 upon his conviction for third degree controlled substance crime. The Court finds that the fine is not unconstitutionally excessive. State v. Buckner, A10-0836 (Ct. App. Unpubl. 04/19/11)

#### **Restitution Must Be Considered**

The District Court in a case involving criminal vehicular homicide declined to order restitution to the family of the deceased victim based on a conclusion that a civil action would be a more profitable

route. The Court of Appeals reverses, finding that a District Court is precluded from basing a decision to deny restitution based on a prospective civil action. State v. Wagner, A10-1805 (Ct. App. Unpubl. 04/19/11)

#### **Probation Violation Reversed**

Defendant pled guilty to and was placed on probation for using a minor in a sexual performance. The District Court ordered the defendant to "comply with any appropriate sex offender treatment that is directed by probation". Defendant complied with direction to be evaluated by Project Pathfinder, but did not have the \$3,000 per month to enter into the program. The Court reverses the defendant's probation violation, concluding that the record lacked the requisite clear and convincing evidence of a probation violation because the defendant was never directed to actually enter into the treatment program. State v. Crosby, A10-1460 (Ct. App. Unpubl. 04/26/11)

#### **Stay of Adjudication - Traffic Offense**

Defendant was stopped for running a red light and asserted that he was called to take his wife to the hospital because she was in labor. Based upon the defense explanation, the Court found the defendant guilty but stayed adjudication. The Court of Appeals reverses, finding that the District Court abused its discretion in ordering a stay of adjudication over the prosecutor's objection. State v. Sweat, Jr., 10-2001 (Ct. App. Unpubl. 04/26/11)

## ***Miscellaneous***

#### **Substantial Bodily Harm**

The Court finds that where the victim sustained a deep laceration to the scalp 5 ½ centimeters in length and a second, parallel laceration 2 centimeters in length, which injury caused large amounts of bleeding and required 11 staples, that the District Court reasonably concluded that the

victim suffered substantial bodily harm. The adjudication of guilt for 3<sup>rd</sup> degree assault is affirmed. In the Matter of W.O., A10-1535 (Ct. App. Unpubl. 04/05/11)

#### **Post Conviction Relief Denied**

In three separate cases, pro se appeals from denials of post-conviction petitions were rejected by the Court. Kadel v. State, A10-1408, Docken v. State, A10-0732 and Weiss v. State, A10-0896 (Ct. App. Unpubl. 04/05/11)

#### **State Appeal - Factual Determination**

Dismissing the State's appeal from a pretrial dismissal of charges against the defendant for lack of probable cause, the Court finds that the District Court decision finding that there were not enough facts to support a racketeering charge was a dismissal based on a factual determination and therefore was not appealable by the State. The Court notes that virtually all cases revolve around principles of law in some sense, but finds that there was no underlying legal determination at issue in this case. State v. Martin, A10-1691 (Ct. App. Unpubl. 04/05/11)

#### **Selling Protected Wild Animals**

Reversing defendant's conviction for attempting to sell protected wild animals in violation of the game and fish laws, the Court finds that the legislature has not clearly stated that the conduct at issue in this case, using equipment tagged for infested waters only used to harvest minnows in non-infested waters is a crime. State v. Barsness, A10-1001 (Ct. App. 04/12/11)

#### **Great Bodily Harm**

Affirming the defendant's conviction of first degree assault, the Court finds that evidence that the defendant assaulted his girlfriend resulting in a highly visible scar on her cheek constituted serious permanent disfigurement and therefore meets the definition of great bodily harm. State v. Breaux, A10-0677 (Ct. App. Unpubl. 04/12/11)

#### **Expungement - Stay of Adjudication**

The Court reverses a District Court order to the extent that it expunges records held by executive branch agencies where the defendant pled guilty to felony receipt of stolen property and received a stay of adjudication. State v. L.K.A., A10-1521 (Ct. App. Unpubl. 04/12/11)

#### **Drive-By Shooting**

The Court reverses the defendant's conviction for drive-by shootings (the defendant did not appeal other convictions), finding that the evidence did not prove beyond a reasonable doubt that the defendant fired a gun "having just exited from a motor vehicle", given the intervening time between the driving and the shooting. State v. Brown, A10-0672 (Ct. App. 04/19/11)

#### **Closing Courtroom - Unanimous Verdict**

Defendant appealed his conviction of second degree assault based upon his sister and a young child being removed from the courtroom during the State's closing argument. The Court remands for the District Court to comply with the four part test set forth in Waller v. Georgia concerning procedures to be followed when a Court excludes individuals from the courtroom. There was no error in failing to give the jury a special instruction on a unanimous verdict as to which of his acts constituted the assault- putting the small gun to the victim's head in the bedroom or "methodically loading" the gun on the sofa two or three hours later. It was not necessary that the jury agree on which specific act constituted the assault as long as all the acts took place as part of a single behavioral incident, which the Court concluded it did. State v. Infante, A10-0692 Ct. App. 04/19/11)

#### **Mixture of Drugs**

Applying the "bong water" case, State v. Peck, 773 NW 2d 768 (Minn. 2009) case, the Court finds that where drugs found in a plastic

bag and partially mixed with a beverage in a bottle, that the entire mixture including all the liquid can be measured in determining weight for the drug charge. The Court reverses the District Court's dismissal of the second degree possession charge, commenting that they do not indicate agreement with the prosecutor's decision to charge a second degree offense based upon this case, but indicate that under separation of powers, that they cannot control the prosecutor's charging authority. State v. Polister, A10-1953 (Ct. App. Unpubl. 04/19/11)

#### **Drug Conspiracy Conviction Reversed**

Defendant was found riding in another car when police pulled the vehicle over and eventually discovered methamphetamines. The Court reverses the defendant's conviction of conspiracy to commit a first degree controlled substance crime, finding the evidence of defendant's connection to any possible sale of meth was insufficient. State v. Storey, A10-0802 (Ct. App. Unpubl. 04/19/11)

#### **Crime for Benefit of Gang**

Affirming defendant's conviction of a crime committed for the benefit of a gang (first degree murder while committing a drive by shooting), the Court finds sufficient evidence that the defendant acted with the intent of furthering primary activities of the gang when the drive by shooting was committed. State v. Vue, A10-0453 (S. Ct. 04/27/11)

#### **Voluntary Intoxication - Assault**

In defendant's trial for 5<sup>th</sup> degree and 2<sup>nd</sup> degree assault based on intentionally inflicting harm and also intending to place another in fear of harm, the defendant asserted an intoxication defense. The District Court gave the intoxication defense only for the intent to cause fear version of the assault. The defendant was acquitted of the assaults based upon fear but was convicted of the other assault charges. Reversing the defendant's convictions, the Court

finds that the crime of assault based upon the intentional infliction of bodily harm is a specific intent crime and the District Court erred in failing to give the voluntary intoxication defense on that theory of the assault. State v. Fleck, A10-0681 (Ct. App. 04/26/11)

#### **Alford Plea Upheld**

The Court affirms a denial of the defendant's post-conviction appeal challenging his 2001 conviction of terroristic threats. The Court finds that when the defendant acknowledged that the State could prove beyond a reasonable doubt that he committed the offense, that this was a sufficient factual basis for the plea. Baccam v. State, A10-1240 (Ct. App. Unpubl. 04/26/11)

#### **Jury Deliberation Guide**

In defendant's trial for taking or driving a motor vehicle worth more than a \$1,000 without consent, the jury was provided a publication in the jury room entitled "Behind Closed Doors - A Guide to Jury Deliberations". Without comment on the appropriateness of the use of such a pamphlet, the Court of Appeals finds that the use of the pamphlet was not a "structural error" and affirms the defendant's conviction. State v. McGhee, A10-0881 (Ct. App. Unpubl. 04/26/11)

#### **Racketeering - Mortgage Fraud**

Defendant intended that in his trial for racketeering, identity theft and other charges that the District Court should have given a specific instruction to the jury on the characteristics of an "enterprise". The Court finds that since the "enterprises" involved were legal entities and not associations-in-fact, that any error in failing to give such instruction as in encouraged by the Supreme Court in State v. Huynh, 519 N.W. 2d 191, was harmless error. The Court rejects the defendant's other claims of error and affirms the defendant's convictions. State v. Maxwell, A09-2018 (Ct. App. Unpubl. 04/26/11)

#### **Waiver of Right to Testify**

Defendant represented himself on charges of violating an order for protection by calling his ex-wife in violation of an order for protection. The Court finds that the defendant waived his right to testify even though the District Court did not explicitly advise the defendant of the right to testify. The Court notes that a defendant representing himself is held to the same standards as an attorney and presumes that any decision not to testify was made voluntarily and intelligently. State v. Gunderson, A10-0835 (Ct. App. Unpubl. 04/26/11)

## **PART II UNITED STATES SUPREME COURT DECISIONS**

#### **AEDPA Limitations on Relief**

Reversing the 9<sup>th</sup> Circuit Court of Appeals, the Supreme Court finds that the defendant was not entitled to federal habeas relief because he was unable to show that the decisions of the California Supreme Court affirming the defendant's death sentence were unreasonable. The Court states that the review of this matter is limited only to the record that was before the California Supreme Court and cannot consider additional evidence submitted later. Justices Soto Mayor, Ginsburg and Kagan dissented in part from the majority opinion of Justice Thomas. Cullen v. Pinholster, #09-1088 (U.S. S. Ct. 04/04/11)

#### **Death Penalty Instructions**

In a per curiam opinion, the Court reverses the 6<sup>th</sup> Circuit and finds the jury instructions given during the penalty phase of the defendant's capital murder trial did not present a false choice of acquittal versus death penalty. The instructions were appropriate, thus reinstating the death penalty sentence. Bobby v. Mitts, #10-1000, (U.S. S. Ct. 05/02/11)

#### **DISCLAIMER**

*We have used our best efforts to provide accurate information herein. However, no warranty of accuracy is made. Independent research or legal consultation is recommended.*