IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 23-0356

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONALD AARON HESSER,

Defendant and Appellant.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Elizabeth A. Best, Presiding

APPEARANCES:

AUSTIN KNUDSEN
Montana Attorney General
TAMMY K PLUBELL
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401
Phone: 406-444-2026
tplubell@mt.gov

JOSHUA RACKI
Cascade County Attorney
121 4th Street North, Suite A
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

NATHAN J. HOINES
JAMES OLSEN
Hoines Law Office, P.C.
401 3rd Ave. N.
Great Falls, MT 59403

ATTORNEYS FOR DEFENDANT
AND APPELLANT

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STATEMENT OF THE ISSUES

1. Whether the district court properly considered the totality of the circumstances, which included an unexplained motorcycle crash and Appellant's history of three prior DUI convictions, to determine that there was probable cause to issue an investigative subpoena to obtain a sample of Appellant's blood that had been drawn for medical treatment.

2. Alternatively, did the district court correctly determine that the investigating trooper was authorized to direct that a blood sample be drawn prior to obtaining an investigative subpoena, based on the undisputed fact that Appellant was the driver in a motor vehicle accident that resulted in serious bodily injury.

STATEMENT OF THE CASE

On July 30, 2021, the State charged Appellant, Donald Aaron Hesser, Jr. (Hesser), by Information with one count felony DUI (4th offense), in violation of Mont. Code Ann. § 61-8-401(1)(a) (2019).[1] (Doc. 3.)

On September 14, 2022, Hesser filed a motion to suppress and dismiss. (Doc. 51.) Hesser argued there was no probable cause for the issuance of an investigative subpoena to obtain a blood test that hospital medical staff had drawn

[1] Since recodified as Mont. Code Ann. § 61-8-1008(1)(a).

while treating Hesser for injuries he sustained in a motor vehicle accident. (*Id.* at 1.)

On January 23, 2023, the district court held a hearing on the motion. (Doc. 70). Montana State Trooper Daniel Arnold testified for the State, and the district court took the matter under advisement. (*Id.*) On January 24, 2023, the district court denied Hesser's motion to suppress and dismiss. (Doc. 71.) The court scheduled trial for May 2, 2023. (Doc. 77.)

On April 28, 2023, Hesser entered into a plea agreement with the State. (Doc. 97). As part of the agreement, Hesser maintained his right to appeal the pretrial ruling on his motion to suppress and dismiss. (*Id.* at 4.) On May 22, 2023, Hesser pled guilty of felony DUI. (Doc. 106.)

The district court sentenced Hesser to the Montana Department of Corrections (DOC) for a period of 13 months for placement in WATCh, followed by a 2-year sentence to the DOC with 2 years suspended, to run consecutively to the WATCh placement and to any other sentence. (Doc. 113 at 1.) The execution of this sentence was stayed pending the outcome of this appeal. (*Id.* at 2.)

STATEMENT OF THE FACTS

On May 4, 2021, Trooper Arnold was dispatched to a motorcycle wreck in Cascade County. (Doc. 71 at 1.) First responders found the male driver in the ditch,

and he was helicoptered to Benefis Health Systems for emergency treatment. (*Id.* at 1-2.)

The weather on that day was unremarkable and sunny, and the section of road where the accident took place was paved, clear, dry, in good repair, and free of obstructions. (*Id.* at 2.) Based upon the scene investigation, law enforcement could not determine why the motorcycle would have crashed. (*Id.*) They did determine that the driver of the motorcycle, identified as Hesser, had been eastbound on the road, and had drifted off to the right during a gradual left-hand turn. (*Id.*) There was no evidence of braking or that Hesser had engaged in any type of corrective steering. (*Id.*)

Upon learning Hesser's identity, Trooper Arnold reviewed law enforcement records and learned that Hesser had three prior DUI convictions. (*Id.*) Trooper Arnold drove to the Benefis Emergency Room, and found Hesser in the trauma bay, unconscious and intubated. (*Id.*) Medical staff had drawn blood from Hesser, and Trooper Arnold asked the hospital not to discard this blood sample. (*Id.*)

On May 6, 2021, the State prepared an investigative subpoena and affidavit for Hesser's medical records and blood sample. (*Id.*) The relevant portion of the State's Affidavit in Support of Investigatory Subpoena Duces Tecum (affidavit) stated as follows:

> On May 4, 2021, Donald Hesser was eastbound on Armington Road on a motorcycle. There was no inclement weather, the roads

> were dry, and the weather was sunny. Hesser was driving . . . around a left-hand curve and drifted off the right road edge, where his motorcycle bottomed out and became airborne. Hesser never corrected and the vehicle lays down and skids to a stop. Hesser is later found unconscious in the ditch. Hesser did not regain consciousness before being transported to the hospital and was intubated and unconscious when Trooper Arnold arrived at the hospital. Hesser does have three prior DUI convictions and is believed to have been intoxicated when this wreck occurred.

(Doc. 70.1 at 4.)

Based upon that information, the district court authorized the investigative subpoena. (*Id.* at 1.) Law enforcement obtained Hesser's blood sample, and subsequent analysis showed that Hesser's blood alcohol content (BAC) was .208 percent. (Doc. 1 at 2.)

Hesser moved to suppress the results of his blood test, claiming that Trooper Arnold, "[a]lbeit an experienced trooper with 13 years on the force," did not have authority to apply for an investigative subpoena. (Doc. 51 at 1.) Hesser also argued that there was no probable cause to justify the issuance of the investigative subpoena. (*Id.* at 3-4.)

The State responded that a prosecutor had sought the subpoena. (Doc. 56 at 4.) The State argued that there was sufficient probable cause to seek the subpoena, quoting relevant portions of the affidavit in support of the subpoena and emphasizing the lack of corrective driving by Hesser. (*Id.* at 4-5.). The State argued, alternatively, that if there was no probable cause to grant the investigative

subpoena, Hesser's blood would have been "inevitably discovered pursuant to the implied consent laws." (*Id.* at 6.)

In its order denying Hesser's motion to suppress, the district court first affirmed that the subpoena had been sought by the prosecutor. (Doc. 71 at 3.) The court next analyzed probable cause, and indicated it was satisfied that "the affidavit recited evidence which is more than adequate to establish probable cause to believe Hesser committed DUI." (*Id.* at 4.) Specifically, the court found that "[t]he road and weather conditions did not show any reason why the wreck should have occurred." (*Id*.) Further, Hesser had four prior DUI convictions."[2] (*Id.*)

SUMMARY OF THE ARGUMENT

The district court correctly concluded that the affidavit for the investigative subpoena established probable cause to obtain Hesser's blood sample. Based upon the undisputed fact that Hesser was involved in a serious, unexplainable motorcycle crash when the weather was clear and sunny, the road was unobstructed and dry, there was no evidence of corrective maneuvers by Hesser prior to the crash, and Hesser had three prior DUI convictions, there was probable cause to issue the investigative subpoena.

[2] The district court's order stated "four" prior DUI convictions, but the affidavit for the investigative subpoena stated there were "three." (Doc. 70.1 at 4.)

Because it was undisputed that Hesser had been the driver of a vehicle involved in an accident or collision that resulted in serious bodily injury, and Hesser was unconscious at the time, Trooper Arnold could have directed that a blood sample be drawn pursuant to Mont. Code Ann. § 61-8-402(3) (2019).[3] Since medical personnel had already drawn a blood sample, the trooper used common sense, and should not be punished for choosing to go to the prosecutor to seek an investigative subpoena rather than obtaining additional blood from Hesser while he was receiving emergency medical care.

ARGUMENT

I. Standard of review

This Court reviews a district court's ruling on a motion to suppress evidence to determine whether the lower court's findings of fact are clearly erroneous and whether the court's interpretation and application of the law are correct. S*tate v. Schlichenmayer,* 2023 MT 79, ¶ 11, 412 Mont. 119, 529 P.3d 789 (citing *State v. Gill*, 2012 MT 36, ¶ 10, 364 Mont. 182, 272 P.3d 60). "A finding is clearly erroneous if it is not supported by substantial credible evidence, if the trial court misapprehended the effect of the evidence, or if the record leaves this Court with

[3] Since recodified as Mont. Code Ann. § 61-8-1016(3).

the 'firm or definite conviction that the trial court made a mistake.'" *Id.* (citing *State v. Carrywater*, 2022 MT 131, ¶ 11, 409 Mont. 194, 512 P.3d 1180).

II. The district court correctly denied Hesser's motion to suppress because there was probable cause to issue an investigative subpoena to obtain his blood sample.

A. Applicable law

Montana Code Annotated § 46-4-301(3) states as follows:

> In the case of constitutionally protected material, such as but not limited to medical records or information, a subpoena may be issued only when it appears upon the affidavit of the prosecutor that a compelling state interest requires it to be issued. In order to establish a compelling state interest for the issuance of such a subpoena, the prosecutor shall state facts and circumstances sufficient to support probable cause to believe that:
>
> (a) an offense has been committed; and
>
> (b) the information relative to the commission of that offense is in the possession of the person or institution to whom the subpoena is directed.

This Court has stated, "When an investigative subpoena seeks discovery of protected medical records or information, the subpoena can be likened to a search warrant which must satisfy the strictures of the Fourth Amendment and Article II, Section 11 of the Montana Constitution. A search warrant can only issue upon a showing of 'probable cause.'" *State v. Nelson*, 283 Mont. 231, 243, 941 P.2d 441, 449 (1997).

Probable cause does not require facts sufficient to establish that criminal activity has occurred, only that there exists a probability of criminal activity. *State v. Giacomini*, 2014 MT 93 ¶ 11, 374 Mont. 412, 327 P.3d 1054 (citing *State v. Barnaby*, 2006 MT 203, ¶ 30, 333 Mont. 220, 142 P.3d 809). This Court pays "great deference to a magistrate's determination that probable cause exists to issue a search warrant," and draws "all reasonable inferences possible to support the issuing magistrate's determination of probable cause." *Giacomini*, ¶ 11 (citing *State v. Cotterell*, 2008 MT 409, ¶ 59, 347 Mont. 231, 198 P.3d 254).

This Court has "adopted a 'totality of the circumstances' test to evaluate the existence of probable cause in a search warrant application." *State v. Robertson*, 2019 MT 99, ¶ 26, 395 Mont. 370, 440 P.3d 17 (citations omitted).

B. The totality of the circumstances stated in the affidavit established probable cause to believe Hesser had been driving under the influence of alcohol.

1. The district court properly considered Hesser's driving conduct in determining probable cause.

As reflected in the affidavit in support of the investigative subpoena,

> On May 4, 2021, Donald Hesser was eastbound on Armington Road on a motorcycle. There was no inclement weather, the roads were dry, and the weather was sunny. Hesser was driving . . . around a left-hand curve and drifted off the right road edge, where his motorcycle bottomed out and became airborne. Hesser never corrected and the vehicle lays down and skids to a stop.

(Doc. 70.1 at 4.)

In other words, law enforcement observed no evidence that could explain why this crash occurred. Hesser did not engage in corrective driving, and simply "drifted off" the road until he bottomed out and became airborne. A reasonable inference from these facts is that Hesser was not paying attention when he inexplicably drove off the road and did not react when it occurred. Even without paying "great deference" to the district court's determination of probable cause, this is not typical behavior associated with someone who is operating a motor vehicle while they are sober.

"The manner in which a vehicle is driven can be evidence of driving under the influence of alcohol." *State v. Price*, 2002 MT 150, ¶ 19, 310 Mont. 320, 50 P.3d 530 (citing *State v. Peterson*, 236 Mont. 247, 250, 769 P.2d 1221, 1223 (1989)); *see also City of Great Falls v. Morris*, 2006 MT 93, ¶ 21, 332 Mont. 85, 134 P.3d 692 (erratic driving corroborated other evidence of DUI); *State v. Miller*, 2008 MT 106, ¶¶ 2, 25, 342 Mont. 355, 181 P.3d 625 ("irregular" driving corroborated other evidence of DUI).

Here, it is not disputed that Hesser was involved in a single vehicle accident that resulted in serious bodily injury. The only logical explanation for the accident was irregular, inattentive, and/or careless driving behavior, including that Hesser did not engage in any corrective maneuvers once he "drifted off" the road. The evidence of irregular driving, when paired with Hesser's prior DUI convictions,

established probable cause to believe he was under the influence of alcohol when the accident occurred.

2. The district court properly considered Hesser's three prior DUI convictions in determining probable cause.

The affidavit stated "Hesser does have three prior DUI convictions and is believed to have been intoxicated when this wreck occurred." (Doc. 70.1 at 4.)

Hesser argues, "The fact that Mr. Hesser was in an accident on a clear sunny day is not enough to establish probable cause. If it were, any person with a prior DUI conviction who was in a crash and transported to the hospital would be subject to a violation of their constitutional rights."[4] (Appellant's Br. at 12.)

The undisputed evidence demonstrates that this was not just "an accident on a clear sunny day." This was an *unexplainable* crash that occurred when Hesser drifted off the road for no apparent reason, with *zero evidence of corrective driving*, and Trooper Arnold's determination that Hesser had *three* prior DUI convictions.

This Court has consistently held that a suspect's criminal history is "one of the many factors to be considered under the totality of the circumstances test." *State v. Zito*, 2006 MT 211, ¶ 16, 333 Mont. 312, 143 P.3d 108 (citing

[4] If there is probable cause to believe a person was driving and was in an accident that resulted in serious bodily injury, law enforcement is statutorily authorized to seek a blood sample, regardless of how many DUI convictions the individual has had. Mont. Code Ann. § 61-8-1016(2)(c).

State v. Johnson, 271 Mont. 385, 390, 897 P.2d 1073, 1076-1077 (1995) (quoting *State v. Hook*, 255 Mont. 2, 6, 839 P.2d 1274, 1277 (1992); *State v. Morse*, 2006 MT 54, ¶ 18, 331 Mont. 300, 132 P.3d 528; *State v. Anderson*, 1999 MT 60, ¶¶ 12-14, 293 Mont. 490, 977 P.2d 983)).

Hesser cites *State v. Hala*, 2015 MT 300, 381 Mont. 278, 358 P.3d 917, *State v. Nelson*, 283 Mont. 231, 941 P.2d 441 (1997), and *State v. Decker*, 251 Mont. 339, 828 P.2d 1342 (1991), for the proposition that single vehicle accidents require "some other indication that alcohol was involved" to establish probable cause for a DUI. (Appellant's Br. at 11.) None of these cases mention a prior DUI conviction or offer insight as to how three prior DUI convictions might factor into a probable cause determination.

In *Hala*, the only issue addressed by this Court was whether the blood test was administered in a reasonable amount of time from when Hala was driving. *Hala*, ¶¶ 2, 3. In *Decker*, the sole issue was whether the hospital employee who drew the defendant's blood sample was legally qualified to do so. *Decker*, 251 Mont. at 340, 828 P.2d at 1342.

Nelson, on the other hand, did include an analysis of probable cause for an investigative subpoena to obtain a medically drawn blood sample. The driving conduct in *Nelson* involved the defendant "drifting off" of Interstate 94 and striking a guardrail. *Nelson*, 283 Mont. at 234, 941 P.2d at 443. A friend drove

Nelson to the Glendive Medical Center, where a physician treated him for a broken jaw and ordered a blood test to determine his BAC. *Id.*

The following morning, Nelson reported the accident to the Montana State Highway Patrol. *Id.* Nelson later admitted to the investigator that he had consumed "a couple of drinks at a local bar" prior to hitting the guardrail. *Id.* Without disclosing the BAC results of Nelson's medically ordered blood sample, the treating physician informed the investigator that Nelson's BAC would explain the "lack of pain" normally associated with the injuries he sustained during the crash. *Id*. at 234, 941 P.2d at 444.

The State obtained an investigative subpoena for the results of the test ordered by the physician, which showed a BAC of .233 percent. *Id*. at 234-35, 941 P.2d at 443-44. In concluding that probable cause existed for the subpoena for Nelson's blood sample, this Court stated:

> Even if we disregard [the physician's] thinly veiled comment to [the investigator] as to the reason for Nelson's lack of pain, the balance of the information known to law enforcement was sufficient to establish probable cause. *That is, that Nelson had consumed a couple of drinks before the accident; that the road was bare and dry; that he ran into a guardrail; that he suffered a broken jaw; and that he had received medical treatment at the Glendive Medical Center.*

Id. at 244, 941 P.2d at 449-50 (emphasis added).

The most significant difference between *Nelson* and this case is that here, the trooper could not conduct a typical DUI investigation because, as a result of the

motor vehicle accident, Hesser was unconscious. Trooper Arnold could not obtain any admissions. However, the totality of the circumstances included Hesser's three prior DUI convictions, as compared to the "couple of drinks" that Nelson admitted to consuming. To paraphrase this Court's determination of probable cause in *Nelson* with the facts before the district court here: Hesser crashed his motorcycle for no apparent reason when he "drifted off" the road until he became airborne; the road was dry, and the weather was sunny; there was no evidence he engaged in corrective driving; he was found unconscious in the ditch; he received emergency medical treatment at Benefis Health Systems, where he remained unconscious; he had three prior DUI convictions.

As the district court concluded, this evidence was "more than adequate to establish probable cause to believe Hesser committed DUI." (Doc. 71 at 4.)

III. Trooper Arnold was authorized to direct that a blood sample be drawn from Hesser prior to obtaining an investigative subpoena.

While Hesser asserts there was no probable cause to suspect him of DUI, he does not contest that he was a driver involved in a motor vehicle accident resulting in serious bodily injury. Nor does he dispute that Trooper Arnold encountered him at the hospital in an unconscious state, in a condition where he was incapable of refusing a test.

Therefore, Trooper Arnold had authority to direct medical staff to draw a sample of Hesser's blood. The relevant provision of Mont. Code Ann. § 61-8-402 (2019), since recodified as Mont. Code Ann. § 61-8-1016, states:

> The test or tests must be administered at the direction of a peace officer when . . . the officer has probable cause to believe that the person was driving or in actual physical control of a vehicle . . . involved in a motor vehicle accident or collision resulting in serious bodily injury[.]

Mont. Code Ann. § 61-8-402(2)(a) (2019).

Because Hesser was unconscious and intubated at the hospital when Trooper Arnold arrived, he was statutorily determined not to have withdrawn his consent to provide a sample of his blood.

> A person who is unconscious or who is otherwise in a condition rendering the person incapable of refusal is considered not to have withdrawn the consent provided in subsection 1.

Mont. Code Ann. § 61-8-402(3) (2019).

In the order denying Hesser's motion, the district court acknowledged this reality, stating:

> The [c]ourt further agrees that because Hesser, a Montana driver, gave implied consent to testing of his blood. See, § 61-8-402, MCA. Had the hospital's test not been secured, Trooper Amold had the authority to direct testing of his blood, because, "based on the best evidence . . . reasonably available at the time, he reasonably believ[ed] that [Hesser was] incapable of refusing the test." *City of Billings v. Grela*, 2009 MT 172, 11, 350 Mont. 511, 209 P.3d 222. Under the "inevitable discovery rule," evidence of Hesser's BAC would have been

> discovered. *State v. Bilant*, 2001 MT 249, ¶ 22, 307 Mont. 113, 36 P.3d 883.

(Doc. 71 at 4.)

Admittedly, application of the inevitable discovery doctrine is awkward in this case because there was no conduct that resulted in a need to "purge the taint" of illegally obtained evidence. *State v. Dasen*, 2007 MT 87, ¶ 21, 337 Mont. 74, 155 P.3d 1282. However, the purpose behind the doctrine is relevant, in that it is utilized when "[i]nvoking the exclusionary rule would put the police not in the same position, as federal and Montana case law require, but in a worse position." *Dasen*, ¶ 20 (citing *Murray v. United States*, 487 U.S. 533 (1988)).

Trooper Arnold could have lawfully directed hospital staff to draw a blood sample from Hesser when he arrived at the hospital and found Hesser to be unconscious. At that time, Hesser was seriously injured and in the process of receiving emergency medical care. Trooper Arnold acted rationally by asking staff not to discard the sample they had already taken, then enlisting the aid of a prosecutor to seek an investigative subpoena for that sample.

Applying the exclusionary rule serves no purpose here, as there is no illegal police conduct to be deterred. Whether or not the inevitable discovery doctrine can be applied to this sequence of events, this Court will affirm a district court when it reaches the right result, even if it reaches the right result for the wrong reason. *State v. Daffin*, 2017 MT 76, ¶ 34, 387 Mont. 154, 392 P.3d 150.

CONCLUSION

Because probable cause existed for the issuance of the investigative subpoena to obtain Hesser's blood sample and the trooper was statutorily authorized to direct medical staff to draw Hesser's blood without an investigative subpoena, the district court's order denying Hesser's motion to suppress and dismiss should be affirmed.

Respectfully submitted this 18th day of January, 2023.

AUSTIN KNUDSEN
Montana Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

By: */s/ Tammy K Plubell*
TAMMY K PLUBELL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is 3,640 words, excluding the cover page, table of contents, table of authorities, certificate of service, certificate of compliance, signature blocks, and any appendices.

/s/ Tammy K Plubell
TAMMY K PLUBELL

CERTIFICATE OF SERVICE

I, Tammy K Plubell, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 01-18-2024:

Nathan J. Hoines (Attorney)
401 3rd Avenue North
P.O. Box 829
Great Falls MT 59403
Representing: Donald Arron Hesser
Service Method: eService

Austin Miles Knudsen (Govt Attorney)
215 N. Sanders
Helena MT 59620
Representing: State of Montana
Service Method: eService

Stephanie L. Fuller (Govt Attorney)
121 4th Street North
2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Joshua A. Racki (Govt Attorney)
121 4th Street North
Suite 2A
Great Falls MT 59401
Representing: State of Montana
Service Method: eService

Kelli Cummings (Attorney)
1219 13th St. S
Great Falls MT 59405
Representing: Donald Arron Hesser
Service Method: eService

Electronically signed by Janet Sanderson on behalf of Tammy K Plubell
Dated: 01-18-2024