

IN THE SUPREME COURT OF THE STATE OF MONTANA
No. DA 23-0356

DONALD AARON HESSER, JR.,

Petitioner and Appellant,

vs.

STATE OF MONTANA,

Respondent and Appellee.

APPELLANT'S REPLY BRIEF

On Appeal from the Montana Eighth Judicial Court
In and For Cascade County, Hon. Elizabeth A. Best

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Standard of Review

Mr. Hesser agrees with the State and maintains that the Montana Supreme Court reviews a district court's denial of a motion to suppress to ascertain whether the court's factual findings are clearly erroneous and whether the findings were correctly applied as a matter of law. *State v. Nelson*, (1997), 283 Mont. 231, 236, 941 P.2d 441, 445. Mr. Hesser also agrees that "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 the 'firm or definite conviction that the trial court made a mistake.'" *State v. Schlichenmayer*, 2023 MT 79, ¶ 11, 412 Mont. 119, 529 P.3d 789 (citing *State v. Carrywater*, 2022 MT 131, ¶ 11, 409 Mont. 194, 512 P.3d 1180).

However, Mr. Hesser also maintains that probable cause to issue an investigative subpoena is at the heart of the district court's decision and the Montana Supreme Court reviews de novo to determine whether probable cause supported the issuance of an investigative subpoena for constitutionally protected material. *State v. Kuneff*, 1998 MT 287, P19, 291 Mont. 474, P19, 970 P.2d 556, P19.

Argument

I. The district court erred by finding there was probable cause to issue an investigative subpoena.

“When an investigative subpoena seeks discovery of medical records, the subpoena can issue only upon a showing of a compelling state interest.” *State v. Nelson* (1997), 283 Mont. 231, 241-42, 941 P.2d 441, 448; Mont. Code Ann. § 46-4-301.

“In order to establish the existence of a compelling state interest to justify the issuance of a subpoena, the State must demonstrate probable cause just as it would if it were seeking issuance of a search warrant under Article II, Section 11 of the Montana Constitution and the Fourth amendment to the United States Constitution.” *Nelson*, at 244.

Probable cause exists when “facts and circumstances within an officer’s personal knowledge prove sufficient to warrant a reasonable person to believe that someone is committing or has committed an offense.” *State v. Kelm*, 2013 MT 115, ¶ 25, 370 Mont. 61, ¶ 25, 300 P.3d 687, ¶ 25 (quoting *State v. Ellington*, 2006 MT 219, ¶ 16, 333 Mont. 411, 143 P. 3d 119). The application for an investigative subpoena must state sufficient facts to support a determination that there is a probability of criminal activity. *State v. Rinehart*, (1993), 262 Mont. 204, 209, 864 P.2d

1219, 1222. Probable cause must be determined exclusively from the four corners of the application. *Id.* at 211.

1. The district court did not properly consider Mr. Hesser's driving conduct in determining probable cause.

The State argues that under the totality of the circumstances, the only logical explanation for Mr. Hesser's accident was irregular, inattentive, and/or careless driving behavior and that this is enough to establish probable cause when combined with his previous DUI's. *Brief of Appellee* at pgs. 9 and 10. The State's argument is misguided for several reasons.

First, the State claims "law enforcement observed no evidence that could explain why this crash occurred." *Brief of Appellee* at pg. 9. Despite this, and on the very same page, the State proceeds to explain why the crash occurred. *Id.* This same failure in logic was central to the district court's decision to find probable cause.

Second, just as there is no evidence that Mr. Hesser was driving while under the influence, there is also no evidence that Mr. Hesser was driving in an irregular, inattentive, or careless manner. Twice the State asserts that "Hesser did not engage in any corrective

driving/maneuvers.” *Brief of Appellee* at pg. 9. What the State means to say is that ***there is no evidence*** of Mr. Hesser engaging in corrective driving. The difference is vital, as the former doesn’t rule out that Mr. Hesser engaged in corrective driving but simply left no evidence.

The true issue, as far as Mr. Hesser’s accident goes, and one that the State repeatedly acknowledges, is that there is simply no evidence as to why Mr. Hesser crashed. The State may proffer “logical explanations” as to why the accident occurred, but without any evidence, the totality of the circumstances is that there are any myriad number of reasons why Mr. Hesser could have crashed. For the State and district court to hand pick the one reason which supports its violation of Mr. Hesser’s rights is not probable cause or logic but true speculation and conjecture. The subjective belief stated in the affidavit that Mr. Hesser “is believed to have been intoxicated” is not based on any hard evidence. (Doc. 70.1 at 4.) In the interest of justice and the rights of Montana’s citizens, situations such as these must lean in favor of the accused.

Regardless of the fact that there is no evidence of Mr. Hesser driving in an irregular, inattentive, or careless fashion, the State cites several cases for the proposition that irregular driving can be evidence of

DUI. *Brief of Appellee* at pg. 9. Each of those cases can be differentiated from Mr. Hesser's.

State v. Price involved an officer personally witness a person recklessly blowing through a stop sign into oncoming traffic. 2002 MT 150, ¶ 20, 310 Mont. 320, 50 P.3d 530. In *State v. Peterson* three law enforcement officers and an eyewitness observed hazardous driving behavior and established that the person was seriously impaired. 236 Mont. 247, 250-251, 769 P.2d 1221, (1989). *City of Great Falls v. Morris* involved a similar situation where an officer saw a vehicle swerving severely and barely avoiding a median. 2006 MT 93, ¶ 7, 332 Mont. 85, 134 P.3d 692. Finally in *State v. Miller*, an officer observed a vehicle swerving erratically, almost hitting a parked vehicle, and driving through an intersection while in a right-turn only lane. 2008 MT 106 ¶ 2, 342 Mont. 355, 181 P.3d 625.

All four of the cases cited by the State involved at least one officer personally viewing irregular driving prior to an accident or traffic stop. Here, nobody, let alone an officer, saw Mr. Hesser driving or what caused the accident. There was no RADD report and Trooper Arnold arrived when Mr. Hesser was already being flown to the hospital. The State is

correct that when irregular driving is witnessed by an officer or a citizen that it may be evidence of DUI. But that is not the case here and those cases should not apply.

In determining whether there was probable cause for an investigative subpoena the district court found that a lack of evidence supported the trooper's hunch that Mr. Hesser was driving under the influence. This is a serious misapprehension of the effect of evidence and as such the district courts decision was clearly erroneous.

2. The district court did not properly consider Mr. Hesser's three prior DUI convictions in determining probable cause.

Appellant agrees with the State and the caselaw that criminal history is "**one** of the many factors to be considered" when determining probable cause for an investigative subpoena. *State v. Johnston*, 271 Mont. 385, 897 P.2d 1073, 1076-1077 (quoting *State v. Hook*, 255 Mont. 2, 6, 839 p. 2d 1274, 1277 (1992)). However, it is not enough to form probable cause by itself when the only other evidence is a crash with no witnesses and no other evidence showing Mr. Hesser was intoxicated.

Each of the cases cited by the State had substantially more evidence accompanying the previous convictions than in the present case. In *State*

v. Zito, the officer conducted a month-long investigation and had a confidential informant to go along with a prior related conviction. 2006 MT 211, ¶ 5, 333 Mont. 312, 143 P.3d 108. Likewise in *State v. Johnston*, the officer had a description of the man, the victims report of previous run-ins with the man, and a positive lineup ID as well as previous convictions of a similar nature. 271 Mont. 385, 897 P.2d 1073, 1076 (1995); *see also State v. Hook*, 255 Mont. 2, 839 p. 2d 1274, (1992) (Informant and excessive power usage enough for probable cause when combined with criminal history); *State v. Morse*, 2006 MT 54, 331 Mont. 300, 132 P.3d 528 (3 informants and over 100 people stopping at an apartment over a weekend enough for probable cause when combined with criminal history); *State v. Anderson* 1999 MT 60, 293 Mont. 490, 977 P.2d 983 (presence at the scene of a valid search warrant, affiliation with known drug dealers, finding of meth at the scene, enough for probable cause when combined with criminal history.)

Most of these cases involved informants or witnesses and involved much longer investigations. Here the only thing accompanying Mr. Hesser's previous DUI convictions is a crash with no evidence explaining

it. Mr. Hesser's criminal history alone is not enough without more evidence or eye witness testimony.

On a similar note, the State cites *State v. Nelson*, 283 Mont. 231, 941 P.2d 441, (1997) to show that an admission to drinking right before driving is comparable to Mr. Hesser's DUI convictions. However, the two are anything but similar. Mr. Hesser's most recent DUI before this incident was in 2014. Mr. Hesser's accident occurred seven years after his previous DUI. A DUI conviction seven years ago cannot possibly hold the same amount of sway as an admission to drinking immediately before driving. An admission to drinking right before driving leads directly to the inference that the person may currently be driving under the influence. A seven-year-old DUI conviction leads to the inference that a person was driving under the influence seven years ago. The two are not the same and should not be weighed similarly in a determination of probable cause.

The district court also misapprehended the effect of this evidence and the weight given to Mr. Hesser's previous DUI convictions. The only other evidence is a crash, which could have a plethora of explanations besides driving under the influence. The district court's ruling that there

was probable cause to support the investigative subpoena is clearly erroneous.

II. Mr. Hesser’s medical records and blood sample would not have been “inevitably discovered.”

As the State puts it, “application of the inevitable discovery doctrine is awkward in this case.” *Brief of the Appellee* at pg. 15. Mr. Hesser would argue that application of the inevitable discovery doctrine is not just awkward but impossible in this case.

The State is correct that Mr. Hesser does not dispute that Trooper Arnold had the authority to direct a blood test under the serious bodily injury provision of Montana’s Implied consent statute. Mont. Code Ann. § 61-8-1016(2)(a)(iii)(c). While Trooper Arnold had the authority to do so, the undisputed facts are that he *did not* use the implied consent statute to obtain Mr. Hesser’s blood. Instead, Trooper Arnold requested an investigative subpoena two days later. At the time the subpoena was issued, Trooper Arnold would not have the authority to use the implied consent statute and it would be pointless.

The State offers zero caselaw supporting the notion that the inevitable discovery doctrine would apply in a situation such as

this. That is because there is no case law supporting their position and because the inevitable discovery doctrine does not apply here.

Conversely, it is apparent from case law cited in Mr. Hesser's opening brief and here that there must be some *prior* illegality in order for the inevitable discovery doctrine to apply. *See State v. Laster*, 2021 MT 269, ¶ 36, 406 Mont. 60, ¶ 36, 14 P.3d 444, ¶ 57; *State v. Dasen*, 2007 MT 87, ¶ 20, 337 Mont. 74, 155 P.3d 1282 (citing *Murray v. United States*, 487 U.S. 533 (1988)). The only potential illegality in this case is the investigative subpoena. Logically then, the inevitable discovery doctrine would only apply to a new search conducted after the investigative subpoena which contains no taint of the previous illegality. The investigative subpoena was served two days after Mr. Hesser's accident, at that point it would have been too late for Trooper Arnold to apply the implied consent statute. Further, it would be pointless as Mr. Hesser's blood would not be the same as it was two days prior.

The inevitable discovery doctrine is not a time machine. It does not let the State go back before an unconstitutional seizure and hypothesize about what an officer could have done. It applies

only to searches conducted after an illegality. The fact that Trooper Arnold could have taken Mr. Hesser's blood under implied consent before the investigative subpoena is completely irrelevant, he did not do so. The district court's finding that the inevitable discovery doctrine would apply is clearly erroneous. Therefore, if the Court finds there was no probable cause it should also find that the inevitable discovery doctrine does not apply.

Conclusion

Besides the crash and Mr. Hesser's past DUI convictions there are no other facts supporting the notion that a crime had been committed and the district court misapprehended the effect of this evidence. Additionally, the inevitable discovery exception does not apply here because it cannot be applied to actions before the alleged violation and because after the alleged violation the implied consent statute would not allow the State to obtain Mr. Hesser's blood sample. For these reasons, Mr. Hesser respectfully requests the Court grant him relief in the form of reversing the District Court's decision on his Motion to Suppress and Dismiss and thereby excluding from evidence, Mr. Hesser's blood sample. Additionally, Mr. Hesser requests the Court to dismiss the case as the

State will not be able to prove their case in chief without the unconstitutionally obtained evidence.

Respectfully submitted this 1st day of March, 2024.

HOINES LAW OFFICE, P.C.

By /s/ Nathan J. Hoines

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Certificate of Compliance

Pursuant to the Montana Rules of Appellate Procedure, I certify that the Appellant's Opening Brief is printed with proportionately-spaced Century Schoolbook typeface of 14 points; is double-spaced except for footnotes and lengthy quotes; and does not exceed 10,000 words. The exact word count, as calculated by my Microsoft Word software, is 2,272 words, excluding tables and certificates.

Dated this 1st day of March, 2024.

HOINES LAW OFFICE, P.C.

By /s/Nathan J. Hoines

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CERTIFICATE OF SERVICE

I, Nathan J. Hoines, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 03-01-2024:

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