

JAN. 16. 2007 2:38PM

CAPLAN LAW FIRM

NO. 016 Document hosted at JDSUPRA™

<http://www.jdsupra.com/post/documentViewer.aspx?fid=4f69d1d9-48a4-4c06-a00f-12cd593d656e>

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

State of Minnesota,

District Court File No. K7-05-601540

And K9-05-600972

Plaintiff,

vs.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Christopher John Brucker,

Defendant.

The above-entitled matter came on for hearing before the undersigned Judge of District Court on December 18th and 19th, 2006.

Thomas Hughes, Esq., New Brighton City Attorney, appeared on behalf of the State of Minnesota; and, David Risk, Esq., appeared on behalf of the defendant, Christopher Brucker, who was also present.

Based upon all the files, records and proceedings herein, and the arguments of counsel, the court makes the following:

FINDINGS OF FACT

1. On May 16, 2006, the defendant was sentenced to the Ramsey County correctional facility for a term of 365 days for the offense of Driving While Under the Influence of Alcohol in the Third Degree.

2. The sentence was stayed to probation for a period of two years on the condition, among others, that the defendant abstain from the use of alcohol. At the defendant's request, his abstinence was to be monitored by

an electronic alcohol monitoring device known as SCRAM (Secure Continuous Remote Alcohol Monitor). (The SCRAM device is worn as an ankle bracelet which monitors the migration of alcohol through the offender's skin. The measurements obtained are converted to a blood-alcohol content which is designated as the TAC, which means Transdermal Alcohol Content.)

3. On November 9, 2006 at approximately 5:53 a.m. the defendant's SCRAM device showed a positive reading for alcohol with a confirmed peak reading of .035 TAC. On November 10, 2006 at approximately 6:00 a.m. the defendant's SCRAM device showed a positive reading for alcohol with a confirmed peak reading of .05 TAC.

4. The defendant was notified on November 10th that he had tested positive for alcohol and that a probation violation would be filed against him as a consequence.

5. The defendant called his attorney who advised him to get an additional test. The defendant got an alcohol test on the evening of November 10th which was negative for alcohol. However, he did not take this test until 9:00 p.m. On November 11th the defendant took an EtG test. The Etg test was negative for alcohol metabolites.

6. Thomas Burr, a forensic scientist called by the defense, testified that EtG testing is a test for ethyl glucuronide metaboloids in the body. He further testified that it has been used in the last five years in alcohol testing and is a very sensitive test, although it does not specifically test for ethanol.

7. Mr. Burr acknowledged, however, that the EtG test is not universally accepted in the scientific community. He also testified that he believed that the SCRAM device was not widely accepted in the scientific community as well.

8. Mr. Burr testified that the alcohol curve indicated by the SCRAM tests on November 9th and November 10th were "very unusual," and "anomalous". He said that the curves would require "strange drinking behavior" over a period of nine hours. He also testified that such drinking behavior would involve sipping alcohol over that period of time.

9. Both the defendant, and his wife, Angeline Brucker, testified that she was with the defendant and that he was not drinking alcohol on the evening in the early morning hours of November 9th and 10th, 2006.

10. Angeline Brucker also testified that she has never seen the defendant sip drinks over the course of several hours. She said when he drinks, he drinks to the point that he has "glazed eyes, slurred speech, can't walk straight, and passes out."

11. Thomas Jungmann, the defendant's supervising probation officer, testified that he had received reports from R. S. Eden, the organization that monitors defendants on the SCRAM bracelet, that the defendant had tested positive for alcohol on November 9th and 10th, 2006. Mr. Jungmann, however, is not familiar with how the SCRAM bracelet works and was not qualified to

testify as to whether the SCRAM bracelet that the defendant was using was in proper working order on the dates in question.

12. The State did not present evidence from anyone who was familiar with the operation of the SCRAM bracelet in general, and whether the particular SCRAM bracelet that the defendant was wearing was in proper working order on the dates in question.

CONCLUSIONS OF LAW

1. Before a court may find that a probationer has violated the terms of his probation, it must be persuaded by clear and convincing evidence presented by the State that he has done so. MRCP 27.04 subd. 3 (3). The clear and convincing standard is met where the truth of the facts asserted is highly probable. Weber v. Anderson, 269 N.W.2d 892, 895 (Minn. 1978).

2. In the instant case, the State has failed to show by clear and convincing evidence that the defendant violated the terms of his probation.

ORDER

IT IS HEREBY ORDERED:

1. The State's motion that the court find that the defendant has violated the terms of his probation is denied.

2. The defendant's motion that he be released from further obligation to use the SCRAM bracelet as an alcohol monitoring device is denied.

FROM :

FAX NO. :6516970100

Jan. 17 2007 09:37AM P5

44-01W

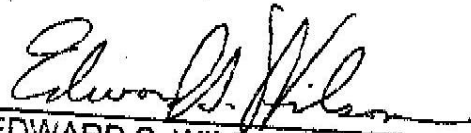
CAPLAN LAW FIRM

NO. 018 Document hosted at JDSUPRA™

<http://www.jdsupra.com/post/documentViewer.aspx?id=4f69cd9-48a7-4c06-a00f-12cd593d656e>

BY THE COURT:

Dated: January 12, 2007.



EDWARD S. WILSON
Judge of District Court