IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Petitioner,
vs.
THE FOURTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF ELKO, AND THE HONORABLE J. MICHAEL MEMEO, DISTRICT JUDGE,
Respondents,
and
MARK ANTHONY LUPERCIO,
Real Party in Interest.

No. 54092

FILED

MAY 10 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER GRANTING PETITION

This original petition for a writ of mandamus challenges a district court order upholding the justice court's refusal to bind over the real party in interest, Mark Anthony Lupercio, for trial on a DUI charge alleging that he operated a vehicle "with an amount of a prohibited substance in [his] blood or urine that is equal to or greater than the law allows," see NRS 484.379(3) (per se theory of liability).[1] At the preliminary hearing, petitioner produced evidence that Lupercio's blood was drawn within an hour after a traffic stop and found to contain marijuana and marijuana metabolite well above the legal limit. See id. The justice court declined to bind over Lupercio on the per se theory of

[1]The justice court bound over Lupercio on that part of the DUI charge alleging that he operated a vehicle under the influence of a controlled substance (marijuana). See NRS 484.379(2)(a).

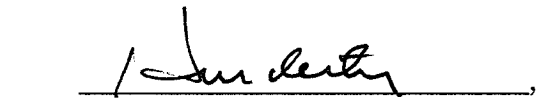
liability, concluding that petitioner failed to produce evidence of dissipation rates showing that at the time he was driving, Lupercio had a prohibited substance in his blood greater than the legal limit.

Subsequently, petitioner filed an information charging Lupercio with DUI, including the per se theory. Lupercio filed a motion to dismiss the information or, in the alternative, to strike the per se theory and have the information conform to the justice court's ruling. The district court ordered petitioner to file an amended information charging Lupercio with driving while under the influence of a controlled substance (marijuana), precluding the State from proceeding on a per se theory of liability.

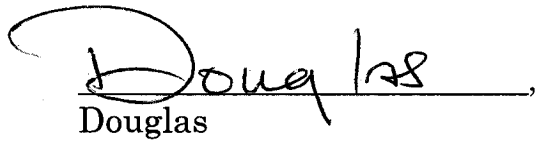
We conclude that sufficient evidence was elicited at the preliminary hearing to establish probable cause to bind over Lupercio on the per se theory of DUI. See Dettloff v. State, 120 Nev. 588, 595, 97 P.3d 586, 590-91 (2004) (providing that State's burden at preliminary hearing stage is to produce slight or marginal evidence to support probable cause). In addition to the blood evidence, other evidence demonstrated that at the time of the traffic stop, Lupercio's eyes were watery and bloodshot, his movements were lethargic, and the apparent smell of burnt marijuana emanated from a tin can found in Lupercio's possession. We conclude that evidence of dissipation rates was not required to establish probable cause in this instance. See Sheriff v. Burcham, 124 Nev. ___, ___, 198 P.3d 326, 335 (2008) (concluding that State not required to produce evidence of retrograde extrapolation to establish probable cause to support charge of driving under the influence of intoxicating liquor). Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the

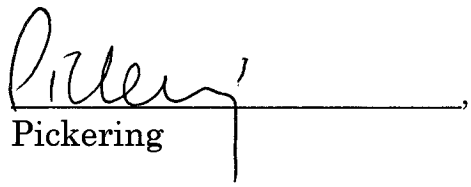
district court to vacate its order directing petitioner to file an amended criminal complaint charging Lupercio with driving under the influence of a controlled substance and allow petitioner to proceed on the additional theory that Lupercio was driving with a prohibited substance (marijuana and marijuana metabolite) in his blood pursuant to NRS 484.379(3).



_____, J.
Hardesty



_____, J.
Douglas



_____, J.
Pickering

cc: Hon. J. Michael Memeo, District Judge
Elko County District Attorney
Elko County Public Defender
Elko County Clerk