

NOTICE

Memorandum decisions of this Court do not create legal precedent. See Alaska Appellate Rule 214(d) and Paragraph 7 of the Guidelines for Publication of Court of Appeals Decisions (Court of Appeals Order No. 3). Accordingly, this memorandum decision may not be cited as binding authority for any proposition of law, although it may be cited for whatever persuasive value it may have. See McCoy v. State, 80 P.3d 757, 764 (Alaska App. 2002).

IN THE COURT OF APPEALS OF THE STATE OF ALASKA

THORTON P. DEPRIEST,

Appellant,

v.

STATE OF ALASKA,

Appellee.

Court of Appeals No. A-12591
Trial Court No. 3PA-15-01008 CR

MEMORANDUM OPINION

No. 6785 — April 10, 2019

Appeal from the Superior Court, Third Judicial District, Palmer,
Kari C. Kristiansen, Judge.

Appearances: Michael Horowitz, Law Office of Michael Horowitz, Kingsley, Michigan, under contract with the Public Defender Agency, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Patricia L. Haines, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Allard, Chief Judge, and Joannides and E. Smith,
Senior Superior Court Judges.*

Judge ALLARD.

* Sitting by assignment made pursuant to Article IV, Section 11 of the Alaska Constitution and Administrative Rule 23(a).

Thorton P. DePriest was driving a truck in icy conditions when it veered off the road and struck a tree. His brother was also in the truck. DePriest's left leg was broken in the collision.

Alaska State Trooper LeRoy Deveaux spoke with DePriest and his brother shortly after the accident. Both men initially agreed that DePriest had been driving, but DePriest later changed his story and claimed that he had not been driving. When Deveaux spoke with DePriest, DePriest had red, bloodshot, watery eyes, slurred speech, and an odor of alcohol.

DePriest received medical treatment from Mat-Su Regional Hospital. Deveaux later obtained a search warrant for DePriest's medical records related to the accident. The medical records showed that DePriest had a blood alcohol content of 336 milligrams per deciliter (which DePriest stipulated was roughly equivalent to .336 on a breath test machine).

Because DePriest had two prior convictions for driving under the influence within the last ten years, he was charged with felony driving under the influence under AS 28.35.030(n).

Prior to trial, DePriest filed a motion to suppress the medical records, arguing that the search warrant was issued without probable cause. The superior court denied his motion and the case proceeded to a bench trial. DePriest did not contest any of the facts presented at trial and agreed that the court should find him guilty, noting that the purpose of the trial had been to preserve his right to challenge the court's denial of his suppression motion.

DePriest raises two issues on appeal. First, DePriest argues that the superior court failed to obtain a personal waiver of his right to trial by jury and that this constitutes structural error. The State concedes that the court failed to obtain DePriest's personal waiver and that this error requires reversal. We have reviewed the record and

find the State’s concession to be well-founded.¹ We therefore reverse DePriest’s conviction and remand for further proceedings.²

Second, DePriest argues that the superior court erred when it denied his suppression motion because Trooper Deveaux’s affidavit in support of the warrant failed to establish probable cause. Even though we have already reversed DePriest’s conviction based on the court’s failure to secure a personal waiver of DePriest’s right to a jury trial, because the court’s denial of his suppression motion will remain the law of the case on remand, we must resolve the suppression issue in this appeal.

“Probable cause to issue a search warrant exists when ‘reliable information is set forth in sufficient detail to warrant a reasonably prudent [person] in believing that a crime has been or was being committed.’”³

Deveaux’s affidavit in support of the search warrant presented the following facts: DePriest was driving a vehicle that was driven into a ditch and collided with a large tree, causing substantial damage to the vehicle; DePriest and his brother both originally stated that DePriest was driving at the time of the accident, but DePriest later changed his statement and stated that he had not been driving; DePriest stated that he was unable to provide a valid driver’s license because he did not have one; a subsequent

¹ See *Boles v. State*, 210 P.3d 454, 455 (Alaska App. 2009) (“[T]his Court has an independent duty to evaluate whether the State’s concession of error is well-founded.” (citing *Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972))).

² DePriest also argues that the court committed a similar error by failing to obtain a more specific personal waiver of DePriest’s right to trial by jury on the element of his prior offenses for drunk driving. Because we are already reversing DePriest’s conviction on the grounds that the superior court failed to obtain a personal waiver of DePriest’s general right to a trial by jury, we need not resolve this more specific claim of error.

³ *Hart v. State*, 397 P.3d 342, 344 (Alaska App. 2017) (quoting *Van Buren v. State*, 823 P.2d 1258, 1261-62 (Alaska App. 1992)).

search of Department of Public Safety computer records revealed that DePriest’s license had been revoked for a previous conviction for driving under the influence; DePriest was required to have an ignition interlock device installed in any vehicle he drives, but the truck did not have one; while talking to DePriest, Deveaux “could smell the odor of an alcoholic beverage coming from, on, or about his person”; and DePriest “slurred his speech and his eyes were bloodshot and watery.”

We agree with the superior court that the totality of these facts constituted probable cause to believe that a crime — driving while intoxicated — had been committed. DePriest’s suppression motion was properly denied.

We AFFIRM the superior court’s denial of DePriest’s suppression motion, but we REVERSE DePriest’s conviction because the superior court failed to obtain a personal waiver of his right to trial by jury. We REMAND for further proceedings.