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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-1741**

State of Minnesota,  
Respondent,

vs.

Terry Lee Lind,  
Appellant.

**Filed September 3, 2013  
Reversed and remanded  
Klaphake, Judge \***

Mille Lacs County District Court  
File No. 48-CR-11-1564

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janice Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney,  
Milaca, Minnesota (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for  
appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and  
Klaphake, Judge.

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to  
Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**KLAPHAKE**, Judge

Appellant challenges his convictions of three counts of second-degree driving under the influence in violation of Minn. Stat. §§ 169A.20, subds. 1(1), (5), (6), .25 (2010), arguing that the district court erred in upholding the constitutionality of the stop and in finding that he was in physical control of the vehicle. Because the district court did not receive a valid waiver of appellant's rights under Minn. R. Crim. P. 26.01, subd. 4, we reverse and remand.

### DECISION

Appellant Terry Lee Lind challenges (1) the district court's pretrial ruling denying his motion to suppress evidence for lack of probable cause because a Mille Lacs County sheriff's deputy entered his truck without a warrant and (2) the sufficiency of the evidence to support his convictions because he was not in physical control of the vehicle when the deputy found him. After the district court denied Lind's motion to suppress evidence of his intoxication and to dismiss the charges against him for lack of probable cause, the parties stipulated to the evidence and the district court found Lind guilty of all counts.

The parties now dispute the nature of the stipulation to the district court. Lind argues that the proceeding in the district court was a trial on stipulated facts, pursuant to Minn. R. Crim. P. 26.01, subd. 3. The state maintains that it was a *Lothenbach* proceeding (a stipulation to the prosecution's case to obtain review of a pretrial ruling), pursuant to Minn. R. Crim. P. 26.01, subd. 4. *See State v. Lothenbach*, 296 N.W.2d 854,

858 (Minn. 1980) (allowing a defendant to stipulate to the state's evidence and have the district court determine guilt to preserve the pretrial issues for appeal). Contrary to Lind's assertions, the stronger inference from the record is that the parties intended the proceeding to comply with Minn. R. Crim. P. 26.01, subd. 4.

The district court failed, however, to conduct the proceeding according to the strict requirements of Minn. R. Crim. P. 26.01, subd. 4, when it did not obtain Lind's acknowledgement that he would not be entitled to appellate review of any finding of guilt or other issues that could arise at a contested trial. The rule specifically requires that "[t]he defendant must also *acknowledge* that appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial." Minn. R. Crim. P. 26.01, subd. 4(f) (emphasis added). In this case, the district court received a specific acknowledgement from Lind that he "underst[ood] . . . the purpose for [the subdivision 4 procedure] is more of a strategy, to reserve the right to appeal . . . [the] pre-trial rulings." But Lind never acknowledged on the record that he understood that appellate review would be limited to the district court's pretrial ruling. Despite the fact that the district court otherwise complied with all the other elements required by the rule, the subdivision 4 procedure in this case was invalid.

Lind argues that, "[e]ven if this court finds that the parties intended to enter into a *Lothenbach* [proceeding] . . . , this court should nonetheless consider the case to be a stipulated facts trial because the waiver provisions for a *Lothenbach* [proceeding] were not properly followed." But he provides no authority that allows this court to treat this as a subdivision 3 trial on stipulated facts when the record shows that the parties intended to

proceed under Minn. R. Crim. P. 26.01, subd. 4. And we cannot rule on the validity of the pre-trial order when the parties failed to follow the mandated Minn. R. Crim. P. 26.01, subd. 4, procedures. *See State v. Burdick*, 795 N.W.2d 873, 877 (Minn. App. 2011) (holding that when a stipulation was invalid, the pretrial issue reserved for appellate review is not properly before this court); *State v. Rasmussen*, 749 N.W.2d 423, 428 (Minn. App. 2008) (holding that “appellate review of the suppression ruling is inappropriate” when the district court has not properly complied with subdivision 4 in obtaining a waiver to a jury trial). We therefore reverse the conviction and remand to the district court for further proceedings.

**Reversed and remanded.**