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JUDICIAL DISTRICT COURT
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MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

STATE OF MONTANA,

Case No. DC-09-55C

Plaintiff,

MOTION TO DISMISS

v.

LORA KATHRYN WHITMORE,

Defendant.

COMES NOW Gallatin County Attorney Marty Lambert, who moves this Court for an Order dismissing the Information filed in this case, based upon the following.

1. On or about March 4, 2009, the State of Montana filed an Information in the above-captioned matter. Defendant was charged with the offense of Vehicular Homicide While Under the Influence, a Felony, in violation of §45-5-106, MCA. The State alleged that the Defendant had negligently caused the death of Chong Suk Everett when the Defendant drove or was in actual physical control of a vehicle and struck Ms. Everett on Jackrabbit Lane, a way of the state open to the public, while the Defendant's alcohol

concentration, as shown by analysis of her blood and breath was .08 or more; to wit, approximately .14 BAC.

2. On March 10, 2010, this Court entered an order suppressing all evidence relating to the Defendant's blood tests. This Court also suppressed all statements made by the Defendant after she was placed in Officer Mike Dixon's patrol car.
3. To prove the charged offense the State must prove at trial that the Defendant negligently caused the death of Chong Suk Everett while operating a motor vehicle in violation of §61-8-406, MCA. §61-8-406, MCA, prohibits the operation of a motor vehicle upon a way of the state open to the public with an alcohol concentration of .08 or more as shown by analysis of the person's blood, breath or urine. §61-8-406, MCA, requires that a person's alcohol concentration be determined by an analysis of a person's blood, breath or urine.
4. Due to this Court's Order suppressing evidence, the State has no admissible evidence of the Defendant's alcohol concentration as shown by analysis of her blood. Therefore, the State lacks the ability to prove a crucial element of the crime of Vehicular Homicide While Under the Influence, a Felony.

5. The State has evidence that the Defendant consumed alcohol at Santa Fe Reds and the Molly Brown Bar prior to striking Ms. Everett. Without evidence of the Defendant's blood results, however, the State cannot prove with any certainty how much alcohol the Defendant actually consumed. As set forth in the Affidavit of Probable Cause filed in this matter:

On February 2, 2009, Dr. John Wyman, a forensic toxicologist, reviewed the toxicology report of the defendant. Dr. Wyman expressed his opinion that due to the amount of alcohol in the defendant's body at the time of the accident she would have displayed slowed reaction times, drowsiness, diminished critical judgment and ability to process information, reduced visual acuity, and decreased sensory motor coordination. Dr. Wyman noted, "All of these affects would have severely compromised the defendant's ability to drive."

6. Dr. Wyman's opinion was based on the fact that Defendant's BAC was .14. Dr. Wyman's opinion now lacks foundation and is most likely inadmissible.

7. Without evidence of the Defendant's BAC, the jury would be left with little evidence with which to judge whether Defendant's driving was impaired. According to the witnesses Defendant's driving prior to striking Ms. Everett was not impaired. Witnesses provided statements that the Defendant was not operating her vehicle erratically or at a high rate of speed prior to striking Ms. Everett. All evidence gathered by law enforcement

indicates that the Defendant was driving at or below the speed limit. Further, the investigation revealed that the Defendant's vehicle was in proper working order with no mechanical deficiencies. The key evidence demonstrating the Defendant's impairment was the Defendant's blood alcohol concentration of .14 and the legal presumption that persons with a BAC greater than .08 are impaired. §61-8-401(4)(c), MCA. Without that evidence, the State cannot meet its burden of proof.

8. As set forth above, without the BAC evidence the State cannot establish that the Defendant's ability to operate a motor vehicle safely was diminished. Moreover, without clear evidence of alcohol impairment the State cannot prove that such impairment caused Ms. Everett's death.

9. After reviewing this case Movant does not believe the State could prove beyond a reasonable doubt that the Defendant negligently caused Ms. Everett's death while operating her motor vehicle while in violation of §61-8-406, MCA. The State also lacks evidence for a successful prosecution of any other alcohol-related criminal offense.

Based on the foregoing, the interests of justice require dismissal of the Information filed in this matter.

DATED this 20 day of August, 2010

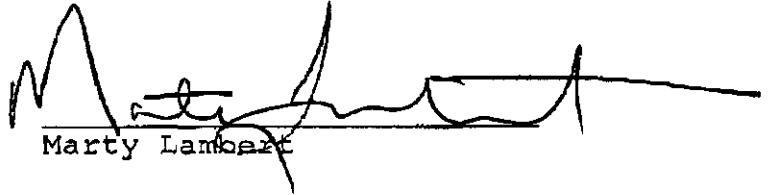


Marty Lambert
County Attorney

CERTIFICATE OF SERVICE

I hereby certify that on August 20, 2010 I mailed a true and accurate copy of the foregoing Motion and Brief, postage prepaid, by U.S. mail, addressed as follows:

Bill Bartlett
125 W. Mendenhall, Suite 201
Bozeman, MT 59715



Marty Lambert

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

STATE OF MONTANA,

Case No. DC-09-55C

Plaintiff,

ORDER

v.

LORA KATHRYN WHITMORE,

Defendant.

The State of Montana having filed a motion to dismiss the information filed in this case, and good cause appearing therefrom,

IT IS HEREBY ORDERED that the information is dismissed with prejudice.

Dated this _____ day of August, 2010

John C. Brown
District Judge

Cc: County Attorney
Bill Bartlett