STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2340

State of Minnesota,
Respondent,

vs.

Creighton Martin Olcott,
Appellant.

Filed April 15, 2008
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 06047725

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Jennifer M. Inz, Melissa A. Johnson, Gregerson, Rosow, Johnson & Niland, Ltd., 650 Third Avenue South, Suite 1600, Minneapolis, MN 55402 (for respondent)

Samuel A. McCloud, Carson J. Heefner, McCloud & Heefner, P.A., Suite 1000, Circle K, Box 216, Shakopee, MN 55379 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Toussaint, Chief Judge; and Crippen, Judge.[*]

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

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

After being charged with careless driving and driving with a blood-alcohol concentration of .08 or more, appellant sought to discover the "source code" of the software used to operate the Intoxilyzer 5000EN that produced a breath analysis reading of .17. The district court ruled that appellant failed to make the rule 9.01, subd. 2(3), showing that is a prerequisite to such discovery. Appellant contends this ruling was an abuse of discretion. We affirm.

FACTS

The state charged appellant Creighton Martin Olcott with the misdemeanors of fourth-degree driving while impaired (later amended to careless driving) and fourth-degree driving with a blood-alcohol concentration of .08 or more. The latter charge was based on an Intoxilyzer 5000EN analysis of a sample of Olcott's breath, which showed an alcohol concentration of .17.

In pretrial discovery, Olcott asked the prosecutor for the "source code" of the Intoxilyzer 5000EN. When the prosecutor declined the request, Olcott moved to compel production of the source code and to compel the state to sell to him a fully operational model of the Intoxilyzer 5000EN.

The district court denied the motion to compel production of the source code, ruling that Olcott had "failed to articulate *any* relationship between the source codes and his guilt or innocence," as required by the discovery rule in Minn. R. Crim. P. 9.01, subd. 2(3).

The court also denied the motion to compel a sale of the machine because the record showed that the machine is available to Olcott for inspecting and testing and Olcott "failed to explain why this is a legally unsuitable alternative."

After the court's denial of his motions, Olcott waived his right to a jury trial and agreed to submit the case for a determination on the merits under the procedure described in *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). Upon the record submitted, the court found Olcott guilty of careless driving and driving with .08 or more alcohol concentration.

On appeal, Olcott contends that the district court erred in denying his motion to compel production of the source code of the Intoxilyzer 5000EN. He has neither briefed nor argued the propriety of the court's denial of his motion to compel the sale of the machine. Thus, we will confine our analysis and decision to the "source code" issue.

D E C I S I O N

Minn. R. Crim. P. 7.04 provides that, in misdemeanor cases, the prosecutor must allow the discovery of "police investigatory reports" upon the defendant's request. "Any other discovery shall be by consent of the parties or by motion to the court." Minn. R. Crim. P. 7.04. It is the nonmandatory discovery noted in the rule that is at issue here.

In its comment to rule 7.04, the advisory committee notes that it is the rare case in which additional, nonmandatory discovery will be necessary but, when it is, counsel and the court may be guided by the discovery provisions of Minn. R. Crim. P. 9:

> In those rare cases in which additional discovery is considered necessary by either party, it shall be by consent of the parties or motion to the court. In such cases it is expected

> that the parties and the court will be guided by the extensive discovery provisions of these Rules. Rule 9 provides guidelines for deciding any such motions, but they are not mandatory and the decision is within the discretion of the trial judge. *State v. Davis*, 592 N.W.2d 457 (Minn. 1999).

Minn. R. Crim. P. 7.04 cmt. Caselaw also provides that the district court enjoys wide discretion in deciding discovery issues and that its decision will not be deemed error on appeal absent a showing of a clear abuse of that wide discretion. *Underdahl v. Comm'r of Pub. Safety* (*In re Comm'r of Pub. Safety*), 735 N.W.2d 706, 711 (Minn. 2007) (citation omitted). If the district court improperly applies the law, it thereby abuses its discretion. *Id.*

Minn. R. Crim. P. 9, which, according to the comment to rule 7.04, contains guidelines for deciding a motion for discovery of items not included in the rule 7 discovery mandate, allows the court, in its discretion, to "require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any relevant material and information," not subject to mandated disclosure, "provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged." Minn. R. Crim. P. 9.01, subd. 2(3). Although this discovery guideline is not mandatory, the district court chose to employ it, as it had discretion to do. Minn. R. Crim. P. 7.04 cmt.

Employing this discretionary guideline, the court required Olcott to make a "showing" as to how the Intoxilyzer 5000EN source code relates to his guilt or innocence or negates his guilt, or reduces his culpability of the charge based on the breath-sample

analysis obtained through the use of that machine. The parties submitted memorandums in support of their respective positions as to this discovery issue.

In his memorandum, Olcott stated that (1) "the Intoxilyzer 5000 and its software were used to test" Olcott's alcohol concentration; (2) Olcott must be "prepared to confront the instrument's evidence"; (3) without the discovery, Olcott is left only with the opportunity "to challenge an officer's testimony regarding his/her particularized training on how to administer the test and receive a result" but not how the machine arrives at that result; (4) an officer competent to testify to an Intoxilyzer result cannot also testify "as to the method used, namely, how the machine takes in a breath sample, extrapolates the data and then renders a numeric value" of a person's breath-alcohol content; (5) to determine how the instrument produced its numeric result, Olcott must have access to "the computer code for the software that runs the instrument"; (6) the Intoxilyzer operator is permitted to "offer an opinion as to the accuracy and reliability of the result"; and (7) Olcott, through his own expert, needs to be able to examine the source code in order "to challenge the Intoxilyzer in any meaningful way."

In its order denying Olcott's discovery motion, the district court noted the essence of Olcott's arguments but held: "On this record, the Court cannot conclude that Defendant has made a preliminary showing that the source codes used in the software of the Intoxilyzer 5000EN relate to his guilt or innocence or reduce his culpability as required by Rule 9.01, subd. 2(3)." The court further noted that, although Olcott's discovery request was "reasonably specific," he failed "to present any testimony or other evidence" to show "how the source codes would impact his ability to assess the validity

of the testing procedure or why the source codes are necessary to challenge the test results." The court characterized Olcott's "showing" as merely a "bald assertion that he needs the source codes" without articulating "*any* relationship between the source codes and his guilt or innocence."

In his contention on appeal that the district court's denial of his motion to compel production of the source code was an abuse of discretion, Olcott makes the identical arguments in his brief that he made in his memorandum in support of discovery in the district court.

Thus, we must decide whether Olcott made the requisite "showing" under rule 9.01, subd. 2(3), to entitle him to the discovery he seeks.

There was no evidentiary hearing on the motion. No evidence by affidavit or otherwise was offered to the court respecting the discovery request. The sole record on this issue consists of Olcott's memorandum and the state's oppositional memorandum. It is on the basis of Olcott's memorandum that we must determine whether he made the necessary rule 9.01 showing. We note, however, for purposes of context, the district court's indications that "[i]t is uncontroverted that the BCA allows a private party to borrow an Intoxilyzer machine for testing purposes" and that the Intoxilyzer "is available to [Olcott] for inspection and independent testing."

We have no quarrel with Olcott's underlying propositions that an accused should be allowed to examine the evidence against him and, generally, he should be allowed to discover information that could lead to admissible evidence. But we fully agree with the

district court that Olcott has offered only a "bald assertion" and legal arguments in support of his discovery requests.

We find nothing in the district court record that even marginally attempts to satisfy the rule 9 "showing" requirement. Olcott has not attempted to show what a "source code" is; or how it fits into the operation of the Intoxilyzer; or what its precise role is in regulating the accuracy of the machine; or what possible deficiencies could be found in a source code; or how significant any deficiencies might be to the accuracy of the machine's result; or whether testing of the machine (which he is permitted to do) cannot reveal potential inaccuracies without also knowing the source code. Olcott seems to suggest that his request for the source code needs no technical explanation, that the thing speaks for itself, and that his mere assertion makes the need for the source code obvious. But this is the realm of a type of expertise beyond ordinary knowledge. Olcott implicitly concedes that fact when he argues that even the expert Intoxilyzer operators cannot testify to the method of producing the result. By presenting only argument on the discovery issue, Olcott left the district court, and this court, to speculate.

Because Olcott has made no "showing" whatsoever of how the Intoxilyzer 5000EN source code relates to his guilt or innocence, negates his guilt, or reduces his culpability, we conclude that the district court did not abuse its discretion in denying Olcott's motion to compel production of the source code for the machine.

Affirmed.