**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A07-2434**

Nicholas Ray Swendra,
petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed January 13, 2009**
**Affirmed**
**Crippen, Judge**[*]

Wright County District Court
File No. 83-CV-07-5524

Derek A. Patrin, Meaney & Patrin, P.A., 6225 Ginger Drive, Eden Prairie, MN 55346 (for appellant)

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Considered and decided by Schellhas, Presiding Judge; Johnson, 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

**CRIPPEN**, Judge

Appellant challenges the district court's denial of his motion for discovery of the source code to the Minnesota Model of the Intoxilyzer 5000EN. Because appellant made an insufficient showing that the code was relevant, we affirm.

## FACTS

In appellant Nicholas Ray Swendra's petition for judicial review of his implied-consent driver-license revocation, he requested production of the complete computer source code for the Intoxilyzer. To support his motion, appellant submitted written testimony of a computer scientist before a congressional committee regarding computerized voting systems, a report on a New Jersey version of a breath tester's source code, and five additional district court orders granting motions for additional discovery of the Intoxilyzer source code.

Respondent submitted an affidavit from a BCA forensic scientist testifying to the accuracy of the source code software used in the Intoxilyzer. At oral argument on the discovery issue before the district court, appellant stipulated that the test was administered properly and that the Intoxilyzer appeared to be in proper working order at the time the test was taken.

The district court sustained the license revocation, addressing issues not raised in this appeal. In a separate order, the court denied appellant's motion for additional discovery. In this order, the district court stated that in *In Re Comm'r of Pub. Safety*, 735 N.W.2d 706 (Minn. 2007) (*Underdahl I*), which is cited by appellant, the supreme court

did not conclude that the source code was discoverable, but only that the commissioner failed to prove that the source code was not discoverable in that case. The court also concluded that production of the code would be unreasonably burdensome and that appellant provided only speculation to support his argument that the source code is relevant.

## D E C I S I O N

Appellant argues that the district court abused its discretion in denying discovery of the Intoxilyzer 5000EN source code. He also contends that the discovery provisions of Minn. Stat. § 169A.53, subd. 2(d) (2006) violate separation of powers principles.

### 1.

Absent a clear abuse of the court's wide discretion, this court will generally affirm a denial of a district court's discovery request. *State v. Willis*, 559 N.W.2d 693, 698 (Minn. 1997).

Under the implied-consent statute, a party may seek discovery not enumerated in the statute by court order. Minn. Stat. § 169A.53, subd. 2(d). As a general matter, the moving party seeking discovery in civil proceedings must show that the requested information is relevant. Minn. R. Civ. P. 26.02(a); *see also State v. Underdahl*, 749 N.W.2d 117, 122-23 (Minn. App. 2008) (*Underdahl II*), *pet. for rev. granted* (Minn. Aug. 5, 2008). Relevant information is information "reasonably calculated to lead to the discovery of admissible evidence." Minn. R. Civ. P. 26.02(a).

The results of the Intoxilyzer breath test are presumed reliable under Minnesota statute. Minn. Stat. § 634.16 (2006) (allowing the results of a breath test to be admitted

"in evidence without antecedent expert testimony that an . . . approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath."); *see also Underdahl I*, 735 N.W.2d at 711. Because appellant stipulated to the Intoxilyzer's reliable administration, he bore the burden of presenting the court with "some evidence beyond mere speculation that questions the trustworthiness of the Intoxilyzer report." *See Kramer v. Comm'r of Pub. Safety*, 706 N.W.2d 231, 236 (Minn. App. 2005).

In *Underdahl II*, this court held that a finding of relevancy respecting the source code "must be premised on a showing that an examination of the instrument's software would show defects in its operation or at least would be necessary to determine whether a defect exists." 749 N.W.2d at 119. We found that the party seeking discovery in *Underdahl II* failed to show relevancy because he furnished no evidence that the code would reveal testing deficiencies or that any deficiencies would affect test results and no evidence that the driver, who is permitted by law to test the machine, was deprived of access to any information that might be revealed by the source code. *Id.* at 122.

As in *Underdahl II*, appellant made inadequate showings in the district court on the relevancy of the source code. Appellant theorized that, "[w]ithout the source code, the Intoxilyzer 5000 is just a machine that does nothing. The source code itself is absolutely relevant and material to the question of whether the test record in this case is accurate and valid." The district court found appellant's evidence (testimony on voting machine source codes, a New Jersey source-code report, and trial court opinions) unhelpful and concluded that "[p]etitioner has provided only speculation that the

information provided by the Intoxilyzer 5000EN is even at issue in this case. . . . In this case and on this record, [p]etitioner is not entitled to additional discovery."

The district court acted within the scope of its wide discretion in its relevancy decision. It follows that we have no occasion to reach appellant's remaining argument that the court erred in addressing respondent's alleged possession of the source code.

**2.**

Appellant also challenges the discovery provisions of Minn. Stat. § 169A.53, subd. 2(d), contending that the limitations on discovery violate separation of powers principles. *See* Minn. Const. art. III, § 1. Under Minnesota law, discovery in implied-consent hearings is governed by the Minnesota Rules of Civil Procedure, except that by statute prehearing discovery is limited to the notice of revocation, the test record, the police revocation certificate (with supporting documentation), and the identity of state witnesses, including the basis for their anticipated testimony. Minn. Stat. § 169A.53, subd. 2(d).

Appellant did not raise this constitutional challenge in the district court, and we generally are to consider only matters argued and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Appellant argues that the interests of justice favor the court's review of this issue. *See, e.g., Tischendorf v. Tischendorf*, 321 N.W.2d 405, 410 (Minn. 1992) (despite *Thiele*, permitting review in the interests of justice, in limited circumstances). But we note, among several considerations, that appellant has failed to show his standing to challenge the statute.

In order to establish standing, "[a] party challenging the constitutionality of a statute must show a direct and personal harm resulting from the alleged denial of constitutional rights." *Davis v. Comm'r of Pub. Safety*, 509 N.W.2d 380, 391 (Minn. App. 1993), *aff'd*, 517 N.W.2d 901 (Minn. June 24, 1994) (quotations omitted). Appellant argues that he was denied a legitimate request for civil discovery as a direct result of the application of the implied-consent statute. But the district court, although noting that "the normal rules of civil procedure and discovery do not strictly apply to implied-consent matters," proceeded to evaluate appellant's discovery request under the civil rules. The court's order does not support a finding that harm was caused by the application of Minn. Stat. § 169A.53.

Due to his lack of standing, the interests of justice do not favor review of appellant's constitutional claim. Because appellant raises this issue for the first time on appeal and because the interests of justice do not favor review, appellant's constitutional claim is barred under *Thiele*. 425 N.W.2d at 582.

**Affirmed.**