STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0738

State of Minnesota,
Respondent,

vs.

Dennis R. Thompson,
Appellant

Filed March 3, 2009
Affirmed
Stoneburner, Judge

Dakota County District Court
File No. 19T007009950

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Helen R. Brosnahan, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Richard L. Swanson, Suite 235, 207 Chestnut Street, Box 117, Chaska, MN 55318 (for appellant)

        Considered and decided by Shumaker, Presiding Judge; Stoneburner, Judge; and

Collins, Judge.[*]

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

STONEBURNER, Judge

Appellant challenges his conviction of misdemeanor driving while impaired, arguing that the district court abused its discretion in denying his motion to discover the source code for the Intoxilyzer 5000EN. We affirm.

DECISION

In misdemeanor cases, any discovery beyond police investigatory reports is by consent of the parties or motion to the district court. Minn. R. Crim. P. 7.04. A trial court has discretion in ruling on discovery motions in misdemeanor cases. *State v. Davis*, 592 N.W.2d 457, 459 (Minn. 1999). The district court's wide discretion in granting or denying a discovery request will generally be affirmed, absent a clear abuse of discretion. *State v. Underdahl*, 749 N.W.2d 117, 120 (Minn. App. 2008), *review granted* (Minn. Aug. 5, 2008).

Minn. R. Crim. P. 9.01 provides guidance for deciding discovery motions in misdemeanor cases. Minn. R. Crim. P. 7.04 cmt. "Under the rule, the district court may exercise its discretion and require the prosecution to disclose material and information if the defendant shows '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.'" *Underdahl*, 749 N.W.2d at 120 (citing Minn. R. Crim. P. 9.01, subd. 2(3)).

In *Underdahl* (consolidated with *State v. Brunner*), we held that the district court abused its discretion by ordering discovery of the source code in each case because Underdahl and Brunner failed to show that the source code was relevant to their guilt or

innocence. *Id.* at 122–23. We did not define what showing would be necessary to justify requiring disclosure of the source code, but noted that the record in each case contained only one expert affidavit bearing directly on the Intoxilyzer source code: the affidavit of a BCA toxicology supervisor "stating that the BCA conducted extensive instrument validation testing as part of the Intoxilyzer approval process, that the results of the testing provided no reason to doubt the accuracy and reliability of the test results, and that the validation testing 'was performed without access to the source code.'" *Id.* at 121. We also noted that "each time the instrument is used, diagnostic tests are performed to ensure the reliability of the test results." *Id.* at 122.

> [R]espondents have not shown what an Intoxilyzer "source code" is, how it bears on the operation of the Intoxilyzer, or what precise role it has in regulating the accuracy of the machine. Accordingly, there is no showing as to what possible deficiencies could be found in a source code, how significant any deficiencies might be to the accuracy of the machine's results, or that testing of the machine . . . would not reveal potential inaccuracies without access to the source code.

Id.

Thompson calls the Intoxilyzer "the State's only witness" and asserts that he is entitled to "conduct a full examination" of this witness. He argues that he cannot assess the reliability of the testing method without access to the source code. He asserts that he has shown the relevance of the source code to his guilt or innocence sufficient to make the district court's denial of its discovery an abuse of discretion. We disagree.

Thompson's discovery request relies primarily on the affidavit of his expert witness, Thomas R. Burr, who makes the conclusory statement that "without access to

those codes it is not possible to determine if the Intoxilyzer functions as designed or as approved [pursuant to Minn. R. 7502]." But the record also contains a February 21, 2007 affidavit of Glenn Hardin (the same BCA toxicology supervisor whose affidavit was quoted in *Underdahl*) in which Hardin states in relevant part:

> In the field of forensic toxicology, validation of analytical methodologies for analyzing alcohol and other drugs in the human body is performed exclusively without access to analytical instrument software source code . . . . I have never heard or read of a validation of a toxicological analysis method that was performed with access to the software source code of the analytical instrumentation. I also am unaware of any articles in peer review journals describing the necessity for access to source codes for any validation tests.

Thompson has not shown the existence of any validation method that requires the source code; has not explained why existing reliability testing (that does not require the source code) is insufficient to establish the reliability of the instrument used in his test; and has not explained how the source code could invalidate existing reliability testing. On this record, we cannot conclude that the district court abused its discretion by denying Thompson's request for discovery of the source code.

Thompson, noting the district court ordered discovery of the source code in his implied-consent proceeding, argues that this court should find that he "has been prejudiced by such a protracted proceeding involving continuing legal fees and ongoing uncertainty regarding discovery of the source code." But Thompson's personal situation does not establish that the district court abused its discretion in denying his request for discovery of the source code in this case.

Affirmed.