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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0761**

Richard Allen Patterson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed March 17, 2009
Affirmed
Minge, Judge**

Mille Lacs County District Court
File No. 48-CV-07-1263, 48-CR-07-1470

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Considered and decided by Minge, Presiding Judge; Larkin, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges his implied-consent license revocation, arguing that the district court abused its discretion by denying his motion for discovery of the source code for the Intoxilyzer 5000EN machine used to measure his alcohol concentration. Because

respondent presented an affidavit stating that it does not possess the source code, there is nothing in the record to rebut this evidence, and appellant concedes that it cannot show that the item requested is in respondent's "possession, custody or control," we affirm.

FACTS

Appellant Richard Allen Patterson was arrested for DWI, and his driver's license was revoked pursuant to the implied-consent law. On review of the revocation, he argued that he was entitled to discover the Intoxilyzer source code because of its relevance to his challenge to the revocation. Appellant provided several supporting exhibits: (1) two affidavits from Thomas R. Burr, a forensic scientist, who opined that peer review of the source code should be conducted to determine whether the machine functions in a scientific manner—even in the absence of any data of malfunction through testing of the machine itself—and that "data integrity" problems could occur when data is transferred from a machine to a networked computer at the BCA; (2) a summary of an analysis of a different brand of testing equipment and its source code indicating problems with that machine; and (3) district court orders granting discovery of the source code.

Respondent opposed the motion, arguing that appellant failed to identify any problem with the test of his alcohol concentration or any facts to suggest that discovery of the source code was likely to lead to evidence that the Intoxilyzer does not accurately measure alcohol concentration. Respondent also stated that it did not have possession, custody, or control of the source code and offered an affidavit in support of that fact.

The district court denied appellant's motion and sustained his license revocation on several bases, including that there was no evidentiary basis to believe the code was possessed by or available to respondent. This appeal follows.

DECISION

The issue is whether the district court abused its discretion in finding that appellant failed to make a showing sufficient to compel discovery of the source code. Rulings related to discovery entail a considerable exercise of discretion by the district court. *EOP-Nicollet Mall, L.L.C. v. County of Hennepin*, 723 N.W.2d 270, 274 (Minn. 2006). Absent a clear abuse of its wide discretion, we will affirm a district court's denial of a discovery request. *Dunham v. Roer*, 708 N.W.2d 552, 572 (Minn. App. 2006). "We review a district court's order for an abuse of discretion by determining whether the district court made findings unsupported by the evidence or by improperly applying the law." *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). In this case, the district court cited several rationales for denying the motion. To reverse, we would need to determine that every basis for denial was an abuse of discretion. We affirm the district court if any basis was not an abuse of discretion and is dispositive.

The most obvious basis for the district court's denial of appellant's motion was its finding that there was no basis to believe that the source code was in the possession of or available to respondent. In *Abbott v. Comm'r of Pub. Safety*, __ N.W.2d __, 2009 WL 366729, at *2 (Minn. App. Feb. 17, 2009), this court held that, unless the driver establishes that the commissioner has the possession of the Intoxilyzer 5000 source code, the right of discovery does not extend to that information. The finding of the district

court in this case is grounded on the rule 34 requirement that, to be discoverable, an item must be in the “possession, custody or control” of the party from whom it is sought. Minn. R. Civ. P. 34.01. In other words, the court cannot compel a party to produce something that it does not have. *See Abbott*, __ N.W.2d at __, 2009 WL 366729, at *2. Respondent presented an unchallenged affidavit from a toxicology supervisor for the BCA, who attested that “the only individual or entity in actual possession of the source code . . . is its manufacturer, CMI, Inc.” Appellant provided no evidence indicating that the source code was in respondent’s possession, custody, or control.

At oral argument on appeal, respondent still maintained that it does not have possession of the source code, and appellant conceded that there is no evidence that respondent does possess it.

We conclude that, on this record, the district court’s denial of the discovery motion on the ground the commissioner does not have possession or control of the source code was not an abuse of discretion under Minn. R. Civ. P. 34.01. *See Abbott*, __ N.W.2d at __, 2009 WL 366729, at *3. Because resolution of this issue is dispositive of the appeal, we do not address the remaining bases for denying the motion.

Affirmed.

Dated: