STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1493

State of Minnesota,
Appellant,

vs.

Nicholas Philip Kuklok,
Respondent.

Filed March 31, 2009
Reversed
Bjorkman, Judge

Washington County District Court
File No. 82CG-CR-08-2120

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

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Considered and decided by Bjorkman, Presiding Judge; Hudson, 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

BJORKMAN, Judge

This appeal is taken from the district court's order compelling disclosure of the computer source code for the Minnesota model of the Intoxilyzer 5000EN (Intoxilyzer), the machine used to test respondent's alcohol concentration following his arrest for driving while impaired (DWI). Because the district court abused its discretion in determining that discovery of the source code was relevant to respondent's guilt or innocence in this case, we reverse.

FACTS

On February 10, 2008, Minnesota State Trooper Steven Dauffenbach responded to a report of a vehicle off of the road in Newport. The dispatcher advised Dauffenbach that the driver of the vehicle was possibly intoxicated. When he arrived at the scene, Dauffenbach met Newport Police Officer Sean McArdell, who indicated that the driver, respondent Nicholas Philip Kuklok, was secured in the back of McArdell's squad car.

Dauffenbach asked respondent to step out of the squad car. Dauffenbach smelled a strong odor of alcohol coming from respondent and observed that respondent's eyes were watery, glassy, and bloodshot. Dauffenbach noted that respondent's speech was slurred and that he swayed when he walked. Respondent admitted that he had been driving and that he consumed his last alcoholic beverage one hour earlier.

Due to extreme cold-weather conditions, Dauffenbach did not conduct any of the usual field sobriety tests. Respondent did submit to a portable breath test, which registered an alcohol-concentration level of .193. Dauffenbach arrested respondent and

transported him to the Washington County jail. After speaking with an attorney, respondent agreed to submit to a breath test using the Intoxilyzer, which indicated an alcohol concentration of .20.

Respondent was charged with one count of second-degree DWI based on his .20 alcohol concentration and one count of second-degree DWI based on the "physical manifestations of consumption observed by a peace officer." At a pretrial omnibus hearing, respondent moved for discovery of the computer source code and other specifications of the Intoxilyzer.

The district court granted respondent's request for discovery of the source code, finding it "relevant and necessary for [respondent's] defense." The district court specifically ordered the state to "provide the full source code to [respondent] within 30 days of the filing of this order," and stated that "[i]f the source code is not produced within 30 days of the filing of this order, the Intoxilyzer test result shall be suppressed." This appeal follows.

D E C I S I O N

I. The state has established critical impact.

The rules of criminal procedure permit the prosecution to appeal a pretrial order in limited circumstances. Minn. R. Crim. P. 28.04. To prevail on appeal of a pretrial order, the state must clearly and unequivocally show that the order is erroneous and will critically impact the state's ability to prosecute the case. *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). The requirement that the state prove critical impact applies to pretrial discovery orders. *See State v. Rambahal*, 751 N.W.2d 84, 89 (Minn. 2008)

(noting that the supreme court has not exempted discovery-related pretrial appeals from the critical-impact rule). Critical impact is a threshold issue, *McLeod*, 705 N.W.2d at 784, and though it is a demanding standard, it is also a "fair and workable rule." *State v. Zanter*, 535 N.W.2d 624, 630 (Minn. 1995).

The state argues that the district court's discovery order has a critical impact on its case because if the Intoxilyzer results are suppressed, the state will be unable to prosecute respondent for second-degree DWI over .08 alcohol concentration. We agree. While the state may still prosecute respondent on the DWI charge based on the officers' observations, this court has held that a critical impact is shown when evidence essential to prove some, but not all, criminal counts is suppressed. *See State v. Grohoski*, 390 N.W.2d 348, 352 (Minn. App. 1986) (holding that the critical-impact test is met when, without the chemical-test evidence, four of six charges would be dismissed), *review denied* (Minn. Aug. 27, 1986). Suppression of the Intoxilyzer result in this case, as required by the district court's discovery order, has a critical impact on the state's ability to prosecute respondent.

II. The district court abused its discretion in ordering the state to disclose the source code to respondent.

The state argues that the district court erred in ordering disclosure of the source code because respondent has not shown such information is relevant or relates to his guilt or innocence, and because the state is not in possession of the source code.

The district court has wide discretion in granting or denying a discovery request and, absent a clear abuse of discretion, that decision will generally be affirmed. *State v.*

Underdahl, 749 N.W.2d 117, 120 (Minn. App. 2008) (*Underdahl II*), *review granted*, (Minn. Aug. 5, 2008).[1] A district court abuses its discretion when it acts "arbitrarily, capriciously, or contrary to legal usage." *State v. Profit*, 591 N.W.2d 451, 464 n.3 (Minn. 1999) (quotation omitted).

The rules of criminal procedure allow for broad discovery. *See State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987). And limitations on discovery imposed through interpretation of the rules must rest on sound policy grounds. *State v. Deal*, 740 N.W.2d 755, 763 (Minn. 2007) (quoting *Anderson v. Florence*, 288 Minn. 351, 357, 181 N.W.2d 873, 877 (1970)). Nonetheless, "[d]iscovery rules are not meant to be used for fishing expeditions." *State v. Hunter*, 349 N.W.2d 865, 866 (Minn. App. 1984) (quotation omitted).

Minn. R. Crim. P. 9.01 mandates disclosure by the prosecution of certain categories of information in gross misdemeanor and felony cases. Other discovery may be ordered based upon the motion of a defendant and in the court's discretion. Minn. R. Crim. P. 9.01, subd. 2. 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." *Id.*, subd. 2(3). We have held that the discovery request must call for relevant material and must be reasonably specific. *State v. Lynch*, 443 N.W.2d 848, 852 (Minn. App. 1989), *review denied* (Minn. Sept. 15, 1989).

[1] The supreme court heard oral arguments in *Underdahl II* on October 13, 2008.

The state argues that respondent has not demonstrated that the source code has any specific relevance to his guilt or innocence. Specifically, the state contends respondent has not presented evidence raising a question as to the accuracy of the test in his case and has not shown that the Intoxilyzer malfunctioned or that the result was unreliable as to him. The state further argues that "[r]espondent failed to explain to the District Court how the source code could demonstrate some flaw in the software of the instrument or its operation."

This is not the first time we have considered a defendant's request to discover the Intoxilyzer source code in a DWI case. In *Underdahl II*, we held that because the defendants failed to show how the source code related to their guilt or innocence, the district court abused its discretion in granting the discovery motions. 749 N.W.2d at 122. We noted that although one of the defendants submitted some evidence providing a general explanation as to what a source code is, the court was nonetheless "without any record from which to determine that the disclosure of the source code would relate to the guilt or innocence of the defendant, or would lead to the discovery or development of admissible evidence on the reliability of the Intoxilyzer." *Id.* at 121 (quotation omitted). While we expressly declined to define what specific showing would be necessary to justify requiring disclosure of the source code, we noted that the defendants had failed to show what an Intoxilyzer source code is, how it bears on the operation of the Intoxilyzer, or the source code's precise function in regulating the accuracy of the instrument. *Id.* at 121-22.

Here, respondent submitted several supporting documents and affidavits to the district court to explain the function and significance of the source code. The district court noted the "significant number of expert affidavits, scholarly articles and data which explains what a source code is and how it relates to the proper operation of the Intoxilyzer 5000." This information generally explains what the Intoxilyzer source code is, and how it functions in the operation of the Intoxilyzer and in regulating accuracy. *See, e.g.*, Minn. Dep't of Pub. Safety, *Intoxilyzer 5000EN Court Challenge Frequently Asked Questions* (2008).

As in *Underdahl II*, however, respondent's challenge and the evidence he submitted "tend[s] to aim more at the validity of an automated testing process, rather than at the need for discovery of one of its component pieces." 749 N.W.2d at 122. The Intoxilyzer instrument underwent significant testing through an accepted process prior to its approval for statewide use. *See Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 438-40 (Minn. 2002); *see also* Minn. R. 7502.0420, subp. 3 (2007); Minn. Stat. § 169A.75(c) (2006) (authorizing the commissioner of public safety to approve instruments for preliminary screening or chemical tests for intoxication). And "diagnostic tests are performed to ensure the reliability of the test results" each time the instrument is used. *Underdahl II*, 749 N.W.2d at 122 (citing *Kramer v. Comm'r of Pub. Safety*, 706 N.W.2d 231, 236 (Minn. App. 2005)). Respondent's challenge to the Intoxilyzer instrument itself is not appropriate in this forum.

Moreover, respondent does not make a connection between the Intoxilzyer result in this case and the information the source code would provide—respondent does not

contend that he was not drinking or that the alcohol concentration the Intoxilzyer reported was too high based on the number of drinks he had that night. Record evidence indicates respondent admitted to having his last alcoholic beverage one hour before Dauffenbach and McArdell responded to the scene, and he admitted he was the driver of the car. In short, respondent has not demonstrated that the source code has any bearing on his guilt or innocence.

The state also contends that it is unable to comply with the district court's discovery order because the source code is not within the state's possession or control. Minn. R. Crim. P. 9.01, subd. 1. The district court did not address this issue in its discovery order. The state is currently engaged in a lawsuit against the manufacturer of the Intoxilyzer for breach of contract based on its refusal to provide the state with the source code information. An affidavit of two forensic scientists in the breath testing section of the Minnesota Bureau of Criminal Apprehension (BCA) Forensic Science Laboratory confirms that "[t]he source code for the Intoxilyzer 5000EN is not now, nor has it ever been, in the possession or custody of the BCA. [The manufacturer] has never provided the BCA with the source code for the [device]." Other than argue that the state waited too long to assert its rights to the source code against the manufacturer, respondent has not provided any evidence establishing that the source code is actually in the state's possession or control. *See Abbott v. Comm'r of Pub. Safety*, 760 N.W.2d 920, 924 (Minn. App. 2009) (holding that unless the driver establishes that the commissioner has the possession of the Intoxilyzer source code, the right of discovery does not extend to that information).

This court's deferential standard of review and the broad criterion that information that "may relate" to a defendant's guilt or innocence is subject to discovery weigh in favor of affirming the district court's decision. But because respondent has failed to establish that the source code specifically relates to his guilt or innocence in this case pursuant to *Underdahl II*, and because the record indicates that the source code is not in the state's possession, we find the district court abused its discretion in granting respondent's discovery motion.

Reversed.