STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0802, A08-1298

Lyle James Chastek, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent (A08-802),

and

State of Minnesota,
Respondent (A08-1298),

vs.

Lyle James Chastek,
Appellant.

Filed April 7, 2009
Affirmed
Hudson, Judge

McLeod County District Court
File No. 43-CV-07-78

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

Lori Swanson, Attorney General, Martin A. Carlson, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134 (for respondent Commissioner of Public Safety)

Jody L. Winters, Glencoe City Attorney, 1017 Hennepin Avenue North, Glencoe, Minnesota 55336 (for respondent State of Minnesota)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Connolly, Judge.

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

HUDSON, Judge

On appeal from the order sustaining the revocation of his driver's license and a conviction of driving while impaired (DWI), appellant argues that the district court erred in (1) determining that appellant's right to counsel was vindicated, and (2) denying appellant's discovery request for the source code to the Intoxilyzer 5000EN. Because appellant did not request to contact an attorney, and because appellant cannot establish the relevancy of the source code, we affirm.

FACTS

On December 22, 2006, City of Glencoe Police Officer Kevin Dietz arrested appellant Lyle James Chastek for suspicion of DWI. After transporting appellant to the law enforcement center, Officer Dietz read to appellant the motor vehicle implied-consent advisory. Appellant indicated that he understood what was read to him. Officer Dietz asked appellant if he wanted to contact an attorney, and appellant responded by saying, "I don't think so." Officer Dietz understood appellant's response to mean that appellant did not want to contact an attorney, but the officer did not attempt to clarify appellant's response. Officer Dietz then asked appellant if he would submit to a breath test, and appellant said that he would. Appellant provided two breath samples, and the result indicated that appellant's alcohol concentration was .13.

Appellant's driver's license was revoked under the implied-consent law, and he was charged with third-degree DWI in violation of Minn. Stat. §§ 169A.20, subd. 1, .26 (2006). Appellant petitioned the district court for judicial review of his license revocation, arguing, in part, that his right to counsel was not vindicated. Appellant also moved the district court for discovery of the source code for the breath-test machine—the Intoxilyzer 5000EN.

A combined implied-consent/evidentiary hearing was held on July 26, 2007. The district court sustained appellant's license revocation, finding that appellant's right to counsel was vindicated. The district court also denied appellant's discovery request, finding that appellant put forth only speculative allegations regarding the validity and trustworthiness of the Intoxilyzer breath test.

After a stipulated-facts *Lothenbach* proceeding, appellant was convicted of DWI. This consolidated appeal follows.

D E C I S I O N

I

Appellant contends that the district court erred in determining that his right to counsel was vindicated. Drivers have a limited right to counsel before deciding whether to submit to chemical testing, as long as it does not unreasonably delay testing. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991). The driver "must be informed of the right to consult with an attorney and the police officers must assist in the vindication of that right." *State v. Fortman*, 493 N.W.2d 599, 601 (Minn. App. 1992); *see also* Minn. Stat. § 169A.51, subd. 2(4) (2006) (requiring as part of the

implied-consent advisory that a person be informed of this limited right to counsel). When the facts are undisputed, as they are here, this court considers de novo whether a defendant's right to counsel was violated. *State v. Christiansen*, 515 N.W.2d 110, 112 (Minn. App. 1994), *review denied* (Minn. June 15, 1994).

Appellant argues that when Officer Dietz asked if appellant wanted to contact an attorney, appellant's response—"I don't think so"—shows that he was confused, and that his confusion required the officer to clarify whether appellant wanted to consult an attorney. Appellant asserts that the officer's failure to clarify appellant's response constitutes a violation of his limited right to counsel warranting reversal of his conviction and license revocation.

If a driver expresses interest in consulting an attorney after being read the implied-consent advisory, an "officer[ ] [is] required either to vindicate the underlying [statutory] right by providing a telephone and a reasonable opportunity to consult with an attorney or clarify [the] request." *State v. Slette*, 585 N.W.2d 407, 410 (Minn. App. 1998). But an officer's duty to clarify arises only after the driver makes an equivocal or ambiguous request to consult an attorney. *Id.*; *see State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988) (stating that "when a suspect indicates by an equivocal or ambiguous statement, which is subject to a construction that the accused is requesting counsel, all further questioning must stop except that narrow questions designed to 'clarify' the accused's true desires respecting counsel may continue").

The facts here are similar to those in *State v. Von Bank*, 341 N.W.2d 894 (Minn. App. 1984). In *Von Bank*, the defendant was asked if she wished to consult with an

attorney and she responded, "Don't know." 341 N.W.2d at 895. Without clarifying, the deputy then asked if the defendant would submit to a breath test, to which the defendant responded, "I suppose." *Id.* We held that the defendant in *Von Bank* "did not ask to consult an attorney" and that the deputy did not violate the defendant's right to counsel. *Id*. at 896.

In light of *Von Bank*, appellant's response was not an equivocal or ambiguous request for an attorney. Accordingly, Officer Dietz was not required to clarify appellant's response, and his failure to clarify did not violate appellant's right to counsel. Therefore, the district court did not err in determining that appellant's right to counsel was vindicated.

Appellant also contends that he was not given a reasonable time to contact an attorney and was never warned that his time to contact an attorney had expired. Because appellant did not request to contact an attorney, this argument is without merit. *See Friedman*, 473 N.W.2d at 835 (holding that a person arrested for DWI in Minnesota "has the right, *upon request*, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing") (emphasis added).

II

Appellant also challenges the district court's denial of his motion for discovery of the source code for the Intoxilyzer 5000EN. Absent a clear abuse of the court's wide discretion, this court will generally affirm a district court's denial of a discovery request. *State v. Underdahl*, 749 N.W.2d 117, 120 (Minn. App. 2008) (*Underdahl II*), *review granted* (Minn. Aug. 5, 2008).

Discovery under the implied-consent statute is limited, and a party may seek discovery not enumerated in the statute only by court order. Minn. Stat. § 169A.53, subd. 2(d) (2006). 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 Underdahl II*, 749 N.W.2d at 122–23 (requiring party seeking discovery of the source code to show that it is relevant). Relevant information is information "reasonably calculated to lead to the discovery of admissible evidence." Minn. R. Civ. P. 26.02(a).

In *Underdahl II*, this court held that a finding of relevancy regarding 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 parties seeking discovery in *Underdahl II* failed to show relevancy because they furnished no evidence that the code would reveal testing deficiencies, or that any deficiencies would affect test results, and no evidence that the parties, who are permitted by law to test the machine, were deprived of access to any information that might be revealed by the source code. *Id*. at 122.

In support of his discovery request, appellant relies primarily on an affidavit from Thomas Burr, a forensic scientist. In his affidavit, Burr concludes that in order to determine if the Intoxilyzer functions reliably, it is "essential . . . to analyze the software as programmed on the computer chips by analysis of the software source code." But Burr's affidavit does not establish what possible deficiencies could be found in the source code or how significant any deficiencies might be to the accuracy of the machine's

results; it does not show the existence of any validation method that requires the source code; and his affidavit does not explain why existing reliability testing (that does not require the source code) is insufficient to establish the reliability of the instrument used in appellant's test. The remaining materials that appellant relies on are similarly unavailing to his discovery request.

Because appellant cannot establish the relevancy of the source code, the district court did not abuse its discretion by denying appellant's discovery request.

Affirmed.