STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0940
A08-1086

Beau Richard Johnson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent (A08-940),

State of Minnesota,
Respondent (A08-1086),

vs.

Beau Richard Johnson,
Appellant.

Filed June 16, 2009
Affirmed
Kalitowski, Judge

McLeod County District Court
File Nos. 43-CV-07-2379, 43-CR-07-2118

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

Jason M. Thiemann, Silver Lake City Attorney, 1017 Hennepin Avenue North, Glencoe, MN 55336 (for respondent State of Minnesota)

Considered and decided by Schellhas, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

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

KALITOWSKI, Judge

In this consolidated appeal from a driving while impaired (DWI) conviction and from an order sustaining the revocation of his driver's license under the implied consent law, appellant Beau Richard Johnson argues that (1) the district court erred in denying his pretrial motion to suppress when it applied the independent source doctrine and held that lawfully obtained evidence provided both an independent basis to question appellant and probable cause to believe that appellant was driving while impaired, and (2) the district court abused its discretion in both proceedings by denying appellant's motions to compel respondents to produce the source code for the Intoxilyzer 5000. We affirm.

D E C I S I O N

I.

The district court denied appellant's pretrial motion to suppress evidence that appellant claims was obtained following a police officer's warrantless entrance into appellant's residence. The court relied on the independent source doctrine to find that "the State has provided evidence from sources independent of the entry into the residence to establish probable cause to arrest." Appellant argues that the district court erred

because the state had no independent basis for believing that appellant had been operating or in physical control of an erratically driven vehicle. We disagree.

"When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing – or not suppressing – the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999).

Independent Source Doctrine

Pursuant to the exclusionary rule, evidence recovered during an unlawful search may not be introduced at trial. *State v. Lozar*, 458 N.W.2d 434, 438 (Minn. App. 1990), *review denied* (Minn. Sept. 28, 1990). "[T]he exclusionary rule reaches not only primary evidence obtained as a direct result of an illegal search or seizure, . . . but also evidence later discovered and found to be derivative of an illegality or fruit of the poisonous tree." *Segura v. United States*, 468 U.S. 796, 804, 104 S. Ct. 3380, 3385 (1984) (citations and quotation marks omitted). However, the independent source doctrine provides an exception to the exclusionary rule, permitting the admission of evidence obtained during an unlawful search if the police could have retrieved the evidence "on the basis of information obtained independent of their illegal activity." *State v. Richards*, 552 N.W.2d 197, 203-04 n.2 (Minn. 1996).

Here, the record indicates that approximately one hour and ten minutes after a police officer's initial warrantless entry, the officer and the chief of police returned to appellant's residence. The state argues that the decision to return to appellant's residence was based on evidence properly obtained prior to the officer's warrantless entry.

Specifically the officer had information from an eyewitness that was obtained prior to the unlawful entry and independent of that entry. *See Andersen v. Comm'r of Pub. Safety*, 410 N.W.2d 17, 19-20 (Minn. App. 1987) (determining that probable cause may be based on a description of events provided by a citizen). The eyewitness described the erratic driving, the driver's conduct, and his belief that appellant driver was intoxicated. Importantly, the eyewitness gave a physical description of appellant and the vehicle, and after following appellant to his residence, told the officers where appellant lived.

In addition, the record indicates that prior to the warrantless entry, the officer corroborated the physical description of the vehicle, and observed appellant's vehicle drive onto the sidewalk on Main Street and almost hit a stop sign and the fire department building. We conclude that the district court properly determined that pursuant to evidence obtained independent of the warrantless entry, the officers were permitted to return to appellant's residence to administer field sobriety tests.

Probable cause

Because we have determined that the independent source doctrine applies here, we reject appellant's argument that the officers did not have probable cause to arrest him when they returned to the residence. We conclude that the evidence gathered before the officers returned to the residence, along with appellant's failed sobriety tests and .26 Intoxilyzer reading were sufficient to create probable cause to arrest appellant. *See Keane v. Comm'r of Pub. Safety*, 360 N.W.2d 357, 359-60 (Minn. App. 1984) (determining that officers' observations of moderate odor of alcohol, balance problem, and very erratic driving were sufficient to establish probable cause).

II.

Appellant argues that the district court abused its discretion in denying his motion to compel respondents to produce the source code for the Intoxilyzer 5000. We disagree.

The district court has broad discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). "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." *Id.*

Criminal case: *State v. Johnson* (A08-1086)

Appellant argues that the district court abused its discretion in denying his motion to compel discovery of the Intoxilyzer source code because Minn. R. Crim. P. 9.01, subd. 1(4), requires mandatory disclosure of scientific tests to permit defense counsel to inspect and reproduce any results of scientific tests made in connection with a particular case. We disagree.

Recently, in *State v. Underdahl*, the Minnesota Supreme Court applied the language of Minn. R. Crim. P. 9.01, subd. 2(3), in addressing discovery of the Intoxilyzer source code. ___ N.W.2d ___, 2009 WL 1150093, at *6-8 (Minn. Apr. 30, 2009). Rule 9.01, subd. 2(3) permits the district court, in its discretion, to "require the prosecuting attorney to disclose . . . any relevant material and information," by motion of the defendant, provided that "a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant." Minn. R. Crim. P. 9.01, subd. 2(3).

In *Underdahl*, the supreme court held that in order to discover the source code, a defendant must show that the source code may relate to his guilt or innocence, and that respondent Underdahl failed to make this showing. 2009 WL 1150093, at *7.

In determining that Underdahl did not make a threshold evidentiary showing that the source code related to his guilt or innocence, the supreme court noted that "Underdahl's motion contained no other information or supporting exhibits related to the source code." *Id.* at *7. Similarly, here, appellant did not submit any affidavits, reports, or other accompanying documents with his motion for additional discovery of the source code. And appellant did not submit anything at the evidentiary hearing to support his motion for additional discovery, nor did he bring any witnesses to testify in support of his motion. Additionally, appellant has not shown what the source code is, how it bears on the operation of the Intoxilyzer, or what role it has in regulating the machine's accuracy. Nor does appellant demonstrate any possible deficiencies in the source code. Thus, appellant failed to make the requisite showing that the source code may relate to his guilt or innocence.

Because appellant failed to submit any evidence to support his motion to compel and failed to show that the source code was related to his guilt or innocence, we conclude that the district court did not abuse its discretion in denying appellant's motion.

Civil case: *Johnson v. Comm'r of Pub. Safety* (A08-940)

Appellant again argues that discovery of the information sought is mandatory because implied consent cases are quasi-criminal, thus requiring application of the Minn. R. Crim. P. 9.01, subd. 1(4), to the present case. We disagree.

Minnesota's implied consent law states that, "Judicial reviews must be conducted according to the Rules of Civil Procedure, except that prehearing discovery is mandatory." Minn. Stat. § 169A.53, subd. 2(d) (2008); *see also Abbott v. Comm'r of Pub. Safety*, 760 N.W.2d 920, 924 (Minn. App. 2009) (deciding an implied consent case and stating that "[t]he Minnesota Rules of Civil Procedure define the scope of allowable discovery in civil cases"), *review dismissed* (Minn. May 19, 2009). Thus, we conclude that Minnesota Rule of Civil Procedure 26 applies here. Rule 26 provides that a party may obtain discovery of any matter "relevant to a claim or defense," and also permits the court to order discovery that is "relevant to the subject matter involved in the action" if the party seeking the discovery can show "good cause." Minn. R. Civ. P. 26.02(a).

In *Abbott*, this court explained that when a petitioner moves for nonmandated discovery, the petitioner must show that the discovery is relevant, and if it is not relevant to a particular claim or defense, that there is good cause for its production. 760 N.W.2d at 925. This court also stated, "in either case, the district court retains the same discretion it has under the ordinary rules to deny the request, even if it is relevant." *Id.* (citing Minn. R. Civ. P. 26.02(b)(3)). *Abbott* clarifies that, under Minn. Stat. § 169A.53, subd. 3(b)(10), "a petitioner is entitled to inquire whether the testing method used to measure alcohol concentration was valid and reliable. If a petitioner can show that evidence is capable of bearing on validity and reliability, discovery would be relevant to that defense and no additional showing of good cause is required." *Id.* at 925-26 (quotation marks omitted). And whether a source code qualifies as this type of evidence depends on the showing made by the parties. *Id.* at 926.

Here, after appellant moved to compel discovery of the source code, he made no showing as to the relevance of this information to his defense or the case and, therefore, did not show that the evidence is capable of bearing on validity and reliability when addressing the motion. Therefore, we conclude that the district court did not abuse its discretion in denying appellant's motion to compel.

Affirmed.