STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1150

State of Minnesota,
Respondent,

vs.

David Allen Heldt,
Appellant.

Filed June 16, 2009
Affirmed
Collins, Judge[*]

McLeod County District Court
File No. 43-CR-06-421

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

Marc Sebora, Hutchinson City Attorney, 111 South East Hassan Street, Hutchinson, MN 55350 (for respondent)

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

Considered and decided by Shumaker, Presiding Judge; Johnson, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Appealing from his conviction of second-degree driving while impaired (DWI) in violation of Minn. Stat. §§ 169A.20, subd. 1(5), .25 (2006), appellant argues that the district court erred by (1) finding probable cause for his arrest; (2) admitting Intoxilyzer test results; and (3) denying his motion to compel discovery of the Intoxilyzer's source code. We affirm.

FACTS

Appellant David Heldt was stopped by an officer who observed him driving his vehicle erratically at approximately 1:00 a.m. In talking with Heldt, the officer detected an odor of alcohol and noticed that Heldt's speech was slurred. Heldt stated that he had consumed one beer.

The officer conducted a Horizontal Gaze Nystagmus (HGN) test, which he had been trained to administer. The test revealed indicators of intoxication. Heldt performed the "walk and turn" test satisfactorily, and was not asked to perform a "one-legged stand" test after indicating that he had back problems.

Because Heldt was chewing tobacco, the officer waited five minutes after Heldt removed the tobacco from his mouth before completing a Preliminary Breath Test (PBT). According to Heldt, the officer did not change the mouth piece on the device after the first time Heldt blew into it. Heldt testified that there was tobacco present on the mouthpiece when he blew into the device for the second time. The PBT indicated an alcohol concentration of 0.11.

Heldt was arrested for suspected DWI and taken to the police station, where the arresting officer read to him the implied-consent advisory. After Heldt agreed to submit to a breath test, the officer inspected Heldt's mouth and observed flecks of tobacco residue. The officer observed Heldt for approximately 15 minutes before administering the breath test using an Intoxilyzer. The Intoxilyzer indicated an alcohol concentration of 0.11.

An omnibus hearing was held at which a defense expert, Thomas Burr, testified that he believed the Intoxilyzer result was inaccurate due to the tobacco residue in Heldt's mouth. The state's expert, Karen Kierzek, testified that the Intoxilyzer result was accurate and reliable and that the tobacco residue would not have affected the test result. Kierzek stated that any alcohol retained in tobacco flecks that were in Heldt's mouth would have dissipated within the 15-minute observation period, but added that it is good practice to require a subject with tobacco residue in the mouth to rinse the mouth with water before administering the test.

The district court initially granted Heldt's motion to compel the state's disclosure of the Intoxilyzer's source code in its possession, custody, or control. However, a few months later, the district court denied Heldt's motion to dismiss based on the state's failure to produce the source code and rescinded its prior order for production of the source code. The district court indicated that it had reconsidered its prior decision because evidence had not been produced at the original hearing that disputed the validity or trustworthiness of the test or made a connection between the alleged error and the validity of the test results.

Heldt subsequently waived his right to a jury trial and submitted the case to the district court on stipulated facts pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The district court found Heldt guilty of second-degree DWI. This appeal followed.

D E C I S I O N

I.

Heldt first argues that the officer lacked probable cause to arrest him for suspected DWI. "Probable cause to arrest exists where the objective facts are such that under the circumstances a person of ordinary care and prudence [would] entertain an honest and strong suspicion that a crime has been committed." *State, Lake Minnetonka Conservation Dist. v. Horner*, 617 N.W.2d 789, 795 (Minn. 2000) (quotations omitted) (brackets in original). The inquiry is objective, not subjective. *State v. Riley*, 568 N.W.2d 518, 523 (Minn. 1997). In evaluating probable cause, a reviewing court must consider the totality of the circumstances. *Groe v. Comm'r of Pub. Safety*, 615 N.W.2d 837, 840 (Minn. App. 2000), *review denied* (Minn. Sept. 13, 2000). While probable cause to arrest requires more than mere suspicion, it requires less than the evidence necessary for conviction. *State v. Camp*, 590 N.W.2d 115, 119 n. 9 (Minn. 1999).

The officer testified about the following observations that support Heldt's arrest: Heldt (1) was speeding; (2) was following another vehicle too closely; (3) struck the curb before stopping in a parking lot; (4) had slurred speech; (5) smelled of alcohol; (6) admitted to consuming alcohol; (7) failed the HGN test; and (8) failed the PBT.

Although Heldt was able to perform certain tasks, such as finding his driver's license and satisfactorily completing the "walk and turn" test, it is not necessary that every observation of Heldt's behavior indicate intoxication. *See State v. Grohoski*, 390 N.W.2d 348, 351 (Minn. App. 1986), *review denied* (Minn. Aug. 27, 1986) (holding that the district court had "improperly focused on the absence of other indicia of intoxication" and that the "suspect need not exhibit every known sign of intoxication in order to support a determination of probable cause"). Indeed, the Minnesota Supreme Court has clarified that probable cause to believe a person is intoxicated may exist "even if none of the commonly-known physical indicia of intoxication is present." *State v. Lee*, 585 N.W.2d 378, 382 (Minn. 1998).

Heldt further implies that the HGN test was administered improperly, arguing that the officer had only one course of training regarding its administration. But nothing in the record suggests that this amount of training is inadequate or that the officer improperly administered the test.

Heldt's argument that the PBT should not be considered because of the presence of tobacco on the mouthpiece also lacks merit. Heldt offered no evidence that the PBT was tainted, only that tobacco may affect Intoxilyzer results. Thus, the district court's consideration of the PBT results, in conjunction with the other indicators of intoxication, was not erroneous.

Our careful review of the record reveals ample evidence to support Heldt's arrest, including the PBT results, and thus the district court's finding that there was probable cause to support the arrest is not erroneous.

II.

Heldt next contends that the district court erred by denying his motion to suppress evidence of the Intoxilyzer results. "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). The results of a breath test, when performed by a trained person, are admissible without expert testimony that an "approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath." Minn. Stat. § 634.16 (2008).

"Once a prima facie showing of trustworthy administration has occurred, it is incumbent on the opponent to suggest a reason why the test was untrustworthy." *Bond v. Comm'r of Pub. Safety*, 570 N.W.2d 804, 806 (Minn. App. 1997) (quotation omitted). "If the prima facie showing of the test's reliability is challenged, the judge must rule upon the admissibility in the light of the entire evidence." *Noren v. Comm'r of Pub. Safety*, 363 N.W.2d 315, 318 (Minn. App. 1985) (quotation omitted). Rebuttal of the state's prima facie showing of admissibility of Intoxilyzer results requires more than "speculation that something might have occurred to invalidate those results." *Hounsell v. Comm'r of Pub. Safety*, 401 N.W.2d 94, 96 (Minn. App. 1987) (citing *Falaas v. Comm'r of Pub. Safety*, 388 N.W.2d 40, 42 (Minn. App. 1986)); *see also Pasek v. Comm'r of Pub. Safety*, 383 N.W.2d 1, 4 (Minn. App. 1986) (holding that appellant's speculation that tobacco would affect reliability of test result was insufficient and that he was "obligated to produce evidence that the tobacco would actually exaggerate the test results").

The state met its initial burden by demonstrating that the officer was a certified Intoxilyzer operator, the Intoxilyzer was in working order and was properly calibrated, and the control chemical solutions were not contaminated. Heldt attempted to rebut the state's prima facie evidence by presenting expert testimony regarding the impact of tobacco on Intoxilyzer results.

The district court did not make explicit findings regarding Heldt's rebuttal evidence. While the district court did not address the rebuttal evidence in its analysis of the reliability of an Intoxilyzer machine, it discussed the evidence in its memorandum when it considered in detail the residue of chewing tobacco in Heldt's mouth when he was tested and the expert testimony regarding the tobacco's potential effect on the test results. This discussion summarized the defense expert's testimony that the tobacco could affect the test results and that rinsing the mouth would be the best practice, as well as the state's expert's testimony that the test results would not be affected by the presence of tobacco flecks and that the officer had followed procedure. And although the district court's ruling would have been better supported by express findings on the credibility of Heldt's evidence, the record supports our inference that the district court fully considered the testimony of Heldt's expert in addition to that of the arresting officer and the state's expert, and made its ruling in light of all of the evidence as is required under *Noren*.

We may decide the appeal without remanding for further factual findings if we are "able to infer the findings from the trial court's conclusions." *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983). Here, there is adequate content in the district court's memorandum for us to infer that the district court's conclusion was based on its

consideration of all the evidence. The district court's discussion of the defense expert's testimony, followed by its finding that the test was reliable, leads to the conclusion that the district court found the state's expert to be more credible and that, although rinsing the mouth after detecting tobacco is the best practice, the failure to do so is not dispositive.

We find these conclusions to be supported by the record. Thus, the district court did not err by denying Heldt's motion to suppress the Intoxilyzer test results.

III.

Heldt also argues that he is entitled to discovery of the Intoxilyzer's source code.[1] A district court has broad discretion to issue discovery orders and, absent a clear abuse of that discretion, its order with respect thereto will not be disturbed. *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). The district court, in its discretion, is permitted to "require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any relevant material and information," not subject to mandated disclosure, "provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate the

[1] The state argues that Heldt's appeal on the source code issue is not properly before us because the order denying discovery was issued in the implied consent case rather than in this criminal matter. But the implied consent order applies here by reference, as the district court stated that it was modifying its October 3, 2007 evidentiary order issued in the criminal proceeding. The district court's intention to apply its evidentiary ruling to the criminal case is made evident by the fact that, based on the stipulated facts, the district court found that the Intoxilyzer testing indicated that Heldt had a blood alcohol concentration of .11.

guilt or reduce the culpability of the defendant as to the offense charged." Minn. R. Crim. P. 9.01, subd. 2(3).

The Minnesota Supreme Court recently affirmed our reversal of a discovery order based on a failure to establish that the source code related to the defendant's guilt or innocence. *State v. Underdahl*, ___N.W.2d___, 2009 WL 1150093, at *7 (Minn. Apr. 30, 2009) (*Underdahl II*). Here, the district court determined that the source code was not discoverable because there was no dispute regarding the test's validity or trustworthiness or to connect the alleged error with the validity of the test results. This is consistent with the supreme court's holding in *Underdahl II* and with the evidence in the record. Like in *Underdahl II*, Heldt failed to make any evidentiary showing that the source code would assist him to dispute the charges against him. *See Underdahl II*, 2009 WL 1150093, at *7 (noting that "while [the defendant] argued that challenging the validity of the Intoxilyzer was the only way for him to dispute the charges against him, he failed to demonstrate how the source code . . . could be related to [his] defense or why the [source code] was reasonably likely to contain information related to the case.") (quotation omitted). Heldt has not demonstrated that the source code relates to his guilt or innocence, but rather simply asserts that he must have the source code in order to test the machine's reliability, which is insufficient under *Underdahl II*. Therefore, the district court did not abuse its discretion by refusing to compel discovery of the Intoxilyzer's source code.

Affirmed.