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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1236

State of Minnesota,
Respondent,

vs.

Eddie Dean Hall,
Appellant.

Filed June 23, 2009
Affirmed
Larkin, Judge

Rice County District Court
File No. CR-07-1122

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

Kurt S. Fischer, City of Faribault Prosecutor, 625 Third Avenue N.W., Faribault, MN 55021 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Larkin, Judge; and Harten, 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

LARKIN, Judge

Appellant challenges his conviction of gross misdemeanor driving while impaired, arguing that the district court abused its discretion by denying his motion to compel disclosure of the Intoxilyzer 5000EN source code and related documents and materials, and by determining that appellant's limited right to pretest counsel was vindicated. Because appellant did not establish that he is entitled to court-ordered disclosure of the source code, and because appellant's right to counsel was vindicated, we affirm.

FACTS

On March 9, 2007, at approximately 11:31 p.m., Officer Robert Vogelsberg observed appellant Eddie Hall driving erratically and initiated a traffic stop. Officer Vogelsberg spoke to Hall, detected an odor of alcohol emanating from Hall, and observed that Hall's eyes were glassy and watery. Officer Vogelsberg administered a preliminary breath test, which Hall failed. Officer Vogelsberg arrested Hall for driving while impaired and transported him to the Rice County Law Enforcement Center (LEC).

Officer Vogelsberg began reading the implied consent form to Hall at 11:53 p.m. at the LEC. Officer Vogelsberg advised Hall that he had a right to consult with counsel prior to deciding whether to submit to an Intoxilyzer test and provided Hall with a telephone and telephone book at 11:55 p.m.

Hall made five phone calls. Hall called multiple attorneys but he was unable to speak with any of them. Hall left messages in which he indicated his name and requested a return call at the LEC. Hall also called a friend, who provided Hall with the name of an

attorney. Hall called that attorney and left a message, but Officer Vogelsberg informed Hall that the attorney had died the night before.

At 12:37 a.m., Officer Vogelsberg told Hall that his time to contact an attorney was limited and that he would have to make his own decision whether or not to take the Intoxilyzer test. At 12:39 a.m. Hall agreed to take an Intoxilyzer breath test, which indicated a .18 blood alcohol concentration. Hall was charged by complaint with third-degree driving while impaired in violation of Minn. Stat. §§ 169A.20, subd. 1(1) and 169A.26 (2006), and third-degree driving while impaired with an alcohol concentration over .08 in violation of Minn. Stat. §§ 169A.20, subd. 1(5) and 169A.26.

In district court, Hall moved to compel disclosure of the Intoxilyzer 5000EN source code and related documents and materials, in an attempt to challenge the validity and accuracy of his Intoxilyzer-test results. Hall did not offer any testimony, affidavits, or exhibits in support of his motion. In response, the state submitted an affidavit from Glenn G. Hardin, Toxicology Supervisor at the Minnesota Bureau of Criminal Apprehension Forensic Science Laboratory. The affidavit states that Hardin oversees the approximately 200 Intoxilyzer 5000EN breath test instruments in operation throughout Minnesota and that "[t]he source code . . . is not now, nor has it ever been, in the possession of the BCA" and "the only . . . entity in actual possession of the source code . . . is its manufacturer."

Hall also moved to suppress his Intoxilyzer-test results and dismiss the complaint, arguing that his right to pretest counsel was not vindicated. At the evidentiary hearing on

Hall's motion to suppress, Officer Vogelsberg testified that he believed Hall made a sincere and good faith effort to contact an attorney.

Following the hearing and briefing, the district court denied both of Hall's motions. The district court, relying upon the affidavit of Glenn G. Hardin, concluded that the state could not be compelled to disclose the Intoxilyzer 5000EN source code because the source code is not in the state's possession. The district court also concluded that Officer Vogelsberg vindicated Hall's right to counsel by providing Hall with a telephone, assistance in locating an attorney, and a reasonable amount of time to contact an attorney.

Hall waived his right to a jury trial and resolved his case in a *Lothenbach* procedure, preserving the right to counsel and source code disclosure issues for appellate review.[1] The district court found Hall guilty of third-degree driving while impaired with a blood alcohol concentration over .08. The district court stayed execution of Hall's sentence and placed Hall on probation for two years. This appeal follows.

D E C I S I O N

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. Willis*, 559 N.W.2d 693, 698 (Minn. 1997).

[1] *See* Minn. R. Crim. P. 26.01, subd. 4, *superseding State v. Lothenbach*, 296 N.W.2d 854 (1980) (providing that when a defendant and the state agree a pretrial issue is dispositive or renders a contested trial unnecessary, the defendant may submit to a stipulated facts trial, preserving the pretrial issue for review).

The district court denied Hall's request for court-ordered disclosure of the source code based solely on its finding that the state does not possess or control the source code and cannot be compelled to disclose it. Hall assigns error to the district court's finding, arguing that the plain language of Minn. R. Crim. P. 9.01, subd. 2(3), does not limit court-ordered disclosure to materials within the state's possession or control. Given the supreme court's recent holding in *State v. Underdahl*, ___ N.W.2d ___, 2009 WL 1150093, *8-9 (Minn. Apr. 30, 2009) (*Underdahl II*), the district court's conclusion that the state does not possess or control the source code is questionable. We nonetheless affirm the district court's decision on an alternative ground.

An appellate court will ordinarily not decide issues that were not determined in the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). An exception to this rule allows the state, without filing a cross-appeal, to defend a district court's decision on any ground that the law and record permit as long as it does not expand the relief that was granted to the state. *State v. Grunig*, 660 N.W.2d 134, 136-37 (Minn. 2003) (citing Minn. R. Crim. P. 29.04 and concluding that the court of appeals erred by failing to apply the rule). "A respondent can raise alternative arguments on appeal in defense of the underlying decision when there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted." *Id.* at 137.

Hall claims that the district erred by failing to analyze Hall's request for court-ordered disclosure under the test articulated in rule 9.01, subdivision 2(3). *See* Minn. R. Crim. P. 9.01, subd. 2(3) (stating that the district court can order the prosecutor to

disclose relevant material if "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 as to the offense charged"). Hall briefed this issue on appeal and argued that his threshold evidentiary showing in the district court entitles him to compelled disclosure. Hall alternatively argued that his appeal should be stayed pending the supreme court's ruling in *Underdahl II*. The state also addressed whether Hall met the standard for court-ordered disclosure under rule 9.01, subdivision 2(3). Because (1) both parties addressed the standard for compelled disclosure under rule 9.01, subdivision 2(3), in their briefs, (2) Hall argued that the factual record is adequate to demonstrate that he met the standard, (3) Hall indicated a preference for application of the holding in *Underdahl II* to his case, and (4) a finding that Hall failed to meet the standard necessary for compelled disclosure would not expand the relief previously granted, we affirm the district court's decision based on the ground that Hall failed to meet the standard necessary for compelled disclosure.

In *Underdahl II*, the Minnesota Supreme Court held that a district court abuses its discretion by ordering disclosure where a defendant has not made a threshold showing of relevance under Minn. R. Crim. P. 9.01, subd. 2(3), and that a district court does not abuse its discretion by finding that the Intoxilyzer 5000EN source code is in the state's possession for the purposes of Minn. R. Crim. P. 9.01, subd. 2(1), based on language in the request for proposal issued by the state when replacing the previous version of its breath-test instrument. 2009 WL 1150093, at *6-9. But the supreme court did not hold that the source code is discoverable in all driving-while-impaired cases involving an

Intoxilyzer 5000EN test result. Instead, the supreme court reiterated that the district court has wide discretion to issue discovery orders and normally will not be reversed absent clear abuse of that discretion. *Id.* at *6 (citing *In re Comm'r of Pub. Safety,* 735 N.W.2d 706, 711 (Minn. 2007) (*Underdahl I*)). "To find an abuse of discretion, an appellate court must conclude that the district court erred by making findings unsupported by the evidence or by improperly applying the law." *Id.*

The supreme court held that "even under a lenient showing requirement, Underdahl failed to make a showing that the source code may relate to his guilt or innocence" where Underdahl made no threshold evidentiary showing, failed to present any information or supporting exhibits related to the source code, and failed to demonstrate how the source code would help him to dispute the charges. *Id.* at *7. Similarly, Hall failed to present any supporting evidence regarding the source code's relevance. Hall offered no testimony, affidavits, or exhibits in support of his disclosure request. Hall merely asserted that the source code is his "accuser" and that he must have access to the Intoxilyzer 5000EN and the computer source code for the software that runs the Intoxilyzer in order to effectively challenge his test result. Hall claims that he demonstrated that an examination of the source code would show defects in the Intoxilyzer 5000EN's operation, or would be necessary to determine whether defects exist, by requesting disclosure of not only the source code but also of all other materials, procedures and error logs pertaining to the Intoxilyzer 5000EN for up to 12 months prior to his test.

Even under a lenient showing requirement, Hall's bare assertion that he must have access to the source code in order to effectively challenge his test result is inadequate to show that the source code may relate to Hall's guilt or innocence. *See id.* at *7-8. And Hall's expansive request for materials, procedures and error logs pertaining to the Intoxilyzer 5000EN in no way demonstrates the relevancy of the source code. We therefore affirm the district court's refusal to order disclosure of the source code based on Hall's failure to show that the source code is relevant to his guilt or innocence.

Hall also claims that the district court erred by denying Hall's motion to compel disclosure of documents and materials related to the Intoxilyzer 5000EN. Hall's motion for disclosure contained 29 separate requests for documents and materials related to the Intoxilyzer 5000EN, in addition to the source code itself. The district court's ruling was limited to Hall's request for court-ordered disclosure of the source code. The district court did not address or rule on Hall's motion for compelled disclosure of documents and materials related to the Intoxilyzer 5000EN other than the source code. And Hall does not present an argument in support of court-ordered disclosure of any documents and materials other than the source code on appeal. This issue is therefore not properly before us for review. *See Roby*, 547 N.W.2d at 357 (stating that this court will generally not consider matters not considered by the district court); *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), (stating that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

Moreover, Hall waived this issue by not preserving it at his *Lothenbach* procedure. "The *Lothenbach* proceeding is a concession that the state's facts are accurate, with the

primary purpose of permitting the defendant to appeal a pretrial ruling . . . ." *State v. Mahr*, 701 N.W.2d 286, 292 (Minn. App. 2005). At the *Lothenbach* procedure Hall's counsel stated: "[O]ur desire, Your Honor, is to preserve two issues, one is on the source code, and the other one is on the ability to contact an attorney during the Implied Consent phase." By proceeding with a *Lothenbach* procedure without first obtaining a ruling on his pretrial motion to compel disclosure of documents and materials related to the Intoxilyzer 5000EN, Hall failed to preserve the issue for review.

Right to Counsel

The determination of whether a driver's limited right to counsel has been vindicated is a mixed question of law and fact. *See Kuhn v. Comm'r of Pub. Safety*, 488 N.W.2d 838, 840 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). Once the facts are established,[2] this court makes an independent legal determination of whether the defendant "was afforded a reasonable opportunity to consult with an attorney." *Id.*

[2] Although the district court held an evidentiary hearing regarding Hall's claim that his right to counsel was not vindicated, the district court did not make findings of fact. The district court must make "appropriate findings in writing or orally on the record" when determining issues presented at an omnibus hearing. Minn. R. Crim. P. 11.07. Appellate review is not possible, and a remand for findings is necessary, when the district court fails to make appropriate findings on contested factual issues whose resolution is necessary to a determination of the issue presented. *See Berg v. Berg*, 393 N.W.2d 40, 41-42 (Minn. App. 1986) (remanding because "[f]indings are necessary to support a judgment and to aid the appellate court by providing a clear understanding of the basis and grounds for the decision"). In this case, the relevant facts were undisputed, and we are therefore able to engage in de novo review of the district court's legal conclusion. *See State v. Rainey*, 303 Minn. 550, 550, 226 N.W.2d 919, 921 (1975) (holding "because there was absolutely no conflict in the evidence at the Rasmussen hearing in this case, we find no prejudice to defendant in the trial court's failure to provide findings of fact"); *see also State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (stating, "if we can say in a particular case that even if the defendant's testimony was true there was no violation of

The Minnesota Constitution provides a limited "right, upon request, to a reasonable opportunity to obtain legal advice before deciding whether to submit to chemical testing" to determine blood alcohol concentration. *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991) (citing Minn. Const. art I, § 6). The right to contact counsel is limited to a reasonable amount of time due to the evanescent nature of the evidence in DWI cases. *Id*. The attorney consultation may not unreasonably delay administration of the test. *Id*. "The person must be informed of this right, and the police officers must assist in its vindication. The right to counsel will be considered vindicated if the person is provided with a telephone prior to testing and given a reasonable time to contact and talk with counsel." *Id*. (quotation omitted). But "[i]f counsel cannot be contacted within a reasonable time, the person may be required to make a decision regarding testing in the absence of counsel." *Id.* (quotation omitted). Whether a person's right to counsel has been vindicated is determined by the totality of the circumstances, including the evanescent nature of alcohol. *Parsons v. Comm'r of Pub. Safety*, 488 N.W.2d 500, 502 (Minn. App. 1992).

In determining what constitutes a reasonable amount of time to contact an attorney, the focus is "both on the police officer's duties in vindicating the right to counsel and the defendant's diligent exercise of the right." *Kuhn*, 488 N.W.2d at 842. Within this framework, three nonexclusive factors are used to determine whether a

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the defendant's rights, then we can decide the issue on that basis without remanding"). But we remind the district court of the need to make findings of fact in order to facilitate meaningful appellate review and avoid remand for fact-finding.

reasonable amount of time has passed. *Id.* First, as a threshold matter, "the driver must make a good faith and sincere effort to reach an attorney." *Id.* Second, the time of day is relevant. *Id.* at 842. More time is reasonable during the early morning hours when an attorney might not be easily reached. *Id.* Finally, "the length of time the driver has been under arrest" is relevant because the chemical test becomes less probative as more time passes. *Id.*

Regarding the first factor, Hall contends that his efforts to contact an attorney and Officer Vogelsberg's testimony that he believed Hall made a sincere and good faith effort to contact an attorney support the conclusion that he made a good faith effort to contact an attorney. We agree. Hall made at least five phone calls to attorneys and left messages requesting a return call.

The second factor is the time of day. Hall contends that attorneys were not readily available because his phone calls were made between 12:06 a.m. and 12:33 a.m. and that Hall should have been provided with more time for an attorney to return his call. The state contends that the time of day was not a factor because there was no evidence that any attorney ever attempted to call Hall back. Given the early morning hour at which Hall was attempting to reach an attorney, we conclude that this factor weighs in Hall's favor.

The third factor concerns the amount of time that Hall had been under arrest. Hall contends that he was in custody for a short amount of time because he was only in custody, at most, for one hour and six minutes before Officer Vogelsberg asked for Hall's final decision regarding testing and that this amount of time was insufficient to reach an

attorney. The state argues that the approximately 40 minutes made available to Hall was sufficient time for him to contact an attorney. We conclude that this factor weighs in favor of the state, given the evanescent nature of alcohol.

Finally, when analyzing the relevant factors, the court must focus on the police officer's duty to vindicate the right to counsel. *Kuhn*, 488 N.W.2d at 842. Officer Vogelsberg provided Hall with a telephone and telephone book. Officer Vogelsberg told Hall that an attorney that Hall wanted to call had died the night before. And Officer Vogelsberg told Hall that his time was limited, prior to his final inquiry regarding whether Hall would submit to a test.

In total, Hall was allowed 42 minutes to consult with an attorney. This amount of time falls within the range of time deemed reasonable in other cases. *See Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995), *review denied* (Minn. Aug. 30, 1995) (concluding that right to counsel was vindicated where (1) driver was calling at 9:00 p.m.; (2) the driver had 37 minutes to call and only made two attempts; and (3) the driver understood his time was limited). In *Parsons* this court concluded that the right to counsel was vindicated when the driver "was provided a telephone and telephone directories"; "she was free to call anyone she wanted"; "she had access to the telephone for approximately 40 minutes"; "she telephoned a non-lawyer friend and spent about 13 minutes talking to him"; and "she understood her time to consult with counsel was limited." 488 N.W.2d at 502. Likewise, in the present case, Hall was provided a telephone and telephone directories; provided access to a telephone for 42 minutes; able

to make multiple calls and leave multiple messages; allowed to call a friend; and made aware that his time was limited.

We conclude that under the totality of the circumstances, appellant was afforded a reasonable amount of time to consult with an attorney and that his limited right to counsel was vindicated. While Hall made a good faith effort to contact an attorney, "[i]f counsel cannot be contacted within a reasonable time, the person may be required to make a decision regarding testing in the absence of counsel." *Friedman*, 473 N.W.2d at 835 (quotation omitted).

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin