STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1304

State of Minnesota,
Respondent,

vs.

Jeffrey Allan Miller,
Appellant.

Filed June 23, 2009
Affirmed
Johnson, Judge
Dissenting in part, Ross, Judge

Hennepin County District Court
File No. 27-CR-08-20316

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Considered and decided by Johnson, Presiding Judge; Ross, 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

JOHNSON, Judge

Jeffrey Allan Miller was convicted of third-degree driving while impaired (DWI) and careless driving. On appeal, Miller argues that the district court erred by denying his discovery motion concerning the source code of the Intoxilyzer 5000EN breath-test machine and his motion to suppress the result of a test that revealed an elevated blood-alcohol concentration. We affirm.

FACTS

On April 22, 2008, a police officer stopped a vehicle that was being driven by Miller in the city of Medina. The officer observed an open container in Miller's vehicle. Miller admitted to having consumed beer. Miller failed a field-sobriety test and a preliminary breath test. The officer arrested Miller, transported him to the Medina police station, and read him the implied-consent advisory. According to Miller, he consented to the breath test because he "was told it was required" and he "did not want to be charged with another crime." The breath test revealed an alcohol concentration of .10.

Two days later, the state charged Miller with two counts of third-degree DWI, one count of careless driving, one count of having an open container, and one count of possession of drug paraphernalia. On June 6, 2008, Miller filed a motion pursuant to Minn. R. Crim. P. 9.01, subd. 2(1), in which he sought to obtain disclosure of the source code of the Intoxilyzer breath-test machine. On the same day, he also moved to suppress evidence of the result of the breath test on the ground that his consent to the test is invalid. On July 9, 2008, the district court denied the discovery motion based on a

determination that Miller had not made an adequate showing of the relevance of the source code. Later the same day, the district court (with a different judge presiding) denied Miller's motion to suppress based on its determination that the implied-consent statute did not violate Miller's Fourth Amendment rights.

After his pre-trial motions were denied, Miller and the state agreed to submit two charges to the district court on stipulated facts pursuant to Minn. R. Crim. P. 26.01, subd. 4. At the stipulated-facts trial, Miller made the necessary waivers, and the prosecutor and Miller's counsel expressly agreed, as required by the rule, that the district court's rulings on the pre-trial motions would be dispositive of the case so that a contested trial would be unnecessary. Based on the facts stipulated by the parties, the district court found Miller guilty of careless driving and third-degree DWI. The state dismissed the three remaining charges. The district court sentenced Miller to one year in the workhouse, with 335 days stayed and credit for three days served. Miller appeals his convictions, challenging the denials of his pre-trial motions.

D E C I S I O N

I. Discovery Motion

Miller argues that the district court erred by denying his discovery motion, which was intended to elicit disclosure of the source code of the Intoxilyzer breath-test machine. A district court's discovery rulings are reviewed for an abuse of discretion. *State v. Willis*, 559 N.W.2d 693, 698 (Minn. 1997).

Miller sought production of the source code pursuant to the following rule:

> Upon motion of the defendant, the court for good cause shown shall require the prosecuting attorney . . . to assist the defendant in seeking access to specified matters *relating to the case* which are within the possession or control of an official or employee of any governmental agency, but which are not within the control of the prosecuting attorney.

Minn. R. Crim. P. 9.01, subd. 2(1) (emphasis added). Neither this court nor the supreme court has interpreted the phrase "relating to the case," as it is used in subdivision 2(1). In *State v. Underdahl*, ___ N.W.2d ___, 2009 WL 1150093, at *6 (Minn. Apr. 30, 2009), *pet. for reh'g filed* (Minn. May 5, 2009) (*Underdahl II*), the supreme court recently analyzed the relevance of the Intoxilyzer source code in light of similar language in another subdivision of the same rule, which provides:

> Upon motion of the defendant, the trial court at any time before trial may, in its discretion, require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any *relevant* material and information . . . provided, however, a *showing is made that the information may relate to the guilt or innocence of the defendant* or negate guilt or reduce the culpability of the defendant as to the offense charged.

Minn. R. Crim. P. 9.01, subd. 2(3) (emphasis added). The supreme court construed subdivision 2(3) to require a defendant to make "'some plausible showing that the information sought would be both material and favorable to his defense.'" *Underdahl II*, ___ N.W.2d at ___, 2009 WL 1150093, at *6 (quoting *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992)).

Underdahl II was comprised of consolidated appeals from two district court orders granting defendants' motions for discovery of the source code. *Id.* at __, 2009 WL 1150093, at *2. Appellant Underdahl convinced the district court that the source code

was relevant merely by arguing (as described by the supreme court) that "a jury in a DWI case is asked to determine whether a breath test result is valid, and the only way . . . to challenge that validity 'is to go after the testing method itself.'" *Id.* at __, 2009 WL 1150093, at *7. Underdahl did not introduce any exhibits or any statements by putative experts. The supreme court reasoned that Underdahl did not make a sufficient showing because his motion "contained no other information or supporting exhibits related to the source code." *Id.* Accordingly, the supreme court concluded that the district court abused its discretion by granting the motion. *Id.*

Appellant Brunner, by contrast, submitted a memorandum with nine exhibits. The first exhibit consisted of a 13-page, single-spaced, written statement of a computer science professor, with 34 endnotes, which explained source codes, their operation in computerized voting machines, and their potential for defects affecting outcomes. *Id.*; *see also* Brief of Appellant at app. A75-A87, *Underdahl II*, ___ N.W.2d ___, 2009 WL 1150093 (Minn. Aug. 20, 2008) (No. A07-2428). The next seven exhibits documented Brunner's efforts to obtain the source code, including his correspondence with CMI, Inc., the manufacturer of the Intoxilyzer. *Id.* at app. A88-A103. The ninth exhibit consisted of the executive summary of a report analyzing the source code of the breath-test machine used in New Jersey. The report, which was prepared by an expert retained by persons alleged to have engaged in drunken driving, described certain problems that were identified in the source code of the New Jersey breath-test machine, which the report stated could have a significant impact on the validity of breath tests derived from that machine. *Id.* at A104-A109. The supreme court concluded that Brunner had made a

sufficient showing of relevance, reasoning that his "submissions show that an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer and, in turn, would relate to Brunner's guilt or innocence." *Underdahl II*, ___ N.W.2d at ___, 2009 WL 1150093, at *8. Accordingly, the supreme court concluded that the district court did not abuse its discretion by granting the motion. *Id.*

The *Underdahl II* opinion clearly provides that the issue of relevance is determined on a case-by-case basis. In this case, Miller did not submit any documents in support of his motion. At the hearing on his motion, his attorney made an oral proffer summarizing the opinions held by Stanley Pride, a software developer whom Miller had retained as an expert:

> We intend to call a software developer and computer expert whose name is Stanley Emerson Pride. He presently owns a private consulting business, I believe it's Pride Consulting, formerly was employed as a software developer, has written code extensively. And if permitted, he has, in fact, testified in this Court before concerning the Intoxilyzer and in Olmsted County. If permitted to testify, he would describe how the Intoxilyzer 5000 operates, specifically as a small computer with attached peripherals, and that the entire thing is governed by the computer source code.
>
> He would further testify that in this case on the face of the Intoxilyzer 5000 test record, this instrument is not accurately and reliably reporting alcohol concentration.
>
> Specifically, in this case, we know that the simulated breath alcohol concentration was that the instrument used for calibration. The instrument test that tested that known sample inaccurately in this test and it tested inaccurately high.
>
> Mr. Pride would testify that, given the opportunity to review the source code, he likely would be able to identify either the source of the [error] or a potential source of – and I

> don't want to – I'm not a computer expert myself, so I don't want to put words in his mouth, but he likely would gather information from the source code sufficient to determine why it was inaccurate in this case and why it might have inaccurately tested the defendant's breath sample.
>
> He also would testify, I'm sure as he did before, concerning the inadequate testing procedures employed by the State to verify the accuracy and reliability of the software changes, the various software changes that have been made to the source code.

The showing made by Miller in this case is stronger than the showing made by Underdahl but not as strong as the showing made by Brunner. As a consequence, the resolution of this appeal necessarily is an exercise in line-drawing. For two reasons, we believe that Miller's showing is insufficient to compel the conclusion that the district court abused its discretion by denying the discovery motion.

First, the proffer is conclusory. It contains little more than a broad statement that Pride likely would glean information from the source code that would allow him to conclude that the breath-test machine is inaccurate. Unlike Brunner, Miller did not explain the process by which Pride would use the source code to develop evidence that might go to the ultimate issue, nor did Miller provide the district court with "an example of a breath-test machine analysis and its potential defects." *Id.*

Second, Miller's showing lacks the most important element of the Brunner showing, a realistic prospect that the proposed expert review would lead to evidence favorable to his defense. Brunner's submission fairly strongly suggested that disclosure of the source code, when combined with an expert's analysis, had the potential to accomplish the ultimate goal of either having the evidence excluded as unreliable or

undermining the state's evidence to the point of persuading a jury to acquit. *Cf. State v. Chun*, 943 A.2d 114, 160, 170 (N.J. 2008) (concluding, based on report of special master following parties' analyses of source code, that results of breath-test machine are, with modifications, "sufficiently scientifically reliable" and admissible, and noting that "shortcomings" are only "stylistic" and "theoretical" and unlikely "to generate inaccurate results"), *cert. denied*, 129 S. Ct. 158 (2008). Unlike Brunner, Miller's showing consists of little more than speculation.

These weaknesses in Miller's showing provided the district court with a reasonable basis for concluding that Miller had not made a "plausible showing that" disclosure of the Intoxilyzer source code "would be both material and favorable to his defense." *Underdahl II*, ___ N.W.2d at ___, 2009 WL 1150093, at *6 (quotation omitted); *see also State v. Bastos*, 985 So. 2d 37, 43 (Fla. Dist. Ct. App. 2008) (holding that state not required to produce source code of breath-test machine because defendant failed to make "particularized showing demonstrating that observed discrepancies in the operation of the machine necessitate access to the source code"); *People v. Robinson*, 860 N.Y.S.2d 159, 165 (N.Y. App. Div. 2008) (holding that DWI defendant did not show that source code of Intoxilyzer 5000 was relevant because "defendant did not provide any evidence that the Intoxilyzer used to test him is unreliable"), *appeal denied*, 900 N.E.2d 563 (N.Y. 2008). It is not enough for a defendant to argue that the source code is theoretically relevant to his or her case. If that were enough, the supreme court would have reversed Underdahl's conviction as well as Brunner's. A defendant must go further by explaining with specificity what counsel and a retained expert intend to do with the

source code. Under *Underdahl II*, a defendant who explains in detail how the defense team will utilize the source code is more likely to persuade a district court that the source code relates to the defendant's case.

Thus, in light of the factual record of this case and the broad discretion afforded district court rulings on discovery motions, we conclude that the district court did not abuse its discretion by denying the discovery motion on the ground that Miller failed to make a sufficient showing of relevance.

II. Reasonableness of Search

Miller argues that the district court erred by denying his motion to suppress. He contends that the warrantless search of his breath violated his right to be free from unreasonable searches and that his consent to the search was not voluntary and, thus, is invalid. The constitutionality of a search is subject to a *de novo* standard of review. *State v. Davis*, 732 N.W.2d 173, 176-77 (Minn. 2007); *Haase v. Commissioner of Pub. Safety*, 679 N.W.2d 743, 745 (Minn. App. 2004).

Both the United States Constitution and the Minnesota Constitution prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. 1, § 10. Collecting a breath sample is deemed to be a search for purposes of the Fourth Amendment. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989). A search conducted without a warrant is "presumptively unreasonable." *State v. Shriner*, 751 N.W.2d 538, 541 (Minn. 2008), *cert. denied*, 129 S. Ct. 1001 (2009). "Nevertheless, because the ultimate touchstone of the Fourth Amendment is 'reasonableness,' the warrant requirement is subject to certain

exceptions." *Id.* (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 1947 (2006)). One exception to the warrant requirement is the consent of the person searched. *State v. Hanley*, 363 N.W.2d 735, 738 (Minn. 1985). Another exception to the warrant requirement is the existence of exigent circumstances. *Shriner*, 751 N.W.2d at 541.

In *State v. Netland*, 742 N.W.2d 207 (Minn. App. 2007), *aff'd in part, rev'd in part*, 762 N.W.2d 202 (Minn. 2009), the defendant argued that the implied-consent statute, which required her to submit to a breath test upon probable cause that she had been driving while impaired, unconstitutionally imposed conditions on her Fourth Amendment right to withhold consent to a warrantless search. *Id.* at 213. This court rejected that argument, concluding that "the Fourth Amendment does not grant the right to refuse a search supported by probable cause and authorized by exigent circumstances." *Id.* at 214. On further review, the supreme court declined to address whether the implied-consent statute violates the Fourth Amendment. *Netland*, 762 N.W.2d at 212 & n.8. But the supreme court resolved Netland's case by holding that a warrantless search conducted pursuant to the implied-consent statute is not unreasonable because "under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense." *Id.* at 214. The supreme court's holding in *Netland* is based on its prior holding in *Shriner* that "[t]he rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant

committed criminal vehicular operation." *Shriner*, 751 N.W.2d at 545. The *Netland* court rejected the argument that the holding in *Shriner* is confined to cases in which the driver is suspected of criminal vehicular operation:

> [E]xigency does not depend on the underlying crime; rather, the evanescent nature of the evidence creates the conditions that justify a warrantless search. It is the chemical reaction of alcohol in the person's body that drives the conclusion on exigency, regardless of the criminal statute under which the person may be prosecuted.

Id. at 213.

In this case, the officer administered the warrantless breath test based on his suspicion that Miller was driving while impaired. On appeal, Miller strains to distinguish his argument from the unsuccessful argument in *Netland*. He asserts that he is not challenging the constitutionality of the implied-consent statute. But he is challenging the constitutionality of the conduct of a law-enforcement officer who acted pursuant to the implied-consent statute, which is essentially the same argument. He also attempts to make a very narrow argument by challenging only the state's reliance on the doctrine of consent. But in *Shriner* and *Netland*, the supreme court made clear that, in practically every case, the evanescent nature of alcohol in a person's bloodstream creates single-factor exigent circumstances that justify the warrantless search of a person's breath. *Netland*, 762 N.W.2d at 214; *Shriner*, 751 N.W.2d at 545. In *Shriner*, the supreme court stated, "Whether exigent circumstances exist is an objective determination, and the individual officer's subjective state of mind is irrelevant." 751 N.W.2d at 542 (citing *Brigham City*, 547 U.S. at 404-05, 126 S. Ct. at 1948). Accordingly, in *Netland*, the

supreme court rejected an argument that the exigent-circumstances exception does not apply "because the State did not show that concern for evanescent evidence motivated the officer to obtain Netland's blood-alcohol content without a warrant." 762 N.W.2d at 214. Rather, exigent circumstances were present because of "the relevant objective facts, namely the rapidly dissipating blood-alcohol evidence." *Id.*

Thus, with or without his valid consent, the warrantless search of Miller's breath is not unreasonable. The search has independent justification in the exigent circumstances presented by the dissipation of the evidence of Miller's blood-alcohol concentration. Therefore, the district court did not err by denying Miller's motion to suppress.

Affirmed.

ROSS, Judge (dissenting in part)

I respectfully dissent from section I of the court's opinion because I believe that Miller's attorney made a sufficient offer of proof showing that the source code may relate to Miller's guilt or innocence, satisfying rule 9.01.

It is difficult for me to imagine that there is any real question whether the operating system of a state-run machine that determines a defendant's guilt "may relate to the guilt or innocence of the defendant" when the defendant asserts that the machine calculates erroneously. And it is impossible for me to conclude that Miller has not shown at least that the operating system, or "source code," "***may*** relate to his guilt or innocence." Miller's attorney made an express offer of proof that he has secured a forensic computer expert who will explain how the source code causes the machine to produce inaccurate results.

It might be that the Intoxilyzer's calculation process generates infallible results when the machine is properly calibrated. But Miller's attorney represented to the district court that he has identified an expert who will explain to a jury how the Intoxilyzer may have calculated the wrong result. He told the district court that all he needs for the expert to make this case is the source code. The information "may relate" to Miller's guilt or innocence because, according to Miller's attorney, Miller's expert will use the information to demonstrate the machine's inaccuracy and Miller's innocence. What information could bear any greater relation to guilt or innocence?

The majority deems Miller's showing to be insufficient because it lacks detail, it is conclusory, and it lacks a "realistic" prospect that the proposed expert review would lead

to evidence favorable to his defense. I recognize that the Brunner defendant in *Underdahl II* demonstrated in much greater detail just how he might use the source code to cast doubt on the Intoxilyzer's accuracy:

> Brunner submitted source code definitions, written testimony of a computer science professor that explained issues surrounding the source codes and their disclosure, and an example of a breath-test machine analysis and its potential defects.

State v. Underdahl, ___ N.W.2d ___, 2009 WL 1150093, at *8 (Minn. Apr. 30, 2009). But while the *Underdahl II* court deemed this expansive showing to be sufficient, it did not hold that the showing must be this expansive to satisfy the relevancy element of rule 9.01. The majority seems to read *Underdahl II* as providing the minimum evidentiary support to meet the rule. Its analysis therefore appears to weigh the likelihood of success on the merits rather than evaluating whether the base threshold of discoverability has been crossed. I think, instead, that what the rule expressly requires is for the district court to exercise discretion regarding whether to order reproduction based on "a showing" of the logical relationship between the information sought (the source code) and the purpose for which it is sought (disproving guilt by revealing machine error). Minn. R. Crim. P. 9.01, subd. 2(3). I would hold that Miller's offer of proof makes that threshold showing.

A defendant's chance to obtain the source code cannot depend on his ability to explain precisely how the secret processing code will prove his innocence. It is not surprising that Miller's attorney did not explain with greater detail the process by which his expert would use the source code to develop dispositive evidence. How does one

establish with any specificity how a secret code that operates the Intoxilyzer will prove his innocence when the secret code is a *secret code*?