**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2110, A08-2112, A08-2113**

State of Minnesota,
Appellant,

vs.

Bradley Joel Veldhuizen,
Respondent (A08-2110),

Nathan William Schwintek,
Respondent (A08-2112),

Steven Patrick McCullough,
Respondent (A082113)

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

Anoka County District Court
File No. 02-CR-07-14662

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[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

Considered and decided by Minge, Presiding Judge; Worke, Judge; and Collins, Judge.

UNPUBLISHED OPINION

COLLINS, Judge

Appealing from the district court's pretrial orders granting each respondent's motion to compel discovery of the Intoxilyzer's source code, appellant-state argues that (1) the discovery orders will have a critical impact on its ability to prosecute the cases; (2) respondents failed to demonstrate that the source code relates to their guilt or innocence; and (3) the state is unable to comply with the discovery orders because the source code is not in its possession or control. We affirm.

FACTS

Respondents Bradley Veldhuizen, Nathan Schwintek, and Steven McCullough were each arrested for driving under the influence and driving while impaired in violation of Minn. Stat. §§ 169A.20, .25-.27 (2006). Each respondent (1) had been pulled over after driving erratically, (2) exhibited various signs of intoxication including bloodshot eyes and slurred speech, (3) failed one or more field sobriety tests, and (4) submitted to Intoxilyzer testing that indicated an alcohol concentration exceeding the legal driving limit.

The district court granted respondent's motion to compel discovery of the Intoxilyzer source code in each case, adding that the Intoxilyzer results would be suppressed if the state failed to deliver the source code within 30 days of the order.

Appellant State of Minnesota (the state) challenges these orders. The three cases have been consolidated on appeal.

DECISION

I.

The state first argues that the district court's discovery orders will have a critical impact on its ability to prosecute the cases. "The prosecuting attorney may appeal as of right to the Court of Appeals . . . in any case, from any pretrial order of the trial court . . . ." Minn. R. Crim. P. 28.04, subd. 1(1). To prevail on appeal of a pretrial order, the state must clearly and unequivocally show that the order is clearly erroneous and will critically impact the state's ability to prosecute the case. *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). "Minn. R. Crim. P. 28.04 requires the State to show critical impact in all pretrial appeals and there is no exception for an appeal from a discovery order." *State v. Underdahl*, ___N.W.2d___, 2009 WL 1150093, at * 4 (Minn. Apr. 30, 2009) (*Underdahl II*). "The State can show critical impact when complying with an order significantly reduces the likelihood of a successful prosecution." *Id.* at *5 (quotation omitted).

The Minnesota Supreme Court recently held that a pretrial order granting discovery of the source code will have a critical impact on the state's ability to successfully prosecute because such an order "keep[s] the Intoxilyzer test results from coming into evidence if the State does not comply with the discovery orders." *Id.* Further, the supreme court concluded that "an order that dismisses DWI charges, even when other charges remain, will have a critical impact on the prosecution's case." *Id.*

The circumstances here are nearly identical to those in *Underdahl II* in that the district court's orders would result in the exclusion of the Intoxilyzer results and dismissal of certain charges if the state fails to comply. Thus, the district court's discovery orders meet the critical-impact test.

II.

The state next contends that the district court abused its discretion by granting discovery of the source code, arguing that respondents have failed to establish that the source code may relate to their guilt or innocence. The district court has broad discretion in granting or denying a discovery request and, absent a clear abuse of discretion, that decision will generally be affirmed. *Shetka v. Kueppers*, *Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990). A district court abuses its discretion when it acts "arbitrarily, capriciously, or contrary to legal usage." *State v. Profit*, 591 N.W.2d 451, 463, 464 n.3 (Minn. 1999) (quotation omitted).

The district court may exercise its discretion and require the prosecution to disclose information if the defendant shows "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." Minn. R. Crim. P. 9.01, subd. 2(3). The supreme court recently discussed what showing is necessary under this rule to support an order compelling disclosure of the source code in a criminal prosecution. *See Underdahl II*, 2009 WL 1150093 at *6-8. In *Underdahl II*, the supreme court affirmed our reversal of the discovery order where there was no showing of the relation of the source code to the defendant's defense, but reinstated the discovery order where the defendant submitted a

memorandum and nine exhibits to support his request for the source code, including source code definitions, scientific testimony explaining source code disclosure issues, and an example of a breath-test machine analysis and its potential defects. *Id.* The supreme court concluded that these submissions demonstrated "that an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer and, in turn, would relate to [the defendant's] guilt or innocence." *Id.* at *8.

Here, respondents' submissions in support of their discovery motions include an expert affidavit of Lamar University Professor of Electrical Engineering, Harley Myler, and a letter from forensic scientist, Thomas Burr. The Myler affidavit describes the source code and its effect on Intoxilyzer testing, the insufficiency of the simulator accuracy tests done by the state after each software update, and the need for the source code to determine Intoxilyzer accuracy. The Burr letter discusses two inconsistent data reports produced from the same underlying Intoxilyzer test, which led Burr to question the accuracy of the Intoxilyzer. The letter also states that "anomalous data raises serious questions as to the reliability of any Intoxilyzer printout . . . ." The district court determined that these submissions sufficiently demonstrate that the source code may relate to respondents' guilt or innocence as required under Minn. R. Crim. P. 9.01, subd. 2(3).

In light of the district court's broad discretion in discovery matters and our reading of the supreme court's opinion in *Underdahl II* to require leniency in evaluating the

required showing,[1] we conclude that respondents made at least a minimally sufficient showing in support of their motions for discovery of the source code. Thus the district court did not abuse its discretion by granting the motions.

III.

Finally, the state contends that it is unable to comply with the district court's discovery order because the source code is not within the state's possession or control as required under Minn. R. Crim. P. 9.01, subd. 1. But the supreme court addressed this issue in *Underdahl II* when it held that the district courts had not abused their discretion by finding that, based on language in its request for proposal (RFP), the state had possession or control of the source code. *Underdahl II*, 2009 WL 1150093, at *8. As in *Underdahl II*, the district court here relied on agreements made by the Intoxilyzer manufacturer in the state's RFP supporting the proposition that the state had contractual rights regarding ownership of the source code. Because the RFP language indicates that the state has at least some rights to the source code, the district court did not abuse its discretion by finding that the state had possession or control of the source code based on its ability to pursue enforcement of these contractual rights.

Affirmed.

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[1] *See Underdahl II*, 2009 WL 1150093, at *7 (holding that "even under a lenient showing requirement" Underdahl failed to show that the source code may relate to his guilt or innocence).