STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2191

State of Minnesota,
Appellant,

vs.

Jennifer Lynn Bunker,
Respondent.

Filed June 23, 2009
Affirmed
Connolly, Judge

Anoka County District Court
File No. 02-CR-08-11491

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

Joseph J. Murphy, Sweeney, Borer & Sweeney, 3250 Rice Street, St. Paul, MN 55126 (for appellant)

Rory P. Durkin, Giancola Law Office, PLLC, 403 Jackson Street, Suite 305, Anoka, MN 55303 (for respondent)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

CONNOLLY, Judge

The state argues that the district court abused its discretion in ordering production of the source code for the Intoxilyzer 5000EN. Because the affidavit submitted by respondent was sufficient to demonstrate that the source code was relevant or related to her guilt or innocence of the charge of gross misdemeanor third-degree driving while impaired under Rule 9 of the Minnesota Rules of Criminal Procedure, we affirm.

FACTS

Respondent Jennifer Lynn Bunker was arrested for driving while impaired on September 8, 2008. She submitted to a breath test on the Minnesota model of the CMI Intoxilyzer 5000EN, which showed an alcohol concentration of .31. Respondent was subsequently charged with third-degree driving while impaired with an alcohol concentration of .20 or more in violation of Minn. Stat. §§ 169A.20, subd. 1(5), .26 (2008) and fourth-degree driving under the influence in violation of Minn. Stat. §§ 169A.20, subd. 1(1), .27 (2008).

Respondent brought a motion to compel production of the source code for the Intoxilyzer 5000EN, and an omnibus hearing was held. The state objected to production of the source code. On December 8, 2008, the district court issued an order granting respondent's motion to compel production of the source code. The district court ordered production of the source code within 30 days or the Intoxilyzer results would be suppressed at trial. This appeal follows.

D E C I S I O N

I. The district court's order to compel production of the source code or face suppression of the Intoxilyzer results had a critical impact on the state's ability to prosecute the case.

"When the state appeals a pretrial order, it must show clearly and unequivocally (1) that the ruling was erroneous and (2) that the order will have a 'critical impact' on its ability to prosecute the case." *State v. McLeod*, 705 N.W.2d 776, 784 (Minn. 2005). This critical impact requirement applies to pretrial discovery orders. *See State v. Underdahl*, __ N.W.2d __, 2009 WL 1150093, at *4 (Minn. Apr. 30, 2009) (*Underdahl II*) ("We now hold that 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."). Critical impact can be shown "not only in those cases where the lack of the suppressed evidence completely destroys the state's case, but also in those cases where the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution." *State v. Joon Kyu Kim*, 398 N.W.2d 544, 551 (Minn. 1987).

Failure to produce the source code, and the resulting suppression of the Intoxilyzer results at trial, would have a critical impact on the state's ability to prosecute the case. Without the ability to offer evidence of respondent's breath-test result, the state would be unable to prove that respondent was driving with an alcohol concentration of .20 or greater. Suppression of the breath-test results would effectively lead to the dismissal of the third-degree driving while impaired with an alcohol concentration of .20 or more charge. Respondent seems to concede that this would be the result. But respondent argues that suppression of the breath test would have no impact on the state's ability to

prosecute the misdemeanor driving while impaired charge. We disagree. The breath test results are an important element to the prosecution and although suppression might not completely destroy the state's case with regard to the misdemeanor charge, it would certainly reduce the likelihood of a successful prosecution. Furthermore, the Minnesota Supreme Court has held that suppression of evidence that would result in the inability to successfully prosecute a driving with an alcohol concentration of .10 charge creates an appealable order, even when a driving under the influence charge remains. *State v. Hicks*, 222 N.W.2d 345, 347 (Minn. 1974). Citing *Hicks*, the supreme court recently concluded that "an order that dismisses DWI charges, even when other charges remain, will have a critical impact on the prosecution's case." *Underdahl II*, at *5. Therefore, suppression of the breath-test results would have a critical impact on the state's prosecution of respondent.

II. The district court did not abuse its discretion by granting respondent's motion to compel discovery of the 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. Underdahl*, 749 N.W.2d 117, 120 (Minn. App. 2008), *rev'd on other grounds* (Minn. Apr. 30, 2009). [1] The rules of criminal procedure allow for broad discovery. *See State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987). Nonetheless, "[d]iscovery rules are not meant to be used for fishing expeditions." *State v. Hunter*, 349 N.W.2d 865, 866 (Minn. App. 1984) (quotation omitted).

[1] The supreme court heard oral arguments in *Underdahl II* on October 13, 2008 and issued its decision on April 30, 2009.

Minnesota Rule of Criminal Procedure 9.01 controls disclosure by the prosecution in gross misdemeanor and felony cases. Some disclosures are mandatory, while others are discretionary and may be ordered by the court. Minn. R. Crim. P. 9.01.

> 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 not subject to disclosure without order of court under Rule 9.01, subd. 1, provided, however, 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.

Id., subd. 2(3).

Respondent argues that the source code relates to her guilt or innocence and is therefore admissible upon the district court's request. The state, however, asserts that respondent made an inadequate showing that the requested source code is relevant or that it relates to respondent's guilt or innocence, the source code is not in its possession or control, and due process does not require disclosure of the source code.

The Minnesota Supreme Court recently considered this issue. In *Underdahl II*, the supreme court addressed whether two appellants had met their burden of proving that the source code was relevant and related to their guilt or innocence. The supreme court concluded that appellant Underdahl had not met this burden because

> Underdahl made no threshold evidentiary showing whatsoever; while he 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 would help him do so. As in *Hummel*, Underdahl advanced no theories on 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." We hold that, even under a lenient showing requirement, Underdahl failed to make a showing that the source code may relate to his guilt or innocence.

Underdahl II, at *7 (citation omitted).

In contrast, the supreme court concluded that appellant Brunner had met the lenient showing requirement because

> 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. Brunner's 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.

Id. at *8.

In particular, the computer science professor's testimony discussed the source code as it related to voting machines and its importance in finding defects and problems in those voting machines. *Underdahl*, 749 N.W.2d at 121.

In this case, respondent has also met the burden of proving that the source code is relevant to her guilt or innocence. Respondent submitted two pieces of evidence: one was an unsworn letter from forensic scientist Thomas Burr questioning the accuracy of an Intoxilyzer test result in a different case and the second was an affidavit from university professor Dr. Harley Myler relating to the Intoxilyzer 5000 (I5000) used in Florida and comparing it to those Intoxilyzers used in Minnesota. In the affidavit, he stated that without access to the software program he "cannot have absolute certainty that the

software is operating properly."[2] We question the evidentiary value of the unsworn Burr letter. However, if an affidavit relating to source codes in voting machines from a professor is sufficient to satisfy Rule 9, we are hard pressed to say that an affidavit from a professor that discusses source codes in an actual Intoxilyzer does not. Under this standard, the evidence pertains to respondent's guilt or innocence. Respondent's 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 [her] guilt or innocence." *Underdahl II*, at *8. Therefore, we hold that the district court did not abuse its discretion by ordering production of the source code.

"The [district] court's factual findings are subject to a clearly erroneous standard of review[.]" *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996). In the district court's order, it stated that "[b]ecause the commissioner has the ability to obtain the source code and is currently pursuing litigation to secure its contractual rights, this Court finds disclosure is appropriate." The supreme court stated in *Underdahl II* that "the district courts did not abuse their discretion in finding the State had possession or control of the source code under Minn. R. Crim. P. 9.01, subd. 2(1)." *Underdahl II*, at *8. Therefore, the district court's finding is not clearly erroneous.[3]

[2] We note that this affidavit seems to have been prepared in a different criminal case relating to a different Intoxilyzer machine.

[3] We further note, as this court did in *State v. Crane*, __ N.W.2d __, 2009 WL 1515264, at *3 (Minn. App. June 2, 2009), that the finding regarding possession of the source code does not foreclose a different result in future cases based on further developments in litigation between the state and CMI.

It is unnecessary to address the state's argument regarding respondent's due-process rights, because we have determined that the district court did not abuse its discretion in ordering production of the source code.

Affirmed.