STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1433

Luke Joseph Freeman, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed July 7, 2009
Affirmed in part, reversed in part, and remanded
Toussaint, Chief Judge

Cass County District Court
File No. 11-CV-07-2079

Richard C. Kenly, Kenly Law Offices, P.O. Box 31, Backus, MN 56435 (for appellant)

Lori Swanson, Attorney General, Melissa J. Eberhart, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Lansing, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

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

TOUSSAINT, Chief Judge

Appellant Luke Joseph Freeman challenges the district court orders denying his petition for judicial review to rescind the revocation of his driver's license and his motion

to compel discovery of the source code of the Intoxilyzer machine used to measure his alcohol concentration following his arrest for driving while impaired. Because the district court did not err in determining that the arresting officer had a reasonable, articulable suspicion of criminal activity to stop appellant's vehicle, we affirm in part. But because the district court abused its discretion in denying appellant's motion to compel discovery of the Intoxilyzer source code, we reverse in part and remand.

D E C I S I O N

I.

Appellant contends that the district court erred in finding that the arresting officer had a reasonable, articulable suspicion of criminal activity to stop his vehicle. He claims that it was improper for the officer to rely on his ex-wife's 911 call in which she told dispatch that he was "driving pretty good" and argues that the officer did not observe illegal driving conduct before stopping his vehicle. We review de novo the district court's determination that the traffic stop was lawful. *State v. Britton*, 604 N.W.2d 84, 87 (Minn. 2000).

The United States and Minnesota Constitutions protect against unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. 1, § 10. An investigative stop of a vehicle must be justified by reasonable and articulable suspicion that the driver is engaged in criminal activity. *Terry v. Ohio*, 392 U.S. 1, 20-21, 88 S. Ct. 1868, 1879-80 (1968). Suspicion is reasonable if the stop was "not the product of mere whim, caprice or idle curiosity." *State v. Pike*, 551 N.W.2d 919, 921 (Minn. 1996). Although an officer must have a "particularized and objective basis for suspecting [a

driver] of criminal activity," law enforcement officials are permitted to make deductions that "might well elude an untrained person." *United States v. Cortez,* 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981). The factual basis needed to justify an investigatory stop is "minimal." *Knapp v. Comm'r of Pub. Safety,* 610 N.W.2d 625, 628 (Minn. 2000). And even an "insignificant" violation of a traffic law can provide the objective legal basis for a stop. *State v. Kilmer,* 741 N.W.2d 607, 609 (Minn. App. 2007).

Appellant contends that the squad-car video of the stop and the truck-driver witness's testimony directly contradict the officer's testimony that he witnessed appellant following another vehicle too closely prior to the stop. No video exists showing appellant's vehicle traveling on the highway. We therefore must defer to the district court's decision to credit the officer's testimony that he observed appellant's vehicle swerving and following too closely over the truck driver's testimony that he did not see a vehicle in front of appellant's vehicle. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (stating that appellate courts defer to district court's credibility determinations). Even if the officer did not observe any illegal driving conduct before pulling over appellant's vehicle, he still had a reasonable, articulable suspicion of criminal activity based on the reliable informant's tip stating personally-observed, detailed facts.

The factual basis for an investigatory stop "need not arise from the personal observations of the police officer but may be derived from information acquired from another person." *Magnuson v. Comm'r of Pub. Safety*, 703 N.W.2d 557, 560 (Minn. App. 2005). An informant's tip to law enforcement may be adequate to support an

investigatory stop if the tip has sufficient indicia of reliability. *Jobe v. Comm'r of Pub. Safety*, 609 N.W.2d 919, 921 (Minn. App. 2000). "Minnesota cases dealing with traffic stops based on informant tips have focused mainly on two factors: (1) identifying information given by the informant, and (2) the facts that support the informant's assertion that a driver is under the influence." *Id.* Identified citizen informants are presumed to be reliable. *Yoraway v. Comm'r of Pub. Safety,* 669 N.W.2d 622, 626 (Minn. App. 2003). An officer may rely on information from an informant who "provides sufficient information so that he may be located and held accountable for providing false information." *Playle v. Comm'r of Pub. Safety,* 439 N.W.2d 747, 748 (Minn. App. 1989). Here, appellant's ex-wife was an identified citizen informant and is thus presumed reliable. *See Magnuson,* 703 N.W.2d at 560 (finding that tip had sufficient indicia of reliability when informant "identified herself by name and provided her telephone number to the 911 dispatcher" and "police could locate the informant and hold her accountable.").

But whether the officer was justified in stopping appellant's vehicle also depends on the nature of the information provided by the informant. *Id.* Appellant's ex-wife told the 911 dispatcher that she believed appellant was "borderline drunk" because she "could smell [alcohol] on his breath," he was "slurring his speech," and had "glazed," "red" eyes when she met him to drop off their daughter in order to exchange custody. She gave the dispatcher appellant's name, exact location, license-plate number, and the color, make, model, and year of his vehicle. She also gave her own name, location, part of her license-plate number, and the make, model, and color of her vehicle. *See id.* (finding that

informant's tip contained sufficient information where informant identified herself, described vehicles of "definitely drunk" drivers, and reported license-plate number); *Playle*, 439 N.W.2d at 748-49 (holding that investigatory stop based on citizen's tip was lawful because tip was reliable and based on informant's personal observations, even though informant did not state why he believed driver was drunk).

Furthermore, a "tip that a driver is intoxicated, as opposed to possibly intoxicated, suggests that the tip was based on [an] informant's personal observation." *Magnuson*, 703 N.W.2d at 560. Here, the informant told dispatch that she believed appellant was "drunk" because she had been married to him for four years and "can tell when he's drinking," and had personally witnessed other common indicia of intoxication.

Because of the certainty with which the informant described appellant's intoxication and because of the specificity of her tip, the officer had reason to believe that the tip was based on her personal observation. The district court did not err in concluding that the officer had reasonable, articulable suspicion to conduct an investigatory stop of appellant's vehicle and to administer a preliminary breath test to appellant.

II.

During appellant's implied-consent proceeding, the district court denied his motion to compel discovery of the Intoxilyzer 5000EN's source code, the original text of the computer program by which the instrument operates. As a threshold matter, respondent argues that the district court lacked subject-matter jurisdiction over appellant's discovery motion, claiming that appellant was essentially challenging the agency rule approving the Intoxilyzer software used statewide, and not the validity of his

own breath-test results. Lack of subject-matter jurisdiction is an issue that may be raised at any time, "including for the first time on appeal." *Cochrane v. Tudor Oaks Condominium Project*, 529 N.W.2d 429, 432 (Minn. App. 1995).

In 2007, the Bureau of Criminal Apprehension (BCA) formally adopted a rule approving use of the Intoxilyzer 5000EN and its software in Minnesota. Minn. R. 7502.0420 (2007). The Minnesota Administrative Procedures Act vests sole review of agency rules in this court:

> The validity of any rule may be determined upon the petition for a declaratory judgment thereon, addressed to the Court of Appeals, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair the legal rights or privileges of the petitioner.

Minn. Stat. § 14.44 (2008). But respondent's argument fails for two reasons. First, it directly contradicts the language of the implied-consent statute. The statute vests district courts with jurisdiction over implied-consent proceedings. Minn. Stat. § 169A.53, subd. 2 (2008). During an implied-consent proceeding, a defendant may challenge the validity and reliability of the testing method used and the accuracy of his alcohol-concentration test results. Minn. Stat. § 169A.53, subd. 3(b)(10) (2008).

Second, the supreme court has expressly rejected respondent's argument: "Because Minn. Stat. § 169A.53, subd. 2, gives the district court jurisdiction of section 169A.53, subdivision 3(b)(10), proceedings, the commissioner's argument that the district court lacks jurisdiction in this case necessarily fails." *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007) (where appellant challenged specific test results under implied-consent statute and not validity of agency rule approving

Intoxilyzer source code) (*Underdahl I*).

Here, although appellant could not specify what defects in his breath test would be revealed by discovery of the source code, nothing in the record establishes that he attempted to generally challenge the agency rule establishing the validity of the Intoxilyzer 5000EN and its software. In his memorandum supporting his motion to compel discovery, appellant wrote that he sought discovery of the source code "because the Intoxilyzer 5000 and its software were used to test the alcohol concentration of [his] breath, and the State would presumably like to offer that evidence against [him]." The district court had subject-matter jurisdiction over appellant's discovery motion.

Appellant next argues that the district court abused its discretion by denying his motion to compel discovery of the source code. He claims that he has proved, based on the experts' testimony, that the source code is relevant and discoverable because it is "basically the brains of the instrument."

The district court "has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order . . . will not be disturbed." *Underdahl I*, 735 N.W.2d at 711 (quotation omitted). This court reviews a discovery order "for an abuse of discretion by determining whether the district court made findings unsupported by the evidence or by improperly applying the law." *Id.*

"[T]he district court has the same discretion to grant or deny a discovery request in implied-consent hearings as it does in civil cases generally, and the parties are bound by the same burden to demonstrate that an item is discoverable." *Abbot v. Comm'r of Pub. Safety*, 760 N.W.2d 920, 926 (Minn. App. 2009) (affirming denial of motion to compel

discovery of source code), *review dismissed* (Minn. May 19, 2009). The Intoxilyzer source code fits under the category of non-mandated discovery, and is governed by the discovery provisions of the Minnesota Rules of Civil Procedure in implied-consent proceedings. *Id.* at 923; *see* Minn. Stat. § 169A.53, subd. 2(d) (2008).

Generally, a party may obtain discovery of any matter "relevant to a claim or defense." Minn. R. Civ. P. 26.02(a). The court may also order discovery that is relevant "to the subject matter involved in the action," rather than the specific claim or defense, if the party seeking it can show "good cause." *Id.* And discovery sought is relevant only if it is "reasonably calculated to lead to . . . admissible evidence." *Id.* Additionally, the "frequency or extent" of discovery otherwise permissible is limited based on a variety of practical considerations, such as when the discovery sought is "unreasonably cumulative," "duplicative," or "obtainable from some other source that is more convenient, less burdensome, or less expensive." *Id.*, (b)(3).

The supreme court has addressed, in the criminal context, the showing that must be made to establish that the Intoxilyzer source code is relevant and discoverable. *State v. Underdahl*, ____ N.W.2d ____ (Minn. Apr. 30, 2009) (*Underdahl II*). To establish relevance, a defendant must "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 [the defendant's] guilt or innocence." *Id.* at ____, 2009 WL 1150093, at * 8 (applying Minn. R. Crim. P. 9.01, subd. 2 and holding that appellant established relevance and discoverability of source code by submitting "source code definitions, written testimony of a computer science professor that explained issues surrounding the

source codes and their disclosure, and an example of breath-test machine analysis and its potential defects").

Here, appellant presented written and oral testimony in support of his motion to compel discovery from witnesses explaining the need for examination of the source code because of potential problems. This evidence indicates that the source code may reveal deficiencies in the accuracy of the Intoxilyzer 5000EN that would be relevant to appellant's defense. In light of the district court's broad discovery in discovery matters and our reading of the supreme court's *Underdahl II* opinion to require leniency in evaluating the required showing, we conclude that appellant made a minimally sufficient showing of relevancy.[1] Thus, the district court abused its discretion in denying his discovery motion.

Affirmed in part, reversed in part, and remanded.

[1] *See Underdahl II*, ____ N.W.2d at ___, 2009 WL 1150093, at *7 (holding that "even under a lenient showing requirement," Underdahl failed to show that source code may relate to his guilt or innocence).