STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1797

Harry David Horarik, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 18, 2009
Affirmed
Lansing, Judge

McLeod County District Court
File No. 43-CV-08-1528

Richard L. Swanson, Suite 235, 207 Chestnut Street, P.O. Box 117, Chaska, MN 55318 (for appellant)

Lori Swanson, Attorney General, Jeffrey F. Lebowski, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

LANSING, Judge

In this appeal from an order sustaining the revocation of his driver's license, Harry Horarik challenges the constitutionality of Minn. Stat. § 634.15 (2008), which applies to

the admissibility of laboratory evidence of alcohol-concentration tests. Because admitting the laboratory analysis of Horarik's urine-test results under section 634.15 did not violate the separation-of-powers provision in Minn. Const. art. III, § 1, or the right of confrontation guaranteed by U.S. Const. amend. VI, we affirm.

F A C T S

Harry Horarik was arrested for driving while impaired on May 14, 2008, and, under Minnesota's implied-consent procedures, provided the Glencoe Police Department with a urine sample for chemical testing to determine alcohol concentration. The laboratory analysis of the sample showed an alcohol concentration of .12. The commissioner of public safety revoked Horarik's license.

After submitting a petition for judicial review of the license revocation, Horarik waived all issues in his petition except his challenge to the admissibility of the laboratory analysis that was completed by the Minnesota Bureau of Criminal Apprehension (BCA). Horarik did not subpoena the BCA chemist who conducted the laboratory analysis of his urine, and at the implied-consent hearing the laboratory analysis was submitted under Minn. Stat. § 634.15, subd. 1(a)(1), without antecedent testimony from the BCA.

Horarik challenged the admissibility of the laboratory analysis on the grounds that section 634.15 violates the separation-of-powers provision in Minn. Const. art. III, § 1. He also argued that, even though this is not a criminal prosecution, the statute violated the right of confrontation guaranteed by U.S. Const. amend. VI.

The district court provisionally admitted the laboratory analysis, and Horarik and the commissioner submitted written arguments on the issue of the constitutionality of

section 634.15. The district court rejected Horarik's challenges to the constitutionality of section 634.15 and upheld the revocation. Horarik appeals.

D E C I S I O N

This appeal raises two constitutional challenges to section 634.15, which governs admission of a laboratory analysis to determine alcohol concentration in a urine sample, and our review is de novo. *State v. Bussmann*, 741 N.W.2d 79, 82 (Minn. 2007). We presume that a statute is constitutional and will hold otherwise "with extreme caution and only when absolutely necessary." *In re Haggerty*, 448 N.W.2d 363, 364 (Minn. 1989).

Under section 634.15, "a report of the facts and results of any laboratory analysis or examination" is admissible "if it is prepared and attested by the person performing the laboratory analysis or examination in any laboratory operated by the Bureau of Criminal Apprehension or authorized by the bureau . . . ." *Id.*, subd. 1(a)(1). A laboratory analysis "purported to be signed by the person performing the analysis or examination" is admissible "without proof of the seal, signature or official character of the person whose name is signed to it." *Id.*, subd. 1(b).

In a criminal prosecution, the defendant may obtain the in-court testimony of the person who performed the laboratory analysis by notifying the prosecuting attorney at least ten days before the trial. *Id.*, subd. 2(a). This notice-and-demand procedure does not apply to civil proceedings, including administrative and judicial review of license revocation. *Id.* Instead, the admissibility of laboratory reports in a judicial-review hearing is governed by Minn. Stat. § 169A.53 (2008), which provides that "[c]ertified or otherwise authenticated copies of laboratory or medical personnel reports, records,

documents, licenses and certificates are admissible as substantive evidence." Section 634.15, subdivision 2(a), apparently recognizes, however, that a civil petitioner may obtain a lab analyst's in-court testimony by subpoena. *See id.* (providing that "[i]f a petitioner in a proceeding under [the implied-consent statute] subpoenas the person [who performed the analysis] to testify at the proceeding, the petitioner is not required to pay the person witness fees . . . in excess of $100").

I

The first constitutional challenge that Horarik advances is that section 634.15, a legislatively created rule of judicial admissibility, violates the Minnesota Constitution's separation-of-powers provision. The Minnesota Constitution establishes three "departments" of government and provides that none of the three "shall exercise any of the powers properly belonging to either of the others" except as provided in the constitution. Minn. Const. art. III, § 1.

"[W]hat judges should and should not consider as evidence in a controversial matter are rules of evidence, the decision of which the constitution . . . has delegated exclusively to the courts." *State v. McCoy*, 682 N.W.2d 153, 160 (Minn. 2004) (internal quotation marks omitted). Respect for coequal branches may, however, lead courts to apply and enforce "reasonable, statutory rules of evidence as a matter of comity" when they do not conflict with the court's rules of evidence. *Id.* (internal quotation marks omitted).

In a decision addressing blood tests, this court held that section 634.15 "is consistent with the rules of evidence" and is therefore entitled to comity. *State v.*

Pearson, 633 N.W.2d 81, 85 (Minn. App. 2001). To determine whether *Pearson*'s holding applies equally to blood and urine tests, we turn to the text of section 634.15. We note, at the outset, that the statute's text addresses blood tests differently than all other tests. Blood must be drawn by someone "competent to administer the test," defined under a separate statutory provision as a person qualifying under one of several job titles. Minn. Stat. § 634.15, subd. 1(a)(2)(ii) (cross-referrencing to separate, implied-consent provision, Minn. Stat. § 169A.51, subd. 7(a) (2008), defining who may draw blood). And a blood-test report must be "prepared consistent with any applicable rules promulgated by the commissioner." *Id.*, subd. 1(a)(2)(iii). The provision applicable to urine tests does not explicitly refer to the competence of the person performing the test or to rules promulgated by the commissioner. *See id.*, subd. 1(a)(1) (allowing reports of laboratory analysis to be admitted if prepared and attested to by person who performed analysis).

We conclude, nonetheless, that these differences in the statutory text do not affect the constitutional analysis. The provision that allows for the admissibility of the urine-test results requires that they be "prepared and attested . . . in [a] laboratory operated by the Bureau of Criminal Apprehension or authorized by the bureau." *Id.* The BCA is a division within the Minnesota Department of Public Safety and is operated under the authority of the commissioner; by admitting evidence of urine tests only from laboratories "operated . . . or authorized by the bureau," the statute necessarily subjects the testing to applicable rules approved by the commissioner. *Id.*; *see* Minn. Stat. §§ 299C.01 (vesting powers and duties of BCA with commissioner), .03 (authorizing rules for operation of BCA, subject to commissioner's approval). The rule applicable to

implied-consent testing requires *both* blood and urine samples to be tested using "procedures approved and certified to be valid and reliable . . . by the director [of the BCA's] Forensic Science Laboratory" and delineates the scientific testing methods that may be employed. Minn. R. 7502.0700 (2007).

The constitutional question addressed in *Pearson* is whether section 634.15 impairs the judicial function of promulgating rules of evidence. *Pearson*, 633 N.W.2d at 84 (citing *State v. Willis*, 332 N.W.2d 180, 184 (Minn. 1983)). The rule of evidence governing admissibility of scientific tests in Minnesota courts is the *Frye*/*Mack* standard. *Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000). For admissibility, courts require scientific evidence to be "generally accepted in the relevant scientific community," to have "foundational reliability," and otherwise to satisfy rules of evidence related to relevance and expert testimony. *Id.* Foundational reliability means that the one offering the evidence must show that "the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability." *Id.*

In *Pearson*, we held that admission of blood tests under section 634.15 "is consistent with the rules of evidence." 633 N.W.2d at 85. The *Pearson* court stated that requiring testing kits and methods approved by the BCA "is sufficient to establish the test's reliability." *Id.* The opinion also suggests that, even if the statute does not ensure the foundation or expertise of the test's preparer, it does not preclude obtaining the preparer's personal testimony. *Id.* *Pearson* concluded that the judicial function was not impaired because a court "would be permitted to hear the testimony of such witnesses and ascertain the facts if the validity of the report or analysis was questioned." *Id.*

These conclusions, which show that the statute is consistent with the court's *Frye*/*Mack* rule, apply with equal force to urine tests. The same BCA rules apply to blood tests and urine tests; thus, urine tests invoke the same presumption of reliability. They are conducted at a BCA-authorized laboratory under approved procedures with an approved scientific methodology. Section 634.15 is, therefore, not an abrogation of *Frye*/*Mack*, but a reliance on the expertise of the commissioner and the BCA to ensure that *Frye*/*Mack*'s requirements are satisfied. This is consistent with *Frye*/*Mack*'s purpose of making a determination on a general category of scientific evidence without the need to litigate its use in every individual case. *See Goeb*, 615 N.W.2d at 814 (stating that *Frye*/*Mack* standard has advantage of less "variation in decisions at the district court level"); *Glick v. Comm'r of Pub. Safety*, 362 N.W.2d 15, 16 (Minn. App. 1985) (stating that section 634.15 is intended to prevent "unnecessary and costly court appearances or document production"). We are satisfied that, as a matter of comity, the application of section 634.15 to laboratory analysis of alcohol concentration in urine samples does not violate the separation of powers.

II

The second constitutional argument that Horarik advances is that the admission of a laboratory report without testimony by its preparer violates the right of confrontation guaranteed by U.S. Const. amend. VI. Horarik, a petitioner in a noncriminal proceeding, seeks to avail himself of protections barring the use of out-of-court, testimonial statements against a criminal defendant. *See, e.g.*, *Crawford v. Washington*, 541 U.S. 36,

51, 124 S. Ct. 1354, 1364 (2004) (holding that Confrontation Clause encompasses witnesses' out-of-court statements when those statements are "testimonial").

Horarik is correct that a laboratory report prepared by the BCA to be offered at a criminal trial against a defendant meets the *Crawford* definition of a testimonial statement. *Melendez-Diaz v. Massachusetts*, 557 U.S. ___, ___, 129 S. Ct. 2527, 2532 (2009); *State v. Caulfield*, 722 N.W.2d 304, 310 (Minn. 2006). And, a criminal defendant's failure to meet section 634.15's demand-and-notice provision is not, by itself, a conclusive waiver of the confrontation right. *Caulfield*, 722 N.W.2d at 313.

The significant distinction, however, is that implied-consent proceedings, unlike the criminal proceedings governed by the *Crawford* rule, are civil in nature. *Davis v. Comm'r of Pub. Safety*, 517 N.W.2d 901, 905 (Minn. 1994), *superseded by statute* Minn. Stat. § 171.30 (1998), *as recognized in Hamilton v. Comm'r of Pub. Safety*, 600 N.W.2d 720 (Minn. 1999); *cf. Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828, 835 (Minn. 1991) (establishing limited right to consult counsel during implied-consent advisory because of implications for criminal DWI proceedings); *Maietta v. Comm'r of Pub. Safety*, 663 N.W.2d 595, 600 (Minn. App. 2003) (noting *Friedman*'s holding but relying on *Davis* to re-assert civil nature of implied-consent statute), *review denied* (Minn. Aug. 19, 2003). A proceeding is not criminal in nature if the resulting sanctions are regulatory as opposed to punitive. *Cf. Boutin v. LaFleur*, 591 N.W.2d 711, 717 (Minn. 1999) (examining whether statute was punitive or regulatory to determine whether criminal defendant's right to presumption of innocence was implicated).

The U.S. Supreme Court has provided a list of factors to use in determining whether a sanction should be treated as punitive or only regulatory. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963) (listing factors); *see also Boutin*, 591 N.W.2d at 717 (applying *Mendoza-Martinez* to registration of predatory offenders). The seven factors to consider are:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment - retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Boutin, 591 N.W.2d at 717.

This court's decision in *State v. Hanson* makes it possible to address many of these seven factors. 532 N.W.2d 598 (Minn. App. 1995), *aff'd*, 543 N.W.2d 84 (Minn. 1996). In *Hanson* we held that the consequences of implied-consent proceedings do not amount to punishment. *Id.* at 602. *Hanson*'s analysis shows that license revocation has not "historically . . . been regarded as punishment" and does not "promote the traditional aims of punishment." *Boutin*, 591 N.W.2d at 717. *Hanson* also concludes that the implied-consent statute "serves public safety by removing drunken drivers from the highways pending the judicial hearing." 532 N.W.2d at 601. These considerations assign a noncriminal purpose to the statute. *Boutin*, 591 N.W.2d at 717. *Hanson* also notes that the disability imposed is neither all-encompassing, nor permanent, nor even particularly lengthy. 532 N.W.2d at 602. These considerations suggest that the implied-consent statute is not "excessive in relation to [its] purpose." *Boutin*, 591 N.W.2d at 717

(quotation omitted). And finally, *Hanson* demonstrates that the "affirmative disability or restraint," imposed by the implied-consent statute is minimal in comparison to that of a criminal conviction. *Boutin*, 591 N.W.2d at 717 (quotation omitted). A driving-while-impaired conviction has the potential to remove the person from society completely as opposed to merely limiting the ability legally to drive. *Hanson*, 532 N.W.2d at 602.

The only *Mendoza-Martinez* factor that weighs in favor of treating implied-consent petitioners the same as criminal defendants is that "the behavior to which it applies is already a crime." *Boutin*, 591 N.W.2d at 717 (quotation omitted). The other factors are sufficient to outweigh this consideration and to preclude application of the protections afforded criminal defendants. This conclusion accords with other opinions of this court affirming the essentially civil nature of implied-consent proceedings. *See, e.g.*, *Ruffenach v. Comm'r of Pub. Safety*, 528 N.W.2d 254, 256 (Minn. App. 1995) (stating that "[a]n implied-consent hearing is *not* a *de facto* criminal proceeding and . . . due process rights associated with criminal trials do not apply").

Horarik was not entitled to the protections of the Confrontation Clause in his implied-consent hearing, and his argument for relief on that basis fails.

Affirmed.