STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1856

Michael Keith Ersfeld, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 25, 2009
Reversed and remanded
Johnson, Judge

Anoka County District Court
File No. 02-CV-08-4280

Jeffrey B. Ring, The Interchange Tower, 600 South Highway 169, Suite 1690, Minneapolis, MN 55426 (for appellant)

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

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

JOHNSON, Judge

The commissioner of public safety revoked Michael Keith Ersfeld's driver's license after he was arrested for driving while impaired (DWI) and failed a breath test. Ersfeld petitioned the district court to rescind the revocation. While his petition was

pending, Ersfeld moved to compel discovery of the source code of the Intoxilyzer 5000EN breath-test machine and moved to suppress the results of his breath test on the ground that it was administered in violation of the Fourth Amendment. The district court denied both motions and sustained the revocation. We conclude the district court did not err by denying Ersfeld's motion to suppress. But we conclude that, in light of intervening caselaw, the district court erred by denying Ersfeld's discovery motion. Thus, we reverse and remand for further proceedings.

FACTS

In May 2008, Officer Andy Knutson of the Fridley Police Department stopped the vehicle that Ersfeld was driving because it crossed the fog line and because the license plate was not illuminated. After Officer Knutson noticed indicia of intoxication, he arrested Ersfeld on suspicion of DWI and read him the implied-consent advisory. Ersfeld submitted to a breath test, which registered an alcohol concentration of .16. As a consequence, the commissioner of public safety revoked Ersfeld's driving privileges.

Two days later, Ersfeld filed a petition in the district court for judicial review of the revocation of his driving privileges. He moved to compel discovery of the source code for the Intoxilyzer 5000EN breath-test machine. At the same time, he also moved to suppress the results of his breath test on the ground that his consent to a breath test was invalid. At a hearing in July 2008, Ersfeld waived all issues except the two issues raised by his motions. In August 2008, the district court denied Ersfeld's motion to compel discovery of the source code, denied his motion to suppress, and denied his petition to

rescind the license revocation. Ersfeld appeals, challenging the district court's rulings on both of his pre-trial motions.

D E C I S I O N

I. Motion to Compel Discovery

Ersfeld first argues that the district court erred by denying his motion to compel discovery of the source code of the Intoxilyzer 5000EN breath-test machine. A district court has wide discretion in discovery decisions. *Underdahl v. Commissioner of Pub. Safety (In re Commissioner of Pub. Safety)*, 735 N.W.2d 706, 711 (Minn. 2007) *(Underdahl I)*. "We review a district court's 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*.

In an action to review the revocation of a driver's license, the rules of civil procedure supply the general framework for analyzing discovery issues. *See id.* at 712; *Abbott v. Commissioner of Pub. Safety*, 760 N.W.2d 920, 924-25 (Minn. App. 2009), *review dismissed* (Minn. May 19, 2009). By statute, however, certain types of disclosures are mandatory: the notice of revocation, the test record, the peace officer's certificate, and a list of potential witnesses. Minn. Stat. § 169A.53, subd. 2(d) (2006). "Other types of discovery are available only upon order of the court." *Id.*

To obtain a court order compelling discovery of non-mandatory matters, a party must make at least one of two possible showings. First, the discovering party is presumptively entitled to discovery of information or other matters "relevant to a claim or defense of any party." Minn. R. Civ. P. 26.02(a). Second, the discovering party, upon a

showing of "good cause," is entitled to "discovery of any matter relevant to the subject matter involved in the action." *Id.* To be deemed "relevant," information or other matters "need not be admissible at the trial" so long as the discovery "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.* Notwithstanding a showing of relevance, a district court may limit discovery for certain specified reasons. Minn. R. Civ. P. 26.02(b)(3); *see generally Abbott*, 760 N.W.2d at 924-26.

The relevance of the matters sought in a motion to compel discovery must be determined with reference to the facts in dispute. *Abbott*, 760 N.W.2d at 926. In a proceeding in which a person seeks to rescind the revocation of his or her driver's license, the issues are finite and limited by statute. Minn. Stat. § 169A.53, subd. 3(b) (2006). One of ten possible issues for an implied-consent hearing is the question, "Was the testing method used valid and reliable and were the test results accurately evaluated?" *Id.*, subd. 3(b)(10). It appears that Ersfeld moved to compel production of the Intoxilyzer source code in an attempt to prove that a breath test conducted with the Intoxilyzer is not "valid and reliable." *Id.* Because the matter sought to be discovered goes directly to one of the claims available to a petitioner in an implied-consent proceeding, Ersfeld must show that the source code is relevant to that claim but need not show good cause. *See* Minn. R. Civ. P. 26.02(a).

Since the time of the district court ruling in this case, the supreme court has provided additional guidance on discovery of the Intoxilyzer source code, but in the context of a criminal case. In *State v. Underdahl*, 767 N.W.2d 677 (Minn. 2009) (*Underdahl II*), the supreme court reviewed consolidated appeals from two district court

orders granting criminal defendants' motions for discovery of the source code. *Id.* at 679. In short, the supreme court held that one of the defendants (Brunner) made a sufficient showing of the relevance of the source code because 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." *Id.* at 686. The supreme court also held that the other defendant (Underdahl) did not make a sufficient showing of relevance because his discovery motion "contained no other information or supporting exhibits related to the source code." *Id.* at 685. The supreme court's mode of analysis in *Underdahl II* demonstrates that the relevance of the source code is to be determined on a case-by-case basis.

In this case, Ersfeld submitted several documents to the district court in support of his motion. Among other things, he submitted two affidavits by Thomas R. Burr, a forensic scientist, who opined that "without access to [the source] codes, it is not possible to determine if the Intoxilyzer functions as designed." Ersfeld also submitted an affidavit by Harley R. Myler, Ph.D., P.E., who opined that without examining the source code, "we cannot have absolute certainty that the software is operating properly when analyzing a subject sample." As a whole, Ersfeld's showing of relevance is significantly better than that of Underdahl and roughly similar to that of Brunner. Thus, we conclude that Ersfeld made a sufficient showing that the source code is relevant to one of his claims. *See* Minn. R. Civ. P. 26.02(a). Accordingly, the district court erred by denying Ersfeld's discovery motion on the ground that the source code is not relevant.

II. Motion to Suppress Evidence

Ersfeld also argues that the district court erred by denying his motion to suppress the evidence of the results of his breath test because he did not give his valid consent to the test. 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, 616-17, 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.* (quotation omitted). 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.

Ersfeld's argument for suppression has two parts, which rely on the same facts but on different legal theories. First, Ersfeld argues that, even though he informed Officer Knutson that he was willing to take a breath test, he did not give valid consent because he was coerced into giving his consent by the implied-consent statute and the implied-

consent advisory, which provide that a person is required by law to consent to a breath test. *See* Minn. Stat. §§ 169A.20, subd. 2, .51, subds. 1(a), 1(b), 2, .52, subds. 1, 3(a) (2006). Second, he argues that, pursuant to the unconstitutional-conditions doctrine, his consent is, as a matter of law, invalid because the statute would have imposed criminal liability on him if he had withheld consent to a breath test.

The first part of Ersfeld's argument is essentially a challenge to the district court's findings of fact. Whether consent to a search was voluntary is a question of fact to be determined from the totality of the circumstances. *State v. Dezso*, 512 N.W .2d 877, 880 (Minn. 1994). This court will not reverse the district court's finding of consent unless it is clearly erroneous. *State v. Alayon*, 459 N.W.2d 325, 330 (Minn. 1990).

The district court found that Ersfeld consulted with an attorney by telephone for 16 minutes after being read the implied-consent advisory. The district court also found that Officer Knutson "did not misinform or mislead Petitioner regarding the law" and did not threaten Ersfeld in any way. The district court further found that Ersfeld expressly agreed to take a test and that his decision was made "freely and voluntarily." Ersfeld has not identified any particular way in which these findings are clearly erroneous. Thus, the district court did not err by finding that Ersfeld consented to a breath test.

The second part of Ersfeld's argument is inconsistent with the caselaw. Regardless whether the implied-consent statute would have coerced his consent or imposed criminal liability on him if he had refused to consent to a breath test, the warrantless search of Ersfeld's breath is reasonable under the Fourth Amendment

because it was justified by exigent circumstances. *See State v. Netland*, 762 N.W.2d 202, 214 (Minn. 2009).

The defendant in *Netland* argued in this court that the implied-consent statute unconstitutionally imposed conditions on her Fourth Amendment right to be free of unreasonable searches and seizures. *State v. Netland*, 742 N.W.2d 207, 213 (Minn. App. 2007), *aff'd in part, rev'd in part*, 762 N.W.2d 202 (Minn. 2009). We 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 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." *Netland*, 762 N.W.2d 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.

Netland, 762 N.W.2d at 213. The supreme court did not decide in *Netland* whether the implied-consent statute violates the Fourth Amendment pursuant to the unconstitutional-conditions doctrine because such a determination was unnecessary in light of the conclusion that a search under these circumstances is constitutional for other reasons. *Id.* at 211-12, 212 n.8.

In this case, Officer Knutson stopped Ersfeld's vehicle because he saw it cross the fog line and because its license plate was not illuminated. Officer Knutson then noticed indicia of intoxication, including an odor of alcohol, watery eyes, slurred speech, and poor balance. In addition, Ersfeld admitted to the officer that he had been drinking. The supreme court's opinions in *Shriner* and *Netland* make clear that the evanescent nature of alcohol in a person's bloodstream creates single-factor exigent circumstances that justify a warrantless search of a person's breath in practically every case. *See id.* at 214; *Shriner*, 751 N.W.2d at 545. "Whether exigent circumstances exist is an objective determination, and the individual officer's subjective state of mind is irrelevant." *Shriner*, 751 N.W.2d at 542. 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.* In light of *Netland*, the facts known by Officer Knutson provided

him with exigent circumstances to conduct a warrantless search of Ersfeld's breath. Thus, with or without Ersfeld's valid consent, the warrantless search of his breath was not unreasonable because there was independent justification in the exigent circumstances presented by the dissipation of the evidence of Ersfeld's alcohol concentration.

In his reply brief, Ersfeld argues that *Netland* does not apply to this case because it is a criminal case, not a civil, license-revocation case. Ersfeld's argument is unpersuasive. It was Ersfeld who invoked the Fourth Amendment in an attempt to suppress the evidence of his alcohol concentration. *Netland* is a case based on Fourth Amendment principles. The caselaw analyzing the Fourth Amendment in criminal cases is equally applicable to Fourth Amendment arguments in license-revocation proceedings. *See Knapp v. Commissioner of Pub. Safety*, 610 N.W.2d 625, 628 (Minn. 2000) (relying on criminal cases in analyzing challenge to the legality of traffic stop in civil case).

Thus, the district court did not err by denying Ersfeld's motion to suppress.

In sum, the district court's denial of Ersfeld's discovery motion is reversed, and the case is remanded for further proceedings on Ersfeld's motion to compel discovery of the Intoxilyzer source code and on the merits of his petition to rescind the revocation.

Reversed and remanded.