STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2237

Ryan Lee Duncan, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed August 4, 2009
Affirmed in part, reversed in part, and remanded
Willis, Judge[*]

Mille Lacs County District Court
File No. 48-CV-08-2191

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

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

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

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

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

WILLIS, Judge

Appellant challenges the decision of the district court sustaining the revocation of his driver's license, arguing that (a) the deputy sheriff's stop of his motorcycle was not based on a reasonable suspicion of criminal activity; (b) the deputy sheriff did not have probable cause to believe that appellant had been operating his motorcycle while impaired; (c) appellant's agreement to submit to a breath test under the implied-consent law was coerced and obtained in violation of the unconstitutional-conditions doctrine; and (d) the district court abused its discretion in denying appellant's request for discovery of the source code for the Intoxilyzer 5000. We affirm as to the first three issues, and we reverse and remand as to the fourth.

FACTS

On Saturday, July 26, 2008, at approximately 11:55 p.m., Deputy Sheriff Dan Mott was on patrol as a part of the federally funded safe-and-sober project, under which he specifically focused on the enforcement of traffic laws. Deputy Mott saw a motorcycle speeding down a hill, and, after a radar reading showed that the motorcycle was traveling 40 m.p.h. in a 30-m.p.h. speed zone, he stopped it.

Deputy Mott observed that the driver, appellant Ryan Lee Duncan, had red and watery eyes and the odor of alcohol on his breath, and Duncan admitted to having had a couple of drinks. Deputy Mott asked Duncan to perform several field sobriety tests, including the horizontal-gaze nystagmus (HGN) test, the one-leg-stand test, and the walk-

and-turn test, and Deputy Mott concluded that Duncan's performance showed that he was impaired.

Deputy Mott arrested Duncan for driving while impaired (DWI), read him the implied-consent advisory, and offered him a breath test, which Duncan agreed to take. Deputy Mott used the Intoxilyzer 5000 to administer the test, and the result was an alcohol concentration of .17.

Duncan's driver's license was revoked under the implied-consent law, and he petitioned for judicial review. At the hearing, Duncan moved for discovery of the source code for the Intoxilyzer 5000. The district court sustained the revocation and denied the motion for discovery. This appeal followed.

D E C I S I O N

In reviewing a decision in an implied-consent proceeding, the district court's findings of fact will not be reversed unless they are clearly erroneous. *State, Dep't of Highways v. Beckey*, 291 Minn. 483, 487, 192 N.W.2d 441, 445 (1971); *Thorud v. Comm'r of Pub. Safety*, 349 N.W.2d 343, 344 (Minn. App. 1984). Conclusions of law are reviewed de novo. *Berge v. Comm'r of Pub. Safety*, 374 N.W.2d 730, 732 (Minn. 1985).

I. Deputy Mott had a reasonable suspicion of criminal activity to support the stop.

Duncan first argues that the stop of his motorcycle was illegal because it was made without a reasonable suspicion of criminal activity. "A stop is lawful if the officer is able to articulate . . . that he had a particularized and objective basis for *suspecting* the particular persons stopped of criminal activity." *Id.* (quotation omitted) (alteration in original). It is unlawful for a driver to exceed the speed limit. Minn. Stat. § 169.14, subd. 2(a) (2008). An

officer's observation that a vehicle was traveling 42 m.p.h. in a 30-m.p.h. zone has been found to provide a reasonable and objective basis for the officer to stop the vehicle. *State v. Shellito*, 594 N.W.2d 182, 185 (Minn. App. 1999).

Deputy Mott testified that he saw Duncan speeding down a hill and that radar confirmed that Duncan was traveling 40 m.p.h. in a 30-m.p.h. zone. No evidence was offered to refute this testimony. Nonetheless, Duncan asserts the stop was unlawful, contending that because Deputy Mott was working on the safe-and-sober shift, he was stopping citizens without reasonable suspicion of criminal activity and then requiring them to submit to DWI testing. Duncan cites the recording of the conversation between him and Deputy Mott at the jail and Deputy Mott's statements on cross-examination, which Duncan asserts support his claim. But Deputy Mott testified that he stopped every vehicle that committed a traffic violation and that he was not targeting drunk drivers. The district court found that Deputy Mott stopped Duncan for speeding and did not accept Duncan's theory that Deputy Mott was stopping vehicles without reasonable suspicion. This finding is supported by the record, and Duncan has not demonstrated that it was clearly erroneous.

II. Deputy Mott had probable cause to arrest Duncan for driving while impaired.

Duncan asserts that the district court erred by concluding that Deputy Mott had sufficient probable cause to arrest him for DWI. Courts should give "great deference" to an officer's probable-cause determination. *State v. Olson*, 342 N.W.2d 638, 640-41 (Minn. App. 1984) (quotation omitted). "The test of probable cause to arrest is whether the objective facts are such that under the circumstances a person of ordinary care and prudence [would] entertain an honest and strong suspicion that a crime has been committed." *State v.*

Wynne, 552 N.W.2d 218, 221 (Minn. 1996) (quotations omitted) (alteration in original). Indicia of impairment can include bloodshot and watery eyes, the odor of alcohol, the admission of drinking, and failing or having difficulty with field sobriety tests. *Reeves v. Comm'r of Pub. Safety*, 751 N.W.2d 117, 120 (Minn. App. 2008). Even one objective indication of intoxication is sufficient. *State v. Kier*, 678 N.W.2d 672, 678 (Minn. App. 2004), *review denied* (Minn. June 16, 2004).

In concluding that Deputy Mott had probable cause to believe that Duncan was impaired, the district court considered a number of facts. First, the court cited Deputy Mott's observation that Duncan had reddened and watery eyes, and the court found that while it was possible, as Duncan contends, that his eyes had been irritated as a result of riding the motorcycle, it was equally possible that their condition was caused by consuming alcohol. And an "innocuous explanation does not negate" an officer's probable-cause determination made at the time the implied-consent law was invoked. *Poppenhagen v. Comm'r of Pub. Safety*, 400 N.W.2d 799, 801-02 (Minn. App. 1987).

The district court next cited Duncan's poor performance on the field sobriety tests; and finally, the court cited Deputy Mott's testimony that he could smell alcohol as he approached Duncan. While Duncan raises various credibility claims regarding these findings, they all are supported by the evidence, and Duncan has not shown that they are clearly erroneous. The district court's conclusion that these facts provided probable cause for the arrest is correct as a matter of law.

III. Deputy Mott's request for a breath test without a search warrant was lawful because the exigent-circumstances exception applied.

Duncan next contends that his consent to a breath test was coerced under the implied-consent law because he was threatened with criminal sanctions if he refused testing, and, therefore, the search that occurred when his breath samples were taken was illegal and the unconstitutional-conditions doctrine applies.

The supreme court recently declined to reach the issue of "whether the unconstitutional conditions doctrine applies to Fourth Amendment rights or whether it should be applied to violations of the Minnesota Constitution" because the driver in that case failed to "establish that the criminal test-refusal statute authorizes an unconstitutional search." *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009). Thus, first we address whether Duncan can show that there was an unconstitutional search here.

"Taking a sample of an individual's breath constitutes a search for purposes of the Fourth Amendment." *Id.* Unreasonable searches and seizures are prohibited. U.S. Const. amend. IV; Minn. Const. art. I, § 10. It is undisputed that Duncan's breath samples were obtained without a warrant. Generally, warrantless searches are unreasonable, but there are several exceptions to the warrant requirement. *Netland*, 762 N.W.2d at 212. In *Netland*, the supreme court focused on the exigent-circumstances exception and concluded that in the case of a breath test, "[i]t is the chemical reaction of alcohol in the person's body that drives the conclusion on exigency." *Id.* at 212-13. The court held

> that the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions 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.

Id. at 214. Consequently, the exigent-circumstances exception to the warrant requirement likewise applies here. While Duncan also argues that the seizure was unconstitutional because his consent was coerced, when the exigent-circumstances exception to the search-warrant requirement applies, it is not necessary to also address the consent exception. *Id.* at 212 n.8.

Because Duncan has not shown that the search was unconstitutional, it is not necessary to reach Duncan's argument regarding the unconstitutional-conditions doctrine.

IV. Under recent Minnesota Supreme Court caselaw, Duncan is entitled to seek discovery of the source code for the Intoxilyzer 5000.

Finally, Duncan contends that the district court abused its discretion by denying his motion for a discovery order allowing him to obtain the source code for the Intoxilyzer 5000 from the commissioner of public safety because, Duncan claims, he showed that production of the source code was reasonably calculated to lead to the discovery of admissible evidence.

"A district court judge has wide discretion to issue discovery orders, and normally an order will not be overturned without clear abuse of that discretion." *State v. Underdahl*, ___ N.W.2d ___, ___, 2009 WL 1150093, at *6 (Minn. Apr. 30, 2009) (*Underdahl II*) (quotations omitted). "To find an abuse of discretion, an appellate court must conclude that the district court erred by making findings unsupported by the evidence or by improperly applying the law." *Id.*

The rules of civil procedure generally apply to judicial review of implied-consent revocations. Minn. Stat. § 169A.53, subd. 2(d) (2008). An exception exists regarding discovery. *Id.* First, prehearing discovery of the notice of revocation, the test records, the police officer's certificate, and the disclosure of potential witnesses is mandatory. *Id.* Second, "[o]ther types of discovery are available only upon order of the court." *Id.*

A petitioner in an implied-consent proceeding may move the court for an order under Minn. R. Civ. P. 26 for discovery of the Intoxilyzer 5000 source code, which is non-mandatory discovery, upon a showing of relevancy. *Abbott v. Comm'r of Pub. Safety*, 760 N.W.2d 920, 925-26 (Minn. App. 2009), *review dismissed* (Minn. May 19, 2009). Relevant information, even if not itself admissible, is that which "appears reasonably calculated to lead to the discovery of admissible evidence." Minn. R. Civ. P. 26.02(a). In addition, to be discoverable, the information sought must be "in the possession, custody or control of the party upon whom the request is served." Minn. R. Civ. P. 34.01.

In *Underdahl II*, the supreme court applied the rule for discovery in criminal matters to determine whether two district courts[1] abused their discretion in their discovery orders. ___ N.W.2d at ___, 2009 WL 1150093, at *7-8. The criminal discovery rule—Minn. R. Crim. P. 9.01, subd. 2(3)—requires the disclosure of "any relevant material," provided that "a showing is made that the information may relate to the guilt or innocence of the defendant." *Id.* at *6 (emphases omitted). This requires "some plausible showing that the information sought would be both material and favorable to his defense." *Id.* (quotation

[1] This court had consolidated two appeals for review. *Underdahl II*, ___ N.W.2d ___, 2009 WL 1150093, at *1.

omitted). The supreme court held in *Underdahl II* that one of the district courts whose order was under review had abused its discretion in granting a discovery order when the defendant made "no threshold evidentiary showing whatsoever" to support his motion. *Id.* at *7. But the defendant in the other case had 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," which showed 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. The supreme court held that in that case, a sufficient showing was made and upheld the discovery order. *Id.*

Given that the civil discovery rule—Minn. R. Civ. P. 26.02(a)—likewise requires relevancy, although, understandably, there is no requirement that the information relate to the guilt or innocence of a defendant, we find *Underdahl II* instructive on the discovery issue raised here.

Under Minn. Stat. § 634.16 (2008), the results of breath tests conducted using the Intoxilyzer 5000 "are admissible and presumed trustworthy and reliable without antecedent expert testimony." *Underdahl v. Comm'r of Pub. Safety (In re Comm'r of Pub. Safety)*, 735 N.W.2d 706, 711 (Minn. 2007) (*Underdahl I*) (quotation omitted). But a petitioner in an implied-consent proceeding may challenge the validity and reliability of the testing method and the accuracy of the test results in that proceeding. *Id.* (citing Minn. Stat. § 169A.53, subd. 3(b)(10) (2006)). In *Underdahl II*, the supreme court stated that "an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer."

___ N.W.2d at ___, 2009 WL 1150093, at *8. *Underdahl II* does not require that there be a preliminary showing by some other means that the test was invalid or unreliable or that the test results were inaccurate.[2] Consequently, if the source code is shown to be relevant, as required under the discovery rules, Duncan should be able to obtain it to challenge his test results.

To show the relevancy of the source code, Duncan submitted, in relevant part, the affidavit of a forensic scientist, stating that access to the source code is necessary to determine whether the Intoxilyzer 5000 functions in a scientifically reliable manner to assure accuracy and integrity in testing, as it was designed to do and as it was assumed to do when it was approved by the commissioner of public safety for use in Minnesota. *See* Minn. R. 7502.0420, subps. 2-3 (2007) (approving the use of several versions of the Intoxilyzer 5000 for "determining the alcohol concentration of a breath sample"). We hold that this is a sufficient showing of the relevancy required to obtain an order for discovery of the source code.

Finally, although Duncan asserts that without a discovery order, he does not have access to the source code, the district court noted "that the source code may not be [as] freely available" to the commissioner as Duncan would have the court think. But we must defer to the supreme court's decision in *Underdahl II*, in which the court concluded that "the district courts did not abuse their discretion in finding the State had possession or control of the source code" and noted that at the time of oral argument the state and the Intoxilyzer's

[2] The district court here, which held to the contrary, did not have the benefit of the supreme court's decision in *Underdahl II*.

manufacturer, which the state had sued, "were working toward a settlement to give DWI defendants access to the source code." *Underdahl II*, ___ N.W.2d at ___ & n.7, 2009 WL 1150093, at *8 & n.7.

The order sustaining the revocation is reversed and remanded to allow Duncan to proceed with discovery of the source code and to assert any appropriate challenges related to the source code.

Affirmed in part, reversed in part, and remanded.