STATE OF MINNESOTA
IN COURT OF APPEALS
A09-239

Michael Russell Stocco, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed February 2, 2010
Affirmed
Halbrooks, Judge

Washington County District Court
File No. 82-CV-07-261

Charles A. Ramsay, Daniel J. Koewler, Charles A. Ramsay & Associates, PLLC, Roseville, Minnesota (for appellant)

Lori Swanson, Attorney General, Natasha M. Karn, Emerald A. Gratz, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

Appellant challenges the admission of the urine test used by respondent to charge him with driving while impaired (DWI). Appellant argues that the general acceptance of the test within the relevant scientific community must be established with a *Frye-Mack*

hearing. Appellant also challenges the admission of the urine test results, claiming that the results should be suppressed because the implied-consent advisory that criminalizes a refusal to submit to a chemical test creates an unreasonable search or seizure under the Fourth Amendment. Because we conclude that appellant waived the issue of whether a *Frye-Mack* hearing was necessary to establish the general acceptance of the test in the relevant scientific community, we decline to address that argument. Because requiring a urine test is not an unreasonable search due to the exigent-circumstances exception to warrantless searches, we affirm the district court's determination that appellant's Fourth Amendment rights were not violated.

FACTS

On October 6, 2007, appellant Michael Russell Stocco was arrested for DWI. Officer Daniel Wenshau read appellant the implied-consent advisory, including the fact that refusal to submit to a chemical test of alcohol concentration is a crime, and appellant agreed to provide a urine sample. Officer Wenshau testified that he followed all of the Bureau of Criminal Apprehension (BCA) procedures for obtaining a urine sample and that he sealed the sample and placed it in the evidence refrigerator. The sample was delivered to the BCA on October 29, 2007, and a BCA analyst measured and recorded an alcohol concentration of .14, which is above the legal limit for driving. Respondent Commissioner of Public Safety revoked appellant's driver's license, and appellant petitioned for judicial review.

Appellant sought, with expert testimony, to challenge the validity and reliability of the urine test results. Respondent moved in limine to exclude all expert testimony related

to whether a urine test conducted without requiring the person providing the sample to pre-void his bladder was valid and reliable. At the implied-consent hearing, the district court granted respondent's motion and continued the hearing to address other issues. At the continued hearing, the district court extended respondent's motion in limine to exclude all expert testimony related to the validity and reliability of the urine test as a scientific method but agreed to hear testimony as to whether the test was properly administered in appellant's case. Appellant's expert, Thomas Burr, testified that the urine test results were unreliable in appellant's case because of the length of time that elapsed between the date that appellant provided a sample and the date the sample arrived at the BCA and because respondent did not properly establish a chain of custody.

Appellant also sought to exclude evidence of the urine test results on the ground that the sample was obtained in violation of his Fourth Amendment right to be free from unreasonable searches and seizures. Specifically, appellant argued that because Officer Wenshau did not have a warrant to obtain his urine sample and because appellant did not voluntarily consent to the urine test, the search was unreasonable.

The district court found that appellant did not present any evidence that would render the urine test unreliable. The district court commented in a footnote that to the extent appellant was offering expert testimony to challenge the reliability of a "first-void" urine sample, that challenge was governed by appellate caselaw addressing that precise issue. The district court also held that appellant's Fourth Amendment right to be free from an unreasonable search or seizure was not violated, in part, because the "exigent-

circumstances" exception to the Fourth Amendment's warrant requirement applied. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court erred by admitting evidence of his urine test results without first conducting a *Frye-Mack* evidentiary hearing.[1] But appellant did not request a *Frye-Mack* hearing, and the district court did not address this question in its order. This court need not address issues that were not determined by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). We therefore conclude that appellant has waived the issue of whether a *Frye-Mack* hearing was necessary to establish the general acceptance of first-void urine tests within the relevant scientific community.

Appellant also argues that the chain of custody was not sufficiently established and that the length of time between the time that appellant provided a urine sample and the delivery of the sample to the BCA was too long to ensure its reliability. "The admissibility of a piece of evidence which is challenged under the chain of custody rule is

[1] To the extent appellant is also arguing that the district court abused its discretion by excluding expert testimony challenging the reliability of the urine test, this argument is disposed of by a recently published case. *Hayes v. Comm'r of Pub. Safety*, 773 N.W.2d 134 (Minn. App. 2009), *review denied* (Minn. Dec. 23, 2009). At appellant's implied-consent hearing, appellant offered testimony identical to the expert testimony that was excluded in *Hayes* to prove that the urine-test method is unreliable. In *Hayes*, we concluded that the expert testimony offered to prove the unreliability of a "first-void" urine test would have been insufficient as a matter of law, and the district court therefore acted within its discretion by excluding the testimony. *Id.* at 138 (citing *Genung v. Comm'r of Pub. Safety*, 589 N.W.2d 311, 313 (Minn. App. 1999), *review denied* (Minn. May 18, 1999)). *Hayes* is therefore dispositive of appellant's arguments that he should have been able to contest the foundational reliability of his urine test with expert testimony or that the urine test is inadmissible under Minn. R. Evid. 702.

generally left to the sound discretion of the [district court]." *Berendes v. Comm'r of Pub. Safety*, 382 N.W.2d 888, 891 (Minn. App. 1986). "In the absence of any indication of substitution, alteration, or other form of tampering, reasonable probative measures are sufficient." *State v. Hager*, 325 N.W.2d 43, 44 (Minn. 1982) (quotation omitted).

The district court found that "Exhibits 2 and 3 establish a chain of custody and there was no evidence that the chain of custody was broken or that the sample was otherwise tampered with between the time it was placed in the refrigerator and the time it was received by the BCA for chemical analysis." The record supports the district court's conclusion that a chain of custody was sufficiently established. Exhibit 3 is a request for a laboratory analysis showing that a sealed urine-collection kit was received by the BCA on October 29, 2007. Officer Wenshau testified that the kit number on the BCA request matched the kit number on his report. Exhibit 2 is the urine test result record from the BCA. Appellant offered no evidence that would indicate tampering of any kind. We therefore conclude that the district court did not abuse its discretion by finding that respondent offered sufficient evidence to establish a chain of custody.

Appellant also argues that the urine test result is unreliable due to the length of time that elapsed between the date appellant provided the sample and the sample's arrival at the BCA. Appellant's expert testified that if the sample had been at room temperature or below freezing during this time, the test result may not be reliable. The district court concluded that "mere speculation that the specimen could have been unrefrigerated and that sugars in the urine could have fermented into alcohol do[es] not constitute affirmative evidence rendering the test result unreliable." The record supports the district

court's conclusion. There is nothing in the record to suggest that the sample was anywhere other than the evidence refrigerator during the time in question. Officer Wenshau testified that he followed BCA procedures, including the use of the proper preservative, when he took appellant's sample. Appellant did not offer any testimony to the contrary. The district court's conclusion that the procedures followed in this case were sufficient to ensure the reliability of the urine test result was not an abuse of discretion.

II.

Appellant also argues that Minnesota's criminal test-refusal statute authorizes an unconstitutionally coercive search, and therefore the result of his urine test should have been suppressed. When material facts are undisputed, the court reviews a district court's ruling on a suppression motion as a question of law. *State v. Othoudt*, 482 N.W.2d 218, 221 (Minn. 1992). The Fourth Amendment to the United States Constitution and article 1, section 10 of the Minnesota Constitution protect individuals from unreasonable searches and seizures. *See State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009). Warrantless searches are generally unreasonable unless an exception applies. *Id.* Consent and exigent circumstances with probable cause are two exceptions to the warrant requirement. *In re Welfare of B.R.K.*, 658 N.W.2d 565, 578 (Minn. 2003). Appellant asserts that he did not consent to the urine test and that the exigent-circumstances exception does not apply in the implied-consent context. Appellant maintains that warrantless searches in the implied-consent context are only reasonable under the

exigent-circumstances exception if the driver "actually injured or killed another person, or damaged another's property."

The argument that the application of the exigent-circumstances exception depends on the underlying criminal offense was recently rejected by the Minnesota Supreme Court in *Netland*. 762 N.W.2d at 213. The supreme court clarified in *Netland* that the exigent-circumstances exception does not "depend on the underlying crime; rather, the evanescent nature of the evidence creates the conditions that justify a warrantless search." *Id.* Accordingly, "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; *see also State v. Shriner*, 751 N.W.2d 538, 549 (Minn. 2008) (holding that rapid, natural dissipation of alcohol in the blood creates exigent circumstances supporting a warrantless blood draw).[2] The exigent-circumstances exception clearly applies in the implied-consent context. We therefore affirm the district court's determination that appellant's Fourth Amendment rights were not violated.

Affirmed.

[2] At oral argument, appellant asserted that the exigent-circumstances exception may not apply with equal force to urine tests. But this argument was not briefed, and appellant could not direct this court to anything in the record that would explain why the exigent-circumstances exception would not apply to urine tests. We conclude that appellant waived this argument. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived).