STATE OF MINNESOTA
IN COURT OF APPEALS
A09-914

State of Minnesota,
Respondent,

vs.

Michael William Garberg,
Appellant.

Filed March 9, 2010
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-08-53168

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Patrick G. Leach, Edina City Attorney, Thomas F. DeVincke, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Stephen R. O'Brien, Minneapolis, Minnesota (for appellant)

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

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

SCHELLHAS, Judge

Following his conviction of third-degree driving while impaired (DWI), appellant challenges the district court's denial of his motion for discovery of the Intoxilyzer source code. We affirm.

FACTS

A police officer stopped appellant Michael William Garberg for speeding on October 22, 2008, at approximately 11:00 p.m. The officer suspected that appellant was driving while impaired and requested that appellant submit to a preliminary breath test (PBT). Appellant acquiesced and the PBT revealed an alcohol concentration of .199. Appellant was arrested for DWI and, at 11:33 p.m., provided a breath sample for an Intoxilyzer test that revealed an alcohol concentration of .24. Respondent State of Minnesota charged appellant with: (1) third-degree DWI for driving under the influence in violation of Minn. Stat. § 169A.20, subd. 1(1) (2008); and (2) third-degree DWI for having an alcohol concentration of .08 or more within two hours of driving, in violation of Minn. Stat. § 169A.20, subd. 1(5) (2008). Third-degree DWI is a gross misdemeanor. Minn. Stat. § 169A.26, subd. 2 (2008).

The parties appeared for trial and advised the district court that they intended to proceed under *State v. Lothenbach*, 296 N.W.2d 854, 857-58 (Minn. 1980).[1] Before the parties submitted the stipulated facts, appellant moved the court for discovery of the source code for the Intoxilyzer machine used to test him. Appellant supported his motion with a memorandum in which he explained that "source code" refers to "the computer program that runs the breath-testing equipment" and argued that the only way to know whether certain mathematical equations were properly programmed is to have an expert

[1] Minn. R. Crim. P. 26.01, subd. 4, which became effective in 2007, "implements and supersedes the procedure authorized by [*Lothenbach*]." *State v. Antrim*, 764 N.W.2d 67, 69 (Minn. App. 2009). Now, when a defendant stipulates to the prosecution's case in order to obtain review of a pretrial ruling, the proceeding occurs under rule 26.01, subdivision 4, not *Lothenbach*. *Id.*

look at the source code. Appellant argued more generally that the breath-test result obtained by the Intoxilyzer is undermined if it can be established that the machine's software generates an incorrect result or is not functioning properly. In opposition to appellant's motion, the state filed a memorandum, along with a copy of an affidavit from a toxicology supervisor at the Bureau of Criminal Apprehension (BCA) Forensic Science Laboratory.

The district court denied appellant's discovery motion without making findings or providing an explanation for its ruling, found appellant guilty of third-degree DWI, and stayed his sentence pending appeal. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by denying his request for discovery of the Intoxilyzer source code. "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*, 767 N.W.2d 677, 684 (Minn. 2009) (*Underdahl II*) (quotation 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.*

In *Underdahl II*, the supreme court addressed two similar discovery requests made in separate cases by defendants Underdahl and Brunner. 767 N.W.2d 677. Both Underdahl and Brunner requested the source code for the Intoxilyzer 5000EN, "the most recently approved breath-test instrument for the State of Minnesota," and the district courts granted the requests. *Id.* at 680-81. The supreme court addressed two issues in its

analysis of the defendants' discovery request for the Intoxilyzer source code: whether the source code was relevant for purposes of Minn. R. Crim. P. 9.01, subd. 2(3); and whether the state had possession or control of the source code such that it must assist the defendant in seeking access to the materials under Minn. R. Crim. P. 9.01, subd. 2(1). *Id.* at 684, 686.

Rule 9.01 governs prosecution disclosure in felony and gross-misdemeanor cases. Subdivision 2 of rule 9.01 details the circumstances under which the district court may use its discretion to order the prosecuting attorney to provide additional discovery. *Underdahl II*, 767 N.W.2d at 684. Subdivision 2(1) provides that "[u]pon motion of the defendant, the court for good cause shown shall require the prosecuting attorney . . . to assist the defendant in seeking access to specified matters relating to the case that are within the possession or control of an official or employee of any governmental agency." Minn. R. Crim. P. 9.01, subd. 2(1). Subdivision 2(3) provides that, upon motion of the defendant, the court "may, in its discretion, require the prosecuting attorney to disclose . . . any relevant material and information" provided that "a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged." Minn. R. Crim. P. 9.01, subd. 2(3). The *Underdahl II* court discussed what "may relate to a defendant's guilt or innocence in a DWI case" for purposes of establishing relevance under subdivision 2(3) of rule 9.01. 767 N.W.2d at 684-85. The court reviewed prior cases that addressed requests for confidential information and noted that, in that context, the court had required "some plausible showing that the information sought would be both material

and favorable to his defense." *Id.* at 684 (quoting *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992)). In one such case, the court had overturned a discovery order when the defense had not demonstrated that the materials "could be related to the defense" or were likely to contain "information related to the case." *Id.* at 685 (quotation omitted).

In evaluating the evidentiary showings made by Underdahl and Brunner, the court noted that Underdahl had requested a copy of the source code with a motion that "contained no other information or supporting exhibits related to the source code." *Id.* "Underdahl made no threshold evidentiary showing whatsoever" and failed to show how the source code would help him dispute the charges against him. *Id.* By contrast, Brunner had submitted a memorandum and nine exhibits supporting his request for the source code. *Id.* Brunner's "memorandum gave various definitions of 'source code'" and his exhibits included written testimony from a computer-science professional, who explained the importance of source code in finding defects and problems in voting machines and explained issues surrounding source-code disclosure. *Id.* Brunner also included a report that analyzed the New Jersey breath-test machine's source code and uncovered "a variety of defects that could impact the test result." *Id.* The *Underdahl II* court concluded that Brunner's submissions 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 Brunner's guilt or innocence." *Id.* at 686. The court concluded that Brunner's discovery requests sought relevant evidence. *Id.* But the court concluded that Underdahl had not shown that the source code may relate to his guilt or innocence and his discovery requests therefore did not seek relevant evidence. *Id.* at 685-86.

In *Underdahl II*, the supreme court also reviewed the district courts' findings that the state was the owner of the source code and addressed whether the state had possession or control of the source code for purposes of rule 9.01, subdivision 2(1). *Id.* at 686-87. The court noted that, at the time of oral arguments, the state and the Intoxilyzer 5000EN's manufacturer, CMI Inc., "were working toward a settlement to give DWI defendants access to the source code," and were doing so as a result of the state suing CMI. *Id.* at n.7. The court concluded that the source code was in the possession, custody, or control of the state, *id.* at 686-87 (citing *Underdahl v. Comm'r of Pub. Safety* (*In re Comm'r of Pub. Safety*), 735 N.W.2d 706, 712 (Minn. 2007) (*Underdahl I*)), and that the district courts had not abused their discretion by "finding the State had possession or control of the source code under Minn. R. Crim. P. 9.01, subd. 2(1)." *Id.*

After addressing relevance and possession or control, the *Underdahl II* court concluded that the district court did not abuse its discretion in ordering the discovery sought by Brunner, but that the district court abused its discretion in ordering the discovery sought by Underdahl. *Id.* at 687.

Here, appellant argues that the source code was relevant, that the state had possession or control of the source code and, for the first time on appeal, that due process requires disclosure of the source code. The state opposes all of appellant's arguments and also argues that appellant presents a "general challenge to the validity" of the Intoxilyzer 5000EN software, which was approved in a rule-making process. *See Underdahl I*, 735 N.W.2d at 710 (summarizing the rule that approved the Intoxilyzer 5000EN for statewide use).

We begin by rejecting the state's argument that the district court had no jurisdiction to hear a challenge to the validity of the Intoxilyzer 5000EN software. Appellant challenges the Intoxilyzer test results in his case; he has not presented a challenge to the use of the Intoxilyzer in general. A defendant charged with DWI may challenge his Intoxilyzer test results in his criminal case. *See Underdahl II*, 767 N.W.2d at 685 n.4 ("The Intoxilyzer 5000EN is statutorily presumed reliable, but Minnesota law permits this presumption to be challenged by drivers charged with DWI-related offenses."); *see also* 10A *Minnesota Practice*, CRIMJIG 29.10 (2006) (addressing the crime of driving with an alcohol concentration of .08 or more and stating that the jury "must evaluate the reliability of the testing method and the test results").[2]

Appellant argues that his discovery motion sought relevant evidence because the source code is relevant. The district court's lack of findings or rationale makes review difficult. But, in this case, rather than remand for findings, we affirm the district court because appellant submitted no evidence in support of his discovery motion. Appellant failed to make a threshold evidentiary showing that the source code information may relate to his guilt or innocence, negate his guilt, or reduce his culpability. Minn. R. Crim. P. 9.01, subd. 2(3); *Underdahl II*, 767 N.W.2d at 684-85. We therefore do not reach appellant's arguments regarding possession or control of the source code. We also do not reach appellant's due-process argument, which appellant waived because he did not raise

[2] We view the JIG as instructive in this case, but we recognize that the JIG is not controlling because JIGs "merely provide guidelines and are not mandatory rules," *State v. Kelley*, 734 N.W.2d 689, 695 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

it in district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts "generally will not decide issues which were not raised before the district court").

Affirmed.