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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1228**

State of Minnesota,
Respondent,

vs.

James Leslie Cornish,
Appellant.

**Filed May 25, 2010
Affirmed
Wright, Judge**

Nicollet County District Court
File No. 52-CR-06-301

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

Paul H. Tanis, Jr., MacKenzie Gustafson, St. Peter, Minnesota (for respondent)

Charles A. Ramsay, Daniel Koewler, Ramsay Law Firm, Roseville, Minnesota (for
appellant)

Considered and decided by Wright, Presiding Judge; Worke, Judge; and Collins,
Judge.*

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

UNPUBLISHED OPINION

WRIGHT, Judge

Appellant challenges the district court's denial of his motions for a new trial, arguing that the district court abused its discretion by denying his motion to compel discovery of the Intoxilyzer source code and by suppressing portions of the testimony of his expert witness. Appellant also argues that his trial counsel rendered ineffective assistance. We affirm.

FACTS

At approximately 1:36 a.m. on August 29, 2006, Mankato Police Officer Christopher Hendrickson observed a vehicle traveling 39 miles per hour, nine miles per hour above the speed limit. As a result, Officer Hendrickson stopped the vehicle. During the course of speaking with the driver, Officer Hendrickson smelled a strong odor of an alcoholic beverage coming from the driver, appellant James Cornish. Cornish performed two field sobriety tests, the results of which demonstrated evidence of intoxication. Cornish also took a preliminary breath test, which confirmed that he had been drinking alcohol.

Officer Hendrickson arrested Cornish and transported him to the Nicollet County Sheriff's Office, where Officer Hendrickson read Cornish the Minnesota implied-consent advisory. When Cornish asked to speak with an attorney, Officer Hendrickson gave Cornish access to telephone directories and a telephone. After Cornish consulted with his attorney, Officer Hendrickson asked him to take a breath test. Cornish agreed to do so.

Officer Hendrickson, who is trained and certified to use the Intoxilyzer 5000, conducted two tests using that machine. A single Intoxilyzer test requires two breath samples. Before the test subject provides the first sample, the Intoxilyzer performs an internal diagnostic check and air blank for two purposes—to ensure that the machine is in proper working order and to clear out any alcohol that may be in the machine. The test subject then blows into the Intoxilyzer to provide the first breath sample. The Intoxilyzer tests this breath sample and displays the sample’s alcohol concentration. The Intoxilyzer then retests the first breath sample and displays a second, replicate alcohol-concentration value. After performing a second internal diagnostic check and air blank, the subject blows into the machine to provide the second breath sample. Again, the Intoxilyzer tests the breath sample twice and displays two alcohol-concentration values. Finally, the Intoxilyzer displays the reported alcohol-concentration value, which is calculated by removing the final digit from the lowest of the four three-digit values.

When Officer Hendrickson conducted the test on Cornish, the Intoxilyzer performed the internal diagnostic check, air blank, and test of the first breath sample without any problem. The Intoxilyzer displayed an alcohol concentration of .094 and a replicate alcohol concentration of .098 for the first breath sample. But before Cornish provided the second breath sample, the Intoxilyzer displayed an “E4” or “Error 4” notation. The Intoxilyzer continued to function, and Cornish gave the second breath sample, which measured a .096 alcohol-concentration value and a replicate alcohol-concentration value of .099. The Intoxilyzer displayed a reported value of .09 alcohol concentration.

Because this was Officer Hendrickson's first experience with an "E4" or "Error 4" code, he consulted the Intoxilyzer manual to determine its meaning. He learned that the error code signified that a paddle that should have been spinning in the simulator solution—the control sample—had stopped spinning. This condition can cause the temperature of the simulator solution to rise above the permissible operating temperature, which in turn will stop the Intoxilyzer test. Here, because the solution's temperature remained within the required operating temperature range, the Intoxilyzer continued with the test.

Officer Hendrickson conducted a second complete test to ensure accurate results. He shut down the Intoxilyzer, moved the paddle on the bottom of the shaft in the solution, and caused it to resume spinning. He then restarted the Intoxilyzer and conducted a second test for which Cornish provided two additional breath samples. No errors occurred during the second test, which resulted in alcohol-concentration readings of .100 and .103 for the second test's first breath sample and .095 and .099 for the second test's second breath sample. The Intoxilyzer displayed the same reported value for the second test as it did for the first—.09 alcohol concentration.

Cornish was charged with multiple counts of driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 1(1), (5) (2006), and one count of driving after cancellation as inimical to public safety, in violation of Minn. Stat. § 171.24, subd. 5 (2006).

At trial, the defense offered the testimony of expert witness Thomas Burr. The state objected to Burr's testimony as to the significance of the "Error 4" code that

appeared during Cornish's test. But the district court ruled that Burr was permitted to testify regarding the purpose of the Intoxilyzer and its components and the possible consequences of the paddle dropping into the simulator solution. The district court also ruled that Burr could not testify regarding the validity of Cornish's Intoxilyzer test results because (1) Burr had never examined the Intoxilyzer used to perform Cornish's test and (2) such testimony would be more prejudicial than probative, as it would be confusing to the jury. Cornish's attorney then made an offer of proof that, if permitted, Burr would testify that the error code indicated that the simulator was malfunctioning and, therefore, the Intoxilyzer had not been subjected to the proper scientific controls. Based on the absence of proper control tests, Burr would testify that Cornish's Intoxilyzer test results were not valid. But Cornish's attorney acknowledged that Burr would not be able to testify as to the accuracy of the test results because he did not have knowledge as to the effect of the error on the test's accuracy. The district court reiterated its ruling, and Burr testified consistent with that ruling.

The jury returned guilty verdicts, and the district court imposed concurrent sentences for first-degree driving while impaired, a violation of Minn. Stat. § 169A.20, subd. 1(1), and driving after cancellation as inimical to public safety, a violation of Minn. Stat. § 171.24, subd. 5. Cornish moved for a new trial, which was denied.

Cornish hired new counsel and brought a second motion for a new trial on April 8, 2008. At the sentencing hearing on April 23, 2008, in which the district court heard argument on the second new-trial motion, Cornish presented a written offer of proof regarding Burr's testimony as to the validity of Cornish's test results. The district court

denied this new-trial motion as untimely and imposed a guidelines sentence. This appeal followed.¹

DECISION

I.

The district court denied Cornish's pretrial motion to compel disclosure of the Intoxilyzer source code because Cornish failed to present evidence that would refute the state's showing of reliability. Cornish filed two posttrial motions for a new trial seeking, in part, to compel disclosure of the Intoxilyzer source code. In its order denying Cornish's first new-trial motion, the district court reaffirmed its basis for denying the pretrial motion to compel disclosure. The district court denied the second new-trial motion because it was untimely. Cornish does not challenge the district court's ruling that the second new-trial motion was untimely.

It is unclear from Cornish's argument whether he challenges the district court's denial of his pretrial motion to compel disclosure of the source code or its denial of his timely motion for a new trial on this issue. Because a new-trial motion was not necessary to preserve the issue for appellate review, *see* Minn. R. Crim. P. 28.02, subd. 11 (providing for appellate review of district court order without new-trial motion); *see also* *State v. Forichette*, 279 Minn. 76, 82, 156 N.W.2d 93, 98 (1968) (considering claims of prejudicial rulings even though defendant did not make motion for new trial), and

¹ The appeal was stayed pending the Minnesota Supreme Court's decisions in *State v. Netland*, 762 N.W.2d 202 (Minn. 2009), and *State v. Underdahl*, 767 N.W.2d 677 (Minn. 2009). *State v. Cornish*, No. A08-1228 (Minn. App. Jan. 20, 2009) (order). Cornish's supplemental brief in this matter was filed after the stay was dissolved.

because Cornish did not provide any new information or argument regarding discovery of the source code in his timely motion for a new trial that would alter the standard of review, our review of the sufficiency of Cornish's showing in the pretrial motion applies with equal force to the denial of the timely motion for new trial.

The district court's rulings on discovery requests rest within its broad discretion and will not be reversed absent a clear abuse of that discretion. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009) (*Underdahl II*). A district court abuses its discretion by making findings unsupported by the evidence or by improperly applying the law. *Id.*

Rule 9 of the Minnesota Rules of Criminal Procedure governs discovery in a criminal case. A prosecutor's disclosure obligations without a court order are set forth in rule 9.01, subdivision 1. Rule 9.01, subdivision 2, describes the circumstances under which the district court may, in its discretion, order additional discovery and provides in pertinent part:

Upon motion of the defendant, the trial court at any time before trial may, in its discretion, require the prosecuting attorney to disclose to defense counsel . . . any relevant material and information[.]. . . provided . . . 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).

A district court abuses its discretion by granting a motion to compel discovery of the source code when the defendant has "made no threshold evidentiary showing whatsoever" and has failed to demonstrate how the source code would help the defendant challenge the validity of the Intoxilyzer. *Underdahl II*, 767 N.W.2d at 685. But a

defendant's submission of source-code definitions, written expert testimony explaining issues surrounding the source codes and their disclosure, and an example of a breath-test-machine analysis and its potential defects is sufficient to demonstrate that "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 686.

Cornish did not present a proffer or analysis in support of either his pretrial motion to compel or his timely motion for a new trial that is comparable to the submission found sufficient in *Underdahl II*. Rather, Cornish submitted a copy of *In re Comm'r of Pub. Safety*, 735 N.W.2d 706 (Minn. 2007) (*Underdahl I*), and two orders from other counties granting discovery of the source code subsequent to *Underdahl I*.² These proffers fail to establish that the source code would be helpful in Cornish's challenge to the Intoxilyzer test. Because Cornish did not submit adequate evidence to establish that the source code may reveal deficiencies in the Intoxilyzer that would have aided in challenging the validity of Cornish's test, the district court did not abuse its discretion by denying the pretrial motion to compel discovery and the timely motion for a new trial on this ground.

II.

Cornish next challenges the denial of his timely motion for a new trial, arguing that the district court erred by suppressing portions of Burr's testimony. We will not disturb the district court's denial of a motion for a new trial absent an abuse of discretion.

² In *Underdahl I*, the Minnesota Supreme Court affirmed our denial of the commissioner's petition for a writ of prohibition to prevent the district court from enforcing its order granting discovery of the source code because the commissioner failed to demonstrate that the source code was not discoverable. 735 N.W.2d at 708.

State v. Green, 747 N.W.2d 912, 917 (Minn. 2008). The decision to admit testimony also rests within the district court’s discretion and is subject to an abuse-of-discretion standard of review. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Expert testimony is admissible if it will assist the jury in understanding the evidence or determining an issue of fact. Minn. R. Evid. 702; *State v. Ritt*, 599 N.W.2d 802, 812 (Minn. 1999). The results of a breath test are admissible “without antecedent expert testimony that an . . . approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath.” Minn. Stat. § 634.16 (2006). When determining whether the defendant’s alcohol concentration was .08 or higher, the jury must evaluate the reliability of the testing method and the test results. *State v. Dille*, 258 N.W.2d 565, 569-70 (Minn. 1977).

Burr testified as an expert for the defense. After describing the purpose of the Intoxilyzer and its components, Burr opined that the Intoxilyzer is not checked by “any independent authority.” When Burr began to testify about the significance of the “Error 4” code, the state objected. The state argued that Burr’s testimony was inadmissible because Burr had no experience with the Intoxilyzer model at issue and he had not attempted to re-create the error code on an Intoxilyzer to determine whether the test results obtained after the error code were inaccurate. Without this foundation, the state argued, Burr’s testimony regarding the significance of the error code would not be helpful to the fact-finder. The district court ruled that Burr’s testimony as to the simulator’s function and the effect of a paddle malfunction was admissible. But Burr was not permitted to testify regarding the validity of the Intoxilyzer test performed on

Cornish's breath samples. Such testimony, the district court concluded, would be more prejudicial than probative and would confuse the jury.

Cornish contends that the district court abused its discretion by suppressing this aspect of Burr's expert testimony, arguing that the jury was required to evaluate the reliability of the testing method. But this argument fails to acknowledge the evidence that was presented to the jury, including Burr's testimony that addressed the reliability of the testing method. Burr testified about the general functions of the Intoxilyzer and its components. Indeed he testified that the Intoxilyzer used here had undergone maintenance in July 2005 and that the newest version of software had been installed but not tested on this Intoxilyzer. Officer Hendrickson testified about the error code that appeared, its meaning, and his response to the error code. Burr's testimony addressed the proper response to an error code, which was consistent with Officer Hendrickson's response. And the undisputed evidence established that multiple readings from the first and second tests were consistent. Accordingly, there was ample evidence, including Burr's testimony, from which the jury could evaluate the reliability of the test method and results in Cornish's Intoxilyzer test.

Because Burr had no personal knowledge regarding either Cornish's test or the Intoxilyzer model that was used, and because Burr had not attempted to re-create an "Error 4" to determine whether such an error would invalidate the Intoxilyzer test result, the district court correctly concluded that Burr's testimony as to the validity of the Intoxilyzer test performed on Cornish's breath samples would be more prejudicial than

probative. Consequently, the district court did not abuse its discretion by excluding this aspect of Burr's testimony.³

III.

Cornish argues that the district court erred by rejecting his claim of ineffective assistance of counsel, which he raised in his second, untimely motion for a new trial. Because the district court addressed the merits of the ineffective-assistance-of-counsel claim despite dismissing the new-trial motion as untimely, we will review the district court's ruling on the issue. To prevail on his claim of ineffective assistance of counsel, Cornish must demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness and (2) Cornish was prejudiced by his counsel's performance. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). The burden of proof on this claim rests with the defendant, who must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732

³ Cornish contends that the district court's evidentiary ruling denied him the constitutional right to present a complete defense. He also argues that he demonstrated, through an offer of proof submitted with his untimely motion for a new trial, that Burr would have presented additional evidence regarding the validity of the Intoxilyzer test. But because neither Cornish's constitutional argument nor the offer of proof was timely raised before the district court, the district court did not address the merits of these claims. Ordinarily, we will not address the merits of an issue that was not presented to and decided by the district court, even if the issue involves constitutional questions regarding criminal law. *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989); *see also Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that we will not consider matters that were not argued and considered in district court). Although we may review a matter without prior consideration by the district court "as the interests of justice may require," Minn. R. Crim. P. 28.02, subd. 11, the record before us does not establish that the interests of justice require us to consider these arguments for the first time on appeal. And we decline to do so.

N.W.2d 243, 248 (Minn. 2007); *see Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (noting that judicial review should be “highly deferential” to counsel’s performance). If the defendant fails to prove either counsel’s deficient performance or prejudice, a claim of ineffective assistance of counsel fails. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005); *see Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064 (noting that defendant must prove both prongs).

Cornish contends that his counsel’s performance meets the standard for ineffective assistance of counsel because his counsel sought disclosure of the Intoxilyzer’s source code “in a perfunctory manner.” We disagree. Cornish’s trial counsel not only pursued a pretrial motion to compel discovery of the source code, he also challenged the district court’s denial of that motion in his timely motion for a new trial. Although Cornish’s trial counsel did not present adequate evidence to meet the standard set forth in *Underdahl II*, 767 N.W.2d at 685-86, failure to do so does not constitute ineffective assistance of counsel. Indeed, *Underdahl II* was not decided until well after Cornish’s trial. Cornish’s trial counsel, therefore, did not have the benefit of a description of the types of evidence that subsequently were deemed adequate to support discovery of the Intoxilyzer’s source code. *See id.*

Although Cornish asserts that “attorneys nationwide are making routine motions to compel disclosure of the source code,” this assertion is insufficient to establish that his trial counsel’s performance fell below the objective standard of reasonableness, particularly when his counsel was one of the attorneys who filed such a motion. Moreover, even if Cornish could establish deficient performance by his counsel, he has

failed to present any evidence as to how the alleged failure to successfully pursue the source code prejudiced his defense. Therefore, this aspect of Cornish's ineffective-assistance-of-counsel claim fails.

Cornish also argues that he received ineffective assistance of counsel because his counsel did not adequately proffer Burr's testimony regarding an "Error 4." Specifically, Cornish maintains that his counsel did not attempt to explain how such an error renders the test invalid and that Burr was not permitted to testify as to the proper response to the error. This argument is contrary to the record. Trial counsel specifically addressed the effects of the "Error 4" code on the validity of the test during counsel's offer of proof, arguing that Burr would testify that the error code eliminates the control element of this case, making the test invalid. Following trial counsel's offer of proof, the district court permitted Burr to testify as to the proper response to an "Error 4" code, namely, turning the Intoxilyzer off and then on again. Indeed, this is precisely how Officer Hendrickson responded. Thus, Cornish's argument fails to establish either deficient performance by his counsel or prejudice.

Accordingly, Cornish has not established that he is entitled to relief on any ground.⁴

Affirmed.

⁴ At oral argument, Cornish withdrew his claim of ineffective assistance of counsel based on his trial counsel's decision not to contest the breath test as an unreasonable search in violation of the Fourth Amendment to the United States Constitution after conceding that this argument and his other arguments related to the Fourth Amendment were without merit. *See Netland*, 762 N.W.2d at 214 (holding that "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").