STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1568

State of Minnesota,
Respondent,

vs.

Kirk Louis McIlraith,
Appellant.

Filed August 3, 2010
Affirmed
Shumaker, Judge

Hennepin County District Court
File No. 27-CR-07-101143

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

Steven M. Tallen, Tallen & Baertschi, Minneapolis, Minnesota (for respondent)

James H. Leviton, Minneapolis, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Shumaker, Judge; and Bjorkman, Judge.

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

SHUMAKER, Judge

On appeal from his misdemeanor convictions of boating with .08 or more alcohol concentration and careless boating, appellant contends that the district court erred in admitting into evidence the result of his separate urine test obtained through an

independent-testing agency because (1) it was testimony given by a defendant in support of a motion to suppress, (2) he did not intend to introduce the result of the second test at trial, (3) it was non-discoverable work product, and (4) the purpose of Minn. Stat. § 169A.51, subd. 7(b) (2006), the independent-testing statute, would be defeated. We affirm.

FACTS

A deputy sheriff assigned to the Hennepin County Water Patrol Unit arrested appellant Kirk Louis McIlraith for boating while intoxicated on Lake Minnetonka. McIlraith agreed to take an intoxilyer test, which showed an alcohol concentration of .13. He also requested the opportunity to have a second test by a person of his own choice. He then designated his wife to collect a urine sample for a second test, but the authorities did not allow her to do so. Nearly six hours after the arrest, an independent-testing agency was allowed to collect a urine sample from McIlraith for additional testing. The independent test showed an alcohol concentration of .12.

The state charged McIlraith with the offenses of boating with an alcohol concentration of .08 or more, boating while impaired, careless boating, and failure to have a proper personal flotation device on board. McIlraith moved to suppress evidence of the state's intoxilyzer test on the ground that he was denied an opportunity to have a second test by a person of his choice. After an evidentiary hearing, the district court denied the motion. McIlraith and the state then agreed to submit to the court for a *Lothenbach* trial the two alcohol-related charges, and the state dismissed the other charges. The district court found McIlraith guilty of both charges.

McIlraith appealed, and this court held that the district court erred in refusing to suppress evidence of the state's chemical test, reversed the conviction of boating with an alcohol concentration of .08 or more, and remanded the case with this statement: "However, it is not clear from the record what the parties intended as to the disposition of the impaired charge and because our determination on the .08 charge does not negate a conviction on the impairment charge, we remand to the district court for a determination on the charge."

On remand, the district court granted the state's motion to reinstate the vacated charge of boating with .08 or more alcohol concentration, but this time the charge was based on the independent test that McIlraith had obtained from the testing service. McIlraith's objection to the admissibility of this test was overruled, and the district court surmised that a new trial was to be held. McIlraith agreed and stipulated to a second *Lothenbach* trial. For that trial, the state dismissed the charge of boating while impaired but reinstated the careless boating charge. Thus, boating with .08 or more alcohol concentration and careless boating were the charges at issue in the second trial.

McIlraith and the state also agreed that if the district court's determination that the independent test is admissible in evidence was reversed on appeal, McIlraith would stand convicted only of careless boating. On the other hand, if the evidentiary ruling was affirmed, McIlraith would stand convicted of both charges.

D E C I S I O N

We note at the outset that McIlraith did not object to the district court's grant of a new trial on remand but that he did oppose the introduction of the independent test to

support the charge of boating with .08 or more alcohol concentration. Thus, the only issue on appeal is the propriety of the district court's evidentiary ruling on the admissibility of that test. This court reviews a district court's evidentiary ruling for an abuse of discretion. *State v. Matthews*, 779 N.W.2d 543, 553 (Minn. 2010).

McIlraith makes several arguments in support of his contention that the independent test was not admissible in evidence.

First, he argues that the evidence of the second test result is inadmissible under *State v. Christenson*, which states that "[t]estimony given by a defendant in support of a motion to suppress cannot be admitted as evidence of guilt at trial and can be used only for impeachment purposes, if at all." 371 N.W.2d 228, 232 (Minn. App. 1985). *Christenson* is inapplicable here. Although McIlraith testified during the first pretrial suppression hearing that he took the independent test, and testified as to what he remembered was the result of that test, it was the actual result of the test, as subpoenaed by the state from Accurate Testing, and not McIlraith's testimony, that provided the basis for the reinstatement of the charge based on testing. Furthermore, the record does not indicate that McIlraith's testimony at the suppression hearing was included in the facts stipulated for the second *Lothenbach* trial. Because it was the test result itself rather than McIlraith's testimony that was at issue in the second *Lothenbach* trial, we reject his first argument.

Second, McIlraith argues that he did not intend to introduce the result of the independent test at trial, making the test inadmissible under Minn. R. Crim. P. 9.02, subd. 1(2), which states that

> [t]he defendant must disclose and permit the prosecutor to inspect and reproduce any results or reports of . . . scientific tests . . . made in connection with the particular case within the possession or control of the defendant that the defendant intends to introduce in evidence at the trial . . . .[1]

However, this rule does not apply to the result of the second test because the state was able to obtain the records from Accurate Testing independently, without the consent of McIlraith. Thus, the district court correctly concluded that this scientific test was not solely within the possession or control of McIlraith. Therefore, whether McIlraith intended to introduce the result of the test into evidence at trial was irrelevant.

Third, McIlraith argues that the independent-test result constitutes non-discoverable work product and is thus inadmissible under Minn. R. Crim P. 9.02, subd. 3. We disagree. As the state correctly points out, the result of a chemical test of alcohol concentration is a scientifically obtained and reported number, and does not contain any opinion, theory or conclusion of a defendant, a defense lawyer, or any other person participating in the defense. Therefore, the district court did not err in determining that the test result was not work product.

Lastly, McIlraith argues that the purpose of Minn. Stat. § 169A.51, subd. 7(b), the independent-testing provision, would be defeated if the result of an independent test could be used against the defendant without his consent. McIlraith correctly indicates that the purpose of the provision is to ensure a criminal defendant's constitutional right to due process and confrontation by facilitating effective investigation and preparation. *See*

[1] The stipulated-facts trial was governed by the 2009 version of the Minnesota Rules of Criminal Procedure. Effective January 1, 2010, the rules were restructured, but the substance is the same.

State v. Shifflet, 556 N.W.2d 224, 228 (Minn. App. 1996) ("A criminal defendant, however, does have a constitutional right to access to potentially exculpatory evidence."). However, the asserted purpose of the statute does not prevent the state from obtaining accurate evidence of a defendant's alcohol concentration. The pertinent language of the statute is as follows:

> The person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test sample on behalf of the person is obtained at the place where the person is in custody, after the test administered at the direction of a peace officer, and at no expense to the state. The failure or inability to obtain an additional test or tests by a person does not preclude the admission in evidence of the test taken at the direction of a peace officer unless the additional test was prevented or denied by the peace officer.

Minn. Stat. § 169A.51, subd. 7(b). The statute only precludes admission of the test administered by the police if an additional test was prevented or denied. It does not prevent the admission of the result of an additional test.

We hold that the district court did not abuse its discretion in allowing McIlraith's independent test into evidence in the second *Lothenbach* trial.

Affirmed.