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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-2192**

State of Minnesota,
Respondent,

vs.

Karl George Granse,
Appellant.

**Filed November 9, 2010
Reversed and remanded
Klaphake, Judge**

Dakota County District Court
File No. 19-K4-07-1768

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

James C. Backstrom, Dakota County Attorney, Lawrence F. Clark, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Karl George Granse challenges his conviction of first-degree driving while impaired (DWI) under Minn. Stat. § 169A.20, subd. 1(5) (2006), based on his

having an alcohol concentration of .08 within two hours of driving. The district court denied appellant's pretrial discovery motion seeking to compel the state to disclose the computer source code of the Intoxilyzer 5000EN,¹ the instrument that was used to obtain appellant's alcohol concentration results. Thereafter, in order to preserve the issue for appellate review, appellant waived his right to a jury trial and submitted the case to the district court to be tried on stipulated facts, under Minn. R. Crim. P. 26.01, subd. 4.² Because we conclude that the district court abused its discretion by denying appellant's discovery motion, we reverse and remand for further proceedings.

DECISION

“A district court has ‘wide discretion to issue discovery orders,’ and normally an order will not be overturned without clear abuse of that discretion.” *Underdahl II*, 767 N.W.2d at 684 (quoting *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007) (*Underdahl I*)). Proper appellate review includes a determination of whether “the district court erred by making findings unsupported by the evidence or by improperly applying the law.” *Underdahl II*, 767 N.W.2d at 684.

On a defendant's motion to compel discovery, the district court has discretion to order disclosure of “any relevant material and information” in the possession or control

¹ Although the parties refer to the breath test instrument as an Intoxilyzer 5000, it appears that the instrument was actually an Intoxilyzer 5000EN, a model which came into use in Minnesota in 1996. See *State v. Underdahl*, 767 N.W.2d 677, 680 n.1 (2009) (*Underdahl II*).

² The parties refer to the proceeding as a “Lothenbach trial,” but it is more properly referred to as a trial on stipulated facts under Minn. R. Crim. P. 26.01, subd. 4. See *State v. Sterling*, 782 N.W.2d 579, 581 (Minn. App. 2010) (noting that Minn. R. Crim. P. 26.01, subd. 4 supercedes “the procedure set out in *State v. Lothenbach*, 296 N.W.2d 854, 857-58 (Minn. 1980)”).

of the prosecution, “provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant . . . as to the offense charged.” Minn. R. Crim. P. 9.01, subd. 2(3). In *Underdahl II*, the supreme court analyzed this rule in a consolidated appeal involving two DWI cases in which the defendants sought disclosure of the source code for the Intoxilyzer 5000EN. There, the supreme court reached different results as to the two defendants, Dale Underdahl and Timothy Brunner, based on the differences in the threshold showings that they had made to support their requests for production of the source code for the Intoxilyzer 5000EN. *Id.* at 687.

As to appellant Underdahl, the court ruled that the district court abused its discretion by ordering production of the source code, because Underdahl had “advanced no theories on how the source code could be related to his defense or why the source code was reasonably likely to contain information related to the case.” *Id.* at 685 (quotation omitted). As to appellant Brunner, however, the court found that his submissions were sufficient to show that the source code was relevant and favorable to his defense. “Brunner 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 and its potential defects.” *Id.* at 686. Therefore, the court concluded that the district court “did not abuse its discretion in concluding that the source code may relate to [Brunner’s] guilt or innocence.” *Id.*

Here, appellant asked for disclosure of the source code because the Intoxilyzer 5000EN has unexplained and “high BAC readings”; the source code “controls almost every aspect of the Intoxilyzer’s functionality according to a Bureau of Criminal

Apprehension scientist; and “[t]he accuracy of the Intoxilyzer test results bears an integral relationship to” his guilt or innocence. In support of his motion, appellant submitted a complaint initiated in federal district court by Minnesota’s Commissioner of Public Safety against CMI of Kentucky, Inc., the manufacturer of the Intoxilyzer 5000EN. The federal complaint alleges breach of contract and other causes of action for CMI’s failure to disclose the source code to this state. Appellant also submitted the declaration of Thomas E. Workman, Jr., a computer forensics expert and attorney; among other things, the declaration analyzes the conditions under which the Intoxilyzer 5000EN may achieve invalid breath test results.

While the district court found this information inadequate to mandate production of the source code, *Underdahl II* requires only a “plausible showing” that the Intoxilyzer source code “would be both material and favorable” to appellant, 767 N.W.2d at 684. We agree that appellant has made such a showing here—appellant offered the same type of information that was found satisfactory by the supreme court in *Underdahl II*, 767 N.W.2d at 685. Therefore, we also conclude that the district court abused its discretion by denying appellant’s motion to compel discovery of the source code,³ mandating reversal of appellant’s conviction and a remand for further proceedings.

³ No published opinion from an appellate court of this state has been released since *Underdahl II*. Unpublished opinions issued by this court have supported granting a defendant’s discovery motion for the source code when the information offered by the defendant might reveal deficiencies in the Intoxilyzer 5000EN that could undermine its reliability. See, e.g., *State v. Scholl*, A08-2138 (Oct. 27, 2009); *State v. Kish*, A08-1342 (Aug. 11, 2009); *Freeman v. Comm’r of Pub. Safety*, A08-1433 (July 7, 2009); *State v. Veldhuizen, et al.*, A08-2110, A08-2112, A08-2113, (June 16, 2009); *Lund v. Comm’r of Pub. Safety*, A08-1408 (June 9, 2009).

Appellant filed a pro se brief that includes 15 issues. Many of these issues exceed this court's scope of review. *See State v. Ortega*, 770 N.W.2d 145, 149 (Minn. 2009) (limiting appellate review in stipulated facts trial to "the pretrial order that denied [appellant's] motion to suppress"). We decline to reach these issues in light of our decision to reverse.

Reversed and remanded.