STATE OF MINNESOTA
IN COURT OF APPEALS
A10-403

State of Minnesota,
Respondent,

vs.

Matt Dixon, Jr.,
Appellant.

Filed January 11, 2011
Affirmed
Halbrooks, Judge
Concurring specially, Klaphake, Judge

Blue Earth County District Court
File No. 07-CR-08-3365

Lori Swanson, Attorney General, Joan M. Eichhorst, Assistant Attorney General, St. Paul, Minnesota; and

Ross E. Arneson, Blue Earth County Attorney, Mankato, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Marie Wolf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

HALBROOKS, Judge

On appeal from his conviction of two counts of first-degree driving while impaired (DWI), appellant Matt Dixon, Jr., challenges the district court's decision to prohibit him

from offering evidence on the reliability of urine testing to measure alcohol concentration; the district court's refusal to grant a mistrial after appellant's girlfriend contacted a juror by phone during the trial; and the district court's rejection of appellant's challenge to the calculation of his criminal-history score, which included two Illinois felony convictions. Because (1) Minnesota recognizes urine testing as a reliable method of measuring alcohol concentration, the district court did not abuse its discretion by excluding evidence to challenge the reliability of urine testing; (2) the juror who was improperly contacted during the trial was not affected by the limited contact, the district court did not abuse its discretion by declining appellant's mistrial motion; and (3) the district court had a proper factual basis for including two Illinois felony convictions in the calculation of appellant's criminal-history score, we affirm.

FACTS

In the early evening of October 17, 2008, Mankato police officer David Blackstock stopped appellant's vehicle after he observed appellant driving 59 miles per hour in a posted 40 mile-per-hour zone. While speaking with appellant, Officer Blackstock immediately noticed indicia of appellant's intoxication and, after further discussion with appellant, brought appellant to the Blue Earth County Law Enforcement Center to complete field sobriety tests. Appellant failed one test, began another, and then quit that test and refused to take any more. Based on his observations, Officer Blackstock concluded that appellant was under the influence of alcohol.

Appellant was read the implied-consent advisory, and he agreed to a urine test, which revealed an alcohol concentration of .17. Appellant was charged with first-degree

DWI in violation of Minn. Stat. § 169A.20, subd. 1(1) (2008) (driving under the influence of alcohol), and Minn. Stat. § 169A.20, subd. 1(5) (2008) (driving with an alcohol concentration of .08 or more).[1]

Before trial, appellant sought to introduce expert testimony challenging the reliability of urine testing to measure the level of alcohol concentration in a person suspected of driving under the influence. The district court ruled that appellant could not offer expert or lay testimony on the reliability of urine testing because Minnesota has accepted the scientific basis of this testing method.

Despite the district court's pretrial ruling, defense counsel challenged the reliability of urine testing during his opening statement and suggested that a state witness employed by the Bureau of Criminal Apprehension (BCA) would testify that urine testing is no longer a scientifically approved method for measuring the level of alcohol concentration. The district court sustained the state's objection to these statements and, out of the presence of the jury, instructed defense counsel not to raise the subject again.

During trial, it came to the district court's attention that appellant's girlfriend, Meghan Haus, had contacted a female juror, S.F., by phone during the lunch break. During an inquiry into the matter, S.F. told the district court that when Haus contacted her, Haus was upset, told her a disjointed version of appellant's interaction with police, and asked about what the other jurors were thinking about the verdict. S.F., who was only vaguely acquainted with Haus, told Haus that she "couldn't talk about anything that

[1] Appellant was also charged with and pleaded guilty to gross misdemeanor driving after license cancellation, Minn. Stat. § 171.24, subd. 5 (2008).

had been going on." S.F. assured the court that while she had been shaken by the conversation, she could still be fair and impartial and could base her decision on the facts of the case. The district court denied appellant's mistrial motion and allowed S.F. to continue to sit on the jury.

During the calculation of appellant's criminal-history score, the district court relied on a sentencing worksheet that included two felony convictions from Illinois. The court rejected appellant's claim that he was not the defendant in the two Illinois offenses and included those two convictions, as well as five Minnesota convictions, in assigning appellant's criminal-history score. The district court imposed an 84-month executed prison sentence.

D E C I S I O N

1. Urine Testing

Appellant claims that the district court abused its discretion by refusing to allow him to cross-examine the state's expert witness about the accuracy of urine testing to measure alcohol concentration and by refusing to allow the introduction of appellant's own expert-witness testimony on the subject. He argues that the urinalysis testing done in his case was inaccurate and that his defense was premised on this fact. This court "appl[ies] an abuse-of-discretion standard of review to a district court's ruling on the admissibility of expert testimony." *Hayes v. Comm'r of Pub. Safety*, 773 N.W.2d 134, 136-37 (Minn. App. 2009).

When an officer has probable cause to believe that a person is driving while impaired, the officer may require the person to consent to a test of the person's "blood,

breath, or urine" to determine the presence of alcohol or controlled substances. Minn. Stat. § 169A.51, subd. 1(a), (b) (2008). Minnesota courts have rejected challenges to the use of urine tests based on the "urine-pooling theory," which suggests that a urine test is scientifically invalid if the suspect is not required to void his bladder once and wait 20 to 30 minutes before providing urine for testing, to assure the accuracy of the test. *Hayes*, 773 N.W.2d at 138-39; *Genung v. Comm'r of Pub. Safety*, 589 N.W.2d 311, 313 (Minn. App. 1999), *review denied* (Minn. May 18, 1999). In *Hayes*, this court ruled that the district court did not abuse its discretion by excluding expert testimony that would have attempted to challenge the validity of the urine testing based on this theory. *Hayes*, 773 N.W.2d at 139. In *Genung*, this court stated that BCA urine-testing procedures "have been found to ensure reliability" and "do not require voiding once before producing the test sample." 589 N.W.2d at 313. In *Hayes*, this court relied on *Genung* to conclude that, even if the proffered expert testimony on the urine-pooling theory were relevant, "it is insufficient as a matter of law to prove that the 'testing method' is not 'valid and reliable'" under the implied-consent statute. *Hayes*, 773 N.W.2d at 138. Because current Minnesota law upholds the reliability of first-void urine test results, the district court did not abuse its discretion by refusing to allow appellant to introduce expert witness testimony on the reliability of the urine-pooling theory or by refusing to permit appellant to cross-examine the state's BCA expert witness on that theory.

2. Effect of Improper Contact with Juror

Appellant claims that the district court abused its discretion by denying his motion for a mistrial after juror S.F. was contacted by appellant's girlfriend, Haus, during trial.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI; *see State v. Graham*, 371 N.W.2d 204, 206 (Minn. 1985) (stating that a juror must "undertake to try the case fairly"). Appellant argues that under the theory of implied juror bias the district court should have granted the mistrial.

Appellant's argument fails for several reasons. The theory of implied juror bias has not been adopted in Minnesota, and under either that theory or a theory of actual bias, which is accepted law in Minnesota, the district court did not abuse its discretion by refusing to grant a mistrial. The theory of implied juror bias applies in "extreme situations where the prospective juror is connected to the litigation at issue in such a way that it is highly unlikely that he or she could act impartially during deliberations." *State v. Brown*, 732 N.W.2d 625, 629 n.2 (Minn. 2007) (quotation omitted). The Minnesota Supreme Court has not explicitly adopted this theory to date. *See id.* (discussing the theory of implied bias without explicitly adopting it). As an error-correcting court, we must reject appellant's claim because we lack the authority to adopt this new theory of law. *See State v. Anderson*, 603 N.W.2d 354, 357 (Minn. App. 1999) (noting that the supreme court "seems to have" rejected the implied-bias theory and stating that "without a clear indication from the Minnesota Supreme Court, this court is reluctant to adopt into its established jurisprudence a new doctrine that would have such a profound effect on current practice"),[2] *review denied* (Minn. Mar. 14, 2000); *see also Lake George Park*,

[2] We also note that appellant has failed to show the "extreme situation" that would warrant application of a theory of implied bias. The contact between S.F. and Haus was

L.L.C. v. IBM Mid-America Emps. Fed. Credit Union, 576 N.W.2d 463, 466 (Minn. App. 1998) ("This court, as an error correcting court, is without authority to change the law."), *review denied* (Minn. June 17, 1998).

Further, appellant has not shown actual juror bias because of Haus's isolated contact with S.F. Under Minnesota law, an appellant claiming juror bias must show that (1) the potentially biased juror was subject to challenge for cause; (2) the appellant suffered actual prejudice from the district court's failure to dismiss; and (3) the appellant made an appropriate objection. *State v. Stufflebean*, 329 N.W.2d 314, 317 (Minn. 1983); *see also* Minn. R. Crim. P. 26.02, subd. 5(1) (enumerating bases under which a juror may be dismissed for cause).

The record does not establish that appellant suffered actual prejudice because of the improper contact made by Haus to juror S.F. As noted by respondent, the only ground upon which a claim of actual prejudice could be based is that S.F.'s state of mind showed that she could not "try the case impartially and without prejudice to the substantial rights of" appellant. Minn. R. Crim. P. 26.02, subd. 5(1)1. Application of this ground for juror dismissal requires that the problem with the juror's state of mind "satisfies the court" of the juror's partiality. *Id.* Appellant cannot meet the second prong of the *Stufflebean* test because S.F. repeatedly stated that she could remain impartial.

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limited and S.F. said that it did not affect her ability to be fair, and the two had little more than a passing acquaintance with each other. These facts do not show that S.F. was connected to the litigation "in such a way that is highly unlikely that he or she could act impartially during deliberations." *Brown*, 732 N.W.2d at 629 n.2 (quotation omitted).

Further, the district court was satisfied with S.F.'s statements that Haus had not caused her to be biased.

For these reasons, the district court did not abuse its discretion by denying appellant's mistrial motion due to claimed juror bias.

3. Calculation of Appellant's Criminal-History Score

Appellant argues that he should not have received two of the seven felony points that he was assigned in the calculation of his criminal-history score. Before sentencing, appellant submitted an affidavit in which he claimed that he was not the offender in two Illinois felony convictions from 1991 and 1995. The district court rejected appellant's claim, relying on the testimony of a Department of Corrections (DOC) employee who prepared appellant's sentencing worksheet, as well as other documents provided by the state.

Foreign convictions are included in the calculation of an offender's criminal-history score. Minn. Sent. Guidelines cmt. II.B.502 (2008). The sentencing court has the discretion to determine the weight assigned to each "out-of-state conviction after considering the nature and definition of the offense and the sentence imposed for the offense." *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001). The state must establish the facts necessary to use a foreign conviction in calculating an offender's criminal-history score. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983); *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *review denied* (Minn. July 15, 2008); *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). By a fair preponderance of the evidence, the state must establish the validity of the prior conviction, that the defendant

was the person convicted, and that the offense constitutes a felony in Minnesota. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983); *see State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980) (defining fair preponderance of the evidence standard as "establish[ing] [a claim] by a greater weight of the evidence" or more likely than not that the claim is true). "The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion." *Maley*, 714 N.W.2d at 711.

In *Griffin*, the supreme court stated that a foreign conviction may be proved by official record or by "other evidence of the contents" of the official record, including oral testimony, in accordance with Minn. R. Evid. 1005. 336 N.W.2d at 525 (quotation omitted). There, the calculation of the defendant's criminal-history score was affirmed, even though the sentencing court lacked a certified record of a foreign conviction, because the record included "considerable documentation" of the foreign conviction. *Id.* Similarly, in *Maley*, this court noted that "absence of a certified record of an out-of-state conviction does not require exclusion of that conviction per se," but this court ruled that the state must present "evidence that sufficiently substitutes for the official, certified record of conviction." 714 N.W.2d at 711-12. This court reversed a criminal sentence in *Maley* that relied on California convictions in calculating the defendant's criminal-history score, because none of the evidence offered by the state to establish the convictions complied with Minn. R. Evid. 1005. *Id.* at 712. Notably, in *State v. Jackson*, 358 N.W.2d 681, 683 (Minn. App. 1984), this court affirmed a sentence that depended on a criminal-history score that included a foreign conviction when the district court heard

"advice and testimony" from a probation officer about his search of the defendant's foreign felony record to establish the basis for inclusion of the foreign conviction.

Here, while the DOC employee who testified at appellant's sentencing hearing did not obtain the official record of appellant's Illinois convictions, the employee gave reasons why he concluded that an independent search was unnecessary. The employee testified that appellant did not contest the Illinois convictions during the sentencing phases of his four prior Minnesota convictions, one of which included a 2007 felony domestic-assault conviction that resulted in an executed prison sentence. He also testified that for the four prior convictions, calculation of appellant's criminal-history score was approved by the Minnesota Sentencing Guidelines Commission, and these sentences were not the subject of postconviction appeals. Because this case includes documentary evidence and testimony from the DOC employee that was similar to the probation officer's testimony that this court found acceptable in *Jackson*, we conclude that the district court did not abuse its discretion by permitting the evidence of appellant's two prior Illinois felony offenses to be included in the calculation of his present criminal-history score.

Affirmed.

KLAPHAKE, Judge (concurring specially)

I agree that under current Minnesota law first-void urinalysis is statutorily recognized as reliable for measuring the presence of alcohol in a DWI suspect. As such, this court lacks authority to reject the scientific reliability of this testing procedure. *See Genung*, 589 N.W.2d at 313-14 (rejecting attack on Minnesota's use of first-void urinalysis, stating that the court "must defer to the legislature and the commissioner [of public safety] as to the appropriate procedures to use to reach test results on which to base a [license] revocation").

I write separately, however, to express my concern that there may be some merit in appellant's underlying arguments. The inherent problem with a first-void urine test is that it does not eliminate urine that has collected in the bladder for an unknown period of time, possibly providing an inaccurate correlation to alcohol in the bloodstream, which is what causes impairment. A.W. Jones & Fredrik C. Kugelberg, *Relationship Between Blood and Urine Alcohol Concentrations in Apprehended Drivers Who Claimed Consumption of Alcohol After Driving With and Without Supporting Evidence*, 194 Forensic Science Int'l 97-98 (2010). "[U]rine is normally stored in the bladder for a variable period of time before voiding and during this time the BAC changes depending on the stage of absorption, distribution and metabolism. This complicates interpretation of UAC/BAC ratio for random voids, although the situation is simplified if two consecutive urinary voids are collected about 60 min apart." *Id.*; *see* Kurt M. Dubowski, *Absorption, Distribution and Elimination of Alcohol: Highway Safety Aspects*, 10 J. Stud. on Alcohol Suppl. 98, 102 (1985) (stating, "There is massive documentation that

the blood alcohol concentration cannot be established sufficiently reliably for forensic purposes from the alcohol concentration of a pooled bladder urine specimen because of the extensive variability of the blood:urine ratio of alcohol"). One study that compares urine and blood alcohol ratios shows an average correlation of 1.57:1, with a range of .07 to 21.0:1, indicating "the high probability of a large error being introduced into the calculation" when applying average of urine alcohol to demonstrate blood alcohol concentration. Charles L. Winek, Kathy L. Murphy, & Tracy A. Winek, *The Unreliability of Using a Urine Ethanol Concentration to Predict a Blood Ethanol Concentration*, 25 Forensic Sci. Int'l 277, 280 (1984). When using urine as a specimen for analysis of alcohol in drunk driving investigations, "[c]are is needed whenever the concentration of ethanol in a random sample of urine is translated into the presumed coexisting BAC for purposes of back extrapolation of BAC," and "[m]ost investigators have been more enthusiastic about use of urine as a biological specimen for analysis of alcohol provided that certain precautions are taken, such as . . . collecting two successive voids for the determination of ethanol." Alan W. Jones, *Urine as a Biological Specimen for Forensic Analysis of Alcohol and Variability in the Urine-to-Blood Relationship*, 25 Toxicology Rev. 15, 18-19 (2006).

Appellant claims that Minnesota is one of the few jurisdictions, if not the only one, that currently authorizes the use of a first-void urine sample as the sole evidence to prove that a DWI suspect is under the influence of alcohol. Under the current statutory scheme, the legislature has made it a per se violation to have a particular percentage of alcohol in the one's urine while driving, operating, or being in control of a motor vehicle. Over the

years, the legislature has also reduced the percentage of alcohol concentration that constitutes an offense and has not fine-tuned the definition of "alcohol concentration," which includes only a crude average correlation between how alcohol in the urine relates to alcohol in the blood. *See* Minn. Stat. §§ 169A.03, subd. 2 (2010) (defining "alcohol concentration" as the "number of grams of alcohol per 67 milliliters of urine"); 169A.20, subd. 1(5) (2010) (defining offense of driving while impaired as "when the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating or being in physical control of the motor vehicle is 0.08 or more"). In light of this, as well as the scientific doubt about the efficacy of using first-void urine testing, the legislature may wish to revisit the fairness and reliability of Minnesota's first-void urine testing methodology. *See State v. Forsman*, 260 N.W.2d 160, 164 (Minn. 1977) ("It is the exclusive province of the legislature to define by statute what acts shall constitute a crime").