STATE OF MINNESOTA
IN COURT OF APPEALS
A10-655

State of Minnesota,
Respondent,

vs.

Donelly Edward Boeder,
Appellant.

Filed February 1, 2011
Affirmed; motion granted
Toussaint, Judge

Sibley County District Court
File No. 72-CR-08-198

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

David E. Schauer, Sibley County Attorney, Winthrop, Minnesota (for respondent)

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

TOUSSAINT, Judge

Appellant Donelly Edward Boeder challenges his conviction of driving while impaired (DWI) in violation of Minn. Stat. § 169A.20, subd. 1(5) (2008), for driving with

an alcohol concentration of .08 or more. Appellant argues that the district court erred by admitting his urine-test result without holding a *Frye-Mack* hearing to determine whether urine testing is generally accepted within the relevant scientific community and abused its discretion by excluding his proffered expert testimony.[1] Appellant also moves to strike portions of respondent State of Minnesota's brief and appendix. Because urine testing is generally accepted in the relevant scientific community and exclusion of appellant's expert testimony was not an abuse of discretion, we affirm; because the portions of respondent's brief's appendix that appellant moves to strike were not part of the district court record, we grant the motion.

D E C I S I O N

I.

Appellant was convicted of DWI following a stipulated-facts trial at which the state introduced evidence that gas-chromatography analysis by the bureau of criminal apprehension (BCA) of appellant's first-void urine sample showed an alcohol concentration of .11. The district court denied appellant's pretrial motion for a *Frye-Mack* hearing. Despite the state's assertion to the contrary, appellant's argument that he was entitled to a *Frye-Mack* hearing is preserved for appeal.

The two-pronged *Frye-Mack* standard governs the admissibility of scientific evidence: "First, a novel scientific technique must be generally accepted in the relevant scientific community, and second, the particular evidence derived from that test must

[1] Appellant also briefed a claim that use of his urine sample violated his privilege against self-incrimination, but he withdrew this claim at oral argument.

have a foundation that is scientifically reliable." *Goeb v. Tharaldson*, 615 N.W.2d 800, 810 (Minn. 2000). "Put another way, the *Frye-Mack* standard asks first whether experts in the field widely share the view that the results of scientific testing are scientifically reliable, and second whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls." *State v. Roman Nose*, 649 N.W.2d 815, 819 (Minn. 2002).

The district court must hold a pretrial evidentiary hearing to determine whether a "novel or emerging" scientific test is generally accepted. *Id.* at 819 n.3. "It is not enough for [an appellate court] to believe the test has gained general acceptance in the relevant scientific community. The state must establish that it has gained general acceptance, and it must do so by evidentiary hearing." *Id.* at 820 n.5. The BCA's use of a particular scientific technique does not mean that it is not novel, but BCA practice may be evidence of general acceptance. *Id.* at 821. This court reviews de novo the district court's legal conclusion of whether the technique is generally accepted. *Goeb*, 615 N.W.2d at 815. Once Minnesota appellate precedent establishes the technique's general acceptance, the technique is no longer novel and the evidence may be admitted without a hearing on the first prong. *Roman Nose*, 649 N.W.2d at 821.

Appellant argues that there is no Minnesota precedent on the first prong of the *Frye-Mack* standard, rendering urine testing "novel" under *Roman Nose* and entitling him to an evidentiary hearing. But subsequent to oral argument in the instant case, this court issued an opinion holding that gas chromatography is a generally accepted technique within the relevant scientific community for measuring the alcohol concentration of a

first-void urine sample. *State v. Edstrom*, ____ N.W.2d ____, ____, 2010 WL 5156050, at *5 (Minn. App. Dec. 21, 2010). In light of our decision in *Edstrom*, the first prong of the *Frye-Mack* test is satisfied, and any error in denying appellant a first-prong hearing to which he is no longer entitled was harmless.

II.

Appellant argues that the district court abused its discretion by ruling that he could not present expert testimony attacking the validity and accuracy of first-void urine testing. Appellant's urine-pooling theory essentially posits that a first-void (as opposed to latter-void) urine sample does not accurately measure a person's blood alcohol concentration or level of impairment.

Expert testimony may be admitted if the expert is qualified and "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Minn. R. Evid. 702. We review the exclusion of expert testimony for an abuse of discretion. *State v. Bird*, 734 N.W.2d 664, 672 (Minn. 2007).

In *Hayes v. Comm'r of Pub. Safety*, 773 N.W.2d 134 (Minn. App. 2009), a case arising out of an implied-consent proceeding, this court held that the district court did not abuse its discretion by excluding proffered expert evidence challenging the scientific validity of a first-void urine sample on the theory that urine pooling may inaccurately measure a person's alcohol concentration. The *Hayes* court reasoned that the license-revocation statute focuses on the result of a chemical test, not on the question of whether a driver was in fact impaired. 773 N.W.2d at 138-39.

Similarly, the statute at issue here provides that a person is guilty of DWI "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." Minn. Stat. § 169A.20, subd. 1(5), .27 (2008). Alcohol concentration may be measured by a urine test. Minn. Stat. § 169A.03, subd. 2(3) (2008). As we explained in *Edstrom*, expert testimony questioning the nexus between actual impairment and the alcohol concentration of a first-void urine sample "does not call into question the scientific community's general acceptance of reliability of the urine test result to determine the urine alcohol concentration of a particular urine sample." ____ N.W.2d at ____, 2010 WL 5156050, at *6. Because the law leaves no room for the argument that appellant's expert sought to make, the district court did not abuse its discretion by excluding appellant's expert evidence.

III.

Appellant moves to strike portions of the state's brief and appendix as outside the record. "The record on appeal consists of the papers filed in the district court, the offered exhibits, and the transcript of the proceedings, if any." Minn. R. Crim. P. 28.02, subd. 8. Because the state's brief discusses a district court order that is included in its appendix but was not submitted to the district court, we grant appellant's motion to strike those portions of the state's brief and appendix. *See State v. Eibensteiner*, 690 N.W.2d 140, 155 (Minn. App. 2004), *review denied* (Minn. Mar. 15, 2005).

Affirmed; motion granted.