

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-1240**

William Robert Thompson, petitioner,  
Appellant,

vs.

Commissioner of Public Safety,  
Respondent.

**Filed May 26, 2009  
Reversed and remanded  
Halbrooks, Judge**

Hennepin County District Court  
File No. 27-CV-08-1376

Shane C. Perry, Parkdale 1, Suite 270, 5401 Gamble Drive, Minneapolis, MN 55416 (for appellant)

Lori Swanson, Attorney General, Peter D. Magnuson, Assistant Attorney General, Emerald A. Gratz, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Johnson,  
Judge.

## UNPUBLISHED OPINION

**HALBROOKS**, Judge

Appellant challenges the revocation of his driving privileges under the implied-consent law on the ground that the district court abused its discretion by denying his motion for discovery of the source code for the Intoxilyzer 5000EN. Because we conclude that appellant made the minimal showing of relevance outlined in *State v. Underdahl*, \_\_\_ N.W.2d \_\_\_, \_\_\_, 2009 WL 1150093, at \*6-\*8 (Minn. Apr. 30, 2009) (*Underdahl II*), we reverse and remand.

### FACTS

On January 12, 2008, appellant William Robert Thompson was stopped by Sergeant Allen Ringate of the Minnetonka Police Department. After appellant signed an implied-consent advisory, Sgt. Ringate gave him a breath test using the Intoxilyzer 5000EN that revealed that appellant had a .10 alcohol concentration.

Following receipt of a notice of license revocation under Minn. Stat. § 169.52 (2006), appellant petitioned for judicial review under Minn. Stat. § 169A.53, subd. 2 (2006). Appellant also moved the district court to suppress the Intoxilyzer breath-test result and to order respondent to produce the source code for the Intoxilyzer 5000EN.

In support of the discovery motion, appellant submitted a variety of documents, including the affidavit of Harley R. Myler, Ph.D., P.E., that described the source code for the Minnesota version of the Intoxilyzer 5000EN and stated that, without the source code, “we cannot have absolute certainty that the software is operating properly when analyzing a subject sample,” as well as two affidavits from Thomas R. Burr. Burr’s first

affidavit described previous problems with the source code for the Minnesota version of the Intoxilyzer 5000EN and articulated that the source code is needed to analyze the function of the machine, and without access to the source code “it is not possible to determine if the Intoxilyzer functions as designed . . . .” The second Burr affidavit evaluated a set of Intoxilyzer 5000EN results from a test administered to an individual in St. Cloud on August 19, 2007 that displayed two different readings from the time of the original test to a later time when the results were uploaded to the Minnesota Bureau of Criminal Apprehension (BCA). According to Burr, these differing results show that “the data integrity of the computer program is clearly compromised and all the data that is generated by this version of the software is unreliable.” Based on this evidence, Burr opined that “this obviously serious problem in data integrity makes it essential that that [sic] source codes of the software be thoroughly examined to identify the source of these serious kinds of errors and their potential effect on all data.”

Appellant also submitted a Minnesota district court order from an unrelated case granting production of a source code, an opinion from the Kentucky Court of Appeals allowing discovery of an Intoxilyzer 5000EN source code, and a report from a DUI attorney in California discussing the results of an expert’s review of the source code for the Draeger AlcoTest 7110. Finally, appellant submitted a transcript of David Edin, an employee of the BCA, discussing the Intoxilyzer 5000’s software updates and deficiencies in the context of an unrelated case.

In opposition to the motion, respondent submitted documents related to its pending federal lawsuit against CMI, Inc., the manufacturer of the Intoxilyzer 5000EN,

demonstrating that respondent is not in possession of the source code for the Intoxilyzer 5000EN.<sup>1</sup> Respondent also submitted the affidavit of Glenn G. Hardin, a toxicology supervisor for the BCA.

The parties stipulated that the arresting officer would testify that the Intoxilyzer was working properly when appellant's test was performed and that the .10 test result was accurate. The district court denied appellant's motion to suppress the test result and to compel discovery of the source code and sustained the revocation of appellant's driving privileges under Minn. Stat. § 169A.53 (2006). This appeal follows.

## D E C I S I O N

### I.

Respondent argues that the district court lacked subject-matter jurisdiction to address appellant's source-code discovery request. Specifically, respondent asserts that appellant's Intoxilyzer 5000EN source-code request is a challenge to the overall Intoxilyzer testing process, an administrative rule challenge that is subject to judicial review at the Minnesota Court of Appeals according to the Minnesota Administrative Procedure Act. *See* Minn. Stat. § 14.44 (2008). "Whether a court has subject matter jurisdiction is a question of law and is reviewed de novo." *Grundtner v. Univ. of Minn.*, 730 N.W.2d 323, 332 (Minn. App. 2007). Although respondent asserts this argument for the first time on appeal, "lack of subject matter jurisdiction may be raised at any time by

---

<sup>1</sup> Respondent has sued CMI in federal district court on claims of (1) breach of contract, (2) breach of the implied covenant of good faith and fair dealing, and (3) copyright infringement.

the parties or sua sponte by the court, and cannot be waived by the parties.” *Dead Lake Ass’n, Inc. v. Otter Tail County*, 695 N.W.2d 129, 134 (Minn. 2005).

In *Underdahl v. Comm’r of Pub. Safety (Underdahl I)*, the Minnesota Supreme Court considered this same argument on appeal from this court’s denial of a writ of prohibition. 735 N.W.2d 706, 709–10 (Minn. 2007). The supreme court held that because Minn. Stat. § 169A.53 gives the district court subject-matter jurisdiction to hear challenges to the reliability and accuracy of test results, the district court has subject-matter jurisdiction to hear challenges to the Intoxilyzer 5000EN. *Id.* at 711.

Here, appellant is challenging the accuracy of his own Intoxilyzer 5000EN test results, not the general use of Intoxilyzers. Appellant requested the source code in order to prove that his test result was inaccurate. Because Minn. Stat. § 169A.53 allows the district court to hear challenges to the accuracy of appellant’s test results, the district court has subject-matter jurisdiction in this matter.

## II.

Appellant contends that the district court abused its discretion by denying his motion to compel production of the source code for the Intozilyzer 5000EN. The district court “has wide discretion to issue discovery orders and, absent clear abuse of that discretion, normally its order with respect thereto will not be disturbed.” *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 921 (Minn. 1990).

Following notice of license revocation under the implied-consent laws, an individual may obtain judicial review of the revocation. Minn. Stat. § 169A.53, subd. 2. These judicial reviews are civil in nature and “must be conducted according to the Rules

of Civil Procedure.” *Id.*; see also *Kramer v. Comm’r of Pub. Safety*, 706 N.W.2d 231, 235 (Minn. App. 2005). The statute provides explicit direction for discovery in an implied-consent proceeding by dividing discovery into two categories. Minn. Stat. § 169A.53, subd. 2(d).

The first category is mandatory and limited to four specific evidentiary matters.<sup>2</sup> *Id.*, subd. 2(d)(1)–(4). The second category is nonmandatory and includes “[o]ther types of discovery . . . available only upon order of the court.” *Id.*, subd. 2(d). This nonmandatory discovery is governed by the discovery provisions of the Minnesota Rules of Civil Procedure. *Abbott v. Comm’r of Pub. Safety*, 760 N.W.2d 920, 924–25 (Minn. App. 2009), *pet. for review dismissed* (Minn. May 19, 2009); see also *Underdahl I*, 735 N.W.2d at 711–12 (applying Minn. R. Civ. P. 26.02(a) to a discovery request for the Intoxilyzer 5000EN’s source code in an implied-consent proceeding). Minn. R. Civ. P. 26.02(a) provides that “[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense . . . .” In addition, “[f]or good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.” *Id.* In defining “relevancy,” the rule states that “[r]elevant information sought need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.*

---

<sup>2</sup> These items are: “(1) the notice of revocation; (2) the test record . . . ; (3) the peace officer’s certificate and any accompanying documentation submitted by the arresting officer to the commissioner; and (4) disclosure of potential witnesses, including experts, and the basis of their testimony.” Minn. Stat. § 169A.53, subd. 2(d).

In *Abbott*, this court addressed the issue of what standard applies to a request for nonmandated discovery under the implied-consent law. 760 N.W.2d at 923–26. We stated, “[I]f a petitioner moves the court for nonmandated discovery—just as a party in an ordinary civil action might do—the petitioner must show that the discovery is relevant and, if it is not relevant to a claim or defense, the petitioner must show good cause for its production.” *Id.* at 925. “When the issue of relevance turns on disputed facts, the district court must make findings based on the evidence presented. The quantum of proof required to establish relevance in implied-consent proceedings is the same as other civil proceedings . . . .” *Id.* at 926.

Appellant asserts that the district court applied an incorrect standard in its determination of the discoverability of the source code. In support of his argument, appellant points to the district court’s statement in its order that “[t]he substantive standard is whether [appellant] has presented some evidence beyond mere speculation that questions the trustworthiness of the Intoxilyzer report.” (Quotation omitted.)

We disagree with appellant’s assertion, as it focuses on a sentence in isolation, instead of a fair reading of the district court’s entire order. The district court expressly cited rule 26.02(a) and Minn. Stat. § 169A.53, subd. 2(d), in describing its approach to appellant’s discovery motion. The district court then analyzed the factual record and concluded:

Although [appellant] offers seven exhibits, [appellant] provides no information to demonstrate that his test results were inaccurate, that his test was administered improperly, or that the Intoxilyzer 5000 does not accurately measure alcohol concentration levels. [Appellant] does not provide any factual

basis to show a good faith belief that the source code will lead to the discovery of admissible evidence. In essence, [appellant] is arguing that further analysis of the source code may possibly provide some information that may possibly call his test results into question. However, this does not rise above the level of mere speculation and does not provide a basis upon which to grant his motion for discovery of the source code.

But while the district court applied the correct standard, we conclude that the district court abused its discretion when it found that appellant had not shown that the source code is relevant to a claim or defense or reasonably calculated to lead to the discovery of admissible evidence. In *Underdahl II*, a consolidated appeal involving two different defendants, Dale Lee Underdahl and Timothy Arlen Brunner, the district courts in both cases ordered the state to produce the source code within 30 days or the breath-test results would be inadmissible and certain charges would be dismissed. \_\_\_ N.W.2d at \_\_\_, 2009 WL 1150093, at \*2.

Underdahl submitted no supporting exhibits or other information related to the source code in support of his motion to compel production of the source code. *Id.* at \_\_\_, 2009 WL 1150093, at \*7. In contrast, Brunner's discovery motion included nine exhibits that provided definitions of the source code, explained the source code in the context of voting machines and its importance in locating potential defects in a particular machine, and detailed the defects in a New Jersey breath-test machine that were discovered after disclosure of the source code. *Id.*

The supreme court stated:

Although broad discretion is given to district courts in discovery matters, the district court in appellant Underdahl's

case abused its discretion in finding the source code relevant and related to his guilt or innocence. Underdahl made no threshold evidentiary showing whatsoever; while he argued that challenging the validity of the Intoxilyzer was the only way for him to dispute the charges against him, he failed to demonstrate how the source code would help him do so. As in *Hummel*, Underdahl 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.” We hold that, even under a lenient showing requirement, Underdahl failed to make a showing that the source code may relate to his guilt or innocence

*Id.* (alteration in original) (citation and footnote omitted). In contrast, the supreme court concluded that “Brunner’s submissions show that an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer and, in turn, would relate to Brunner’s guilt or innocence.” *Id.* at \_\_\_, 2009 WL 1150093, at \*8. As a result, the supreme court held that the district court did not abuse its discretion by ordering production in Brunner’s case. *Id.*

The supporting affidavits and other documents that appellant here submitted in support of his motion are very similar to the relevancy showing that the supreme court held to be sufficient in Brunner’s case. The affidavits of Burr and Dr. Myler provide definitions of the source code, describe the need for examination of the source code, and generally demonstrate the potential problems with the source code of the Intoxilyzer 5000EN. Because the source code may reveal deficiencies in the accuracy of the Intoxilyzer 5000EN that would be relevant to a claim or defense, we conclude that the district court abused its discretion by denying appellant’s discovery motion.

**Reversed and remanded.**