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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1408**

James Kolby-Ralph Lund, Jr., petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed June 9, 2009
Reversed and remanded
Stoneburner, Judge**

Mower County District Court
File No. 50CV073501

Samuel A. McCloud, Carson J. Heefner, Suite 1000, Circle K, Box 216, Shakopee, MN
55379 (for appellant)

Lori Swanson, Attorney General, Mary McKinley, Peter D. Magnuson, Assistant
Attorneys General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134
(for respondent)

Considered and decided by Stoneburner, Presiding Judge; Bjorkman, Judge; and
Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STONEBURNER, Judge

In this implied-consent matter, appellant challenges the district court's order denying his motion for discovery of the source code for the Intoxilyzer 5000EN and sustaining revocation of his driver's license. Because we conclude that under the recently released opinion *State v. Underdahl*, __N.W.2d __ (Minn. Apr. 30, 2009) (*Underdahl II*), appellant made a sufficient showing that the source code is relevant, we conclude that the district court abused its discretion in denying discovery of the source code, and we reverse and remand.

FACTS

Appellant James Kolby-Ralph Lund, Jr. was arrested for driving while impaired. He submitted to an Intoxilyzer 5000EN (Intoxilyzer) test that reported an alcohol concentration of .15. Lund's driver's license was revoked under the implied-consent law then in effect, Minn. Stat. § 169A.52, subd. 4(a) (2006). Lund petitioned for judicial review of his license revocation under Minn. Stat. § 169A.53, subd. 2(a) (2006).

Prior to the hearing on his petition, Lund sought discovery of the source code for the Intoxilyzer or, alternatively, suppression of the results of the breath test. In support of his discovery motion, Lund submitted the affidavit of forensic scientist Thomas R. Burr describing the source code as the computer programming codes that are the source of the software on the Intoxilyzer computer chips containing the information that would allow analysis of the functioning of the Intoxilyzer software. Burr opined that without access to those codes "it is not possible to determine if the Intoxilyzer functions as designed or as

approved,” and that “the source codes must be discoverable and must be analyzed to assure accuracy and integrity in testing.” At the hearing on his discovery motion, Lund argued that he sought the source code “to take a look at the testing method that was used to arrive at his results so that he can properly challenge them in court.”

The district court denied Lund’s request for discovery of the source code based on its conclusion that Lund had failed to allege any specific problems with the source code or any evidence that an error in the source code relates to the validity of the test results. After the hearing, the district court sustained revocation of Lund’s driver’s license. This appeal followed.

D E C I S I O N

I. Jurisdiction

On appeal, respondent Commissioner of Public Safety (state) argues for the first time that Lund is challenging the Intoxilyzer validation process as opposed to the results of his individual test and that the district court lacked subject-matter jurisdiction to address such a challenge to the Intoxilyzer because it can only be pursued in a declaratory judgment action before this court. Subject-matter jurisdiction may be raised at any time, “including for the first time on appeal.” *Cochrane v. Tudor Oaks Condo. Project*, 529 N.W.2d 429, 432 (Minn. App. 1995), *review denied* (Minn. May 31, 1995). Because Lund argued to the district court that he sought the source code to properly challenge his test results, we conclude that Lund is seeking to challenge his individual test results, and the district court had jurisdiction to hear his claims. *See In re Comm’r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007) (*Underdahl I*) (rejecting a similar challenge to the

district court's jurisdiction because Minn. Stat. § 169A.53, subd. 3(b)(10), includes the determination of whether the testing method used was valid and reliable within the scope of a judicial hearing challenging a license revocation).

II. Discovery

Limited pretrial discovery is mandated in judicial reviews of license revocations. Minn. Stat. § 169A.53, subd. 2(d) (limiting prehearing discovery to: (1) notice of revocation; (2) the test record; (3) the peace officer's certificate and accompanying documentation; and (4) disclosure of potential witnesses and the basis of their testimony). Other discovery is available only by order of the court. *Id.* To obtain nonmandated discovery, the petitioner must show that the discovery is relevant to a claim or defense or, if, not relevant to a claim or defense, must show good cause for its production under Minn. R. Civ. P. 26. *Abbot v. Comm'r of Pub. Safety*, 760 N.W.2d 920, 925 (Minn. App. 2009), *review dismissed* (Minn. May 19, 2009).

Underdahl I did not decide or discuss the extent of the showing that a driver might be required to make in order to obtain discovery of the source code in an implied-consent proceeding. 735 N.W.2d at 711. But in *Underdahl II*, in connection with Underdahl's criminal prosecution, this court held that the district court abused its discretion by ordering discovery of the source code where the party seeking discovery makes no showing to establish that the source code is *relevant*. *State v. Underdahl*, 749 N.W.2d 117, 122–23 (Minn. App. 2008), *aff'd in part, rev'd in part*, ___ N.W.2d ___ (Minn. Apr. 30, 2009).

The supreme court's recently released opinion in *Underdahl II* discusses what showing is necessary to support an order compelling the state to disclose the source code in a criminal prosecution under the Minnesota Rules of Criminal Procedure. 2009 WL 1150093, at *6 (allowing the trial court to require the state to disclose any *relevant* material not subject to disclosure without order of the court under Rule 9.01, subd. 1, on a showing that "the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged") (quoting Minn. R. Crim. P. 9.01, subd. 2(3)). In *Underdahl II*, district courts had ordered disclosure of the source code for defendants, Dale Underdahl and Timothy Brunner, whose cases were consolidated for supreme court review.

The supreme court affirmed this court's reversal of the discovery order as to Underdahl, based on the lack of any showing of the relation of the source code to Underdahl's defense, but reinstated the discovery order as to Brunner, because Brunner submitted a memorandum and nine exhibits to support his request for the source code, documents that gave definitions of "source code" and reported on defects discovered through analysis of source codes for New Jersey's breath-test machines. *Id.* at ___, 2009 WL 1150093, at *7 (discussing a report prepared on behalf of defendants in *State v. Chun*, 943 A.2d 114 (N.J. 2008), who were challenging the reliability of such machines). The supreme court concluded that Brunner's submissions showed "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.

The supreme court in *Underdahl II* focused on “what showing is required to support a district court’s conclusion that information may relate to a defendant’s guilt or innocence in a DWI case.” *Id* at ___, 2009 WL 1150093, at *6. Although the test for relevancy in an implied-consent proceeding is not identical to the test in a criminal proceeding, we conclude from these cases that a showing that discovery of the source code is relevant to the accuracy of a petitioner’s test results is sufficient to support a motion for discovery of the source code in an implied-consent proceeding. *See Abbott*, 760 N.W.2d at 926 (“If a petitioner can show that evidence is capable of bearing on validity and reliability, discovery would be relevant to that defense and no additional showing of good cause is required.”). And we conclude that Lund has made a minimally sufficient showing to support an order granting motion for discovery of the source code in this case.

III. Discretion

Absent a clear abuse of its wide discretion, this court will generally affirm a district court’s denial of a discovery request. *Id.*; *Erickson v. MacArthur*, 414 N.W.2d 406, 407 (Minn. 1987). *Underdahl II* does not address whether a district court abuses its discretion by denying a motion for discovery of the source code when a petitioner has made a showing of relevance to his test results sufficient to support granting such a motion.

In this case, the state submitted the affidavit of a forensic scientist in the Breath Testing Section of the Minnesota Bureau of Criminal Apprehension (BCA) Forensic Science Laboratory describing the validation process for the Intoxilyzer and noting that

20 other states in addition to Minnesota have approved the use of the Intoxilyzer after validation processes that did not involve the source code. The BCA forensic scientist states that she is unaware of any agency conducting software validation testing that has required the source code for the validation process. Here, the district court appears to have balanced all of the information presented to arrive at its decision to deny Lund's discovery request.

This court's recent decision in *Abbott* addressed the required showing for relevancy in implied-consent cases. 760 N.W.2d at 925. Unlike *Abbott*, who failed to provide any expert evidence, did not show that the source code was relevant to her defense, and failed to meet a more stringent "good cause" showing of relevancy to the subject matter, Lund submitted an expert affidavit explaining the relevancy of the source code to his defense. *Abbott*, 760 N.W.2d at 926. Therefore, despite the district court's wide discretion in discovery matters, given the broad scope of discovery in civil matters,¹ and our reading of *Underdahl II* to require leniency in evaluating the required showing,² we conclude that because Lund made a showing that discovery of the source code is

¹ See Minn. R. Civ. P. 26.02(a) (providing for discovery of any relevant matter not privileged even if the information sought is not admissible at trial "if discovery appears reasonably calculated to lead to the discovery of admissible evidence"). See also *Abbott*, 760 N.W.2d at 925 (describing the categories of relevant evidence, stating "if a petitioner moves the court for nonmandated discovery . . . the petitioner must show that the discovery is relevant," however, if the evidence sought "is not relevant to a claim or defense, the petitioner must show good cause for its production. And, in either case, the district court retains the same discretion it has under the ordinary rules to deny the request, even if it is relevant").

² See *Underdahl II*, ___ N.W.2d at ___, 2009 WL 1150093, at *7 (holding that "even under a lenient showing requirement" *Underdahl* failed to show that the source code may relate to his guilt or innocence).

relevant to his ability to properly challenge his test results, the district court abused its discretion in denying his discovery request. Because we are reversing and remanding, we do not reach Lund's due-process argument, which was raised for the first time on appeal.

Reversed and remanded.