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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1893**

Christopher Jerome Arnold, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed July 30, 2012
Affirmed
Halbrooks, Judge**

Clearwater County District Court
File No. 15-CV-11-51

Richard Kenly, Backus, Minnesota (for appellant)

Lori Swanson, Attorney General, Kristi Nielsen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant contends that the district court erred by sustaining the revocation of his driver's license, arguing that the blood test used to analyze his alcohol concentration was

invalid because the Bureau of Criminal Apprehension (BCA) impermissibly reduced the number of blood kits tested for quality control from 1% to 0.1%. We affirm.

FACTS

At approximately 2:00 a.m. on October 3, 2010, appellant Christopher Arnold was driving on Highway 2, west of Bagley. Deputy Michael Frees pulled appellant over on suspicion of drunk driving. Appellant failed three manual dexterity field tests and registered a .143 in a preliminary breath test. Deputy Frees arrested appellant and read him the implied-consent advisory form. Appellant agreed to take a blood test, and Deputy Frees transported him to the Clearwater County Memorial Hospital.

Shannon Mistelske, who is a registered nurse, drew appellant's blood, using a BCA blood kit that Deputy Frees provided to her. After Mistelske completed the test, Deputy Frees sealed the kit and sent it to the BCA. Kathryn Fuller, Ph.D., a forensic scientist at the BCA, determined that appellant's alcohol content was .143. Appellant's license was subsequently revoked.

Appellant challenged the revocation of his license on three grounds: (1) Deputy Frees did not have reasonable and articulable suspicion to make the stop; (2) respondent Commissioner of Public Safety did not give him proper notice before revoking his license; and (3) the commissioner failed to establish the reliability of the blood test. After a one-day bench trial, the district court concluded that (1) the officer had reasonable and articulable suspicion to stop appellant, (2) the issue of proper notice was outside the scope of the implied-consent hearing, and (3) the commissioner made a prima facie

showing that the blood test and analysis were reliable. On appeal, appellant challenges only the reliability of the blood test.

D E C I S I O N

Appellant contends that the blood kit used to draw his blood was not reliable because the BCA performed quality testing on less than 1% of the batch of kits from which his kit came. When a defendant has his or her license revoked, the defendant can challenge the reliability of the testing method. Minn. Stat. § 169A.53, subd. 3(b)(10) (2010). The commissioner has the burden to establish that the chemical or scientific test was reliable. *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977.) “Without a foundation guaranteeing the test’s reliability, the test result is not probative as a measurement and hence is irrelevant.” *Id.* To meet her burden, the commissioner must prove reliability by a preponderance of the evidence. *Renner v. Comm’r of Pub. Safety*, 373 N.W.2d 628, 630 (Minn. App. 1985). Once the commissioner has met her burden, the defendant must introduce evidence that would contradict the test results. *Id.*

This court will not reverse the district court’s findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01; *Olson v. Comm’r of Pub. Safety*, 513 N.W.2d 491, 492 (Minn. App. 1994). Clearly erroneous means “manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Olson*, 513 N.W.2d at 492 (quotation omitted).

The supreme court has held that if the BCA furnished the blood-testing kit, it is prima facie evidence of reliability. *Dille*, 258 N.W.2d at 568. Here, the testing kit that Deputy Frees used was supplied by the BCA. The BCA ensures reliability by conducting

mandatory quality-control testing. The BCA's procedures provide that for lots containing more than 8,000 kits, an analysis should be done on 0.1% by selecting one kit from every 1,000. The kit that Deputy Frees used was part of a lot of 16,000 blood-testing kits. The 16,000 kits were split into two groups of 8,000; eight kits from each group were tested for quality-control purposes.

Appellant contends that the commissioner failed to meet her burden of reliability despite the test kit being provided by the BCA because the BCA impermissibly reduced the number of kits that it tested from 1% to 0.1%. Relying on three unpublished cases for support, appellant contends that this court has embraced the 1% standard as the threshold required to guarantee reliability.

Appellant's argument fails for two reasons. First, unpublished cases from this court are not precedential. Minn. Stat. § 480A.08, subd. 3(c) (2010). Second, for any persuasive value that the unpublished cases carry, appellant overstates their holdings. In *State v. Scott*, this court affirmed the district court's suppression of a blood test because the BCA conducted no quality control testing whatsoever. No. CO-89-2066, 1990 WL 52605, at *1 (Minn. App. May 1, 1990). In a footnote, this court observed, "The Minnesota BCA now conducts quality controls on blood test kits received from the manufacturer by testing 1% of the kits." *Id.* at *1 n.1. This court did not endorse or reject the 1% level of testing. Five years later, this court, in *Happel v. Comm'r of Pub. Safety*, stated "The BCA now conducts its own quality control tests, and the reliability of samples taken using BCA kits can no longer be challenged on that ground," citing to *Scott* and footnote 1. No. C7-93-1579, 1995 WL 15085, at *3 (Minn. App. Jan. 17,

1995). While this court endorsed 1% as sufficient to establish reliability, it did not conclude that a smaller percentage would not meet the threshold of reliability. Finally, the record in *Falk v. Comm’r of Pub. Safety* provided that the BCA tested one kit of every 100 at random, and there was evidence presented that the Society of Forensic Toxicologists (SOFT) endorsed this random sampling as a “scientifically valid and reliable quality control procedure.” No. C3-97-1197, 1998 WL 51378, at *2 (Minn. App. Feb. 10, 1998). Based on that record, this court held that there was adequate foundation for the reliability of the test. *Id.* But we did not hold that SOFT’s endorsement is the standard bearer of what percentage of kits must be tested to be reliable or that 1% is the threshold for reliability.

Because the record supports that the blood-testing kit was supplied by the BCA and that testing in compliance with BCA standards was done to ensure reliability, the district court did not err by sustaining the commissioner’s revocation of appellant’s license.

Affirmed.