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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-1210**

Brian R. Backstrom, petitioner,  
Appellant,

vs.

Commissioner of Public Safety,  
Respondent.

**Filed July 8, 2008  
Affirmed  
Minge, Judge**

Anoka County District Court  
File No. C6-07-1791

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Considered and decided by Ross, Presiding Judge; Minge, Judge; and Connolly,  
Judge.

**UNPUBLISHED OPINION**

**MINGE**, Judge

On appeal, appellant driver argues that the district court abused its discretion in  
admitting the results of appellant's breath test, claiming that respondent failed to establish  
the reliability of the test. We affirm.

## FACTS

On February 10, 2007, appellant Brian R. Backstrom was arrested on suspicion of driving while impaired. Following his arrest, appellant was asked to submit to a breath test using the Intoxilyzer 5000. He took the test. The results showed an alcohol concentration of 0.10. On the basis of this evidence, respondent Minnesota Commissioner of Public Safety revoked appellant's driver's license pursuant to Minnesota's implied-consent law, Minn. Stat. § 169A.52, subd. 4(a) (2006).

Appellant protested the revocation and requested an implied-consent hearing in district court. At the hearing, Officer Brad Bluml of the Ramsey Police Department testified that he and another officer stopped appellant and appellant ultimately submitted to a preliminary breath test (PBT). Based on the results of the PBT, the other officer arrested appellant and read appellant the implied-consent advisory. Officer Bluml further testified that although he was at the scene of the stop, he did not recall whether he was with appellant and the arresting officer inside the squad car when the implied-consent advisory was read and that during this time frame he conducted an inventory of appellant's vehicle and spoke with appellant's wife.

Officer Bluml also testified that he administered the Intoxilyzer 5000 test, that appellant was in his presence for 15 to 20 minutes before administering the test, and that he did not see appellant put anything into his mouth during that time that may have affected the outcome of the test. Officer Bluml testified that he began the observation period after appellant submitted to the PBT and that he was within sight of appellant after the PBT, when he was placed in the squad car, while he was in the squad car, and when

he was removed. Officer Bluml testified that he could observe appellant through the windows of the squad car, but that he was not watching appellant continuously for the entire observation time.

Officer Bluml testified that he was a certified Intoxilyzer operator, that in using the machine on the date in question it successfully completed all of its self-administered diagnostic checks, and that if the machine does not pass these checks, testing stops. The printed report generated after the test indicated that all calibration and diagnostic checks were successfully completed. Officer Bluml testified that, based on his training and the operation of the specific Intoxilyzer machine being used, he believed appellant's test results were accurate.

Appellant did not call any witnesses or present any evidence at the implied-consent hearing. However, appellant did challenge the admission of the test results from the Intoxilyzer test on several grounds, including that the commissioner failed to establish sufficient foundation. Appellant argued that Officer Bluml's pretest observation of appellant was inadequate as a matter of law.

The district court found that the commissioner did not have to establish that there had been a given observation period as a prerequisite for the admission of test results and sustained the commissioner's revocation of appellant's driver's license. This appeal follows.

## **DECISION**

Appellant challenges the district court's order sustaining the revocation of appellant's driver's license. Appellant argues that the district court erred in admitting the

test results because the commissioner failed to establish the reliability of the test results because the officer could not testify as to the condition of the test chemicals, and the officer did not conduct a proper observation period. Appellant further argues that the burden to rebut the test results had not yet shifted to him because the commissioner had failed to make a sufficient showing of reliability.

We will not reverse the district court's findings of fact unless they are clearly erroneous. *Thompson v. Comm'r of Pub. Safety*, 567 N.W.2d 280, 281 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997); *see also* Minn. R. Civ. P. 52.01. "Conclusions of law will be overturned only upon a determination that the trial court has erroneously construed and applied the law to the facts of the case." *Dehn v. Comm'r of Pub. Safety*, 394 N.W.2d 272, 273 (Minn. App. 1986).

"The Minnesota Supreme Court has held that the results of a breathalyzer test may be admitted into evidence without antecedent expert testimony if the machine was operated by a certified operator and it is established that the machine was in proper working order and the chemicals were in proper condition." *Zern v. Comm'r of Pub. Safety*, 371 N.W.2d 82, 83 (Minn. App. 1985) (citing *State, Dep't of Pub. Safety v. Habisch*, 313 N.W.2d 13, 15 (Minn. 1981); *State, City of St. Louis Park v. Quinn*, 289 Minn. 184, 187-88, 182 N.W.2d 843, 845 (1971)). "Once a prima facie showing of trustworthy administration has occurred, it is incumbent on the opponent to suggest a reason why the test was untrustworthy." *Bond v. Comm'r of Pub. Safety*, 570 N.W.2d 804, 806 (Minn. App. 1997) (quoting *Ahrens v. Comm'r of Pub. Safety*, 396 N.W.2d 653, 655-56 (Minn. App. 1986)). "If the prima facie showing of the test's reliability is

challenged, the judge must rule upon the admissibility in the light of the entire evidence.” *Id.* at 806-07 (quoting *Noren v. Comm’r of Pub. Safety*, 363 N.W.2d 315, 318 (Minn. App. 1985) (other quotation omitted)).

A. *Reliability*

Appellant relies on *State v. Dille*, 258 N.W.2d 565, 567 (Minn. 1977), in arguing that because the administration of the Intoxilyzer test in this case followed procedures that would not ensure the machine’s reliability, the commissioner failed to establish the reliability of the test, and therefore, the test results should not have been admitted.

In *Dille*, our supreme court stated:

The proponent of a chemical or scientific test must establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability . . . . Without a foundation guaranteeing the test’s reliability, the test result is not probative as a measurement and hence is irrelevant.

*Id.* It is the state’s burden to provide “a sufficient indicium of reliability to establish the prima facie admissibility of the test results. It [is] then incumbent upon defendant to suggest a reason why the . . . test was untrustworthy.” *Id.* at 568. Appellant characterizes the standard set forth in *Zern* as an erosion of the standard articulated in *Dille*. But the standard articulated in *Zern* and applied in implied-consent cases is not an erosion of *Dille*. Rather, *Zern* discusses how the threshold established by *Dille* is met. *See Zern*, 371 N.W.2d at 83. The commissioner, as the proponent of the test, must establish that “the machine was operated by a certified operator and . . . that the machine was in proper working order and the chemicals were in proper condition.” *Id.* By making this showing,

the commissioner establishes that a test is reliable and that its administration in a particular case conforms with procedures necessary to ensure reliability. *See Dille*, 258 N.W.2d at 567 (stating that the proponent of a test must establish the reliability of the test and conformity with procedures necessary to ensure reliability). If the commissioner cannot meet this burden in a particular case, then the test result is not probative and should not be admitted. *Id.*

Officer Bluml was a certified operator, and the Intoxilyzer-test record established that the machine was in working order and that the chemicals were in proper condition. Applying the standard articulated in *Zern*, we conclude that the commissioner made a sufficient prima facie showing of the reliability of the breath test as admitted by the district court. *See Zern*, 371 N.W.2d at 83. Accordingly, the burden shifted to appellant to produce evidence of why the test results were not reliable. *Bond*, 570 N.W.2d at 806. At the implied-consent hearing, appellant presented no evidence that would suggest that the results of the breath test in this case were unreliable. We therefore conclude that appellant failed to meet his burden.

#### *B. Scientific Standard*

Appellant argues that the standard for reliability of a breath test, as promulgated by the courts, has no basis in science and that no standard has been promulgated by the agency assigned the responsibility of providing such guidance.<sup>1</sup> However, appellant

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<sup>1</sup> At oral argument, counsel for appellant urged this court to take judicial notice of a report promulgated by the National Safety Council. Counsel did not provide copies of the report nor an accurate title for it. This document does not exist in the record before this court and was not introduced to the district court. Therefore, it is not properly before

provides no authority to support this argument. Appellant argues that this court should adopt a new standard for determining the reliability of breath-test results. As previously stated, there is ample precedent for determining the reliability of test results. *See Zern*, 371 N.W.2d 83; *Dille*, 258 N.W.2d at 567. We also note that appellant did not present these arguments to the district court. Therefore, they are not properly before this court. *See Theile v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

*C. Condition of Test Chemicals*

Appellant argues that because the officer who administered the test was unable to provide testimony regarding the condition of the simulator solution, the commissioner failed to establish that the test was reliable. This argument is without merit. This court has previously rejected a similar argument. *See Bond*, 570 N.W.2d at 807 (stating that evidence showing that the simulator solution had been used beyond its expiration date, without more, was not sufficient to rebut a prima facie showing of reliability). Moreover, the record does not support appellant's argument. The Intoxilyzer-test record notes that the simulator solution had been changed on January 31, 2007 by "D P Peterson" and that 135 samples remained.

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this court. As an appellate court, we decide cases based on the record before the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (holding that this court generally will not consider matters not argued and considered in the court below). Appellant's counsel attempted to submit a copy of the report in question under Minn. R. Civ. App. P. 128.05 as supplemental authority. The submission of the report is not supplemental authority under the rule and will not be considered.

#### *D. Observation Period*

Appellant next argues that the commissioner did not make a sufficient prima facie showing of reliability to the district court because the officer who administered the breath test did not conduct an effective observation period as recommended by the BCA. Appellant relies on *McGregor v. Comm’r of Pub. Safety*, 386 N.W.2d 339 (Minn. App. 1986), in arguing that an observation period that is conducted in such a way as to render it useless does not ensure the reliability of the subsequent breath test. In discussing the observation period, this court in *McGregor* stated that “the officer had no understanding of the purpose of the procedure, thus making it impossible to ensure the reliability of the test” and affirmed the district court’s finding that the results of the breath test were unreliable. *Id.* at 341.

*McGregor* is distinguishable from the present case. Here, the officer conducting the observation was certified to administer Intoxilyzer tests, understood the procedures, and knew why he should be observing appellant. It cannot be said that Officer Bluml had “no understanding of the purpose of the procedure.” *Id.*

Appellant also argues that the necessity of an observation period is demonstrated by the presence of a line on the test record for the observer to indicate that the observation period was conducted. Appellant argues that the Intoxilyzer assumes that a test sample is free from contaminants and that unless there is a proper observation period to ensure the sample is free, the test cannot be considered reliable.

“The purpose of the observation period is to preclude the possibility that the testimony may be affected by mouth alcohol, resulting from burping or vomiting.” *State*

*v. Nelson*, 399 N.W.2d 629, 631 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987). “[F]ailure to properly observe does not necessarily invalidate the test results, but it does give the driver an opportunity to explain why this might make the test unreliable.” *Id.* at 632. “Therefore, once the proponent of the test has shown that the necessary steps have been taken to ensure reliability, it is incumbent on the driver to suggest a reason why the . . . test was untrustworthy.” *Id.* (citing *Dille*, 258 N.W.2d at 568).

Officer Bluml did admit that he was not focused on appellant for the entire 15 to 20 minutes that appellant was seated in the back of the squad car. The district court found that Officer Bluml’s observation of appellant “was not direct at all times, but it was good enough. More importantly, nothing has come forward from [appellant] to show that anything happened, like he had anything in his mouth, that he burped or belched, regurgitated, anything of that sort.” Based on this record, we conclude that the district court’s finding is not clearly erroneous.

Accordingly, we conclude that to the extent there is any burden on the commissioner to establish adequate observation, Officer Bluml’s observations were adequate, a prima facie case of reliability was established, the test results were admissible, and appellant had the burden of rebutting the test results, which he did not do.

**Affirmed.**

Dated: