

No. A08-440

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STATE OF MINNESOTA

IN COURT OF APPEALS

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Travis Jonathan Schulz,

Appellant,

vs.

Commissioner of Public Safety,

Respondent.

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**RESPONDENT'S BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## LEGAL ISSUES

- I. Whether Appellant clearly requested additional testing thereby requiring the arresting officer to vindicate that right.

The trial court held: In the negative.

*DeBoer v. Commissioner of Public Safety*, 406 N.W.2d (Minn. Ct. App. 1987).

*Przymus v. Commissioner of Public Safety*, 488 N.W.2d 829 (Minn. Ct. App. 1992) *review denied* (Minn. Sept. 15, 1992).

*Ringwelski v. Commissioner of Public Safety*, No. A06-2416 (Minn. Ct. App. Feb. 12, 2008) (unpublished opinion).

## STATEMENT OF THE CASE AND FACTS

This is an appeal from a District Court Order sustaining the revocation of Appellant's driver's license under authority of Minn. Stat. § 169A.50-.53 (2006), the Implied Consent Law. The matter arises from Appellant's DWI arrest on June 9, 2007, and the subsequent revocation of his driving privileges for submitting to an alcohol concentration test which disclosed a .09 reading. The matter came before The Honorable Robert B. Varco, Judge of Sherburne County District Court, on January 18, 2008. By an Order dated January 23, 2008, the trial court sustained the revocation of Appellant's driver's license. *See generally* Trial Court Findings of Fact, Conclusions of Law and Order, reproduced in Respondent's Appendix at RA1.<sup>1</sup> From that Order, Appellant takes the instant appeal.

On June 9, 2007, City of Elk River Police Officer Todd Erickson was on duty when he stopped and arrested Appellant for DWI. T. 4-5.<sup>2</sup> The Minnesota Implied Consent Advisory form was read to Appellant at the scene of the arrest. T. 6. Appellant was asked if he would submit to urine testing. T. 8; *see also* Exhibit 1<sup>3</sup>. When the Implied Consent Advisory form was read to him, Appellant became upset because he was

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<sup>1</sup> "RA" references are to pages of Respondent's Appendix attached hereto. The Trial Court's Findings of Fact, Conclusions of Law and Order is reproduced in Respondent's Appendix at RA1 - RA4.

<sup>2</sup> "T." references are to pages of the transcript of the hearing held on January 18, 2008, before The Honorable Robert B. Varco, Judge of Sherburne County District Court, Tenth Judicial District.

<sup>3</sup> Exhibit 1 is the Minnesota Implied Consent Advisory form that was read to Appellant and was admitted into evidence at the implied consent hearing. T. 5, 6.

not being offered a blood test. T. 6. Appellant stated that he would like to take a blood test instead. T. 7. Officer Erickson explained to Appellant that he was not offering a blood test and repeated that he was requesting a urine test. T. 7-8. Appellant stated, "I'm not refusing, but what happens if I don't want to take a urine test." T. 8. Officer Erickson responded that if he declined to take a urine test, that an alternative breath test would be offered. T. 8. At that time, Appellant was transported to Sherburne County Jail where he complained again about not being offered a blood test. T. 8, 9. However, according to Officer Erickson, "he wasn't requesting an additional test." T. 6, 8-9. A urine test was eventually administered to Appellant which disclosed an alcohol concentration reading of .09. T. 5. After the urine test was administered, there was no further discussion regarding alcohol concentration testing. T. 6-8. Officer Erickson never told Appellant that he had a right to an independent test because Appellant neither asked for nor wanted an additional test. T. 9.

At the close of the implied consent hearing, the trial court took the matter under advisement and in its Findings of Fact, Conclusions of Law and Order dated January 23, 2008, the trial court made a finding of fact that Petitioner did not request an additional test; rather, he was seeking an alternative blood test offer. Specifically, the trial court stated:

Although Petitioner informed Officer Erickson during the Advisory that he wanted a blood test instead of the urine test Officer Erickson offered, he never requested a test in addition to the initial test. In fact, the undisputed testimony indicates that Petitioner said nothing about any form of testing after he submitted to the initial test.

Trial Court Findings of Fact, Conclusions of Law and Order, at pg. 3. From that Order, Appellant takes this appeal.

## ARGUMENT

### I. STANDARD OF REVIEW.

The trial court's findings of fact are entitled to the same weight as the verdict of a jury and cannot be reversed if the court can reasonably make the findings of fact based upon the evidence adduced at trial. *See Thompson v. Commissioner of Public Safety*, 567 N.W.2d 280 (Minn. Ct. App. 1997). When a trial court has the opportunity to judge witness credibility, findings of fact will not be set aside unless they are clearly erroneous. *See Thorud v. Commissioner of Public Safety*, 349 N.W.2d 343 (Minn. Ct. App. 1984). Conclusions of law, on the other hand, can be overturned upon a showing that the trial court erroneously construed and applied the law to the facts of the case. *See Dehn v. Commissioner of Public Safety*, 394 N.W.2d 272, 273 (Minn. Ct. App. 1986).

The question of whether a driver's right to an additional test was vindicated presents a mixed question of law and fact. Once the facts are found, it must be determined whether the trial court correctly applied the law. *See Mulvaney v. Commissioner of Public Safety*, 509 N.W.2d 179, 181 (Minn. Ct. App. 1993).

Here, Appellant challenges the trial court's factual findings and legal conclusions. Respondent submits that the trial court's finding that he did not request an additional test has ample support in the record and is not clearly erroneous. The trial court properly applied the law to the facts as found by the court and concluded that Appellant's right to additional testing was not prevented or denied since he did not clearly request an

additional test. Accordingly, the trial court's order sustaining the revocation of Appellant's driving privileges should be affirmed.

**II. APPELLANT HAS FAILED TO DEMONSTRATE THAT THE TRIAL COURT CLEARLY ERRED IN FINDING THAT HE DID NOT REQUEST ADDITIONAL TESTING.**

Appellant argues that Officer Erickson was sufficiently placed on notice that he wanted an "additional test" when he asked if he could take a blood test rather than a urine test. *See* Appellant's Brief at 15. Respondent submits that the trial court's finding of fact that Appellant did not request an independent or additional test is supported by the record below and is not clearly erroneous. Furthermore upon making that findings of fact, the trial properly applied the law in concluding that Officer Erickson did not prevent or deny Appellant's right to an additional test.

In order to prevail on appeal, Appellant must demonstrate that the trial court's finding of fact are clearly erroneous. Appellate courts give great deference to trial court findings of fact because trial courts have the advantage of hearing live testimony, assessing the relative credibility of the witnesses, and acquiring an understanding of the circumstances of the matter before them. *See Hasnudeen v. Onan Corp.*, 552 N.W.2d 555 (Minn. 1996). Respondent submits that the trial court's findings of fact that Appellant did not request an additional test but rather that he was requesting an alternative blood test, is amply supported by the record below and that Appellant has failed to demonstrate that this determination was clearly erroneous.

A DWI suspect is entitled to obtain an independent or additional test after the test administered at the direction of the police officer has been completed. Minn. Stat. § 169A.51, subd. 7(b) (2006) provides:

[T]he person tested has the right to have someone of the person's own choosing administer a chemical test or tests in addition to any administered at the direction of a peace officer; provided, that the additional test sample on behalf of the person is obtained at a place where the person is in custody, after the test administered at the direction of the peace officer, and at no expense to the state. The failure or inability to obtain an additional test or tests by a person does not preclude the admission in evidence of the test taken at the direction of the peace officer unless the additional test was prevented or denied by the peace officer.

*Id.*

Although a driver has the right to exercise their option to obtain an additional test after submitting to the test administered by law enforcement, a driver may not claim that his or her statutory right to an additional test was prevented or denied if the driver provides no evidence to show that a request for an additional test was *clearly made and communicated* to law enforcement. See *DeBoer v. Commissioner of Public Safety*, 406 N.W.2d 43 (Minn. Ct. App. 1987); see also *Przymus v. Commissioner of Public Safety*, 488 N.W.2d 829 (Minn. Ct. App. 1992) *review denied* (Minn. Sept. 15, 1992) (if driver did not make clear his request for an additional test, the officers could not have hindered his attempt to obtain one); *State v. Downs*, No. C5-99-265 (Minn. Ct. App. Nov. 23,

1999) (unpublished opinion)<sup>4</sup> (it is the obligation of the person arrested to make clear the intent to have a second test administered); *Newquist v. Commissioner of Public Safety*, No. C7-00-1666 (Minn. Ct. App. May 22, 2001) (unpublished opinion)<sup>5</sup> (a driver's right to an additional test is waived if he does not make clear his intent to have a second test administered); *Chinander v. Commissioner of Public Safety*, No. CX-92-982 (Minn. Ct. App. November 23, 1992) (unpublished opinion)<sup>6</sup> (before a driver can argue the right to obtain an additional test was prevented or denied, the driver must first have actually attempted to exercise the right).

In *DeBoer*, a case very similar to the instant matter, the motorist was offered a breath test, but asked for a blood test instead. The trooper explained to DeBoer that he was only offering a breath test.<sup>7</sup> After administration of the breath test, DeBoer did not renew his request for a blood test or otherwise put law enforcement on notice that he wanted an additional test. In concluding that DeBoer's right to an additional test was not

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<sup>4</sup> Pursuant to Minn. Stat. § 480A.08, subd. 3 (2006), a copy of *State v. Downs*, No. C5-99-265 (Minn. Ct. App. Nov. 23, 1999) (unpublished opinion), is reproduced in Respondent's Appendix at RA5.

<sup>5</sup> Pursuant to Minn. Stat. § 480A.08, subd. 3 (2006), a copy of *Newquist v. Commissioner of Public Safety*, No. C7-00-1666 (Minn. Ct. App. May 22, 2001) (unpublished opinion), is reproduced in Respondent's Appendix at RA9.

<sup>6</sup> Pursuant to Minn. Stat. § 480A.08, subd. 3 (2006), a copy of *Chinander v. Commissioner of Public Safety*, No. CX-92-982 (Minn. Ct. App. November 23, 1992) (unpublished opinion), is reproduced in Respondent's Appendix at RA18.

<sup>7</sup> A driver who is offered a breath test has no right under the implied consent statute to refuse a breath test and demand that a blood test be administered instead. See *Forrest v. Commissioner of Public Safety*, 366 N.W.2d 371 (Minn. Ct. App. 1985).

violated, this Court stated that: “because he did not assert his right to an *additional* test . . . his rights were not violated.” *DeBoer*, 406 N.W.2d at 46 (emphasis added). In so concluding, the Court placed the onus on the driver to clearly manifest his demand for additional testing.

In this case, it is undisputed that Appellant never told Officer Erickson that he wanted to obtain a blood test *in addition* to the breath test. It is also undisputed that he did not raise the issue of a blood test again after taking the urine test. If Appellant had genuinely wanted an independent test, he could have simply manifested his desire to obtain one. Respondent submits that if a mere inquiry about taking an alternative blood test is insufficient to invoke the right to an additional test under *DeBoer*, then Appellant’s request for a blood test in this case should also be deemed to be insufficient to invoke the right.

Recently, this Court again examined whether a motorist’s discussion about taking an alternative test amounted to a request for an additional test. In *Ringwelski v. Commissioner of Public Safety*, No. A06-2416 (Minn. Ct. App. Feb. 12, 2008) (unpublished opinion),<sup>8</sup> a Coon Rapids Police Officer was on duty when he stopped and arrested a motorist for DWI. The Minnesota Implied Consent Advisory form was read to the motorist and the officer requested a breath test. The motorist responded to his offer of the breath test by requesting a blood test instead. The officer explained to the motorist

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<sup>8</sup> Pursuant to Minn. Stat. § 480A.08, subd. 3 (2006), a copy of *Ringwelski v. Commissioner of Public Safety*, No. A06-2416 (Minn. Ct. App. Feb. 12, 2008) (unpublished opinion), is reproduced in Respondent’s Appendix at RA23.

that he was not offering a blood test, that he was offering a breath test. The motorist agreed to submit to the breath test and no further conversation concerning a blood test occurred. Additionally, at no time after taking the breath test did the motorist inquire about additional testing. As in the instant matter, the motorist later argued that her inquiry about an alternative should have been interpreted as a request for an additional test. In rejecting the motorist's position, this court stated:

Our initial inquiry is whether the district court's finding that Ringwelski never requested a second blood test was clearly erroneous. This case is similar to *DeBoer v. Comm'r of Pub. Safety*, 406 N.W.2d 43, 45 (Minn. App. 1987), where the arrestee requested a blood test in response to the police officer's initial request that the arrestee take an Intoxilyzer breath test. After taking the Intoxilyzer test, the arrestee did not renew his request for a blood test. *Id.* This court held that the arrestee did not assert his right to an additional test and his rights were not violated. *Id.* at 46. We reached the same result in *Przymus v. Comm'r Pub. Safety*, 488 N.W.2d 829, 833 (Minn. App. 1992), *review denied* (Minn. Sept. 15, 1992).

Here, Ringwelski requested a blood analysis when the officer was asking for her consent to the Intoxilyzer test as authorized under Minn. Stat. § 169A.51, subd. 3. The district court found, based on the testimony of Ringwelski and the arresting officer, that Ringwelski did not request a test in addition to the Intoxilyzer test. *See Umphlett v. Comm'r of Pub. Safety*, 533 N.W.2d 636, 639 (Minn. App. 1995) (concluding that, in resolving the issue regarding denial of an additional test against the driver, the district court implicitly found the officer's testimony that driver did not request an additional test to be more credible than driver's contrary testimony), *review denied* (Minn. Aug. 30, 1995). Because we conclude that the district court was not clearly erroneous in finding that Ringwelski failed to renew her demand for a blood test *after and in addition to* the Intoxilyzer test, we rule that the officer did not prevent or deny Ringwelski's right to a second test.

*Id.* at slip op. 4-5 (emphasis in original).

Here, as in *Ringwelski*, the trial court made a factual finding based on the trial testimony that Appellant did not request an additional test. Here as in *Ringwelski*,

Appellant did not request an additional test after the initial test was administered. Here as in *Ringwelski*, the trial court's findings of fact that Appellant did not request an additional test is not clearly erroneous. As in *Ringwelski*, this Court should conclude that the trial court did not clearly err in determining that Appellant failed to adequately put the arresting officer on notice that he desired to obtain an additional test. Accordingly, the trial court's conclusion that Appellant's right to an additional test was not prevented or denied by law enforcement should not be disturbed on appeal.

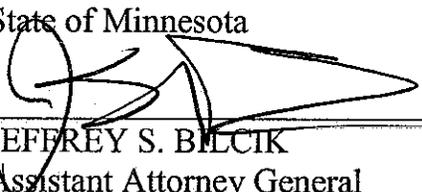
### CONCLUSION

Appellant has failed to demonstrate that the trial court clearly erred in making its determination that Appellant did not request an additional test. Also, the trial court correctly concluded as a matter of law that Appellant's right to an additional test was not violated when it was neither prevented or denied by the police. Accordingly, Respondent submits that the trial court's decision should be affirmed.

Dated: 6-10-08

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