

This opinion will be unpublished and may not be cited except as provided by Minn.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
A08-1267**

Ashley Jean Bowen, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed May 12, 2009
Reversed and remanded
Peterson, Judge**

Washington County District Court
File No. 82-CV-08-1762

Stefan A. Tolin, Suite 845, Rand Tower, 527 Marquette Avenue South, Minneapolis, MN 55402-1316 (for appellant)

Lori Swanson, Attorney General, Emerald Gratz, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134 (for respondent)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this implied-consent case, appellant argues that the district court erred by denying her motion to compel discovery of the source code for the Intoxilyzer 5000 EN.

Respondent argues that the district court lacked jurisdiction to decide appellant's motion. We reverse and remand.

FACTS

Appellant Ashley Jean Bowen was arrested for driving while impaired. She consented to a breath test, which was performed using the Minnesota model of the Intoxilyzer 5000 EN (Intoxilyzer). The breath test indicated an alcohol concentration of 0.11, and appellant's driving privileges were revoked. Appellant filed a petition for judicial review of the revocation in which she asserted that "the breath test from the Intoxilyzer 5000 EN, was invalid and/or unreliable." The petition also included a demand for discovery of "[a]ll Source Codes and changes in Source Codes since January 1, 1997 of the Intoxilyzer used in the instant case." By letter, respondent commissioner of public safety refused to disclose the source code on the grounds that respondent did not have possession or control of the source code and the request was (1) not reasonably calculated to lead to the discovery of relevant and admissible evidence; (2) overly broad and unduly burdensome; (3) outside the scope of discovery under Minn. Stat. § 169A.53, subd. 2d (2006); and (4) outside the court's jurisdiction.

Appellant then filed a motion to compel discovery pursuant to Minn. Stat. § 169A.53 (2006). Appellant argued that the source code was potentially relevant to whether the Intoxilyzer functioned properly and produced a reliable result. Along with her motion, appellant filed an affidavit of Thomas Workman, a source-code expert, and a paper that Workman wrote that explains what a source code is and the role that a source

code plays in producing test results from a breath-test machine. The paper also explains generally how an error in a source code could lead to an error in a test result.

The district court denied appellant's motion to compel discovery of the source code and sustained the revocation of appellant's driving privileges. The court reasoned that (1) respondent had made a prima facie showing of the reliability of the Intoxilyzer during the rulemaking proceeding that approved the Intoxilyzer for use in Minnesota and (2) because appellant had made no showing beyond mere speculation that the Intoxilyzer was unreliable, the discovery request was not reasonably calculated to lead to the discovery of admissible evidence. This appeal followed.

DECISION

I.

Respondent argues that the district court lacked subject-matter jurisdiction to decide appellant's discovery request regarding the source code. "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). The issue of subject-matter jurisdiction may be raised at any time in the proceedings. *Dead Lake Ass'n v. Otter Tail County*, 695 N.W.2d 129, 134 (Minn. 2005).

Based on the fact that the Bureau of Criminal Apprehension formally adopted Minn. R. 7502.0420 (2007), which approves the use of the Intoxilyzer, respondent argues that appellant's discovery request is essentially "a challenge to the validity of the approved testing process." Respondent contends that appellant's motion to compel discovery is a challenge to an administrative-agency rule, and the Minnesota

Administrative Procedure Act, Minn. Stat. §§ 14.001-.69 (2008) (MAPA), vests sole review of agency rules in the court of appeals.

The supreme court has expressly rejected the argument that district courts lack subject-matter jurisdiction over source-code discovery requests. In *Underdahl v. Comm’r of Pub. Safety (In re Comm’r of Pub. Safety)*, 735 N.W.2d 706, 708 (Minn. 2007) (*Underdahl I*), the district court ordered discovery of the source code, and the commissioner of public safety challenged the order by writ of prohibition. The supreme court explained:

The commissioner argues . . . , that because [Minn. Stat. § 634.16] establishes that an approved breath-testing instrument is presumed reliable, the only way to challenge the reliability of the instrument is to challenge the administrative rule that approved the instrument for statewide use. The commissioner then asserts that, because [MAPA] gives the court of appeals exclusive subject matter jurisdiction over challenges to administrative rules, the district court lacked jurisdiction to order discovery of the source code.

Underdahl I, 735 N.W.2d at 710.

The supreme court noted that the appellant was challenging his specific test results, not the validity of the administrative rule in its entirety, and held that, because Minn. Stat. § 169A.53 specifically permits a driver to challenge the presumption of reliability and accuracy of the driver’s test results, the district court had jurisdiction to order discovery of the source code. *Id.* at 710-11. Because respondent’s argument in the present case is the same argument that the supreme court rejected in *Underdahl I*, we reject the argument and conclude that the district court had jurisdiction to hear appellant’s motion to compel discovery of the Intoxylizer source code.

II.

Appellant argues that the district court erred by denying her motion to compel discovery. “The district court has considerable discretion in granting or denying discovery requests and, absent abuse of that discretion, will not be reversed on appeal.” *Berge v. Comm’r of Pub. Safety*, 588 N.W.2d 177, 179 (Minn. App. 1999).

The implied-consent statute states that judicial reviews must be conducted according to the rules of civil procedure, except that prehearing discovery is mandatory and limited to the notice of revocation, the test record, documentation submitted by the peace officer, and disclosure of potential witnesses. Minn. Stat. § 169A.53, subd. 2(d) (2008). The statute allows other types of discovery upon order of the court. *Id.* The rules of civil procedure generally permit the discovery of material that “appears reasonably calculated to lead to the discovery of admissible evidence.” Minn. R. Civ. P. 26.02(a).

In an opinion that was released after oral argument in this case, this court addressed the interplay between Minn. Stat. § 169A.53, subd. 2(d) (2006), and Minn. R. Civ. P. 26 and concluded that

if a petitioner moves the court for nonmandated discovery [under Minn. Stat. § 169A.53, subd. 2(d)]—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. 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.

Abbott v. Comm’r of Pub. Safety, 760 N.W.2d 920, 925 (Minn. App. 2009), *pet. for review filed* (Minn. Mar. 20, 2009).

This court further explained:

For example, Minn. Stat. § 169A.53, subd. 3(b)(10), establishes that a petitioner is entitled to inquire whether the testing method used to measure alcohol concentration was “valid and reliable.” 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.

Id. at 925-26; *see also State v. Underdahl*, ___N.W.2d ___, ___, 2009 WL 1150093, at *8 (Minn. Apr. 30, 2009) (holding that in criminal prosecution for driving while intoxicated, district court did not abuse its discretion in concluding that source code may relate to driver’s guilt or innocence when driver’s submissions showed that an analysis of Intoxilyzer source code may reveal deficiencies that could challenge reliability of Intoxilyzer).

The Workman paper that appellant submitted to the district court shows that the source code used in a breath-test machine is capable of bearing on the validity and reliability of test results produced by the machine. Consequently, discovery of the source code would be relevant to appellant’s claim in her petition that “the breath test from the Intoxilyzer 5000 EN, was invalid and/or unreliable,” and discovery of the source code is reasonably calculated to lead to the discovery of admissible evidence. Therefore, we conclude that under *Abbott*, the district court abused its discretion when it concluded that appellant’s discovery motion was not reasonably calculated to lead to the discovery of

admissible evidence,¹ and we reverse the order that denies the motion and sustains the revocation of appellant's driving privileges and remand for further proceedings.

Reversed and remanded.

¹ In reaching its conclusion that to obtain discovery, appellant must present evidence beyond mere speculation that questions the trustworthiness of the Intoxilyzer report, the district court relied on *Kramer v. Comm'r of Pub. Safety*, 706 N.W.2d 231, 236 (Minn. App. 2005). But that opinion addresses the sufficiency of evidence at an implied-consent hearing to rebut a prima facie showing of reliability of test results; it does not address discovery of evidence in preparation for a hearing.