STATE OF MINNESOTA
IN COURT OF APPEALS
A10-749

Mark A. Hansen, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed January 4, 2011
Reversed and remanded
Ross, Judge

Crow Wing County District Court
File No. 18-CV-08-5454

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

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

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

The state revoked Mark Hansen's driver's license after a police officer deemed that his providing a weak breath sample constituted refusal to submit to an alcohol-content test in violation of Minnesota's implied-consent law. Hansen moved the district

court to compel the state to disclose the Intoxilyzer 5000EN source code so he could prove that a defect in the Intoxilyzer's software caused the machine to reject the breath sample as inadequate. The district court held the source code to be irrelevant because an officer's testimony that Hansen intentionally offered an inadequate breath sample independently proved that Hansen had effectively refused the test. Because caselaw establishes that only the machine determines breath-sample inadequacy, the officer's observations about the sample's inadequacy does not render irrelevant technical evidence about the machine's proper functioning. We therefore reverse.

FACTS

A natural resources officer stopped Mark Hansen's ATV and noticed that Hansen smelled of alcoholic beverages and had watery eyes. The officer administered a hand-held breath test and arrested Hansen.

Officer Raymond Birkholtz twice attempted to administer a breath test using the Intoxilyzer 5000EN at the Crow Wing County jail. Before each attempt, he performed various diagnostic tests to verify the machine's proper functioning. Hansen verbally agreed to take the test, twice approached the machine, put the tube in his mouth, and exhaled air. Twice the Intoxilyzer 5000EN indicated that he did not expel enough air into its mouthpiece for the machine to calculate his alcohol content.

Birkholtz thought Hansen had merely feigned compliance and that he had intentionally provided an inadequate breath sample by using his tongue to block the mouthpiece and by failing to seal his lips around it when pretending to blow into the machine. He believed that Hansen "was purposely messing with the test and attempting

to not provide a sample." He repeatedly told Hansen to make a tight seal around the mouthpiece and exhale steadily. The state revoked Hansen's license for refusing to provide an adequate sample in violation of Minnesota's implied-consent law, Minnesota Statutes section 169A.52 (2008).

Hansen challenged the revocation and moved the district court to compel discovery of the Intoxilyzer 5000EN source code. The court scheduled a combined administrative implied-consent and criminal omnibus hearing, but on the day of the hearing, the parties agreed that they would address only the discovery issue. In addition to Birkholtz's and the arresting officer's testimony, the district court received testimony from Thomas Burr, a forensic expert called by Hansen, and Karin Kierzek, a forensic expert called by the public safety commissioner.

Burr relied on the written records from both tests, the officer's written observations, the machine's maintenance and usage records, police reports, and e-mails between BCA scientists and the Intoxilyzer 5000EN manufacturer regarding testing of the Intoxilyzer 5000EN. He testified that a software problem in the Intoxilyzer 5000EN may have contributed to the machine's inability to test Hansen's breath. He specifically discussed the effects of a software problem related to the machine's ability to test a subject's breath sample:

> According to the BCA test, the harder you blow, the more liters are required for you to satisfy the device. So if the subject is blowing and not satisfying the device, you tell them to blow harder, harder. The result of that would be that they will have to have more liters of air than if they don't blow as hard, so to speak.

Burr also testified that the Intoxilyzer's manufacturer identified and fixed the software problem, but that the corrected version of the software was never implemented by the BCA. He said that Hansen's access to the source code would help show whether Hansen had intentionally deceived the system or whether the deficient sample was instead the result of a software problem. He opined that the software error could have caused the machine's failure to register the sample regardless of whether Hansen had made a tight seal:

> If a person steps up and blows into an Intoxilyzer, the fact that air leaks around the mouth piece is of no consequence. That happens all the time. That's very common. I've done thousands of breath tests and that's very common and it doesn't prohibit people from giving samples in a properly designed sampling system.

Karin Kierzek, a BCA scientist, acknowledged the existence of the software error but opined that the error was not related to the Intoxilyzer's inability to register Hansen's sample. She explained that the BCA had learned that one tested individual had been unable to cause the machine to register her breath sample after "blowing incredibly hard." She and two colleagues successfully replicated the problem in testing. She testified that they found that when blowing "eye-popping hard," there is a large increase in the volume of air needed to accept a sample, if the machine will accept it at all.

After that evaluation, BCA scientists asked the Intoxilyzer's manufacturer about the sample-acceptance problem. The manufacturer sent the BCA a software update, but Kierzek did not believe that the update was related to the problem. Kierzek acknowledged that she is "potentially" aware of a problem with the current version of

software that would cause the machine to reject what should be a valid breath sample. She knows that the Intoxilyzer's manufacturer "purportedly" provided the BCA with a fix to correct the sampling problem, but she testified that the BCA did not test it.

The district court denied Hansen's request to compel discovery. It held that the source code was irrelevant because Officer Birkholtz's testimony that Hansen appeared to intentionally avoid blowing directly into the machine was sufficient to prove that Hansen had refused the test by his conduct regardless of any sample-acceptance technical failure. A second hearing was scheduled for remaining issues but the district court struck that hearing from its calendar after it concluded that Hansen had previously waived all other issues. It sustained the license revocation. Hansen appeals.

D E C I S I O N

Hansen challenges his license revocation. The public safety commissioner may revoke an individual's driver's license if a peace officer has probable cause to believe that he was driving while impaired and he "refused to submit to a test." Minn. Stat. § 169A.52, subd. 3(a) (2008). The driver may petition for post-revocation review through an implied-consent hearing governed by the Minnesota Rules of Civil Procedure. Minn. Stat. § 169A.53, subd. 2(d) (2010). Hansen contends that the district court should have allowed him to discover the source code and that it should not have deemed his other issues to be waived.

I

First we address whether the district court erred by denying Hansen's motion to compel the state to disclose the Intoxilyzer 5000EN source code. We review district

court discovery orders for abuse of discretion. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). And we reverse if "the district court made findings unsupported by the evidence or . . . improperly appl[ied] the law." *Id.* The combined implied-consent and omnibus hearing was governed by separate but similar discovery rules. Minnesota Rule of Civil Procedure 26.02(a) permits discovery of any matter "relevant to a claim or defense," and Minnesota Rule of Criminal Procedure 9.01, subd. 2(3) permits discovery of any matter relevant "to the guilt or innocence of the defendant."

The seminal case for determining whether the Intoxilyzer's source code is relevant under the criminal rule is *State v. Underdahl (Underdahl II)*, 767 N.W.2d 677 (Minn. 2009), which illustrates two points on the relevancy continuum. That case held that a failure to make any "threshold evidentiary showing [of relevance] whatsoever" would justify a finding of irrelevance. *Id.* at 685. But it also held that attaching to the motion "source code definitions, written testimony of a computer science professor that explained issues surrounding the source codes and their disclosure, and an example of a breath-test machine analysis and its potential defects," and explaining how "an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer and, in turn, would relate to [a defendant's] guilt or innocence," was sufficient to show relevance to compel discovery of the source code. *Id*. at 686.

Hansen provided sufficient evidence to support his theory that the source code was relevant in the *Underdahl II* framework. He presented expert testimony that a software problem could have caused the Intoxilyzer not to register his sample even if he blew the requisite amount of air into the machine. The state's expert not only acknowledged one

actual occurrence of machine failure, she also described simulated occurrences in which the Intoxilyzer was unable to register the breath sample of individuals blowing into the machine. Hansen's expert also pointed to a number of other inconsistencies and concerns about the Intoxilyzer software, focusing on the amount of breath required for the machine to obtain an objectively testable sample.

The district court relied on the officer's subjective assessment to hold that the source code was irrelevant because Hansen refused testing by his conduct. This reasoning is certainly logical, and we have no reason to doubt the quality of the officer's observations. But relying on the officer's reasonable observations alone to determine that the breath sample is inadequate is inconsistent with the statute as interpreted by caselaw. Under the relevant statute, "when a test is administered using an infrared or other approved breath-testing instrument, failure of a person to provide two separate, adequate breath samples in the proper sequence constitutes a refusal." Minn. Stat. § 169A.51, subd. 5(c) (2008). And "a sample is adequate if the instrument analyzes the sample and does not indicate the sample is deficient." *Id*., subd. 5(b). We have held that an identically worded statute "makes it clear that the Intoxilyzer, not the police officer, is to determine the adequacy of a breath sample." *Genia v. Comm'r of Pub. Safety*, 382 N.W.2d 284, 286 (Minn. App. 1986). And we found no statutory authority that, once the breath test began, "a refusal can be based on an officer's conclusion that a driver is not making a good-faith effort to provide an adequate sample." *Id.*

Genia controls here. Hansen stepped to the machine and blew air into it sufficient to cause the machine to engage and to assess the testability of the quantity of air that

Hansen was providing. So the breath test had begun. Because Hansen was blowing at least some air into the machine sufficient to begin the test, the machine was able to definitively determine the inadequacy of his sample. The officer's testimony might corroborate the machine's assessment that Hansen provided an inadequate quantity of air for the machine's qualitative testing, but that testimony does not render the machine's determinative assessment irrelevant. *See id*.

Because the district court denied Hansen's request for discovery by relying on the officer's subjective testimony about Hansen's conduct without regard to the greater significance of the machine's inadequacy assessment, it mistakenly deemed the machine's assessment irrelevant. We therefore reverse and remand to the district court to consider Hansen's motion to compel discovery in light of the relevance of the machine's proper functioning when it rejects a breath sample based on quantitative inadequacy.

II

Because further proceedings will occur on remand, we also address whether the district court violated Hansen's due process rights by concluding that he waived his right to contest all other issues in his implied-consent hearing. We review de novo due process issues that can be decided on undisputed facts. *Bendorf v. Comm'r of Pub. Safety*, 727 N.W.2d 410, 413 (Minn. 2007). And we will rely on a district court's findings of fact unless they are clearly erroneous. Minn. R. Civ. P. 52.01.

The record demonstrates that all parties were apparently confused about the scope of the combined administrative implied-consent and criminal omnibus hearing. Before it began, the court asked Hansen's attorney, Charles Ramsay, to clarify the issues for the

hearing. Ramsay listed four issues, including Hansen's motion to compel discovery of the source code. After reciting all four issues, the district court asked, "So all other issues raised in the Notice of Motion and Motion dated October 14, 2008, are waived?" Ramsay replied, "Yes, Your Honor."

But moments after this waiver, Ramsay qualified it. He said, "I'm uncomfortable having the sole issue or that there is a sole issue there. We are not waiving all of our issues in the Implied Consent case. We just think that we need to first necessarily address the discovery issue." The district court responded, "All right. So you want it treated as a discovery motion, reserving all other issues under the implied [consent] motion?" Ramsay replied, "Yes, please."

Kristi Neilsen, attorney for the state said, "[B]ut in light of the sole issue being whether or not the Source Code is needed, I guess I would ask for the Court's direction on how much testimony you would like." The district court responded:

> I see that it being a motion for discovery based upon the argument that the State should have incorporated its modified software into its system that would have addressed the issue that Counsel is raising as far as potentially deficient samples, and that I think is the issue, and then once we got past that hurdle, the issue of sustaining or not sustaining the revocation will go to your argument of whether or not it was a reasonable refusal.

Ramsay again clarified that the extant issue regarded discovery, and, citing *Underdahl II*, stated,

> [A]s long as we make it a very limited threshold showing, we're entitled to the Source Code. The question here, I believe, is what is the Source Code that we're entitled to? Are we entitled to just what has been provided or permitted

> under the federal settlement, or are we entitled to more? And that's how I see the hearing today, Your Honor, to determine that.

Hansen and the commissioner now disagree about whether the discussion indicates Hansen's intent to waive all issues except the discovery contest. But we are convinced from this record that Hansen did not intentionally waive any other issue. The district court's order denying discovery of the source code expressly reserved all other issues. In both the order and the amended order, the district court stated, "The issue presented to the court was whether Petitioner is entitled to discovery of the source code for the Intoxilyzer 5000EN ("Source Code"). All other issues identified in the petition were reserved by Petitioner."

The district court's description of Hansen's reservation of issues is well supported. Given Ramsay's statement expressly reserving all other issues, the district court's acknowledgment that the other issues were reserved, and the actual scheduling of an implied-consent hearing to resolve the other issues, the district court reasonably perceived that Hansen reserved all other issues.

In light of this, the district court's statement in its later order that "[a]t the outset of the hearing . . . [a]ll other issues were waived" is puzzling. That order amounts to the district court's *sua sponte* reversal of its earlier decision that Hansen had reserved the issues at the hearing, and the reversal came without notice to Hansen or without explanation. Both the United States and Minnesota constitutions provide that a person may not be deprived of life, liberty or property without due process of law. *See* U.S. Const. amend XIV, § 1; Minn. Const. Art. I, § 7. A driver's license is property. *Bell v.*

Burson, 402 U.S. 535, 539, 91 S. Ct. 1586, 1589 (1971). For license revocations, "[d]ue process requires a . . . meaningful postrevocation review." *Fedziuk v. Comm'r of Pub. Safety*, 696 N.W.2d 340, 346 (Minn. 2005). At a minimum, "the petitioner [must] be given the right to compel witnesses to attend the hearing and to cross-examine persons who prepared [police or lab] reports." *Id*. By reversing itself *sua sponte* and without notice to conclude that Hansen waived all remaining issues, the district court prevented Hansen from initial or appellate consideration of his previously asserted revocation issues other than the discovery issue. It is impossible for Hansen to have both reserved and waived the remaining issues, so the best explanation is that a mistake was made arising from the confusion. On remand, the district court should reconsider Hansen's discovery motion in light of our holding and address the unwaived issues.

Reversed and remanded.