STATE OF MINNESOTA
IN COURT OF APPEALS
A12-42

Annika Clair Andberg-Grahn,
petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed July 9, 2012
Affirmed
Huspeni, Judge[*]

Dakota County District Court
File No. 19HA-CR-10-1809

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

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

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Huspeni, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUSPENI, Judge

Appellant challenges a district court order upholding her license revocation under the implied-consent law. She claims that the district court either erred or abused its discretion by: (1) ruling that respondent Minnesota Commissioner of Public Safety met his burden to prove the reliability of procedures used to test her urine for the presence of alcohol; (2) applying the incorrect standard for spoliation of evidence and not sanctioning respondent for the intentional destruction of evidence; (3) denying appellant's motion for a *Frye-Mack*[1] hearing to challenge the scientific acceptance of first-void urine testing and to challenge the reliability of appellant's first-void urine test; and (4) upholding the constitutionality of the warrantless seizure and analysis of appellant's urine sample. We affirm.

FACTS

At approximately 1:00 a.m. on April 5, 2010, Mendota Heights police officer Michael Shepard stopped a vehicle driven by appellant Annika Andberg-Grahn. She was driving 69 miles per hour in a posted 55-mile-an-hour area on Highway 110, and she had crossed the centerline three times. Appellant admitted that she had been drinking, and Officer Shepard noticed indicia of her intoxication; he asked appellant to submit to field sobriety testing and a preliminary breath test, which she failed.

[1] "A *Frye-Mack* hearing is a pretrial hearing regarding the admissibility of scientific evidence." *State v. Tanksley*, 809 N.W.2d 706, 708 n.1 (Minn. 2012).

Appellant was placed under arrest and read the implied-consent advisory. After appellant provided a urine sample for testing by the Minnesota Bureau of Criminal Apprehension (BCA) that revealed an alcohol concentration of .09, appellant's driving privileges were revoked under the implied-consent law. Appellant later had an independent test conducted on the urine sample after it had been frozen for more than four months. This later test showed an alcohol concentration of .05.

Appellant petitioned for judicial review of her license revocation and moved for a *Frye-Mack* hearing on the scientific efficacy of using a first-void urine test to prove alcohol concentration. The district court denied the motion and issued an order excluding expert testimony on the issue.

At appellant's judicial review hearing, she offered expert testimony from Thomas Burr, a forensic scientist, who testified that the second test conducted on appellant's urine sample was reliable because it was conducted at Regions Hospital, whose testing procedures are approved by the BCA. Burr also noted that the differences in the two test results were significant and that there was no reason to believe that either laboratory's results were inaccurate.

Dr. Edward Stern, a BCA forensic toxicologist who testified for the commissioner, explained the difference in the two test results. He testified that the Regions Hospital test result did not undermine the validity of the BCA test result because a freezing process used to store appellant's urine sample could have caused evaporation of some alcohol, resulting in a lower alcohol concentration reading. The district court found Dr. Stern's testimony credible and concluded that the BCA test result was reliable and that appellant

did not meet her burden to show invalidation of the first test result. The court also concluded that appellant's Fourth Amendment rights were not violated by the warrantless collection of her urine for testing, and that appellant's due process rights were not violated in this case by spoliation or loss of evidence that resulted from the act of freezing the sample used for the independent test for preservation. The district court sustained revocation of appellant's driver's license, and this appeal resulted.

D E C I S I O N

I.

Appellant claims that the district court erred by concluding that the BCA test results on her urine sample were reliable to prove her alcohol concentration. "Upon the trial of any prosecution arising out of acts alleged to have been committed by any person arrested for [driving while impaired] . . . , the court may admit evidence of the presence or amount of alcohol in the person's blood, breath, or urine as shown by an analysis of those items." Minn. Stat. § 169A.45, subd. 1 (2010). Other "competent evidence" bearing on whether the person was driving while impaired may also be admitted at trial. Minn. Stat. § 169A.45, subd. 4 (2010). The commissioner has the burden to establish "a prima facie case that the test is reliable and that its administration conformed to the procedure necessary to ensure reliability." *Genung v. Comm'r of Pub. Safety*, 589 N.W.2d 311, 313 (Minn. App. 1999) (quotation omitted), *review denied* (Minn. May 18, 1999); *see King v. Comm'r of Pub. Safety*, 366 N.W.2d 613, 615 (Minn. App. 1985) (stating that commissioner's burden of proof in implied consent cases is by preponderance of the evidence). If this burden is met by the commissioner, the burden

shifts to the driver to show "why the test is untrustworthy," although the burden of persuasion remains with the commissioner. *Genung*, 589 N.W.2d at 313; *see Bielejeski v. Comm'r of Pub. Safety*, 351 N.W.2d 664, 666 (Minn. App. 1984) (stating that burden shifts to driver to "produce evidence to impeach the credibility of the test results").

There is no question that the commissioner in this case satisfied the duty to establish a prima facie case that the BCA test was reliable. Rather, appellant contends that the district court erred by ruling that appellant failed to offer sufficient evidence to rebut this evidence of reliability. The district court rejected the evidentiary value of the Regions test result, concluding that it was insufficient to negate the first test's reliability. The court found credible Dr. Stern's testimony that "provided an explanation for the lower test results – that despite certain changes in collection kit designs and BCA's efforts to solve the problem, the loss of alcohol concentration upon freezing is still a function of how well the top seals onto the rim of the sample bottle."

We conclude that the district court did not err by rejecting appellant's proffered rebuttal evidence. The commissioner's expert, Dr. Stern, testified to a common reason for test result differences due to evaporation of alcohol that occurs in frozen samples after inadequate sealing. This was a plausible explanation for the discrepancy in test results, and the district court specifically found this witness credible. *See* Minn. R. Civ. P. 52.01 ("[D]ue regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.") On this record, the district court did not err by concluding that appellant offered insufficient evidence to show by a preponderance of evidence that the first test was unreliable. *See Schwarzrock v. Comm'r of Pub. Safety*, 388 N.W.2d 425,

426 (Minn. 1986) (stating that showing correlation of only 86% between two breath test results did not satisfy driver's duty to rebut commissioner's proffered test results, because "[a] person challenging . . . test results must show that the perceived error results in a test showing a higher alcohol concentration than it would have but for the error"); *cf. Hounsell v. Comm'r of Pub. Safety*, 401 N.W.2d 94, 96-97 (Minn. App. 1987) (rejecting driver's claim that a minor drop in alcohol concentration between first and second breath test affected the accuracy and reliability of the test results, when, despite driver's claim that his burping affected test results, the testing procedure used did not show that driver's burping had any effect on test results).

II.

Appellant next asserts that the district court abused its discretion by denying her spoliation claim. "[T]he spoliation of evidence is the failure to preserve property for another's use as evidence in pending or future litigation." *Miller v. Lankow*, 801 N.W.2d 120, 127 (Minn. 2011) (quotation omitted). Appellate courts review district court decisions on spoliation claims for an abuse of discretion. *Id.*

The evidence at the implied-consent hearing established that the BCA's routine procedure for urine-sample preservation was to test the sample in fluid form and then freeze the sample remainder for possible future testing. In fifty percent of frozen samples, the storage vials are not fully sealed so that evaporation can occur from the top of the vials, resulting in a less concentrated, and possibly invalid, test result.

Appellant characterizes the BCA's urine-sample preservation process as the causative factor in the destruction of the sample. But not all actions by a custodian of

evidence that result in destruction of evidence constitute spoliation. *See id.* at 128 ("a custodial party's duty to preserve evidence is not boundless"). The supreme court recently ruled that a custodian may even destroy evidence when there is a legitimate need to do so and when the noncustodial party is given sufficient notice to protect itself against the loss of evidence. *Id.* Here, presumably, the urine sample could not be stored indefinitely in liquid form; freezing a sample is a reasonable procedure for prolonging its viability. *See id.* (citing with approval language from *Hirsch v. Gen. Motors Corp.*, 628 A.2d 1108, 1122 (N.J. Super. 1993), and stating that a "potential spoliator need do only what is reasonable under the circumstances").

Dr. Stern testified that freezing urine samples was "the best way to preserve the samples for drug analysis at a future time." He also testified that there was "[a]bsolutely not" an intention on the part of the BCA to destroy such evidence. Appellant offered no evidence to show that the BCA's handling or preservation of appellant's urine sample was unreasonable or not scientifically efficacious. Under these circumstances, the BCA's handling of appellant's urine sample did not constitute spoliation of evidence, and the district court therefore did not abuse its discretion by concluding that sanctions for spoliation of evidence were unwarranted.

Even if the BCA's conduct did constitute spoliation, appellant failed to demonstrate a basis for imposition of sanctions against respondent. In *Miller*, the supreme court stated that in considering whether to award sanctions for a custodial party's destruction of evidence, the district court should follow *Schmid v. Milwaukee*

Elec. Tool Corp., 13 F.3d 76, 79 (3d Cir. 1994), which enumerates the following three factors for consideration:

> (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by others in the future.

Miller, 801 N.W.2d at 132. Here, the BCA was not at fault in freezing the urine sample evidence because the record does not establish the existence of another viable preservation method. Further, appellant did not demonstrate prejudice from lack of the sample preservation because appellant has not shown, or even suggested, that a second viable test of the sample would have produced a different test result.

III.

Appellant also claims that the district court erred by denying her request for a *Frye-Mack* hearing to challenge the scientific acceptance of first-void urine testing and to challenge the reliability of her first-void urine test. In *State v. Tanksley*, 809 N.W.2d 706, 707 (Minn. 2012), the supreme court addressed whether a defendant in a DWI case was entitled to a *Frye-Mack* pretrial hearing on the reliability of first-void urine test results. In that case the defendant challenged the scientific acceptance of testing first-void urine samples, claiming that such testing is "unreliable, inaccurate, and not generally accepted in the scientific community because it does not require an individual to empty his or her bladder, wait a certain period of time, and then provide a second sample for testing." *Id.* at 708. The defendant had argued that he should receive a *Frye-Mack* hearing "to resolve

his claim that first-void urine testing does not reliably correlate with a driver's blood alcohol concentration." *Id.* at 707. The supreme court rejected the defendant's claim in *Tanksley*, ruling that "blood alcohol concentration is irrelevant when the State seeks to prove the offense of driving with an alcohol concentration of 0.08 or more solely with the evidence of the amount of alcohol in the defendant's urine[.]" *Id.* at 707-08. The court reasoned that because Minn. Stat. § 169A.20, subd. 1(5) (2010), permits "alcohol concentration" to be proven by testing of blood, breath, or urine, "[t]he presence or absence of a correlation between urine alcohol concentration using the first-void method and blood alcohol concentration does not make the existence of a 0.08 or higher alcohol concentration in [the defendant's] urine any more or less probable." *Id.* at 710. The court concluded, "[b]ecause the State is not required under the statute to prove a correlation between blood alcohol concentration and urine alcohol concentration to obtain a conviction on an alcohol-concentration charge, we will not impose such a requirement through the guise of demanding a *Frye-Mack* hearing on that question." *Id.* at 711-12.

Appellant claims that *Tanksley* is not controlling here because her reason for requesting a *Frye-Mack* hearing is different from that in *Tanksley*; her challenge "relates directly to the *method* used to produce the *evidence* that a given sample is at or above .08g per 67 ml of urine." She argues that the judiciary should not be "so narrowly fixated on a statute's plain language that the judiciary reaches a result that contradicts what the law more plainly attempts to accomplish."

A straight-forward reading of *Tanksley* does not support appellant's claim. As noted by respondent, "[a]ppellant's claim is nothing more than a repackaged urine

pooling claim" that was rejected in *Tanksley*. We agree with respondent and see no abuse of discretion in the district court's denial of appellant's request for a *Frye-Mack* hearing. *See Tanksley*, 809 N.W.2d at 709 (referring to district court's denial of a *Frye-Mack* hearing as discretionary).

IV.

Finally, appellant argues that the district court erred by upholding the warrantless seizure of her urine sample. The Minnesota and United States Constitutions protect individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art I, § 10. A search without a warrant is presumptively unreasonable. *State v. Othoudt*, 482 N.W.2d 218, 221-22 (Minn. 1992). Fourth Amendment protections apply to the taking of urine samples. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989). But a warrantless search is permitted as an exception to the warrant requirement if "the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *State v. Skinner*, 751 N.W.2d 538, 541 (Minn. 2008) (quotation omitted).

Appellant claims that a search of her urine could be conducted only after her consent or upon issuance of a warrant, because urine in the body is not evanescent, which is the basis for similar non-warrant searches of blood and breath. *See State v. Netland*, 762 N.W.2d 202, 212-13 (Minn. 2009) (holding warrantless breath test admissible); *State v. Shriner*, 751 N.W.2d 538, 545 (Minn. 2008) (holding warrantless blood test admissible).

There is no merit in appellant's argument that a warrant was required before a urine sample was taken. This precise issue was addressed in *Ellingson v. Comm'r of Pub. Safety*, 800 N.W.2d 805 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011). There, the driver argued that the exigent circumstances exception to the warrant requirement should not apply to the taking of urine for alcohol-concentration testing, because "urine alcohol does not dissipate or metabolize and there is no burn-off of alcohol in urine." *Id.* at 807. This court rejected the argument, based on evidence in the record establishing that while alcohol in urine does not metabolize in the same manner as it does in breath or blood, "the body's [other] natural processes cause the alcohol concentration of urine to change rapidly." *Id.* A forensic scientist testified in *Ellingson* that "alcohol concentration of urine in the bladder can decrease from .081 to .079 in 15 minutes" and "that it is not possible to use retrograde extrapolation to determine the alcohol concentration of urine at a time prior to testing." *Id.* The court held that "the exigent circumstances justifying a warrantless blood or breath test—the rapid change in alcohol concentration through the body's natural processes—also justify the warrantless collection of a urine sample." *Id.*

Appellant claims that a different result should be reached in this case because the scientists who testified for both sides here agreed that alcohol is not metabolized in urine. However, Dr. Stern testified that alcohol has a strong diuretic effect, causing urine production to increase to ten times the normal rate. Dr. Stern also testified that alcohol concentration in urine could fall below the legal threshold during the time it would take

to seek a warrant because of the uncertainty of urine production rates, changes in alcohol concentration in the bladder, and the driver's need to urinate. This evidence is similar to the evidence used to support this court's decision in *Ellingson*, and appellant has offered no other reason to deviate from the ruling of that case.

Affirmed.