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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1512

William Karl Bengtson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed May 6, 2013
Affirmed
Klaphake, Judge[*]

Itasca County District Court
File No. 31-CV-12-881

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

Lori A. Swanson, Attorney General, Eric Peter Schieferdecker, Natasha Karn, Assistant Attorneys General, St. Paul, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Kirk, Judge; and Klaphake, 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

KLAPHAKE, Judge

Appellant William Karl Bengtson challenges a district court order denying his motion for a *Frye-Mack* hearing. Appellant argues that he should have been allowed to present testimony regarding the scientific community's greater confidence in second-void urine samples to approximate a person's blood-alcohol concentration. Because we conclude that any correlation between second-void urine samples and blood-alcohol concentration is not relevant to the alcohol concentration in appellant's urine, we affirm.

D E C I S I O N

The two-pronged *Frye–Mack* standard governs the admissibility of scientific evidence: "First, a novel scientific technique must be generally accepted in the relevant scientific community, and second, the particular evidence derived from that test must have a foundation that is scientifically reliable." *Goeb v. Tharaldson*, 615 N.W.2d 800, 810 (Minn. 2000). "Put another way, the *Frye–Mack* standard asks first whether experts in the field widely share the view that the results of scientific testing are scientifically reliable, and second whether the laboratory conducting the tests in the individual case complied with appropriate standards and controls." *State v. Roman Nose*, 649 N.W.2d 815, 819 (Minn. 2002). "[T]he proponent of scientific evidence bears the burden of demonstrating foundational reliability." *State v. Tanksley*, 809 N.W.2d 706, 710 n.4 (Minn. 2012). However, a "district court does not have an obligation to hold a *Frye–Mack* hearing absent a relevant challenge to scientific evidence." *Id.* "[T]he party

seeking a *Frye–Mack* hearing . . . must provide some *relevant* reason for holding the hearing." *Id*.

Respondent commissioner of public safety revoked appellant's driver's license based on the test results of a urine sample, which indicated an alcohol concentration in excess of .08 grams per 67 milliliters. Under Minnesota law, "the commissioner shall revoke the person's license" upon

> certification by the peace officer that there existed probable cause to believe the person had been driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired) and that the person submitted to a test and the test results indicate an alcohol concentration of 0.08 or more.

Minn. Stat. § 169A.52, subd. 4 (2012). "'Alcohol concentration' means: (1) the number of grams of alcohol per 100 milliliters of blood; (2) the number of grams of alcohol per 210 liters of breath; or (3) the number of grams of alcohol per 67 milliliters of urine." Minn. Stat. § 169A.03, subd. 2 (2012). The supreme court has stated that "in defining the alcohol-concentration offense, the Legislature set forth three methods for proving alcohol concentration without expressing a preference for one method over another." *Tanksley*, 809 N.W.2d at 711. Therefore, "a lack of correlation [between a urine test and] blood alcohol concentration [is] not relevant to the alcohol-concentration offense," and a *Frye-Mack* hearing is not necessary to decide that issue. *Id*. at 710.

Appellant argues that his case is distinguishable because the *Tanksley* decision "involved one remarkably narrow and precise question: whether or not first void urine testing passes muster under the first prong of *Frye-Mack* analysis, that of general

acceptance in the scientific community," whereas he is contesting "the BCA's method of collecting urine samples—first void testing" under the second prong. But the supreme court explicitly stated 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 evidence of the amount of alcohol in the defendant's urine." *Id.* at 707-08. The question of closer correlation of alcohol concentration in urine to blood-alcohol concentration is irrelevant to the charge against appellant. *See id.* at 710 n.4 ("[T]he party seeking a *Frye–Mack* hearing . . . must provide some *relevant* reason for holding the hearing.").

Appellant also argues that he would have presented testimony regarding his glucose levels, which he asserts "were abnormally high when he provided a urine sample for analysis" and "would have dramatically increased the opportunities for alcohol fermentation absent strict safeguards specifically designed to ensure the integrity of the sample." Although appellant raised this issue at a hearing, he did not raise it in his petition for judicial review. He claims that his "concerns about fermentation . . . went completely unaddressed by the district court." Contrary to appellant's assertion, the district court did address his argument regarding fermentation: it ruled that he did not provide proper notice and that he would have to file another motion to address the issue. Appellant did not file the motion. Thus, the district court did not err in ruling that the fermentation issue was not properly raised for consideration. *See* Minn. Stat. § 169A.53, subd. 2(b)(3) (2010) (stating that the petition must "state with specificity the grounds upon which the petitioner seeks rescission of the order of revocation"); *Kraker v. Comm'r of Pub. Safety*, 372 N.W.2d 741, 742 (Minn. App. 1985) (holding that the district court

did not err in not considering petitioner's argument that he was not driving because he "failed to specifically raise the issue of the driver's identity in his petition for judicial review"), *review denied* (Minn. Sept. 19, 1985).

Affirmed.