STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0752

Matthew Phillip Dugas, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed November 25, 2013
Affirmed
Harten, Judge*

Ramsey County District Court
File No. 62-CV-12-5416

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

Lori Swanson, Attorney General, James E. Haase, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Smith, Judge; and Harten, 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

HARTEN, Judge

Appellant challenges a district court decision to sustain the revocation of his driver's license, claiming that the district court erred in relying on the result of a Datamaster breath test administered at a law enforcement center shortly after appellant's arrest rather than on the result of a blood-alcohol test administered at a hospital four hours later. We affirm.

FACTS

On 24 June 2012, about twenty minutes after midnight, appellant Matthew Dugas was stopped for driving without a headlight. The arresting officer administered some field sobriety tests, which appellant failed, and a preliminary breath test, which indicated a breath-alcohol concentration of .10. Appellant was arrested for driving while impaired (DWI), his driver's license was revoked, and he was taken to a law enforcement center where, at 1:24 a.m., he was given a Datamaster breath-alcohol test (DMT) that indicated a breath-alcohol concentration of .09.

Appellant asked to be taken to a hospital for medical treatment. At appellant's request, hospital staff at 5:34 a.m. administered a blood-alcohol test that indicated a blood-serum alcohol concentration of .03.

Appellant sought judicial review of the revocation of his driver's license. At the hearing, he admitted consuming about six drinks between 6:00 p.m. and 11:00 p.m. on 23 June. Appellant's forensic toxicology expert testified that (1) he saw no problems with either the DMT instrument or the DMT result obtained at the law enforcement center;

(2) the test at the hospital used a method not yet approved for DWI testing in Minnesota; (3) at the normal rate of elimination (.015 grams per hour) appellant would have eliminated about .06 grams of alcohol during the four hours between the two tests; and (4) the result of appellant's blood-alcohol test at the hospital, a blood-serum alcohol concentration of .03, was consistent with the .09 result of the breath-alcohol test taken four hours earlier.

The district court sustained the revocation of appellant's driver's license. Appellant challenges the order, arguing that the hospital test shows that his blood-alcohol concentration was less than .08 at the time of testing.

D E C I S I O N

In an implied-consent proceeding, we "review a district court's order for an abuse of discretion by determining whether the district court made findings unsupported by the evidence or by improperly applying the law." *Underdahl v. Comm'r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). "Due regard is given the district court's opportunity to judge the credibility of witnesses, and findings of fact will not be set aside unless clearly erroneous." *Snyder v. Comm'r of Pub. Safety*, 744 N.W.2d 19, 22 (Minn. App. 2008).

> The party offering the results of a chemical or scientific test into evidence has the burden of establishing a prima facie case that the test is reliable and that its administration conformed to the procedure necessary to ensure reliability. The burden of production then shifts to the party opposing admission to show why the test is untrustworthy. The burden of persuasion regarding the accuracy of the result remains with the proponent of the evidence. Burden-of-proof determinations are reviewed independently, on the basis of the facts found, omitting any factual findings that are clearly erroneous.

Genung v. Comm'r of Pub. Safety, 589 N.W.2d 311, 313 (Minn. App. 1999) (quotation and citations omitted), *review denied* (Minn. 18 May 1999). Thus, respondent Minnesota Commissioner of Public Safety had the burden of establishing a prima facie case that the DMT at the law enforcement center was reliable and properly administered and the burden of persuasion regarding its accuracy. Respondent met that burden: appellant concedes that "[r]espondent made a prima facie showing of reliability of [the DMT] result by entering the result into evidence."

As the opponent of the DMT, appellant must show that it was untrustworthy. *See id*. Appellant did not offer evidence of any inherent defect in the DMT or its result. The DMT was taken one hour after appellant was stopped while driving and produced a result of .09; it therefore indicated that appellant's breath-alcohol concentration was over .08 within an hour of driving. Appellant did not meet his burden to show why "the [DMT was] untrustworthy."

Finding that the DMT was trustworthy, the district court was free to accept its result rather than the result of the blood-serum alcohol test. *See Quick v. Comm'r of Pub. Safety*, 429 N.W.2d 298, 301 (Minn. App. 1988) ("Neither the statute nor case law compels the court to accept the results of additional testing rather than the test requested by the officer pursuant to the statute."), *review denied* (Minn. 23 Nov. 1988). *Quick* concluded that "the trial court was not clearly erroneous in accepting the [state's breath test] result and [in] rejecting the [blood and urine] test results offered by appellant" and sustained a driver's license revocation. *Id.* at 302. In the instant case, the district court

did not err in basing its decision on the result of the DMT and in rejecting the result of the blood-serum alcohol test.

Although appellant's expert testified that he saw no problems with the DMT result and answered, "True," when asked if the blood-serum alcohol test result was "exactly what we would expect four hours [after the DMT]," appellant's argument implies that (1) the DMT was untrustworthy and (2) its result should have been rejected because a blood-serum alcohol test performed four hours later, at a hospital, using a method not approved for DWI testing in Minnesota, yielded an arguably different result only if certain assumptions were made.

One such assumption was that a .03 result on the blood-serum alcohol test is the equivalent of a .02 blood-alcohol test. Appellant's expert testified to this assumption, and the district court agreed, finding that the test at the hospital yielded a result of .02.

> I have an expert witness . . . explaining to me that that .03 is the equivalent of a .02 because it's a serum test and not the kind of blood tests that are used for purposes of DWIs and related issues. I have no reason to disbelieve that, so I'm going to take that as a .02.

At the average metabolic rate, .015 grams of alcohol evaporates or burns off per hour, so appellant's .02 result on the blood-serum alcohol test at 5:34 a.m. would be consistent with a .08 result at 1.24 a.m., when appellant's DMT indicated .09.

Another assumption appellant wanted the district court to make was that appellant's burn-off rate is lower than the .015 average. The district court declined to do this: "[Appellant's expert] took the idea that [appellant's] metabolic rate was slow and placed him at the very end of the range . . . [with] a metabolic rate[] of .01. But there's

no reason to believe that he's a .01 . . . . I do not have medical testimony as to what [appellant's] metabolic rate is." This finding was supported by testimony from appellant's expert, who agreed that he "[was] not a medical doctor[,]" "[knew] nothing about [appellant's] medical condition other than what [appellant said] . . . here in court[,]" and "[had] never done any testing as to [appellant's] particular rate of metabolism." The expert also testified, "I don't know what [appellant's] burn-off rate is, no."

We note that "[n]either the statute nor case law compels the court to accept the results of additional testing rather than the test requested by the officer pursuant to the statute." *Id.* at 301. Accordingly, the district court did not err in relying on the DMT results, obtained in a law enforcement center one hour after appellant was stopped, by a method accepted for DWI use in Minnesota. The district court correctly declined to rely on appellant's problematic blood-serum alcohol test obtained in a hospital five hours after the stop.

Affirmed.