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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1853**

State of Minnesota,
Respondent,

vs.

Dustin John Wagner,
Appellant.

**Filed September 9, 2008
Affirmed
Connolly, Judge**

Redwood County District Court
File No. 64-VB-07-730

Lori Swanson, Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800,
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Considered and decided by Lansing, Presiding Judge; Minge, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his conviction of misdemeanor DWI-alcohol concentration over .08 within two hours, arguing that he had a due-process right to be allowed to introduce results of a preliminary breath test that had an alcohol-concentration reading of .079 for the purpose of raising reasonable doubt as to the validity of the urine test that he later took and that registered an alcohol-concentration reading of over .08. Because no such right has been recognized in Minnesota and because appellant failed to introduce any evidence of the preliminary breath test's reliability, we affirm.

FACTS

In the early morning hours of April 14, 2007, Deputy Jason Jacobson of the Redwood County Sheriff's Office observed appellant Dustin Wagner's vehicle parked along the side of a rural highway. Deputy Jacobson stopped his vehicle behind appellant's car and initiated a welfare check. Deputy Jacobson found appellant sitting in the driver's seat of the stopped vehicle. Appellant informed the deputy that he had been arguing with his girlfriend on the telephone and that he had stopped his vehicle to talk to her. Deputy Jacobson observed appellant to have a "sad-type demeanor" and bloodshot, watery eyes and noted an odor of alcohol coming from the vehicle. Deputy Jacobson suspected that appellant was under the influence of alcohol, and appellant admitted to drinking one beer. At the deputy's request, appellant agreed to submit to a preliminary breath test (PBT), which indicated the presence of alcohol on appellant's breath and a

preliminary alcohol concentration of .079. Deputy Jacobson then administered field sobriety tests to appellant, including the horizontal-gaze-nystagmus test, the walk-and-turn test, and a one-legged-stand test. Based on his experience, Deputy Jacobson concluded that appellant had failed all three tests and that appellant had been driving while under the influence of alcohol.

Appellant was placed under arrest and transported to the law enforcement center. Appellant was read the implied-consent advisory and agreed to submit a urine sample for testing. The Minnesota Bureau of Criminal Apprehension (BCA) tested appellant's urine sample and found an alcohol concentration of more than .08.¹ Appellant was charged with one count of driving while impaired² and one count of driving, operating, or being in physical control of a motor vehicle with an alcohol concentration of .08 or greater as measured within two hours.³

A jury trial was held on September 18, 2007. Appellant moved in limine to be allowed to introduce evidence of the PBT results for the purpose of raising reasonable doubt. Appellant acknowledged that Minn. Stat. § 169A.41 (2006) prohibits the admission of PBT results except in certain enumerated circumstances which do not apply here. But appellant argued that such prohibition applies only to attempts by the prosecution to use PBT results to prove guilt and not to a defendant's attempts to use the

¹ Two separate tests of appellant's urine were conducted by Dr. Kathryn Fuller of the BCA on April 19, and April 20, 2007, showing alcohol concentrations of .089 and .088, respectively. These values were recorded by the BCA. Because of the BCA policy regarding reported results, the lower value was estimated downward so that the final report indicated an alcohol concentration of .08.

² Minn. Stat. § 169A.20, subd. 1 (2006); Minn. Stat. § 169A.27 (2006).

³ Minn. Stat. § 169A.20, subd. 1(5).

results to raise reasonable doubt. Appellant cited *Patrick v. State*, 750 S.W.2d 391 (Ark. 1988), in support of his argument that he had a due-process right to be allowed to introduce the results of the PBT. The district court cited another Arkansas case, *Elser v. State*, 114 S.W.3d 168 (Ark. 2003), to distinguish the present case from *Patrick*. In denying appellant's motion, the district court stated:

As [appellant's] counsel indicated, there is no Minnesota case law . . . that could be found on [this issue]. I don't think there is any. I would normally definitely err[] on the side of allowing it in . . . from a due process standpoint, but I think in this case it would be such a direct violation of the statute to allow the precise number in that . . . I think that's simply something that a . . . trial judge at least cannot do absent either appellate guidance or statutory guidance.

The jury returned a verdict of not guilty of misdemeanor driving while impaired and guilty of misdemeanor driving, operating, or being in physical control of a vehicle with an alcohol concentration of .08 or more. This appeal follows.

DECISION

Appellant argues that he has a due-process right to admit into evidence at trial the results of a PBT for the purpose of establishing reasonable doubt, despite the general prohibition against the use of PBT results established in Minn. Stat. § 169A.41.

Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996). Evidentiary decisions generally rest within the discretion of the district court, not to be reversed absent an abuse of discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). But despite the district court's general discretion to make evidentiary decisions, we review de

novo whether a defendant has been denied due process. *Spann v. State*, 704 N.W.2d 486, 489 (Minn. 2005). The United States Constitution and the Minnesota Constitution guarantee all criminal defendants due process of law. U.S. Const. amend. XIV, § 4; Minn. Const. art. I, § 7.

Minnesota Statutes, section 169A.41, subdivision 2, reads:

The results of this preliminary screening test must be used for the purpose of deciding whether an arrest should be made and whether to require the tests authorized in section 169A.51 (chemical tests for intoxication), but must not be used in any court action except the following:

- (1) to prove that a test was properly required of a person pursuant to section 169A.51, subdivision 1;
- (2) in a civil action arising out of the operation or use of the motor vehicle;
- (3) in an action for license reinstatement under section 171.19;
- (4) in a prosecution for a violation of section 169A.20, subdivision 2 (driving while impaired; test refusal);
- (5) in a prosecution or juvenile court proceeding concerning a violation of section 169A.33 (underage drinking and driving), or 340A.503, subdivision 1, paragraph (a), clause (2) (underage alcohol consumption);
- (6) in a prosecution under section 169A.31, (alcohol-related school or Head Start bus driving); or 171.30 (limited license); or
- (7) in a prosecution for a violation of a restriction on a driver's license under section 171.09, which provides that the license holder may not use or consume any amount of alcohol or a controlled substance.

Appellant argues that the prohibition embodied in the statute is “in place to prohibit use of the PBT as proof of intoxication. However, a defendant in a criminal trial has the due-process right to admit into evidence relevant information that would cast reasonable doubt upon his guilt.” Appellant does not provide any authority interpreting

the Minnesota statute to support this argument, and we are not aware of any such authority.

Appellant relies on *Patrick*, a decision of the Arkansas Supreme Court. 750 S.W.2d 391. Appellant argues that *Patrick* grants to defendants “a due process right to admit results of a PBT test in order to raise reasonable doubt in the mind of a jury.” In *Patrick*, the defendant was subjected to field sobriety testing but no certified breathalyzer test was performed because there was not a certified test machine in the county. *Id.* at 392. The defendant did submit to a PBT. *Id.* The defendant maintained throughout the case that he had not consumed any alcohol. *Id.* The state opposed the defendant’s attempts to admit the results of the PBT, and a pretrial hearing was held. *Id.* At the pretrial hearing, the defense presented the testimony of an expert witness who testified that a PBT “is generally accepted as reliable in detecting the presence or absence of alcohol, *although not the exact quantity.*” *Id.* at 394 (emphasis added). The *Patrick* court concluded that

the results of the PBT were critical to the defense. The officers testified they smelled alcohol, but Patrick denied he was drinking. No liquor was found in his vehicle. He was not given a [breathalyzer] test nor offered a chance for a blood test. . . . [T]he results of the test, which were negative, and would have shown he was not drinking, were critical to his defense and a fair trial.

Id. Patrick was not seeking to introduce evidence of a specific alcohol concentration, but rather was attempting to show that he had not consumed alcohol at all.

The Arkansas case relied on by the district court is more analogous to this case. In *Elsner*, the defendant argued on appeal that the results of a PBT should be admissible to

show concentration if they are consistent with the results of a certified test. 114 S.W.3d at 174. Elser was attempting to introduce evidence of the results of the PBT for the purpose of establishing reasonable doubt as to the concentration of alcohol as detected by a certified test. *Id.* The *Elser* court held that “PBT results are not admissible as substantive proof absent proof PBT results are reliable.” *Id.* at 175.

Appellant’s argument fails in several respects. First, the authority he relies on is not binding on this court. *See Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984) (noting that decisions from foreign jurisdictions are not binding as authority). Nor was the *Patrick* court interpreting the Minnesota statute. Second, the facts in this case are easily distinguished from those in *Patrick*. Here, appellant concedes he was drinking, and he sought to introduce the PBT result for the purpose of casting doubt on the certified test results from the BCA because the PBT reading was lower; unlike in *Patrick*, appellant sought to introduce the PBT reading for a purpose other than to demonstrate the absence of any alcohol consumption. This is virtually the same evidence the Arkansas Supreme Court rejected in *Elser*. 114 S.W.3d at 174. Also, unlike *Patrick*, appellant here submitted to a certified urine test, the results of which were admitted at trial.⁴ Third, appellant asks this court to expand the interpretation of due-process rights in Minnesota to include the right to introduce PBT results as substantive evidence at trial, an expansion for which there is no precedent in this state. That is not the proper role of this court. *See*

⁴ We do not address the issue of whether a PBT would be admissible in a case factually similar to *Patrick*. Because appellant failed to introduce any evidence of the PBT’s reliability, and because *Patrick* is easily distinguishable from this case, this case raises a different issue than that raised in *Patrick*.

In re Minn. State Patrol Troopers Ass'n ex rel. Pince v. State, Dep't of Pub. Safety, 437 N.W.2d 670, 676 (Minn. App. 1989) (stating that it is not the province of this court to “make . . . a dramatic change in the interpretation of the Minnesota Constitution” where the supreme court has not done so) (quotation omitted), *review denied* (Minn. May 24, 1989).

Finally, appellant’s attempt to introduce the results of the PBT was inconsistent even with the requirements of the authority he attempts to rely on. The *Patrick* court held that the PBT result was admissible under the facts of that case in part because Patrick demonstrated through expert testimony that a PBT could be considered reliable for the purpose of determining whether alcohol was present, but not necessarily for the purpose of determining concentration. 750 S.W.2d at 394. Under Minnesota law,

[t]he proponent of a chemical or scientific test must establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability. Without a foundation guaranteeing the test’s reliability, the test result is not probative as a measurement and hence is irrelevant.

State v. Dille, 258 N.W.2d 565, 567 (Minn. 1977) (citations omitted). As the proponent of the test, appellant made no effort to establish that the results of the PBT were reliable for any purpose. In denying appellant’s motion to admit the PBT results, the district court stated that appellant provided no “offer of proof or expert testimony indicating that a PBT is reliable as to precise blood alcohol concentration readings.” There is no

authority to support appellant's argument to admit PBT results to show concentration readings.

Affirmed.