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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2172**

Richard Kendall Poplinski, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

**Filed November 25, 2008
Affirmed
Shumaker, Judge**

Stearns County District Court
File No. 73-CV-07-1192

Charles A. Ramsay, Charles A. Ramsay & Associates, 450 Rosedale Towers, 1700 West Highway 36, Roseville, MN 55113 (for appellant)

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Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

On appeal, appellant driver argues that the district court abused its discretion in admitting the results of appellant's breath test, claiming that respondent failed to establish

the reliability of the test. Appellant also argues that the Intoxilyzer 5000EN breath test is not trustworthy when appellant showed he suffered from gastroesophageal reflux disease. We affirm.

FACTS

After being arrested for driving while intoxicated, appellant Richard Poplinski submitted to an Intoxilyzer 5000EN breath analysis, which showed an alcohol concentration of .12. Because that reading was over the permissible limit, his driver's license was revoked, and he challenged the propriety of the revocation at an implied consent hearing.

At the outset of the hearing, Poplinski asserted that the Intoxilyzer 5000 did not produce an accurate reading because his condition of gastroesophageal reflux disease (GERD) distorted the breath-analysis process.

Darcy Weinrich, the state trooper who arrested Poplinski and administered the breath test, testified that he is a Certified Intoxilyzer Operator who has administered a "few hundred" tests. He stated that, as he prepared to test Poplinski, he was always within 5 to 15 feet of him and that he observed Poplinski for 15 to 20 minutes before the test. During this time, Weinrich did not see Poplinski regurgitate or vomit, did not hear him burp or belch, and did not see him put anything into his mouth. Weinrich admitted that he was not "staring at [Poplinski's] mouth the entire time." He also testified that he did not ask Poplinski whether he had burped or belched or whether he had GERD. He did ask if Poplinski was taking any prescription medication and Poplinski said he was taking Xanax.

Weinrich testified that he did not notice anything irregular about the testing process, that the machine appeared to be working properly, and that the Intoxilyzer reading was consistent with the physical signs of intoxication that Poplinski exhibited.

Poplinski testified about his history of GERD and a surgery that he claimed was related to it. He stated that his medication helps but does not eradicate his symptoms, which include pain and continuous burping, and that he has learned to conceal the burping. He indicated that spicy foods, alcohol, and stress aggravate his symptoms, and he admitted to drinking alcohol and eating mini-tacos on the evening before and early morning of his arrest. He had not taken his medication on this evening because he left it at home.

During the test, Poplinski testified that he experienced symptoms, feeling a burning in his throat and mouth. He did not testify that he burped, belched, regurgitated, or vomited in the 20-minute period before the test or while it was being administered.

Two expert witnesses offered opinions at the hearing. Dr. Michael Hlastala, called by Poplinski, testified to the scientific unreliability of the test, saying that residual mouth alcohol created by GERD falsely elevates the test result. He explained in detail the breath-testing process and how GERD distorts it so as to produce a reading higher than the actual alcohol concentration present in the breath. Dr. Hlastala was not able to quantify how much higher Poplinski's reading was because of GERD, and he conceded that the reading could have been entirely attributable to the amount of alcohol Poplinski had consumed.

Respondent's expert, David Edin, a forensic scientist employed by the Minnesota Bureau of Criminal Apprehension in its breath-testing section, testified to the protocol and safeguards used to ensure reliability of the Intoxilyzer test, and he stated his opinion that Poplinski's reading was accurate. He also gave rebuttal testimony as to the likely effect of GERD on the test, indicating that it would not distort the result as Dr. Hlastala contended.

Citing Dr. Hlastala's concession that Poplinski's reading could have been valid because of the quantity of alcohol consumed, the district court sustained the revocation of Poplinski's driver's license. This appeal followed.

D E C I S I O N

In his challenge to the revocation of his driver's license, Poplinski contends that the district court improperly admitted the Intoxilyzer test results because the trooper failed to maintain the requisite period of pre-test observation and because Poplinski's GERD distorted the accuracy of the reading. He also claims that the court erroneously shifted to him the burden of rebutting the reliability of the test when the respondent had failed first to demonstrate the test's reliability.

The district court's findings of fact will not be reversed unless they are clearly erroneous. *Jasper v. Comm'r of Pub. Safety*, 642 N.W.2d 435, 440 (Minn. 2002). "When findings of fact rest almost entirely on expert testimony, the district court's evaluation of credibility is of particular significance." *Id.* "Conclusions of law will be overturned only upon a determination that the trial court has erroneously construed and applied the law to the facts of the case." *Dehn v. Comm'r of Pub. Safety*, 394 N.W.2d

272, 273 (Minn. App. 1986) (citing *Durfee v. Rod Baxter Imports, Inc.*, 262 N.W.2d 349 (Minn. 1977)).

“The Minnesota Supreme Court has held that the results of a breathalyzer test may be admitted into evidence . . . if the machine was operated by a certified operator and it is established that the machine was in proper working order and the chemicals were in proper condition.” *Zern v. Comm’r of Pub. Safety*, 371 N.W.2d 82, 83 (Minn. App. 1985) (citing *State, Department of Public Safety v. Habisch*, 313 N.W.2d 13 (Minn. 1981); *State, City of St. Louis Park v. Quinn*, 289 Minn. 184, 82 N.W.2d 843 (1971)). “Once a prima facie showing of trustworthy administration has occurred, it is incumbent on the opponent to suggest a reason why the test was untrustworthy.” *Bond v. Comm’r of Pub. Safety*, 570 N.W.2d 804, 806 (Minn. App. 1997) (quoting *Ahrens v. Comm’r of Pub. Safety*, 396 N.W.2d 653, 655-56 (Minn. App. 1986)). “If the prima facie showing of the test’s reliability is challenged, the judge must rule upon the admissibility in the light of the entire evidence.” *Id.* (quoting *Noren v. Comm’r of Pub. Safety*, 363 N.W.2d 315, 318 (Minn. App. 1985)).

Reliability

Poplinski contends that the respondent did not meet his burden of proving that the test was reliable, and, therefore, the results were inadmissible. The supreme court has held that the proponent of a chemical test must establish the test’s reliability by showing that procedures to ensure reliability were followed:

The 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). It is the state's burden to provide "a sufficient indicium of reliability to establish the prima facie admissibility of the test results. It [is] then incumbent upon defendant to suggest a reason why the . . . test was untrustworthy." *Id.* at 568. Poplinski contends that *Dille* sets the proper threshold standard for the admission of a chemical test and that *Zern*—which allows admission upon showing that there was a certified operator and that the machine and chemicals were in proper order and condition—erodes the *Dille* standard. We disagree. *Zern* did not alter the standard but rather indicated how the *Dille* standard can be met. *See Zern*, 371 N.W.2d at 83-84. Thus, the respondent, as proponent of the test, must establish its prima facie reliability and he can do so by showing that the machine was operated by a qualified operator, that it was working properly, and that the chemicals used were in proper condition. *Id.* Such a showing conforms with the procedures necessary to establish prima facie reliability, as required by *Dille*. *See Dille*, 258 N.W.2d at 567. If the respondent fails to make the requisite showing, the test results are inadmissible. *See id.*

It is undisputed that Weinrich was a certified operator and that he was qualified to testify as to the testing procedure. He did so, stating that the machine was working properly and that there were no irregularities in the process. The district court correctly found that the respondent had made a prima facie showing of reliability and then properly admitted the test results. The burden then shifted to Poplinski to show that the test was

unreliable. *Bond*, 570 N.W.2d at 806. Poplinski failed to show that the foundation as to reliability of the test was insufficient.

Scientific Standard

Poplinski argues that the standards for determining the reliability of chemical tests, as developed by the courts, are without scientific basis. He has not supported that contention with any authority, and he did not raise the issue below. For those reasons, we decline to consider the argument now. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (finding waiver of issues not supported by argument or authority); *Theile v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (“An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.”).

Observation Period

Poplinski contends that the respondent failed to show prima facie reliability of the test because the pre-test observation period the trooper conducted was inadequate. Poplinski argues that the Intoxilyzer assumes that a test sample is free from contaminants and that unless there is a proper observation period to ensure the sample is free, the test cannot be considered reliable. He relies on *McGregor v. Comm’r of Pub. Safety*, 386 N.W.2d 339 (Minn. App. 1986), for the proposition that an observation period conducted in such a way as to render it useless is not adequate to show test reliability. In *McGregor*, we observed that “the officer had no understanding of the purpose of the [observation period], thus making it impossible to ensure the reliability of the test.” *Id.* at 341.

Poplinski contends that his observation period was not proper because, while preparing for the breath test, the trooper turned his back on Poplinski. *McGregor* can be distinguished from the present case. Here, Weinrich was certified to administer the Intoxilyzer tests. He testified that he followed the proper procedures and completed the required diagnostic tests before administering the breath test. Weinrich also testified that he observed Poplinski for any signs of burping, regurgitating, or vomiting, and to prevent Poplinski from putting anything in his mouth. It cannot be said that Weinrich had “no understanding of the purpose of the procedure.” *Id.*

“The purpose of the observation period is to preclude the possibility that the testimony may be affected by mouth alcohol, resulting from burping or vomiting.” *State v. Nelson*, 399 N.W.2d 629, 631 (Minn. App. 1987), *review denied* (Minn. Apr. 17, 1987). “[F]ailure to properly observe does not necessarily invalidate the test results, but it does give the driver an opportunity to explain why this might make the test unreliable.” *Id.* at 632. “Therefore, once the proponent of the test has shown that the necessary steps have been taken to ensure reliability, it is incumbent on the driver to suggest a reason why the . . . test was untrustworthy.” *Id.* (citing *Dille*, 258 N.W.2d at 568).

This case is analogous to *Nelson* in which this court deemed the observation period proper even when the officer contemporaneously completed paperwork relative to the arrest while in an adjacent room 25 feet away from the driver. Here, the trooper was moving about the testing room preparing to administer the test but, more importantly, the trooper acknowledged that the observation period was primarily to observe Poplinski for any burping or belching, regurgitating, or vomiting.

Mouth Alcohol

Finally, Poplinski argues that the district court erred in concluding that he failed to meet his burden of proof in light of his defense that his GERD condition produced mouth alcohol that invalidated the test. This court has addressed the mouth-alcohol argument in other opinions holding that “the fact something *may* have occurred during the observation period to affect the test result was speculation and should not be used without supporting evidence as the basis for rescinding a revocation.” *Nelson*, 399 N.W.2d at 632 (respondent’s only contention was that he may have burped or regurgitated during observation period) (citing *Falaas v. Comm’r of Pub. Safety*, 388 N.W.2d 40, 42 (Minn. App. 1986)). The driver must produce evidence impeaching the credibility of the testing results. *Melin v. Comm’r of Pub. Safety*, 384 N.W.2d 474, 476 (Minn. App. 1986) (finding no evidence that recent cigarette smoking elevated the Intoxilyzer test result) (citing *Scheper v. Comm’r of Pub. Safety*, 380 N.W.2d 222 (Minn. App. 1986)) (undetected belching during observation).

Poplinski suggests that, because of his GERD, he might have burped during the observation period. But this is speculation, and he did not testify that he did in fact burp at that time. Credibility issues are for the district court to determine. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (stating that weight and believability of witness testimony is an issue within the province of the district court), *review denied* (Minn. July 15, 2003). Speculative testimony is not reliable and the court need not credit it.

Dr. Hlastala’s testimony is similarly premised on the credibility of Poplinski’s statements as to his alcohol consumption and the gastric content in his esophagus. Dr.

Hlastala acknowledged on cross-examination that the Intoxilyzer results could be entirely attributable to the amount of alcohol that Poplinski actually drank. Edin addressed the manner in which the Intoxilyzer instrument provides safeguards against an invalid reading from mouth alcohol. Thus, the district court had to assess the credibility of the experts. Their conflict required the court to decide which expert to believe. Unless testimony simply is devoid of credibility, we defer to the trial court on credibility issues. *See Bury v. Bury*, 416 N.W.2d 133, 137 (Minn. App. 1987) (where expert testimony conflicts, appellate courts defer to district court's evaluation of expert credibility).

Accordingly, we conclude that the district court did not err in admitting the results of Poplinski's Intoxilyzer test.

Affirmed.