STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0440

Bruce Andrew Olson, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed October 21, 2019
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CV-17-16631

John L. Lucas, Minneapolis, Minnesota (for appellant)

Keith Ellison, Attorney General, Stephen D. Melchionne, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Cochran, Judge; and Kirk, Judge.*

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

JOHNSON, Judge

The commissioner of public safety revoked Bruce Andrew Olson's driver's license after he was arrested for driving while impaired and a breath test indicated that his alcohol

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

concentration was 0.16. He petitioned to rescind the revocation and sought to introduce evidence that the breath-test results are an uncertain measurement of his alcohol concentration. The commissioner moved *in limine* to exclude the evidence. The district court granted the commissioner's motion and excluded the evidence. The district court then denied Olson's petition and sustained the revocation of his driver's license. We conclude that the district court did not err by excluding Olson's evidence because such evidence is not relevant to the question whether the commissioner properly revoked Olson's driver's license. Therefore, we affirm.

FACTS

On the evening of October 24, 2017, Olson was arrested for driving while impaired by Officer Geyer of the South Lake Minnetonka Police Department. The officer administered a breath test to Olson using a DataMaster DMT-G instrument with Fuel Cell Option. Olson provided, and the DataMaster instrument tested, two breath samples. The DataMaster produced a one-page report, signed by Officer Geyer, stating that the alcohol concentration of the first sample was 0.181 and that the alcohol concentration of the second sample was 0.168. The report states that the "reported value" is 0.16.

Officer Geyer signed and issued to Olson a Notice and Order of Revocation on behalf of the Department of Public Safety. The notice states that, one week later, Olson's driver's license would be revoked for one year. Olson signed the notice to acknowledge that he received it.

On October 30, 2017, Olson petitioned the district court for the rescission of the revocation of his driver's license. The next day, Olson requested that the revocation be

stayed pending the district court's disposition of his petition. The district court ordered a stay. After his corresponding criminal case was resolved, Olson requested a hearing on his petition, which was scheduled for December 27, 2018.

On December 18, 2018, Olson gave notice to the commissioner of public safety that, at the hearing on his petition, he intended to offer the testimony of a "breath testing expert" from the Bureau of Criminal Apprehension, who would "testify regarding the foundational reliability of the breath test result" and "the uncertainty of measurement values that apply to these breath test results." The next day, the commissioner filed a motion *in limine* to exclude Olson's evidence concerning uncertainty of measurement on the ground that the evidence is irrelevant. At the hearing on Olson's petition, the parties stipulated that the DataMaster is an approved instrument for analyzing breath samples, that the breath test was properly administered to Olson, and that the results of the breath test are admissible. No witnesses testified. Two weeks later, Olson filed a post-hearing memorandum in which he raised only one issue—whether the breath-test results were accurately evaluated—and argued that his evidence concerning uncertainty of measurement would assist the district court in determining whether the test results were accurately evaluated.

In January 2019, the district court filed an order in which it granted the commissioner's motion *in limine* and sustained the revocation of Olson's driver's license. In an accompanying memorandum, the district court focused on the admissibility of Olson's evidence concerning uncertainty of measurement. The district court stated that the terms "margin of error" and "uncertainty of measurement" describe the same concept and noted, "While a petitioner may challenge the actual administration of a breath test, a

petitioner may not challenge the general reliability of the breath test, whether via margin of error, uncertainty of measurement, or another similar statistical method." Accordingly, the district court concluded that Olson's evidence of uncertainty of measurement is inadmissible and that, without such evidence, the commissioner had proved that the breath-test results were accurately evaluated. Olson appeals.

D E C I S I O N

Olson argues that the district court erred by excluding his proffered evidence concerning the uncertainty of measurement of his breath tests. He emphasizes that he is not challenging the admissibility of the breath-test results but, rather, is seeking to introduce additional evidence concerning whether the test results were accurately evaluated. He asserts that the Bureau of Criminal Apprehension has access to information concerning the uncertainty of the measurement of all breath-test results produced by the DataMaster instrument.[1] He calls our attention to a recent opinion of this court in a case in which a district court allowed a petitioner to introduce such evidence. *See McIntyre v. Commissioner of Pub. Safety*, No. A16-1968, 2017 WL 3469740 (Minn. App. Aug. 14, 2017).[2] He contends that the evidence would have revealed "the actual scientific

[1]The one-page report of the breath-test results in this case includes the following statement: "For DMT test uncertainty of measurement information, email the BCA Calibration Laboratory at bca.breathtest@state.mn.us."

[2]In *McIntyre*, an employee of the Bureau of Criminal Apprehension testified that an uncertainty range could be applied to the average of the driver's breath-test results. This court described the evidence by stating that "there was an 81.92 percent possibility that her test result was over 0.08." 2017 WL 3469740, at *1. The district court sustained the revocation of the petitioner's driver's license, reasoning that the implied-consent statute did not require consideration of the margin of error for breath-test results, that the driver had provided two breath tests exceeding 0.08 alcohol concentration, and that the test was

interpretation of the test results using the known scientific principles of bias and uncertainty of measurement." In response, the commissioner contends that the breath-test results are valid and reliable and that Olson's proffered evidence is irrelevant.

A.

"Any person who drives . . . a motor vehicle within this state . . . consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance." Minn. Stat. § 169A.51, subd. 1(a) (2016). A chemical test "may be required of a person" if a law-enforcement officer has probable cause to believe that the person was driving while impaired and if the officer has arrested the person for that offense. *Id.*, subd. 1(b)(1). The officer "may direct whether the test is of blood, breath, or urine." *Id.*, subd. 3.

If a breath test is selected, it may be "administered using an infrared or other approved breath-testing instrument." *Id.*, subd. 5(a). The commissioner has approved three breath-testing instruments. Minn. R. 7502.0425 (2017). Such a breath test "must consist of analyses in the following sequence: one adequate breath-sample analysis, one control analysis, and a second, adequate breath-sample analysis." Minn. Stat. § 169A.51,

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properly administered with an approved instrument. *Id.* at *2. This court affirmed, concluding that the commissioner of public safety is not required to prove an alcohol concentration within any particular range of uncertainty and that, in any event, the testimony regarding the "81.92 percent possibility" was sufficient to meet the preponderance-of-the-evidence standard of proof. *Id.* at *3-5. The *McIntyre* opinion is unpublished and, thus, not precedential. *See* Minn. Stat. § 480A.08, subd. 3(c) (2018); *Vlahos v. R & I Constr., Inc.*, 676 N.W.2d 672, 676 n.3 (Minn. 2004); *State v. Porte*, 832 N.W.2d 303, 312 n.1 (Minn. App. 2013). We mention it in this opinion not as legal authority but to illustrate how Olson might have used evidence of uncertainty of measurement.

subd. 5(a). A breath sample "is adequate if the instrument analyzes the sample and does not indicate the sample is deficient." *Id.*, subd. 5(b). A breath test is "acceptable" if it "consist[s] of two separate, adequate breath samples within 0.02 alcohol concentration." *Id.*, subd. 5(d).

If the results of a breath test indicate an alcohol concentration of 0.08 or more, "the results of that test must be reported to the commissioner [of public safety] and to the authority having responsibility for prosecution of impaired driving offenses for the jurisdiction in which the acts occurred." Minn. Stat. § 169A.52, subd. 2(a) (2016).

> 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 . . . , then the commissioner shall revoke the person's license or permit to drive . . . .

Id., subd. 4(a). The duration of the revocation ordinarily is 90 days, but "if the test results indicate an alcohol concentration of twice the legal limit or more," the revocation is for "not less than one year." *Id.*, subd. 4(a)(1).

A person whose driver's license has been revoked pursuant to section 169A.52, subdivision 4, may petition a district court for judicial review of the revocation. Minn. Stat. § 169A.53, subd. 2(a) (2016). The petition must "state with specificity the grounds upon which the petitioner seeks rescission of the order of revocation." *Id.*, subd. 2(b)(3). The district court must conduct a hearing on the petition. Minn. Stat. § 169A.53, subd. 3(a) (2016); Minn. R. 7409.4600, subp. 1. "The scope of the hearing is limited to" one or more

of twelve issues that are defined by statute. *Id.*, subd. 3(b). The eighth issue in the statute asks: "If a test was taken by a person driving, operating, or in physical control of a motor vehicle, did the test results indicate at the time of testing . . . an alcohol concentration of 0.08 or more . . . ?" *Id.*, subd. 3(b)(8)(i). If the petitioner's license was revoked for one year, the eighth issue is whether the test results indicate an alcohol concentration of 0.16 or more. *Janssen v. Commissioner of Pub. Safety*, 884 N.W.2d 424, 426-28 (Minn. App. 2016). The tenth issue in the statute is: "Was the testing method used valid and reliable and were the test results accurately evaluated?" Minn. Stat. § 169A.53, subd. 3(b)(10) (2018). Regardless of the issue, "the commissioner must demonstrate by a preponderance of the evidence that license revocation is appropriate." *Axelberg v. Commissioner of Pub. Safety*, 831 N.W.2d 682, 684 (Minn. App. 2013), *aff'd*, 848 N.W.2d 206 (Minn. 2014).

The hearing on a petition for rescission "must be conducted according to the Rules of Civil Procedure." Minn. Stat. § 169A.53, subd. 2(d) (2018). In addition, the Rules of Evidence apply. *See In re Source Code Evidentiary Hearings in Implied Consent Matters*, 816 N.W.2d 525, 539-43 (Minn. 2012); *Hayes v. Commissioner of Pub. Safety*, 773 N.W.2d 134, 136-38 (Minn. App. 2009). A district court may admit relevant evidence and may exclude evidence that is not relevant. *In re Source Code*, 816 N.W.2d at 540. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. With some exceptions, "[a]ll relevant evidence is admissible," and "[e]vidence which is not relevant is not admissible." Minn. R. Evid. 402. Furthermore, relevant evidence "may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Minn. R. Evid. 403. This court applies an abuse-of-discretion standard of review to a district court's evidentiary rulings at a hearing on a petition to rescind the revocation of a driver's license. *Wilkes v. Commissioner of Pub. Safety*, 777 N.W.2d 239, 245 (Minn. App. 2010).

Evidence consisting of "the results of a breath test" is, as a matter of law, "admissible in evidence without antecedent expert testimony that an infrared or other approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath," so long as the breath test was "performed by a person who has been fully trained in the use of an infrared or other approved breath-testing instrument . . . pursuant to training given or approved by the commissioner of public safety or the commissioner's acting agent." Minn. Stat. § 634.16 (2018); *see also In re Source Code*, 816 N.W.2d at 528 n.3; *State v. Norgaard*, 899 N.W.2d 205, 207-08 (Minn. App. 2017); *State v. Ards*, 816 N.W.2d 679, 685 (Minn. App. 2012). "But section 634.16's presumption of reliability may be challenged in a proceeding under section 169A.53, subdivision 3(b)(10), which specifically permits a driver to challenge the reliability and accuracy of his or her test results." *In re Commissioner of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007); *see also State v. Underdahl*, 767 N.W.2d 677, 685 n.4 (Minn. 2009).

B.

To determine whether Olson's proffered evidence was relevant, we must identify the factual issue or issues that were in dispute at the hearing. Olson limited his challenge

to the tenth issue in the statute: "Was the testing method used valid and reliable and were the test results accurately evaluated?" *See* Minn. Stat. § 169A.53, subd. 3(b)(10). More particularly, Olson focused his argument on the second part of that issue: whether "the test results [were] accurately evaluated." *See id.* He sought to prove that the breath-test results were not accurately evaluated on the ground that the DataMaster instrument's measurements of the alcohol content of his breath samples was subject to a degree of uncertainty. Olson contends that his proffered evidence was relevant because it would have shed light on the "actual true range" of the alcohol concentration of his breath samples.[3]

In response, the commissioner argues that he "is not required to prove an alcohol concentration within some alleged margin of potential error." The commissioner cites a line of opinions of this court that have so held. *See Barna v. Commissioner of Pub. Safety*, 508 N.W.2d 220, 222 (Minn. App. 1993); *Loxtercamp v. Commissioner of Pub. Safety*, 383 N.W.2d 335, 336-38 (Minn. App. 1986), *review denied* (Minn. May 22, 1986); *Dixon v. Commissioner of Pub. Safety*, 372 N.W.2d 785, 786 (Minn. App. 1985); *Hrncir v. Commissioner of Pub. Safety*, 370 N.W.2d 444, 445 (Minn. App. 1985); *Schildgen v. Commissioner of Pub. Safety*, 363 N.W.2d 800, 801 (Minn. App. 1985); *Grund v. Commissioner of Pub. Safety*, 359 N.W.2d 652, 653 (Minn. App. 1984). The earliest of

[3]Olson did not raise the eighth issue in the statute, whether the test results indicate an alcohol concentration of 0.16 or more. *See* Minn. Stat. § 169A.53, subd. 3(b)(8)(i); *Janssen*, 884 N.W.2d at 426-28. In essence, he concedes that the test results indicated an alcohol concentration of 0.16 or more but contends that the reported value of 0.16 is not based on an accurate evaluation of the test results.

these opinions stated simply that "Minn. Stat. § 169.123 (1982), does not require the Commissioner of Public Safety to prove an alcohol concentration of .10 within an alleged margin for potential error." *Grund*, 359 N.W.2d at 653. A later opinion explained the rationale for that statement:

> Under Minn. Stat. § 169.123, subd. 4 (1982), the Commissioner must revoke a person's license when "the test results indicate an alcohol concentration of .10 or more." The statute clearly requires a concentration of .10—not .10 plus or minus an error factor. And, Minn. Stat. § 169.123, subd. 6(3) (1982), expressly limits the issue to be raised at a hearing to whether "the test results indicate an alcohol concentration of .10 or more at the time of testing," not whether or not the reading was .10, coupled with some margin of error.

Schildgen, 363 N.W.2d at 801.[4] The concept of margin of error, which is the subject of the precedent on which the commissioner relies, is functionally equivalent to the concept of uncertainty of measurement, which is the subject of Olson's proffered evidence. *See State v. Brazil*, 906 N.W.2d 274, 279-80 (Minn. App. 2017), *review denied* (Minn. Mar. 20, 2018); *see also State v. King Cty. Dist. Court*, 307 P.3d 765, 769 (Wash. Ct. App. 2013).

In this case, the Datamaster instrument measured the alcohol concentration of Olson's two breath samples to be 0.181 and 0.168, respectively. Both of these measurements exceed the 0.16 threshold in the relevant statute. *See* Minn. Stat. § 169A.52,

[4]At the time of the *Schildgen* opinion, it was unlawful to drive a motor vehicle with an alcohol concentration of 0.10 or more. Minn. Stat. § 169.123, subd. 4 (1982). In 2004, the threshold amount was changed to 0.08, effective August 1, 2005. *See* 2004 Minn. Laws ch. 283, §§ 3, 15. In addition, at the time of the *Schildgen* opinion, the issues that could be raised at an implied-consent hearing included "whether the testing method used was valid and reliable" and "whether the test results were accurately evaluated." Minn. Stat. § 169.123, subd. 6(3)(b) (1982); *cf.* Minn. Stat. § 169A.53, subd. 3(b)(10) (2018).

subds. 2(a), 4(a)(1). The Datamaster's written report states that the "reported value" is 0.16, which reflects the lower measurement, rounded downward to the next hundredth of a unit. In light of the above-described caselaw, as well as the fact that both of the Datamaster's two measurements exceed the legal threshold, the district court did not abuse its discretion by reasoning that Olson's proffered evidence was not relevant to the issue to be decided at the implied-consent hearing.

The district court did not err by excluding Olson's proffered evidence concerning the uncertainty of measurement of the results of his breath test and by denying his petition to rescind the revocation of his driver's license.

Affirmed.