STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1129

Craig David Halicki,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed April 25, 2022
Affirmed
Bjorkman, Judge

Steele County District Court
File No. 74-CV-21-29

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

Keith Ellison, Attorney General, Nicholas R. Moen, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Gaïtas, Presiding Judge; Bjorkman, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

Appellant challenges the revocation of his driver's license, arguing that the district court abused its discretion by denying his motion to compel discovery of the breath-testing device's source code. We affirm.

FACTS

Appellant Craig David Halicki was arrested on suspicion of driving while impaired. He consented to an evidentiary breath test using the DataMaster DMT-G (DMT). Testing revealed an alcohol concentration of 0.08. Respondent Commissioner of Public Safety revoked Halicki's driver's license pursuant Minnesota's Implied Consent Law, Minn. Stat. §§ 169A.50-.53 (2020). Halicki sought judicial review of the revocation and moved for discovery of the DMT's computer source code.[1]

Halicki argued that the source code is relevant to whether his test revealed an alcohol concentration of 0.08 and whether the DMT testing method is valid and reliable. In support of his motion, he submitted the testimony of Dr. Andreas Stolz and exhibits purporting to show how an error in the source code could result in an erroneous DMT test result. In opposition to the motion, the commissioner submitted his own exhibits, including Halicki's test results and an affidavit from forensic scientists in the Minnesota Bureau of Criminal Apprehension supporting the veracity and reliability of DMT breath testing.

After an evidentiary hearing, the district court denied Halicki's motion and sustained the revocation of his license. In its order, the district court principally determined that it lacked jurisdiction to direct the requested discovery because Halicki's challenge was to the administrative rule authorizing use of the DMT, which parties must bring to this court. *See* Minn. Stat. § 14.44 (2020) (stating that "[t]he validity of any rule may be

[1] The district court initially granted Halicki's motion, subject to a protective order. But because the commissioner did not have an opportunity to respond to the motion, the district court later revoked its order and set the motion on for a hearing.

determined upon the petition for a declaratory judgment thereon, addressed to the court of appeals . . . .”). But the district court also addressed the merits of Halicki’s discovery request, concluding that nothing suggested that the particular DMT device used to test Halicki’s breath malfunctioned or was improperly used; “Dr. Stolz is not a qualified expert on breath testing or source code analysis”; and the commissioner did not possess the source code as it “is under the exclusive control of Intoximeters, Inc.” Halicki appeals.

DECISION

Halicki solely challenges the denial of his motion for discovery of the source code. Resolution of discovery issues is within the district court’s broad discretion. *Underdahl v. Comm’r of Pub. Safety (In re Comm’r of Pub. Safety)*, 735 N.W.2d 706, 711 (Minn. 2007) (*Underdahl I*). A district court abuses its discretion when it makes findings of fact that lack evidentiary support or improperly applies the law. *Id.*

I. The district court did not abuse its discretion by denying Halicki’s discovery motion.

License-revocation proceedings are subject to the rules of civil procedure. Minn. Stat. § 169A.53, subd. 2(d). The scope of these proceedings is limited to 12 specific issues. *Id.*, subd. 3(b). Prehearing discovery is required but limited to four areas; other discovery is “available only upon order of the court.” *Id.*, subd. 2(d). A party seeking other discovery must demonstrate that the information requested “is relevant to any party’s claim or defense and proportional to the needs of the case.” Minn. R. Civ. P. 26.02(b); *see Abbott v. Comm’r of Pub. Safety*, 760 N.W.2d 920, 926 (Minn. App. 2009). The nonmandatory discovery sought must bear on the validity and reliability of “the testing method used” and “the test

results" in the case at hand. Minn. Stat. § 169A.53, subd. 3(b)(10); *see also Abbott*, 760 N.W.2d at 926 (concluding no abuse of discretion in denying discovery where the record supported the district court's determination that the Intoxilyzer 5000 breath-testing device's "source code would not shed light on Abbott's test results").

The DMT source code is not subject to mandatory discovery. Accordingly, the focus of our analysis is whether the district court abused its discretion by concluding the source code is not relevant to Halicki's claims or defenses. Halicki contends it is relevant to determine whether the testing method was "valid and reliable" and whether the test results were "accurately evaluated," as set out in Minn. Stat. § 169A.53, subd. 3(b)(10). The commissioner asserts that Halicki did not make the requisite showing of relevance because he did not provide evidence of potential error specific to his test.

As a preliminary matter, we address the district court's determination that it lacked jurisdiction to consider Halicki's discovery motion. Our supreme court rejected this conclusion in *Underdahl I*, reasoning that the presumptive reliability of a different breath-testing device (the Intoxilyzer 5000) is subject to the district court's jurisdiction because Minn. Stat. § 169A.53, subd. 3(b)(10), of the implied-consent statute "specifically permits a driver to challenge the reliability and accuracy of his or her test results." 735 N.W.2d at 711. While the district court here erred in concluding otherwise, it addressed the merits of Halicki's motion, to which we now turn.

Halicki cites *State v. Underdahl*, 767 N.W.2d 677 (Minn. 2009) (*Underdahl II*), for the proposition that the DMT source code is relevant to the validity and reliability of his breath-test results. In *Underdahl II*, the supreme court considered two consolidated

criminal cases in which the district court ordered the State of Minnesota to produce the source code for the Intoxilyzer 5000. 767 N.W.2d at 679. As to defendant Underdahl, the supreme court concluded that the district court abused its discretion because Underdahl "made no threshold evidentiary showing whatsoever" that the source code was relevant to his guilt or innocence. *Id.* at 685. As to defendant Brunner, the supreme court discerned no abuse of discretion because Brunner "submitted source code definitions, written testimony of a computer science professor that explained issues surrounding the source codes and their disclosure, and an example of a breath-test machine analysis and its potential defects." *Id.* at 686. Halicki asserts that he, like Brunner, sufficiently demonstrated the relevance of the DMT source code to warrant discovery. We are not persuaded for three reasons.

First, Halicki overlooks the significant distinction between the discovery afforded in criminal and civil cases. In a criminal case, district courts may order discovery of any information that "may relate to the guilt or innocence of the defendant." Minn. R. Crim. P. 9.01, subd. 2(3). In contrast, in an implied-consent case, the party seeking nonmandatory discovery must show how the information sought bears on the validity and reliability of the testing method used and the test results in the case at hand. Minn. Stat. § 169.53, subd. 3(b)(10); *Abbott*, 760 N.W.2d at 925-26 (citing Minn. R. Civ. P. 26.02). *Underdahl II* provides helpful context regarding the type of evidence courts consider in determining the relevance of a breath-testing device's source code. But it does not alter Halicki's burden to show that the source code is relevant to his claims and defenses regarding his breath test or compel a conclusion that the district court abused its discretion.

Second, we see no clear error in the district court's finding that Dr. Stolz is not a qualified expert on the topic of breath testing or the DMT source code. Halicki did not expressly challenge this finding in his briefing. Generally, "issues not argued in briefs are deemed waived on appeal." *State v. Grecinger*, 569 N.W.2d 189, 193 n.8 (Minn. 1997). But even if Halicki did not waive this challenge, the record supports the district court's finding regarding Dr. Stolz's qualifications. Dr. Stolz is an associate professor at the National Superconducting Cyclotron Laboratory at Michigan State University. He studies rare isotopes and programs computer software to analyze measurements of these isotopes. He testified about his general familiarity with source codes but acknowledged that his work does not involve breath testing, source codes for breath-testing equipment, or the DMT. In short, the record supports the district court's finding that Dr. Stolz lacks expertise to support Halicki's request for discovery of the source code.

Third, the district court did not misapply the law or otherwise abuse its discretion in determining that the evidence Halicki offered does not establish that the source code is relevant to Halicki's claims and defenses. Halicki emphasizes that he submitted a law-review article, two newspaper articles, an article from an academic journal, and the expert report generated in *State v. Chun*, 943 A.2d 114 (N.J. 2008), which Brunner submitted in support of his discovery motion in *Underdahl II*. None of these submissions shed light on how the DMT source code is relevant to Halicki's claims or defenses. The law-review article does not discuss the DMT source code or any potential problems with it, instead stating that "[m]any times, the greatest challenge is convincing the court that the source code is relevant and material" before directing the reader to other secondary sources. The

newspaper articles chronicle experiences working with and assessing the reliability of breath-testing devices nationwide; neither mentions the DMT's source code or anything specific to Halicki's test results. And while the academic article concludes the DMT is not reliable at detecting the presence of mouth alcohol, Halicki does not contend that mouth alcohol affected his test results. Finally, the *Chun* report concerned the source code for the Alcotest 7110 Mk III, not the DMT.

Even if we consider Dr. Stolz's testimony, we see no abuse of discretion by the district court. Dr. Stolz testified that potential defects in the source code could impact Halicki because his test revealed an alcohol concentration of 0.08—precisely the level at which driving is prohibited. But when asked whether "there [was] anything that was different about the DMT . . . or the procedures used by the BCA in this case from every other case in Minnesota," Dr. Stolz responded, "From the DMT case—or from the instrument, no." In other words, Dr. Stolz's proffered testimony does not bear on the reliability of Halicki's testing or test results.

Because Halicki has not established that the district court abused its discretion by determining that the DMT source code is not relevant to his claims or defenses, we need not decide whether the source code is in the commissioner's possession or control. But we note the commissioner's assertion that the state's contract with the entity that possesses the source code—Intoximeters, Inc.—outlines procedures a litigant may follow to access the DMT source code with the assistance of an expert qualified to review the information.

II. The district court did not violate Halicki's due-process rights.

In its discovery order, the district court expressed concern that Halicki's lawyer may have violated certain ethical duties.[2] Halicki asserts that these expressions reflect a violation of his due-process rights. He offers no legal support for this contention, and we construe this to be a claim of judicial bias. In reviewing such claims, we presume that judges discharged their duties properly and focus our analysis on whether the judge considered the arguments of all parties, ruled in favor of the complaining party on any issue, and acted to minimize prejudice to that party. *See Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006); *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). Previous adverse rulings alone do not demonstrate judicial bias. *Mems*, 708 N.W.2d at 533. Rather, judicial bias "must be proved in light of the record as a whole." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008).

The record does not support a claim of judicial bias. The district court noted its concerns about counsel only after making detailed findings of fact and stating that it "diligently reviewed the more than 500 pages filed by [Halicki] in this matter, and all cited law." Indeed, the expressed concerns flow from the district court's assessment that Halicki's arguments lacked precedential support. In other words, the district court necessarily considered and decided the merits of Halicki's arguments before denying his motion.

Affirmed.

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[2] We were not asked to, and do not, comment on the district court's concern regarding counsel's conduct.