STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1234

State of Minnesota,
Respondent,

vs.

Kelcey Markema Hamblin,
Appellant.

Filed May 16, 2011
Affirmed
Randall, Judge[*]

Hennepin County District Court
File No. 27-CR-07-124478

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Randall, 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

RANDALL, Judge

Appellant challenges the district court's denial of his request for expert-witness fees under Minn. Stat. § 611.21 (2010). He argues that he needed an expert to make a threshold showing for discovery of the Intoxilyzer 5000EN source code, and, therefore, the district court's refusal to grant funds for an expert denied him the right to a fair trial. We affirm.

FACTS

Appellant Kelcey Markema Hamblin appeals from a conviction of first-degree driving while impaired (DWI), arguing that he did not validly waive his jury-trial rights when he agreed to a stipulated-facts trial. Hamblin also argued the district court abused its discretion in denying his motion for discovery of the Intoxilyzer 5000EN source code. The state agreed that Hamblin did not waive his right to call witnesses at trial. Because Hamblin's jury-trial waiver was invalid, this court issued an order opinion on September 16, 2009, reversing and remanding without reaching the pretrial discovery issue.

On remand, Hamblin again agreed to a stipulated-facts trial and waived his jury-trial rights. During the stipulated-facts trial, Hamblin's attorney stated that off the record, the district court had denied Hamblin's request of funds for a computer forensic expert to evaluate the results of the Intoxilyzer 5000EN. The district court confirmed that it denied the request. There is no motion or written request for expert fees in the record. Based on the facts in the complaint, the district court found Hamblin guilty of first-degree DWI and sentenced him to 42 months in prison, with execution of the sentence stayed. Hamblin's

waiver of his jury-trial rights, conviction, and sentencing were all completed at the same hearing on April 20, 2010. This appeal followed.

D E C I S I O N

Hamblin challenges the district court's denial of his request for expert-witness fees under Minn. Stat. § 611.21. On appeal, Hamblin has a two-part argument. He argues that he needed funds to hire an expert; and then the expert could have a chance to support his request for production of the Intoxilyzer 5000EN source code.

In Minnesota, an indigent defendant may request funding from the district court for necessary expert-witness services. Minn. Stat. § 611.21(a) (2010). On finding that the requested services are necessary, "the court shall authorize counsel to obtain the services on behalf of the defendant." *Id*. The burden of making a threshold showing to the district court of the need for expert assistance is on the defendant. *State v. Volker*, 477 N.W.2d 909, 911 (Minn. App. 1991). A defendant must give specific reasons for needing an expert. *Id.*; *State v. Richards*, 495 N.W.2d 187, 197-98 (Minn. 1992) (stating defendant must present trial court with some specific evidence that expert's testimony is necessary to the defense). This court reviews a district court's determination concerning Minn. Stat. § 611.21 expert-witness fees under an abuse-of-discretion standard. *In re Jobe*, 477 N.W.2d 723, 725 (Minn. App. 1991).

Adequate record

The problem that immediately arises in this case is the record on appeal does not contain sufficient evidence of Hamblin's request to the district court for expert-witness fees, and the district court did not make written findings when it denied the request.

At the April 20, 2010 proceedings, Hamblin's attorney references "Hamblin's motion that was to be heard today regarding the funding of an expert for him to be able to challenge the Intoxilyzer." Hamblin made his request to the district court off the record prior to trial, but the only evidence of the request before this court is Hamblin's affidavit.

As the state asserts, Hamblin's affidavit does not contain any information about the necessity of the expert. It merely states he is unemployed, has no assets beyond $75 cash, and that he borrowed money from family and friends to retain an attorney, so he is unable to pay for an expert witness. Because Hamblin was represented by a private attorney at trial, his affidavit was necessary for him to demonstrate his financial inability to obtain expert services. *See* Minn. Stat. § 611.21(a) (stating that court must find defendant is financially unable to obtain requested services); *Application of Wilson*, 509 N.W.2d 568, 570 (Minn. App. 1993) (holding that defendant may make a request under Minn. Stat. § 611.21(a) "whether or not counsel was appointed by the court"); *Volker*, 477 N.W.2d at 911 (stating that because appellant qualified for a public defender, she undisputedly lacked the finances to pay expert fees). The parties do not dispute Hamblin's inability to pay for an expert.

"[A] party seeking review has a duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary to consider the questions presented." *State v. Carlson*, 281 Minn. 564, 566, 161 N.W.2d 38, 40 (1968); *State v. Taylor*, 650 N.W.2d 190, 204 n.12 (Minn. 2002) ("On appeal, the appellant is responsible for providing the court with an adequate record.").

The proper way to request fees for expert services is to file an ex-parte application. Minn. Stat. § 611.21(a). There is no indication in the record, and Hamblin does not claim, that he submitted an ex-parte application to request fees for expert services. Without evidence of Hamblin's motion, which his attorney mentioned at trial but is not in the record, or any arguments that may have been made in the application to the district court, it is difficult to determine whether the district court erred.

Hamblin faults the district court for failing to issue an order or make the statutorily required written findings denying his request for expert-witness fees. *See* Minn. Stat. § 611.21(c) ("If the court denies authorizing counsel to obtain services on behalf of the defendant, the court shall make written findings of fact and conclusions of law that state the basis for determining that counsel may not obtain services on behalf of the defendant."). But with no evidence of an ex-parte application or a motion requesting funds for expert services, we will not assign error to the district court. An appellate court cannot presume error in the absence of an adequate record. *White v. Minn. Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997).

Necessity of expert to adequate defense

Hamblin argues he needed an expert to make a threshold showing to support his request for production of the Intoxilyzer 5000EN source code. He claims that because expert services are required for such a request, the court's refusal to grant funds for an expert denied him the right to a fair trial.

Hamblin accurately asserts that in order to comply with *State v. Underdahl*, 767 N.W.2d 677 (Minn. 2009) (*Underdahl II*), he needed to obtain expert services. The district court's denial of Hamblin's original motion for discovery of the Intoxilyzer 5000EN source code preceded *Underdahl II*. Since *Underdahl II*, we have yet to conclude that a discovery motion seeking an Intoxilyzer source code is sufficient *without testimony or an affidavit from an expert witness*.[1] Each time this court has found a denial of a pretrial discovery motion seeking Intoxilyzer source codes to be an abuse of discretion, the appellant has supported the motion with testimony or an affidavit by an expert. *See, e.g.*, *State v. Granse*, No. A09-2192, 2010 WL 4451243 (Minn. App. Nov. 9, 2010); *Scholl*, No. A08-2138; *Lund*, 2009 WL 1587135. Retaining an expert, however, does not guarantee a discovery motion will be granted. *Underdahl II* requires a "plausible showing" that the Intoxilyzer source code "would be both material and favorable" to appellant. 767 N.W.2d at 684.

There is no evidence in the record that Hamblin ever expressed to the district court the necessity of an expert for compliance with *Underdahl II*, and he only briefly makes the argument to this court. Hamblin claims his request was "necessary to an adequate

[1] No published opinion from an appellate court of this state has been released on this issue since *Underdahl II*. Unpublished opinions issued by this court have supported granting a defendant's discovery motion for the source code when the information offered by the defendant might reveal deficiencies in the Intoxilyzer 5000EN that could undermine its reliability. *See, e.g.*, *State v. Scholl*, No. A08-2138 (Oct. 27, 2009) (order op.); *State v. Kish*, No. A08-1342, 2009 WL 2432284 (Aug. 11, 2009); *Freeman v. Comm'r of Pub. Safety*, No. A08-1433, 2009 WL 1919931 (July 7, 2009); *State v. Veldhuizen, et al.*, Nos. A08-2110, A08-2112, A08-2113, 2009 WL 1684494 (June 16, 2009); *Lund v. Comm'r of Pub. Safety*, No. A08-1408, 2009 WL 1587135 (June 9, 2009), *review denied* (Minn. Aug. 26, 2009).

defense" and that access to the Intoxilyzer 5000EN source code "is a legitimate discovery request" that "cannot be disputed." For a court to make a determination that the requested services are necessary, appellant must give specific reasons for needing the expert. *Volker*, 477 N.W.2d at 911; *Richards*, 495 N.W.2d at 197-98.

In *State v. Volker*, this court held that merely stating the services of "an Intoxilyzer 5000 expert are necessary to an adequate defense" was insufficient to show a specific need for an expert. 477 N.W.2d at 911. A showing of specific need for an expert "answer[s] the questions: Why is the expert necessary? How would the expert's testimony aid in appellant's defense?" *Id*.

The extent of Hamblin's argument to the district court in the record on appeal is his attorney's remarks at trial, in which he stated Hamblin requested funds for "a computer forensic expert to evaluate or challenge the results of the Intoxilyzer 5000." Put another way, it was a "pre-*Underdahl II*" argument. Hamblin did not specify why the expert would be necessary to aid Hamblin's defense at trial. Rather, he argued that he needed funds for an expert witness to see if he would have further need of that witness plus funds for the witness at trial. We understand the argument. It is not illogical. But at this point, the law requires specificity as to why an appellant needs the expert at trial, rather than just a request for the state to pay for an expert to aid the pretrial decision of "whether an expert would be needed at trial."

The state uses *Underdahl II*'s language to show that Hamblin's motion for expert fees under Minn. Stat. 611.21(a) is inadequate. This argument is improper. The standards to be applied to requests for discovery of source codes and to requests for

expert fees are different. *Volker* articulates the correct standard and the requisite showing for requests of expert fees, not *Underdahl II*.

The record is barren of any information necessary to determine whether the district court abused its discretion in refusing Hamblin expert-witness fees. We affirm on that issue. *See State v. Gilles*, 279 Minn. 363, 365, 157 N.W.2d 64, 66 (1968) (holding that claims without support in the record are not reviewable); *State v. Vang*, 357 N.W.2d 128, 128 (Minn. App. 1984) (affirming because the limited record available to the court on appeal made appellate review impossible); *State v. Heithecker*, 395 N.W.2d 382, 383 (Minn. App. 1986) (stating that in the absence of an adequate record to provide meaningful review, appellate court will affirm).

Hamblin makes no argument on appeal to this court regarding the May 15, 2008 pretrial order that denied discovery of the Intoxilyzer 5000EN source code. As a result, we need not address the issue. Issues not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

Affirmed.