STATE OF MINNESOTA
IN COURT OF APPEALS
A09-238

Cordell L. Schroeder,
petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 15, 2009
Affirmed
Crippen, Judge[*]

Washington County District Court
File No. 82-CV-08-5142

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Considered and decided by Wright, Presiding Judge; Ross, Judge; and Crippen, 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

CRIPPEN, Judge

Appellant Cordell Schroeder challenges the district court order that sustains the revocation of his driver's license under the implied-consent law, arguing that the urine test result did not meet scientific-evidence standards and that the court erred in denying him the opportunity to present expert evidence contesting the validity and reliability of the test result. Because the validity and reliability of urine testing has been established under Minnesota law, we affirm.

FACTS

After arresting appellant for driving while impaired (DWI) and reading him the implied-consent advisory, the police officer requested that appellant submit to either a blood or urine test; appellant agreed to submit to a urine test. In administering the urine test, the officer followed the applicable Bureau of Criminal Apprehension (BCA) procedures. Testing of the urine sample showed an alcohol concentration of .17.

Appellant petitioned for judicial review of his driver's-license revocation. Before the hearing, appellant gave notice of his intent to offer expert testimony by Thomas Burr that the urine sample did not result in a proper measurement of appellant's alcohol concentration at the time of the test because he provided a urine sample without having previously voided his bladder. The district court granted respondent Commissioner of Public Safety's (commissioner) motion in limine to exclude the evidence and allowed appellant to make an offer of proof for appellate review. The offer of proof included several articles disputing the reliability of determining alcohol concentration based on

urine samples taken without first voiding the bladder. Appellant called Burr to testify at the hearing, the commissioner renewed its objection to Burr's testimony, and the district court excluded the testimony. Thereafter, the court sustained the license revocation.

D E C I S I O N

The issue in this case regards the validity and reliability of the BCA urine-testing procedures, an issue that has already been addressed by this court in *Hayes v. Comm'r of Pub. Safety*, 773 N.W.2d 134 (Minn. App. 2009), *pet. for review filed* (Minn. Nov. 6, 2009), and *Genung v. Comm'r of Pub. Safety*, 589 N.W.2d 311 (Minn. App. 1999), *review denied* (Minn. May 18, 1999). Appellant acknowledges *Hayes* and *Genung* but argues that they improperly shift the burden of proving validity and reliability from the commissioner to the driver. This assertion has no merit.

The *Genung* court stated that the commissioner has the initial burden to establish "a prima facie case that the test is reliable and that its administration conformed to the procedure necessary to ensure reliability." *Genung*, 589 N.W.2d at 313 (quotation omitted). When the commissioner meets this burden, the burden of production shifts to the driver to show "why the test is untrustworthy." *Id.* The ultimate burden of persuasion remains with the commissioner. *Id.* This court concluded in *Genung* that the commissioner met the burden of persuasion regarding the urine test result by showing that the officer complied with applicable BCA procedures as required by Minn. R. 7502.0700 (2007). *Id.*

Minn. R. 7502.0700 requires that "urine samples must be tested for alcohol using only procedures approved and certified to be valid and reliable testing procedures by the

director, Forensic Science Laboratory, Bureau of Criminal Apprehension, Minnesota Department of Public Safety," based on one of four specified scientific methods.

In construing the statute making breath test results "admissible in evidence without antecedent expert testimony" and the administrative rule setting forth approved instruments for breath testing, the supreme court concluded that the statute'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." *Underdahl v. Comm'r of Pub. Safety (In re Comm'r of Pub. Safety)*, 735 N.W.2d 706 711 (Minn. 2007) (construing Minn. Stat. § 634.16 (2006) and Minn. R. 7502.0420 (2005)). But the statute and rule at issue in *Underdahl* addressed only a presumption of reliability. Minn. R. 7502.0700 goes further by also addressing the burden of persuasion. *See Hayes*, 773 N.W.2d at 138 (holding that even if proffered expert testimony that first-void urine sample did not accurately measure alcohol concentration at the time of the test was relevant, it was insufficient as a matter of law to prove that testing method was not valid and reliable).

Appellant argues that *Frye-Mack* establishes a scientific inquiry that must be satisfied for scientific evidence to be admissible and that *Genung* and *Hayes* did not address the *Frye-Mack* standard for the admissibility of scientific evidence. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 809-10 (Minn. 2000) (discussing *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and *State v. Mack*, 292 N.W.2d 764 (Minn. 1980)). Under *Frye-Mack*, the party offering evidence from a novel scientific technique must show that the method is generally accepted in the relevant scientific community, and the party must

also show that the results used in an individual case were obtained in compliance with appropriate standards and controls. *State v. Bailey*, 732 N.W.2d 612, 616 n.2 (Minn. 2007) (quoting *State v. Roman Nose*, 649 N.W.2d 815, 819 (Minn. 2002)). The *Frye-Mack* test is aimed at reliability, and this is an issue that is clearly addressed in both *Genung* and *Hayes*. *Hayes*, 773 N.W.2d at 138; *Genung*, 589 N.W.2d. at 313.

Moreover, as the commissioner observes, if scientific evidence is not novel or emerging, its admission is not subject to the *Frye-Mack* test. *See State v. Klawitter*, 518 N.W.2d 577, 579 (Minn. 1994) (considering whether drug-recognition protocol involves novel scientific theory); *State v. Hodgson*, 512 N.W.2d 95, 98 (Minn. 1994) (ruling that bite mark analysis does not involve novel scientific theory). Minn. R. 7502.0700 goes to the very issue of reliability and has had court approval dating back to 1999.

Because the reliability of first-void urine testing has been established by this court in both *Genung* and *Hayes*, the district court did not err in excluding the expert testimony proffered by appellant.

Appellant also argues that Burr's testimony regarding urine pooling was relevant to the issue of whether appellant was impaired at the time of driving. The *Hayes* court also rejected this argument, explaining that the statute authorizing the commissioner to revoke a driver's license considers whether probable cause exists to believe a person committed the offense of DWI and whether test results indicate an alcohol concentration of 0.08 or more, and that "the statute authorizing rescission of revocation is focused on the results of a chemical test, not on the question whether a driver actually was impaired while driving." 773 N.W.2d at 139.

Appellant also argues that the urine test violated equal protection because it subjected him to different treatment than other Minnesota drivers. This argument also was rejected by the *Hayes* court. 773 N.W.2d at 139-40.

Finally, appellant raises a Fourth Amendment issue, which the district court declined to address because it was not raised with sufficient specificity to permit respondent to submit relevant evidence. *See Smith v. Comm'r of Pub. Safety*, 401 N.W.2d 414, 417 (Minn. App. 1987) (explaining that reason for specificity requirement in petition for judicial review is to give commissioner notice of issues on which he must present evidence), *review denied* (Minn. Apr. 29, 1987). As a result, this court will not consider it on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that this court will consider only those issues that were presented to and decided by the district court).

Affirmed.