STATE OF MINNESOTA
IN COURT OF APPEALS
A10-392

State of Minnesota,
Respondent,

vs.

Herman Tanksley, Jr.,
Appellant.

Filed December 28, 2010
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-09-31958

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

Susan L. Segal, Minneapolis City Attorney, Jennifer Saunders, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

William M. Ward, Chief Hennepin County Public Defender, Paul J. Maravigli, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

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

WORKE, Judge

Appellant challenges his driving-while-intoxicated (DWI) conviction, arguing that the district court erred in denying his request for a *Frye-Mack* hearing on the

acceptability and reliability of first-void urine testing and his motion to suppress such evidence. We affirm.

FACTS

Appellant Herman Tanksley, Jr. was involved in a property-damage car accident. Responding officers detected an odor of alcohol coming from appellant and observed that his pupils were restricted and his eyes were bloodshot and glossy. Appellant admitted that he had consumed beer earlier in the day. Appellant demonstrated signs of impairment during field sobriety testing, and a preliminary-breath test indicated a .16 alcohol concentration. First-void urine testing—testing of a urine sample collected without the individual first voiding his bladder—reported an alcohol concentration of .13. Appellant was charged with two counts of DWI and requested a *Frye-Mack* hearing on the admissibility of urine-test results and moved to suppress his urine-test results. The district court denied appellant's request for a *Frye-Mack* hearing, determining that urine testing is not a novel scientific technique. The district court denied appellant's motion to suppress the urine-test results.

Appellant also moved for a *Frye-Mack* hearing on glucose testing of a urine sample. The state provided expert testimony that the Bureau of Criminal Apprehension (BCA) uses testing kits that contain 1% sodium fluoride to prevent glucose from producing ethanol in a urine sample. The district court determined that appellant's expert failed to show how glucose could cause the production of alcohol in a urine sample kept in a container with sodium fluoride. Thus, the district court concluded that a *Frye-Mack* hearing was not necessary regarding glucose testing because the usefulness of such a test

and the BCA methodology for preventing glucose from producing ethanol in a urine sample are issues within the ability of a jury to comprehend and decide. The district court granted appellant's motion for the admission of expert testimony to show that the failure to test for glucose in a urine sample renders a urine-alcohol-concentration (UAC) test unreliable. Appellant submitted the matter on stipulated facts, and the district court found appellant guilty of operating a motor vehicle with an alcohol content of more than .08 within two hours of driving.[1] This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion in denying a *Frye-Mack* hearing on urine testing, asserting that urine testing is subject to *Frye-Mack* analysis because it is a novel scientific technique that has never received appellate review. "Evidentiary rulings rest within the sound discretion of the [district] court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

In determining the admissibility of evidence based on novel scientific techniques, the district court evaluates the proffered evidence using the *Frye-Mack* test. *State v. Jobe*, 486 N.W.2d 407, 419 (Minn. 1992) (citing *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923); *State v. Mack*, 292 N.W.2d 764, 768 (Minn. 1980)). Whether a *Frye-Mack* analysis is necessary depends on whether the technique is scientific and whether it is novel. *State v. Edstrom*, __ N.W.2d __, __, No. A10-912, slip op. at 6 (Minn. App. Dec. 21, 2010). The parties do not dispute that UAC testing is scientific. Thus, the issue

[1] The city attorney dismissed the other count.

is whether UAC testing is novel. Appellant argues that UAC testing is novel because it has never received appellate review. This court reviews de novo the question of whether evidence is based on an emerging scientific technique. *Goeb v. Tharaldson*, 615 N.W.2d 800, 815 (Minn. 2000).

This court recently released *Edstrom*, which is dispositive of this matter. In *Edstrom*, the district court conducted a *Frye-Mack* hearing to determine the acceptance and reliability of first-void urine testing. Slip op. at 6. This court held that the district court did not err in conducting a *Frye-Mack* hearing. *Id.* This court also held that "[t]he uncontroverted evidence . . . demonstrates that gas headspace chromatography is generally accepted in the scientific community for the purposes of measuring the concentration of alcohol in a urine sample." *Id.* at 10.

A defendant is entitled to a new trial based on the admission of scientific evidence without a requested *Frye-Mack* hearing only if the evidence was erroneously admitted and the defendant suffered prejudice. *State v. Roman Nose*, 649 N.W.2d 815, 822 (Minn. 2002). Even though the district court in this matter erred in declining to conduct a *Frye-Mack* hearing, the error was harmless. In *Edstrom*, a *Frye-Mack* analysis of first-void urine testing has received appellate review and has been determined to be acceptable and reliable. Slip op. at 14. Thus, the UAC testing in this case was admissible and appellant cannot show prejudice from the district court's refusal to hold a *Frye-Mack* hearing. The district court did not err in denying appellant's motion to suppress the results of first-void testing.

Finally, appellant argues that the district court erred in admitting UAC evidence because appellant raised competing views regarding the effect of glucose in a urine sample. The district court found that appellant's expert failed to explain why a test for glucose was necessary when BCA kits contain 1% sodium fluoride, which prevents glucose from producing ethanol. The district court granted appellant's motion to introduce expert testimony regarding the glucose issue; thus, any challenge appellant had to the glucose issue could have been raised at trial, which appellant waived.

Affirmed.