STATE OF MINNESOTA COUNTY OF SHERBURNE } SS
FILED
JUN 16 2009
COURT ADMINISTRATOR

STATE OF MINNESOTA
COUNTY OF SHERBURNE

DISTRICT COURT
TENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

J[redacted] A[redacted] J[redacted],

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

Court File 71-CR-09-581

On May 12, 2009, the above-entitled matter came before the Honorable [redacted] Judge of District Court, Sherburne County, for a contested omnibus hearing.

E[redacted] S[redacted], Assistant Sherburne County Attorney, appeared on behalf the State of Minnesota.

Ryan Garry, Esq., appeared on behalf of Defendant, who also appeared.

Defendant moved to reduce the charges from third degree to fourth degree and for disclosure of the source code of the Intoxilyzer 5000EN (Intoxilyzer). No testimony was taken, but the Court left the record open for the parties to file written submissions. The Court received the State's submission on May 26, 2009, and Defendant filed submissions on May 11, 2009, May 22, 2009, and May 26, 2009. Both parties attached exhibits to their respective memoranda.

NOW, after consideration of the evidence presented, the files and memoranda in this matter, the arguments of counsel, and the applicable law, the Court makes the following:

FINDINGS OF FACT

On March 15, 2009, at approximately 1:57 a.m., Defendant was stopped by law enforcement for crossing the fog line several times. Defendant subsequently failed field sobriety tests and a preliminary breath test, and she was arrested for driving while under the influence (DWI). After the officer read Defendant the implied consent advisory, Defendant submitted to a breath test;

the Intoxilyzer indicated an alcohol concentration of 0.14. Defendant's breath test record shows that each of the four air blanks registered zero, and that the control and her two breath samples were within proper range.

Minnesota Department of Safety records indicated that Defendant had an implied consent license revocation dated December 23, 2008 and that she has a limited license valid only for driving between home and work. Based on the revocation, Defendant was charged with DWI in the Third Degree - Under the Influence, a gross misdemeanor in violation of Minn. Stat. § 169A.20, subd. 1(1), and with DWI in the Third Degree - Alcohol Concentration of 0.08 or More Within Two Hours of Driving, a gross misdemeanor in violation of Minn. Stat. § 169A.20, subd. 1(5).

Defendant's license was revoked based upon an arrest for DWI on December 23, 2008. She filed a petition for judicial review on January 9, 2009. A hearing was set for February 27, 2009, but by letter dated February 5, 2009, Defendant confirmed that the hearing was continued to June 17, 2009 without objection from the State. The revocation of Defendant's license was not stayed.

Defendant submitted several exhibits to support her request for the source code. In particular, she submitted two affidavits from Thomas Burr, a forensic scientist; a report of a special master, detailing issues with another breath test machine in New Jersey; written testimony of a computer scientist about the source code in voting machines; the complaint and two orders from the federal lawsuit between the State and CMI, the manufacturer of the Intoxilyzer; and an affidavit from Thomas Workman filed in the federal lawsuit, giving a thorough analysis of the Intoxilyzer source code. Defendant also submitted an article written by Workman on the source code, which was presented at a seminar for DWI defense attorneys.

In an affidavit dated March 13, 2009, D[redacted] E[redacted] and K[redacted] K[redacted], forensic scientists with the Minnesota Bureau of Criminal Apprehension (BCA), state that the BCA conducted extensive validation testing on the Intoxilyzer to

verify its accuracy. They state that the source code was not needed for validation testing and that the source code is not in the possession of the BCA.

The State filed a federal lawsuit against CMI on March 3, 2008 to declare the State the sole owner of the copyright to the source code and to grant it a complete copy of the source code. In its complaint, the State asserts that it has never had a copy of the source code in its actual possession or custody. In an order dated February 9, 2009, the federal court refused to accept the proposed settlement between the State and CMI, which included provisions that the source code may not leave CMI's custody and that parties must travel to CMI headquarters in Kentucky to view the source code. The federal court also found that it cannot adopt several of the paragraphs in the proposed judgment due to a lack of facts. Specifically, the court held that it "declines to adopt paragraph 1 of the conclusions regarding ownership and assignment of the Source Code. The current record lacks sufficient factual foundation for such a conclusion at this stage of the case."[1] The litigation is still pending.

Defendant argues that her license revocation of December 23, 2008 cannot be used to enhance the charges in this case because it has not been reviewed. She also argues that the source code is relevant and that it is in the State's possession and control. The State argues that Defendant failed to proceed with her petition for judicial review in a timely manner. It also argues that the source code is not within the State's possession or control. The State does not present an argument regarding the relevance of the source code.

ISSUES

1. Must the charges against Defendant be reduced from third degree to fourth degree?

2. Must the State provide Defendant with the source code for the Intoxilyzer?

[1] *Minnesota ex rel. Campion v. CMI, Inc.*, No. 08-CV-603, slip op. at 8 (D. Minn. Feb. 9, 2009).

CONCLUSIONS OF LAW

I. Using the Revocation as an Aggravating Factor Violates Due Process.

A person is guilty of third-degree DWI if she drives or operates a motor vehicle while impaired and one aggravating factor is present. Minn. Stat. § 169A.26, subd. 1. One aggravating factor is a qualified prior impaired driving incident, which may be a conviction or a loss of license, within the immediately preceding ten years. Minn. Stat. § 169A.03, subds. 3(1) and 22. A "prior impaired driving-related loss of license" includes a license revocation under Minn. Stat. §§ 169A.50 to 169A.53, or the implied consent law. Minn. Stat. § 169A.03, subd. 21(a)(1). Minn. Stat. § 169A.53 addresses judicial review of license revocations, and it requires that a person must petition for review within 30 days of the notice of revocation and that the hearing must be held no later than 60 days after the petition is filed. Minn. Stat. § 169A.53, subds. 2 and 3.

The question of whether a pending, unreviewed license revocation may be used as an aggravating factor for a later DWI charge was addressed by the Minnesota Supreme Court in *State v. Wiltgen*, 737 N.W.2d 561 (Minn. 2007). In *Wiltgen*, the defendant filed a petition for judicial review, but the district court issued a standing order which provided that the hearing would be held after the related criminal matter was resolved. *Id.* at 565. The defendant then sought and obtained a stay of the balance of her revocation period. *Id.* While her case was pending, the defendant was again arrested for DWI, which was enhanced based upon her pending license revocation. *Id.*

The Minnesota Supreme Court held that using the unreviewed revocation to enhance the later DWI charge would violate due process under the test established in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Id.* at 572. The *Mathews* test requires a balancing of three factors: "(1) the private interest that will be affected by the official action, (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards, and (3) the Government's

interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 568 (quoting *Mathews*, 424 U.S. at 335). It also found that the legislature's inclusion of Minn. Stat. § 169A.53 in the definition of "prior impaired driving-related loss of license" mandates that judicial review be completed or waived before a license revocation can be used as an aggravating factor. *Id.* at 571. The supreme court rejected the court of appeals' conclusion that the defendant failed to advance her petition for judicial review because the standing order, which made it impossible for the defendant to obtain a hearing within 60 days, was "unilaterally imposed" by the district court. *Id.* at 567. The court also noted that the defendant's request to stay her revocation is not a waiver; it emphasized that the stay resulted from the standing order, which was not sought by the defendant. *Id.*

The Minnesota Court of Appeals distinguished the holding in *Wiltgen* in a vehicle forfeiture case. In *Heino v. One 2003 Cadillac*, the petitioner filed a petition for review of her license revocation; the hearing was continued when the petitioner waived the 60-day hearing requirement. 762 N.W.2d 257, 258 (Minn. Ct. App. 2009). She was then arrested again for DWI and received a notice to forfeit her vehicle because the previous revocation was used to enhance the subsequent DWI to a second degree offense. *Id.* The petitioner demanded judicial review of the forfeiture. *Id.* After sentencing for both DWIs, but before the forfeiture trial, the petitioner withdrew her petition for the license revocation. *Id.* The appeals court held that it does not violate due process to use the petitioner's license revocation as an aggravating factor in a vehicle forfeiture proceeding because the petitioner voluntarily withdrew her petition. *Id.* at 265. Unlike the driver in *Wiltgen*, whose hearing was delayed against her wishes, this petitioner waived the time requirements and then withdrew her petition. *Id.* at 264. The court held that it would be absurd to allow a person to file a petition for judicial review of a revocation, waive the 60-

day requirement, and prevent the revocation from being used against her by withdrawing the petition before the forfeiture trial. *Id.* at 263.

In this case, due process forbids Defendant's unreviewed revocation from being used to enhance the degree of this offense. This case differs from *Wiltgen* in that it was Defendant, not the court, who caused the delay in proceedings, thus preventing judicial review of her license revocation from occurring before the date of this offense. Yet this case also differs from *Heino* because Defendant has not withdrawn her petition for review and has a hearing date on June 17, 2009. *See id.* at 264. Moreover, *Heino* was a forfeiture action, which involved a property interest; this is a criminal case involving a liberty interest, which is an arguably weightier interest. *See Wiltgen*, 737 N.W.2d at 568 (liberty is a substantial interest). More significantly, allowing the revocation to be used as an aggravating factor would risk an erroneous deprivation of Defendant's liberty interest. *See Mathews*, 424 U.S. at 335. Defendant is charged with DWI in the Third Degree, which has a maximum penalty of one year in jail. *See* Minn. Stat. § 169A.26, subd. 2. Without the revocation as an aggravating factor, Defendant could only be charged with DWI in the Fourth Degree, which has a maximum penalty of 90 days in jail. *See* Minn. Stat. § 169A.27, subd. 2. Since Defendant is seeking judicial review of her license revocation and there is a possibility she may prevail, it would be unfair to allow the revocation to aggravate this charge. *See Heino*, 762 N.W.2d at 264 (due process in a criminal context requires that defendants be treated with fundamental fairness). Therefore, the license revocation of December 23, 2008 may not be used as an aggravating factor for this DWI charge.

II. The State Must Provide the Source Code to Defendant.

Minn. R. Crim. P. 9.01, subd. 1(3), provides that the state shall disclose, without order of court, documents and tangible objects which are within the prosecuting attorney's possession or control. A defendant may also seek discovery through a court order under Minn. R. Crim. P. 9.01, subd. 2(3), which provides that a trial court "in its discretion" may require the State to disclose

relevant information to the defense as long as a showing is made that the information may relate to the guilt or innocence of the defendant.

The Minnesota Supreme Court specifically addressed discovery of the source code for the Intoxilyzer in *State v. Underdahl*, --- N.W.2d ----, 2009 WL 1150093 (Minn. 2009) (*Underdahl II*). The issue before the Court was whether the district court abused its discretion in ordering the production of the source code based upon its conclusion that the source code was relevant. *Id.* at *6. The supreme court found that it was an abuse of discretion to find the source code relevant when absolutely no showing is made, but that it was not an abuse of discretion when the defendant submitted documents showing that a source code analysis may reveal deficiencies to challenge the Intoxilyzer's reliability. *Id.* at *7-*8.

The supreme court also reviewed whether the district court abused its discretion in finding that the State had possession or control of the source code. *Id.* at *8. Relying on its conclusion in *In re Commissioner of Public Safety* (also known as *Underdahl v. Comm'r of Pub. Safety*), 735 N.W.2d 706, 712 (Minn. 2007) (*Underdahl I*), the supreme court found that the district court did not abuse its discretion. *Id.* In *Underdahl I*, the issue was whether the Commissioner was entitled to a writ of prohibition to prevent the court from enforcing its order to require the State to turn over the source code. *Underdahl I*, 735 N.W.2d at 708. The court had found that the Commissioner failed to prove that the source code was "clearly not discoverable" because the State's Request for Proposal (RFP) with CMI granted the State ownership rights of the source code. *Id.* at 712. However, the supreme court also noted that the inadequate factual record, which consisted of the RFP, made impossible any determination of ownership under copyright theory. *Id.* Nevertheless, the supreme court held in *Underdahl II* that the RFP supports the district court's conclusion that the State possesses the source code. *Underdahl II*, 2009 WL 1150093 at *8.

Before *Underdahl II* was decided on April 30, 2009, the court of appeals held that it was not an abuse of discretion to deny a motion for the source code based upon the lack of evidence that it was in the State's possession or control. *Abbott v. Comm'r of Pub. Safety*, 760 N.W.2d 920, 927 (Minn. Ct. App. 2009). The appellate court rejected the argument that *Underdahl I* established that the State had possession, noting that "at most," the supreme court found that the State "could *pursue* obtaining the source code if necessary, which is not the same as saying the [State] had possession, custody, or control of it." *Id.* (emphasis in original). Although *Abbott* was decided before *Underdahl II*, review of *Abbott* was dismissed on May 19, 2009.

Since *Underdahl II*, the court of appeals has switched gears and has issued several unpublished decisions declaring it to be an abuse of discretion to deny requests for the source code. *See, e.g., Lund v. Comm'r of Pub. Safety*, No. A08-1408, 2009 WL 1587135 (Minn. Ct. App. June 9, 2009); *Bowen v. Comm'r of Pub. Safety*, No. A08-1267, 2009 WL 1312130 (Minn. Ct. App. May 12, 2009). In a published case, the court of appeals first recognized that a district court has "wide discretion" in deciding discovery requests, but it found that the lower court abused that discretion. *State v. Crane*, --- N.W.2d ----, 2009 WL 1515264, at *3 (Minn. Ct. App. 2009). The district court found that the State did not possess the source code based upon an affidavit from Glenn Hardin, the toxicology supervisor at the BCA. *Id.* However, despite a lack of evidence to the contrary, the court of appeals held that this finding was clearly erroneous due to the supreme court's conclusion in *Underdahl II* that the State possesses the source code. *Id.*[2]

---

[2] In a special concurrence, Judge Johnson disagrees with this conclusion. *Id.* at *6. He notes that Minn. R. Crim. P. 9.01, subd. 2(1) requires a showing that the source code is within the possession or control of the State, which the defendant failed to do. *Id.* Rather, the only facts in the record show that the State does not have possession, and a ruling that the State does not have the source code is not inconsistent with *Underdahl II*. *Id.* Johnson noted that the supreme court did not clearly state that there is only one way to resolve the issue of possession of the source code; the court instead indicated that this discovery issue is subject to a deferential standard of review. *Id.* Furthermore, Johnson recognized that until the State's interests in the source code are clarified in federal court or by the supreme court, the two *Underdahl* "district court rulings based on a single document [the RFP], unsupported by the complex legal analysis

Here, there does not appear to be a dispute that the source code may relate to Defendant's guilt or innocence, especially since Defendant has submitted three expert affidavits and several documents to support her request for the source code. *See* Minn. R. Crim. P. 9.01, subd. 2(3). Rather, the issue is whether the State has possession or control of the source code. Defendant asserts that the State owns the source code, which is evident from its lawsuit against CMI, and that it does not matter if the State actually possesses the source code. However, the presiding judge in the lawsuit between the State and CMI noted that the federal court's record, which certainly contains more information on the copyright issue than this Court or any state court in Minnesota, lacked enough facts to make a conclusion about the ownership and assignment of the source code. *See also Underdahl I*, 735 N.W.2d at 712.

In any event, Minn. R. Crim. P. 9.01, subd. 2(1) requires that the requested information be within the "possession or control" of the State; ownership is not the issue. The affidavit from Edin and Kierzek states that the BCA does not have the source code in its possession, and the record does not contain any facts to refute this assertion. In fact, the order dated February 9, 2009 from the federal lawsuit indicates that the source code is in CMI's custody in Kentucky. Despite the lack of any evidence that the State possesses the source code and the "wide discretion" to be afforded the district court over discovery requests, the Minnesota Court of Appeals has determined that it is an abuse of discretion to find that the State does not possess the source code. *See Crane*, 2009 WL 1515264 at *3. Therefore, even though the factual record here indicates that the source code is not within the State's possession or control, this Court is compelled to order the State to disclose the source code.

Based on the foregoing, the Court makes the following:

ORDER

1. Defendant's motion to reduce the charges to fourth degree is GRANTED.

---

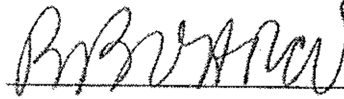
that the supreme court previously said is necessary, should not be elevated to a legal rule that binds the state in all DWI cases." *Id.* at *7.

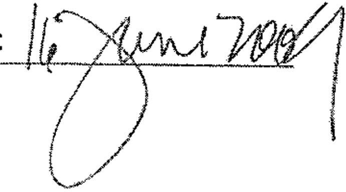
2. Defendant's motion for the source code is GRANTED.

a. Within 30 days of entry of this Order, the State shall provide, for Defendant's inspection, a complete copy of the computer source code for the "Minnesota model" of the Intoxilyzer 5000EN currently used in the State of Minnesota.

b. If the source code is not provided to defense counsel as ordered, the Intoxilyzer results are suppressed and may not be offered at trial.

BY THE COURT:



Dated: 

Judge of District Court