

State of Minnesota
In Supreme Court

In Re: Source Code Evidentiary Hearings
in Implied Consent Matters,

In Re: Source Code Evidentiary Hearings
in Criminal Matters

APPELLANT'S REPLY BRIEF

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I.

Reversal is required because the district court did not articulate and apply the appropriate standard to determine whether source code errors render Intoxilyzer breath alcohol concentration test results unreliable.

Respondents incorrectly cast appellants' argument regarding the district court's failure to articulate and apply the correct standard as an argument that:

[T]he district court should have disregarded the presumptions of admissibility contained in Minn. Stat. § 634.16 (2010) and Minn. R. 7502.0420, subp. 3, and should have placed the burden on the Commissioner and the State to prove foundational reliability of Intoxilyzer 5000EN test results in contradiction to State v. Dille, 258 N.W.2d 565 (Minn. 1977).

Prosecution's brief at 26-27; see also Commissioner's brief at 20-21. Appellants argued no such thing.

Appellants in their brief acknowledged the burden-shifting standard set forth in a series of appellate court decisions beginning with State v. Dille. Appellant's brief at 18.¹ Under this standard, the government must make a prima facie showing that a test result is reliable. Id. at 567. If the government meets that burden, the driver/defendant must come forward with evidence disputing the

¹ Amicus Curiae CMI of Kentucky argue that the standard the district court should have used is the preponderance of the evidence standard. Amicus brief at 10. This leaves the question: preponderance of what? The answer, of course, is the preponderance of the evidence to show foundational reliability, which leads to the three-part burden shifting test. Even if the question of whether the government could make the prima facie showing of reliability is appropriately left to individual trials and hearings, the district court in this case still had the responsibility to determine whether source code errors would require the burden to shift back to the government to show scientific foundational reliability under Minn. Rule Evid. 702 and State v. Dille.

trustworthiness of the test. Id. And if the prima facie showing of reliability is sufficiently challenged, the judge must rule on admissibility in light of all the evidence. Id.

What respondents fail to recognize, however, is that, because breath alcohol test results are obtained through scientific means, the proponent of the evidence—in this case, the government—bears the ultimate burden of proving foundational reliability under Minn. R. Evid. 702. Thus, once a driver/defendant sufficiently challenges the reliability of a particular test result, the government must prove foundational reliability before the result can be admitted.²

Respondents acknowledge that the district court did not explicitly state it was applying the required burden-shifting test. Prosecution’s brief at 29; Commissioner’s brief at 24. They claim, however, that the court’s analysis suggests that it did. Id. This claim disregards that the court’s analysis confused two very different questions: whether Intoxilyzer results are reliable and therefore admissible (the issue it was to decide) versus whether challenges to the reliability of such results should be permitted (an issue not before the court in this proceeding). See Appellants’ brief at 21. This confusion of issues demonstrates the

² Respondents also complain that appellants do not identify a specific standard the court should have applied. Commissioner’s brief at 22. Appellants did, however, identify the standard: that required both by the burden-shifting standard set forth in State v. Dille and the test for foundational reliability required by Minn. R. Evid. 702.

court's failure to articulate and apply the correct standard for admissibility in this case.

Respondents also argue that even if the court did not clearly define the appropriate burdens, "it does not matter because the court rejected" appellants' evidence and credited respondents' evidence. Commissioner's brief at 24; see also Prosecution's brief at 29. This argument ignores that articulation and application of the correct standard for admissibility of particular evidence is not just a formality. It is a necessary procedural requirement to ensure the law regarding admissibility has been followed, as well as to render appellate review possible. That is, this court cannot adequately judge whether the result was correct without knowing what, if any, standard the district court employed.

II.

The district court's blanket ruling that appellants cannot present evidence of source code error violates due process and fair trial rights.

Respondents claim that the district court's blanket ruling that appellants cannot present any evidence to their individual factfinders that certain breath alcohol test results may be affected by source code error does not violate due process and fair trial rights because appellants had the opportunity to present such evidence in this proceeding. Prosecution's brief at 30. Essentially, respondents are arguing that any evidence bearing on the weight of breath test evidence is not admissible because the test results are reliable enough to be admissible. But, again, admissible does not mean unassailable. That is, just because evidence is admissible does not mean its credibility cannot be challenged.

Specifically, respondents claim: "The district court did not so much decide the admissibility of test results, which is statutorily presumed, but the inadmissibility of the challenges to the Intoxilyzer 5000EN based on the source code." Id. at 32. While this is, in part, what the district court did, this is not what the district court was supposed to do.

The supreme court instructed the district court to determine whether source code errors rendered Intoxilyzer 5000EN unreliable and therefore inadmissible. In re. Minn. Intoxilyzer Source Code Litigation Order, No. A09-2109 (Minn. Jan. 11, 2010). This proceeding was the result of appellants' motions to *exclude* Intoxilyzer results, not a motion to *admit* evidence attacking the credibility of

those results. The only issue before the court was whether Intoxilyzer results were admissible at all, not whether any evidence challenging individual results was admissible. Thus, the district court had no authority to rule, in advance, that no driver/defendant could ever present any evidence of any source code error that might bear on the weight a factfinder would give to a breath alcohol test result.

Respondents also argue that appellants are asking this court to “overturn numerous appellate court decisions that stand for the proposition that a margin of error is not relevant to the credibility of the results of the Intoxilyzer 5000EN” and require test results to be reported within a margin of error. Prosecution’s brief at 36; see also Commissioner’s brief at 31, n.18. Appellants are not making that argument. Rather, appellants contend that the district court violated due process and fair trial rights by prohibiting any individual drivers from ever presenting any evidence to their individual factfinders that the Intoxilyzer machine operates with a scientific margin of imprecision, so that the factfinders can decide for themselves whether to credit a particular test result. See Appellants’ brief at 26.

Respondents also claim that appellants “argue that this ruling violates their procedural due process rights” Commissioner’s brief at 28. Respondents maintain that appellants have gotten all the procedural due process to which they are entitled. *Id.* at 28-32.

The concern with the district court’s sweeping ruling on the future admissibility in any implied consent or DWI hearing of evidence challenging the credibility of Intoxilyzer 5000EN results is that the district court was in no

position in this proceeding to judge how each individual driver may challenge the government's case against him or her. Appellants are not concerned that they will not get their hearings, but that they will not get fair hearings in their individual cases. In other words, it is not fair to allow the state to admit evidence of guilt without allowing appellants in individual cases to present relevant (as determined by the individual judges) evidence attacking the credibility of that evidence.

Amicus Curiae contends that the district court did not over step its authority by ruling that evidence of source code errors may not be admitted to challenge test results in individual hearings. Amicus brief at 11; see also Amicus brief at 8 and 26-27 claiming "the district court's ruling was entirely consistent with . . . this Court's Consolidation Order, which specifically instructed the district court to 'decide such pretrial matters as he deems appropriate.'" Amicus brief at 11, quoting from paragraph 3 on page 4 of the consolidation order.

Amicus Curiae truncate this quote and take it out of context. Paragraph 3 of the consolidation order refers to the district court's assignment in criminal DWI cases. This part of the order directs the district court in those cases to "decide such pretrial matters as he deems appropriate *concerning challenges to the reliability of Intoxilyzer 5000EN results based on the source code of the instrument*" in all pending and future criminal DWI cases in which a party challenges the reliability of breath test results based on source code error and both parties consent to the assignment. Consolidation Order at 4, para. 3 (emphasis added to language omitted from the amicus brief).

The language in this part of the order differs slightly from the order consolidating the civil implied consent cases, which gives authority to the district court to decide all pretrial matters, but does not say “as he deems appropriate.” Consolidation Order at 3, para. 1. The different language with respect to the criminal cases recognizes that the district court might not consider it appropriate to consolidate certain challenges in criminal cases in light of heightened due process concerns. The different language did not, however, grant the district court the authority to decide anything other than the question of whether errors in the computer source code render Intoxilyzer 5000EN breath tests unreliable and therefore inadmissible.

III.

The district court's ruling that evidence of a deficient sample test result is admissible if other evidence supports the deficient sample result must be reversed because unreliable evidence is not admissible to bolster other evidence of refusal by conduct.

Respondents claim that the refusal to test statute, Minn. Stat. § 169A.51, subd. 5(c) “does not apply to criminal charges,” and thus in criminal cases, the “Deficient Sample” report is “just a starting point.” Prosecution’s brief at 45; see also Commissioner’s brief at 35 (“The statutes is very specific that a deficient sample constitutes a refusal only for purposes of license revocation, not for purposes of criminal charges.”). Respondents further claim, without citing any authority, that in criminal cases evidence in addition to a deficient sample result is required to support a criminal conviction. Commissioner’s brief at 35, n.21.

These assertions are incorrect. The crime of refusal to submit to a chemical test is defined in Minn. Stat. § 169A.20, subd. 2, which provides: “It is a crime for any person to refuse to submit to a chemical test of the person’s blood, breath, or urine *under section 169A.51 (chemical tests for intoxication)*” (emphasis added). Minn. Stat. § 169A.51, subd. 5(c) provides that “when a test is administered using an infrared or other approved breath-testing instrument, failure of a person to provide two separate, adequate breath samples in the proper sequence constitutes a refusal.” Thus, by the very explicit terms of the criminal test refusal statute, Minn. Stat. § 169A.51, subd. 5(c) not only applies to civil implied consent refusal cases, it absolutely applies to criminal charges as well, and

requires nothing more than “the failure of a person to provide two separate, adequate breath samples in the proper sequence” to obtain a criminal conviction for test refusal.

Respondents also argue:

If Appellants had their way, there would be no situation in which “refusals by conduct” could occur during the testing process. * * * They suggest that a subject may refuse an Intoxilyzer test only by behavior that occurs before a test sequence begins. * * * This would be a ludicrous result as almost all “refusals by conduct” occur during the testing process, and not before it starts. This would give a defendant free reign to do whatever he or she could to defeat the testing process once it had begun, without criminal consequence.

Prosecution brief at 44.

Appellants are not arguing that “refusals by conduct” cannot occur during the testing process. They are simply arguing that evidence of a “deficient sample” test report generated by an Intoxilyzer 5000EN is not admissible to bolster any other evidence the state might have to support a refusal by conduct allegation. What is ludicrous is respondents’ position that evidence ruled inadmissible because it is scientifically unreliable can be admitted if other evidence exists to support the conclusion the sample was deficient. Respondents are asking this court to decide what “other evidence” may be admitted to prove a “refusal by conduct.” But that is not the issue before this court. The individual district courts will have the opportunity to hear and consider the state’s various arguments about what “other evidence” may be used. The issue for this court is simply whether

unreliable evidence should ever be permitted to bolster other evidence offered in a trial.

The state can prove refusal by conduct with evidence that a test subject engaged in behavior designed to frustrate the testing process. But because “deficient sample” test results generated by the Intoxilyzer 5000EN are scientifically unreliable, such results do not become reliable simply because a “trained operator” claims the deficient sample reading was the result of subject behavior rather than source code error. Source code errors are rarely visible to the naked eye and even a “trained operator” is in no position to judge why a sample was rejected. As discussed in appellants’ principal brief, such speculation by an officer would be far more likely to distort rather than assist a fact finder’s determination.

Moreover, appellants are not, as respondents contend, asking this court to disregard established case law regarding refusal by conduct by eliminating evidence other than the test result. Commissioner’s brief at 37. Instead, appellants are asking the court to prohibit only the test result itself when the result is a “deficient sample” generated by an Intoxilyzer 5000EN running the “240 software.” Respondents always have the option of finding software that actually could produce a scientifically reliable result from an Intoxilyzer 5000EN, or they could replace the machine shown to produce unreliable results with one that

produces reliable ones.³ Respondents are essentially arguing that they should get to introduce unreliable evidence simply because unreliable evidence is all they have. That is not a valid basis upon which to admit evidence in any trial.

Respondents further claim that the “Intoxilyzer does not deem a deficient sample a refusal. A person must read the result and determine whether it is a refusal, based in part on whether there is evidence of an intent to frustrate the testing process.” Commissioner’s brief at 38. But unreliable scientific evidence does nothing to shed light on a driver’s intent. Again, respondents are conflating appellants’ arguments and the district court’s order. The district court did not hold that other evidence of test refusal is not admissible in a refusal trial; such rulings are left to the discretion of the trial courts hearing those matters. Here, the district court held that *if* that other evidence is presented, then the evidence the district court itself found to be unreliable could be admitted for the purpose of bolstering that other evidence. It is the holding that even though the evidence has been determined to be unreliable, it may nonetheless be used to take a license or send a driver to prison, that must be reversed.

Now that errors in the operation of the Intoxilyzer 5000EN have been revealed to show the scientific unreliability of a “deficient sample” result, it is clear that, no matter what a trained operator observes or believes, the machine cannot be trusted to render a deficient sample report that will ever be admissible.

³ In fact, the Department of Public Safety is in the process of attempting to do just that. The department has already begun the process of replacing the entire fleet of antiquated CMI Intoxilyzer 5000ENs with National Patent DataMasters.

Thus, a deficient sample result is not at all relevant to the issue of whether a subject refused testing by conduct.

CONCLUSION

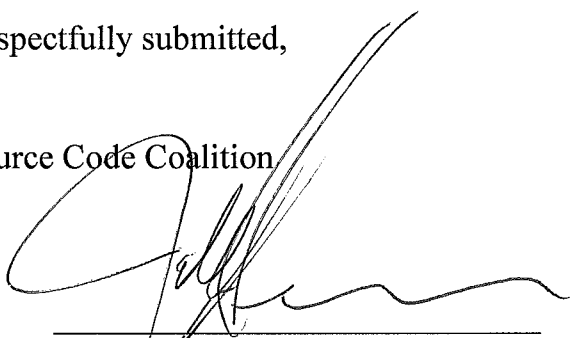
For the foregoing reasons, as well as the reasons argued in appellants' principal brief, this court should reverse the district court's finding that Intoxilyzer 5000EN breath alcohol concentration test results are reliable and admissible or reverse the district court's order and remand with instructions that the district court apply the correct standard. This court also should reverse the district court's order that evidence of errors in the computer source code that affect the results of breath alcohol concentration test results is never admissible. Finally, this court should reverse the district court's order that unreliable evidence of a deficient sample in certain cases may become admissible if other evidence supports the sample as being deficient.

DATED: 10/14/11

Respectfully submitted,

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