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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1765
A16-1766**

State of Minnesota,
Respondent,

vs.

Lawrence John Mahoney,
Appellant A16-1765,

Edwin James McCarthy,
Appellant A16-1766

**Filed July 17, 2017
Affirmed
Jesson, Judge**

Ramsey County District Court
File Nos. 62SU-CR-15-6451, 62SU-CR-15-6571

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Considered and decided by Jesson, Presiding Judge; Rodenberg, Judge; and Toussaint, Judge.*

UNPUBLISHED OPINION

JESSON, Judge

In this consolidated appeal from convictions of driving while impaired, appellants Lawrence John Mahoney and Edwin James McCarthy challenge the district court's decision to admit into evidence their individual breath test results from the DataMaster DMT-G, a breath alcohol testing device. Because the district court appropriately decided to admit the evidence at trial pursuant to Minnesota Statutes section 634.16, we affirm.

FACTS

In their respective cases, each appellant provided two breath samples after being suspected of driving while impaired in 2015. The results were obtained from the DataMaster DMT-G, a breath-testing instrument approved by the commissioner of public safety. *See* Minn. R. 7502.0425 (2015). Mahoney's breath samples registered at 0.129 and 0.125, with a final value of 0.12 alcohol concentration. He was charged with second-degree driving while impaired. *See* Minn. Stat. § 169A.25, subd. 1 (2014). McCarthy's breath samples registered at 0.106 and 0.100, with a final value of 0.10 alcohol concentration. He was charged with fourth-degree driving while impaired, driving with an alcohol concentration of .08 or more. *See* Minn. Stat § 169A.20, subd. 1(5) (2014); Minn. Stat. § 169A.27, subd. 1 (2014).

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Appellants consolidated their cases and moved to suppress the individual test results, arguing that the results were not scientifically valid or reliable. The district court held a two-day pretrial hearing on the admissibility of the test results. At the hearing, the district court received expert testimony from three witnesses: Andreas Stolz, an associate professor of the Superconducting Cyclotron Laboratory at Michigan State University; Janine Arvizu, an analytical chemist; and Erik Johnson, a forensic scientist at the Minnesota Bureau of Criminal Apprehension.

The district court found that the individual breath test results were not foundationally reliable under Rule of Evidence 702.¹ But the district court did not suppress the test results, concluding that Minnesota Statutes section 634.16 “moves all issues of reliability from pretrial litigation to the fact-finder at trial,” thus creating “blanket admissibility.”

After the district court denied appellants’ motions to suppress, the parties agreed to stipulate to the state’s evidence (including the individual test results) and submit the matter to the district court for a trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 4. Appellants’ attorney explained that appellants wished to preserve their right to challenge the pretrial order on appeal. Appellants waived their rights to a jury trial, to

¹ In its reliability determination, the district court distinguished between the fleet-wide calibration of the DataMaster DMT-G devices and the individual test results. Specifically, the district court found that the BCA’s fleet-wide calibration of the DataMaster DMT-G was foundationally reliable under Rule of Evidence 702 because of the BCA’s procedures, which included reporting measurement uncertainty for its calibrations. In contrast, the district court explained that the BCA failed to report measurement uncertainty for the individual test results. Accordingly, the district court found that the individual test results were not foundationally reliable.

testify on their own behalf, to have any witnesses testify on their behalf, and to cross-examine adverse witnesses.

The district court found Mahoney guilty of second-degree driving with an alcohol concentration of 0.08 or more and stayed execution of a one-year sentence pending appeal. *See* Minn. Stat. § 169A.25, subd. 1; Minn. R. Crim. P. 28.02, subd. 7. The district court found McCarthy guilty of fourth-degree driving with an alcohol concentration of 0.08 or more and stayed execution of a 30-day sentence. *See* Minn. Stat. § 169A.27, subd. 1. This appeal follows.

DECISION

Appellants contend that the district court erred by determining, as a matter of law, that Minnesota Statutes section 634.16 requires the results of an approved breath test be admitted into evidence.² To construe this statute to dictate admissibility would be an encroachment by the legislature into judicial functions, appellants argue, raising separation-of-powers concerns. Ordinarily, we review the district court's evidentiary rulings for an abuse of discretion. *State v. Griller*, 583 N.W.2d 736, 742-43 (Minn. 1998).

² We note that appellants couch their appeals as a challenge to the denial of their motion to suppress under Minnesota Rules of Criminal Procedure 26.01, subdivision 4. We question whether that procedure, which preserves the defendant's right to obtain review of a pretrial ruling *dispositive* of the case, applies here. *See* Minn. R. Crim. P. 26 cmt. Given that the district court judge in her pretrial order specifically noted that appellants would be able to challenge the reliability of the results at trial, it is unclear whether the pretrial order was, indeed, dispositive. However, because both appellants and the state agreed that the issue was dispositive, we address the issue raised by the district court's pretrial order. *Cf. State v. Burdick*, 795 N.W.2d 873 (Minn. App. 2011) (remand appropriate where parties did not agree issue was dispositive and favorable appellate ruling was not necessarily dispositive).

But where, as here, that ruling is based on the district court's interpretation of a statute, we review de novo. *State v. Zais*, 805 N.W.2d 32, 36 (Minn. 2011).

The DataMaster DMT-G is a breath-testing instrument approved by the commissioner of public safety for determining alcohol concentration.³ According to Minnesota Statutes section 634.16, the results of an approved breath test are admissible in evidence without foundational expert testimony. The statute provides as follows:

In any civil or criminal hearing or trial, the results of a breath test, when performed by a person who has been fully trained in the use of an infrared or other approved breath-testing instrument . . . are admissible in evidence without antecedent expert testimony that an infrared or other approved breath-testing instrument provides a trustworthy and reliable measure of the alcohol in the breath.

Minn. Stat. § 634.16.

We do not interpret this language in a vacuum. Rather, as appellants acknowledge, we are guided by our interpretation of an identical statute, which applies to the admission of blood-analysis test results, in *State v. Pearson*. 633 N.W.2d 81, 85 (Minn. App. 2001). In *Pearson*, appellant argued that this statute, Minnesota Statutes section 634.15, violated the separation-of-powers doctrine of the Minnesota Constitution by limiting a party's ability to challenge the admissibility of evidence, in contravention of the rules of evidence. *Id.* at 84; see Minn. Stat. § 634.15 (2014). This court reiterated that the Minnesota Supreme Court has the inherent authority to create procedural rules governing the courts. *Id.* But

³ An approved breath-test instrument is one that has been approved by the commissioner of public safety for determining alcohol concentration. Minn. Stat. § 169A.03, subd. 11 (2014); see Minn. R. 7502.0425 (stating that the DataMaster DMT-G is approved by the commissioner).

we also clarified that the legislature may enact statutes that shift the burden of proof by creating rebuttable presumptions, which have been upheld as constitutional. *Id.* at 85. Accordingly, while the statute in *Pearson* provided that the evidence “shall be admissible,” Minn. Stat. § 634.15, this court concluded that the statute “merely establishes a presumption of reliability *that the driver may choose to rebut with live testimony.*” *Id.* at 86 (emphasis added). As the court noted: “A defendant in a criminal case may challenge the accuracy or reliability of the test by subpoenaing the laboratory assistant or BCA analyst to testify . . . allowing the court the opportunity to determine if the admission of the evidence was unfairly prejudicial.” *Id.* at 85.

Given the ability of a party to refute the presumption of reliability at trial, we held that the statute does not significantly impair the judiciary’s role in ruling on evidentiary matters. *Id.* at 85.⁴

Here, the district court appropriately interpreted the statute consistently with *Pearson*. The court found that the commissioner established a prima facie case that the

⁴ Our conclusion in *Pearson* is consistent with caselaw governing other potential conflicts between evidentiary rules and statutes. For example, in *State v. Willis*, the legislature enacted a statute that allowed for the admission of evidence explaining the absence of an alcohol concentration test. 332 N.W.2d 180, 184 (Minn. 1983). The supreme court refused to declare the statute unconstitutional because it “in no way interferes with the judiciary’s function of ascertaining facts and applying the law to the facts established.” *Id.* More recently, the statute in *State v. McCoy* allowed for the admission of relationship evidence in domestic abuse prosecutions without requiring the state to meet the clear-and-convincing-evidence standard in Rule of Evidence 404(b). 682 N.W.2d 153, 160 (Minn. 2004) (upholding a legislatively created rule of evidence).

DataMaster DMT-G tests are reliable, a finding unchallenged by appellants.⁵ The burden then shifts to petitioners in a license-revocation proceeding to dispute the test's validity and trustworthiness. *Kramer v. Comm'r of Pub. Safety*, 706 N.W.2d 231, 235 (Minn. App. 2005). Whether a party has rebutted a presumption is generally a question of fact. *Kluball v. Am. Family Mut. Ins. Co.*, 706 N.W.2d 912, 916 (Minn. App. 2005). As such, the district court's decision to advance the issue "from pretrial litigation to the fact-finder at trial" was appropriate and consistent with *Pearson*. 633 N.W.2d at 85-86.

Since *Pearson*, Minnesota courts have frequently cited Minnesota Statutes section 634.16 with approval. In *Jasper v. Commissioner of Public Safety*, the Minnesota Supreme Court acknowledged that section 634.16 created a rebuttable presumption of the reliability of breath-test results. 642 N.W.2d 435, 440 (Minn. 2002). In *State v. Underdahl*, the supreme court explained that, while section 634.16 creates a presumption of reliability for a breath test to be admitted into evidence, "Minnesota law permits this presumption to be challenged by drivers charged with DWI-related offenses." 767 N.W.2d 677, 685 n.4 (Minn. 2009). See *In re Source Code Evidentiary Hearings in Implied Consent Matters*, 816 N.W.2d 525, 537-38 (Minn. 2012) (recognizing three-part burden-shifting test for admitting breath test results⁶); *State v. Norgaard*, ___ N.W.2d ___, 2017 WL 2414832, at

⁵ The fact that a qualified person drew the blood sample using the testing kit provided by the BCA is sufficient to establish the prima facie admissibility of the test results. See *State v. Dille*, 258 N.W.2d 565, 568 (Minn. 1977).

⁶ In the third step of the three-part test, upon a successful showing that a defect affects the validity of the test, the burden shifts to the state to show that the defect did not affect the reliability of the test. *Source Code*, 816 N.W.2d at 538.

*2 (Minn. App. June 7, 2017) (no abuse of discretion to admit breath-testing instrument approved by the commissioner).

Despite this backdrop, appellants argue that the district court’s decision to admit the DataMaster DMT-G test results—after the pretrial determination that the test measurements lacked foundation—makes the test results unassailable and interferes with the judicial function. We disagree. Once a prima facie case of reliability is established, that case may be disputed by producing specific evidence that the test results were invalid. *See Fritzke v. Comm’r of Public Safety*, 373 N.W.2d 649, 651 (Minn. App. 1985). But *Pearson* does not require that this opportunity to dispute the test results occurs in a pretrial setting, as appellants appear to suggest. Rather, as the district court ruled, the statute “moves all issues of reliability from pretrial litigation to the fact-finder at trial.” *See State v. Ards*, 816 N.W.2d 679, 687 (Minn. App. 2012) (stating that once evidence is admitted, the reliability of the test is an issue for the fact-finder); *State v. Birk*, 687 N.W.2d 634, 639 (Minn. App. 2004) (explaining that the admission of Intoxilyzer breath results without expert testimony did not create an unconstitutional presumption of guilt). Moving disputes over the validity and reliability of test results to trial is not removing the judicial role altogether.

Appellants further suggest that *Bond v. Commissioner of Public Safety*, 570 N.W.2d 804, 806 (Minn. App. 1997), mandates suppression of the individual test results. In *Bond*, this court reversed the district court decision to exclude Intoxilyzer test results. In so doing, the court noted that when “the prima facie showing of the test’s reliability is challenged,

the judge must rule upon the admissibility in the light of the entire evidence.” *Id.* (quotation omitted).

And that is precisely what the district court decided to do here—to permit appellants to challenge the reliability of the results “in light of the entire evidence” at trial. But appellants chose not to challenge the results of the DataMaster DMT-G at trial. Instead, they stipulated to the state’s evidence and proceeded to a court trial where they were ultimately found guilty. Because the district court did not err in its interpretation of section 634.16 or in its corresponding decision to admit the individual breath test results at trial, we affirm.

Affirmed.