

Not Reported in N.W.2d, 2010 WL 5292291 (Minn.App.)
(Cite as: 2010 WL 5292291 (Minn.App.))



Only the Westlaw citation is currently available.

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UNPUBLISHED AND MAY NOT BE CITED EX-
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480A.08(3).

Court of Appeals of Minnesota.
STATE of Minnesota, Respondent,
v.
Herman **TANKSLEY**, Jr., Appellant.

No. A10-392.
Dec. 28, 2010.
Review Granted March 15, 2011.

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

[Lori Swanson](#), Attorney General, St. Paul, MN; and
[Susan L. Segal](#), Minneapolis City Attorney, [Jen-
nifer Saunders](#), Assistant City Attorney, Min-
neapolis, MN, for respondent.

[William M. Ward](#), Chief Hennepin County Public
Defender, Paul J. Maravigli, Assistant Public De-
fender, Minneapolis, MN, for appellant.

Considered and decided by [WORKE](#), Presiding
Judge; [KALITOWSKI](#), Judge; and [MINGE](#), Judge.

UNPUBLISHED OPINION

[WORKE](#), Judge.

*1 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 reliab-
ility 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 of-

ficers detected an odor of alcohol coming from ap-
pellant 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 ur-
ine-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 Crimi-
nal Apprehension (BCA) uses testing kits that con-
tain 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 al-
cohol in a urine sample kept in a container with so-
dium fluoride. Thus, the district court concluded
that a *Frye-Mack* hearing was not necessary re-
garding glucose testing because the usefulness of
such a test and the BCA methodology for prevent-
ing 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 testi-
mony to show that the failure to test for glucose in
a urine sample renders a urine-alco-
hol-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.^{FNI} This appeal

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follows.

FN1. The city attorney dismissed the other count.

DECISION

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 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).

*2 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.

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