

IN THE COUNTY COURT FOR THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Vs.

CASE NO. 04 CT 14406 SC*

CAROL MAE BJORKLAND, et al.*

Defendant.

✓ 2004 CT 014406

FILED FOR RECORD
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KARL E. HENNING, JR.
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FL.

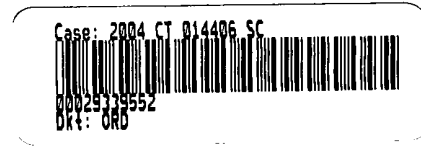
ORDER ON MOTION FOR SANCTIONS

This cause came before the court on the Defendant's Motion for Sanctions. After considering the arguments of both State and Defense, the court finds as follows:

The court ordered the State of Florida on November 2, 2005 to produce the source code for the Intoxilyzer 5000 to the Defendants' expert witness under strict confidentiality restrictions. The State has since provided the court with documentation that they attempted to comply with this order; however, the manufacturer for the Intoxilyzer 5000, CMI Inc. refuses to disclose the source code.

The defendants seek exclusion of the Intoxilyzer results as a proper sanction in the above cases based upon two theories: 1) The State's failure to comply with the discovery order, and 2) The State's failure and/or inability to comply with the "full information" provision of Florida Statute 316.1932 under the Implied Consent provisions.

The court first considers the discovery issue. The defendants correctly point out that the court issued a discovery order with which the State has not complied. The parties agree that the State Attorney's office requested the manufacturer of the instrument to provide the source code and that the manufacturer refused. In order to exclude evidence based upon a discovery violation, factors the court should consider include whether the violation was willful or inadvertent, whether it was substantial or trivial, the prejudice to the defendant, and the availability of remedies other than exclusion. See *Richardson v. State*, 246 So.2d 771 (Fla. 1971). Although the court agrees that the defendants' inability



to review the source code will prejudice their ability to prepare for trial¹, the court must evaluate the willfulness of the violation and the availability of other remedies before determining an appropriate remedy.

With regard to the issue of “willfulness”, the court has ruled² that the State cannot contract away its statutory obligation to comply with the discovery obligation pursuant to Fla. R. Crim. P. 3.220. However, the court does not find that the State Attorney’s Office, or the State itself, willfully violated the court’s prior order mandating disclosure of the source code. *c.f. Muldowney v. State*, 871 So.2d 911, n1 (Fla. 5th DCA 2004) (in which the state refused to provide information in its’ actual possession). The record in this case does not establish that the State purposely intended to deprive persons charged with DUI of “full information” when it presumably allowed the Intoxilyzer manufacturer to retain the source code as a trade secret. Although it is true that the State Attorney’s Office, as an arm of the State, is held to the standards of section 316.1932, the court cannot find that the State Attorney’s Office, or the state itself, willfully violated the provisions of the court’s prior order.

The court must also be mindful that when it imposes a sanction for a discovery violation, exclusion of evidence should only be used as a last resort. *Fla. R. Crim. P. 3.220(n); State v. Tascarella*, 580 So.2d 154 (1991). Relevant evidence should not be excluded from the jury unless no other remedy suffices, and it is incumbent upon the trial court to conduct an adequate inquiry to determine whether other reasonable alternatives can be employed to overcome or mitigate any possible prejudice. *State v. Eaton*, 868 So.2d 650 (Fla. 2d DCA 2004). The court, after thorough analysis, has found a reasonable alternative to the Defendants’ request for exclusion and therefore **DENIES** their request for exclusion of the breath test results for a discovery violation.

However, the analysis does not end here. As to the defendants’ second basis for relief, they contend that the State’s failure to comply with the implied consent statute justifies exclusion of the breath test results in these cases because the state is unable to prove that the instruments used in these cases comply with the provision of Fla. Admin.

¹ The State’s failure to comply with the court’s November 2nd order frustrates the defendants’ attempt to determine if the particular Intoxilyzer used to test them had been substantially modified without FDLE approval.

² In the November 2nd order.

Code 11D-8. *State v. Bender*, 382 So.2d 697, 699 (Fla. 1980); *See also State v. Sandt*, 774 So.2d 692 (Fla. 2000). The State responds that any non-compliance is purely speculative and that the Defendants have not shown any basis to question the reliability of the individual breath test results in these cases.

Florida's Implied Consent law provides a statutory scheme whereby the State may introduce a breath test result in an individual case without laying a traditional scientific predicate.³ *State v. Bender*, 382 So.2d 697, 699 (Fla. 1980); *Robertson v. State*, 604 So.2d 783 (Fla. 1992); *State v. Clarke*, 834 So.2d 398 (Fla. 2d DCA 2003). The reasoning behind this provision follows from the presumption that the State uses authorized instruments that are certified, maintained and used in accordance with the administrative code and applicable statutes. In essence, the Implied Consent Law gives the State an evidentiary shortcut that allows it to present incriminating evidence against a particular defendant by providing documentary evidence of the instrument's certification and maintenance. The trial court is then required to instruct the jury that a rebuttable presumption of impairment exists for those persons who register a result of .08 grams of alcohol per 210 liter of breath on the instrument. A criminal defendant has no other means to protest the admissibility of the breath test results into evidence absent a showing of unreliability.

In these cases, the defendants have the dilemma of challenging the reliability of the Intoxilyzer 5000 without having the means, i.e. the source code, to make the necessary analysis of reliability. The State's inability to comply with the provisions of section 316.1932, Florida Statute (2005) has effectively eliminated the defendants' ability to determine if the Intoxilyzer used to test them is in compliance with FDLE's own rules. Thus, the issue is whether this inability merits total exclusion of the results in these cases.

The Implied Consent laws, as stated above, were designed to streamline the necessary predicate for introduction of breath test results. *State v. Bender*, 382 So.2d 697, 699 (Fla. 1980). This procedure assumes compliance with the applicable administrative codes. When, as in this case, this assumption can be effectively challenged or disproved, the state cannot maintain the right to use the procedure to introduce breath test results.

³ The *Bender* predicate consists of three prongs: "(1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment, and (3) expert testimony was presented concerning the meaning of the test." *State v. Bender*, 382 So.2d 697, at 699.

Id. Instead, the State must lay the traditional scientific predicate to establish the breath tests reliability and accuracy. *Id.* at 700; *Robertson v. State*, 604 So.2d 783 (Fla. 1992).

Therefore, the Defendant's Motion for Exclusion is DENIED; however, the State must first lay the proper scientific predicate as to the Intoxilyzer results in these cases before the results may be admitted into evidence. Assuming the State is able to lay the proper scientific predicate, the presumptions of impairment contained in Florida Jury Instructions will not be given. *Robertson v. State*, 604 So.2d 783 (Fla. 1992); *State v. Clarke*, 834 So.2d 398 (Fla. 2d DCA 2003).

In consideration of the complex issues in this case, and recognizing that courts throughout the state have addressed this issue with varying results, the court believes it is necessary to have a consistent and uniform policy within this circuit and district so that all parties will be properly advised of their rights and obligations. Due to the large volume of cases in which this issue has arisen and will continue to arise throughout the district, a direct certification to the District Court of Appeal will provide a more efficient means of establishing uniform guidelines. Therefore, the court, on its own motion, certifies the following questions as ones of great public importance to the Second District Court of Appeal:

UNDER THE "FULL INFORMATION" PROVISION OF FLORIDA STATUTE 316.1932, IS A DEFENDANT WHO HAS PROVIDED A BREATH SAMPLE WITH THE INTOXILYZER 5000 AND IS CHARGED WITH DRIVING UNDER THE INFLUENCE, ENTITLED (UNDER PROPER CONFIDENTIALITY PROVISIONS) TO EXAMINE THE "SOURCE CODE" FOR THE INTOXILYZER 5000 WHEN THE DEFENDANT CAN DEMONSTRATE AN INCONSISTENCY BETWEEN THE APPROVED INSTRUMENT AND THE ONE USED TO OBTAIN THE BREATH SAMPLE?

IF YES, WHAT IS THE APPROPRIATE REMEDY IF THE STATE IS UNABLE TO PROVIDE THE SOURCE CODE BECAUSE IT IS IN THE POSSESSION OF A THIRD PARTY WHO REFUSES TO DISCLOSE IT?


DONE AND ORDERED, Sarasota County, Florida, this 21 day of December, 2005.



HON. DAVID L. DENKIN



HON. KIMBERLY C. BONNER



HON. JUDY GOLDMAN

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KRISTEN BENNETT	2005 CT 5705 SC
DARIN S. BUSHONG	2005 CT 1158 SC
KATHLEEN CHARLES	2004 CT 11430 SC
JOHN DOWNING	2002 CT 4894 SC
CHRISTOPHER FORRESTER	2004 CT 11276 SC
LEWIS FRYE	2005 CT 7074 SC
KEVIN GAUL	2005 MM 10208 SC
JAY GROEPEL	2003 CT 1756 SC
DEBORAH HACKER	2004 MM 6921 SC
KRISTIN HAVLIN	2004 CT 17591 SC
ELIZABETH HOMAN	2004 CT 9906 SC
JOHN BARTON KEENAN	2005 CT 12195 SC
PERRY LYTLE	2004 CT 450 SC
TIERESA MATTHEWS	2003 CT 18940 SC
KEVIN MOONEY	2005 CT 3776 SC
PATRICK O'BRIEN	2005 CT 4029 SC
MARY O'KEEFE	2004 CT 12679 SC
ROBERT PILLSBURY	2005 CT 4833 SC
BRANDY PUSATERI	2005 CT 6732 SC
GERALD RIELEY	2004 CT 20081 SC
ROBERTA ROBINSON	2005 CT 11053 SC 2004CT011053
DAVID ROSS	2004 CT 6571 SC
BENJAMIN S. SAXBY	2003 MM 9907 SC
SHANNON STEVENSON	2003 CT 16502 SC
STEVEN STINSON	2004 CT 16192 SC
LYNDA TATROMORALEE	2005 CT 4014 SC
JAMES TAYLOR	2005 CT 10276 SC
JOHN VANARMAN	2004 CT 17504 SC
STEVEN VANHORN	2004 CT 16670 SC
STEVEN WEEKS	2005 CT 9462 SC
STEVEN WEEKS	2004 CT 5363 SC
JAIMEE WELCH	2003 CT 15180 SC
MICHAEL PACHOTA	2005 CT 7092
AMBER PADDOCK	2005 CT 905
MORLEY PARENT	2003 MM 8714
SARA PENNEY	2003 CT 18637
DOMINIC BURCH	2004 CT 12605
SHANE HALE	2005 CT 12050
VICTOR GARCIA	2005 CT 59 2005MM000659
ADRIAN JUAREZ MATIANO	2004 CT 19990
OWEN ERICKSON	2005 MM 3057
WINIFRED JACOBSON	2005 CT 3325
PIERRE SANTILLANA	2005 CT 8274
JEREMY MOUNCE	2004 CT 16624
KENNETH BAKER	2005 MM 2364 SC
LOUIS DARNA	2004 CT 12684 SC
CATHY GANGE	2003 CT 18650 SC
DANN E. GRAFF	2005 CT 6385 SC
LAWRENCE KALLAS	2005 CT 318 SC
MATT PALMER	2005 CT 10079 SC
ROBERT PROVAZNIK	2004 CT 19929
JAMES TRAYWICK	2004 CT 5463 SC
GLEN WEDMORE	2004 CT 11521 SC
BETTY MOORE	2005 CT 7451
JULIE SUTTON	2005 CT 13098
DAVID MAGDALIK	2005 CT 4730

MITCHELL MALONE	2004 CT 15472
SHELBY RAE STEBBINS	2005-CT-18500 SC
REGAN E. PATON	2005 CT 2556
MARK DAIL	2004 CT 19325
TARA BROWN	2005 CT 1681 2005 CT 001681
THOMAS JANKE	2005 CT 1214
LISA FREDERICKSON	2005 CT 1816 2004 CT 018161
MICHAEL ABEL	2005 CT 7446
CARMEN CARTER	2005 CT 11089
CARL COURY	2005 CT 13540
DOUGLAS KREMER	2005 CT 13490
RONALD LABASKY	2005 CT 12042
COURTNEY MASSEY	2005 CT 7881
BELINDA BARNETT	2005 CT 11034 SC
MARCIA BARRETT	2005 CT 8445
DAVID BENNETT	2005-CT-17330 SC
MELISSA BENNETT	2005 CT 1286
KAREN BURNHAM	2005 CT 11691 SC 2005 CT 008620
MARTHA BURNS	2005 CT 11691 SC
WILLIS CHAMBERS	2005 CT 7721 SC
BARBARA CHANDLER	2005 CT 11268
ROBERT CORREIA	2005 CT 11514 SC
GREG COWELL	2005-CT-15152 SC
JAMES DALE	2005 CT 10255 SC
MARIO FELIX	2005 CT 6391
ALMASA FOCO	2005 CT 12050 2005 CT 012186
JAROLD FRENCH	2005 CT 9097 SC
JESUS GARCIA	2005 CT 9965 SC
RYAN GREEN	2005 CT 10636 SC
JOSHUA HAAG	2005 CT 15691 SC
CARROLL HARTLOVE	2005 CT 5624 SC
GEORGES HILARE	2005 CT 11530 SC
DAWN JORDAN	2005 CT 8198
JAMES JOYCE	2005 CT 7664 SC
KURT KRAMER	2005 CT 12866 SC
BERNARD KILLION	2005 CT 3999 SC
GARY MICHAEL LEE	2005 CT 4425 SC
DANIELLE LYNCH	2005 CT 3233 SC
GARCIA MADDOX	2005 CT 13276
LESLEY McGOWAN	2005 CT 14247
LUIS MONTALVAN	2005 CT 14660
PATRICIA PATE	2005 CT 14345
LAURA PEACE	2005 CT 14160
STEVEN ROSADO	2005 MM 11846 SC
JASON ROSE	2005 CT 873
MOISES SANTIAGO	2005 CT 1586 SC 2005 CT 016650
DANIEL SAULS	2005 CT 6391 2005 CT 013782
RANDY SCHLESMAN	2005 CT 9281
JUSTIN SCHRIEBER	2005 CT 9128
GLENN SEEPL	2005 CT 13039 SC
ROBIN SPUNKS	2005 CT 17158 SC
GRACE SULKOWSKI	2005 CT 13904
JUAN VASQUEZ	2005 CT 14687
ANTHONY WOLF	2005 CT 8885 SC
FRANCES KORKUS	2005 CT 6697
MARK ELLIS	2005 CT 12841
MICHAEL GANEY	2005 CT 3195 SC

MICHAEL GANEY
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 WILLIAM HALL
 MICHAEL GRAMIGNA
 WILLIAM ARCHER
 MARY HYNDS
 RICHARD KOSA
 JEFFREY MITCHELL
 LINDA NEACE
 JOHN RICCOTA
 JAMES WARREN
 VITTORIO DELLASALA
 FRANK FARLEY
 JOSE MARES
 LUIS MARTINEZ
 ADAM SMITH
 HORTENSE HARMON
 DONALD OSENGA
 COY GREEN
 DALE DREGER
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~~2005 CT 4303~~ Manatee Co
~~2005 CT 2367~~ Manatee Co

And

ADAM GYSON
 STEVEN FINDLAY
 MOSES HOWARD
 MIKE COTE
 JAMES BAILEY
 MARY CAIN
 NANETTE PICHETTA
 KATHLEEN FLORIO
 PAUL WATTERSON

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