

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CMI, INC. OF KENTUCKY,

Petitioner,

v.

Case No. 2D08-2134

JOHN C. FABIAN, ET AL.,
CATHERINE MARSH,
MORLEY PARENT,
SARA PENNEY,
KENNETH BAKER, ET AL.,
and THE STATE OF FLORIDA,

Respondents.

MOTION FOR CLARIFICATION AND FOR A WRITTEN OPINION

Petitioner CMI, Inc., d/b/a CMI, Inc. of Kentucky (“CMI”), pursuant to Rule 9.330(a), Florida Rules of Appellate Procedure, respectfully requests this Court issue a clarification, by way of a written opinion, to its order dated August 27, 2008, and states as follows:

I. Introduction

On August 27, 2008, this Court issued a per curiam denial of CMI’s Petition for Writ of Certiorari. In doing so, this Court has refused to grant any relief relating to a number of contempt orders issued against CMI by the Twelfth Judicial Circuit Court in and for Sarasota County. The contempt orders require CMI, an out-of-state corporation and non-party witness, to produce proprietary computer

source code for its Intoxilyzer instruments to criminal defendants charged with driving under the influence of alcohol (the “DUI defendants”). *See Fabian*, Vol. 1, p. 184; *Baker*, p. 51; *Marsh, Parent, Penney*, p. 29. The contempt orders directing production of the source code are directly contrary to existing law in other Florida appellate districts, including the Third, Fourth, and Fifth DCAs. However, the denial of relief without a written opinion in this case fails to demonstrate the required express and direct conflict necessary to obtain further review. FLA. CONST. art. V, §3(b)(3). CMI believes that a clarification of this Court’s basis for denial of relief, issued as part of a written opinion, would demonstrate a basis for conflict jurisdiction and therefore permit review by the Florida Supreme Court, pursuant to Rule 9.030(a)(2)(iv), Florida Rules of Appellate Procedure. CMI respectfully requests this Court issue a clarification by virtue of a written opinion in this matter.

II. Basis for Supreme Court Review – Conflict Between the DCAs

The orders under review hold CMI, a Kentucky corporation, in contempt for failing to produce documents pursuant to a subpoena duces tecum issued by the DUI defendants in Sarasota County. *See Circuit Court Appellate Opinion*, at p. 2. Specifically, CMI was ordered to produce the computer source code for its Intoxilyzer instruments that measure blood alcohol levels of individuals suspected of DUI. Florida courts have already addressed a DUI defendant’s entitlement to

CMI's source code. The decision below appears to be in direct conflict with decisions of the Third, Fourth and Fifth DCAs.

A. Conflict Over Materiality of CMI Source Code

In *State v. Bastos*, 985 So. 2d 37 (Fla. 3d DCA 2008), the Third DCA considered a remarkably similar situation, also involving production of CMI's source code. The *Bastos* decision was not cited in the previous briefing to this Court because it was decided the same day CMI's Reply Brief was filed. In *Bastos*, DUI defendants sought production of CMI's source code under the procedure set forth in Florida Statutes §942.01 *et. seq.*, the Uniform Law to Secure Attendance of Witnesses from Within or Without a State in Criminal Proceedings ("Uniform Law"). *Bastos*, at 38. The Third DCA held the Uniform Law was the proper way to obtain testimony and documents from CMI, and that the Intoxilyzer source code was not material to a criminal defense. *Id.* at 40, 42. Specifically, the Third DCA stated:

[W]e cannot accept the proposition that simply because a piece of testing equipment is used in a criminal case, it follows that the source code for its computer must be turned over.

Id. at 43. Since the source code was not material, the criminal defendants had no right to seek its production. *Id.* The *Bastos* decision is final and the mandate issued in July 2008.

The *Bastos* decision comports with other Florida law on this issue. In *Pfleiger v. State*, 952 So. 2d 1251, 1254 (Fla. 4th DCA 2007), the Fourth DCA affirmed a county court ruling that a DUI defendant had no right to obtain CMI's proprietary source code for the Intoxilyzer 5000.¹ The *Pfleiger* case cited to *Moe v. State*, 944 So. 2d 1096 (Fla. 5th DCA 2007). In *Moe*, the Fifth DCA also held that a DUI defendant had no right to CMI's proprietary source code for the Intoxilyzer 5000. *Id.* at 1097. In fact, the court held that neither the State of Florida nor the DUI defendant had a right to obtain the source code. *Id.*

Florida appellate courts in the Third, Fourth and Fifth DCA's have unequivocally and uniformly held that DUI defendants have no right to obtain CMI's source code for the Intoxilyzer instruments. In fact, the most recent decision in *Bastos* clearly suggests that such information is not material to a DUI defense without a very specific showing of need. *Bastos*, 985 So. 2d at 42-43.

Rarely do cases present such a clear potential for conflict. The *Bastos*, *Pfleiger* and *Moe* cases all hold that criminal DUI defendants in Florida are not entitled to CMI's proprietary source code. These cases involve the same subpoenaed party and the same requested documents. Yet, the ruling below holds CMI in contempt for failing to produce documents that three Florida appellate

¹ The *Pfleiger* case does not specifically name CMI, but CMI is the manufacturer of the Intoxilyzer 5000, one of the same instruments at issue in this case.

districts have clearly held CMI has no duty to produce.² A clarification of this Court's ruling will likely provide the basis for an express and direct conflict.

B. Conflict Over Procedure for Obtaining Criminal Discovery from Out-of-State Non-Parties

The DUI defendants previously attempted to obtain CMI's proprietary source code through other statutory procedures, without success.³ See Petition, p. 2-3. The discovery subpoena now at issue was prepared by counsel for the DUI defendants in the name of the Sarasota County Court, and was simply served upon CMI's Florida registered agent pursuant to Rule 3.220(f), Florida Rules of Criminal Procedure. See *Fabian*, Vol. 1 p. 48; *Baker*, p. 2-5; *Marsh, Parent, Penney*, p. 2-3. However, CMI is not a party and has no offices, documents, employees or property in Florida. Furthermore, the Kentucky state court quashed these subpoenas, and on a

² In addition to the finding of materiality in this case, the Sarasota and Manatee County Courts, during the pendency of this appeal, recognizing the source code as a trade secret pursuant to Florida Statutes §90.506, have actually found the production of source code to be not only "material," but also "reasonably necessary" to the DUI defense. This further demonstrates the fundamental disparity between the handling of these matters in Sarasota and Manatee Counties and the other appellate districts in Florida. The issue of "reasonable necessity" under Florida Statutes §90.506 is currently pending before this Court in *CMI, Inc. v. Almaraz*, Case No. 2D08-3230.

³ In response to these types of requests, the Florida legislature recently amended Florida Statutes §316.1932(1)(f)(4) to address this exact issue. The "full information" that DUI defendants are entitled to receive was specifically limited to *exclude* "software of the instrument used to test the person," and "any other material that is not in the actual possession of the state," and "information in the possession of the manufacturer of the test instrument." *Id.*

similar subpoena even ordered CMI not to respond to subpoenas that did not comport with the Uniform Act. *See Fabian*, Vol. 1, p. 131, 165. The DUI defendants below never addressed the significance of their failure to comply with the Uniform Act, or the newly fashioned statutory protection for testing equipment software under Florida Statutes §316.1932(1)(f)(4), or the implications for personal or long-arm jurisdiction in Florida.

However, the procedural underpinnings of this case provide another potential for direct conflict. The *Bastos* case, decided after the close of briefing in this matter, held under very similar circumstances that the proper method for a DUI defendant to obtain discovery of documents from Kentucky-based CMI was through the Uniform Act. 985 So. 2d at 38-39. In doing so, the Third District noted it was following the “prevailing rule,” and that the Uniform Act would be the proper vehicle for obtaining documents from CMI. *Id.* The *Bastos* court also noted that the DUI defendants had misinterpreted the decision in *General Motors v. State*, 357 So. 2d 1045 (Fla. 3d DCA 1978), which allegedly authorizes issuance of a subpoena to a non-resident corporation’s Florida registered agent. The Third DCA cautioned that Florida’s

adoption of the Uniform Act required uniformity of procedure by adopting states, such as Florida and Kentucky.⁴ *Bastos*, 985 So. 2d at 39-40.

A written opinion in this matter will likely reveal a conflict with *Bastos* on this point as well. To the extent this Court has permitted the DUI defendants to obtain documents from an out-of-state corporation by subpoena to CMI's Florida registered agent, such decision would appear to conflict with the approved procedure outlined in *Bastos*. The denial without a written opinion leaves open the possibility that any company that does business in Florida will be susceptible to subpoena by Florida's county or circuit courts merely by serving a registered agent, and without complying with the Uniform Act.

III. Other Factors Favoring Issuance of a Written Opinion

While a decision without a written opinion is certainly the prerogative of this Court, this appears to be a circumstance in which a written opinion would be warranted. As part of its extensive study in 2000, the Committee on Per Curiam Affirmed Decisions issued a Final Report and Recommendations ("PCA Report")

⁴ The Supreme Courts of Mississippi, Louisiana and Alabama have all held that a non-resident non-party may not be subpoenaed for documents or testimony by serving the registered agent in the state. See *Syngenta Crop Protection v. Monsanto Co.*, 908 So. 2d 121, 129 (Miss. 2005); *Phillips Petroleum v. OKC Ltd. Partnership*, 634 So. 2d 1186, 1189 (La. 1994); *In re: National Contract Poultry Growers' Assoc.*, 771 So. 2d 466, 469-70 (Ala. 2000).

that included guidelines for determining when a written opinion is warranted. The factors pertinent to this case are as follows:

- The decision is in conflict with that of another district.
- The decision appears to be in conflict with that of another district, but the latter can be harmonized or distinguished.
- There is an arguable basis for Supreme Court Jurisdiction.
- The issue decided is also present in other cases pending before the court.
- The issue decided can be expected to arise in future cases.

See PCA Report, at E-1 to E-2. Each of these factors may be met in this case, and weigh in favor of the issuance of a written opinion. The potential for conflict with other DCA opinions, and the basis for conflict jurisdiction in the Florida Supreme Court, has been previously addressed above.

However, the resolution of these issues in the Second DCA is also important. There are a number of other cases pending in Sarasota County which involve these exact issues. As noted by the county court below, the resolution of these issues has created “a tremendous backlog” of DUI cases in Sarasota County, including more than just those cases consolidated in this appeal. *See* County Court Order of Civil Contempt, at ¶18. A denial without opinion does not provide the involved parties with any guidance as to how the Uniform Act, or existing Florida case law, will be applied in the Second DCA. The uncertainty over the basis for

this Court's decision will likely result in additional litigation, additional appeals, and an additional backlog in Sarasota County DUI cases. A written opinion would aid in the resolution of other cases pending before the county court, and in other cases expected to arise in the future. The factors identified by the PCA Committee Report indicate a strong need for a written opinion in this case.

IV. Conclusion

CMI believes that a written opinion may demonstrate a direct and express conflict between this case and *Bastos, Pflieger* and *Moe*.⁵ An express and direct conflict would permit review by the Florida Supreme Court. Alternatively, a written opinion may demonstrate an alternative basis for the ruling that would similarly provide guidance to the parties involved in this situation, which is ongoing and recurring. The goals of justice and judicial economy would be well-served by the issuance of a written opinion in this case. Uncertainty in the law in the Second DCA has caused a significant backlog in the adjudication of misdemeanor DUI cases in Sarasota County as DUI defendants seek to discover the Intoxilyzer source code that is not material to their defense for strategic purposes and delay. CMI respectfully requests this Court clarify its order dated

⁵ CMI also believes that this case may demonstrate a conflict with rulings by the Supreme Courts of Mississippi, Louisiana and Alabama. *See supra*, p. 7, note 4.

August 27, 2008, and issue a written opinion describing the basis for denial of relief.

Certification Required by Rule 9.330(a)

I express a belief, based upon a reasoned and studied professional judgment, that a written opinion will provide a legitimate basis for supreme court review for all of the reasons set forth above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to:

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this 9th day of September, 2008.



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