

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

STATE OF FLORIDA,
Plaintiff,

vs.

CASE NO. 04 CT 14406 SC

CAROLE BJORKLAND, et al.,
Defendant.

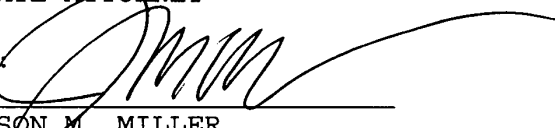
STATE'S NOTICE OF SUPPLEMENTAL AUTHORITY

COMES NOW the State of Florida, represented by Earl Moreland, State Attorney for the Twelfth Judicial Circuit, and herein notifies all parties and this Court of the following recent supplemental authority, as such:

Our office received an order from Hillsborough County on October 31, 2005, involving a similar issue to one pending before this Court. In that case, named State v. Walker (et al.) and attached to this filing, County Judge Tom Barber denied a coalition of defendants' request for Intoxilyzer 5000 source code.

Respectfully submitted.
EARL MORELAND
STATE ATTORNEY

BY:



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I HEREBY CERTIFY that a true copy of the foregoing has been furnished by hand to: Robert Harrison, Esquire, 825 S. Tamiami Trail, Ste. 1400, Sarasota, Florida 34237-700 this 31st day of Oct, 2005.

BY:



JASON M. MILLER

2005 OCT 31 PM 3:24

FILED FOR RECORD

Case: 2004 CT 014406 SC
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Dkt: NOT

**IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
CRIMINAL DIVISION**

STATE OF FLORIDA

DIVISION: E

vs

MARQUISE D. WALKER
ANNE PARRETT
CHERYL FERNANDEZ
NATHAN WEIRICH
THOMAS WELCH

CASE NO. 125-834-J
CASE NO. 720-432-X
CASE NO. 727-469-X
CASE NO. 726-655-X
CASE NO. 6270692-XAF
007-090-DCY

TRAVIS WHITE
MARK E. HOLLOBAUGH
JAMES P. HANKS
BRAIN HENRIQUEZ
SHERRICK ERVIN
PAUL WALDERS
PHILLIP WILSON
JOSEPH FISHER

CASE NO. 727-427-X
CASE NO. 006-285-XAF
CASE NO. 731-770-X
CASE NO. 726-098-X
CASE NO. 000-570-XAM
CASE NO. 731-570-X
CASE NO. 627-111-X
CASE NO. 002-476-XAM

ORDER DENYING DEFENDANTS' MOTIONS TO COMPEL/PRODUCE

THESE CASES came to be heard on September 30, 2005 on various Motions To Compel/Produce Source Code Information Relating to the Intoxilyzer 5000. The court, having reviewed said motions, applicable legal authorities, and hearing the testimony of witnesses and arguments of counsel, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED that defendants' motions are DENIED for the following reasons:

Background

Defendants in various DUI cases have filed motions seeking to compel the State of Florida ("the State") to produce computer source code information for the Intoxilyzer 5000 ("the source code"). In each of these cases the defendant was arrested in Hillsborough County and charged with driving under the influence (violation of § 316.193, *F.S.*). In each case a breath test was performed using an Intoxilyzer 5000 and all defendants provided breath samples exceeding the legal limit. The Intoxilyzer 5000 is manufactured by CMI, Inc. ("CMI") which is located in Owensboro, Kentucky.

Defendants have elected to participate in discovery and they have requested the State to provide the source code to them. In response to these requests, the State indicated that the source code is a trade secret of CMI and, consequently, the State can not produce it because the State does not have actual or constructive possession of the source code. No defense attorney in any of these cases has attempted to use any formal, court sanctioned means to obtain the source code directly from CMI.¹

At the hearing on these motions defendants provided testimony from three witnesses: Beverly Gray, Dr. Harley Myler and Laura Barfield. Dr. Myler was qualified as an expert witness in the field of electrical engineering and computer engineering. Ms. Gray is the official agency Intoxilyzer inspector for the Hillsborough County Sheriff's Office ("HCSO"). Ms. Barfield is the Florida Department of Law Enforcement ("FDLE") program manager of the alcohol testing program. The State presented

¹ One defense attorney indicated that he placed telephone calls to CMI in 2004, but these calls were not returned.

testimony from Ms. Barfield and CMI's principal engineer, Dana Glenn Gilbreath.

Dr. Myler's testimony focused on the erasable programmable read only memory ("EPROM") contained within the software for the Intoxilyzer 5000 breath testing instruments manufactured by CMI. The EPROM is contained on a small computer chip. Boiled down to its essential points, Dr. Myler's extensive testimony indicated that he has examined EPROMs from different Intoxilyzer instruments and found that these EPROMs contained different amounts of data. After the hearing Dr. Myler submitted a supplemental report that discusses his examination of additional EPROMs. Dr. Myler's supplemental report discusses certain additional differences he found including "version number anomalies," and "differences in text messages."

At the hearing Dr. Myler testified that the differences in the software he observed might indicate something as innocuous as a software upgrade needed for a new type of printer, or, the differences in the software might indicate an issue more substantial that might cause inaccuracies in breath test results. Dr. Myler explained that he could not conclusively determine the nature of the differences in the software without examining the manufacturer's source code. Dr. Myler acknowledged that the source code was a trade secret of CMI.

Ms. Gray testified that all documentation required by law relating to the Intoxilyzer is available for inspection. She also testified that the HCSO does not have the source code information, and she has never been asked by anyone within law enforcement to get that information from the manufacturer.

Ms. Barfield testified regarding various official tests and evaluations that have

been performed on the Intoxilyzer 5000 from 1988 through 2005. She indicated that the Intoxilyzer 5000 is presently in compliance with all applicable statutes, rules and regulations. In her view, the various tests and evaluations conducted by FDLE would have discovered any variances in the software that compromised the reliability of breath test results. She also testified that no law enforcement agency of the State of Florida presently has possession of the source code information sought here, nor has any Florida law enforcement agency ever had such information in the past. In addition, she indicated that there has never been a written contract between the State of Florida and CMI relating to the Intoxilyzer (other than a possible bill of sale).

Mr. Gilbreath testified that the computer source code information at issue in these cases is a trade secret of CMI, and CMI has not, and will not, provide it to the State of Florida. He did not dispute the fact that certain software differences exist. However, he explained that these software differences have resulted from upgrades necessary to accomplish tasks such as adding new printers and the like. According to Mr. Gilbreath, these differences have not effected the Intoxilyzer's reliability in any way. He also indicated that CMI has various quality control procedures in place to ensure that the Intoxilyzer instruments operate properly. In his view, if the variances in the software effected the reliability of breath test results, these problems would have been detected by CMI's quality control procedures.

No evidence was presented at the hearing suggesting that the State has intentionally tried to avoid gaining possession of the source code from CMI, or somehow engaged in what could be characterized as "willful blindness."

Analysis

In their motions defendants claim that they need the source code to determine whether software variations have effected the reliability of Intoxilyzer 50000 breath test results. The State has responded by filing a document titled "State's Response To Defendant's Motion To Compel/Produce The Source Code For FDLE Intoxilyzer 5000-R Software EPROM 904.04" ("the State's Response"). The State's response asserts three arguments: (1) the State does not have actual or constructive possession of the source code; (2) the source code is a trade secret of CMI; and (3) the defense efforts to gain access to the source code is an impermissible fishing expedition. Only the first argument requires extended discussion.

It is well settled in Florida that the State is not required to produce information in discovery that is not in its actual or constructive possession. The text of Rule 3.220(b)(1), *Florida Rules of Criminal Procedure*, clearly states, in relevant part, that "... the prosecutor . . . shall disclose to the defendant . . . the following information and material within the state's possession or control. . ." See also *Sinclair v. State*, 657 So.2d 1138 (Fla. 1995); *State v. Miranda*, 777 So.2d 1173 (Fla. 3d DCA 2001)(state not required to disclose information relating to a prosecution witness when said information was in the custody and control of federal law enforcement agencies). The testimony at the hearing from Ms. Barfield, Ms. Gray and Mr. Gilbreath made it clear that the source code is not within the actual possession of any Florida law enforcement agency.

The fact that the State is not required to produce items in discovery that are not in its actual or constructive possession does not, however, fully answer the question at hand.

Defendants argue that the State is required to obtain the source code from CMI, and disclose it in discovery, because § 316.1932(1)(f)(4), *F.S.* provides that “*Upon request of the person tested, full information concerning the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney.*” (emphasis added). Defendants argue that the State is statutorily required to have actual possession of the source code, or, put differently, the State is charged with constructive possession of the source code by virtue of this statute. According to this argument, § 316.1932(1)(f)(4), *F.S.* creates an exception to the rule that the State is not required to produce information in discovery that is not in its actual or constructive possession. At the hearing on these motions, defense counsel took the position that § 316.1932(1)(f)(4), *F.S.* imposes an affirmative obligation on the State to send a Subpoena to CMI to obtain the information requested by the defense in discovery.

The success, or failure, of this argument depends on the meaning of the term “full information” as used in § 316.1932(1)(f)(4), *F.S.* In support of their “full information” argument, defendants rely on four authorities: *State v. Muldowny*, 871 So.2d 911 (Fla. 5th DCA 2004); *State v. Guthrie*, 12 Fla. Weekly Supp. 395 (Seminole County Ct. Jan. 2005); *Dilallo v. Riding Safely, Inc.*, 687 So.2d 353 (Fla. 4th DCA 1997); and § 90.954, *F.S.* (“the best evidence rule”). As will be discussed below, none of these authorities is sufficient to carry the day for defendants.

Muldowny

In *State v. Muldowny*, 871 So.2d 911 (Fla. 5th DCA 2004), the State refused to disclose an operator’s manual, maintenance manual and schematic relating to the

Intoxilyzer. It is critical to note that *all of these items were within the State's actual possession*, yet the State refused to produce them in discovery. The trial court suppressed the breath test result due to the State's deliberate refusal to disclose. The Fifth District cited the "full information" provision in § 316.1932(1)(f)(4), *F.S.* as support for its decision affirming the trial court. However, *Muldowny*, is distinguishable from the situation presented here in at least two significant respects: (1) the State does not have actual possession of the source code; (2) the State is not "stonewalling" or attempting to conceal information as was done in *Muldowney*. As such, *Muldowny* does not support the proposition that the State is required to disclose information that is not in its actual possession, custody or control.

Guthrie

State v. Guthrie, 12 Fla. Weekly Supp. 395 (Seminole County Ct. Jan. 2005), appears to have involved the very same argument asserted here. There, the Court accepted the defendants' interpretation of § 316.1932(1)(f)(4), *F.S.* and the *Muldowny* case. However, *Guthrie* appears to be the *only* Florida court that has accepted this argument. All of the other Florida courts that have considered arguments of this nature have rejected them. *See, e.g., State v. Cohen, et. al*, Case No. 2005-CT-2049 (Leon County Ct. October 11, 2005); *State v. Fuller*, Case No. 05-2004-CT-58986-A (Brevard County Ct. May 11, 2005); *State v. Lowdell*, Case No. 04-5254-CTMA (Bay County Ct. April 21, 2005); *see also, State v. Cadima*, Case No. 381528-W (Miami-Dade County Ct. June 2, 2005)(rejecting expansive view of *Muldowny*); *State v. Blackburn*, Case No. 2003-CT-1158-C (Clay County Ct. January 21, 2005)(rejecting expansive view of

Muldowny); *State v. Contreras, et. al*, Case No. CTC-2003-1283-MMAWS (Volusia County Ct. April 22, 2005). Review of the decisions in these cases shows that *Guthrie* represents a minority position on this issue.

Dilallo

In support of their interpretation of “full information,” defendants also cite *Dilallo v. Riding Safely, Inc.*, 687 So.2d 353 (Fla. 4th DCA 1997). *Dilallo* was a civil personal injury case brought against a horseback riding facility by a young girl who was injured while riding a horse at the defendant’s facility. The defendant obtained a summary judgment, in part, by relying on a tort immunity statute that went into effect *after* the accident in question. However, the defense attorney never informed the court that the tort immunity statute only went into effect *after* the accident, and was *not* retroactive. The Fourth District used the term “full disclosure” to describe the defense attorney’s ethical obligation, pursuant to the Rules Regulating the Florida Bar, to provide “full disclosure” to the court regarding the immunity statute, and to know and disclose adverse legal authority. *See* Rule 4-1.1 and 4-3.3(3), *Rules Regulating the Florida Bar*. This opinion has no value in explaining the meaning of “full disclosure” as that term is used in § 316.1932(1)(f)(4), *F.S.*

Best Evidence Rule

Defendants assert that the best evidence rule, § 90.952, *F.S.*, imposes an affirmative obligation on the State to produce the Intoxilyzer’s source code in discovery since the State is the proponent of the breath test. Defendants argument with respect to the best evidence rule is not well taken for several reasons. First, the best evidence rule is

not a rule defining the scope of discovery in a criminal case. Rather, it is a rule relating to the admissibility of writings, recordings or photographs into evidence at a judicial proceeding. "The rule requires that when the contents or terms of a writing, recording, or photograph are being proved, the original writing, recording or photograph must be introduced into evidence unless one of the enumerated reasons for its absence is shown." Ehrhardt, *Florida Evidence*, § 951.1 (2004 Ed.). Thus, defendants' best evidence rule argument might arise at a trial when the State attempted to introduce the breath test results. The best evidence rule would not serve as the basis for a pre-trial motion to compel. In any event, the best evidence rule would only apply if the State were trying to prove the contents of a writing, recording or photograph. Such is not the case here; the State is not trying to prove the contents of the source code. Furthermore, it is not clear that the source code would fall within the definition of writing, recording or photograph in this particular scenario.

If defendants' argument were to be accepted, any time a party in any civil or criminal litigation wanted to introduce the results of any kind of scientific test, they would be required by the best evidence rule to provide all software information -- including the source code -- for the scientific device that was used to perform the test. In a DUI manslaughter case, for example, the State would be required to introduce the computer source code for the medical device used to test a defendant's blood if they wanted to introduce the blood test results into evidence. In a civil medical malpractice case where a particular medical test was used as evidence of negligence (or lack of negligence), the proponent of the test would have to introduce the computer source code

for the medical device if they wanted to introduce the test results into evidence. This interpretation of the best evidence rule is not supported by the language of the statute or Florida case law on this issue.

Legislative History, Statutory Context and Public Policy

Unfortunately, there is no legislative history to shed light on the meaning of “full disclosure.” The statutory scheme requiring “full disclosure” in DUI cases has been in effect for at least 25 years. *See State v. Guthrie*, 12 Fla. Weekly Supp. 395 (Seminole County Ct. Jan. 2005). However, with the exception of *Guthrie*, never during this entire 25 year time period has the “full information” obligation contained within Florida DUI law been interpreted to require the State to provide information not in its actual possession, custody or control.

With respect to legislative intent, the Florida Legislature has indicated its desire to provide enhanced protection in the area of trade secrets. For example, the Florida Evidence Code and the Federal Rules of Evidence are similar, if not identical, in most respects, yet the Florida Evidence Code includes a *specific evidentiary privilege* with respect to trade secrets that does not exist within the Federal Rules of Evidence. *See* § 90.506, *F.S.* (“Privilege with respect to trade secrets”). Moreover, various sections of the Florida Statutes include provisions specifically intended to protect trade secrets. *See* § 812.081, *F.S.* (theft of trade secrets); § 815.045, *F.S.* (public records exemption for trade secrets); § 688.01, *et. seq.*, *F.S.* (uniform trade secrets act). As previously noted, the defense expert, Dr. Myler, testified that he believes that the source code is a CMI trade secret.

Finally, it should be noted that defendants' position is not consistent with sound, practical public policy. If defendants' position were to be accepted, the State's discovery obligations in DUI cases would be, essentially, limitless. Any time the defense claimed a need for any kind of technical information about the Intoxilyzer, the State would then have the obligation to go out and gather such information no matter where it might be located in the world.

This concern is not merely theoretical or hypothetical. At the hearing on these motions Dr. Myler testified regarding a "Thermistor" issue that has arisen in the past with respect to the Intoxilyzer.² In connection with this testimony Dr. Myler indicated that the paint used on the Intoxilyzer might result in temperature changes that would, in turn, cause substantial changes to the Instrument. If defendants' argument with regard to the source code were to be accepted, the State would then be required -- in the case of an alleged paint problem -- to go out and obtain the formulas for the Intoxilyzer's paint from the paint manufacturer or risk having the breath tests suppressed. It is not difficult to predict protracted litigation and continuing discovery disputes concerning every component part included within the Intoxilyzer.

Conclusion

It is unlikely that the Florida Legislature intended to impose a limitless discovery obligation on the State in DUI cases when it enacted the "full information" provision in §

² "Thermistors (THERMally sensitive resISTORS) are solid state, electronic devices which detect thermal environmental changes for use in temperature measurement, control and compensation circuitry." See <http://www.thermistor.com/>

316.1932(1)(f)(4), *F.S.* Rule 3.220(b)(1), *Florida Rules of Criminal Procedure*, only requires the State to produce information in discovery that is in its actual or constructive possession. Therefore, this court interprets the "full information" provision in § 316.1932(1)(f)(4), *F.S.* to include only such information that is in the State's actual or constructive possession.³ Because the source code is not within the State's actual or constructive possession, defendants' motions are DENIED.

DONE AND ORDERED in Chambers at Tampa, Hillsborough County, Florida,
this 25th day of October, 2005.



THOMAS P. BARBER
COUNTY COURT JUDGE

ORIGINAL SIGNED

OCT 25 2005

TOM BARBER
COUNTY JUDGE

cc: Bilam Isaak
W.F. "Casey" Ebsary, Jr.
Victor Pellegrino
Asst. State Attorney
Traffic Clerk

³ If it had been established that the State intentionally tried to *avoid* gaining possession of the source code, it is possible that the State would have been required to provide such information to the defense under a constructive possession theory despite its lack of actual possession. As noted above, those facts are not presented here.