IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT, IN AND
FOR ORANGE COUNTY, FLORIDA

APPELLATE CASE NO. **07-AP-38**

STATE OF FLORIDA,
Appellant,
vs.

MAEGAN McGRATTY	2007-CT-584-E
EDWARD MIZO	2006-CT-2252-O
TODD BLEDSOE	2006-CT-16980-O
FERNANDO MEJIA MARTINEZ	2006-CT-20735-O
JOSEPH BLAIR	2006-CT-20720-O
JOSE LUIS FLORES LANDEROS	2006-CT-1764-W

Appellees.
_____/

Appeal from the County Court for Orange County,
Florida, Leon B. Cheek III, County Court Judge

Lawson Lamar, State Attorney, and Christina J. Dubois,
Assistant State Attorney, for Appellant

Stuart Human, Esquire; Joerg F. Jaeger, Esquire; and
Catherine Chein, Assistant Public Defender, for Appellees

Before THORPE, J. ADAMS, AND PERRY, J.J.

PER CURIAM.

FINAL ORDER AFFIRMING TRIAL COURT

In this consolidated appeal, the State of Florida appeals the trial court's Order granting in part Appellees' Motions to Produce and Motions for Subpoena Duces Tecum, rendered June 14, 2007. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1).

Appellees were charged at various times and places with driving under the influence in violation of Florida Statute section 316.193. Defense counsel filed a series of motions, including three Motions to Produce, a Motion for the Production of the Source Code or in the alternative, a Motion for the Exclusion of Breath Test Results, and a Motion for Issuance of a Subpoena Deuces Tecum to CMI, the manufacturer of the Intoxilyzer 8000.

The trial court granted the Motion to Produce in part, ordering the State:

> to produce all operators' manuals, schematics, instrument specification documents or manuals and mechanical drawings for the Intoxilyzer 8000, with the exception of the Intoxilyzer 8000 "Operational Guide" (Rev. 3/02) and the Intoxilyzer 8000 "Operational Guide (Rev. 11/01), if such has not already been produced to defendants' counsel.

The trial court granted the Motion to Produce III in part, ordering the State:

> to allow a defense expert to examine a download of the 8100.26 and 8100.27 disks in their possession and the EE-PROMS from the machine used by FDLE ...

Finally, the trial court granted the Motion for Issuance of Subpoena Duces Tecum in part, ordering the defendants to prepare a proposed subpoena to CMI, Inc. The other motions were denied. (R 1248-1265.)

Issues on Appeal

I. Florida Rule of Criminal Procedure 3.220 and Florida Statute 316.1932(1)(f)(4) requires the State to provide only the results of the test taken by the Appellees.

II. In granting Appellees' motion to produce, the trial court's order effectively requires the State to infringe upon the copyright held by CMI, a private entity, in violation of Title 17 of the United States Code entitled "Copyrights."

Point I

The State alleges the trial court erred by requiring the State to produce discovery beyond the results of the individual breath tests. After setting forth a "history of discovery," the State argues the Florida Legislature amended section 316.1932(1)(f)(4), effective October 1, 2006.[1] It places particular emphasis on the phrase: "Full information *does not include manuals, schematics, or software of the instrument used to test the person* or any other material that is not in the actual possession of the state." (emphasis in State's Initial Brief) The State's position is that it does not have to produce the source code,[2] software, manuals, schematics and trade secrets of the Intoxilyzer 8000

[1] Upon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney. Full information is limited to the following:

a. The type of test administered and the procedures followed.
b. The time of the collection of the blood or breath sample analyzed.
c. The numerical results of the test indicating the alcohol content of the blood and breath.
d. The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test.
e. If the test was administered by means of a breath testing instrument, the date of performance of the most recent required inspection of such instrument.

Full information does not include manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the state. Additionally, full information does not include information in the possession of the manufacturer of the test instrument.

[2] Production of the source code is not an issue in this appeal.

in a DUI prosecution. In support of its claim that the Legislature intended to limit the disclosure requirement, the State cites *Moe v. State*, 944 So. 2d 1096 (Fla. 5th DCA 2006), wherein the Fifth District Court of Appeal held the State was not required to disclose the source code for an Intoxilyzer.

The Appellees argue that it was within the discretion of the trial court to grant or limit discovery. The State admitted that it is in possession of the software; therefore, the limitations set forth in §316.1932(1)(f)(4) do not apply. *State v. Muldowny*, 871 So. 2d 911 (Fla. 5th DCA 2004), permits a defendant to use the discovery process to determine the scientific reliability of a breath alcohol test and determine whether the device was properly approved. *Muldowny* specifically referenced "operating manuals, maintenance manuals, and schematics" but the holding was that full information "includes" these materials. Appellees argue there was no intention to exclude software.

Appellees also argue the Fifth District Court of Appeal specifically limited the holding in *Moe* to the facts of that case, where the Appellant was seeking the source code in particular. Furthermore, Moe did not challenge the accuracy of his test results, whereas the Appellees in the instant case did. Therefore, Appellees contend they shown materiality, because the information sought "may reasonably be considered admissible and useful to the defense in the sense that it is probably material and exculpatory," citing *Coney v. State*, 294 So. 2d 82 (Fla. 1974). In support, Appellees refer to several Ninth Judicial Circuit opinions regarding "the checkered history of breath testing machines,"

specifically, the existence of unapproved modifications.

The State's argument fails. *Moe* is distinguishable because the Fifth District recognized that the State did not have possession of the source code. By contrast, the State has acknowledged that it does have possession of the software and other materials requested. Therefore, the relevant clause of the amended statute is not the one italicized by the State but "*or any other material that is not in the actual possession of the state*." To articulate the obvious: The limitation on disclosure is that State is not required to produce materials it does not possess. Furthermore, the software is material because the defense must be allowed to challenge the reliability of the breath testing machine, and this cannot be accomplished without reviewing the software.

Point II

The State alleges the trial court erred by effectively requiring it to infringe on the copyright held by CMI, the manufacturer of the Intoxilyzer 8000, in violation of Title 17 of the United States Code entitled "Copyrights." After summarizing copyright law, it argues: "While the State was in the actual possession of the physical CD on which the Intoxilyzer 8000 software is embodied, the State was not in actual or constructive possession of the underlying copyrighted software itself." In other words, possession of the software does not make the State the copyright owner.

The State further argues the owner of the software is CMI, and the license agreement between the State and CMI is "restricted" in that it prohibits the copying or

transferring of the software outside the registered business premises. Therefore, it is the State's position that copying and distributing the software would infringe upon CMI's copyright.

Appellees argue the trial court's order provided only that the defense expert could examine the bit and byte patterns and would not receive a copy of the disk or the print-out obtained from the disk or ee-proms. They also argues that none of the six rights set forth in Title 17 apply.[3] Appellees argue that since nothing was to be copied, the copyright laws have no application.

Appellees further argue no evidence was presented that the software was, in fact, copyrighted. Furthermore, the State has the right to maintain the software on various laptop computers and CD disks and to download it into Intoxilyzer 8000 machines located throughout Florida. Finally, Appellees rely on the fair use doctrine, contending they are not seeking disclosure for commercial use but only in preparation for litigation.[4]

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[3] Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission. 17 U.S.C.A. §106 (2002)

[4] (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the

While the Fifth District Court of Appeal held in *Moe* that the source code for the software is a trade secret owned by CMI, the State has cited no authority or other evidence indicating that the software itself is copyrighted or that the license agreement precludes Appellees from examining it.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that the ruling of the trial court is hereby AFFIRMED.

DONE AND ORDERED on this 29th day of June 2009.

/S/_____
JANET C. THORPE
Circuit Court Judge

/S/_____
JOHN H. ADAMS, SR.
Circuit Court Judge

/S/_____
BELVIN PERRY, JR.
Circuit Court Judge

Certificate of Service

I certify that a copy of the foregoing Final Order Affirming Trial Court has been provided this 29th day of June 2009 to Christina J. Dubois, Assistant State Attorney, Appeals Unit, 415 North Orange Avenue, Orlando, Florida 32801; Stuart Hyman, Esquire, 1520 East Amelia Street, Orlando, Florida 32803; Joerg F. Jaeger, Esquire, Jaeger & Blankner, 217 East Ivanhoe Boulevard North, Orlando, Florida 32804; and Catherine Chein, Assistant Public Defender, Appeals Unit, 435 North Orange Avenue, Orlando, Florida 32801.

/S/_____
Judicial Assistant

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amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.