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

APPELLATE CASE NO: **11-AP-3-A-O**
LOWER COURT CASE NO: 48-2008-CT-846-A-E

STATE OF FLORIDA,
Appellant,
vs.

ZAKARIAH BENHAKUMA,
Appellee.
_____/

DATE: September 23, 2013

Appeal from the County Court for Orange County, Florida, Ken A. Barlow, County Court Judge

Lawson Lamar, State Attorney, and David H. Margolis, Assistant State Attorney, for Appellee

Stuart I. Hyman, Esquire, for Appellee.

Before Thorpe, McDonald, and Higbee, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State of Florida (herein "Appellant") appeals the "Order on Defendant's Pending Motion for Sanctions, Motions to Dismiss, and/or Alternatively, Motions to Suppress Evidence," rendered on January 18, 2011. This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1).

Zakariah Benhakuma (herein "Appellee") was charged with driving under the influence. At the breath testing center, the implied consent warning was read to him and he refused. Appellee's trial counsel filed several pre-trial motions to exclude or suppress

his refusal to take the breath test, including the Motion in Limine with Regard to Refusal to Submit to Intoxilyzer and Intoxilyzer Test Results VIII and the Motion for Production of the Source Code or Dismissal and in the Alternative, Motion for the Exclusion of the Refusal to Submit to Breath Test.

The trial court cited the findings in *State v. Covington*,[1] which was received into evidence by stipulation, and ruled that prior to the hearing, it had ordered the production of the computer source code of the Intoxilyzer, along with the schematics and supporting documents. It found that by failing to produce those items, the State committed a discovery violation for which sanctions could be imposed, and granted the motions in part. Despite finding that refusal to take a breath test is admissible without regard to whether the testing machine is incompliance, the trial court suppressed Appellee's refusal to submit to breath testing.

The issue on appeal is whether the trial court erred by finding that the State violated a discovery order and suppressing evidence as a sanction. Appellant argues it was never ordered to produce the discovery in question and therefore never violated a discovery order.

The trial court wrote: "Prior to these hearings, this Court ordered the production of the source code and schematics that the Defendant has sought both through the discovery process and through Florida's Public Records Law" and concluded that in failing to turn over the documents and source code, Appellant had committed a discovery violation. Appellant argues that line mis-states the history of this case, and contends it is

[1] 2006-CT-8374

unable to find any prior order instructing it to produce a source code or schematic, pursuant to either the discovery rules or public record laws. Appellant suggests that the trial court actually did order the production of these items in other DUI cases, which are not part of this appeal, but contends the absence of such an order in this case is dispositive of the appeal.

Appellee argues the record in this case should have included, by stipulation, the record in *State v. Atkins*, 2008-AP-32, 16 Fla. L. Weekly Supp. 251a (9th Jud. Cir. 2008), where an en banc panel of the County Court ordered that the Intoxilyzer 8000 results would be excluded until the State was able to establish that it had been properly approved and operated by producing the source code and evidence that the machine was the same one listed on the United States Department of Transportation Conforming Products List. He also argues the lower court relied by stipulation on the transcript of the proceedings in *State v. Covington, et al.*, 2006-CT-8364-O, where the court made "substantial findings of fact," including the fact that the head of the Florida Department of Law Enforcement Alcohol Testing Program, Laura Barfield, knew contract documents existed for years while repeatedly denying that they existed in response to discovery requests. The *Covington* court gave FDLE and the State of Florida the choice of turning over the materials ordered or losing the ability to rely on the evidentiary presumptions in section 316.1932, Florida Statutes.

"A trial court's ruling excluding evidence as a discovery sanction is subject to an abuse of discretion standard of review." *Harrison v. State*, 33 So. 3d 727, 729 (Fla. 1st DCA 2010), *citing Grace v. State*, 832 So. 2d 224, 226-227 (Fla. 2d DCA 2002). In the

instant case, Appellant is correct in stating that the *Atkins* ruling does not apply to defendants who refused a breath test. It follows that the State was under no obligation to provide the Intoxilyzer documents to the defense, and there was no discovery violation. As the trial court recognized in its ruling, Appellee's refusal to submit to sobriety testing was admissible based on *State v. Kline*, 764 So. 2d 716, 717 (Fla. 5th DCA 2000) without regard for whether the machine was in compliance with the administrative rule. *See also* §316.1932(1)(a)1.a., Fla. Stat. Therefore, this Court concludes that the trial court abused its discretion in suppressing this evidence.

Based on the foregoing, it is hereby ORDERED AND ADJUDGED that the ruling of the lower court is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

Certificate of Service

I certify that a copy of the foregoing Final Order Reversing Trial Court has been provided this 23rd day of September 2013 to the Appeals Unit, Office of the State Attorney, 415 North Orange Avenue, Suite 200, Orlando, Florida 32801; and Stuart I. Hyman, 1520 East Harwood Street, Orlando, Florida 32803.

/S/_____
Judicial Assistant