STATE OF FLORIDA,

      Appellant,

v.

GRANT LARRY BURTON,

      Appellee.

   _____/

Appeal from the County Court
for Orange County, Florida
A. James Craner, County Court Judge

Jeffrey Ashton, State Attorney,
and Dugald McMillan, Assistant State Attorney
for Appellant

Joerg F. Jaeger, Esq.
for Appellee

Before LEBLANC, MYERS, S. KEST, J.J.

PER CURIAM.

FINAL ORDER REVERSING TRIAL COURT

The State of Florida (herein "State") appeals the trial court's "Order on Defendant's Motion for Production of the Source Code or Dismissal and in the Alternative Motion for Exclusion of the Breath Test Result." This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(1)(B). We reverse and remand.

Facts and Procedural History

On June 4, 2012, Appellee was arrested for Driving Under the Influence. He submitted to a breath test on a CMI, Inc. Intoxilyzer 8000 using software version 8100.27. The breath test result was above the legal limit of .08. On September 5, 2012, Appellee filed a Motion for Production of EE-Proms and or/Software or in the Alternative Motion for Exclusion of the Breath Test Results. On the same date, Appellee filed a Notice of Acceptance of the State's March 21, 2011 stipulation to the factual record in *State v. Atkins*, 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. June 20, 2008).[1] The trial court accepted the factual findings and transcript supporting the findings in *Atkins*, agreed to receive all other evidence offered by the State, and established timelines for the State to produce additional evidence. On November 9, 2012 and January 11, 2013, hearings were held on the motion to produce. On January 14, 2013, the trial court issued its order. The trial court found that the source code, EE proms, and software 8100.26 and 8100.27 are material under Florida Rules of Criminal Procedure 3.020 and 3.220 and the State must make all three items available to Appellee in order to introduce the breath test result under section 316.1934 of the Florida Statutes. The order also stated that the State is not prohibited from introducing the breath test result in any other lawful manner.

The State argues that the portion of the order that compels it to make the source code available to Appellee is an abuse of discretion. The State claims that there was no evidence that it had actual or constructive possession of the source code and as the Court held in *Moe v. State*, 944 So. 2d 1096 (Fla. 5th DCA 2006), the trial court cannot compel it to produce evidence that it does not possess.

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[1] In *Atkins,* evidence was presented about problems with the Intoxilyzer 8000 such as readings of "volume not met" when a sufficient sample was provided. A defense expert witness testified that he believed the error stemmed from problems in the software or source code but was unable to determine the specific cause without examining the software or source code. The expert testified that in his opinion, the instrument is not scientifically reliable.

Appellee argues that the trial court's order only required the State to make available the EE proms, software 8100.26, and software 8100.27. Appellee states that the trial court's ruling is consistent with the State's stipulation in *Atkins,* the binding authority of *State v. McGratty*, 16 Fla. L. Weekly Supp. 813a (Fla. 9th Cir. Ct. June 29, 2009), and the finding that the State must produce the source code is a scrivener's error. Appellee requests this Court direct the trial court to correct the scrivener's error and remove the language that the State must produce the source code.

Standard of Review

A trial court's decision to admit or exclude evidence is discretionary. The trial court's ruling should not be disturbed absent a showing of an abuse of discretion. *State v. Tascarella*, 580 So. 2d 154, 155 (Fla. 1991); *Black v. State*, 920 So. 2d 668 (Fla. 5th DCA 2006).

Analysis

We disagree with Appellee that the order did not require the State to make the source code available. Appellee's motion to produce requested access to the source code and in *Atkins,* the trial court also required the State to make the source code available. *Atkins*, 16 Fla. L. Weekly Supp. 251a. The trial court's order states:

> [The] Court finds that the items sought (source code, EE proms, and software 8100.26 and 8100.27) are material under either or both F.R.Cr.P. 3.020 and 3.220.
>
> Consistent with the decision in *Atkins*, the Court holds that in order for the State to introduce the results of the breath test in this matter under Florida Statue section 316.1934, the State must make all three items available to the Defendant. This order does not prohibit the State from introducing the breath test result in any other lawful manner.

State v. Burton, 2012-CT-6035-A-O, (Fla. Orange Cty. Ct. Jan. 14, 2013).

Therefore, the trial court did require the State to make the source code available in order to introduce the breath test result under section 316.1934.

As in *Atkins*, the trial court did not compel the State to disclose the source code. *See Atkins*, 16 Fla. L. Weekly Supp. 251a ("So that the remedy is clear, the Court is *not compelling* CMI, the State of Florida or FDLE to disclose the source code, release notes and supporting documents; however if the code, notes and supporting documentation are not provided, then the Defense has been denied material evidence in support of their defense that the instrument is not an approved test as required by the implied consent statutes. If the defense is denied this evidence, then the proper remedy is to prohibit the State from the benefit of the implied consent statues."). However, if the State did not make the source code available to Appellee, the State could not introduce the breath test results under section 316.1934. The trial court determined that the source code was material and discoverable under Rule 3.220. In order for a defendant to obtain items from the State pursuant to Rule 3.220, the defendant must be unable to obtain the items through due diligence and the items must be in the actual or constructive possession of the State. *See State v. Coney*, 294 So. 2d 82, 87 (Fla. 1973); *Moe*, 944 So. 2d at 1097; *McGratty*, 16 Fla. L. Weekly Supp. 813a. Appellee has not alleged and the record in this case does not demonstrate that the State has possession of the source code and that Appellee is unable to obtain the source code by other means. Therefore, the State's method of presenting the breath test should not be limited for failing to provide material that Appellee has not demonstrated is unascertainable by other means and is not in the State's possession. *Id.*

Based on the record in this case, the trial court abused its discretion when it required the State to make the source code available to Appellee in order to introduce the breath test results under section 316.1934 without a showing that Appellee was unable to obtain the source code by

other means and the source code was in the State's possession. On remand, the trial court shall issue an amended order that does not require the State to provide the source code in order to introduce the results of the breath test under section 316.1934 or conduct further proceedings prior to entering an amended order that complies with this opinion.

Based on the foregoing, it is hereby **ORDERED AND ADJUDGED** that the trial court's order is **REVERSED** and the matter is **REMANDED** for further proceedings.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this <u>30th</u> day of <u>April</u>, 2015.

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/S/_____

BOB LEBLANC
Presiding Circuit Judge

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MYERS, and S. KEST, J.J., concur.

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that a copy of the foregoing order was furnished to: **Dugald McMillan, Assistant State Attorney,** 415 N. Orange Avenue, Orlando, Florida 32801, **Joerg F. Jaeger, Esq.**, Jaeger & Blankner, 217 E. Ivanhoe Blvd., N., Orlando, 32804; **Honorable Wilfredo Martinez**, 425 N. Orange Avenue, Orlando, Florida 32801 this <u>30th</u> day of <u>April</u>, 2015.

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/S/_____

Judicial Assistant

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