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

Appellate Case No: 2014-AP-52-A-O
Lower Case No.: 2013-CT-582-A-E

STATE OF FLORIDA,

Appellant,
v.

AMBER ANN ROBERSON,

Appellee.
_____/

Appeal from the County Court
for Orange County, Florida
Deborah B. Ansbro, County Court Judge

Jeffrey Ashton, State Attorney,
and Carol Levin Reiss, Assistant State Attorney
for Appellant

Andrew B. Greenlee, Esq.
for Appellee

Before APTE, ROCHE, O'KANE, JJ.

PER CURIAM.

Appellant, the State of Florida (herein "State") appeals the trial court's Order Granting Defendant's Motion to Compel Source Code and Resetting of Trial Date. This Court has jurisdiction pursuant to section 924.07(1)(h), Florida Statutes (2014). We dispense with oral argument pursuant to Florida Rule of Appellate Procedure 9.320 and reverse and remand.

Facts and Procedural History

Appellee, Amber Roberson, was arrested for Driving Under the Influence on April 28, 2013, and 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 January 9, 2014, Appellee filed a Motion to Compel Source Code requesting the trial court compel the State to provide "full information concerning the breath test including but not limited to information relating to the source code for this instrument . . . , the instruments schematics, and the user manuals."

On March 19, 2014, the case was called for trial. Defense counsel asked the trial court if it was still following *Atkins*[1] and if the breath test would be excluded. The trial court stated that *Atkins* stands and the breath test would be excluded. The State requested a written order on the trial court's ruling and objected to the exclusion of evidence. The trial court stated that it would not issue an order on matters not addressed that day, a hearing was already conducted on that issue, and an order excluding the breath test was entered.[2] Defense counsel requested a continuance to obtain witnesses and the trial was continued.

On October 21, 2014, the case was again called for trial and the State requested a written order on the trial court's oral order that the breath test was excluded. The trial court stated it was not an oral order but an observation of the case law as it stands and it would not enter an order on a motion that was not filed. The trial court then reset the case for trial on December 2, 2014, and informed the State that it could file a written motion and set a hearing before the trial. There is no record that the State filed a motion.

[1] In *State v. Atkins*, the trial court found that the source code was material under Rule 3.220(f)(2); granted the defense's request for production of the source code for the Intoxilyzer 8000; and the source code, software version, and release notes were ordered to be provided to the defense with 21 days of the order. The trial court also held that if those items were not provided, the State must lay the proper traditional scientific predicate as to the admissibility of the breath test results and the presumption of impairment would not be included in the jury instructions. *State v. Atkins*, 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. June 20, 2008).

[2] There is no record of an order or hearing excluding the breath test in this case.

On November 24, 2014, the trial court entered an order granting the defense's January 9, 2014 Motion to Compel Source Code, ordered the State to "produce full information concerning the breath test, including but limited to, information relating to the source code for the relevant instrument . . . , the schematics of all such instructions and the user manual(s) for all such instruments" within 30 business days, and set the trial for February 10, 2015. The State appeals the order granting the Motion to Compel Source Code.

Issues on Appeal

Appellant argues that the trial court departed from the essential requirements of law by ordering the State to produce the source code and materials listed in the motion to compel and implying that the State possessed the source code because: 1) the Fifth District Court of Appeal found that the State does not have possession of the source code in *Moe v. State*, 944 So. 2d 1096 (Fla. 5th DCA 2006); 2) section 316.1932(1)(f)(4) excludes the source code from disclosure; 3) the State had no duty to obtain evidence the Defendant could obtain on its own; and 4) the items requested are not material.

Appellee argues that the trial court did not abuse its discretion and the State's arguments were not preserved for appellate review because they were not raised in the lower court. Appellee also argues that even if they were preserved for review, the arguments fail on their merits because: 1) there is no record that the State does not possess the source code, 2) *Moe* is distinguishable because in that case there was no dispute that the State did not possess the source code, unlike in this case, and *Moe* involved the Intoxilyzer 5000; 3) there is no record that Appellee could have obtained the items requested; and 4) the requested items are material.

Standard of Review

A trial court's ruling on a discovery issue is discretionary and should not be disturbed absent a showing of an abuse of discretion. *State v. Tascarella*, 580 So. 2d 154, 155 (Fla. 1991). "If reasonable men could differ as to the propriety of the action taken by the trial court, then the action is not unreasonable and there can be no finding of an abuse of discretion." *Canakaris v. Canakaris*, 382 So. 2d 1197, 1203 (Fla. 1980).

Analysis

Florida Rule of Criminal Procedure 3.220 sets forth the State and defendant's discovery obligations. "If, at any time during the course of the proceedings, it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or with an order issued pursuant to an applicable discovery rule, the court may order the party to comply with the discovery[.]" Fla. R. Crim. P. 3.220(n)(1).

Although the State argues numerous reasons why the trial court's order should be reversed, there is no record that the State preserved these arguments for appellate review. *Martin v. State*, 107 So. 3d 281, 318 (Fla. 2012); *Gliszczynski v. State*, 654 So. 2d 579, 580 (Fla. 5th DCA 1995). However, the November 24, 2014 order granting the motion to compel lacks any findings to support the decision to grant the motion and the motion to compel does not cite to any authority requiring the State to produce the items requested. In addition, there is no record of a hearing on the motion to compel to review the trial court's reasons for granting the motion.

Without findings to support the trial court's order granting the motion to compel or a transcript of a hearing on the motion, this Court is unable to determine whether the trial court abused its discretion. Therefore, because the record is inadequate to conduct a meaningful review of the order, we must reverse and remand for the trial court to make findings to support

its decision. *See Hopkins v. State*, 632 So. 2d 1372, 1376–77 (Fla. 1994) (reversing for a new trial because absent the "specific findings of reliability" mandated in section 90.803(23), an appellate court cannot determine whether the hearsay statements admitted under the statute were in fact reliable); *State v. Smith*, 52 So. 3d 821, 824 (Fla. 5th DCA 2011) (finding that it was impossible for the appellate court to determine whether the order on review could be sustained on any basis because it lacked any findings, and thus, remand was necessary for the trial court to make express findings); *McDonald's Restaurants of Florida, Inc. v. Doe*, 87 So. 3d 791, 795 (Fla. 2d DCA 2012) (discovery order compelling production that failed to specify findings to support its determination was deficient); *KPMG LLP v. State, Dept. of Ins.*, 833 So. 2d 285, 286 (Fla. 1st DCA 2002) (discovery order that failed to include factual findings to support its decision requiring production of documents was deficient because an appellate court must be able to conduct a meaningful review of the trial court's reasons for granting or denying a request to produce).

Based on the foregoing, the Order Granting Defendant's Motion to Compel Source Code is reversed and remanded for the trial court to make findings that support its decision.

REVERSED and REMANDED.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida, this 2nd day of February, 2016.

/S/
ALAN S. APTE
Presiding Circuit Judge

ROCHE and O'KANE, JJ., concur.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing order was furnished to: **Carol Levin Reiss, Assistant State Attorney,** 415 N. Orange Avenue, Orlando, Florida 32801, **Andrew B. Greenlee, Esq.**, Andrew B. Greenlee, P.A., 401 East 1st Street, Unit 261, Sanford, Florida 32772; **Honorable Faye L. Allen**, 425 N. Orange Avenue, Orlando, Florida 32801, this 2nd day of February, 2016.

/S/
Judicial Assistant