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

STATE OF FLORIDA,

Appellant,

v.

PATRICIO EDWARD SALAZAR,

Appellee.
_____/

CASE NO.: 2013-AP-28-A-O
Lower Case No.: 2013-CT-2706-A-O

Appeal from the County Court
for Orange County, Florida
Maureen A. Bell, County Court Judge

Jeffrey Ashton, State Attorney
and David A. Fear, Assistant State Attorney
for Appellant

Robert Wesley, Public Defender
and Matthew E. Baker, Assistant Public Defender
for Appellee

Before MYERS, DAVIS, BLACKWELL, J.J.

**PER CURIAM**.

**FINAL ORDER REVERSING TRIAL COURT**

Appellant, the State of Florida (herein "State") appeals the trial court's Case Management and Pretrial Order for Scheduling Post *Atkins* Hearings. 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 March 17, 2013, 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 June 19, 2013, Appellee filed numerous

motions for production of source code, ee-proms, Intoxilyzer 8000 software versions 8100.26 and 8100.27, the computer software and corresponding documents; motions to suppress the breath test results; motion to adopt testimony and ruling in *State v. Atkins*[1]; and motion to inspect photograph/and or video tape Orange County Sheriff's Office Intoxilyzer 8000 and corresponding documents. One of Appellee's arguments in his motions is that the breath test result is scientifically unreliable due to the Intoxilyzer's inability to measure accurate breath volume as revealed by inspection records, and the source code is material to determine whether the Intoxilyzer is reliable. The *Atkins* court granted the motions to produce based upon this same argument. The State filed a Response on June 27, 2013 arguing that Appellee's motions should be denied.

On July 1, 2013, the trial court entered a Case Management and Pretrial Order for Scheduling Post *Atkins* Hearings. The order stated that: 1) after an evidentiary hearing the court granted Defendant's request to produce the software, source code and other related documents for the Intoxilyzer 8000 on June 20, 2008 in *Atkins*; 2) on February 13, 2012, the court heard Defendants' motion to admit the *Atkins* testimony and granted the motion adopting the testimony from the *Atkins* hearing; 3) if the State has additional testimony or case law to present, it must file a motion outlining the evidence to be presented and hearing time requested prior to pretrial conference; and 4) if the State does not file a motion alleging additional evidence, the case will be scheduled for trial and the State will be required to lay the proper traditional scientific predicate as to the admissibility of the Intoxilyzer results before the results will be admitted. Attached to the trial court's order was a copy of the Order Granting Defendant's Request to Produce in *State v. Atkins*, a letter from former State Attorney Lawson Lamar dated March 21, 2011 stipulating to the factual record of *Atkins*, a transcript of a February 13, 2012 proceeding on

[1] *State v. Atkins et al.* 16 Fla. L. Weekly Supp. 251a (Fla. Orange Cty. Ct. June 20, 2008).

a motion to adopt the *Atkins* hearing involving eight defendants but not Appellee, and a letter from former State Attorney Lamar dated October 10, 2012 withdrawing any stipulation to the *Atkins* record. The State now appeals the Case Management Order.

The State argues that the trial court's order is an abuse of discretion because the order 1) incorrectly and erroneously applies the facts and evidence of the *Atkins* case that was not entered in the record and there is no legal means to admit the *Atkins* record because it is inadmissible hearsay, 2) incorrectly treats *Atkins* as binding authority, 3) reaches the same incorrect conclusions as the *Atkins* court, 4) was entered *sua sponte* without a hearing or reviewing evidence, and 5) improperly shifts the burden from Appellee to the State.

Appellee argues that the State's appeal is not ripe for review because the trial court's order is a non-final case management and pretrial order and not an order excluding evidence that the State is authorized to appeal pursuant to section 924.07(1)(l), Florida Statutes. Appellee also argues that the trial court did not enter a *sua sponte* order because the order addressed his motions and the State had an opportunity to request a hearing to respond to the motions, but did not request a hearing.

## Standard of Review

A trial court's ruling on a discovery issue and decision to take judicial notice of a record is discretionary. The trial court's ruling should not be disturbed absent a showing of an abuse of discretion. *Schwab v. State*, 969 So. 2d 318, 322 (Fla. 2007); *State v. Tascarella*, 580 So. 2d 154, 155 (Fla. 1991).

## Analysis

The State's appeal is ripe for review. The State may appeal orders suppressing evidence or evidence in limine pursuant section 924.07(1)(l) and any pretrial order pursuant to section

924.07(1)(h), except it may not take more than one appeal under subsection (h). Therefore, the discovery order is a non-final appealable order.

The trial court's order was entered after Appellee filed numerous motions regarding the Intoxilyzer 8000, a motion to adopt the *Atkins* record, and the State's response to Appellee's motions. Therefore, the State was provided with notice of the request for judicial notice of the *Atkins* record as required by section 90.203(1). § 90.203(1), Fla. Stat. (2013). The Case Management Order does not state that the trial court is applying *Atkins* as binding authority. The Order states that the State has not presented any new evidence that would alter the court's decision in *Atkins*. The trial court's Order also states that a hearing was held on February 13, 2012 granting the motion to admit the *Atkins* testimony. However, the February 2012 hearing was held before Appellee filed the motion to adopt the *Atkins* record on June 19, 2013. Therefore, the court's ruling at the February hearing did not address Appellee's motion.

The *Atkins* record was not admitted and it is not part of the record on appeal. Therefore, the trial court's use of the *Atkins* record as the basis for its decision was an abuse of discretion and the trial court's discovery order must be reversed.[2]

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 5th day of May, 2015.

/S/
**DONALD A. MYERS, JR.**
**Presiding Circuit Judge**

DAVIS and BLACKWELL, J.J., concur.

[2] We cannot address Appellant's other arguments alleging that the trial court's decision based on *Atkins* was an abuse of discretion, in light of the trial court's failure to make the required findings in this case.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing order was furnished to: **David A. Fear, Assistant State Attorney,** 415 N. Orange Avenue, Ste. 200, Orlando, Florida 32801; **Matthew Eric Baker, Assistant Public Defender**, 435 N. Orange Avenue, Ste. 400, Orlando, Florida 32801; **Honorable Maureen A. Bell**, 425 N. Orange Avenue, Orlando, Florida 32801 this this 5th day of May, 2015.

/S/
Judicial Assistant