IN THE CIRCUIT COURT OF THE TWELFTH JUDICIAL CIRCUIT IN AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,	:	
	:	
Plaintiff,	:	
	:	
Vs.	:	CASE NO. 2008 CF 003193
	:	
JANET LANDRUM	:	
	:	
Defendant.	:	
_____/		

ORDER GRANTING DEFENDANT'S MOTION TO SUPPRESS

THIS MATTER came before this Court pursuant to the Defendant's Motion to Suppress. The Defendant is charged with Driving Under the Influence after submitting to a breath test on an Intoxilyzer 8000. The motion alleges that the Intoxilyzer 8000 was not a properly approved breath testing instrument under Section 316.1932, Florida Statutes and Rule 11D-8 of the Florida Administrative Code.

ISSUE PRESENTED

Was the version of the Intoxilyzer 8000 "approved" by FDLE, the same version of the Intoxilyzer 8000 on the Department of Transportation conforming products list?

FACTUAL BACKGROUND
(THE APPROVAL PROCESS)

In 2002, the Florida Department of Law Enforcement evaluated the Intoxilyzer 8000 for use in the State of Florida. This evaluation ultimately resulted in the State listing the Intoxilyzer 8000 as an approved instrument in Chapter 11D-8 of the Florida Administrative Code. To gain this approval, Rule 11D-8.003(6) required FDLE to conduct the evaluation in accordance with procedures specified in Form 34. Form 34 limits the instruments that can be evaluated to those that appear on the United States Department of Transportation (hereinafter DOT) conforming products list.

SOFTWARE VARIATIONS

The evidence is undisputed that the software program running on the Intoxilyzer 8000 submitted to the DOT was not the same program on the Intoxilyzer 8000 approved by FDLE. The Defendant contends that the version of the Intoxilyzer 8000 placed on the DOT conforming products list uses a computer program that is materially different from the program used by the version of the Intoxilyzer 8000 "approved" by FDLE.

The Defendant submitted the deposition of William Schofield, the manager of engineering for CMI, Inc., the manufacturer of the Intoxilyzer 8000. The deposition included the following testimony:

Q Do you have knowledge as to what the differences are between the DOT version and the version that was sold to Florida in 2005?
A No, I do not.
Q Do you know who would know what the differences are?
A I don't think anyone would know what the differences are from the standard, what we're calling, DOT software to the Florida software without a lot of research.
Q What type of research would that take to find out what the differences are?
A We would have to go back and look at what version went to DOT and what the changes were from that version to the Florida version.
Q You're talking about the actual code?
A Yes.

To this end the Defendant issued and served a subpoena upon CMI to produce the following:

Any and all evidence existing in paper, electronic or other form of any and all source code(s) used in the Intoxilyzer 8000, software version 8100.27 and any and all evidence existing in paper, electronic or other form of any and all source code(s) used the Intoxilyzer 8000 submitted to the United States Department of Transportation for evaluation to be included on the conforming products list.

CMI did not produce this material, but instead filed a Motion to Quash the subpoena. The Motion to Quash was denied. CMI Petitioned the Second District Court of Appeal to review the denial of this motion. This Petition was denied. *CMI, Inc. v. Landrum*, 2010 WL 2441026 (Fla. 2nd DCA 2010); review

denied 54 So.3d 973 (Fla. 2011). CMI never complied with the subpoena duces tecum. Mr. Schofield testified that the only way to determine the difference in these two software programs is by conducting "a lot of research" into the differences in the two versions of the code. Due to CMI's failure to comply with the subpoena, this Court is unable to make a determination of whether the version of the Intoxilyzer 8000 placed on the US DOT conforming products list uses a computer program that is materially different from the program used by the version of the Intoxilyzer 8000 "approved" by FDLE.

LEGAL ANALYSIS

The court's decision in this matter is dictated by the burden of proof. A review of two prior cases (*State v. Reisner*, 584 So.2d 141 (Fla. 5th DCA 1991) and *State v. Berger*, 605 So.2d 488 (Fla. 2d DCA 1992), affirmed 635 So.2d 977 (Fla. 1994)) that dealt with identical challenges to the admissibility of a breath test demonstrate how the burden of proof will control this court's decision. The issue in both *Reisner* and *Berger* dealt with the use of two different forms that set forth the procedure used during monthly inspections of breath testing instruments. The instruments were being inspected using the procedures contained in an unpromulgated form (there were valid procedures contained in a promulgated form which was not being used). At issue was

whether the differences between the promulgated and unpromulgated forms were insubstantial and unimportant. In *Reisner*, the State presented no expert testimony to explain the differences. In *Berger*, expert testimony was presented that the differences in the forms were minor. The *Reisner* court ruled against the State (and suppressed the breath test results) for the State had the burden to prove it was proper to use the procedures contained in the unpromulgated form, but presented no evidence. The contrary result was reached in *Berger*, for expert testimony was presented which established the unpromulgated procedures used to inspect the breath instruments were substantially the same as the promulgated procedures.

In the current proceedings, the State has the burden to establish that 1) either the version of the Intoxilyzer 8000 on the conforming products list was the same version approved by the State of Florida, or 2) that the differences in the two were insubstantial or unimportant. There is no question that the two Intoxilyzers used different software programs. Thus, in order to prevail, the State must establish that the differences between the two software programs are insubstantial or unimportant. CMI's failure to comply with this Court's subpoena made it impossible for the State to meet its burden. Since the State had the burden of proof on this issue, the state failed to prove its case. *Reisner.*

At the suppression hearing, the State Attorney suggested that the State could meet its burden of proof with expert testimony without production of the

Intoxilyzer source code. The court finds as a matter of law this would not be possible. The Defendant is entitled to cross-examine the State's expert witness; on cross-examination the expert shall be required to specify the facts or data that the expert is basing his / her opinion on. Section 90.705(1), Florida Statutes. The testimony of Mr. Schofield was the only way to determine the difference in the two versions of the software is by a lot of research into the actual code. The Defendant is entitled to production of the source code before the State can present expert testimony as to what the actual differences are. The Defendant cannot adequately cross examine the State's expert without access to the source code.

In *State v. Polak*, 598 So.2d 150, (Fla. 1st DCA 1992), the court held if the only support for obtaining blood alcohol content evidence is based upon consent, the record must display that the consent was voluntarily given. While the admissibility of blood alcohol evidence is not determined solely by reference to the implied consent statutes, and that such evidence continues to be subject to traditional rules regarding admissibility of evidence, if the consent is not voluntary, the State will not be allowed to introduce the results of the breath test. In *Polak*, the court found, due to modifications to the intoximeter, it was not an approved instrument; since the defendant's consent was based on misinformation (that the intoximeter was an approved instrument) the

defendant's consent was involuntary and the breath test results were suppressed.

The Second District Court of Appeal adopted the holding in *Polak*, when it ruled "a urine test taken pursuant to the implied consent law, which is not an approved test, is not admissible as a scientific test pursuant to the traditional rules regarding the admissibility of evidence since consent was not voluntarily given. See *State v. Polak*." *State v. Bodden*, 872 So.2d 916 (Fla. 2nd DCA 2002); reversed on other grounds 877 So.2d 680 (Fla. 2004).

Breath test results may be inadmissible because of noncompliance with some statutory or administrative testing provision. In such cases, the court may, nevertheless, allow the results into evidence pursuant to the traditional scientific predicate. However, if those samples were secured by advising the subject of the coercive elements of the Implied Consent Law, the results are inadmissible even if the State establishes that scientific predicate. *Polak*; *Bodden.* In this case, the breath sample was seized after advising the Defendant of the implied consent warnings.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the State failed to establish that the version of the Intoxilyzer 8000 approved by FDLE was the same version of the Intoxilyzer 8000 on the Conforming Products List. Since the State failed to establish the Defendant submitted to an approved

breath test, the Defendant's Motion to Suppress the results of the breath test is granted.

DONE AND ORDERED in chambers in Manatee County, Florida, *Nunc Pro Tunc* to April 29, 2011.

5/23/11

Honorable Scott M. Brownell
Circuit Judge

cc: Robert N. Harrison, Esquire
Mark Lipinski, Esquire
Pamela Buha, Assistant State Attorney