

IN THE COUNTY COURT FOR THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

Vs.

CASE NO. 04 CT 14406 SC*

CAROL MAE BJORKLAND, et al.*

Defendant.

✓ 2004 CT 014406

FILED FOR RECORD
2005 DEC 22 PM 3:21
KAROL BJORKLAND
CLERK OF CIRCUIT COURT
SARASOTA COUNTY, FL.

ORDER ON MOTION FOR SANCTIONS

This cause came before the court on the Defendant's Motion for Sanctions. After considering the arguments of both State and Defense, the court finds as follows:

The court ordered the State of Florida on November 2, 2005 to produce the source code for the Intoxilyzer 5000 to the Defendants' expert witness under strict confidentiality restrictions. The State has since provided the court with documentation that they attempted to comply with this order; however, the manufacturer for the Intoxilyzer 5000, CMI Inc. refuses to disclose the source code.

The defendants seek exclusion of the Intoxilyzer results as a proper sanction in the above cases based upon two theories: 1) The State's failure to comply with the discovery order, and 2) The State's failure and/or inability to comply with the "full information" provision of Florida Statute 316.1932 under the Implied Consent provisions.

The court first considers the discovery issue. The defendants correctly point out that the court issued a discovery order with which the State has not complied. The parties agree that the State Attorney's office requested the manufacturer of the instrument to provide the source code and that the manufacturer refused. In order to exclude evidence based upon a discovery violation, factors the court should consider include whether the violation was willful or inadvertent, whether it was substantial or trivial, the prejudice to the defendant, and the availability of remedies other than exclusion. See *Richardson v. State*, 246 So.2d 771 (Fla. 1971). Although the court agrees that the defendants' inability



to review the source code will prejudice their ability to prepare for trial¹, the court must evaluate the willfulness of the violation and the availability of other remedies before determining an appropriate remedy.

With regard to the issue of “willfulness”, the court has ruled² that the State cannot contract away its statutory obligation to comply with the discovery obligation pursuant to Fla. R. Crim. P. 3.220. However, the court does not find that the State Attorney’s Office, or the State itself, willfully violated the court’s prior order mandating disclosure of the source code. *c.f. Muldowney v. State*, 871 So.2d 911, n1 (Fla. 5th DCA 2004) (in which the state refused to provide information in its’ actual possession). The record in this case does not establish that the State purposely intended to deprive persons charged with DUI of “full information” when it presumably allowed the Intoxilyzer manufacturer to retain the source code as a trade secret. Although it is true that the State Attorney’s Office, as an arm of the State, is held to the standards of section 316.1932, the court cannot find that the State Attorney’s Office, or the state itself, willfully violated the provisions of the court’s prior order.

The court must also be mindful that when it imposes a sanction for a discovery violation, exclusion of evidence should only be used as a last resort. *Fla. R. Crim. P. 3.220(n); State v. Tascarella*, 580 So.2d 154 (1991). Relevant evidence should not be excluded from the jury unless no other remedy suffices, and it is incumbent upon the trial court to conduct an adequate inquiry to determine whether other reasonable alternatives can be employed to overcome or mitigate any possible prejudice. *State v. Eaton*, 868 So.2d 650 (Fla. 2d DCA 2004). The court, after thorough analysis, has found a reasonable alternative to the Defendants’ request for exclusion and therefore **DENIES** their request for exclusion of the breath test results for a discovery violation.

However, the analysis does not end here. As to the defendants’ second basis for relief, they contend that the State’s failure to comply with the implied consent statute justifies exclusion of the breath test results in these cases because the state is unable to prove that the instruments used in these cases comply with the provision of Fla. Admin.

¹ The State’s failure to comply with the court’s November 2nd order frustrates the defendants’ attempt to determine if the particular Intoxilyzer used to test them had been substantially modified without FDLE approval.

² In the November 2nd order.

Code 11D-8. *State v. Bender*, 382 So.2d 697, 699 (Fla. 1980); *See also State v. Sandt*, 774 So.2d 692 (Fla. 2000). The State responds that any non-compliance is purely speculative and that the Defendants have not shown any basis to question the reliability of the individual breath test results in these cases.

Florida's Implied Consent law provides a statutory scheme whereby the State may introduce a breath test result in an individual case without laying a traditional scientific predicate.³ *State v. Bender*, 382 So.2d 697, 699 (Fla. 1980); *Robertson v. State*, 604 So.2d 783 (Fla. 1992); *State v. Clarke*, 834 So.2d 398 (Fla. 2d DCA 2003). The reasoning behind this provision follows from the presumption that the State uses authorized instruments that are certified, maintained and used in accordance with the administrative code and applicable statutes. In essence, the Implied Consent Law gives the State an evidentiary shortcut that allows it to present incriminating evidence against a particular defendant by providing documentary evidence of the instrument's certification and maintenance. The trial court is then required to instruct the jury that a rebuttable presumption of impairment exists for those persons who register a result of .08 grams of alcohol per 210 liter of breath on the instrument. A criminal defendant has no other means to protest the admissibility of the breath test results into evidence absent a showing of unreliability.

In these cases, the defendants have the dilemma of challenging the reliability of the Intoxilyzer 5000 without having the means, i.e. the source code, to make the necessary analysis of reliability. The State's inability to comply with the provisions of section 316.1932, Florida Statute (2005) has effectively eliminated the defendants' ability to determine if the Intoxilyzer used to test them is in compliance with FDLE's own rules. Thus, the issue is whether this inability merits total exclusion of the results in these cases.

The Implied Consent laws, as stated above, were designed to streamline the necessary predicate for introduction of breath test results. *State v. Bender*, 382 So.2d 697, 699 (Fla. 1980). This procedure assumes compliance with the applicable administrative codes. When, as in this case, this assumption can be effectively challenged or disproved, the state cannot maintain the right to use the procedure to introduce breath test results.

³ The *Bender* predicate consists of three prongs: "(1) the test was reliable, (2) the test was performed by a qualified operator with the proper equipment, and (3) expert testimony was presented concerning the meaning of the test." *State v. Bender*, 382 So.2d 697, at 699.

Id. Instead, the State must lay the traditional scientific predicate to establish the breath tests reliability and accuracy. *Id.* at 700; *Robertson v. State*, 604 So.2d 783 (Fla. 1992).

Therefore, the Defendant's Motion for Exclusion is DENIED; however, the State must first lay the proper scientific predicate as to the Intoxilyzer results in these cases before the results may be admitted into evidence. Assuming the State is able to lay the proper scientific predicate, the presumptions of impairment contained in Florida Jury Instructions will not be given. *Robertson v. State*, 604 So.2d 783 (Fla. 1992); *State v. Clarke*, 834 So.2d 398 (Fla. 2d DCA 2003).

In consideration of the complex issues in this case, and recognizing that courts throughout the state have addressed this issue with varying results, the court believes it is necessary to have a consistent and uniform policy within this circuit and district so that all parties will be properly advised of their rights and obligations. Due to the large volume of cases in which this issue has arisen and will continue to arise throughout the district, a direct certification to the District Court of Appeal will provide a more efficient means of establishing uniform guidelines. Therefore, the court, on its own motion, certifies the following questions as ones of great public importance to the Second District Court of Appeal:

UNDER THE "FULL INFORMATION" PROVISION OF FLORIDA STATUTE 316.1932, IS A DEFENDANT WHO HAS PROVIDED A BREATH SAMPLE WITH THE INTOXILYZER 5000 AND IS CHARGED WITH DRIVING UNDER THE INFLUENCE, ENTITLED (UNDER PROPER CONFIDENTIALITY PROVISIONS) TO EXAMINE THE "SOURCE CODE" FOR THE INTOXILYZER 5000 WHEN THE DEFENDANT CAN DEMONSTRATE AN INCONSISTENCY BETWEEN THE APPROVED INSTRUMENT AND THE ONE USED TO OBTAIN THE BREATH SAMPLE?

IF YES, WHAT IS THE APPROPRIATE REMEDY IF THE STATE IS UNABLE TO PROVIDE THE SOURCE CODE BECAUSE IT IS IN THE POSSESSION OF A THIRD PARTY WHO REFUSES TO DISCLOSE IT?

DONE AND ORDERED, Sarasota County, Florida, this 21 day of December, 2005.



HON. DAVID L. DENKIN



HON. KIMBERLY C. BONNER



HON. JUDY GOLDMAN

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