IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT

CMI INC.OF KENTUCKY[1],	:	
	:	
Petitioner,	:	
	:	
Vs.	:	CASE NO. 2D08-3230
	:	Circuit Case No. 41 2008 CA 003664
	:	
ISMAEL ALMARAZ ET. AL., and THE STATE OF FLORIDA	:	
	:	
Respondents.	:	
_____/		

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Ismael Almaraz, et al., files this Response to the Petition for a Writ of Certiorari.

Standard of Review

CMI Inc of Florida / Kentucky (Hereinafter CMI) is seeking to have this Court review the Circuit Court's affirmance of County Court's Amended Order granting CMI's Motion for Protective Order. "As a case travels up the judicial ladder, review should consistently become narrower, not broader." *Haines City*

[1] The Circuit Proceeding was styled CMI Inc of Florida, not CMI Inc of Kentucky.

Cmty. Dev. v. Heggs, 658 So.2d 523, 530 (Fla.1995). A district court should grant second-tier certiorari review of an appellate circuit court decision only when there has been "'a violation of a clearly established principle of law resulting in a miscarriage of justice.' "*Id.* at 529 (quoting *Combs v. State,* 436 So.2d 93, 96 (Fla.1983)). Certiorari review of a circuit court appellate decision is narrow and must not be utilized as a means for obtaining a second appeal. *Id.; City of Deerfield Beach v. Vaillant,* 419 So.2d 624, 626 (Fla.1982).

Statement of the Case and Facts[2]

On May 5, 2006, following an evidentiary hearing which included expert testimony from the both the State and the Defense, including representatives from CMI, the County Court entered an Order compelling disclosure of the Intoxilyzer source code. (Respondents' Appendix, Page 4). CMI was served a subpoena duces

[2] The Statement of the Case and Facts, together with the record presented by CMI in the appendixes to both this Court and the Circuit Court omitted many material orders and pleadings, necessary for a proper analysis of this cause. The Respondents' Appendix contains the omitted pleadings, which are referenced in this Statement of the Facts. However, transcripts of the original evidentiary hearing and the proceedings for the entry the February 26, 2008 Protective Order are not part of the record.

tecum to produce the source code at the evidentiary hearing.[3] Only one subpoena was served upon CMI for this hearing, and this subpoena was styled "State v. Jack Irish" (the companion Sarasota County case) (Respondents' Appendix, Pages 60 - 63). In the Order compelling disclosure of the Intoxilyzer source code, the County Court found this subpoena served on CMI was **not** valid. (Respondents' Appendix, Page 16, footnote 22).

The County Court's Order compelling disclosure of the Intoxilyzer source code certified the question to be one of great public importance and the State of Florida appealed to this Court. (Respondents' Appendix, Page 13). This Court consolidated the *Almaraz* and *Irish* appeals. Following the Fifth District Court of Appeal's decision addressing the source code in *Moe v. State*, 944 So.2d 1096, (Fla. 5th DCA 2007), this court relinquished jurisdiction to the County Court to readdress the original decision. (Respondents' Appendix, Page 18). The State of Florida then filed a Motion to Reconsider the prior ruling (Respondents' Appendix, Page 19) and the Defendant filed a Motion for Reconsideration whether CMI was lawfully served with a subpoena (Respondents' Appendix, Page 21). Both Motions were granted. (Respondents' Appendix, Page 25). The County Court found CMI

[3] The evidentiary hearing was conducted at the same time and place as the Sarasota County case of *State v. Jack Irish*. Both the Sarasota case of *Irish* and the Manatee County case of *Almaraz* were part of the consolidated appeal before this court that was dismissed in 2007. See Case Nos. 2D06-2862 and 2D06-2874.

was properly served with a subpoena and stated it would issue an order to show cause by separate order. (Respondents' Appendix, Page 29). The County Court certified the question of the lawfulness of the CMI subpoena in this order, however the issue was not decided by this Court, for the State of Florida, through its attorney Jarrod Malone (now representing CMI in this matter), filed a notice of voluntary dismissal of the Appeal. (Respondents' Appendix, Pages 30 - 31).

Following the Dismissal of the Appeal, Judge Henderson entered an Order to Show Cause for CMI's failure to comply with the subpoena to produce the source code at the evidentiary hearing. (Respondents' Appendix, Page 41). CMI filed a motion for protective order relating to the production of the source code, which included the request that if the Court found the production of the source code was reasonably necessary under section 90.506, Florida Statutes, that the Court enter a protective order. (Respondents' Appendix, Page 43). Certified copies of the subpoena and proof of service for the subpoena issued under the Sarasota County *Irish* case was filed with the clerk of court in this case in Manatee County. (Respondents' Appendix, Page 60). Judge Mark Singer, who was now assigned to this case, found that CMI could not be held in contempt, for CMI was not served with a subpoena in this particular case. (Respondents' Appendix, Page 64). The Defendants then filed a motion for the issuance of a subpoena duces tecum.

(Respondents' Appendix, Page 65). This motion specifically alleged that the source code was reasonably necessary to the defendants' defense. (Respondents' Appendix, Page 67). Once CMI was served with a subpoena in this case, CMI did not file a new motion for protective order; counsel for the Defendants, in an abundance of caution, scheduled the original motion for protective for a hearing to be heard on March 14, 2008. (Respondents' Appendix, Page 75). Prior to this hearing, this case was set for a pretrial conference on February 26, 2008 before Judge Henderson, who was again assigned to the case. Judge Henderson filed with the clerk of court e-mail correspondence with Judge Denkin from Sarasota that occurred on the morning before this pretrial conference, which addresses whether CMI was producing the source code in Sarasota following the issuance protective order. (Respondents' Appendix, Page 76). Judge Denkin suggested to Judge Henderson that he call Michael Taaffe (attorney for CMI) during Court to find out CMI's Position. (Respondents' Appendix, Page 76). The e-mail message also contains Judge Henderson's hand written notes which include Mr. Taaffe's name, phone number, the date of "2/26" and the following:

> They agree with non-disclosure agreement. As for the Order: they are looking into security as to putting source code on the CD and transcribing it. Also: how do we enforce the terms? March 7th – a panel of Circuit Judges, Moreland, Riva and Bennett will hear an appeal. DH. (Respondents' Appendix, Page 76).

On February 26, 2008, Judge Henderson entered a Protective Order. (Respondents' Appendix, Page 77). The Defendants then cancelled the March 14, 2008 Hearing. (Respondents' Appendix, Page 86).

On March 4, 2008, CMI filed a Motion for Reconsideration or in the Alternative Modification of Protective Order. (Respondents' Appendix, Page 87). On March 24, 2008, the County Court entered an Amended Order on Disclosure of Source Code and Object Code for Intoxilyzer 5000 and Protective Order. (Respondents' Appendix, Page 113). This Order denied CMI's Motion for reconsideration, and granted in part the Motion to Modify. (Respondents' Appendix, Page 113).

CMI, on April 22, 2008, petitioned the Circuit Court for a Writ of Certiorari, challenging the Protective Order. (Petitioner's Appendix C, Page 1). On May 2, 2008, the Defendants filed a Motion to Dismiss this petition, asserting that CMI's Petition did not challenge the modifications to the original Protective Order; CMI was only seeking review of matters decided in the February 26, 2008 Protective Order; the Petition was untimely, for it was not filed within 30 days of the ruling. (Petitioner's Appendix C, Page 14). The Circuit Court ruled:

> The County Court did not depart from the essential requirements of the law in holding that production of the source codes is material and reasonably necessary to Respondents' case. The order noted that the Petitioner has

> advised the County Court that it will comply with the subpoena duces tecum for production of the source codes, provided that a protective order and a non-disclosure agreement are executed. The Petitioner fails to demonstrate material injury if it has already agreed to disclose the source codes.
>
> As a second ground, the Petitioner cites the County Court's requirement that Petitioner submit itself to the jurisdiction of the County Court by executing the non-disclosure and confidentiality agreement detailed in the order. This submission, however, was limited to *"solely* for enforcement and resolution of any disputes in regards to the Non-Disclosure and Confidentiality Agreement." This Court regards this limitation as a sensible approach, within the County Court's discretion, that achieved an *enforceable* protective order while still preserving the Petitioner's objections to jurisdiction. It certainly does not result in a miscarriage of justice as required by *Kaklamanos.* (Respondents' Appendix, Page 113).

The record provided by CMI to both the Circuit Court and this Court does not include a transcript of the evidentiary hearing where the County Court heard testimony from not only the Defendants' expert, but also testimony from two representatives of CMI. Also missing from the record is any transcript relating to the entry of the Original Protective Order where the County Court found "The Defendants in this case have demonstrated materiality and a reasonable necessity for production of the Source Code." (Respondents' Appendix, Page 77).

Argument

The Trial Court Correctly Found That the Defendants Demonstrated a Reasonable Necessity for the Production of the Source Code

CMI asserts that "the issue of whether the source code is reasonably necessary was never raised by either party, framed in any pleading, noticed for hearing, or litigated by the parties." (Initial Petition, Page 7). In its statement of the facts, CMI states "Without any request by either party or hearing on the issue of "reasonable necessity", the County Court *sua sponte* entered an Order that the source code was material and reasonably necessary." (Initial Petition, Pages 2 – 3). CMI did not cite to any place in the record to support the proposition that the County Court ruled *sua sponte.* However, the record conclusively establishes that CMI's claim that the issue of whether the source code is reasonably necessary was never raised by the parties or framed by pleading is utterly false.

In CMI's Motion for Protective Order, in paragraph 7, CMI alleged "… should this Court decide the Source Code is reasonable and necessary…" (Respondents' Appendix, Page 44). In the Defendants' Motion for Issuance of Subpoena Duces Tecum, in paragraph 15, the Defendants alleged "The source code is reasonably necessary to …" (Respondents' Appendix, Page 67). CMI's argument that the County Court ruled on the issue of whether the Defendants

demonstrated a reasonable necessity for the production of the source code on its own, without the issue being raised by either party or being framed by the pleadings is lacking any merit.

CMI also relies on a 2006 amendment to Section 316.1932(4), Florida Statutes, which defines "full information" that must be provided under Florida implied consent statute, for the proposition that the source code does not need to be produced. This argument fails for several reasons. First, the amended statute is inapplicable to the Defendants in this cause. The subject offenses occurred prior to the amendment to this statute, which did not become law until October 1, 2006[4]. Secondly, the subpoena was issued pursuant Rule of Criminal Procedure 3.220, not the "full information" statute. (Respondents' Appendix, Page 113). Third, the legislature cannot enact a Statute that limits a criminal defendant's right to discovery. The power to enact rules of procedure for the courts is the exclusive province of the Florida Supreme Court. Article V, Section 2 Florida Constitution. While the legislature has the power to enact laws that would allow access to evidence distinct from the rules of procedure (i.e. public records), this law cannot have any bearing on the rules of procedure in order to be valid under the Florida

[4] The initial evidentiary hearing took place on April 11, 2006 (Respondents' Appendix, Page 61).

Constitution. Whether a document is or is not a public record has no bearing on its discoverability under the rules of Criminal Procedure. Likewise, whether or not the source code is part of statutory "full information" has no bearing on whether it is discoverable under the Rules of Criminal Procedure.

CMI asserts that the Third District Court of Appeal "specifically held that the source code to the Intoxilyzer was not material and criminal defendants are not entitled to it.", citing to *State v. Bastos*, 33 Fla. L Weekly D1541 (Fla. 3d DCA June 11, 2008). (Initial Petition, Page 11). This is not what the Third District held. The Court stated:

> After careful consideration, we conclude that **the present record does not support the conclusion that the proposed testimony and documents are "material" for purposes of the Uniform Law**. The defendants certainly are entitled to investigate their case. They have retained two experts, Dr. Rose and Dr. Harley Myler, who are highly knowledgeable about the Intoxilyzer 5000. The defendants are entitled to bring forth testimony, or conduct testing, to demonstrate that interferents yield false positives or skew the machine's readings.
>
> However, we cannot accept the proposition that simply because a piece of testing equipment is used in a criminal case, it follows that the source code for its computer must be turned over. **There would need to be a particularized showing demonstrating that observed discrepancies in the operation of the machine necessitate access to the source code**. **We are unable to see that any such evidence was brought forth in the evidentiary hearing below**. (Emphasis added) *id.*

Bastos does not stand for the proposition that the source code is not material; rather the decision was fact specific, finding that the defendants in Bastos did not

establish that the source code was material, ruling that a more particularized showing was necessary. CMI asserts that the Defendants failed to present "any live testimony" and "merely presented an affidavit of Dr. Mylar (sic)" (Initial Petition, Page 11). CMI does not cite to where in the record this proposition comes from; this assertion is false. The Defendants in this cause did not rely upon an affidavit, there was live testimony presented to the County Court. The Order Directing Clerk to Issue Subpoena Duces Tecum, in paragraph 13 found: "Based upon the testimony presented to this Court on April 11, 2006, the defendants have established that the source code is material to their theory of defense in this case." (Respondents' Appendix, Page 73). CMI did not present the record of the testimony relied upon by the trial court. Without a record, neither this Court nor the Circuit Court can address the sufficiency of the evidence that the trial court relied upon when ruling that the source code was material to the defendants' theory of the case.

The Circuit Court Petition Was Untimely

On April 23, 2008, CMI filed its Petition to the Circuit Court. This Petition was untimely, for CMI was seeking review of the County Court rulings contained in an Order entered February 26, 2008. The nature of the relief sought by the

Petition to the Circuit Court is a "ruling that the County Court departed from the essential requirements of the law in its finding that the source code was reasonably necessary and by ordering Petitioner to submit to the jurisdiction of the County Court in such Order". (Appendix C, Page 3). CMI sought relief from the County Court rulings entered on February 26, 2008 in the "Order on Disclosure of Source Code and Object Code for Intoxilyzer 5000 and Protective Order", which was more than thirty (30) days prior to the filing of the Petition to the Circuit Court. CMI had thirty (30) days from the rendition of this order to file a Petition for Certiorari. Rule 9.100(c) (1).

On March 4, 2008, CMI filed with the trial Court a "Motion for reconsideration or in the alternative Modification of Protective Order". (Respondents' Appendix, Page 87). Unlike an authorized and timely motion directed to a final order, a motion for reconsideration or rehearing of a non-final order does not toll the time for filing a notice of appeal or petition for a writ. *Richardson v. Watson,* 611 So.2d 1254 (Fla. 2d DCA 1992). Also see *Holzman v. Southern Bell Telephone and Telegraph Co.*, 303 So.2d 678 (Fla. 4th DCA 1974) holding that an appeal of an order denying a motion for rehearing (which is not authorized by the rules) does not bring up for review the correctness of **other** interlocutory orders previously entered in the cause. A Motion for rehearing

directed to an interlocutory discovery order is not authorized and does not toll the time for seeking review. *Vliegenthart v. Grover*, 575 So.2d 781, (Fla. 5th DCA 1991). Even if the trial court entertains a motion for rehearing, the time for filing a petition is not tolled. *Princess Cruises, Inc. v. Edwards*, 611 So.2d 598 (Fla. 2d DCA 1993).

A petition for writ of certiorari seeking review of an order compelling discovery will be dismissed for lack of jurisdiction if it is not filed within thirty days of rendition of the order. *Princess Cruises.* On March 24, 2008 the County Court entered an "Amended Order on Disclosure of Source Code and Object Code for Intoxilyzer 8000 and Protective Order". The March 24, 2008 Order and the February 26, 2008 Order are identical as they relate to CMI's first issue (reasonable necessity); as to CMI's second issue raised in the writ, the March 24, 2008 order merely added the word "solely"[5] to the jurisdiction provision – CMI's Petition to the Circuit Court did not contest this modification; CMI's challenge relates the original ruling of February 26, 2008.

[5] The Amended Order also changed the forum that CMI was submitting to from Manatee County to Sarasota County. This appears to be a scrivener's error and is not an issue raised by CMI in its Petition. The order in this cause was the product of a consolidated hearing with the County Court of Sarasota (*State v. Woods*, case no. 2006 CT 012017 NC). Both Courts entered similar orders, with the only material differences being the county for production, and the Sarasota cases dealt with the Intoxilyzer 8000 while the Manatee County cases dealt with the Intoxilyzer 5000.

As to the first issue raised in the Petition to the Circuit Court, both Orders provided:

> The Defendants in this case have demonstrated materiality and a reasonable necessity for production of the Source Code.

As to the second issue raised in the Petition, the Original order provided:

> By signing the Non-Disclosure and confidentiality Agreement, CMI, the Defendant's Expert and any other person(s) bound by the Non-Disclosure and Confidentiality Agreement submit themselves to the jurisdiction of Manatee County for enforcement and resolution of any disputes in regards to the Non-Disclosure and Confidentiality Agreement.

As to the second issue raised in the Petition, the Amended order provided:

> By signing the Non-Disclosure and confidentiality Agreement, CMI, the Defendant's Expert and any other person(s) bound by the Non-Disclosure and Confidentiality Agreement submit themselves to the jurisdiction of **Sarasota** County **solely** for enforcement and resolution of any disputes in regards to the Non-Disclosure and Confidentiality Agreement.

CMI had thirty days from the date of the February 26, 2008 Order to file a Petition for Certiorari to obtain review of this Order. CMI's Motion for Reconsideration did not toll or otherwise extend the time for filing a Petition. While the County Court entered an Amended Order on March 24, 2008, this Order did not alter the rulings of February 7, 2008 as it related to the issues set forth in "the nature of the relief sought" that is set forth in CMI's Petition to the Circuit Court. If CMI's Petition to the Circuit Court was contesting the County Court's

insertion of the word "solely" (which was done at CMI's request), then the Petition would have been timely. CMI's Petition is not challenging the modifications to the original order, but is contesting the original ruling; this petition was untimely. The Circuit Court lacked jurisdiction to review the untimely filed Petition. *State v. Bjorkland,* 924 So.2d 971 (Fla. 2nd DCA 2006).

CMI Lacks Standing to Contest the Issuance of the Subpoena

The trial court granted the Defendant's motion for issuance of a subpoena duces tecum. The judge found the source code was material and a subpoena was issued and served upon CMI for the production of the Intoxilyzer source code. (Respondent's Appendix, Page 71). While the State of Florida had the right to appeal the decision to grant discovery in this matter, no such appeal was taken. The County Court certified the issue of the issuance of a subpoena dues tecum for the source code to be one of great public importance. When the case returned to this court, the State of Florida, though its attorney, elected not to pursue an appeal of the issuance of a subpoena upon CMI, and dismissed the State's appeal. (Respondent's Appendix, Page 36). CMI, a non-party, did not have standing to contend that materials sought are not relevant to the underlying proceedings. ". . . [A] third party deponent . . . is properly concerned only with whether the subpoena

is burdensome, oppressive, unreasonable or Seeks the disclosure of confidential information. If a subpoena duces tecum does fall into one of these categories, it may be quashed, modified, or subject to a protective order, Even though it seeks relevant information." *Dade County Med. Ass'n v. Hlis*, 372 So.2d 117 (Fla. 3d DCA 1979). While CMI could challenge whether the subpoena sought disclosure of confidential information, CMI lacked standing to contest whether the source code was material to the Defendant's theory of defense.

CMI failed to provide either this Court or the Circuit Court any transcript of the proceedings that led to the issuance of the subpoena. Without a record of the proceedings, even if CMI had standing, it was impossible for the Circuit Court to rule on the sufficiency of the evidence. Furthermore, this Court cannot find the Circuit Court erred in affirming the finding of materiality, for there is not a record to support CMI's claim that the Defendant's failed to establish the materiality of the source code.

CMI Failed to Raise Lack of Personal Jurisdiction in the Circuit Court

In CMI's petition to this court, "The Nature of the Relief Sought" asserts "Petitioner also contests the very jurisdiction of the lower court over Petitioner, but that issue is more properly handled in the Fabian case before this Court". (Initial Petition, Pages 4 – 5). This issue was not presented to the Circuit Court. (Petitioner's Appendix C, Page 3). CMI cannot show that the Circuit Court failed to follow a clearly established principle of law where the Circuit Court failed to address an issue never put before it. CMI cannot raise this issue here for the first time. Furthermore, the consolidated cases before the court in the instant matter are all from Manatee County and are not part of the *Fabian* proceedings out of Sarasota County. While the attorneys are the same, the records and parties are different. If CMI wanted to contest personal jurisdiction in Manatee County, CMI had to do so, or this issue was waived.

CMI sought relief under the Florida Rules of Procedure by filing a Motion for Protective Order. A party seeking relief under the Florida Rules of Procedure for a Protective Order waives any claim it may have had to contest personal jurisdiction. *Zimmerman v. Weinberg*, 557 So.2d 193 (Fla. 4th DCA 1990; *Royal Industries, Inc. v. Birdsong*, 340 So.2d 526 (Fla. 1st DCA 1977); *McKelvey v. McKelvey*, 323 So.2d 651 (Fla. 3d DCA 1976); *Cueto v. Golden State Industries*,

Inc., 883 So.2d 817 (Fla. 3d DCA 2004. While CMI had the right to contest personal jurisdiction, CMI's act of seeking relief under the Florida Rules of Procedure in the County Court acted as a waiver of any claim it may have had to contest personal jurisdiction.

The Circuit Court did not err when it did not rule on the personal jurisdiction issue which CMI did not put before the court. However, if this issue was raised, CMI still could not prevail. CMI went to the County Court, and told the Court it would produce the source code if the Court entered a protective order. The County Court granted CMI's motion. CMI now asserts the County Court did not have jurisdiction to issue the protective order that was requested by CMI.

Conclusion

CMI requested that the County Court enter a protective order. CMI's attorney told the county court that CMI would produce the source code if the county court entered a protective order. The County Court granted CMI's request and entered a protective order. CMI now claims in this second level appeal, that the Circuit Court should have overturned the entry of this order. CMI attempts to support its claim by providing an incomplete record and arguments based upon

allegations that are not supported by the record and other assertions which are blatantly false. CMI has not shown that the Circuit Court departed a clearly established principle of law resulting in a miscarriage of justice.

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[6] Robert N. Harrison is representing all of the Respondents in this cause, except for the State of Florida.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by regular U.S. mail to Cliff Ramey, Assistant State Attorney, State Attorney's Office, 2071 Ringling Blvd., Sarasota, FL 34237 and Michael S. Taaffe, Esquire, PO Box 49948, Sarasota, FL 34230 on this _____ day of August , 2008.

Robert N. Harrison

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I hereby certify that this Petition complies with the font requirements of Rule 9.210.

Robert N. Harrison