

TUCSON CITY COURT
103 E ALAMEDA • P.O. Box 27210 • Tucson, Arizona 85725-7210 • Phone (520) 791-4216

State of Arizona, PLAINTIFF	Docket Number	Citation Number
vs.		
Martinez, Richard	TR6089884	
McGrath, Brian	TR7036779	
Kemling, Joni	TR6093183	
Loya, Evangelina	TR7034778	
Maxwell, Darren	TR7026596 / 95	
Coult, Jennifer	TR7016354	
Batz, Brooke	TR7049084	
Cervantes, Yolanda	TR7034752	
Panno, Dax	TR7032594	
Leining, Addie	TR7058158	
Dal Pazzo, Dorely	TR7058103	
Loya, Evangelina	TR7034778	
Raler-Wittmann, Tommy	TR7054186	
Polzin, Nichole	TR7061625	
Pena, Jose	TR7045969	
Kirchner, Bob	TR7025053	
Arellano-Haring, Bryan	TR7020376 (Judge Pollard)	
McManus, Mary Ann,	TR7022975 (Judge Pollard)	
DEFENDANTS		

-----ORDERS OF THE COURT-----
In-Chambers Rulings

"Sunlight is said to be the best disinfectant."
 —Supreme Court Justice Louis Brandeis

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Defendants in the above entitled causes have requested disclosure of the computer software source codes for the Arizona versions of the Intoxilyzer Model 8000, manufactured by CMI, Inc., claiming a substantial need for the codes in the defense of the related DUI charges. Although the State does not object in principle to the Defendants obtaining, possessing, or analyzing the source codes, the State denies it has access to or possession of the source codes.

A consolidated evidentiary hearing on this issue was held August 16, 2007, at which Defendants presented the testimony of Mark Stoltman and Thomas Workman. The State presented the testimony of TPD criminalist Terry Gallegos. After the presentation of evidence, the Court took the matter under advisement.

It is a longstanding principle that the court has inherent power, where due administration of justice requires, to order discovery of papers, documents, and other tangible objects. State v. Wallace, 97 Ariz. 296, 399 P.2d 909 (1965); State v. McGee, 91 Ariz. 101, 370 P.2d 261 (1962), certiorari denied 83 S.Ct. 75, 371 U.S. 844, 9 L.Ed.2d 79. Defendant cites Rule 15.1(g), Arizona Rule of Criminal Procedure, as authority for the disclosure of the source codes. Rule 15.1(g) provides as follows:

Disclosure by Order of the Court. Upon motion of the defendant showing that the defendant has *substantial need* in the preparation of the defendant's case for material or information not otherwise covered by Rule 15.1, and that the defendant is unable *without undue hardship* to obtain the substantial equivalent by other means, the court in its discretion may order *any person* to make it available to the defendant. The court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive. (Emphasis added).

“SUBSTANTIAL NEED”

The testimony at the hearing established a surprisingly compelling and thoroughly convincing case that the source codes are a critical component affecting the reliability and accuracy of breath testing on the Intoxilyzer 8000. Mr. Workman and Mr. Stoltman credibly provided the Court with numerous instances where flaws in the source codes could and would impact the reliability and accuracy of any given test result. This holds true, as well, for any updates or patches for the software, which may themselves create (and are expected to create) additional, unforeseen errors while correcting others.

After careful consideration of the testimony and evidence, this Court is firmly convinced that examination of the source codes would substantially assist the defense in confronting the State's evidence.¹ The Court finds, as a matter of fact and law, that the

¹The State claims no interest in conducting their own, independent examination of the source codes. Although this Court believes the State, too, has a compelling interest in examining the codes to assure their quality and/or to rebut defense challenges, the State has not made a concomitant disclosure request.

Defendants have a substantial need in the preparation of their defenses to examine the source codes of the devices used to generate evidence critical to their prosecution. Any Defendant who breathes into a device which purportedly measures alcohol concentration, and which produces a result, must be offered the opportunity to *fully* examine the process by which that result is reached, whether the software used is the same approved the State of Arizona, and whether it is functioning as advertised. Due process and principles of fundamental fairness demand no less.

“UNDUE HARDSHIP”

Although this Court is not in a position to determine ownership or proprietary rights for the Intoxilyzer 8000's source codes themselves, the Court finds that *access* to the source codes vests solely with CMI, Inc. The evidence supports the State's position that it does not have the ability to access the codes, despite ownership of the instruments themselves. Although neither the Defendants nor the State directly asked CMI for the source codes, a fact surprising to this Court, it is clear from the evidence presented that CMI will not willingly disclose the source codes to any third party. Arguably, if the State is unable to obtain the source codes, as they claim, despite their longstanding, ongoing commercial relationship with CMI, the Defendants have no reasonable possibility of obtaining these source codes from CMI without court intervention. The Court finds that both the State and Defendants cannot obtain the source codes from CMI without undue hardship. Certainly, it is in the interests of both parties to attempt to persuade CMI to disclose the codes voluntarily, but under the circumstances presented, the Court expects these efforts to be fruitless.

DISCLOSURE ORDER

The Court having concluded that Defendants have a substantial need for the source codes and cannot obtain the same without undue hardship, CMI, Inc. is ordered to make available to the Defendants the complete computer source codes for the operation of the versions of the Intoxilyzer Model 8000s approved for use in Arizona. CMI, Inc. is a proper subject of the order under Rule 15.1(g) (“any person”) and as a vendor in conducting business in this state.

At the evidentiary hearing, no representative from CMI was present. The State, in some instances, argued on behalf of CMI while at the same time disavowing standing or a stake in source code disclosure from CMI directly to Defendants. The Court is cognizant of the fact that CMI may wish to challenge this order as unreasonable or oppressive.

Rule 15.1(g), anticipating situations such as this, provides that “[t]he court may, upon the request of any person affected by the order, vacate or modify the order if compliance would be unreasonable or oppressive.” Until such time as such a challenge is raised by CMI, Inc., this Court’s order stands.

This Court’s order is not, however, without limits. Rule 15.4(d) Ariz.R. Crim.Proc., delineates appropriate restraints on the disclosure of the source codes:

Any materials furnished to an attorney pursuant to this rule shall not be disclosed to the public but only to others to the extent necessary for the proper conduct of the case.

To protect the interests of CMI, Inc., Defendants are to provide the source codes, upon receipt from CMI, without delay to a designated expert for examination and analysis. Any person(s) gaining access to the source codes pursuant to this order are prohibited from disclosing the source codes to the public or any other third party except by order of this Court. Any violation of this order will subject the offender to contempt proceedings or other penalties provided by law.

The Defendant(s) are to prepare and provide to the Court for signature any appropriate forms, orders, or documents necessary to execute this order upon CMI, Inc., pursuant to A.R.S. 13-4091 et. seq. or as otherwise provided by law.

ADMISSIBILITY OF BREATH TEST RESULTS

As the State does not have possession or control of the source codes, sanctions are not appropriate against the State for failing to disclose the source codes. Moreover:


The inability of any person to obtain manufacturer’s schematics and software for a quantitative breath testing device that is approved as prescribed in subsection A of this section shall not affect the admissibility of the results of a breath test pursuant to this section.

A.R.S. 28-1323(C). This Court fully appreciates that today’s ruling will not be the final authority on this issue, and that appellate review of this and related rulings from other courts is forthcoming. Nonetheless, the breath test results in question are admissible even if the source codes are ultimately not obtained, subject to appropriate foundation under the statute or Rules of Evidence. Insofar as Defendants have requested suppression of the breath tests for non-disclosure of the source codes, Defendants’ motions are denied.

CONCLUSION

Disclosure of the source codes by CMI, Inc. to the defense does not in any conceivable way deprive the State of any right or interest. Indeed, the Court agrees with the State that it would have no standing to object to the disclosure order issued today. It is clear that an open examination of the source codes, by all interested parties, including the State, Defendants, and CMI, would result in a better product, more reliable and accurate results, and ultimately more just results in criminal prosecutions. Undoubtedly, these goals are shared by all involved and would be a welcome side effect of the critical examination of the source codes. Any company who markets a product used to run determinative calculations affecting the liberties of the accused citizenry of this state must reasonably expect, permit, and should welcome critical examination of the software used to make such calculations. In weighing the due process rights of the Defendants against the commercial interests of CMI, this Court intends for this order to strike the proper balance and protect the interests of both.

VACATE OCT 4, 2007 3:30 REVIEW HEARING AND ACCELERATE TO SEPT 10, 2007, 1:45PM

	
8-23-07	Jeffrey A. Klotz
Date	Magistrate, City of Tucson

File ___ Atty/PD ___ Pros ___ Def ___ Prob ___ Other ___

Distributed by _____ on _____