

STATE OF MINNESOTA  
COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT COURT  
DIVISION II - BROOKDALE

State of Minnesota,

File Number 27CR09-14456

Plaintiff,

vs.

**ORDER**

Aaron Michael Sommers,

Defendant.

In this criminal case the defendant moves this Court for an order compelling the State to reveal the source code for the Intoxilyzer 5000 within 14 days or prior to trial, whichever is earlier.

For reasons stated in the attached memorandum that motion is granted.

IT IS SO ORDERED.

Dated: 5/26/2009

BY THE COURT:



Thor Anderson  
Senior Judge of District Court

## M E M O R A N D U M

This memorandum relates to the attached pretrial order which decides a defense motion which is part of the lava flow from a recent volcanic eruption by our Supreme Court. State v. Underdahl and Brunner (A09-2293, A09-2428, April 30, 2009).

For the reader fortunate enough to be unfamiliar with the issue, a Reader's Digest summary of the underlying situation is in order.

In Minnesota it is illegal to drive a motor vehicle with a blood alcohol concentration (BAC) of over .08. A violation has both civil and criminal consequences.

With the appropriate legal predicates (which are not an issue here) the police can test the BAC by blood, urine or the driver's breath. In the overwhelming percentage of cases the breath test is used (including the case at bar). This is accomplished by taking the driver to a local police station and having the driver give a breath sample in a machine known as an Intoxilyzer. This machine is operated by a computer program known as a "source code." The machine's accuracy can be authoritatively tested by use of a known alcohol sample. The use of

the machine is authorized by state law and the State designates the model to be used and contracts for or otherwise specifies the machine's operating characteristics.

In recent months and years, in both implied consent and criminal matters, drivers have moved pretrial for disclosure by the State of the above-mentioned source code.

The State has responded in two ways. Firstly, that the source code is irrelevant because the accuracy of the machine can be proven (or disproven if in fact the source code is out of kilter) by a test of the machine by a known alcohol sample.

Secondly, that the State does not possess the source code and cannot obtain it. The manufacturer claims it is proprietary information and will not disclose it to the State (or anyone else.)

These issues by fits and starts lurched their way to our Supreme Court and this motion comes about as the result of that Court's most recent pronouncement cited above.

Firstly, the Court decided that if a party files an elaborate and expensive enough supporting affidavit (which all litigants now have submitted), need

for the source code has been shown. One supposes this will be quibbled with in some law review articles but as a matter of fact, it doesn't matter. This is because the State's position is that if it had the source code it would disclose it faster than a speeding bullet. The State does not care if the drivers have the source code. In fact, it is the State and, of course, those people killed by drunk drivers that are the victims in this judicial squeeze play.

In fact, the State has claimed it is entitled to the source code under its agreements with the manufacturer in a case commenced by it in U.S. District Court. That leisurely proceeding has become more exciting by the embellishment of a judicially permitted intervenor who is not a party to the contract or agreement between the State and the manufacturer. There could of course be a surprise settlement (rumor has it that the intervenor torpedoed a recent attempt at one), but absent that we can be assured that with appeals, remands, new trials, and further appeals the case will be completed within lives in being plus twenty-one years.

Our Supreme Court has in effect held that the source code is in the possession, custody or control of the State. This author realizes that sounds odd, but the reader should keep in mind that when our Supreme Court speaks ex cathedra on matters of law from its courtroom in St. Paul it is, as far as the lower courts are concerned, miraculously preserved from error. It is a good thing, too, because the miracle of finding that the State has control of the source code makes accepting any miracle in the Bible a slam dunk.

It appears the Supreme Court reached its conclusion because the paperwork seemed to the Court (without input from the manufacturer who claims otherwise) that the State is entitled to the source code. Well, the State must think so, too, or it would not sue for the source code in Federal Court. But a freshman logic course would teach us that being entitled to something is different than having it. Just ask Hillary Clinton.

The Court's decision puts the trial court in the position of Galileo, who in the 1600s was deemed by the Holy Inquisition a heretic because he argued the Earth goes around the Sun, when every God-fearing

person could look up in the sky and watch the Sun go around the Earth once a day.

The trial court now must sacrifice truth as a burnt offering on the altar of stare decisis and go down the rabbit hole with Alice and from the Precincts of Wonderland tell the world that the State has the source code when it really doesn't. It of course may in the future, but it doesn't now, and it is now that drunk drivers will keep their licenses and kill people. These decedents are unable to intervene here or in Federal Court.

Galileo was sentenced to house arrest for life (this author could see that coming) but to prevent the unpleasantness of the medieval equivalent of waterboarding, Galileo publicly renounced his heresy and stated that the Sun revolved around the Earth. But as he left the room he whispered to his guard, "The Earth still revolves around the Sun."

In the accompanying order, this author renounces his heresy and follows the Supreme Court's findings to the letter. But to the people of Minnesota and every family that has had a loved one killed by a drunk driver, he whispers, "The State does not now have possession, custody or control of the source code."

