STATE OF MINNESOTA | FOURTH JUDICIAL DISTRICT CO URT

COUNTY OF HENNEPIN | CRIMINAL DIVISION

FILED
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BY _______________ DEPUTY
HENN CO. DISTRICT
COURT ADMINISTRATOR

State of Minnesota
Plaintiff,

vs

Danica Lane Hagen,

Defendant.

ORDER

Court File 27 CR 07-105717

ORDER

This hearing was on December 10, 2007.

Jennifer Marie Inz appeared on behalf of Plaintiff.

Rachael Goldberger appeared on behalf of Defendant.

The defendant, accused of impaired driving, moves for disclosure of the "source codes" for the Intoxilizer device, whose reading the prosecution proposes to offer in evidence against him; and, failing that, for suppression of the evidence.

The Intoxilizer produces a report of the subject's blood-alcohol content, (a report virtually decisive of guilt in most cases), by a technical process governed and influenced in part by these "source codes." They are, therefore, clearly discoverable, since the defense has an interest in knowing how the reading is arrived at, and an indisputable right to challenge its validity and accuracy. (Indeed, I believe the proponent of the evidence has a routine and scarcely arguable duty to provide the codes and proof of their validity as foundation for the reading's admissibility, but that is not the issue here).

This is ultimately a right to confrontation of the accuser, and more broadly the right to due process of law, specifically the right to present a defense, but at this point it is a simple discovery request within my authority and discretion.

The state does not primarily oppose disclosure as such, but claims that it, too, does not have the codes and therefore cannot produce them. This is because the manufacturer refuses to release them, but this is hardly relevant to the immediate question. The state cannot proffer evidence and claim immunity from the obligation to show its evidentiary foundation, especially not on behalf of a private non-party.

This refusal raises a natural, strong, and reasonable inference (among others) that the codes will reveal a defect in the machine or its results. The claim of proprietary information rings hollow for several reasons. First, there is no persuasive reason to believe it, no more reason than to believe the more damning inference just mentioned. Second, even if true, although the manufacturer's profits and market security may be of primary importance to the manufacturer, these cannot be of concern to the judicial system; certainly not in a criminal case. Private cupidity does not override the state or federal constitution, or the Rules of Criminal Procedure and Evidence, or fundamental fairness. I believe and conclude an analysis of the source codes may show the Intoxilizer is flawed in design or function or both, and that the fear of this is the probable reason for secrecy. That there may be other reasons is quite beside the point.

This secrecy also endangers the state's ability to prosecute accused drunken drivers, and in this sense the public as well as the accused driver has a stake. The public therefore no less than an accused driver should be outraged at the non-disclosure.

The remedy is simple and obvious. The manufacturer need not disclose the codes; but if it does not, the machine's results cannot be used in court. If the results cannot be used, the machine ceases to have value to law enforcement agencies who, therefore, will simply cease to purchase the machine, as they should. Traffic violations can and will be quite effectively prosecuted by other means, as they have been almost since the advent of the internal combustion engine. (Or a more forthcoming manufacturer may step into the breach.)

There has been discussion of disclosure conditioned upon a protective order, but such an order is neither required nor appropriate. The manufacturer is not a party to this litigation. It sells for profit a device it represents to be useful in the enforcement of impaired driving laws. It mistakenly believes, apparently, that courts will allow it to enrich itself without risk, at the expense not only of accused drivers, but of the judicial process itself. In this it is mistaken.

One can only view as sinister the proposition that a company that offers for sale an instrument designed to produce evidence before neutral factfinders in our courts would argue (and with some success) that it can arrogate to itself even a small part of the inherently and exclusively judicial function of controlling how and on what terms the admissibility of evidence should be determined. Even more alarming is that the executive branch of government would accede to and even affirmatively support this presumptuousness, and compromise the fact-finding process.

It is and should be an article of faith recognized by universal consent that no person in this state or country need accept on faith the word of any accuser, government agent or private person or corporate entity, who seeks to deprive him of life, liberty, or property. And yet that is precisely what I am asked to do

here: to "take their word for it." I don't, and I won't. I believe the source codes may show that the Intoxilizer is faulty. That I do not know this for certain is of no consequence; it is beside the point; the point being that on this record we cannot reasonably believe the contrary.

It bespeaks an astonishing degree of hubris for a company that designs and markets a device specifically to produce evidence for use against individuals in our courts to believe that it must not make every single piece of information concerning that product's composition and functions immediately and fully available to both the purchaser (the state) and the subject of its analysis (the driver). The courts should not and I shall not collude in the dilution of the quality of justice in order to protect a manufacturer's bottom line. The company and the state cannot bargain away the people's rights and privileges.

Just as a person who chooses to drive impliedly consents to the testing of his system for intoxicants, a seller or user of a testing instrument impliedly consents to the full disclosure and testing of all aspects of the device.

Of the two obvious motives for secrecy—fear or revelation of defectiveness and preservation of profits—the former cries out for disclosure, and the latter presents no legitimate obstacle to it. Both are motivated by powerful self-interest, and the proponent of secrecy therefore lacks credibility.

This ruling is not constitutionally based (though it could be). It is a simple discovery question, a request I have the power and discretion to grant, which I do. Although it appears obvious to me that a failure to order disclosure would violate the defendant's rights to confrontation and due process, it is not necessary here to invoke those lofty concepts, and a Constitutional decision should, of course, always be avoided where a dispute admits resolution on other grounds, as this one readily does.

The criminal rules (7 and 9), incidentally, refer to evidence that relates to the "guilt or innocence" of the accused. This can be misleading since the reference to "innocence" implies a burden on the defendant that does not and constitutionally could not exist. The purpose of discovery is not to prove "innocence," but merely to illustrate potential weakness in the proffered proof of guilt.

(I note in passing that it is a crime even to refuse to submit to this device. That this could be so, constitutionally, implies a very high confidence in its reliability, to the degree indeed that the driver is entitled to know that everything about the device is open to inspection and analysis that will assure the most hardened skeptic that its reading is true, accurate, and reliable. Is it thinkable, constitutionally, that our society could imprison persons who simply decline to take a test on a machine to whose design, construction, and functioning they do not have complete access? We are dealing here with a mere commercial

gadget, not with state secrets, or threats to national security from non-citizens held off-shore in wartime. It is a pernicious notion to which we should be indignantly unwillingly to subscribe.)

The parties have submitted and I have read with care and interest a large number of orders by many other judges, ruling for and against similar motions, in both criminal and civil cases. Many of these were obviously carefully thought-out. None of them changes my view as to the proper result.

The motion to disclose is granted. If the source codes are not produced in thirty days the Intoxilizer reading is suppressed.

IT IS SO ORDERED

Dated: 10 Dec 07

BY THE COURT:

Jack Nordby
Judge of District Court