

Legal standoff over Intoxilyzer takes yet another turn

Attorneys for the Minnesota Department of Public Safety and CMI, Inc. announced a tentative settlement Monday in the department's long-running lawsuit over access to the computer source code for the Intoxilyzer 5000EN, a breath-alcohol testing device.

The settlement, if given final approval, would give defendants in criminal DWI cases and petitioners in civil implied-consent cases complete access to the computer code, or programming language, for the Intoxilyzer. It represents the next chapter in a novel legal standoff between the State of Minnesota, members of the defense bar, and CMI, Inc., which manufactures the principal testing device used by police agencies in the enforcement of Minnesota's DWI laws.

A changing landscape

Legal wrangling over access to the source code for CMI's Intoxilyzer machine has gone on since 2006, and the matter has reached the Minnesota Supreme Court on two separate occasions. As Minnesota's high courts have grappled with source-code issues, district courts across the state have had to adapt to rapidly changing rulings that have challenged long-held assumptions about the way DWI prosecutions are handled.

One can look to an ongoing DWI case in Hennepin County District Court for an example of how the source-code matter has played out at the trial-court level. A handful of years ago, a case such as *State of Minnesota vs. Aaron Michael Sommers* would have been just another routine DWI prosecution. Since the advent of the source-code controversy, however, cases like *Sommers* have become forums for claims and counterclaims about the propriety and validity of the source-code issue.

On May 26, Hennepin County District Judge Thor Anderson issued an order in the *Sommers* case in response to a discovery motion made by Aaron Sommers' attorney. At first glance, his order is unremarkable. Like many orders granting discovery motions, it requires the prosecution to turn over specific materials to the defense — in this case, the complete computer source code for the Intoxilyzer 5000EN machine. Anderson's four-sentence order, however, is qualified by a five-page memorandum that chastises the Minnesota Supreme Court for compelling prosecutors to produce the code in the first place. Why? Because, said Anderson, they simply don't have it.

"Our Supreme Court has in effect held that the source code is in the possession, custody, or control of the State," Anderson wrote. He noted that the Supreme Court has held that the State is essentially entitled to the source code through a contractual arrangement with the CMI, Inc. "But," Anderson continued, "a freshman logic course would teach us that being entitled to something is different than having it. Just ask Hillary Clinton."

Seeking the source code

The Intoxilyzer 5000EN is a microprocessor-driven breath alcohol analyzer

manufactured by CMI, Inc. of Owensboro, Kentucky. CMI manufactures several types of breath-alcohol devices that are currently in use across the country. Since 1983, Minnesota law-enforcement agencies have used various models of CMI's Intoxilyzer to test the blood-alcohol levels of individuals suspected of drunken driving.

The Intoxilyzer analyzes physical data from breath samples, and the machine's computer source code determines how to interpret the data the device receives. Intoxilyzer test results have been used in scores of criminal and civil cases over the past three decades, and they have become a cornerstone of Minnesota DWI prosecutions.

In past years, defense challenges to Intoxilyzer tests were specific to the results produced by a particular machine, in a particular instance. That changed in 2006, when Eagan-based defense attorney Jeff Sheridan moved to obtain the machine's entire computer source code on behalf of this client, Dale Lee Underdahl. In doing so, Sheridan sought to examine — and to call into question — the overall reliability of the machine.

The Underdahl case begins

Dale Underdahl was arrested on suspicion of driving while intoxicated, and submitted to a breath test in which the Intoxilyzer was used. At Underdahl's license-revocation hearing, Sheridan sought access to the Intoxilyzer's computer source code as part of the discovery process in his case. He maintained that Underdahl needed to have access to the instrument and its source code in order to ensure its accuracy and reliability. "The instrument," Sheridan later stated, "is (Underdahl's) accuser."

In responding to Sheridan's motion, the State maintained that defense counsel had failed to adequately show that obtaining the source code would provide facts relevant to Underdahl's defense. It also claimed that the district court lacked jurisdiction to hear a generic challenge to the Intoxilyzer's reliability.

The State noted that, as a procedural matter, such challenges would have to be brought in the Court of Appeals, since the Intoxilyzer had already been approved for use in Minnesota through an administrative rule-making process, and had been presumed to be reliable. Finally, the State claimed that the source code was not in its possession — it was held by the manufacturer instead.

On May 2, 2006, Judge Richard Spicer granted Underdahl's discovery request, and ordered the State to produce the complete Intoxilyzer source code, as well as a fully functional Intoxilyzer 5000EN machine. The Minnesota Department of Public Safety, which held a contract with CMI to use the Intoxilyzer, appealed.

As in the lower court, much of the argumentation turned on the question of who actually possessed the Intoxilyzer source code. During the appeals process, the commissioner of public safety sought to prohibit the district court from enforcing its order to produce the source code. The State, the commissioner claimed, simply did not possess or control the code.

Supreme Court weighs in

In 2007, the Supreme Court examined the source code issue for the first time. It ultimately ruled against the State, and noted that the commissioner of public safety had not met the threshold necessary to prohibit the district court from ordering production of the Intoxilyzer code.

In its opinion, the court agreed with Underdahl that the code was in the possession of the state, based on language found in a request for proposal (RFP) that CMI submitted in its bid to obtain the Intoxilyzer contract. The language of the RFP stated that any copyrightable materials created by the contractor would be "the property of the State" and that the contractor would also provide information to "attorneys representing individuals charged with crimes in which a test with the proposed instrument is part of the evidence." The Court held that because of this arrangement, the State could compel CMI to honor its contract, and thereby make the source code available for discovery.

While the State acknowledged that it owned a portion of the source code, it expressed skepticism that CMI would turn over the entire source code, because the company considered the full code to be proprietary information that it wished to conceal from its competitors. As it turns out, this is precisely what happened.

The source code show-down

As source-code litigation proceeded through the Minnesota Court system, the commissioner of public safety attempted to obtain the complete Intoxilyzer code from CMI. CMI refused, and the State then filed suit in federal court, alleging breach of contract.

CMI's initial reply was blunt. Responding to the State's complaint, CMI's brief stated that the company essentially denied "each and every allegation, matter, and thing" alleged by the State. For its part, the company maintained that the state of Minnesota lacked the authority to order it to produce the source code. Furthermore, CMI's attorneys noted that courts had only ordered the State of Minnesota — and not CMI itself — to turn over the code.

After much wrangling, a tentative deal was struck between the two parties in early 2009. This deal was subsequently rejected by Judge Donovan Frank, on the grounds that litigants seeking source code information would have to travel to Kentucky to get it.

At issue

For the parties involved, the battle over the source code is not an academic matter. In its complaint against CMI, the State noted that the company's refusal to produce the source code had "placed the outcome of numerous impaired driving-related cases in jeopardy" since Intoxilyzer results would be thrown out of court if defendants did not have an opportunity to examine the code. Similarly, the Bureau of Criminal Apprehension later noted that if Minnesota police were effectively prohibited from using Intoxilyzer tests, they would have to move toward using blood and urine tests — the volume of which would quickly overwhelm the bureau's crime lab.

For their part, defense attorneys close to the source code issue have pointed to other states — such as New Jersey — where they claim that the methodology behind CMI's Intoxilyzer has been called into question. Disclosure of the source code, they maintain, would allow them to verify the Intoxilyzer's ultimate reliability.

'A speeding bullet'

After a rocky trip back through Minnesota's lower court system, the source-code issue ended up before the Supreme Court for a second time. In a 2009 opinion, the Supreme Court expanded on its decision in the original *Underdahl* case, and ordered the production of source code information to a DWI defendant, Timothy Arlen Brunner.

After the court's ruling, district courts began issuing discovery orders for the Intoxilyzer code, even though the State's lawsuit against CMI was still ongoing. While many defense attorneys viewed this outcome as a net positive, the court's decision caused consternation among some trial-court judges.

For instance, in Thor Anderson's memo in the *Sommers* case, the judge decried what he saw as the untenable situation that district court judges had been placed in, due to the Supreme Court's rulings on source code matters.

"The State's position is that if it had the source code, it would disclose it faster than a speeding bullet," Anderson wrote. "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."

Toward resolution?

Yesterday's settlement agreement may finally resolve the question of who actually has access to the Intoxilyzer source code. The tentative agreement struck between CMI and the State allows defendants in criminal cases and petitioners in civil implied-consent cases full access to the computer code, and also makes \$50,000 in fees available for experts to defend the source code in Minnesota legal proceedings. The agreement is not final, however, and its validity is already being called into question by some local attorneys. Defense lawyer Chuck Ramsay wrote on his blog yesterday that "This agreement is not yet settled."

A hearing on the proposed settlement between the State and CMI, Inc. will be held in federal court on June 11 before Judge Donovan Frank.

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