

motorist blow into the Intoxilyzer. The officer instructed Petitioner on how to provide a breath sample. During the course of the test, Officer observed Petitioner place his tongue over the mouthpiece, thus blocking the flow of air into the machine. Also during the test, Petitioner would stop and start his blowing sequence in such a manner as to interfere with the ability of the machine to measure his blood alcohol level. The machine indicated more than once that Petitioner's breath sample was deficient to measure his blood alcohol level.

3. Prior to being taken to the police station, Petitioner had refused to blow into the preliminary breath test device and had refused to sign an acknowledgement that he had received the Notice and Order of Revocation.
4. Petitioner failed to provide a single adequate breath sample for testing. Petitioner has not asserted that his refusal was based on a reasonable ground.
5. Approximately fifteen minutes after Petitioner refused to submit a breath sample, he asked to take another test. Office declined to give Petitioner a second opportunity.

CONCLUSIONS OF LAW

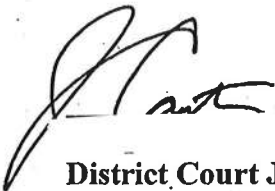
1. The Commissioner has proved by a preponderance of the evidence that Petitioner refused to provide two separate, adequate breath samples in the proper sequence into the Intoxilyzer 5000. *See, Cantor v. Commissioner of Public Safety*, 376 N.W.2d 530 (Minn. Ct. App. 1985).
2. Petitioner is entitled to discovery of the source code to the Intoxilyzer 5000. *See Comm'r of Pub. Safety v. Underdahl*, 735 N.W.2d 706 (Minn. 2007).

ORDER

1. On the issue of whether Petitioner reasonably refused the breath test, the revocation of Petitioner's driving privileges by the Commissioner of Public Safety is conditionally sustained.
2. Petitioner's motion for additional discovery for the source code to the Intoxilyzer 5000 is granted.
3. The Commissioner shall provide the source code to defense counsel within sixty (60) days of entry of this Order.
4. Failure to comply with this Order may result in sanctions, including the exclusion of an alcohol concentration test run on the Intoxilyzer 5000 and rescission of the license revocation. In the event the Commissioner fails to comply with this Order compelling disclosure of the complete source code, Petitioner shall file a motion seeking imposition of the sanctions set forth above.
5. Respondent's motion for a Protective Order and Order requiring the Petitioner to sign a Non-Disclosure Agreement is denied.
6. The attached memorandum is incorporated herein by reference.

December 27, 2007

BY THE COURT:



District Court Judge

MEMORANDUM

Pursuant to Rule 9.01, subd. 2(1) of the Minnesota Rules of Criminal Procedure, the court, for good cause shown, shall require the prosecuting attorney to assist the Petitioner in seeking access to specified matters relating to the case which are within the possession or control of an official or employee of any governmental agency.

Subdivision 2(3) permits the court to order the discovery of any relevant material and information not subject to disclosure without an order of the court. The rules focus on two important principles: whether the sought-after information is relevant and whether the prosecuting authority has access to the information.

In this case, Petitioner submitted to a test of his blood alcohol level via the use of the Intoxilyzer 5000. Because Petitioner is charged with driving a motor vehicle with a blood alcohol level above .08%, the State intends to introduce the results of the test. This makes the Intoxilyzer and its reliability relevant. While the State argues that Petitioner must make a specific showing that something was amiss with the particular machine used in his case, Petitioner cannot make such a showing without the benefit of the source code to the computer. The disclosure of the source code may reasonably lead to the discovery of other admissible relevant evidence.

The Minnesota Supreme Court in *Underdahl v. Comm'r of Pub. Safety*, 735 N.W.2d 706 (Minn. 2007), has held that the State has access to the source code of the Intoxilyzer 5000. More specifically, the Court stated:

While on the one hand the commissioner argues that ownership of the source code for the Intoxilyzer 5000EN is to be determined under federal copyright law and that under that law he does not have possession, custody, or control of the source code, on the other hand he concedes that the state owns and thus controls some portion of the source code. That concession is supported by the express language of the RFP granting CMI the right to supply the Intoxilyzer 5000EN to the state. Further, given the express language of the RFP that requires CMI to provide the state with

“information * * * to be used by attorneys representing individuals charged with crimes in which a test with the [Intoxilyzer 5000EN] is part of the evidence” when production of the information is mandated by court order “from the court with jurisdiction of the case,” it is not clear to us that the commissioner is unable to comply with the district court's order. *Id.* at 712-13.

Therefore, the source code is both relevant and discoverable.

It is necessary for Petitioner to have access to the discovery within a reasonable time prior to trial to afford him the opportunity to make beneficial use of it.

J.T.C.