

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF ANOKA

TENTH JUDICIAL DISTRICT

Bradley Louis Audette,

Petitioner,

vs.

Commissioner of Public Safety,

Respondent.

FILED
Jane F Morrow
Court Administrator

Court File No.: 02-CV-08-5420

MAY 13 2009

**ORDER TO PRODUCE
SOURCE CODE**

**APPROVED
NYKKIA STRECKER**
Deputy

TO: THE ANOKA COUNTY DISTRICT COURT – CIVIL DIVISION; RYAN P. GARRY, CAPLAN LAW FIRM, P.A.; ATTORNEY GENERAL’S OFFICE – IMPLIED CONSENT DIVISION.

INTRODUCTION

On May 6, 2009, the above-entitled matter came on for implied consent hearing before the Honorable _____, Judge of the Anoka County District Court on Petitioner’s motion to compel the State to produce the source code for the Intoxilyzer 5000EN in electronic format suitable for inspection and analysis. Ryan P. Garry of Caplan Law Firm, P.A. represented Petitioner in the above-mentioned matter and _____ Assistant Attorney General, represented the Respondent.

Based on the file, records, submissions, arguments of counsel, the Court makes the following:

FINDINGS OF FACT

1. Petitioner was arrested and charged with driving with an alcohol concentration of .08 or more. The Petitioner submitted to an Intoxilyzer 5000EN breath test which revealed a test level of allegedly .08 or more. Consequently, his driving privileges were revoked pursuant to Minnesota’s implied consent law.
2. “Parties may obtain discovery of any matter, not privileged, that is relevant to a claim or defense of any party.” Minn. R. Civ. Pro. 26.02(a).

3. At the hearing, Petitioner moved the Court to compel discovery of the source code which underlies the operation of the Intoxilyzer 5000EN, and provided documentation on the need to analyze the source code in order provide an adequate defense against the license revocation.
4. In *State v. Underdahl*, ___ N.W.2d ___ (Minn. April 30, 2009)(*Underdahl II/Brunner*), the Minnesota Supreme Court held that the district court did not abuse its discretion in concluding that the source code may relate to Brunner's guilt or innocence and that the district court did not abuse its discretion in finding that the State had possession or control of the source code under Minn.R.Crim.P. 9.01, subd. 2(1). The Court unanimously held that the contractual language between the State and CMI was sufficient to show that the State was in possession or control of the "source code". *Id.*
5. Petitioner's submissions in support of the motion are numerous, listed by exhibits from A through I, and include the documentation submitted by defendant Brunner in *State v. Underdahl*, ___ N.W.2d ___ (Minn. April 30, 2009)(*Underdahl II/Brunner*).
6. In addition, Petitioner submitted expert affidavits from computer expert Thomas Workman and forensic scientist Thomas Burr supporting the need to examine the source code and the relevance of the source code to the operation of the Intoxilyzer 5000EN.
7. Given the numerous exhibits and expert affidavits, Petitioner provided this Court with a more than adequate showing of relevance, and specifically that the source code is "relevant to a claim or defense" of their case as required by Minn. R. Civ. Pro. 26.02(a), *Underdahl I*, and *Underdahl II*.
8. This Court finds that the State has possession or control of the source code. *Id.*

CONCLUSIONS OF LAW AND ORDER

1. The Petitioner is entitled to discovery of the source code of the Intoxilyzer 5000EN.
2. The State must produce to the Petitioner the source code for the Minnesota model Intoxilyzer 5000EN in electronic format suitable for inspection and analysis by July 6, 2009.
3. If the source code is not produced as ordered this Court will consider Petitioner's sanctions motion.

BY THE COURT


The Honorable
Judge of the Anoka County District Court

Dated: 5/13/09