State of Minnesota
Hennepin County

District Court
Fourth Judicial District
Court File Number: 27-CV-07-14168
Case Type: Implied Consent

Mailing Label

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D[redacted] M[redacted] B[redacted] vs Commissioner of Public Safety

Please find enclosed, documents from Hennepin County Court Administration.

Dated: February 25, 2009

[redacted]
Court Administrator
Hennepin County District Court
300 South Sixth Street, C-12
Minneapolis MN 55487-0421

cc:

STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT

[redacted],

Petitioner,

vs.

Commissioner of Public Safety,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Court File No. 27-CV-07-14168

The above-entitled matter came before the Honorable , Judge of District Court, on February 19, 2009, by letter request from the Assistant Attorney General's Office requesting the Court's leave to bring a motion for reconsideration, or in the alternative, to order the Petitioner to file a Motion to Compel Discovery or a Motion for Sanctions. No parties appeared.

NOW THEREFORE, after consideration of the files and memoranda in this matter, the arguments of counsel and the applicable law, the Court makes the following:

FINDINGS OF FACT

1. Upon the Court's own reconsideration, a Revised Order for Production of Source Code (hereinafter "Revised Order") was issued by Judge of Hennepin County District Court on November 13, 2008.

2. The Revised Order specifically incorporated the orders from the *Peterson v. Commissioner of Public Safety,* File No. 27 CV 08-13261. The Revised Order held that the Revised Order "supersedes all prior orders."

3. The most recent of the *Peterson* orders, dated November 4, 2008, (hereinafter "*Peterson* order") ordered the following:

1) That the State shall furnish a complete copy of the Intoxilyzer 5000 EN source code for the driver's review at the BCA office in St. Paul, Minnesota without cost to the driver.

2) In the alternative, if the driver(s) want to furnish a copy of the source code to their expert for the expert to analyze at the expert's office then the State shall provide a copy to the expert at the driver(s) expense for a reasonable copy cost.

3) In either mode of source code production, the drivers and their representatives shall sign a reasonable non-disclosure agreement.

4) The State's obligation to furnish the source code is stayed until February 16, 2009. This stay will accommodate the possibility that conditions imposed by the U.S. District Court might be incorporated into this order (upon written motion of either party). Such a motion might cause a short delay in the February 16, 2008 deadline, but in no event shall the requirement of production imposed in paragraph 1 and 2 above be avoided by the resolution in Federal Court.

5) If the State fails to produce the source code by February 16, 2009 as required above, or as may be extended by a motion referenced in paragraph 4 above, then the criminal test charges and the Implied Consent license revocation shall be dismissed/rescinded, provided, however, that on or before February 16, 2009 the State may move the court to impose reasonable conditions on its source code production obligations as set forth in paragraph a and c above.

6) This order supersedes any and all prior source code production orders that were issued or may been issued in this case.

4. As of the date of this order, the State has not furnished a complete copy of the Intoxilyzer 5000 EN source code for the driver's review.

5. In the case before the U.S. District Court on the source code issue, *State of Minnesota and Bergstrom, et al., v. CMI of Kentucky, Inc.*, File No. 08-603, the Minnesota Court of Appeals recently issued an order dated February 9, 2009, denying the joint motion of Plaintiff, the State of Minnesota, by Michael Campion, its Commissioner of Public Safety, and the Defendant, CMI of Kentucky, Inc., for entry of a consent judgment and a permanent injunction. Consequently, there has been no resolution of the source code issue by the Federal Court.

6. In view of the Federal Court order in *State v. CMI*, neither party in the above-entitled matter has brought forth a motion to impose any additional conditions that may have arisen in the *State v. CMI* case, as permitted by the *Peterson* order in paragraph 4.

7. Furthermore, the State has not moved this Court to impose reasonable conditions on its source code production obligations, as permitted by the *Peterson* order in paragraph 5.

8. Instead, the State has brought a motion for reconsideration of the prior order, arguing that the Court, in the *Peterson* order, erroneously held that the State has possession, custody or control of the source code.

9. In the alternative, the State requests that the Court require the Petitioner to bring a Motion to Compel Discovery or a Motion for Sanctions.

CONCLUSIONS OF LAW

1. Motions for reconsideration are governed by the Minnesota Rule of General Practice 115.11, stating that such motions are expressly prohibited except by permission of the Court, which will be granted only upon a showing of compelling circumstances.

2. In this case, the State has made a letter request dated February 19, 2009, as required by Minn.R.Gen.Prac. 115.11, arguing that the *Peterson* order incorporated into this case erroneously held that the State has possession, custody or control of the source code. In support of its argument, the State cites the recent decision of *Abbott v. Commissioner of Public Safety*, A08-0399 (Minn. Ct. App. Feb. 2009) (hereinafter "*Abbott*"). However, the Court of Appeals in *Abbott*, in affirming the district court's denial of the petitioner's motion for discovery of the source code, stated that the Minnesota Supreme Court has not yet made a factual determination as to the possession of the source code. *Abbott*, A08-0399 at p. 11. Rather, the Court in *Abbott* interpreted the *Underdahl* case, finding that the commissioner "could pursue obtaining the source code if necessary, which is not the same as saying the commissioner had the possession, custody or control of [the source code]." *Id., citing In re Comm'r of Pub. Safety*, 735 N.W.2d 706 (Minn. 2007) (also known as "*Underdahl*").

3. In reviewing the *Peterson* order dated November 4, 2008, paragraph 1 of the memorandum, Judge Wexler found that "CMI has introduced its product into the state knowing that it would be involved in determining important penal and property rights. Indeed, the State has purchased CMI's product for that very purpose." This finding is more in line with the facts of the *Underdahl* case, where the district court had found that under the contract between the State and CMI, the State owned the source code for the Intoxilyzer 5000EN. In that case, as in the one before this Court, the commissioner argued that the source code is not discoverable under

Minnesota Rules of Civil Procedure 34.01 because the source code is not within the commissioner's possession, custody or control. The district court did not agree and granted the petitioner's request for discovery of the source code. That decision was affirmed by both the Minnesota Court of Appeals and the Minnesota Supreme Court, the latter finding that

> the express language of the RFP that requires CMI to provide the state with "information *** to be used by attorneys representing individuals 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. Accordingly, we cannot conclude that the district court ordered the production of information that is clearly not discoverable.
>
> *Underdahl*, 735 N.W.2d at 713.

4. The Court also notes that the doctrine of law of the case applies to the case at hand. The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Matter of the Welfare of M.D.O*, 462 N.W.2d 370, 375 (Minn. 1990). The U.S. Supreme Court has restated this doctrine in the following manner: though "a court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance, ...as a rule courts should be loathe to do so in the absence of extraordinary circumstances." *Kornberg v. Kornberg*, 525 N.W.2d 14, 19 (Minn. 1996), *citing Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817, 108 S. Ct. 2166, 2178, 100 L.Ed.2d 811(1988).

5. In particular, in situations where a presiding judge retires and a successor judge takes over the case, a successor judge may only reverse a prior decision if that judge believes that the prior decision is clearly erroneous or unjust, or when a substantial change occurs in the essential facts, the evidence, or the applicable law. *Kornberg*, 525 N.W.2d at 18.

6. Because the facts of this case are similar to those found in the *Underdahl* case where the Supreme Court upheld the District Court's decision to order the State to produce the source code, the Court does not find that the *Peterson* order by Judge Wexler dated November 4, 2008, is clearly erroneous or unjust. The Court does not find that there has been a substantial change in the essential facts, the evidence, or the applicable law to warrant reversing the holding of that order. Nor does the Court find that the State's argument rises to the "compelling circumstances" standard set forth in the rules of practice to warrant the granting of the State's motion for reconsideration.

7. Furthermore, as the discovery in the above-entitled matter has already been court ordered, a Motion for Order Compelling Discovery is unnecessary.

8. Also, pursuant to the Minnesota Rule of Civil Procedure 37.02 (b), where a party fails to obey an order, the court in which the action is pending may make such orders in regard to failure as are just. In the case at hand, the *Peterson* order dated November 4, 2008, already addressed the situation whereby the State did not comply with its order to produce the source code and determined that, in such an event, the criminal test charges and the Implied Consent license revocation shall be dismissed/rescinded.

9. Finally, the Court notes that per the *Peterson* order dated November 4, 2008, all motions regarding the source code were required to have been brought on or before February 16, 2009. The state's present motion requests were submitted on February 19, 2009 and are thus untimely.

ORDER

1. Because the Court has not found compelling circumstances to warrant a reconsideration of the order dated November 13, 2008, the State's Motion for Reconsideration is hereby **DENIED**.

2. Because the State has not furnished a complete copy of the Intoxilyzer 5000 EN source code for the driver's review as ordered by the court, the Defendant's criminal test charges and the Implied Consent license revocation shall be dismissed/rescinded as set forth in the *Peterson* order dated November 4, 2008, and incorporated into the above-entitled matter in the Revised Order for Production of Source Code dated November 13, 2008.

Dated: 2/25/09

BY THE COURT:

Judge of District Court

COPIES MAILED TO:

Ryan P. Garry, Esq.
, Esq.

By
Law Clerk to the Honorable