STATE OF MINNESOTA DISTRICT COURT

COUNTY OF ANOKA TENTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs. **ORDER**

B[redacted] W[redacted] P[redacted],

Defendant.

File No. 02-CR-08-10976

This matter came before the Honorable [redacted], Anoka County District Court, on Defendant's May 11, 2009, request for permission to move the Court for reconsideration of the Court's April 14, 2009, Order denying disclosure of the source code. Defendant B[redacted] W[redacted] P[redacted] is represented by Ryan Garry. The State is represented by Coon Rapids Assistant City Attorney D[redacted] B[redacted]. On May 14, 2009, the Court granted the request and ordered submissions no later than June 1, 2009. There was not a hearing. On June 1, 2009, the Court took the matter under advisement.

Based upon the file, the proceedings and the written arguments of counsel, the Court makes the following:

ORDER

1. Defendant's motion for discovery of the Intoxilyzer source code is **GRANTED.**
2. The State shall disclose the computer source code to Defendant within ninety days. Sanctions for a failure to comply with this discovery Order may include the suppression of the breath test and dismissal of the charge of Third Degree Operating a Motor Vehicle with an Alcohol Concentration of .08 or More within Two Hours of Driving.
3. The attached memorandum of law is incorporated herein by reference.
4. This case remains scheduled for pretrial on July 14, 2009.

BY THE COURT:

Dated: 06/11/2009

FILED
Court Administrator
[redacted]

[redacted]
Judge of District Court

JUN 11 2009

Anoka County, MN

MEMORANDUM

On August 12, 2008, at approximately 1:36 A.M., Coon Rapids Police Officer J[redacted] was on patrol in Coon Rapids when he observed a motor vehicle weaving. Officer J[redacted] stopped the vehicle and spoke with the driver, B[redacted] W[redacted] P[redacted], herein the defendant. Officer J[redacted] detected an odor of alcohol coming and observed Defendant had watery eyes and slurred speech. Defendant stated he had consumed a shot of alcohol about ten minutes prior to the stop. Officer J[redacted] asked Defendant to exit the vehicle and asked Defendant to perform several sobriety tests. Defendant then submitted to a preliminary breath test, which indicated a .112 reading. Officer J[redacted] informed Defendant he was being arrested for DWI. During the inventory search of Defendant's vehicle prior to towing, Officer J[redacted] located two small baggies of a substance later identified as marijuana.

Defendant was transport to the Coon Rapids Police Department. He was provided with the implied consent advisory, declined the opportunity to contact an attorney, and agreed to take the Intoxilyzer test. At 2:21 A.M., Defendant took the Intoxilyzer test which reported an alcohol concentration of .09. The Intoxilyzer was operated by a certified operater, the diagnostic checks of the instrument and the chemicals were error free, and the proper procedures were followed to test Defendant. Defendant was subsequently charged with Third Degree Driving While Impaired, Third Degree Operating a Motor Vehicle with an Alcohol Concentration of .08 or More within Two Hours of Driving, and Possessing over 1.4 Grams of Marijuana in a Motor Vehicle.

On November 19, 2008, Ryan Garry, on behalf of Defendant, moved to compel discovery of the computer source code for the Minnesota model of the Intoxilyzer 5000EN because a key piece of evidence against Defendant is the 0.09 alcohol concentration result. On April 14, 2009, this Court denied Defendant's motion, finding that Defendant had adequately demonstrated that the Intoxilyzer source code was relevant but failed to show that the State had possession, custody or control of it. On May 11, 2009, Defendant requested permission to move for reconsideration pursuant to Rule 115.11 of the Minnesota General Rules of Practice. Due to the Minnesota Supreme Court's opinion filed April 30, 2009, in *State v. Underdahl*, --- N.W.2d ----, 2009 WL 1150093 (Minn. 2009) ("*Underdahl II*"), this Court found compelling circumstances justifying reconsideration and granted Defendant's request. The parties had until June 1, 2009, to file submissions. A hearing was not requested.

Discovery of a source code is discretionary with the Court under Minn. R. Crim. P. 9.01, subd. 2(3) (2008). The Court in its discretion may order disclosure of any relevant material upon a showing that the material may relate to the guilt or innocence of the Defendant, negate guilt or reduce culpability. *Id.* The *Underdahl II* Court construed the language from Rule 9 to require the Defendant to make some "plausible showing" that the material would be both material and favorable to his defense. *Underdahl II*, at 7. The threshold showing is minimal and need not be directly related to the operation of the specific machine which conducted the test. *Id.* at 8.

In *Underdahl II*, the other named defendant's (Brunner) submissions included the written testimony of David Wagner, a computer science professor at the University of California in Berkeley which explained the source code in voting machines, its importance in finding defects and problems in those machines, and the issues surrounding its disclosure. *Id.* at 7. Brunner also submitted a report analyzing the New Jersey breath-test machine's computer source code and defects discovered that could impact the test results. *Id.* The Supreme Court found that Brunner had demonstrated that the integrity of the source code was essential to the scientific reliability of the Intoxilyzer 5000EN test result and thus would relate to his guilt or innocence. *Id.* at 7-8. The trial court had ordered the State to produce the source code and the Supreme Court affirmed. *Id.*

Here, Defendant has submitted the same documentation as Brunner—the written testimony of David Wagner and the report of the New Jersey breath-test machine. Additionally, Defendant submitted an affidavit dated October 21, 2008, from forensic scientist T[redacted] B[redacted]. Mr. B[redacted] describes what the source code is, how it bears on the operation of the Intoxilyzer, and the precise role is has in regulating the accuracy of the machine in this Petitioner's case. Mr. B[redacted] states that the Intoxilyzer Petitioner used has not been tested or certified in over eighteen months, and this lack of maintenance make a low value test, such as Petitioner's .09 reading, unreliable because the acetone and other interferent checking and correcting systems must be regularly tested and adjusted to ensure that they are working correctly. According to Mr. B[redacted], "the source codes control all these interferent detection functions that are critical in low value tests." The Defendant has shown the relevance of the source code and has met the threshold established in *Underdahl II*.

The State has also opposed the discovery motion on the basis that it is not in possession of the source code. The Supreme Court answered that question in *Underdahl II* as well, relying upon *Underdahl I*, 735 N.W.2d 706, 708-09 (Minn. 2007), and the language from the State's

contract with the manufacturer of the machine. *Underdahl II* at 8. The Supreme Court affirmed a finding that the State does have possession or control of the source code within the meaning of the rules of discovery, notwithstanding the fact that the State is engaged in ongoing litigation with CMI over access to the source code. *Id.* Further, in applying *Underdahl II* the Court of Appeals opined on June 2, 2009, that the district court abused its discretion when it made a finding that the source code was not within the possession or control of an employee of any governmental agency. State v. Crane, --- N.W.2d ---, 2009 WL 1515264, 3 (Minn. Ct. App. 2009). This Court finds that the State has possession or control of the source code, and that it is discoverable. As such, Defendant's motion is granted.

- *TMF*