IN THE COURT OF APPEALS
STATE OF GEORGIA

STATE OF GEORGIA, Appellant,	)	
vs.	)	CASE NO: A09A1827
SPERLIN SMILEY, Appellee.	)	

BRIEF OF APPELLEE

Respectfully Submitted,

_____
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PART ONE

PROCEDURAL BACKGROUND

On January 26, 2006, Appellee was arrested for DUI. Appellee Smiley was allegedly read implied consent and provided two breath samples on the Intoxilyzer 5000, the alleged designated state administered chemical test, and registered over the legal limit. On March 27, 2007, Appellee filed for statutory discovery and exculpatory evidence under Brady v. Maryland. "Full Information" under O.C.G.A. § 40-6-392 ("Full Information") was listed a one class of exculpatory information requested from the State. Further, Appellee Smiley requested Full Information in a document titled demand for statutory discovery but separately and distinctly from scientific reports under O.C.G.A. § 17-16-23. On June 28, 2007, Appellee Smiley filed an Amended Motion to Suppress/Motion in Limine alleging that the State had failed to produce Full Information as

requested under O.C.G.A. § 40-6-392(a)(4). The State produced a witness list containing the arresting Officer's name only, a copy of the accusation and the print out from the Intoxilyzer 5000 only. The State did not provide the Full Information requested, the foundation evidence for the breath test such as the calibration certificates for the Intoxilyzer 5000, the officer's operating certificate, nor the name, address and phone number of the Area Supervisor who executed the calibration certificate which is nothing more than an self authenticating affidavit. The Trial Court initially entered an order granting Appellee Smiley's Motion for Full Information. After the decision in Hills v. State, 291 Ga. App. 873 (2008), the Court vacated its prior order and asked the parties to re-brief the Full Information issue in light of Hills, supra. After re-briefing and a hearing on the matter, the Trial Court ruled that Hills did not apply as Appellee Smiley requested full information not under O.C.G.A. §17-16-23 as a scientific report but only under O.C.G.A. §40-6-392(a)(4) and reinstated her previous order. The State indicated to the Court that it would not provide any information to Appellee Smiley other than copy of the breath test result from the Intoxilyzer 5000 and would not provide any items requested under Full Information nor amend its witness list to include the name, address and phone number of the area supervisor. On November 14, 2008, Appellant filed a

notice of appeal from Trial Court's order granting Appellee Smiley's motion in limine as to Full Information. The case was docketed on May 20, 2009. This brief is filed in opposition to that appeal.

STATEMENT OF FACTS

The Defendant in this case was stopped by Officer Gilmore of the Atlanta Police Department on January 26, 2006 for a traffic violation and subsequently arrested for DUI. The Defendant Sperling Smiley consented to a state administered test of his breath under the Georgia Implied Consent Law. An adequate breath sample was obtained by Officer Gilmore on Intoxilyzer 5000 s/n 68-010751. The Defendant requested full information pursuant to O.C.G.A. § 40-6-392(a)(4). The State provided only the copy of the original breath test result print out produced by the Intox. 5000 at issue and refused to provide any other information. No other breath test information was produced by the State at the time of any of the hearings despite the "Full Information" request having been made in July of 2007 in Defendant's written motion. The State did not provide the self authenticating, self admitting Intox. 5000 calibration certificates nor list the "Area Supervisor" who performed those calibration tests on the witness list provided to the Defendant. Preventing Defendant in any practical respect from subpoenaing the Area Supervisor or the calibration certificates created in

O.C.G.A. §40-6-392 or the underlying calibration testing documents themselves.

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PART TWO

ARGUMENT AND CITATIONS OF AUTHORITY

ENUMERATION OF ERROR

NO. ONE

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN GRANTING APPELLEE SMILEY'S AMENDED MOTION AS THE STATE FAILED TO PRODUCE THE PROPERLY REQUESTED FULL INFORMATION AND THE FULL INFORMATION IS NOT A SCIENTIFIC REPORT AS CONTEMPLATED UNDER O.C.G.A. §17-16-23 AND SHOULD BE AFFIRMED.

O.C.G.A. § 40-6-392 (a)(4), provides "Upon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or

his attorney." The Court of Appeals reviews for abuse of discretion the trial court's ruling on a defendant's request for production of Full Information under O.C.G.A. § 40-6-392(a)(4). See, Cottrell v. State, 287 Ga. App. 89 (2007).

Appellee Smiley requested all training materials utilized by the officer; all training materials utilized by the Area Supervisor; all training records for the Intox Operator in question; all training records for the Area Supervisor in question; copies of any studies, journal articles or other learned treatises relied upon by any experts called by the state on the Intoxilyzer 5000 or utilized or referenced in training manuals utilized by operators or area supervisors; all logs or other records maintain for the Intoxilyzer 5000 in question for the past two years; all maintenance logs for the Intoxilyzer 5000 for the last 2 years; all calibration records and test results for the last two years; the owner's manual or operator's instructions for the Intoxilyzer 5000 in question provided by CMI, Inc. or other applicable manufacturer, any and all software information including source code, software version on the arrest date, date of software version installation, date this version of the software was tested and approved by the Georgia Department of Forensic Services of the Georgia Bureau of Investigation; and all maintenance, calibration, and test

results stored in the software memory of the Intoxilyzer 5000 as of the date of this motion.

In Birdsall v. State, 254 Ga. App. 555; 562 S.E.2d 841 (2002), the Court of Appeals held that it is reversible error for a trial court to quash a subpoena seeking the printout from the chromatograph used to analyze a defendant's blood alcohol level pursuant to O.C.G.A. § 40-6-392(a)(4). Price , infra, and the statutory language imply that a subpoena is not required and that a request for discovery directed to the state is adequate to prompt production of the printout, whether it is in the hands of the prosecutor or in the files of the state crime laboratory.

In Price v. State, 269 Ga. 222; 498 S.E.2d 262 (1998), the Supreme Court held that Defendant has the right to subpoena "memos, notes, graphs, computer print-outs, and other data" relied upon by the state crime lab chemist. Additionally, O.C.G.A. § 40-6-392(a)(4) is consistent with the broad right of cross-examination embodied in O.C.G.A. § 24-9-64.

“Statutes should be read according to the natural and most obvious import of the language without resorting to subtle and forced constructions, for the purpose of either limiting or extending their operation, and this principle is particularly compelling when interpreting criminal statutes.” State v. Johnson, 269 Ga. 370, 499 S.E.2d 56, (1998). Given the holding of Johnson, the Defendant is entitled to “full information

concerning the test or tests,”including the items requested above, as shown in the plain language of O.C.G.A. § 40-6-392 (a)(4). To the extent the meaning of “full information” is ambiguous, the statute must be construed in favor of making the information requested available to the defendant. “In interpreting criminal statutes, any ambiguities must be construed most favorably to the defendant.” Mann v. State, 273 Ga. 366, 541 S.E.2d 645, (2001).

In Holowiak v. State, A08A1872, the Court of Appeals refused to address the Intoxilyzer 5000 source code in an appeal from the State Court of Cherokee County in Canton, Georgia. Mr. Holowiak, who was stopped at a roadblock in Cherokee County, challenged the "propriety of the roadblock and test results from the Intoxilyzer 5000 machine that used his breath to measure his BAC." The Court held a hearing on Holowiak's motion to suppress and produce [the Intoxilzyer 5000 computer source code]. The motions were denied by the trial court in Cherokee County State Court. An interlocatory appeal was granted. Holowiak enumerated as error the Cherokee County Trial Court's failure to find that the computer source code for the Intoxilyzer 5000 machine used to test Holowiak's BAC was "necessary, material and relevant," so that Holowiak could procure this evidence by means of a subpoena. Holowiak filed a Petition for Certification of

Materiality of Testimony from an Out of State Witness four months before the hearing in the Canton, Georgia Trial Court.

The Court of Appeals found that Holowiak had not reserved the issue for appeal because he did not bring the issue up at the Trial Court level in Cherokee County. The Court of Appeals distinguished the issue that the Petition filed was for relevance and materiality of the out of state witness who was to testify on the source code and not the relevance and materiality of the source code itself. Therefore, the Court of Appeals refused to rule on the issue of the relevance of the source code. This issue remains unresolved.

In dicta, the Court of Appeals commented that Holowiak did not raise the issue of the Cherokee County State Court's ruling that source code was not a scientific report, but "even if he had" Holowiak did not carry his prima facie burden that the State possessed or controlled the Intoxilyzer 5000 Source Code so he would have lost anyway.

Source Code is clearly not a scientific report under O.C.G.A. 17-[1]6-23. O.C.G.A. 17-16-23 provides in pertinent part,

> “(a) As used in this Code section, the term written scientific reports” includes, but is not limited to, reports from the Division of Forensic Sciences of the Georgia Bureau of Investigation; an autopsy report by

> the coroner of a county or by a private pathologist; blood alcohol test results done by a law enforcement agency or a private physician; and similar types of reports that would be used as scientific evidence by the prosecution in its case-in-chief or in rebuttal against the defendant.”

Clearly, source code does not fall into any of these categories. If the source code is not a scientific report, it does not matter if the source code is in the possession or control of the prosecutor because the "full information" provisions of OCGA 40-6-392(a)(4) do not require "possession or control" and simply provide that “full information” be produced and are outside and separate from the discovery statutes.

Assuming arguendo that Full Information is classified as a class of scientific report, then possession and control does not end the inquiry. O.C.G.A. 17-16-23(c) provides, "If the scientific report is in the possession of or ***available to*** the prosecuting attorney" they must be provided within 10 days of trial. CMI of Kentucky, Inc. which manufactures the Intoxilyzer 5000 has made judicial admissions in sworn and verified legal filings that, "CMI further affirmatively asserts and alleges that in or about September 2007, CMI voluntarily changed its policy regarding the availability and has thereafter offered to produce the source code in response to a valid court order,

subject to an appropriate Non-Disclosure Agreement and Protective Order that will protect CMI's valuable proprietary trade secrets." State of Minnesota et al v. CMI of Kentucky, Para. 21, Case No. 08-cv-603, United States District Court, District of Minnesota, April 9, 2008. Obtaining the source code with a simple Non-disclosure Agreement is "available."

The State contends that the recent case of Hills v. State, 291 Ga. App. 873 (2008) requires the denial of any request for source code under the Full Information request under O.C.G.A. § 40-6-392(a)(4). It does not for two reasons Hills, supra, is not binding authority but merely persuasive as it is distinguishable as being made pursuant to the statutory definitions of O.C.G.A. § 17-16-1 and the provisions of O.C.G.A. § 17-16-23 and not the Full Information provisions of O.C.G.A. § 40-6-392(a)(4). Defendant has not requested the Source Code under the statutory discovery provisions of Title 17 but rather only under O.C.G.A. § 40-6-392(a)(4). Further, the Source Code is only a small fraction of the information requested, and the prosecution has not made a showing that the other full information aside from the source code is not "available to the prosecuting attorney" under O.C.G.A. § 17-16-23(b) regardless of any conclusory assertions of non-possesion. O.C.G.A. § 17-16-23(b) appears to indicate that the Prosecution must at least ask CMI, Inc. for the source code before relying on the Possession

argument in Hills v. State, supra. The State cannot fulfill its obligation by simply looking in its file. See Generally, Dickerson v. State, 241 Ga.App. 593, 526 S.E.2d 443 (1999)(Reasoning in a reciprocal discovery context the state must make a reasonable and diligent inquiry with law enforcement and related state agencies to see if the information is in its possession or the possession of some other involved state agency or reasonably available upon request.)

The State also contends that Defendant Smiley's request for Full Information on the breath test is a fishing expedition citing Cottrell v. State, 287 Ga. App. 89 (2007). The State's reliance on Cottrell, supra is misplaced as the Court of Appeals concluded that the Full Information was not required as to the breath test because the state was relying solely on the State Administered Blood Test. The criminal lab technician testified that he knew of no interferent which would invalidate a breath test that could effect a blood test. Therefore, the Court reasoned that Cottrell had not produce sufficient evidence to show that the Full Information concerning the breath test was relevant to the blood test. In the case at bar, the Intoxilyzer 5000 breath test is the only evidence of the Driving Under the Influence count under O.G.C.A. § 40-6-392(a)(4) and the Trial Court was well within its discretion to conclude that it was relevant and order production of the requested information.

The State only addresses one of Appellee Smiley's arguments at the Trial Court level that the failure to provide Full Information implicates Constitutional provisions of both the Georgia and United State Constitution. The State argues that the breath test is not testimonial and not subject to confrontation under Rackoff v. State, 281 Ga. App. 306 (2006). The State ignores Smiley's other Constitutional arguments including right to Due Process, Right to Counsel, and that the Failure to produce Full Information is burden shifting. The failure to provide Full Information is burden shifting in that it requires Defendant to hire an expert to contest the State Administered Breath test and prevents Defendant from a thorough and shifting cross examination of the State Administered Breath tests. The Trial Court further found that a denial of "Full Information" negates the constitutional due process "quid pro quo" for the creation and admissibility of the breath test results and self-authenticating, self admitting calibration certificates contemplated by O.C.G.A. § 40-6-392(a)(1)(A) & (B) and (f).

It also implicates the right to confrontation, as the State would not amend its witness list to add the name, address and phone number of the area supervisor in order for the Defendant to subpoena the Area Supervisor to trial, yet would seek to admit the self admitting calibration certificates signed by the very same Area Supervisor under oath attesting that the

Intoxilyzer 5000 was tested and found to be in good working order which is nothing more than an affidavit termed a certificate. See Generally, Charles Short, GUILT BY MACHINE: THE PROBLEM OF SOURCE CODE DISCOVERY IN FLORIDA DUI PROSECUTIONS, 61 Florida Law Rev. 177 (2009)(Arguing that given the numerous documented flaws with computer generated alcohol breath testing, source code is not proprietary as it contains only known algorithms and violates the confrontation clause).

In Melendez-Diaz v. Massachusetts, 557 U. S. __ (June 25,2009) (Supreme Court of the United States, No. 07–591), the U.S. Supreme Court recently held that Crime Lab Reports violate a Criminal Defendant's right to confrontation as they are little more than affidavits prepared for trial and de facto testimonial. Justice Scalia defined the "core class of testimonial statements which include,

> *ex parte* in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements … contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made

under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Citing, Crawford v. Washington, 541 U. S. 36, 51-52 (2004).

Justice Scalia held that crime lab reports do not qualify as business records when the business of the entity is to establish or prove some fact at a criminal trial. Id at 16, 18. Justice Scalia reasoned that business record or not they are subject to confrontation. Id at 18. The requirements of the confrontation clause may not be relaxed simply because it makes the prosecutor's job burdensome. Id at 19. Justice Scalia flatly rejected the proposition that there should be an exception for neutral scientific testing rejecting the "particularized guarantees of trustworthiness" rationale of Roberts v. Ohio, 448 U.S. 56 and specifically referencing breathalyzer tests. Id at pp.11,12, fn.5).

In the case at bar, the breath test result is similar to the crime lab report as it establishes a fact based on the testimony of an operator who is not required to have any knowledge of the internal workings of the device. Further, the certificate of calibration referenced in O.C.G.A. § 40-6-392(f) is little more than an affidavit statutorily designed for use at trial as a self authenticating affidavit and admissible at trial. Miller v. Caraker, 9 Ga.App. 255, 71 S.E. 9

(1911)(Holding that a written signed statement of facts, purporting to be the statement of the signer, followed by the certificate of an officer authorized to administer oaths that it was sworn to and subscribed before him, is a lawful affidavit). There can be little doubt that the confrontation clause is implicated and that Rackoff v. State, 281 Ga. 306 (2006) has implicitly overruled by the U.S. Supreme Court.

This lack of confrontation when combined with a lack of statutory Full Information violates not only the Sixth Amendment but violates the Defendant's right to fundamental due process. A Defendant does not even have the requisite information to subpoena the area supervisor who certifies the State Administered breath testing device in O.C.G.A. § 40-6-392(f). The Defendant is left to hire an expert to rebut the State's breath test machine without any significant information on the internal workings of the machine, how it operates or its history of malfunctions.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Appellee requests this Court affirm the trial court's grant of the amended motion to suppress/motion in limine.

SO REQUESTED this _____ day of June 2009.

_____
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CERTIFICATE OF SERVICE

This is to certify that I have on this day served a copy of the foregoing pleadings upon all opposing counsel by depositing same in the United States Mail in a properly addressed envelope with adequate postage affixed thereon to assure delivery as follows:

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Respectfully submitted this the ___ day of June 2009.

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