



Cracking the DUI Code

Local attorneys challenge breathalyzer results

by Grant Hutchinson

For decades, law enforcement agencies have relied on the breathalyzer as a primary method for acquiring evidence against DUI suspects.

Defense attorneys have often tried to question the admissibility of data obtained by the device. And now they may have caught a break.

Florida courts are facing difficulties in examining the source code that governs the machine's software. CMI, the company that manufactures all of Florida's breathalyzers, argues that the source code is a trade secret that must be protected.

The debate has now reached Escambia County. Local public and private defenders are pushing CMI to produce the source code. State attorneys, however, say that the code is not material to a DUI case.

The court's decision on this controversy could have far-reaching effects on DUI cases past, present and future.

The "Guilt-o-Meter"

The Florida Department of Law Enforcement performed a statewide breathalyzer upgrade to CMI's Intoxilyzer 8000 in 2002. According to FDLE Public Information Officer Heather Smith, the device was chosen over competitive offerings because it was "among the most sophisticated and state-of-the-art" devices available.

"It operates reliably...and accurately," said Smith.

Regular inspections ensure that the devices are working properly.

"(They are) inspected by local law enforcement agencies monthly...and by FDLE annually."

"Anyone that operates the breathalyzer in our state has to be trained and certified by FDLE," added Smith. "We have a very thorough training, inspection and certification process in place."

Florida defense attorneys have long argued with courts about the admissibility of breathalyzer results.

"There's a presumption that if you blow over a .08, you're impaired," said local defense attorney Eric D. Stevenson.

"For everything else, there's a presumption of innocence. So you have this machine that's almost a guilt-o-meter, and the people who manufacture it won't let you know how it works."

Stevenson and other attorneys have also found fault with the type of information the Intoxilyzer 8000 records.

"(Other models of the Intoxilyzer 8000) will take your body temperature. That's important in the calculation (of BAC). They also have a place where they can store part of the breath samples for later testing. When Florida ordered theirs, (they) didn't come with (those features)."

The FDLE confirmed that their breathalyzers do not record body temperature or capture breath samples

Not Quite Breathing Easy

A team of local public and private defense attorneys have led the charge against CMI.

"(It's) been an issue around the state for probably three or four years," said Stevenson. "I helped choose one of the public defenders (to attend) seminars called Blood, Breath and Tears. He came back on fire, enthused about doing the source code issue up here and challenging it."

Defense attorneys scored a victory of sorts when CMI agreed to allow an expert, Dr. Harvey Myler, to examine the Intoxilyzer 8000 source code and report his findings back to the court. That examination will occur in June.

"We are hopeful but cautious that when...Dr. Myler...shows up (at CMI headquarters) in Kentucky, they will actually let him have access to the source code," said Stevenson. "(But) it's been other people's experience that once they've gotten up there, CMI has continued to play hide the ball. So we'll see what really happens."

Attorneys say they have reason to believe that examination of the source code will reveal problems with the device.

"We've had some experts review some testing data around the state...(it) has shown some anomalies that could be due to the source code," said public defender Jason Cromey.

If fault is found within the source code, or if the courts determine that CMI has not been compliant in releasing pertinent information, the effects could be far-reaching.

"Some judges have said we're just not going to let the breath test in here anymore," said Stevenson. "That's what we're seeking."

Secret Ingredients

The FDLE doesn't believe the source code should have any bearing on DUI cases.

"Most (Florida) counties have ruled that it's not material to the case," said FDLE's Heather Smith. "The National Safety Council...has taken the position that the source code is not pertinent, required or useful for the examination or evaluation of the analyzer's accuracy, reliability or validity."

For CMI, the source code debate is less about DUI evidence and more about intellectual property.

"The source code represents one of CMI's most valuable corporate assets," said CMI attorney Ed Guedes. "It represents what makes CMI's products unique from its competitors."

"It's like Coke's secret formula. These are...assets that companies protect. So CMI has been very cautious about the source code...being out there without any kind of protections in place."

Despite their reluctance to release the source code unconditionally, Guedes claims that CMI has been fully compliant with court orders and subpoenas.

"To the best of my knowledge, CMI has always filed the necessary motions to seek relief from the court with respect to any of the subpoenas that were issued," said Guedes. "But (that's) an answer with various qualifications. There are literally hundreds of cases."

Guedes also says that CMI's compliance goes beyond allowing Dr. Myler's examination.

"CMI has produced the source code already, in Clay County. That source code has been sitting there, (on a Flash drive), unexamined by any defendant, lawyer or expert for weeks now."

"Defense attorneys have clamored that they absolutely need to see this," added Guedes. "And yet when it's produced, they don't even ask to see it."

Guedes believes that defense attorneys are more interested in the controversy itself rather than actually examining the code.

"They figure if they can raise the issue, (then) they can delay the proceedings. They can interfere with the State Attorney doing his or her job in prosecuting DUI drivers."

Pulling the Plug

Statewide testing procedures for the Intoxilyzer 8000 have also raised issues for defense attorneys.

In a sworn statement before Assistant State Attorney Adrienne Emerson, former FDLE inspector Martha Geddings admitted to questionable practices in the testing of the device.

Geddings discovered that the use of a cell phone or radio could cause tests on the devices to prematurely abort, something she admits to doing on several occasions. Geddings claims that this process was only used to save time and did not impact the accuracy of test results.

"The only time I ever (ended a test early with a cell phone) was when it had already failed. It just simply ends the inspection early."

Geddings also says that she only used the cell phone trick to correct her own errors.

"It was never the instrument, ever. (The failure occurred because of) something I could identify."

"When I repeated the inspection, it always passed. Always."

The equipment used by Geddings also features an abort button that can be used to end the inspection early. When asked why she chose to use a cell phone instead of the button, Geddings struggled to answer.

"I don't know why (I didn't use the abort button)," said Geddings. "It might have been pride."

Local attorneys will soon add Geddings' testimony to their case.

"Our office is slated to take her deposition in the upcoming week," said public defender Jason Cromey.

No End in Sight?

Dr. Myler's upcoming examination of the source code could bring some form of closure to the debate. But if defense attorneys can find fault within the code, it would have a sizeable impact on DUI cases statewide.

"If there's a problem with the code, we have to determine whether that causes a pall over the entire breath testing program, or whether it would just apply to individual tests," said defense attorney Eric Stevenson.

"I think there would certainly be a lot of challenges to breath tests around the state."

As for a Wild West scenario where previous DUI convictions are being overturned?

"That's possible," said Stevenson. "I would say it's not likely. But that is a possibility."

No matter what Dr. Myler's examination of the source code reveals, CMI attorney Ed Guedes doesn't think the debate will end any time soon.

"We have produced the source code...and nobody wants to look at it. There is, for many of these defense attorneys...a dubious motivation here. It's not all of them. But (that's the case) for a lot of those folks."