ORIGINAL

20070098

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

City of Fargo,	)	
	)	
Petitioner and Appellee,	)	Supreme Court No. 20070098
	)	
vs.	)	District Court No. 06-K-01966
	)	
Glenn Richard Levine,	)	
	)	
Respondent and Appellant.	)	

APPEAL FROM CONVICTION
CASS COUNTY DISTRICT COURT
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE WADE WEBB

APPELLEE'S BRIEF

Renata J. Olafson Selzer
N.D. License No. 06076
Fargo City Prosecutor
PO Box 150
Fargo, ND 58107-0150
Phone: (701) 241-8596
Facsimile: (701) 297-7789

ATTORNEY FOR THE PETITIONER/APPELLEE

TABLE OF CONTENTS

[¶ 1] TABLE OF AUTHORITIES

[¶ 2] STATEMENT OF ISSUE

[¶ 3] I. **Is the City of Fargo required to provide the Defendant with the source code for the Intoxilyzer 5000, even though the code is not within the City's possession, custody, or control, and the Defendant has failed to show that the code is plainly exculpatory?**

[¶ 4] STATEMENT OF CASE AND FACTS

[¶ 5] On April 26, 2006, Glenn Richard Levine ("Levine") was arrested and charged with driving under the influence of alcohol, in violation of Fargo City Ordinance 08-0310. (App. at 3). Levine filed a motion to compel the City to disclose the source codes for the Intoxilyzer 5000, arguing that the source code is crucial to an adequate defense. (App. at 4).

[¶ 6] The Intoxilyzer 5000 was manufactured by CMI, Inc., a corporation based in Owensboro, Kentucky. On July 17, 2006, the Fargo City Prosecutor's Office received a letter from Allen W. Holbrook, an attorney for CMI, Inc. (Pl.'s Resp. to Def.'s Mot. to Compel, Ex. A, Docket No. 23). Mr. Holbrook stated that "[t]he source code for the Intoxilyzer 5000 is a trade secret of CMI." (Pl.'s Resp. to Def.'s Mot. to Compel, Ex. A, Docket No. 23). Further, Mr. Holbrook noted that "CMI has not produced the source code to any of its customers in any of the 40 states in which it does business, including North Dakota." (Pl.'s Resp. to Def.'s Mot. to Compel, Ex. A, Docket No. 23). Mr. Holbrook argued that "as a non-party to the DUI case, CMI cannot be compelled to produce either documents or a witness except pursuant to the terms of your statute 31-03-28." (Pl.'s Resp. to Def.'s Mot. to Compel, Ex. A, Docket No. 23).

[¶ 7] Levine's Motion to Compel Disclosure of Source Codes came on for hearing in Cass County District Court on October 17, 2006. (App. at 15). The defense called Dr. Robert Howard, the Chief Operating Officer of Medscan Laboratory and Advanced Drug Testing in Williston, North Dakota. (App. at 16-17). Dr. Howard explained that Medscan Laboratory is a facility that tests fluids, tissues, and hair for drugs and alcohol, and Advanced Drug Testing is a third-party administrator of drug and alcohol programs for companies around the United States. (App. at 17). Dr. Howard stated that he is certified as a breath alcohol instructor and a breath alcohol technician for the Intoxilyzer 5000EN and the Intoximeter device. (App. at 19). According to Dr. Howard, there is no way for a defendant to accurately question the scientific reliability of the Intoxilyzer 5000 without the source code. (App. at 28).

[¶ 8] On cross-examination, Dr. Howard acknowledged that he uses the Intoxilyzer 5000 in his business and that the federal government approves the use of the device for testing breath alcohol. (Tr. of Mot. Hr'g at 30-32). Dr. Howard indicated that as part of his business, he runs control tests on the Intoxilyzer machine to make sure that it is working properly. (Tr. of Mot. Hr'g at 34). He stated that the control tests are similar to the tests used by the State Toxicologist. (Tr. of Mot. Hr'g at 35).

[¶ 9] Ruling from the bench, the Honorable Wade Webb denied Defendant's Motion to Compel Disclosure of Source Codes. (App. at 31). Judge Webb noted that the source code is not in the possession, custody, or control of

the City of Fargo, and will not be even with reasonable efforts. (Tr. of Mot. Hr'g at 48). On March 19, 2007, Levine entered a conditional plea of guilty to the charge of driving under the influence. (App. at 8). Levine filed a notice of appeal on March 30, 2007. (App. at 12).

[¶ 10] **LAW AND ARGUMENT**

[¶ 11] **I. The City is not required to provide the Defendant with the source code for the Intoxilyzer 5000 because the code is not within the City's possession, custody, or control, and the Defendant has failed to show that the code is plainly exculpatory.**

[¶ 12] Levine contends that his conviction should be reversed, and the District Court should be instructed to overturn its denial of Levine's Motion to Compel Disclosure of Source Codes. In support of this argument, Levine primarily relies on Rule 16 of the North Dakota Rules of Criminal Procedure ("Rule 16") and the decision of a Florida county court. Levine claims that the source code for the Intoxilyzer 5000 is material to preparing the defense of his case. However, it must be acknowledged that the City cannot produce something to which it has no access. To put it simply, the source code is not within the City's possession, custody, or control.

[¶ 13] Rule 16 is not a constitutional requirement; rather, it is "an evidentiary discovery rule designed to further the interests of fairness." State v. McNair, 491 N.W.2d 397, 400 (N.D. 1992). With respect to the prosecution's discovery obligations, Rule 16 provides in pertinent part:

> (D) Documents and objects.
> Upon a defendant's written request, the prosecuting attorney must permit the defendant to inspect and to copy or photograph books,

> papers, documents, data, photographs, tangible objects, buildings, or places, or copies or portions of any of these items, **if the item is within the prosecution's possession, custody, or control**, and: (i) the item is material to preparing the defense: (ii) the prosecution intends to use the item in its case-in-chief at trial: or (iii) the item was obtained from or belongs to the defendant.
> (E) Reports of examinations and tests.
> Upon a defendant's written request, the prosecuting attorney must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination, and of any scientific test or experiment if: (i) **the item is within the prosecution's possession, custody, or control**; (ii) the prosecuting attorney knows-or through due diligence could know-that the item exists; and (iii) the item is material to preparing the defense or the prosecution intends to use the item in its case-in-chief at the trial.

N.D.R.Crim.P. 16(a)(1)(D), (E) (emphasis added). Citing Rule 16, this Court recently noted that the prosecution "is not required to provide information . . . which is not in its possession, custody, or control." State v. Loughead, 2007 ND 16, ¶ 9, 726 N.W.2d 859.

[¶ 14] Defendant relies on State v. Bjorklund, a case in which a large number of defendants charged in Florida with driving under the influence sought to obtain the source code for the Intoxilyzer 5000. 924 So.2d 971, 973 (Fla. Dist. Ct. App. 2006). In a consolidated proceeding, the county court authorized supplemental discovery concerning the source codes. Id. The State subsequently filed a petition for a writ of certiorari in circuit court. Id. The petition was dismissed, and the State appealed. Id. at 973-74. Basing its decision on procedural rules, the Florida Court of Appeal, Second District, held that the circuit court "had no jurisdiction to review the challenged order by certiorari and . . . was required to dismiss the proceeding as an untimely appeal." Id. at 975.

[¶ 15] The Bjorklund case is inapposite for several reasons. It must first be noted that Florida has a very specific statute addressing discovery of information relative to machines used for testing. See Fla. Stat. ch. 316.1932(1)(f)(4) (2007) (providing that "[u]pon the request of the person tested, full information concerning the results of the test taken at the direction of the law enforcement officer shall be made available to the person or his or her attorney"). The statute was amended in the time period following the county court's decision in Bjorklund to include the following language: "Full information does not include manuals, schematics, or software of the instrument used to test the person or any other material that is not in the actual possession of the State." 2006 Fla. Laws ch. 247.

[¶ 16] Moreover, other Florida courts have recently decided that disclosure of the source code is not required. The Florida Court of Appeal, Fifth District, held that the State was not compelled to provide the defendant with the source code for the Intoxilyzer 5000 machine. Moe v. State, 944 So.2d 1096, 1097 (Fla. Dist. Ct. App. 2006). The Court acknowledged that the State did not have possession of the source code because it is the property of CMI, Inc. Id. Further, the Court noted that the source code is a trade secret of CMI, Inc., and that CMI, Inc. "had invoked its statutory and common law privileges protecting the code from disclosure." Id. The Florida Court of Appeal, Fourth District, has concurred with the holding in Moe. Pflieger v. State, 952 So.2d 1251, 1254 (Fla. Dist. Ct. App. 2007).

[¶ 17] In People v. Cialino, the Criminal Court of the City of New York, Richmond County, also considered the issue of whether the State was compelled to provide the defendant with the source codes for the Intoxilyzer 5000. 831 N.Y.S.2d 680 (N.Y. Crim. Ct. 2006). The Court noted that the defendant had not provided a "reasonable basis to believe that any software changes and upgrades have caused the Intoxilyzer 5000 used in this case to be unreliable." Id. at 682. Further, the Court concluded that it "will not assist the defendant in his proposed fishing expedition for trade secrets held by a third party." Id.

[¶ 18] In two unreported cases, Connecticut courts have also held that the prosecution is not compelled to produce the source code for the Intoxilyzer 5000. See State v. Burnell, No. MV06479034S, 2007 Conn. Super. LEXIS 157, at *5 (Conn. Super. Ct. Jan. 18, 2007) (noting that "CMI, Inc., manufacturer of the Intoxilyzer 5000, through its counsel, has declined to produce the items, claiming they constitute trade secrets and that they are not material insofar as being favorable to the defense"); State v. Walters, No. DBDMV050340997S, 2006 Conn. Super. LEXIS 726, at *2-3 (Conn. Super. Ct. Feb. 15, 2006) (concluding that "the source code for the CMI computer chip is not within the State's possession," and "the defendant is entitled to subpoena the manufacturer of the Intoxilyzer 5000 for purposes of cross-examination at trial").

[¶ 19] Here, Levine focuses almost exclusively on the materiality of the source code to the preparation of his defense. However, it is unnecessary to reach the issue of materiality at this juncture because Rule 16 only requires disclosure

of items that are within the prosecution's possession, custody, or control. CMI, Inc. has informed the City that it will not disclose the source code and that it views the source code as a trade secret. As the above-cited cases illustrate, CMI, Inc. has refused to provide the source code to prosecutors in other states as well. Because the City does not have access to the source code, it should not be compelled to provide the code to the defense.

[¶ 20] Although Levine did not directly cite Brady in his brief, he did raise the issue at the motion hearing. In Brady v. Maryland, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). To establish a Brady violation, the defendant bears the burden of showing:

> (1) the government **possessed** evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed.

State v. Goulet, 1999 ND 80, ¶ 15, 593 N.W.2d 345 (emphasis added). Brady materials are "plainly exculpatory." City of Grand Forks v. Ramstad, 2003 ND 41, ¶ 10, 658 N.W.2d 731. The Brady rule "does not apply where it is merely 'speculative whether the evidence *might* have been exculpatory, or *might* have been inculpatory.'" Id. (quoting State v. Steffes, 500 N.W.2d 608, 613 (N.D. 1993)).

[¶ 21] Levine has not established that a Brady violation occurred in this case. As previously noted, the City does not possess the source code. Thus, Levine cannot establish the first element of a Brady violation. Furthermore, Levine has not shown that the source code is plainly exculpatory. At best, Levine is merely speculating that the source code will lead him to exculpatory information regarding the Intoxilyzer machine.

[¶ 22] It must also be noted that Levine was not without recourse. Section 31-03-28 of the North Dakota Century Code sets forth the procedure for obtaining testimony from an out-of-state witness. The statute provides:

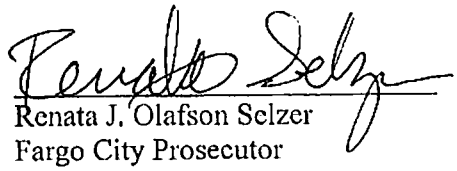
> If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions in this state, is a material witness in a prosecution pending in a court of record in this state, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

N.D.C.C. § 31-03-28 (2007). Levine could have sought the issuance of a certificate to obtain the testimony of a CMI, Inc. representative.

[¶ 23] CONCLUSION

[¶ 24] In this case, no discovery violation has occurred. The source code for the Intoxilyzer 5000 is not within the City's possession, custody, or control. Moreover, Levine has failed to show that the source code is plainly exculpatory. For the foregoing reasons, the City respectfully requests that this Court affirm the decision of the District Court.

Respectfully submitted this 2nd day of July, 2007.



Renata J. Olafson Selzer
Fargo City Prosecutor
P. O. Box 150
Fargo, ND 58107-0150
(701) 241-8596
N.D. License No. 06076
Attorney for Petitioner/Appellee

AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

STATE OF NORTH DAKOTA)
) ss:
COUNTY OF CASS)

RE: CITY OF FARGO v. Glenn Richard Levine
Supreme Court No. 20070098
District Court No. 06-K-01966

ANGIE CAMERON, being first duly sworn, says that she is of the legal age, a citizen of the United States of America, and is not a party to nor has she an interest in the above-referenced matter; that on July 2, 2007 she emailed in the City of Fargo, North Dakota, a true and correct copy of **Appellee's Brief** as follows upon:

Steven M. Light
Larivee & Light
stevenlight@lariveeandlight.com

Lorelle Moeckel
Larivee & Light
lorelle@lariveeandlight.com

To the best of your affiant's knowledge, information and belief, such addresses as given above are the actual email addresses of the party intended to be so served.

That the above document was duly emailed in accordance with the provisions of the North Dakota Rules of Appellate Procedure.

Angie Cameron
ANGIE CAMERON

Subscribed and sworn to before me this 2nd day of July, 2007.

AMY FREDRICKSON
Notary Public
State of North Dakota
My Commission Expires May 4, 2011
(SEAL)

AMY FREDRICKSON, Notary Public
Cass County, North Dakota
My Commission Expires: 05/04/2011