11-1648

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

**STATE OF WEST VIRGINIA ex rel.**
**PAMELA JEAN GAMES-NEELY,**

*Petitioner,*

v.

**CIVIL ACTION NO. 11-C-403**
**HON. GINA M. GROH**

**HON. JOANN OVERINGTON,**
Magistrate, Berkeley County, West Virginia,

*Respondent.*

BERKELEY COUNTY CIRCUIT CLERK
2011 OCT -5 PM 3:28
VIRGINIA M. SINE, CLERK

# ORDER DENYING PETITION FOR WRIT OF PROHIBITION

**THIS MATTER** came before the Court on the 5th day of October, 2011, upon the Petitioner's *Petition for Writ of Prohibition*, and upon the Defendant in the underlying criminal proceeding's Response thereto. The Court heard oral argument with regard to this matter on July 8, 2011, the Petitioner appearing by Christopher Quasebarth, Esq., Chief Deputy Prosecuting Attorney for Berkeley County, and the Defendant appearing by Harley O. Wagner, Esq., of Martinsburg. The Court, having reviewed the Petitioner's Petition and the Defendant's Response, having heard the parties' respective arguments, and having further consulted pertinent legal authorities on the matter, hereby makes the following Findings of Fact and Conclusions of Law:

cc
10-5-11.
J Overington
H Wagner

*Findings of Fact*

1. On January 6, 2011, Christopher Thomas Seidell (hereinafter "Defendant"), was charged in the Magistrate Court of Berkeley County with the misdemeanor crime of Driving

Under the Influence, in violation of W. Va. Code § 17C-5-2(d), and a minor traffic offense.

2. The arrest was based on the following allegations: (1) the arresting officer observed the Defendant almost hitting another vehicle at an intersection and then not signaling lane changes and weaving; (2) the Defendant exhibited signs of intoxication and admitted drinking beers; and (3) the Defendant failed each of the non-scientific field sobriety tests and blew a .114 on the preliminary breath test. After being arrested, the Defendant registered a .149 blood alcohol content on the designated secondary chemical test, the Intoximeter EC/IR II.

3. The Defendant filed a *Motion for Breath Test Discovery*, wherein he sought the following, verbatim:

    a. The downloaded data for the Intoximeter EC/IR II breath machine used in this case. Specifically all the data for all the records for all of the files downloaded for EC/IR II serial number 008084 for the time period of January 1, 2010 through March 1, 2011. It is requested that this data be in both digital and hard copy format with the first row showing headers. Regardless how the data is provided, it is important that all the files, including the blow data and fuel cell data be provided.

    b. All the maintenance and certification records for EC/IR II serial number 008084 for the time period of January 1, 2010 to March 1, 2011.

    c. All the maintenance and certification records for any and all simulators used in the calibration or verification of accuracy for EC/IR II serial number 008084. This particular request includes documentation for any NIST thermometers that are used in the verification of simulator calibration.

    d. All assays for any and all simulator solutions used in the calibration or verification of accuracy for EC/IR II serial number 008084.

    e. Identification and verification of alcohol concentration of any and all dry gas used in the calibration or verification of accuracy for EC/IR II serial number 008084.

f. Copies of any and all training materials received by the department from Intoximeters, Inc. for the training of breath test operators and maintenance technicians.

4. The Respondent Magistrate granted the Defendant's Motion over the Petitioner's objection.

5. The Petitioner (hereinafter also referred to as "the State"), argues that the Respondent Magistrate's discovery order was outside the scope of discovery permitted in magistrate court criminal cases, pursuant to W. Va. R. Cr. Pro. Mag. Ct. 29. The Petitioner further argues that to the extent that such information might be considered discoverable notwithstanding Rule 29, W. Va. R. Crim. Pro. Mag. Ct., the Defendant has failed to demonstrate any relevancy of the requested information, or of the time frame for which the information is requested. The Petitioner also asserts that the West Virginia State Police have represented to it that the training material provided to them by Intoximeters, Inc. is copyrighted, and as such the State Police lack the authority to provide the Defendant with a copy, although the Defendant is free to examine the manuals in person.

6. The Defendant asserts, first, that the computer portion of the Intoximeter EC/IR II evidential breath alcohol machine is fully capable of storing information from each and every test and/or sampling conducted on the device (this information will hereinafter be referred to as "the operational database information"). This allegedly includes information on the fuel cell at the time of each sampling that can only be found in the downloaded data, as well as information pertinent to the test subject's sample, such as length of blow and volume of the breath sample delivered that is not always provided on the test record of the machine. According to the Defendant, this data should presumably be unbiased, as each and every test and sampling conducted on the machine, whether

completed or not, would be recorded and stored. The Defendant's proffered expert witness could then examine this field of data in order locate and identify any operator and/or instrumental issues, if any exist at all, which are present with regard to the particular Intoximeter EC/IR II machine used to test the Defendant. This information would be used by the Defendant to evaluate the reliability of the particular breath alcohol machine used in his case.

7. The Defendant further asserts that in order to fairly evaluate an evidential breath alcohol machine's performance it is necessary to have data from a year prior to the date of a defendant's testing and a year subsequent, if possible. This wide time frame allows for a thorough review of how the instrument was functioning at a point in time pre or post the Defendant's test in order to assess whether or not anything has changed with the instrument's functionality. According to the Defendant, issues such as calibration stability and/or drift can only be evaluated if there is sufficient verification data, which is why the Defendant requires a wider window of operational data.

8. The Defendant argues that the informational database contained within the Intoximeter EC/IR II is information maintained in regular course by the State and is easily exported to a disk and/or printed, which testimony was uncontroverted by the Petitioner.

9. The Defendant argues that the training manuals which the West Virginia State Police provides to operators of the Intoximeter EC/IR II are relevant as they give information pertaining to normal operation and protocols to follow as well as protocols for when various messages are triggered during testing. These protocols and messages are allegedly customized by the manufacturer for each individual state to meet that individual state's requirements, and the exact language for various messages will thus vary from

state to state. The Defendant argues that the requested manuals identifying how the State of West Virginia has the testing sequences configured, what the various messages are, and what actions are required of the operators in various testing situations, would allow the Defendant, his counsel, and the Defendant's proffered expert a chance to familiarize themselves with program specifics and requirements under West Virginia testing protocol. The Defendant argues that it would be unduly burdensome to require him, his counsel, and/or his proffered expert to travel to Charleston, West Virginia, in order to examine the manuals in person.

## *Conclusions of Law*

### *1. Prohibition Standard*

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1.

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. pt. 2, *West Virginia Dep't of Military Affairs & Public Safety Div. of Juvenile Services v. Berger*, 203 W. Va. 468, 508 S.E.2d 628 (W. Va. 1998) (citing Syl. pt. 4, *State ex rel. Hoover v.*

*Berger*, 199 W. Va. 12, 483 S.E.2d 12 (W. Va. 1996)). *See also* Syl. pt. 2, *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 601 S.E.2d 75 (W. Va. 2004).

2. *West Virginia Rule of Criminal Procedure 16*

W. Va. R. Crim. Pro. 16(a)(C) provides that: "[u]pon request of the defendant, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody and control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence in chief at trial, or were obtained from or belong to the defendant."

For purposes of defining "materiality," the Supreme Court of Appeals has held, within the context of a *Brady/Hatfield* challenge,[1] that "evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different[.]'" *State v. Morris*, 227 W. Va. 76, 705 S.E.2d 583, 592 (W. Va. 2010) (citations omitted).

3. *West Virginia Rule of Criminal Procedure for Magistrate Courts 29*

W. Va. R. Crim. Pro. Mag. Ct. 29, entitled "Discovery in Misdemeanor Actions," provides, in pertinent part, that:

> (a) The state and the defendant shall make every reasonable effort to informally exchange reciprocal discovery prior to trial. In the event that the parties are unable to reach an agreement on discovery, the following provision shall apply:
>
> (b) Disclosure of evidence by the state.

[1] *See Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (U.S. 1963); *State v. Hatfield*, 169 W. Va. 191, 286 S.E.2d 402 (W. Va. 1982).

(1) The following must be disclosed by the state, if the state intends to use such evidence during any stage of the court proceedings:

(A) Statement of defendant

(B) Defendant's prior criminal record

(C) Documents and tangible objects

(D) Reports of examinations and tests

(E) Expert witnesses: names, addresses, and summary of expected testimony

(F) State witnesses: names and addresses . . . .

*4. The Intoximeter EC/IR II Operational Database Information*

The Petitioner argues, first, that the Respondent Magistrate erred as a matter of law in ordering that the operational database information for the particular Intoximeter EC/IR II machine in question be provided to the Defendant, because such information is outside the scope of Rule 29 of the West Virginia Rules of Criminal Procedure for Magistrate Courts. The Petitioner acknowledges that such information might arguably be discoverable pursuant to Rule 16 of the West Virginia Rules of Criminal Procedure, but argues, citing *State v. Doonan*, 220 W. Va. 8, 640 S.E.2d 71 (W. Va. 2006), that the Rules of Criminal Procedure are only applicable in circuit court cases, whereas the Rules of Criminal Procedure for Magistrate Courts govern all discovery conducted in magistrate courts.

The Defendant argues that the West Virginia Rules of Criminal Procedure for Magistrate Courts notwithstanding, he is entitled on constitutional due process grounds to the discovery of relevant information material to his defense.

As an initial matter, it is not clear to the Court that the Petitioner is correct in its assertion that the discovery sought by the Defendant is precluded by W. Va. R. Crim. Pro. Mag. Ct. 29.

Looking to the text of the *Doonan* decision cited by the Petitioner, the Supreme Court of Appeals noted that "[i]n addition to [the Supreme Court of Appeals'] inherent authority to promulgate rules governing discovery . . . there are other instances when magistrate courts are instructed to look to the procedure employed in circuit courts for direction . . . [t]hus, it is not exceptional for the Rules of Criminal Procedure for Magistrate Courts to look to guidance from the West Virginia Rules of Criminal Procedure for circuit courts." *Doonan*, 220 W. Va. at 13.

Granted that at the time the *Doonan* decision was issued there was no specific provision within the West Virginia Rules of Criminal Procedure for Magistrate Courts pertaining to discovery[2], it is still not clear that the existence of Rule 29, W. Va. R. Crim. Pro. Mag. Ct., completely precludes a magistrate court from looking to the West Virginia Rules of Criminal Procedure for guidance on issues beyond the general scope of discovery in misdemeanor cases.

More fundamentally, though, the Court agrees with the Defendant that Rule 29, W. Va. R. Crim. Pro. Mag. Ct. notwithstanding, the Defendant has a constitutional due process right, pursuant to both the Fifth Amendment to the United States Constitution and Article III, § 10 of the West Virginia Constitution, to discover and to examine relevant evidence which is material to his defense.

The Defendant has proffered, both through his counsel at oral argument and by way of an affidavit of an expert witness sought to be utilized by the Defendant[3], that "[i]n conducting a complete evaluation of the scientific accuracy and reliability of an evidential breath alcohol test device, the best source of information pertaining to the operation of that device is the database collected by the device showing the fuel cell parameters, blow data and calibration and

[2] The *Doonan* decision was issued in December of 2006; W. Va. R. Crim. Pro. Mag. Ct. 29 became effective in May of 2007.

[3] The Petitioner has objected to the Defendant's proffered expert's affidavit as hearsay; however, for purposes of the instant writ petition the Court will consider the affidavit as an extension of the argument advanced by the Defendant's counsel at oral argument.

verification data." Inasmuch as this information goes to the reliability of the particular evidential breath alcohol test device used to analyze the Defendant, such information is both relevant and material to the Defendant's defense.

Furthermore, the Defendant's proffered expert states that in her experience working with breath alcohol data she has found that to obtain enough data to fairly evaluate an instrument's performance it is helpful to have data from a year prior and a year subsequent to the particular breath test in question. According to the Defendant's proffered expert, "[t]his wide time frame allows a look at how the instrument was functioning at a point not relevant to the immediate test to determine if anything has changed . . . [i]ssues, such as calibration stability and or drift can only be evaluated if there is sufficient verification data, thus the need for a wider window of operational data . . . [s]maller windows of time bracketing a given test can hide problems that are intermittent in nature or matters of calibration drift."

While the Petitioner concedes that if the Defendant could demonstrate the relevancy of the request for the operational database information, then the Petitioner could conceive of a relevant time frame of perhaps ninety days before the date of the Defendant's breath test for which the Defendant might be entitled to such information, the Petitioner argues that the Defendant has nonetheless failed to articulate any such relevancy in the instant case. The Petitioner cites a case from the Court of Criminal Appeals of Tennessee, also dealing with a discovery issue pertaining to an Intoximeter EC/IR II evidential breath alcohol machine, for the proposition that the Defendant "must do more than emphatically state that [he] need[s] certain discovery . . . [he] must show how the discoverable items [are] material to the preparation of [his] defense." *See State v. Tindell*, 2010 WL 2516975 at 16 (Tenn.Crim.App. 2010) (citations

omitted).[4] The Court is satisfied, however, that the Defendant in the instant case has made a threshold showing of relevance, because the Defendant is seeking to test the accuracy of the particular machine which the State intends to use as evidence against him.

Moreover, producing the operational database information for the entire timeframe requested by the Defendant will not be unduly burdensome on the State. From the testimony which the Court has heard, regardless of how much or how little information is produced by the State, it can be produced in a relatively short period of time, though paper reporting is admittedly more time consuming than digital reporting due to the necessity of tying up a computer and printer for printing of the reports.

With regard to the Petitioner's contention that the Defendant has failed to articulate the materiality of all the maintenance and certification records for any and all simulators used in the calibration or verification of accuracy for the particular Intoximeter EC/IR II machine in question, the Defendant asserts that a software change and recalibration was performed on EC/IR II Serial Number 008325 at some point between April of 2010 and July of 2010, and argues that data from both before and after this software change and recalibration is necessary in order to evaluate the accuracy and linearity of the device on October 16, 2010, the date that the Defendant's breath test was conducted. The Court finds that this information is relevant and material to the Defendant's defense, and it would not be unduly burdensome on the State to produce it.

For the same reasons contained in the preceding paragraph, the Court finds that the Defendant has articulated the materiality of all of the of the maintenance and certification records for any and all simulators used in the calibration or verification of accuracy for the particular

[4]The Court would note that the appellant in *Tindell* was seeking discovery of the source code for the general computer program that drives the Intoximeter EC/IR II, as opposed to the Defendant in the instant case, who merely seeks the operational database information for one particular EC/IR II machine.

Intoximeter EC/IR II machine in question, that the Defendant has articulated the materiality of all assays for any and all simulator solutions used in the calibration or verification of accuracy for the particular Intoximeter EC/IR II machine used in the Defendant's case, and that the Defendant has articulated the materiality of the identification and verification of alcohol concentration of any and all dry gas used in the calibration or verification of accuracy for the particular Intoximeter EC/IR II machine in question. Thus, the Court concludes that such evidence is relevant and material to the Defendant's defense, and that such information is not unduly burdensome for the Petitioner to produce.

For the foregoing reasons, this Court finds that the Respondent Magistrate did not err as a matter of law in ordering the production of the operational database information for the particular Intoximeter EC/IR II machine in question for the time period of January 1, 2010 to March 1, 2011; that the Respondent Magistrate did not err as a matter of law in ordering the production of the maintenance and certification records for the particular Intoximeter EC/IR II machine in question for the time period of January 1, 2010 to March 1, 2011; that the Respondent Magistrate did not err as a matter of law in ordering the production of all the maintenance and certification records for any and all simulators used in the calibration or verification of accuracy for the particular Intoximeter EC/IR II machine in question; that the Respondent Magistrate did not err as a matter of law in ordering the production of all assays for any and all simulator solutions used in the calibration or verification of accuracy for the particular Intoximeter EC/IR II machine in question; and that the Respondent Magistrate did not err as a matter of law in ordering the production of the identification and verification of alcohol concentration of any and all dry gas used in the calibration of accuracy for the particular Intoximeter EC/IR II machine in question. The Petitioner's Petition for a Writ of Prohibition on such grounds is, therefore, **DENIED**.

*5. The Training Manuals in the Possession of the West Virginia State Police*

With regard to copies of any and all training materials received by the West Virginia State Police from Intoximeters, Inc. for the training of breath test operators and maintenance technicians, the Defendant argues that such information is relevant because it gives the information pertaining to normal operation and protocols to follow as well as protocols for when various messages are triggered during testing. According to the Defendant's proffered expert, each state has the manufacturer of the Intoximeter EC/IR II machine customize the messages and sequence protocols for the testing, and the Defendant's proffered expert needs the chance to familiarize herself with program specifics and requirements under West Virginia testing protocol, in order to conduct her broader analysis of the operational database information from the particular EC/IR II machine in question.

The Petitioner concedes that such training manuals could be both relevant and material, but maintains that the West Virginia State Police have indicated to it that the materials provided to them by Intoximeters, Inc. are available for inspection but protected by copyright. Therefore, the Petitioner argues that it cannot produce copies of said manuals for the Defendant, and the Respondent Magistrate thus clearly erred by requiring the State to provide such information.

The Defendant, in response, argues that copyright arguments never trump due process, and that the Defendant has the constitutional due process right to discover and to examine evidence which is relevant and material to his defense.

The Court agrees with the Defendant that the mere fact that a document is copyrighted cannot be used to preclude a criminal defendant from discovering evidence relevant to his defense. The Court furthermore notes that any reproductions of copyrighted manuals in the instant case would be solely for purposes of the Defendant's case, and would not in any way be

used for any commercial or economic purpose. Therefore, because the training manuals appear relevant and do not appear to be unduly burdensome for the State to produce, this Court cannot conclude that the Respondent Magistrate clearly erred in ordering the State to provide copies of any and all such manuals to the Defendant. The Petitioner's Petition for a Writ of Prohibition on such grounds is, therefore, **DENIED**.

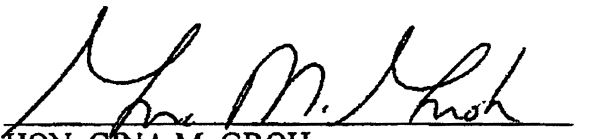
**WHEREFORE**, based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby **ADJUDGED** and **ORDERED** that the Petitioner's Petition for a Writ of Prohibition is **DENIED**.

It is further **ORDERED** that any reproductions of copyrighted manuals in the instant case shall be solely for purposes of the Defendant's case, and shall not in any way be used for any commercial or economic purpose. For the purposes of this case, no person(s) reviewing the manuals shall copy them or distribute them to anyone or permit anyone not directly involved in this case to review them. Furthermore, after this case has been resolved, no one shall maintain copies of the manuals and other records produced. Finally, to the extent that information identifying other defendants or individuals may be contained within the records produced, all records produced pursuant to this Order shall be redacted so that no information identifying other persons uninvolved in this case (such as names, dates of birth, etc.) shall be disclosed.

The Court notes the exception of the Petitioner to any adverse ruling contained herein.

The Circuit Clerk shall enter the foregoing Order as of the day and date first above written and shall forward attested copies to all counsel of record and/or *pro se* parties.

Entered: Oct. 5, 2011



HON. GINA M. GROH
JUDGE OF THE CIRCUIT COURT OF
BERKELEY COUNTY, WEST VIRGINIA