

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

v.

Criminal Docket No. 08 - 333

NICHOLAS D. SILVESTER,
Defendant

ORDER RULING ON DEFENDANT'S MOTIONS

This case came before the court on October 13, 2008, on the Defendant's Motions. Derrick Aston, Esquire, appeared for the Commonwealth; and J. Benjamin Dick, Esquire, appeared for the Defendant.

Upon consideration whereof, it appears to the Court that:

1. Virginia Code Section 2.2-4342F and the Agency Procurement and Surplus Property Manual of the Commonwealth of Virginia (September 1998) require that when vendors like CMI provide equipment and software to agencies of the Commonwealth that "all trade secrets or proprietary information must be identified in writing or other tangible form and conspicuously labeled as 'proprietary' either prior to or at the time of submission to the Commonwealth." Agency Procurement Manual. The Manual also provides that the Commonwealth receives the source codes where applicable.
2. Thus far in this case, no designation of the proprietary nature of the CMI source code for the Intoxilyzer 5000 has been produced except for a July 28, 2008, letter from Allen W. Holbrook, Kentucky counsel for CMI, which does not refer to Virginia Code Sec. 2.2-4342F and which is years after the Commonwealth acquired the Intoxilyzers. The Court based its earlier ruling denying the Defense access to the Intoxilyzer source codes on Holbrook's letter. Having now been informed of the Commonwealth's procurement policies, it does not appear that a letter from a vendor's counsel prepared years after the acquisition of the equipment should be accepted as a valid assertion of the protection of proprietary information in lieu of following the clear statutory and regulatory prescription of the Code of Virginia and the Procurement Manual. Moreover, according to policy of the Procurement Manual, the Department of Forensic Science should have the source code for the



Intoxilyzer 5000.

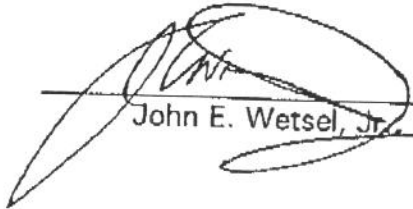
2. A Subpoena Duces Tecum has been issued requiring that the Department of Forensic Science produce on or before October 10, 2008, "All documents showing CMI, Inc. of Kentucky is in compliance with Section 2.2-4342 (F) ...," which request includes all documents by which CMI designated the source codes of the Intoxilyzer 5000 as propriety "prior to or at the time of submission [of the Intoxilyzer 5000] to the Commonwealth." Pursuant to that Subpoena, the Department of Forensic Science has produced no document indicating that the source codes of the CMI Intoxilyzer 5000 were designated as protected proprietary property when the Department purchased those instruments. With respect to the source codes, the Department of Forensic Science responded that it does not have the source code.
3. In an August 2005, Budget Request for funds to purchase new breathalyzers, the Department of Forensic stated that the reason for the budget request was "to replace dated, unstable and unreliable Breath Alcohol instrumentation [CMI 5000] used by police officers throughout the Commonwealth to certify whether a driver is or is not impaired."
4. On January 17, 2008, the Circuit Court of Fairfax County found CMI in contempt of Court for failing to respond to a subpoena duces tecum to produce the source codes of the Intoxilyzer 5000. Commonwealth v. Nam Cho, Fairfax Crim. No. MI-2007-345.

Therefore, it is ADJUDGED AND ORDERED that:

1. The earlier Subpoena Duces Tecum issued to be served on CMI, Inc. for production of the CMI Intoxilyzer source codes in a readily readable form, which was quashed on Motion of the Commonwealth, shall be reissued and served on CMI, Inc., pursuant to Virginia Code Section 19.2-272 et seq.
2. Defendant's Motion to Compel Verizon Communications to produce designated customer phone records for September 17, 2007, is granted.
3. The Defendant's Motion to Continue the trial of this case is granted, and this case continued is reset for trial on **March 27, 2009, at 9:00 a.m.**, before a misdemeanor jury.
4. This case is continued to November 25, 2008, at 9:00 a.m., for further proceedings.

The Clerk is directed to send a copy of this order to counsel of record, and to Michelle Gowdy, Virginia Department of Forensic Science, 700 N. Fifth Street, Richmond, Virginia 23219, who shall file such objections hereto as deemed advisable within ten days of their receipt of a copy of this order.

Entered October 23, 2008.


John E. Wetsel, Jr. Judge

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

v.

Criminal Docket No. 08 - 333

NICHOLAS D. SILVESTER,
Defendant

ORDER RULING ON COMMONWEALTH'S MOTION TO QUASH

This case came before the court on October 7, 2008, on the Commonwealth's Motion to Quash another Defense Subpoena Duces Tecum served on the Virginia Department of Forensic Science returnable on October 10, 2008. Heather Enloe and Derrick Aston, Esquires, appeared for the Commonwealth; and J. Benjamin Dick, Esquire, appeared for the Defendant.

Upon consideration whereof, it appears to the Court that pursuant to an earlier Subpoena duces tecum, the Department is already required to produce "all documents of any kind dealing with the repair, maintenance, or complaints about the Intoxilyzer 5000 in the period from September 1, 2006, through September 17, 2007, *this is an all inclusive document response for the period in question*, and shall among other things include "trouble call logs" or "instrument maintenance history reports" regardless of what designation or description is given those documents by the Department of Forensic Science", *which includes emails and all other electronically generated communications or records*. Item 1 of the Subpoena under consideration requests this same information.

Therefore, it is ADJUDGED AND ORDERED that the Commonwealth's Motion to Quash the Subpoena Duces Tecum served on the Virginia Department of Forensic Science is granted with respect to Item 1 of the materials requested.

It further appears to the Court that Virginia Code Section 2.2-4342F and the Agency Procurement and Surplus Property Manual of the Commonwealth of Virginia (September 1998) require that when vendors like CMI provide equipment and software to agencies of the Commonwealth that "all trade secrets or proprietary information must be identified in writing or other tangible form and conspicuously labeled as 'proprietary' either prior to or at the time of submission to the Commonwealth." Agency Procurement Manual. The Manual also provides that the Commonwealth receive the source codes where applicable. Thus far in this case, no designation of the proprietary nature of the CMI source code for the Intoxilyzer 5000

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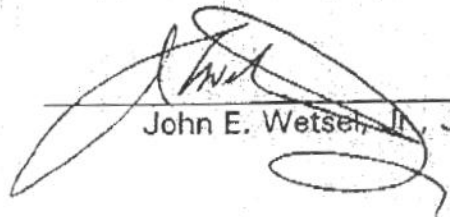
has been produced except for a July 28, 2008, letter from Allen W. Holbrook, Kentucky counsel for CMI, which does not refer to Virginia Code Sec. 2.2-4342F and which is years after the Commonwealth acquired the Intoxilyzers. The Court based its earlier ruling denying the Defense access to the Intoxilyzer source codes on Holbrook's letter. Having now been informed of the Commonwealth's procurement policies, it does not appear that a letter from a vendor's counsel prepared years after the acquisition of the equipment should be accepted as a valid assertion of the protection of proprietary information in lieu of following the clear statutory and regulatory prescription of the Code of Virginia and the Procurement Manual. Moreover, according to policy of the Procurement Manual, the Department of Forensic Science should have the source code for the Intoxilyzer 5000. Accordingly, the Department should either produce the source code, which was earlier requested but denied by the Court, or it should produce the documents upon which the Department relies as a basis for not producing the source code because CMI designated that information as propriety when the Department of Forensic Science originally acquired the CMI Intoxilyzer 5000's.

Therefore, it is FURTHER ADJUDGED AND ORDERED that the Commonwealth's Motion to Quash Item 2 of the Subpoena Duces Tecum is denied and that the Department of Forensic Science produce on or before October 10, 2008, "All documents showing CMI, Inc. of Kentucky is in compliance with Section 2.2-4342 (F) ...," which request includes all documents by which CMI designated the source codes of the Intoxilyzer 5000 as propriety "prior to or at the time of submission [of the Intoxilyzer 5000] to the Commonwealth."

It is FURTHER ADJUDGED AND ORDERED that the Defendant's Motion to extend the date for the filing of Defense Motions to October 17, 2008 is granted.

The Clerk is directed to send a copy of this order to counsel of record, and to Michelle Gowdy, Virginia Department of Forensic Science, 700 N. Fifth Street, Richmond, Virginia 23219, who shall file such objections hereto as deemed advisable within ten days of their receipt of a copy of this order.

Entered October 7, 2008.



John E. Wetzel, Jr. Judge

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF WINCHESTER

COMMONWEALTH OF VIRGINIA

v.

Criminal Docket No. 08 - 333

NICHOLAS D. SILVESTER,
Defendant

**CERTIFICATE TO SECURE ATTENDANCE OF OUT OF STATE
WITNESS AND DOCUMENTS**

This case came before the court pursuant to this Court's granting the Defendant's Motion for the issuance of a subpoena duces tecum on a foreign corporation and his motion to compel the attendance of an out of state witness. Therefore, pursuant to the Uniform Act to Secure the Attendance of Witnesses from without the State, Virginia Code § 19.2-272, et seq., it is certified and ORDERED that:

1. The above captioned criminal case is pending in this Court in which the Commonwealth alleges that that Defendant was driving under the influence of Alcohol. Incident to his arrest, the Defendant was administered a breath test using the CMI Intoxilyzer 5000 Breathalyzer, and the Defendant is challenging the reliability of that instrument and its analysis of his blood alcohol content.
2. The Documents requested are material to the defense, and those documents are requested to be produced in this Court on December 5, 2008, at 9:00 a.m., or at such earlier time and place as counsel for CMI and the Defendant may agree in writing. The Documents to be produced are described in Exhibit 1 to this Certificate.
3. Although CMI, Inc. of Kentucky does business in Virginia, it has refused to produce documents in Virginia pursuant to a subpoena served on its registered agent in Virginia, which leaves the Defendant with no alternative but to seek the documents and the attendance of the witness under the Uniform Act to Secure attendance of Out of State Witnesses. Virginia Code § 19.2-272 et seq. and Kentucky Rev. Statutes § 421.230 et seq.
4. Given the past refusal of CMI to respond to similar document requests and the fact that they have been held in contempt by the Fairfax County,

Virginia Circuit Court for failing to respond to a similar subpoena, it is also requested that following material witness

Toby Hall
President of CMI, Inc. of Kentucky
316 E. 9th Street
Owensboro, Kentucky 42303

be subpoenaed to appear in this court on December 12, 2008, at 9:00 a.m. In the event that the documents requested are produced, the Defendant may request the withdrawal of this subpoena for the witness's personal appearance. Pursuant to the Uniform Act a check for the required mileage and any other fees will be tendered to the witness in open court in the recipient state when the witness agrees or is ordered to attend the proceedings in Virginia.

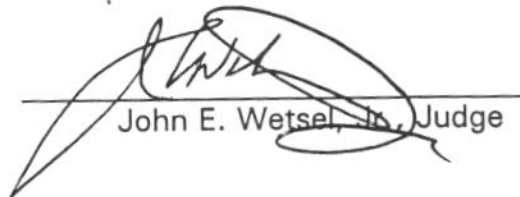
5. Virginia Code Section 2.2-4342F and the Agency Procurement and Surplus Property Manual of the Commonwealth of Virginia (September 1998) require that when vendors like CMI provide equipment and software to agencies of the Commonwealth that "all trade secrets or proprietary information must be identified in writing or other tangible form and conspicuously labeled as 'proprietary' either prior to or at the time of submission to the Commonwealth." Agency Procurement Manual. The Manual also provides that the Commonwealth receives the source codes where applicable.
6. No designation of the proprietary nature of the CMI source code for the Intoxilyzer 5000 has been produced in this Court except for a July 28, 2008, letter from Allen W. Holbrook, Kentucky counsel for CMI claiming that the information sought is proprietary, which does not refer to Virginia Code Sec. 2.2-4342F and which is years after the Commonwealth acquired the Intoxilyzers and which does not comply with the clear statutory and regulatory prescription of the Code of Virginia and the Commonwealth Procurement Manual for the protection of proprietary information.
7. Pursuant a Subpoena Duces Tecum issued in this case, the Department of Forensic Science produced no document indicating that the source codes of the CMI Intoxilyzer 5000 were designated as protected proprietary property when the Department purchased those instruments. With respect to the source codes for the CMI Intoxilyzer, the Department of Forensic Science responded that it does not have the source codes.

8. On January 17, 2008, the Circuit Court of Fairfax County found CMI, Inc. of Kentucky in contempt of Court for failing to respond to a subpoena duces tecum to produce the source codes of the Intoxilyzer 5000. Commonwealth v. Nam Cho, Fairfax Crim. No. MI-2007-345. A copy of that order is attached as Exhibit 2.

Therefore, this Court requests that the appropriate Court in the State of Kentucky issue a subpoena pursuant to the Uniform Act to Secure the Attendance of Witnesses from with the State for the production of the designated documents and the appearance of the named out of state witness.

The Clerk is directed to send a copy of this certificate to counsel of record, who shall file such objections hereto as deemed advisable within ten days of their receipt of a copy of this order. The Clerk and counsel for the Defendant are directed to comply with the provisions of the Uniform Act to Secure the Attendance of Witness from without the State and to send this certificate, duly attested, and such other pleadings as are necessary to the appropriate Court in Kentucky for processing.

Entered November 10, 2008.



John E. Wetsel, Jr., Judge

A COPY TESTE:


~~CLERK~~ DEPUTY CLERK
WINCHESTER CIRCUIT COURT

EXHIBIT 1 - CMI DOCUMENTS TO BE PRODUCED

- 1) CMI, Inc. is hereby ORDERED to produce all software versions and add ons of the 5000 Intoxilyzer sold to the Commonwealth of Virginia since the time CMI, Inc. as a vendor was awarded by the Commonwealth of Virginia in its procurement process the sale of all Intoxilyzer 5000 machines, including but not limited to all of its source codes and executive codes. Production should be in readable form and in the native electronic format and should be produced on a CD ROM, a USB Thumb Drive and as an e-mail attachment in a Zip file container. Native electronic format differs from electronic format in that the native format is the exact version used by CMI in the production of CMI software, whereas a file in electronic format may be a PDF file that is analogous to a photograph of the information and is thus unable to be processed other than to print to a printer.
- 2) All of the electronic files required to produce the machine level code that resides in the EPROM located in every Intoxilyzer 5000 sold to Virginia, hereinafter "Machine Code".
- 3) An electronic true copy in the native format that is or was distributed to Virginia of the Machine Code instructions that are loaded into the Virginia Intoxilyzer 5000 and which represent all software versions, i.e., Software A, B, C, etc... .
- 4) This includes each and every "include" file, library routine,

translated into object code that becomes a part of the Machine Code.

- 5) The file referred to in the industry as the "make file", in its electronic format, which is the set of instructions to the assembler and inker as to exactly how, to include in what order, the various source code files are to be processed and combined to create the file which represents the Machine Code. If the Makefile has optional switches contained within it, the value of each switch should be provided so that the Makefile can be operated in exactly the way that CMI uses the file to create the Machine Code.
- 6) The identity of each and every computer software program utilized to construct the machine Code to include the manufacturer of the software, the version of the software and the history at CMI of implementing patches or "service packs" of corrections to that version of the software. The identity of the operating system utilized on the computer at CMI upon which the Machine Code is manufactured from the Source Code.
- 7) All documentation of the changes made to the original source code in order to create subsequent "versions", i.e., Version A, B, C, etc... .
function, procedure and routine written in a computer language which is processed by an assembler or compiler and which is

- 8) All documentation of the tests performed to insure that the changes made did in fact correct all found defects that were corrected and that each change did not create new unintended actions that are themselves new defects.
- 9) All documentation relating to problems in the source code which have either not been investigated or which were investigated and a decision was made not to make program changes to the source code to correct problems. These should be produced for Virginia and for all Intoxilyzers 5000 models that are used in Virginia and sold to other states.
- 10) All written specifications for the source code to include correspondence within CMI or between CMI and others regarding deficiencies or errors in those specification as they relate to the model of the 5000 Intoxilyzer used in Virginia and specifically all e-mails and correspondence concerning the maintenance and repairs and parts of the Intoxilyzer 5000 with Alka Lohmann of the Virginia Department of Forensic Science from 2004 to 2008.

EXHIBIT 2

VIRGINIA

In the Circuit Court for the County of Fairfax

Commonwealth of Virginia

v.

Criminal No. MI-2007-345

Nam Cho,
Defendant.

Order

THIS MATTER came before the Court this 17th day of January, 2008 on return of this Court's Order to Show Cause In Re Contempt issued to CMI, Inc. in the captioned case. Mark Sullivan, Esq. appeared on behalf of the Commonwealth. Alan J. Cilman, Esq. appeared on behalf of the defendant. CMI, Inc. failed to appear and failed to show cause. After reviewing the pleadings and hearing arguments of counsel, the Court finds:

1. Two judges of this Court (Alden, J. and Brown, J.) have determined that information subpoenaed by the defendant in this case from CMI, Inc. is material and important to the defense and should be produced;
2. CMI, Inc. is the manufacturer of the Intoxilyzer 5000 used in this case to ascertain the blood alcohol from the breath of those arrested for driving under the influence, including the defendant herein;
3. The Commonwealth has contracted with CMI, Inc. to provide Intoxilyzer 5000 equipment; and,
4. CMI, Inc. has failed to respond to the properly served orders of this Court and as a result the defendant has been deprived of his rights to call for evidence in favor and to confront and cross examine evidence against him as guaranteed by the Sixth Amendment to the Constitution of the United States

and Article I, Section 8 of the Constitution of the Commonwealth of Virginia.

5. CMI, Inc.'s disregard of this Court's orders is unacceptable and this Court is concerned that the continued use of CMI, Inc. for breath alcohol measurement may adversely affect DUI prosecutions and may reflect poorly on the criminal justice system in this Commonwealth.

As a result of this Courts findings and the willful disobedience of this Court's orders by CMI, Inc., it is hereby

ORDERED, ADJUDGED AND DECREED that CMI, Inc. is in contempt. It is further

ORDERED, ADJUDGED AND DECREED that CMI, Inc. shall pay a civil contempt assessment of One Hundred and 00/100 dollars (\$100.00) per day and interest at the legal rate until such time as it provides the required information to the defendant. It is further

ORDERED, ADJUDGED AND DECREED that the captioned case is continued until April 10, 2008 for further proceedings.

22 Jan. 2008
Date

[Signature]
Judge

Seen and agreed;

[Signature]
Alan J. Cilman
Counsel for Defendant
4160 Chain Bridge Road
Fairfax, VA 22030
(703) 385-7300
Virginia Bar No. 13066

Seen and Objected to:

[Signature]
Mark Sullivan
Assistant Commonwealth Attorney
4110 Chain Bridge Road
Fairfax, VA 22030
(703) 246-2776
Virginia State Bar No. _____

A COPY TESTE:
JOHN T. FREY, CLERK
BY: [Signature]
Deputy Clerk

Original retained in the office of:
the Clerk of the Circuit Court at