

Traffic Safety Standard

Providing relevant information to Montana's prosecutors, law enforcement, & judges

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The Source Code Setback

by Melissa Broch, Mary Cochenour, and Ole Olson

About a dozen DUI prosecutions in Helena are held up, and they will remain in limbo at least until January 11, 2010. What is the cause? Defense counsel moved for discovery of the source code to the Intoxilyzer 8000 breath alcohol instrument, and the court has yet to decide how to handle the demand.

What is the Source Code?

The source code is computer programming language for the Intoxilyzer 8000, an instrument used by law enforcement officers across Montana to test breath alcohol levels in DUI cases. Source code is the language that a programmer uses to tell an instrument how to function. This source code language is then translated into machine code and installed in the Intoxilyzer 8000. The Intoxilyzer's source code contains the set of computer commands for sequencing the operation, all the data entry questions, the operational parameters, and the math formulas for the analysis of a defendant's breath sample.



The Intoxilyzer's source code contains the set of computer commands for sequencing the operation, all the data entry questions, the operational parameters, and the math formulas for the analysis of a defendant's breath sample. In written format, the source code is about 1200 pages of written computer language (code) that can only be read and understood by computer programming experts.

Why Does Defense Counsel want the Source Code?

Defense counsel claims a review of the source code by its expert will reveal inaccuracies or defects in the instrument's testing. The hope is that after combing through 1200 pages of code, there will be a colorable claim that the instrument is inaccurate and/or unreliable. However, the defendants, who have consolidated their cases in front of Judge Dorothy McCarter in the First Judicial District, cannot point to any specific instances in which the Intoxilyzer 8000 has performed inaccurately in any one of their cases. Nevertheless, defense counsel wants the source code delivered to their expert witness in Massachusetts in an electronic format, so that he can spend months pouring over the code.

The State argues it is unnecessary to review the source code in order to determine whether the Intoxilyzer 8000 is accurate and reliable. The proper way to determine whether the instrument works is to test it using known standards of alcohol. In Montana a 0.080 alcohol gas standard is used with the Intoxilyzer 8000. The instrument insures that all results generated from the analysis of the 0.080 gas standard are at

(Continued on page 2)

least +/- 5% or 0.005. That means all results from the gas standard *must* be at least 0.075 at a minimum and 0.085 at a maximum. If results are found outside this range, the instrument will not allow testing. In this way the State assures accuracy and reliability with each Intoxilyzer 8000.

Why Doesn't the State Provide the Source Code?

The State does not own, or possess the rights to, the source code to give to the defendants. The Source Code is computer language used by CMI programmers that is neither contained within any of the Intoxilyzer 8000 instruments in Montana nor has it been provided to the State by the manufacturer, CMI, Inc. In fact, CMI, Inc. is the only entity that controls or possesses the source code, and will not freely give it out. The Intoxilyzer 8000 contains *only* machine code that was generated from source code.

CMI maintains that the source code is a protected trade secret under Kentucky law. In order to protect its proprietary interests, the company will allow review of the source code under a protective order and nondisclosure agreement. This order and agreement would permit the defendants to review the source code at CMI's headquarters in Owensboro, Kentucky.

The defendants, however, refuse to sign the protective order and nondisclosure agreement. They also refuse to view the source code in Kentucky. Instead, they demand that CMI deliver the source code to a defense expert without any conditions or protections to CMI's intellectual property interests.

What is Happening in the Helena Cases?

This fall, Judge McCarter signed a subpoena, ordering CMI to produce the source code in a hearing in her courtroom on January 25, 2010. But the Kentucky courts refuse to recognize the Montana subpoena unless Judge McCarter makes specific findings that there is a material need for the information. Montana discovery rules also require the defendants to show a substantial need for the source code and explain why they cannot obtain the source code by means other than through the State.

The State argues that there can be no finding of material or substantial need for the source code because the defendants have failed to allege any specific inaccuracies or defects in the results of their breath tests. Furthermore, the State points out that the defendants are free to go to Kentucky and examine the source code at CMI's headquarters. Courts in similar cases from Arizona and Kentucky agree that defendants have yet to show a substantial need for the source code.

In July, the Kentucky Supreme Court ruled that a defendant's request for the source code amounted to a fishing expedition. Kentucky v. House, 295 S.W.3d 825, 2009 Ky. LEXIS 184 (2009). As recently as October, the Arizona Court of Appeals reached the same conclusion in State of Arizona v. Bernini et. al., 2009 Ariz. App. Lexis 754 (Ariz. Ct. App. 2009) (Bernini II). The lower court had held a two-day evidentiary hearing where a consolidated group of Arizona defendants attempted to show a substantial need for the source code. After reviewing the record, the Bernini II court pointed out that none of the testimony or evidence submitted at the hearing "was shown to implicate the reliability of the Intoxilyzer 8000." Bernini II, 2009 Ariz. App. Lexis 754 at ¶ 13. The court agreed that a review of the Source Code could "potentially" uncover software defects and help one understand how the instrument works. However, the court explained that how the instrument works is a separate issue from whether it was working properly. The court concluded that "the accuracy of the equipment would be determined by whether it passed quality assurance tests," not an examination of the source code. Id.

The Helena hearing to determine whether the State must turn over material not in its possession and whether defendants have shown a substantial need in the consolidated cases is January 11, 2010 before Judge McCarter.

Melissa Broch and Mary Cochenour are Deputy Lewis and Clark County Attorneys, and Ole Olson is Deputy Helena City Attorney.

REFUSALS: *Will the LJIC Solve the Problem?*

Driving Under the Influence (DUI) is a crime in Montana, but it is given special treatment in the statutes. It is the only crime in Montana which restricts, and in about 25% of the cases, actually prohibits law enforcement officers from gathering significant evidence of the crime: the blood alcohol content (BAC). In the case of other crimes, an officer is allowed to gather evidence if there is probable cause of the crime and a warrant has been issued, or an exception to the warrant requirement exists. However, Montana's implied consent laws place additional restrictions on law enforcement officers investigating DUIs.

The only way a Montana law enforcement officer is allowed to gather blood alcohol evidence is if 1) the officer has probable cause to believe a DUI has been committed, and 2) the person being investigated consents to providing a breath or blood sample. "About one in every four persons investigated for DUI refuses to provide the breath sample," states Ben Vetter, Director of Breath Alcohol at the Montana Department of Justice Forensic Sciences Division. Without that information, the State is unable to determine whether the person is a hard core drunk driver, so a judge cannot sentence in view of the individual needs of the defendant.

According to the Century Council a hard core drunk driver is defined as "one who drives with a high BAC of 0.15 or above, who does so repeatedly as demonstrated by having more than one drunk driving arrest, and who is highly resistant to changing their behavior despite previous sanctions, treatment or education." These drivers are among the most dangerous of all DUIs, accounting for 67% of drinking related fatalities in the United States. Yet in Montana, officers are restricted in identifying these drivers because of the limitations placed on them by statute. In many cases this means the officer, the prosecutor, and the judge are unable to identify those defendants who are the most dangerous individuals on the road. The Law and Justice Interim Committee (LJIC) is considering remedying the situation. Among other proposals, the LJIC is considering changing the statutes to 1) allow officers to seek warrants for BAC, and 2) criminalize refusal.

Both proposals have their strengths and weaknesses. Warrants demand officer, prosecutor, and judicial time, and have the potential of bogging down already busy jurisdictions such as Billings. A statute criminalizing refusals is certain to face constitutional challenges. No solution is perfect, but the LJIC will continue looking into these and many other proposals in an effort to improve Montana's laws and save lives. The next LJIC meeting will be held February 8-9, 2010 at the Capitol Building in Helena in Room 137.

For more information:
leg.mt.gov/css/Committees/interim/2009_2010/Law_and_Justice. For more information on hardcore drunk drivers, go to www.centurycouncil.org.

Hardcore drunk driver:

- BAC > 0.15
- Previous DUI

Traffic Safety Case Highlights

State v Weller, 2009 MT 168

DUI is an absolute liability offense, so it is proper to not permit an instruction on involuntary intoxication.

State v Clark, 2009 MT 327

Warden had particularized suspicion to stop a vehicle that was identified as a hunting related vehicle which stopped short of the game check

State v Blue, 2009 MT 304

It does not violate Article II, § 28(1) of the Montana Constitution, and the state is not stopped from charging a person with a fourth offense DUI, if they have three priors, none of which are "third

offense." Montana's treatment of first through fourth offense DUIs does not discriminate based on age, and does not deprive individuals of equal protection.

State v Schauf, 2009 MT 281

Failure of an officer to inform a defendant of a right to an independent blood test is remedied by suppression of the evidence (not dismissal) unless the officer intentionally impedes the defendant from obtaining an independent blood test.

State v Leprowse, 2009 MT 387

Compulsion is an affirmative defense of DUI.

Interested in presenting HGN testimony in Court?

Email Erin for predicate questions, validation studies, and other information.

INSIDE THE NEXT ISSUE:

- **Schauf: The Good, the Bad, and the Aftermath**
- **Flathead County Attorney holds bartender responsible for his role in DUI death**
- **Massive state-wide volunteer effort to gather DUI statistics**
- **Traffic Safety Case Highlights**

Advanced Roadside Impaired Driving Enforcement

Most law enforcement officers in Montana are trained in Standardized Field Sobriety Testing (SFST), which is a useful tool in the enforcement of Montana's driving under the influence (DUI) laws. Additionally, some officers complete more advanced training through the Drug Evaluation and Classification (DEC) program and become Drug Recognition Experts (DRE). Now there is another class being offered in Montana called Advanced Roadside Impaired Driving Enforcement (ARIDE). The two day course is intended to bridge the gap between the SFST and DRE courses and provide a level of awareness to the participants, in the area of drug impairment in the context of traffic safety. Based on that premise, the ARIDE course was developed with the following goals in mind:

It will train law enforcement officers to observe, identify and articulate the signs of impairment related to drugs, alcohol, or combination of both, in order to reduce the number of impaired driving incidents as well as crashes which result in serious injuries and fatalities.

To be considered for ARIDE TRAINING the applicant must meet the following criteria:

- Have a minimum of one year Road Patrol experience;
- Complete probation with your agency;
- Have at least one year of experience after successfully completing the National Highway Traffic Safety Administration (NHTSA) SFST Training; and
- Have a reasonable background and level of experience in making DWI arrests.

ARIDE is divided into sessions that are designed to provide the participant with an overview of the issue of impaired driving and the effects of drugs and alcohol on a person's ability to operate a vehicle safely, as well as demonstrate methods of identifying and processing the impaired driver.

This course is to build on the Standardized Field Sobriety Test practitioner course. In order for the participant to effectively utilize the information presented in this course, NHTSA has set a prerequisite of SFST proficiency. The participant will receive a short review and update for the SFST's. After completing that session, the participant will be required to pass a SFST proficiency evaluation. Failure to successfully complete the SFST proficiency evaluation will result in dismissal from the class. At the end of the two days training a Final Exam will be given that the participant must pass to receive a Certificate.

Upcoming courses are scheduled for January 17 and 18 at Fort Harrison and February 22 and 23 in Missoula. For more information about ARIDE, or to register for an upcoming course, contact: Trooper Kurt Sager, Montana Highway Patrol, Traffic Safety Resource Officer, (406) 444-9873, ksager@mt.gov.

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The *Traffic Safety Standard* is a product of Montana's Traffic Safety Resource Prosecutor (TSRP). The TSRP position is funded by the Montana Department of Transportation as part of a comprehensive effort to reduce the number and severity of traffic crashes, injuries and fatalities on Montana highways.

Please email with comments, suggestions, or questions.

Training Dates

Course Title	Date	Location	Registration Information
Social Networking Sites and Underage Drinking (POST and CLE credit)	Jan. 8, 2010	Deer Lodge	Contact Erin Inman (406) 449-1255, etinman@qwestoffice.net
	Jan. 27, 2010	Missoula	
	Jan. 28, 2010	Dillon	
ARIDE	Jan. 17,18, 2010	Ft. Harrison	Contact Trooper Kurt Sager (406) 444-9873, ksager@mt.gov
	Feb. 22,23, 2010	Missoula	
Lifesavers Conference	April 11-13, 2010	Philadelphia, PA	www.lifesaversconference.org
DRE	April 19-30, 2010	Ft. Harrison	Contact Trooper Kurt Sager (406) 444-9873, ksager@mt.gov
DUI Prosecution	April 20-22, 2010	MLEA, Helena	Contact Erin Inman (406) 449-1255, etinman@qwestoffice.net

For information about other trainings and conferences, go to www.mdt.mt.gov/tsrp/ and click on "Trainings."