House v. Com.
Ky.App.,2008.
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THIS OPINION IS NOT FINAL AND SHALL NOT BE CITED AS AUTHORITY IN ANY COURTS OF THE COMMONWEALTH OF KENTUCKY.

Court of Appeals of Kentucky.
Lennie G. HOUSE, Appellant
v.
COMMONWEALTH of Kentucky, Appellee.
No. 2007-CA-000417-DG.

Jan. 18, 2008.

Discretionary Review Regarding Fayette Circuit Court, Action No. 06-XX-00054; Kimberly N. Bunnell, Judge.

Harold L. Kirtley, II, Lexington, KY, for appellant.
Gregory D. Stumbo, Attorney General, Jennifer O. True, Special Assistant Attorney General, Lexington, KY, for appellee.
Allen W. Holbrook, Owensboro, KY, amicus curiae for CMI, Inc.

Before DIXON and LAMBERT, Judges; ROSENBLUM, Senior Judge.[FN1]

FN1. Senior Judge Paul W. Rosenblum, sitting as Special Judge by Assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

OPINION

ROSENBLUM, Senior Judge.

***1** Lennie G. House appeals from an Opinion of the Fayette Circuit Court which affirmed the Fayette District Court's granting of the Commonwealth of Kentucky and CMI, Inc.'s, (CMI) motion to quash a subpoena issued by House to CMI requiring CMI to produce the computer source code of its breathalyzer instrument, the Intoxilyzer 5000. For the reasons stated below, we reverse.

On March 8, 2006, House was charged with operating a motor vehicle while under the influence of alcohol with the aggravating circumstance of having an alcohol concentration of 0.18 or more. *See*KRS[FN2] 189A.010. Following his arrest, House was given a breathalyzer test using an Intoxilyzer 5000 instrument, which is manufactured by CMI, Inc.

FN2. Kentucky Revised Statutes.

On July 28, 2006, House filed a discovery motion requesting that the Commonwealth provide various information. Among the information requested was the computer source code for the breathalyzer instrument used on House, the Intoxilyzer 5000EN, Serial Number 68-011299.

After the Commonwealth failed to produce the requested source code, House issued a subpoena duces tecum to CMI seeking production of the code. In response, both the Commonwealth and CMI filed a motion to quash the subpoena. House, in turn, filed a motion to suppress the breathalyzer results for failure to comply with the subpoena.

A hearing on the motions to quash was held on August 8, 2006, at which time House produced a computer software engineer, Jeremy Riley, who testified that if the source code for the instrument were produced, he could examine the code for any "bugs" or flaws in the code's logic which may be contained therein, and which as a result may produce an incorrect blood alcohol reading.

On September 1, 2006, the district court entered an opinion and order granting the Commonwealth and CMI's motions to quash the subpoena. House subsequently entered a conditional guilty plea pursuant to RCr[FN3] 8.09, reserving for appeal the issue of the district court's granting of the mo-

tions to quash the subpoena for CMI to produce the Intoxilyzer 5000 computer code. On January 24, 2007, the Fayette Circuit Court entered an opinion affirming the district court's order. We subsequently granted discretionary review.

FN3. Kentucky Rules of Criminal Procedure.

Before us, House contends that the district court erred in granting the Commonwealth and CMI's motions to quash his subpoena seeking the Intoxilyzer 5000 computer code. We agree.

RCr 7.02(3) provides as follows:

(3) A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be **unreasonable or oppressive.**The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys. (Emphasis added).

***2** Thus, a subpoena may be quashed only upon a showing that compliance therewith would be unreasonable or oppressive.[FN4] We do not believe the Commonwealth and CMI have made this showing.

FN4. We note, of course, that the information sought would have to be relevant to the proceeding.

The request is not unreasonable because its purpose is to challenge the validity of the breath alcohol readings produced by the Intoxilyzer 5000 instrument which is anticipated to be used at trial in support of the Commonwealth's DUI charge against House. The reading was also used to support the aggravating factor of driving with a breath alcohol reading of .18 or more. Under KRE[FN5] 401, evidence is relevant if it has any tendency to render the existence of any consequential fact more or less probable, however slight that tendency may be. *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky.1999); *Turner v. Commonwealth*, 914 S.W.2d 343, 346 (Ky.1996). Relevant evidence is admissible unless excluded by some other rule. KRE 402. Because a flaw in the computer source code of the Intoxilyzer 5000 would be consequential to the accuracy of the reading intended to be relied upon by the Commonwealth, such evidence is relevant and admissible. Accordingly, requesting the computer code to test the verity of the readings produced by the instrument is not unreasonable.

FN5. Kentucky Rules of Evidence.

Moreover, the burden upon CMI in producing the code is not oppressive. The record discloses that the code could be copied to a cd rom computer disc and produced in that form at minimum expense. It appears that the only other requirement would be that the passwords to access the code would need to be supplied. Thus, the burden of providing the information is minimal and the expense de minimis.

Thus, upon application of the test as set forth in RCr 7.02(3), we believe that the movants have not met their burden of demonstrating that complying with the subpoena would be unreasonable or oppressive, and, accordingly, we also conclude that the district court erred in quashing the subpoena.

Based upon our disposition above, we need not discuss the other arguments raised by House in support of reversal.

The Commonwealth and CMI argue, however, that the computer code is a protected trade secret and that this should weigh against disclosure. However, House has expressed his willingness for he, his attorney, and his expert witness to enter into a protective order stipulating that the code or its contents are not to be shared with any party outside of the case. The district court is authorized to enter such orders in accordance with CR[FN6] 26.03. We further note that the order may provide that any copies or work product generated as a result of the software engineer's review be returned to CMI upon

completion of the review. As civil and/or criminal penalties could result from the disclosure of the code to other parties, such a protective order should obviate any concern CMI may have with respect to protection of its source code.

FN6. Kentucky Rules of Civil Procedure.

Citing *Commonwealth v. Rhodes,* 949 S.W.2d 621 (Ky.App.1996), *Commonwealth v. Wirth,* 936 S.W.2d 78 (Ky.1996), *Commonwealth v.. Roberts,* 122 S.W.3d 524 (Ky.2003) and *Commonwealth v. Walther,* 189 S.W.3d 571 (Ky.2006), the Commonwealth and CMI also argue to the effect that the Intoxilyzer 5000 has been previously accepted as scientifically reliable in various appellate court cases, and thus the verity of the Intoxilyzer 5000 has already been determined to be established. A review of these cases, however, discloses that the issue herein was not squarely addressed in any of those cases. We find nothing in those cases which provide that the computer source code of the Intoxilyzer 5000 is above challenge. As such, we are unpersuaded by this argument.

***3** In its brief, citing *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) and the parallel federal rule, CMI argues that the subpoena served upon it by House was procedurally deficient because RCr 7.02(3) requires that a defendant file a motion for the court's approval to issue the subpoena and that there be a hearing thereon. We have previously set out the text of RCr 7.02(3). See pg. 3, *infra.*A review of the text of the rule discloses no such requirement as asserted by CMI. Accordingly, we will not read such a requirement into the rule.

For the foregoing reasons the judgment of the Fayette Circuit Court is reversed and remanded for additional proceedings consistent with this opinion.

DIXON, Judge, Concurs.
LAMBERT, Judge, Dissents and Files Separate Opinion.
LAMBERT, Judge, Dissenting:

Respectfully, I dissent and would affirm the judgment of the Fayette Circuit Court in its entirety.

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--- S.W.3d ----, 2008 WL 162212 (Ky.App.)

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