

COBB COUNTY, GA
IN THE STATE COURT OF COBB COUNTY FILED IN OFFICE
STATE OF GEORGIA

11 OCT 17 PM 4:06

STATE OF GEORGIA

Case No. 10T-14909
JANE B. WEBB
STATE COURT CLERK-02

vs.

[REDACTED]

Defendant.

ORDER
and
CERTIFICATE OF MATERIALITY

This case is before the court on defendant [REDACTED] request that the court issue a certificate of materiality concerning a witness with information and documentation relating to the source code for the Intoxilyzer 5000 (Georgia Model) breath testing machine approved by the Georgia Division of Forensic Sciences under O.C.G.A. § 40-6-392 and which is the breath testing machine used to test defendant's breath in this case. Defendant asks that the court issue the certificate of materiality pursuant to the Uniform Act to Secure the Attendance of Witnesses from without the State, O.C.G.A. § 24-10-90, et seq., which would be directed to the appropriate court in the State of Kentucky requesting that the Kentucky court issue a subpoena duces tecum directed to CMI, Inc., and compelling it to produce the source code.

Under the uniform act, it is the responsibility of this court to determine whether the evidence is material to the case pending in this court. Davenport v. State, 289 Ga. 399, 711 S.E.2d 699 (2011). In support of his request, defendant submitted the testimony of its expert concerning the source code and its relation to the functioning of the Intoxilyzer 5000.

In Davenport, supra, the Georgia Supreme Court adopted the following standard concerning the issue of materiality: "this Court . . . construes 'material witness' as 'a witness who can testify about matters having some logical connection with the consequential facts, esp. if few others, if any, know about these matters.' Black's Law Dictionary (8th ed. 2004)." Id. at 404.

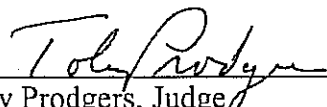
Upon consideration of the testimony of defendant's witness, Matthew Malhiot, and of defendant's proffer in light of the standard set out in Davenport v. State, this court finds that the testimony and evidence sought by defendant concerning the source code for the CMI, Inc., Intoxilyzer 5000 (Georgia Model) is material to the issues pending in this case. This court is therefore issuing this order and certificate of materiality concerning same under the uniform act. Under O.C.G.A. § 24-10-92 (b) it will be for the appropriate court in Kentucky to determine if the witness is "material and necessary" to the proceedings in this case. Davenport v. State, supra. Also, it will be for the corporation in this case, CMI, Inc., to designate the particular individual to act as its agent in this regard. See Yeary v. State, 289 Ga. 394, 396-397, 711 S.E.2d 694 (2011), where the Georgia

Supreme Court in analyzing the uniform act held that “the more expedient course is to permit a party to request that a corporation, rather than its human agent, be found to be a material witness under the Uniform Act and leave the issue of designation of its human agent to the corporation.” Id.

The presence of CMI, Inc., will be required in the State Court of Cobb County, Georgia, in order to produce this source code for use by the defendant at trial, for no longer than two days, the trial date to be determined at a later time; and the laws of Georgia, O.C.G.A. § 24-10-96, will give CMI, Inc., and any of its agents, officers and employees protection from arrest and the service of civil and criminal process while in Georgia pursuant to any subpoena or summons issued based on this certificate.

The original of this order and certificate of materiality is being filed of record in this case this date. In order to avoid unnecessary delays in the final disposition of this case, defendant is to present a certified copy of the certificate to the appropriate court in Kentucky within forty-five days from the date of this order. Defendant is to comply in all respects with the requirements of the uniform act.

So ordered, this 17th day of October, 2011.



Toby Prodgers, Judge
State Court of Cobb County