IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
v.	)	**Case No.: 1009015961**
	)	
GIOVANNI FERRANTE,	)	
Defendant.	)	

Submitted: June 25, 2012
Decided: July 10, 2012

On State's Motion to Quash
GRANTED

ORDER

Danielle J. Brennan, Esquire, Deputy Attorney General, Department of Justice, 820 N. French Street, 7th Floor, Wilmington, Delaware, 19801. Attorney for the State of Delaware.

Edmund Daniel Lyons, Esquire, The Lyons Law Firm, 1526 Gilpin Avenue, P.O. Box 579, Wilmington, Delaware, 19899. Attorney for Defendant.

ROCANELLI, J.

On September 17, 2010 at approximately 10:49 p.m., Cpl. Michael J. Cahall of the Delaware State Police observed Giovanni Ferrante ("Defendant") make an illegal U-turn prior to entering a sobriety checkpoint in the area of Capitol Trail, Newark, Delaware. Cpl. Cahall initiated a traffic stop. Upon contact with Defendant, Cpl. Cahall smelled a strong odor of alcohol on Defendant's breath and noticed that Defendant's eyes were glassy and bloodshot. Defendant admitted to consuming eight beers and stated that he was nineteen years old. Defendant submitted to a portable breathalyzer test and Intoxilyzer test. Defendant was arrested for Driving Under the Influence of Alcohol

("DUI") in violation of 21 *Del. C.* § 4177(a) and Driving Over the Median in violation of 21 *Del. C.* § 4126.

The parties appeared for DUI case review on December 15, 2010, where a plea offer was extended to and rejected by Defendant. A preprinted scheduling order form was completed and signed by both parties. Neither the State nor Defendant checked the line in the "Witnesses" section of this form requesting the appearance of the State Chemist at trial. Trial was scheduled for March 28, 2011.

On March 28, 2011, the Court ordered the matter continued to June 29, 2011. On June 29, 2011 the trial was continued to October 19, 2011 due to time constraints.

On July 25, 2011, Defendant sent a Subpoena *duces tecum* (the "Subpoena") addressed to the "State Chemist who calibrated intoxilyzer machine with serial number 68-013516." The Subpoena ordered this witness to appear at trial on October 19, 2011 at 8:30 a.m. The Subpoena also requested the calibration, maintenance, and "out of service" records of the Intoxilyzer machine at issue in this case; records reflecting the date this machine was originally put into service and the extent of any modifications; records reflecting whether an RFI detector had been installed or adjusted; records reflecting whether an "Ambient Air" module had been installed or adjusted; and the dates of modifications or service to the Intoxilyzer. Defendant did not notify the State that the Subpoena had been issued.

On October 19, 2011, the Court ordered the matter continued to January 9, 2012.

On January 9, 2012, Defendant moved to suppress evidence gathered by the State. The Court held an evidentiary hearing on the Motion to Suppress. The parties then submitted legal memoranda as requested by the Court. On March 7, 2012, this Court denied the Motion to Suppress. Trial was rescheduled for April 9, 2012.

On March 13, 2012, Defendant sent a letter to Ms. Julie Willey, advising that the trial was rescheduled and requesting her appearance at the April 9, 2012 trial date. The State was not provided a copy of this letter by Defendant. Although Defendant sent the letter to Ms. Willey, she was not the State Chemist who actually tested the Intoxilyzer machine with serial number 68-013516. Rather, Ms. Cynthia McCarthy tested this Intoxilyzer machine during the relevant time period.

On April 9, 2012, the parties appeared for trial. Neither Ms. Willey nor Ms. McCarthy appeared at trial. The State moved to quash the Subpoena. After brief oral argument, the parties submitted legal memoranda as requested by the Court.

STATE'S MOTION AND DEFENDANT'S OBJECTION

The State contends that the State Chemist is not a necessary witness for the introduction of the Intoxilyzer calibration certification sheets, the requested information is immaterial, and that granting the motion would not violate Defendant's rights under the Confrontation Clause of the United States Constitution.[1]

[1] U.S. Const. amend. VI.

Defendant argues that he has a right under the Confrontation Clause[2] to cross-examine the State Chemist as a witness where the State intends to offer evidence which relies upon testing conducted by the State Chemist.

ANALYSIS

The decision to grant or deny a motion to quash is within the discretion of the Court.[3] For the following reasons, the Court hereby grants the State's Motion to Quash.

First, the Court finds that the Subpoena is procedurally defective because it was not reissued and served for the April 9, 2012 trial date. Furthermore, the Subpoena did not properly state, with specificity, the individual required to appear for trial.[4] The March 13, 2012 letter addressed to Ms. Willey did not cure these defects.

Second, the Court finds that compliance with the Subpoena would be oppressive to the State because the State Chemist is not a necessary witness. The State may establish a proper foundation for the admission of Intoxilyzer calibration certification sheets through the testimony of another qualified witness.[5] Moreover, this Court has held that requests for production of Intoxilyzer records other than the certification sheets,

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[2] *Id.*

[3] Ct. Com. P. Crim. R. 17.

[4] *Id.*

[5] D.R.E. 803(6); *Palomino v. State*, 2011 WL 2552603, at *6-7 (Del. Super. Apr. 4, 2011) (citing *Trawick v. State*, 845 A. 2d 505, 508-09 (Del. 2004)).

including documents concerning service, modifications, and calibrations checks on the Intoxilyzer, are overbroad and unduly burdensome unless the defendant establishes such records are material to the defense.[6]

Third, the Court rejects Defendant's argument that an inability to cross-examine the State Chemist will violate Defendant's confrontation rights afforded by the Sixth Amendment of the United States Constitution.[7] Intoxilyzer calibration certification sheets are admissible in evidence under Delaware Rules of Evidence Rule 803(6).[8] To meet the requirements under D.R.E. 803(6), the records must be: (1) prepared in the regular course of business; (2) made at or near the time of the event; (3) trustworthy; and (4) testified to by the custodian of the record or other qualified person.[9] Business records are not testimonial within the meaning of *Melendez-Diaz v. Massachusetts*.[10] Therefore, the admission of Intoxilyzer calibration certification sheets without the opportunity to cross-examine the author does not offend the confrontation clause.

Finally, it would be improper to sanction the State for failing to produce Ms. McCarthy because Defendant contributed to this failure by his own failure to serve either the July 25, 2011 Subpoena or the March 13, 2012 letter on the Delaware Department of

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[6] *State v. McCurdy*, 2010 WL 546499 (Del. Com. Pl. Feb. 3, 2010).

[7] U.S. Const. amend. VI.

[8] *Palomino*, 2011 WL 2552603 at *6-7; D.R.E. 803(6).

[9] See *Tally v. State*, 841 A.2d 308 (Del. Supr. 2003).

[10] 557 U.S. 305, 329 (2009).

Justice. Additionally, Defendant has not sought modification of the December 15, 2010 scheduling order to request the appearance of the State Chemist at trial.

CONCLUSION

Therefore, State's Motion to Quash the Subpoena pursuant to Court of Common Pleas Criminal Rule 17(c) is hereby GRANTED. The matter shall be scheduled for trial before this judicial officer to conclude the proceedings.

IT IS SO ORDERED this 10th day of July, 2012.

Andrea L. Rocanelli

The Honorable Andrea L. Rocanelli