

60 Misc.3d 721  
Criminal Court, City of New York.

The PEOPLE of the State of New York, Plaintiff,  
v.  
S.B., Defendant.

XXXXX

|  
Decided on June 5, 2018

### Synopsis

**Background:** Defendant charged by misdemeanor information with three counts of operating a motor vehicle while under the influence of alcohol or drugs moved to compel discovery.

**[Holding:]** The Criminal Court, City of New York, Bronx County, Jeffrey Rosenblueth, J., held that defendant was entitled to discovery of all back-up documentation related to breath test machine and simulator solution.

Motion granted.

West Headnotes (2)

#### [1] Automobiles

🔑 Conduct and Proof of Test; Foundation or Predicate

#### Automobiles

🔑 Reliability of particular testing devices

Results of an alcohol breath test from breath test machine are inadmissible at trial unless the People establish that the machine was in proper working order at the time the test was administered and that the chemicals used in conducting the test were of the proper kind and mixed in the proper proportions.

[Cases that cite this headnote](#)

#### [2] Criminal Law

🔑 Particular documents or tangible objects

Defendant, who was charged with three counts of operating a motor vehicle while under the influence of alcohol or drugs, was entitled to discovery of backup documentation related to breath test machine and simulator solution, including headspace gas chromatography data, for purposes of establishing whether alcohol breath test was accurate; although headspace gas chromatography machine was not used to analyze defendant's breath sample, it was utilized to test accuracy of simulator solution, which was vital to the "inspection, calibration and repair" of breath test machine, such that requested discovery was material to the preparation of his defense. [N.Y. CPL §§ 240.20\(1\)\(k\), 240.40\(1\)\(c\); N.Y. Vehicle and Traffic Law § 1192.](#)

[Cases that cite this headnote](#)

### Attorneys and Law Firms

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For the People: ADA Amanda Iannuzzi, Bronx District Attorney's Office, 215 East 161st Street, Bronx, New York 10451

### Opinion

Jeffrey Rosenblueth, J.

Defendant's motion is decided as follows:

#### ***MOTION TO COMPEL DISCOVERY—GRANTED***

Defendant is charged in the accusatory instrument with committing the offenses of Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs [VTL § 1192(2)] under count one; Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs [VTL § 1192(3)] under count two and Operating a Motor Vehicle While Under the Influence of Alcohol or Drugs [VTL § 1192(1)] under count three.

The misdemeanor information sworn to by P.O. James Fagan alleges that on or about April 3, 2017 at

approximately 11:30 P.M. in the county of the Bronx he observed defendant seated behind the steering wheel and operating a Gray Nissan \*886 Sedan in that said engine was running and the car was moving on a public street. P.O. Fagan further alleged that he observed defendant operating the vehicle at approximately eighty-one (81) miles per hour in a fifty (50) mile per hour zone. P.O. Fagan also alleged that he observed defendant to have watery eyes, slurred speech and an odor of alcoholic beverage on his breath and defendant stated that he “only had one drink.” Additionally, P.O. Fagan stated that he was present during the administration of a chemical test of defendant's breath and that defendant's blood alcohol content was .10 or 1 percentum by weight per volume.

[1] The instrument used to test defendant's breath sample in the instant matter was the Intoxilyzer 5000, which is a machine designed to measure the ethyl alcohol in the test subject's breath. The Intoxilyzer machine is presumed to be reliable (see 10 NYCRR 59.4; *People v. Robinson*, 53 A.D.3d 63, 860 N.Y.S.2d 159). However, the results of a breath test from the Intoxilyzer are inadmissible at trial unless the People establish that the machine was in proper working order at the time the test was administered (see *People v. Boscic*, 15 N.Y.3d 494, 912 N.Y.S.2d 556, 938 N.E.2d 989) and “that the chemicals used in conducting the test were of the proper kind and mixed in the proper proportions,” *People v. Freeland*, 68 N.Y.2d 699, 506 N.Y.S.2d 306, 497 N.E.2d 673.

In order to ensure that the Intoxilyzer 5000 functions properly, a “*simulator test*” must be run prior to or following every breath test [10 NYCRR § 59.5(d)]. During the simulator test, the Intoxilyzer 5000 measures the alcohol content of a “*simulator solution*” which contains a specific quantity of ethyl alcohol and is intended to simulate a known blood alcohol content. In order for the Intoxilyzer machine to be certified as accurate, it must measure the simulator solution to within the limits of plus or minus .01% per weight per volume. Thus, if the simulator solution's actual measurement is .10% the Intoxilyzer must register a reading of .09%, .10% or .11% [see 10 NYCRR § 59.5(d); Peter Gerstenzang & Eric Sills, *Handling the DWI Case in New York* § 29.11 (2016–2017 ed)].

Prior to the simulator test, the simulator solution is tested in a separate process known as “headspace [gas chromatography](#)” which measures the concentration of

ethyl alcohol in the simulator solution. Generally, during this process (1) the simulator solution sample containing ethyl alcohol is placed into a small sealed container; (2) this container is then heated producing “headspace gas”; (3) a technician injects a small syringe into the top of the sealed container which collects the sample of the “headspace gas.”; (4) this sample is then placed into a gas chromatogram machine that analyzes the headspace gas to determine the proportion of ethyl alcohol in the sample; (5) the headspace gas chromatograph machine, which is attached to a computer, generates results referred to as [gas chromatography](#) (“GC”) data and (6) the technician then reviews the data which includes graphical displays known as “chromatograms” and prepares a report with respect to the level of ethyl alcohol in the simulator solution [see generally Bruno Kolb and Leslie Etre, *Static Headspace Gas Chromatography: Theory and Practice*, (2nd ed. 2006); Restek, *A Technical Guide for Static Headspace Analysis Using CG* (2000)].

On April 6, 2017 defendant served the People with a Demand for Discovery including all written documents concerning scientific tests and experiments. The court file indicates that the People served discovery upon defendant on May 1, 2017. The People represent that pursuant to defendant's discovery request they have provided \*887 defendant, in pertinent part, with the calibration and field testing reports of the Intoxilyzer machine that was used to test defendant's breath.

[2] Defendant now moves this Court pursuant to [CPL § 240.40\(1\)\(c\)](#) to compel discovery of all documentation related to the preparation, testing and analysis of Simulator Solution, Lot Number 16380, including the headspace [gas chromatography](#) data, relating to the certified reports generated on December 14, 2016, March 23, 2017 and April 5, 2017, or in the alternative, for an order precluding the prosecution from offering at trial evidence of defendant's Intoxilyzer result. Defendant claims that such material is discoverable under [CPL § 240.20\(1\)\(c\)](#) and [CPL § 240.20\(1\)\(k\)](#) as “any written report or document, or portion thereof, concerning a physical examination, a scientific test or experiment...” (*Lee Affirmation*, ¶ 13). Defendant asserts that the records with respect to the simulator solution are evidence of whether the calibration of the Intoxilyzer machine was accurate. Moreover, defendant argues that, here, because the Intoxilyzer machine registered a .10% level of alcohol in defendant's breath sample, which is only .02% above the

legal limit of .08% under [VTL § 1192\(2\)](#), such records are critical to the defense.

The People, in opposition to defendant's motion, contend that the simulator solution paperwork and headspace gas [chromatography](#) data are not discoverable under [CPL § 240.20\(1\)\(c\)](#) and [CPL § 240.20\(1\)\(k\)](#) because the simulator solution, although used to verify whether the Intoxilyzer is functioning properly, does not actually test defendant's breath. Further, the People contend that providing defendant with the documents related to the testing of the simulator solution would create a “slippery slope” of discovery practice wherein defense counsel could then demand “further reports regarding the chromatogram machine itself, reports regarding the various parts and solutions involved in testing and reports regarding the manufacturing of each chromatogram machine ... [and] ... would be an overwhelming strain on government resources” (*Iannuzzi Affirmation*, pg. 8 ¶ 3).

After reviewing the written submissions of the parties and the relevant law defendant's motion to compel discovery is decided as follows:

[CPL § 240.20\(1\)\(c\)](#) sets forth, in pertinent part,

“...[U]pon a demand to produce by a defendant against whom an... information charging... a misdemeanor is pending, the prosecutor shall disclose to the defendant and make available for inspection, photographing, copying or testing, the following property: Any written report or document, or portion thereof, concerning... a scientific test or experiment, relating to the criminal action or proceeding which was made by, or at the request or direction of a public servant engaged in law enforcement activity, or which was made by a person whom the prosecutor intends to call as a witness at trial, or which the people intend to introduce at trial.”

[CPL § 240.20\(1\)\(k\)](#), which relates specifically to vehicle and traffic law violations, directs the prosecution to provide, in pertinent part, the following additional discovery:

“... any written report or document, or portion thereof concerning... a scientific test, or experiment, including the most recent record of inspection, or calibration or repair of instruments utilized to perform such scientific tests or experiments and the certification certificate, if any, held by the operator of the machine or machines

or instrument, which tests \*888 or examinations were made by or at the request or direction of a public servant engaged in law enforcement activity or which was made by a person whom the prosecution intends to call as a witness at trial, or which the People intend to introduce at trial.”

[CPL § 240.40\(1\)](#) provides, in pertinent part, that:

“Upon motion of a defendant against whom an information charging a... misdemeanor is pending, the court in which such accusatory instrument is pending may: (c) order discovery with respect to any other property, which the people intend to introduce at the trial, upon a showing by the defendant that discovery with respect to such property is material to the preparation of his or her defense, and that the request is reasonable.”

Discovery in criminal cases in New York State is governed by statute (see *People v. Colavito*, 87 N.Y.2d 423, 639 N.Y.S.2d 996, 663 N.E.2d 308). However, with respect to [VTL § 1192](#) prosecutions, the list of discoverable items in [CPL § 240.20\(1\)\(k\)](#) is not an exhaustive list inasmuch as “the statute expressly placed the word ‘including’ immediately prior to listing all discoverable material,” Peter Gerstenzang & Eric Sills, *Handling the DWI Case in New York*; § 20.40 (2016–2017 ed). Indeed, in *People v. Robinson*, *supra*, the appellate court held that “case law has recognized defendant's right in prosecutions charging driving while intoxicated and related offenses, to disclosure of various documents not expressly listed in [CPL § 240.20](#)” (see also *People v. Alvarez*, 70 N.Y.2d 375, 521 N.Y.S.2d 212, 515 N.E.2d 898; *People v. Corley*; 124 A.D.2d 390, 507 N.Y.S.2d 491; *People v. English*, 103 A.D.2d 979, 480 N.Y.S.2d 56). As such, documents not expressly listed under [CPL § 240.40\(1\)\(k\)](#) but recognized as discoverable include documents relating: to ampoule analysis and simulator solution analysis (see *People v. Crandall*, 228 A.D.2d 794, 644 N.Y.S.2d 817); simulator maintenance log for the Intoxilyzer unit used (see *People v. DiLorenzo*, 134 Misc.2d 1000, 513 N.Y.S.2d 938); records that a machine may not have been operating properly (see *Matter of Constantine v. Leto*, 157 A.D.2d 376, 557 N.Y.S.2d 611); a breathalyzer operator's permit, weekly test record, state police rules and regulations, the operational checklist and calibration reports of the Intoxilyzer machine (see *People v. Erickson*, 156 A.D.2d 760, 549 N.Y.S.2d 182).

Further, in *People v. Ramrup*, 45 Misc. 3d 1222(A), 5 N.Y.S.3d 329, the court in granting defendant's motion to compel discovery, ordered the People to produce to defendant “any and all documents relating to the preparation and testing of the simulator solution, the forensic method utilized in the production of the simulator solution, the standard operating procedure for the production of all simulator solution utilized in defendant's testing, and the actual chromatograms of the headspace gas chromatography” (see also *People v. Torre*, 48 Misc.3d 745, 11 N.Y.S.3d 445).

Additionally, the Appellate Division, Second Department in *Matter of Singas v. Engel*, 155 A.D.3d 877, 63 N.Y.S.3d 695 recently held that trial the court “did not act without jurisdiction or in excess of his authority” when it ordered the People to provide headspace gas chromatography data to the defendant in a VTL § 1192 prosecution.

Based on the foregoing, this Court rejects the People's narrow view that defendant is limited to discovery of the documents that they have disclosed to him. Although, it is factually correct that the headspace gas chromatography machine was not used to analyze defendant's breath sample, significantly, it was utilized to test the accuracy of the simulator solution \*889 which is vital to the “inspection, calibration and repair” [CPL § 240.20(1)(k)] of the Intoxilyzer machine itself. Thus, defendant's demand is clearly “material to the preparation of his... defense and... is reasonable” [CPL § 240.40(1)(c)].

Discovery of the data related to the preparation and testing of the simulator solution is particularly important in the instant matter inasmuch as the Intoxilyzer machine registered a reading of defendant's blood alcohol content to be .10%, which is only .02% above the legal limit under VTL § 1192(2). Therefore, logically, if the simulator solution used in this matter was not measured and tested properly, such procedural defects could have a considerable impact on the reliability of defendant's Intoxilyzer breath test result. Since evidence of a defendant's blood alcohol content is often dispositive at trial in Driving While Intoxicated cases defendant should not be limited to conclusory reports regarding the preparation and testing of the simulator solution. Rather, he is entitled, through pre-trial discovery, to all backup documents related thereto so that defense counsel has a full and fair opportunity to challenge such evidence at

trial (see *People v. Torre*, supra; *People v. Brown*, supra); (see also *People v. Baghai-Kermani*, 84 N.Y.2d 525, 620 N.Y.S.2d 313, 644 N.E.2d 1004; *People v. Flores*, 84 N.Y.2d 184, 615 N.Y.S.2d 662, 639 N.E.2d 19; *People v. Banch*, 80 N.Y.2d 610, 593 N.Y.S.2d 491, 608 N.E.2d 1069; *People v. Young*, 79 N.Y.2d 365, 582 N.Y.S.2d 977, 591 N.E.2d 1163).

Moreover, in considering defendant's discovery motion this Court is cognizant of the New York Court of Appeals admonition that “[the] trial of a criminal charge should not be a sporting event...[b]roader discovery enables the defendant to make a more informed plea decision, minimizes the tactical and often unfair advantage to one side, and increases to some degree the opportunity for an accurate determination of guilt or innocence,” *People v. Copiccotto*, 50 N.Y.2d 222, 428 N.Y.S.2d 649, 406 N.E.2d 465.

Finally, contrary to the People's contention, defendant's discovery request is neither overbroad or extensively burdensome since it is confined to the records of a single lot number of simulator solution and pertains to certified reports produced on three specific dates (see *People v. Torre*, supra; *People v. Brown*, supra; *People v. Ramrup*, supra).

Accordingly, pursuant to CPL § 240.40(1)(c), defendant's motion to compel discovery is granted. The People are directed to disclose to defendant and make available for inspection all documents related to the preparation, testing and analysis of Simulator Solution, Lot Number 16380, including the chromatograms of the headspace gas chromatography made in connection with the issuance of certified reports dated December 14, 2016, March 23, 2017 and April 5, 2017.

Order entered accordingly.

This constitutes the decision and order of the Court. The Clerk of the Court is directed to forward a copy of this order and memorandum to the attorney for the defendant and the District Attorney.

#### All Citations

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