STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Iris Z. Campos,

Petitioner,

vs

FINAL, TERMINAL, ULTIMATE, LAST, CONCLUSIVE ORDER (UNTIL THE NEXT) IN IMPLIED CONSENT PROCEEDING

FILE # 27-CV-08-16099

Commissioner of Public Safety,

Respondent.

Once upon a time, (what follows is, at least in part, hypothetical), an enterprising inventor, whom we shall call Professor Gearloose, devised an ingenious machine which, when attached to the extremities of a suspected malefactor, would pronounce him (or her) guilty (or not) of the alleged offense. This concept appealed to law enforcement agencies. The legislature, always quick to identify and promote efficiency, detected the potential budgetary benefits of this time-saving and resource-sparing approach, and adopted legislation approving and facilitating its use. The courts, too, were not blind to the advantages of this approach, and readily abetted the campaign to make what might be called the Gearloose index easily admissible and virtually conclusive evidence. One particularly ingenious aspect of the program was the notion that the machine itself was designed and largely permitted to determine whether it was operating properly. Thus the machine was always right – if it said it was. Moreover, to shield it from cynical claims it had not properly analyzed the emanations it captured from the body of the accused, and

to prevent unseemly second-guessing, the Gearloose Culpability Gauge was designed to destroy the samples it analyzed so they could not be re-tested.

The accused was, of course, left with certain, generally peripheral and often illusory, methods to challenge the machine's verdict – the preliminary events leading to administration of the test were prescribed and enforced; warnings of the consequences of the suspect's reaction to the "request" to submit to testing (fairly summarized as: You're probably damned if you do and certainly damned if you don't) were required and enforced; a right to a lawyer was even clumsily engrafted on to the state Constitution (a "limited" constitutional right, virtually an oxymoron, and mostly meaningless in practice – partly because lawyers were forbidden, remarkably, to advise clients not to submit to testing), and so on.

Once upon a time, too, the law said (and still says, but doesn't mean) that a driver was entitled to a hearing within sixty days, absent extraordinary circumstances, to determine whether the Gearloose box's revocation of his (or her) driving privileges was valid.

And so, for many years, a mostly undisturbed stream of cases involving allegedly drinking drivers made its way through our courts and administrative agencies, thanks in no small part to Professor Gearloose and his marvelous invention, on the considerable income from which he had long since retired to a life of accolades and supposedly abstemious luxury.

Then, one dark day a lightbulb came on in the head of a lawyer, possibly one frustrated by repeated defeats to Gearloose and company in efforts to rescue clients from revocation and incarceration: He asked himself: "How does this thing work?"

He meant: "How, exactly, does the Gearloose box analyze and report the samples it takes? And, more importantly perhaps, how do we know it does this reliably?"

To the second question, of course, the Gearloose establishment had long since replied: Because it says so. But, the lawyer wondered, if that is so, how do we know it is right when it says it is right? Which brought him back to the first question: How does this work?

Cursory research informed him that the reading announced by a Gearloose box resulted ultimately from a series of operations (mysterious to the layperson, but understandable enough to the scientifically adept) directed in all significant respects by a computer program or "source code" upon the validity of which the entire operation depended (assuming the physical components of the device were flawless). So naturally enough the lawyer decided to have a look at the source code.

And this is where the plot thickens, (if we may be permitted to prolong our use of the comic book and pulp fiction as stylistic models).

Our lawyer – call him Pettifog – asked the prosecutor of the client who was next in line to be led to slaughter for the source code. The prosecutor – Ms. Torquemada – said: "The what?" "The source code. The software that makes the Gearloose box go." "Oh. That source code. I don't have it." "Where is it?" "I don't know." "Well, I want it." "What for?" "None of your business." "File a motion." "I think I will." "Good luck with that."

And he did.

With which we begin at last to approach the point of the present order.

As is so often the case with well-wrought melodrama, little did this innocent lawyer and his interlocutor know what horrors they were about to unleash.

After an initial exchange of paper and further discussion the two appeared before a judge in a hearing that may be summarized thus: Pettifog: I am entitled to the source code. Torquemada: He's not. The Court: You're not.

But by now the lawyer had persuaded himself he was on to something, and in other cases he tried again, and again. (There is rumored to be a sinister cabal of defense lawyers who meet in secret places at odd hours to exchange nefarious schemes, which may explain why other lawyers soon began to make similar demands and motions.)

Eventually some judge somewhere granted one of the lawyer's motions. "Turn over the source code," the judge said.

"I haven't got it," the prosecutor said.

"Oh. Where is it?"

"The Gearloose Corporation has it."

"Oh. Did you ask them for it?"

"No."

"Do so."

So the prosecutor contacted Gearloose, Inc., and reported back to the judge.

"Well?"

"I asked for the source code."

"And?"

"They told me to get lost."

"Oh."

The judge (unlike many other judges) nevertheless ordered the source code disclosed, by a certain day, failing which the Gearloose reading would be excluded from the proceedings.

This was not a good sign for the prosecutor, who may well have had a clandestine meeting with her colleagues at some odd hour at some secret place.

Meanwhile, similar motions were appearing like an infestation in various courts, and judges were issuing orders of various kinds and qualities, and doing a good deal of unproductive grumbling. Prosecutors and defense lawyers naturally began removing judges who were known to have granted or denied these motions, adding scheduling problems and delays. In due, deliberate course, the appellate courts became involved and, to the consternation of many judges and prosecutors, they affirmed the order that the source code should be disclosed. (The grumbling and consternation were not shared by the comparatively few judges who had granted such motions, partially perhaps by a few who had both granted and denied them. The vindicated judges felt vindicated and were tempted to say "I told you so," but mostly refrained despite the absence of recognition from colleagues that they had been correct all along.)

Also meanwhile, the prosecutors, in the dilemma of not having the actual source code they were ordered to produce and therefore not having an admissible Gearloose reading, undertook at last to sue the Gearloose corporation, claiming their contract when they purchased the costly devices entitled them to the source code. This federal lawsuit was eventually settled with a complex document, having no necessary effect at all on the state cases (and they are all state cases) where the device was in dispute, which purported

to allow parties access to the source code on certain peculiar conditions, and in practice at very considerable expense.

Meanwhile, some trial courts (including the largest in the state), had undertaken a number of steps to attempt to forestall their total submersion in source code litigation. The largest district, in blatant defiance of the legislation requiring implied consent hearings within sixty days, had earlier directed that all these hearings be delayed until after related criminal cases were resolved, in the not unfounded hope that most of the unpopular implied consent cases would go away. Once it became clear the source code must be disclosed, and that when this was done it would take time for those to whom it was disclosed to analyze it, this court began scheduling all such cases for an arbitrary date far in the future – a chasm, threatening to become a black hole, into which untold hundreds, even thousands, of cases are now being routinely tossed. Schemes are afoot to avoid actual litigation of these cases, or of more than one or a handful.

From a system which at the outset had a reasonably workable and reasonably uniform guarantee that a driver would have a final decision (barring appeal) upon the status of his driver's license in two or three months, we now have a nightmare where thousands of drivers's license privileges are in a court-created limbo for many months, even years. None of this was necessary, and no one knows how it will play out.

There are certain principles of timing which courts are usually anxious and even aggressive in applying, the hoariest and most time-honored of which is: justice delayed is justice denied. Like any cliché it is not always true or always wisely applied, but like any cliché it has a core of truth and is not a bad general guideline. It is embodied explicitly in both the rules of civil and criminal procedure, whose proclaimed purposes include,

respectively, the "just, speedy, and inexpensive determination of every action," (M .R. Civ. P., Rule 1), and the "elimination of unjustifiable expense and delay." (M. R. Crim. P., Rule 1.02). It is explicit in the statute which purported to guarantee an implied consent hearing in sixty days. It is in the constitutional right to a speedy trial, and the doctrine of laches. It is the reason judges must decide cases in ninety days, or lose their pay. It is the subject of countless memorable pronouncements in law, literature, and lore. Justice Jackson, for example, to choose only one, said in a case involving a law firm, but in terms that should, I think, equally (if not a fortiori) apply to a court:

> I doubt if any court should be a party to encouraging the accumulation of more business in one law office than it can attend to in due time.
>
> *Knickerbocker Printing Corp. v. U.S.*, 75 S.Ct. 212 (1954).

And yet that is exactly what we have done and are in the process of doing. It is not necessary or desirable. The solution, for many of the cases at least, is and has been obvious and simple.

1. These source code motions are mere discovery motions, mere trial preparation.

2. Whether the motion is granted or denied, the ruling does not prevent the case from otherwise proceeding:

A – If granted, the prosecution can proceed with whatever other evidence it has, or dismiss; if the driver successfully obtains delay to analyze the source code, (not necessarily a foregone development) he will waive objections to delay.

B – If denied, the case can go to trial, with or without an Intoxilyzer reading.

3. Every case involves an individual litigant, and several cases involve victims, and they also involve a concern of the public, all of whom have a general interest in reasonably prompt resolution.

4. All of these cases, civil and criminal, are begun by the state, which when it initiates a case should be prepared to proceed with it with dispatch, absent extraordinary circumstances beyond its control.

5. This means that, ab initio, if it chooses and intends to offer an Intoxilyzer reading in litigation it should be prepared immediately to make the source code available.

6. The operative point is not whether the prosecution had or has the source code. The point is that it should have had it before it offered to use the product of the device to which it applies. The point is not that the prosecution did or does not have the source code, but that the defense does not.

7. Production of it is or should be, in my judgment, simply part of the foundation for the admissibility of the reading, produced immediately, without cost.

8. The state cannot by mere inaction deny the other party what amounts to an essential part of an offered exhibit.

9. Nor can the state contract away its right to this, and thus deny it to the other party.

10. Nor can the manufacturer (not even a party in any of these driving cases) withhold the item, and thus provide the state an excuse for not producing. If the manufacturer refuses or fails to produce it, the result should be simply – and promptly – to exclude the reading and move on. There would be no deliberate withholding by the

state, but that does not matter, since the deprival has the identical effect on the integrity of the litigation.

Although this order need not and does not go so far, it seems to me to be so obvious that the admissibility of an Intoxilyzer reading at trial or hearing should depend upon immediate availability of the source code (to determine whether the machine works, and therefore yields a reliable result), and given our now demonstrated ability and willingness to delay thousands of cases beyond any conceivably reasonable time, planting thereby the seeds of a disastrous congestion next spring or next summer or next fall of cases in courts already under-resourced and with other sometimes important things to do, I believe no Intoxilyzer reading should be admissible unless either at the time the test was administered, or at the latest when the case was filed with a court, the source code was made immediately available in usable electronic form without cost. The present debacle appears to have been created solely by the manufacturer's or its agents's or assigns's unwillingness to produce the code, for financial, competitive reasons, unrelated to the quality of justice that may flow from use of the evidence, and that quality of justice (including the reasonable speed of justice) should be the courts's prominent if not only concern.

It makes no difference, in this respect, whether it is found after examination that the source code is perfect, disastrously flawed, or – as seems most probable – something in between. Courts simply must take control of the business before them, and while agreement among parties is often a desirable first and sometimes final method of determining a case's progress and schedule, it is the courts, honoring of course the legitimate commands of constitutions, statutes, rules and other recognized guidelines,

who must see that justice is dispensed in a fair and timely way, even if necessary without the agreement of prosecutors, defense lawyers, and private corporations. We are instead in the midst of an impending and self-augmenting crisis largely avoidable and largely of our own making.

The world will not end if this problem is not promptly and decisively solved; the world will not end if some drivers retain or retrieve their driving privileges as a windfall , or on a technicality, or a loophole; nor will the world end if some drivers lose their licenses unfairly; these things happen every day in our imperfect system of justice. But that system of justice – much of our world when we speak as judges and lawyers – is diminished and its quality compromised, not only for the drivers directly involved, and their prosecutors, but for other unrelated litigants whose cases are delayed and made more expensive.

In this district we are now scheduling all implied consent cases involving source code orders for March 2010, a date likely to be extended; even a single hearing on the significance of the source code will take appreciable more time, and its result will be reviewed by the Court of Appeals and in all likelihood in the Supreme Court – another year perhaps. At the end of which – what? Many hundred or a few thousand drivers will learn that they have lost their driving privileges, or have retained or regained them, because of conduct years ago. Or, given the anticipatable argument that in the former kinds of cases the delay is unfair, will some kind of amnesty be devised? And by whom? And would this be blanket amnesty, or piecemeal, depending on circumstances, such as losses of jobs because of inability to drive, which could, of course, involve untold

numbers of further hearings. And what will all this have accomplished? How will the interests of the parties or public be served?

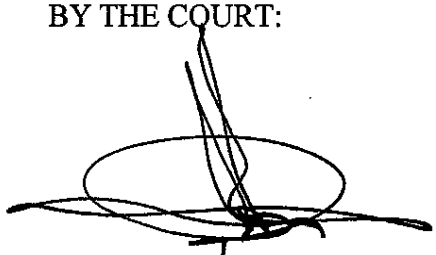
In the present case I ordered the source code produced by a certain date or the reading would be suppressed. It was not produced. The intervening federal settlement does not change the original order, nor did my subsequent order do so (except in giving petitioner the option to delay resolution of the case pending analysis of the source code, which petitioner has not requested), nor has there been any appeal, nor has any other development affected that order.

After an exchange of correspondence, counsel and I had a telephone conference on November 19, 2009, at which it was agreed I would issue a final order without a further court appearance.

The original order is reaffirmed. The Intoxilyzer is suppressed. The revocation of Petitioner's driving privileges is rescinded.

IT IS SO ORDERED.

BY THE COURT:



Dated: November 20, 2009

Jack S. Nordby
Judge of District Court