



State v. Marino Finds No Error in Denying Defendant Source Code

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The North Carolina Court of Appeals decided its first [breath-testing source code](#) case yesterday. The court in [State v. Marino](#) affirmed the trial court's determination that the defendant had no right to examine the source code for the Intoximeter EC IR II, the instrument used to analyze his breath alcohol concentration after he was arrested for impaired driving.

Facts.

Jory Marino was pulled over by a Pinehurst police officer for speeding in March 2009. He subsequently was arrested for impaired driving and submitted to a breath test on the Intoxilyzer EC/IR II at the Pinehurst Police Department. His first and second breath samples registered alcohol concentrations of .11 and .10, respectively.

Procedural History.

According to Marino's brief to the court of appeals, he pled not guilty in district court "but stipulated sufficient evidence to adjudicate guilt," and was found guilty. Marino then immediately appealed to superior court for trial de novo. See [G.S. 15A-1431\(b\)](#). In superior court, Marino filed a motion seeking an order that the Intoximeter source code was material, relevant and necessary for his defense. The purpose of this latter motion apparently was to facilitate issuance of a subpoena ordering Intoximeters, Inc., a Missouri company, to produce the source code. The State opposed the motion. The trial court preliminarily ordered the State to provide the defendant with "all downloaded and non-downloaded data in its possession that was generated from [the] Intoximeter [used to analyze defendant's breath.]," and ultimately denied the defendant's motion for an order finding the Intoximeter source code material.

The defendant was convicted at trial. The jury returned a special verdict finding the defendant guilty under both the appreciable impairment and per se impairment prongs of [G.S. 20-138.1\(a\)](#).

Defendant appealed, arguing that, among other errors, the trial court erred in denying his motion to examine the Intoximeter source code.

Holding.

No error, said the court of appeals. The appellate court rejected Marino's argument that he was entitled to the source code under *Brady v. Maryland*, 373 U.S. 83 (1963). The court reasoned that the defendant failed to show the source code to be favorable to his case or material to guilt or punishment. Instead, the court noted that the defendant sought to examine the source code "in the hopes that it will be exculpatory in nature or will lead to exculpatory material." Given that the defendant failed to show discrepancies in the Intoximeter results, the court characterized the materiality of the source code as "speculative at best." Moreover, given that the defendant was convicted under both prongs of impairment, he failed to show a reasonable possibility that having the source code would have affected the outcome of his case. The court also rejected the defendant's argument that he had a Sixth Amendment right to examine the Intoximeter source code, declining the defendant's invitation to so extend the Supreme Court's confrontation clause

jurisprudence.

The court of appeals then addressed a defendant's right to discovery generally when a misdemeanor conviction is appealed for trial de novo in superior court. The court began by noting that, with the exception of *Brady* material, a defendant has no constitutional right to discovery in criminal cases. Instead, the discovery right is purely statutory. The [discovery provisions of the Criminal Procedure Act](#) apply only in cases within the original jurisdiction of the superior court. See [G.S. 15A-901](#). Because [original jurisdiction for misdemeanor criminal actions](#) lies in district rather than superior court (subject to a [few exceptions](#) not relevant here), a defendant charged with driving while impaired or any other misdemeanor offense is not entitled to statutory discovery. The court rejected the defendant's argument that his due process rights were violated by the provisions of G.S. 15A-901 that limit discovery to cases originating in superior court.

For its part, the State sought a ruling that the trial court exceeded its authority and erroneously granted discovery when it ordered the State to provide all data generated by the Intoximeter on which the defendant was tested. The court refused to so hold on the basis that the State "voluntarily complied" with the order.

Source Code Significance.

Marino makes clear that the Intoximeter source code is not material and exculpatory in every case in which a defendant is charged with impaired driving based on a breath-alcohol concentration of .08 or more. The court's holding does not, however, foreclose a defendant from establishing that such source code is material and exculpatory and thus discoverable under *Brady* by making some additional showing. For example, a defendant who demonstrates otherwise unexplained discrepancies in the results of multiple breath tests or a discrepancy between blood and breath testing of the same individual near the same point in time, might be able to establish a constitutional right to the source code. Likewise, a defendant charged with impaired driving in a case in which she allegedly refused testing might, upon a foundational showing of inconsistent outcomes, be able to establish a right to the source code. *Cf.* In re Source Code Evidentiary Hearings in Implied Consent Matters, 816 N.W.2d 525 (Minn. 2012) (discussed [here](#)).

Discovery in Misdemeanor Cases.

Defendants not entitled to statutory discovery (that is to say, defendants charged with misdemeanors in district court) frequently use the subpoena power in [G.S. 15A-802](#) to obtain documentary evidence in advance of trial. Those subpoenas sometimes are issued to law enforcement agencies, seeking items like the videotaped recording of a traffic stop. Unlike the proprietary source code sought by *Marino*, which apparently was exclusively possessed by the third-party manufacturer, this is the type of information that, were the case a felony, would be discoverable.

The *Marino* court emphasized that defendants charged with misdemeanors are "not entitled to statutory discovery," and have "no statutory right to pretrial discovery." Yet application of G.S. 15A-802 in the manner mentioned above effectively affords a defendant discovery, albeit by a different name. *Marino* dodged the issue of whether a defendant might obtain otherwise undiscoverable information through a different avenue, refusing to hold that -- or even analyze whether -- the trial court erred by ordering the State to produce data from the Intoximeter on which the defendant was tested.

Since *Marino* doesn't clarify the relationship between the subpoena power and the discovery rules, I'll ask you practitioners to tell me how it works in the real world. Does the subpoena power effectively provide discovery in misdemeanor prosecutions?