

Justices hand lawyers the bill for key test of new DWI device

Tuesday, May 01, 2007

BY RICK HEPP
Star-Ledger Staff

The state Supreme Court yesterday gave defense attorneys challenging the reliability of a new computerized device in drunken-driving cases the chance to examine the machine's software -- but only if they want to pay for it themselves.

Defense attorneys have been fighting for more than two years to review the source code behind the Alcotest 7110, a fully automated device connected to a computer and used by police in 17 counties in place of the older Breathalyzer.

But the defense attorneys decried the court's order yesterday because it puts the burden of proof and cost on them and their clients.

"It's outrageous to shift the burden to the defendants to pay for their own prosecution," said Evan Levow, one of the lead attorneys in the case. "We asked for this to be provided 2 1/2 years ago and the state and the manufacturer refused to do so. It is probably the greatest constitutional violation yet in this litigation."

The defense lawyers have seven days to find an independent software house to perform the review if they decide to proceed, the Supreme Court wrote in the order. If they go forward, Draeger Safety Diagnostics Inc., which manufactures the machine, has seven days to hand over the source code or to object to the defense's choice of a software house.

In that event, the special master who conducted a year-long inquiry into the Alcotest, which included 41 evidentiary hearings, can appoint a software house, according to the order. The special master, retired Appellate Division Judge Michael Patrick King, found the Alcotest is superior to the Breathalyzer and its results should be admissible evidence in court.

The software house has 90 days to hand its findings over to King, according to the order.

Attorney General's Office spokesman Peter Aseltine declined to comment on the order, which comes more than three weeks after the Supreme Court heard oral arguments on the reliability of the Alcotest.

Draeger had resisted releasing the software to the defense for fear of revealing trade secrets, but reached an agreement with them in December to allow for an independent software house to review it.

During oral arguments, defense attorneys contended the review of the source code was the only way to verify the state's claim that the machine can be trusted.

But the Attorney General's Office told the court that another test was not needed on the Alcotest, which has undergone multiple reviews in the last five years by various courts and internal and outside experts.

Rick Hepp may be reached at rhepp@starledger.com or (609) 989-0398.