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Cronkite v. State

Supreme Court Holds That A Trial Court's Refusal To Find An Out-Of-State Witness From CMI, Inc. "Material" Was Not An Abuse Of Discretion Because The Defendant Failed To Show A "Logical Connection" Between The Source Code Of The Intoxilyzer 5000 And Facts Supporting The Existence Of An Error In His Evidential Breath Test

In *Cronkite v. State*, S12G1927 (July 1, 2013), the Supreme Court of Georgia affirmed a decision of the Court of Appeals upholding a trial court determination that evidence relating to the source code of the Intoxilyzer 5000 evidential breath testing instrument was not material within the meaning of the Uniform Act to Secure the Attendance of Witnesses from Without the State (O.C.G.A. § 24-10-90, *et seq.*, since recodified at O.C.G.A. § 24-13-90 *et seq.*). The record showed that at the Uniform Act hearing to determine the materiality of the source code evidence, the defendant introduced the testimony of an expert witness (found to be credible by the trial court) who could only speculate as to the existence of errors in the code. Furthermore, despite a stipulation that the defendant had dental implants and a retainer in his mouth at the time of the breath test, the defense did not introduce evidence indicating that mouth alcohol was actually present when the test occurred, and did not point to any other evidence supporting the existence of another potential error in the defendant's breath test.

The Court of Appeals upheld the trial court's finding of non-materiality, reasoning that the defense was required to establish "some fact indicating the possibility of an error in this case," because "[s]ome evidence of such an error [in the source code] is the consequential fact that would render testimony regarding the source code logically connected to the issue presented here." *Cronkite v. State*, 317 Ga.App. 57, 60 (2012). After granting *certiorari*, the Supreme Court affirmed the holding of the Court of Appeals, but disagreed with its analysis of the "consequential facts" that would render the source code evidence material. According to the Supreme Court, "it cannot be the case that a defendant must be able to show the possibility of an error in the source code itself in order to compel testimony regarding the very same source code. Rather, the 'consequential facts' of this case deal with whether the Intoxilyzer 5000 may have generated erroneous results from Cronkite's breath test."

Turning to these pivotal "consequential facts," the Supreme Court noted that Cronkite presented no evidence that mouth alcohol was actually present during his test such that the Intoxilyzer should have generated an error message that it did not generate. Further, the Court held that Cronkite failed to "point to any other evidence of *facts* supporting the existence of a possible error in his specific breath test results such as discrepancies in the operation of the Intoxilyzer 5000 machine itself." (Emphasis in original). Thus, the Court held that the defendant failed to establish the logical connection between alleged errors in the source code and the consequential facts of his

case that would have made evidence regarding the code “material.” Therefore, the Supreme Court agreed with the Court of Appeals’ determination that the trial court did not abuse its discretion by declining to issue a certificate of materiality. In an important footnote, the Supreme Court also stated that because the trial court did not abuse its discretion in finding that the out-of-state witness was not material, Cronkite’s argument that he was denied his right to compulsory process was “entirely without merit.”