DATE FILED: December 20, 2016 5:05 PM FILING ID: 751F014FAA7F7

|  |  |
| --- | --- |
| **COUNTY COURT**COUNTY OF GILPIN, COLORADO2960 Dory Hill Road, Suite 200 Black Hawk, CO 80422 | CASE NUMBER: 2016T169 |
| **Plaintiff**: PEOPLE OF THE STATE OF COLORADO | ▲ COURT USE ONLY ▲ |
| v. |  |
| **Defendant:** ROBERT FRIEDLANDER | Case Number: 16T169 |
|  |
| ATTORNEYS FOR THE DEFENDANTFife Luneau, P.C. Charles Fife, #17799Daniel Luneau, #43639 | Div.: 1 |
| 1873 S. Bellaire, Ste. 200Denver, CO 80222 |  |
| Ph: (303) 757-2200Fax: (303) 756-6160 |  |
| **MOTION TO SUPPRESS BREATH TEST RESULT DUE TO FRAUDULENT CERTIFICATION** |

COMES NOW the Defendant, above named, by and through his attorneys, Fife Luneau, P.C., and moves this court for an Order denying the admission of Mr. Friedlander’s I-9000 breath test result at trial. As grounds, Defendant states as follows:

1. On or about May 30, 2016, Trooper Sullivan of the Colorado State Patrol arrested Mr. Friedlander for driving while ability impaired and advised him of the Colorado express consent law. Mr. Friedlander submitted to a breath test.
2. Theorizing that the result of this breath test is incriminating, the prosecution seeks to introduce the breath evidence at trial, and to use that evidence to convict and punish Mr. Friedlander.
3. In discovery, the prosecution has provided evidence purporting to be a certification of the Intoxilyzer 9000 (I-9000) instrument that the government used to analyze Mr. Friedlander’s breath alcohol content. *See Exhibit A.*
4. The certification in question was delivered by the Colorado Department of Public Health and Environment (CDPHE) to the District Attorney, just as has occurred in thousands of other criminal cases.
5. The certification in our case features the state seal of Colorado and it attests that the Intoxilyzer 9000 device with serial number 90-000318 is certified and approved for evidential breath alcohol testing (EBAT) between the dates 03/17/16 and 03/17/2017.
6. The certification bears the signature of Laura Gillim-Ross, Ph.D, in the capacity of director of the CDPHE’s laboratory services division.
7. Yet defense has learned that Laura Gillim-Ross did not actually approve, superintend or even attest certification of the Intoxilyzer device for the period relevant to Mr. Friedlander’s case.
8. The defense has learned that Dr. Gillim-Ross left her position as the head of the entire Laboratory Services Division more than a year before the Defendant took a breath alcohol test.” *See Exhibit B.*
9. Having left her position at the laboratory services division almost a year before Mr. Friedlander took a breath test on May 5, 2016, Laura Gillim-Ross did not and could not oversee or even superintend or certify the I-9000 device used to test Mr. Friedlander’s breath.
10. The certification bearing her signature and attestation is fraudulent.
11. To certify means:

Certify, vb. 1. To authenticate or verify in writing. 2. To attest as being true or as meeting certain criteria. . . .

*Black’s Law Dictionary*, p. 93 (3d Pocket Ed. 2006).

1. A certification means:

Certification, n. 1. The act of attesting. 2. The state of having been attested.

3. An attested statement *Id*.

1. The document styled as a certificate misleads by asserting that Laura Gillim-Ross has attested and certified I-9000 # 90-000269 for use at the time of Mr. Friedlander’s test, when she has not. The document styled as a certificate misleads by asserting that Laura Gillim-Ross was the director of the CDPHE at the time of its making, when she was not. The document styled as a certificate misleads by asserting it is a duly executed official record of the CDPHE, when it is not.
2. Thus, what the government has presented through discovery as a certification is fraudulent and the precise antithesis of a certification; it is an affirmative and material misrepresentation.
3. Fraudulent certifications presented to the judiciary are not such a frivolous matter.
4. It is unprofessional conduct for lawyers such as a prosecuting attorney to perpetrate a fraud on the court “by knowingly presenting perjured testimony or other false evidence.” *People v. Schultheis*, 638 P.2d 8, 11 (Colo. 1981).
5. The defense has also learned that in 2013, the CDPHE sought to import an entirely new fleet of ethanol breath testing devices into Colorado’s law enforcement system, by replacing Intoxilyzer 5000 devices with Intoxilyzer 9000 devices.
6. Upon procuring some 162 of the new Intoxilyzer 9000 devices, the CDPHE needed to bring them into commission through testing and validation of each machine and its software, prior to the planned roll-out date in April of 2013.
7. For each of the 162 devices that was commissioned for service in EBAT testing throughout the state, the CDPHE issued “Instrument Performance Reports” listing the date on which the testing and validation procedures had been conducted, and the name of the technician who had conducted it, as indicated by the technician’s ID number.
8. Such “Instrument Performance Reports” have been included with the CDPHE’s written certifications when the CDPHE reported chemical breath results to district attorneys throughout the state in preparation for criminal litigation.
9. The technician’s ID number listed on all of these “Instrument Performance Reports” is “467497,” which represents technician Michael Barnhill. *See Exhibit C.*
10. Michael Barnhill, however, conducted no more than a small fraction of those 162 testing and validation procedures, twelve or less. *See Exhibit C.*
11. Despite what is represented in the CDPHE’s certifications, Michael Barnhill did not witness or even superintend the testing and validation of the other 150 devices. *See Exhibit C.*
12. The government’s certification that Michael Barnhill performed validation tests on the 162 Intoxilyzer 9000 devices prior to the roll-out in April of 2013 is fraudulent, just like the signature and attestation of Laura Gillim-Ross. *See Exhibit C.*
13. Due to this willful fraudulence, it is impossible to establish which machines were tested and validated by whom, or whether in fact they were tested or validated by a qualified person, or whether they were tested or validated at all.
14. Pursuant to 42-4-1301(6)(f), strict compliance with the Department of Health rules and regulations prescribed by the department of public health and environment shall not be a prerequisite to the admissibly of test result at trial unless the court finds that the extend of noncompliance with a board of health rules has so impairment the validity and reliably of the testing method and the test result as to render the evidence inadmissible. In all other circumstances, failure to strictly comply with such rules and regulations shall only be considered in the weight to be given to the test results and not to the admissibility of such test results (emphasis added).
15. Defense counsel anticipates that, in their objection to this motion, the People will point to *People v. Bowers*, in which the Supreme Court of Colorado stated:

We hold that the results of chemical testing of a driver’s breath for alcohol content may be admitted into evidence so long as the proponent of such evidence presents foundational evidence adequate to satisfy the trial court that, notwithstanding technical noncompliance with a State Board of Health rule, the testing method, procedures, and results were sufficiently valid and reliable to be admitted.

*People v. Bowers*, 716 P.2d 471, 472 (1986).

1. Specifically, Defense Counsel anticipates that the People will point to *Bowers* and argue that, in spite of the I-9000’s lack of certification to perform Mr. Friedlaner’s breath test, the results of the test should be admitted to the jury, as the I-9000’s lack of certification goes to the weight of the results it produced, not their admissibility.
2. Such an argument would be without merit.
3. For one, the People will be unable to present the necessary foundational evidence to show that the testing results were sufficiently valid and reliable.
4. As stated above, the certificate used to attest to the reliability and validity of breath test results produced by the I-9000 in question (*Exhibit A*) was not signed by the person whose signature appears on the page. This renders that certificate, the I-9000, and any EBAT results it produces inadmissible.
5. Secondly, *Bowers* goes on to state:

Before an EBAT result is offered as evidence at trial, the prosecution must establish that the “testing devices were working properly and that such testing devices were properly operated.” C.R.S. § 42-4-1301(6)(c). Furthermore, a party who offers the results of a chemical test into evidence at trial is required to lay foundation to show the test was administered in accordance with the Colorado Department of Public Health and Environment (“CDPHE”) rules and regulations (emphasis added).

*People v. Bowers*, 716 P.2d 471, 473 (Colo. 1986).

1. Again, if this matter were to proceed to trial, the People would be unable to lay such a foundation.
2. While the People will likely point to C.R.S. § 16-3-309(5), pertaining to the admissibility of lab test results, to get around the necessary foundational requirements, such an assertion is again without merit.

35. C.R.S. § 16-3-309(5) provides:

Any report or copy thereof or the findings of the criminalistics laboratory shall be received in evidence in any court, preliminary hearing, or grand jury proceeding in the same manner and with the same force and effect as if the employee or technician of the criminalistics laboratory who accomplished the requested analysis, comparison, or identification had testified in person. Any party may request that such employee or technician testify in person at a criminal trial on behalf of the state before a jury or to the court, by notifying the witness and other party at least fourteen days before the date of such criminal trial.

1. CR.S. § 16-3-309(5) does not, however, excuse the People from complying with either C.R.S. 42-4-1301(6)(f) or the Supreme Court of Colorado’s holding in *Bowers*.
2. *Bowers* goes on to state at page 473:

The traditional requirements for admitting the results of an Intoxilyzer or other form of breath test are the same as those required for other forms of scientific testing. The proponent of the evidence must lay a proper foundation showing that the testing method is reliable, that **the testing equipment is in proper working order when the test was administered**, and that the equipment was properly operated by a qualified person (all emphasis added).

1. Again, the People will be unable to show that the testing equipment (the I-9000) used in Mr. Friedlander’s case was in proper working order when his EBAT was administered. This is because the certificate that purported to attest to the I-9000’s validity and reliability (and therefore, permitted the results of the breath test to be introduced into evidence) had the signature of Laura Gillim-Ross on it. This signature, attached to *Exhibit A*, was placed there for the purpose of showing that the I-9000 and the results that it produced were valid, reliable, and therefore admissible. This presents a serious problem, as the signature of Ms. Gillim-Ross does not appear to have been placed there by Ms. Gillim-Ross, as she had long left the Colorado Department of Public Health and Environment when this I-9000 was certified. It is yet unknown how Ms. Gillim-Ross’ signature came to be on this certificate. It is known, however, that the lack of a valid signature on *Exhibit* A renders the results of Defendants I-9000 invalid, unreliable, and inadmissible.

WHEREFORE, Defendant requests that the Court enter an Order denying the admission of the I-9000 test result at Defendant’s jury trial.

DATED THIS 20th DAY OF December, 2016.

Respectfully submitted,

/s/Danny Luneau Charles L. Fife Daniel E. Luneau

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF MAILING

I do hereby state and affirm that a copy of the foregoing **MOTION TO SUPPRESS BREATH TEST RESULT DUE TO FRAUDULENT CERTIFICATION**

was served, via ICCES, this 20th day of December, 2016, to the following:

Office of the District Attorney County of Gilpin

**/s/Danny Luneau**