A defense lawyer's challenge to the scientific integrity of the machine that gauges sobriety could affect thousands

Holding breath tests accountable

By STEVE MCVICKER

One night last December, a Houston man drove away from a downtown bar and had an accident. After taking a breath test, he joined 98,000 other Texans charged that year with driving while intoxicated.

RESOURCES

Graphic: The Intoxilyzer 5000

The case's outcome was far from routine, however.

In September, a judge threw out the charge after a defense lawyer raised questions about not only the scientific integrity of the machine that gauges sobriety, but about the state's breath-alcohol testing program, too.

Those questions — sparked by the discovery that Texas disregards the manufacturer's guidelines for operating the machine — potentially could affect thousands of cases throughout the state as authorities and defense lawyers debate the credibility of breath tests.

Attorney Troy McKinney argued in a Harris County court last month that the program lacks adequate quality controls for calibrating breath-test devices, which compute a DWI suspect's breath-alcohol level.

Results are critical in determining whether a driver is legally drunk.

After hearing the argument, Court at Law Judge Jay Karahan refused to allow the head of the Houston Police Department breath-testing training program to testify against McKinney's client, and prosecutors dropped the charge.

The judge did not elaborate on his reasons, and declined a Houston Chronicle request for an interview.

McKinney, however, said the decision could have far-reaching impact.

"This has the potential to make other problems at the HPD crime lab look like small potatoes," McKinney said.

The crime lab's DNA division was closed in December 2002 after an outside audit revealed widespread problems. Since then, two men have been released from prison after the discovery that DNA testing in their cases was flawed.

Questions also have arisen about several other divisions of the lab, and the city has hired an investigator to conduct a comprehensive review.

So far, state and local officials continue to vouch for the breath-test program's integrity, although HPD crime lab director Irma Rios began investigating the judge's ruling after being contacted by the Chronicle.

"Any time forensic science that is being widely used throughout Texas, and outside Texas, is suppressed, it is cause for concern," Rios said.

The district attorney's office also is conducting a review.

"I'm looking at it and I want to know if I have to be concerned," said Assistant District Attorney Marc Brown, who heads the division of prosecutors who try DWI cases. "I don't foresee it being a big, big problem in other DWI cases."

Outside the guidelines

McKinney became suspicious after looking at the Intoxilyzer 5000, the machine used throughout Texas in a DWI program overseen by the state Department of Public Safety. He said records indicated the machine in his client's case was operated with its voltage meter registering a current outside that recommended by the manufacturer, CMI Inc. of Owensboro, Ky.

Questioned about the discrepancy in a hearing without the jury present, HPD breath test training chief Rick Viser, who also performs maintenance on the machines, testified that DPS guidelines on an acceptable voltage range for the Intoxilyzer differ from the manufacturer's — although he could not say exactly how.

Viser, who has a bachelor of science degree in biology from Prairie View A&M University, declined to speak with the Chronicle for this story. He took on more responsibilities in the HPD breath test program after the October 2003 ouster of Pauline Loule, who retired after being suspended as head of the crime lab's toxicology division, which tests blood and urine for alcohol and drugs.

The Police Department also briefly closed that division and announced a review of 1,300 cases, including evidence retests in nearly 400.

No voltage parameters

The DPS-approved version of the Intoxilyzer operator's manual is available on the agency's Web site, but it does not include voltage parameters. The department does not make the manufacturer's version, which includes voltage range recommendations, available to the public.

In November 2002, Richard Baxter, head of the DPS breath test program, asked CMI not to send operator manuals to Texas law enforcement agencies that buy the machine.

"We have our own operator's manual that is used exclusively in our program and we routinely discard the CMI manual when we unpack a newly arrived Intoxilyzer," Baxter wrote in a letter McKinney obtained through the Texas open records law.

In an e-mail to the Chronicle, DPS spokesman Tom Vinger wrote: "DPS follows the manufacturer's guidelines regarding the electrical parameter used in the Intoxilyzer."

But, he said, those guidelines can be modified under CMI's rules. He added that since "the (voltage) range is calculated by the Intoxilyzer based upon a number of internal factors," a set range cannot be definitively stated.

"This is why neither CMI nor the DPS publishes the (voltage) numbers for Intoxilyzers that are placed into service," Vinger wrote.

He adds that the voltage "target" range for the Intoxilyzer is between 3300 and 3600. However, according to HPD records presented as evidence in the September hearing, during 25 maintenance checks during a three-month period on the machine used to test McKinney's client, the readings fell outside what DPS says is the manufacturer's parameters.

CMI officials did not return calls from the Chronicle.

Al Eisele, head of breath-alcohol testing in North Carolina, which also uses the Intoxilyzer, said the manufacturer's voltage parameters should be nonnegotiable.

"As far as electronics are concerned, we pretty much follow the manufacturer's guidelines," said Eisele, whose program is lauded by industry experts and officials in other states.

Eisele added that the Intoxilyzer is supposed to automatically shut down if the voltage falls outside the manufacturer's specified range.

That, says McKinney, is exactly his point.

"They are supposed to shut down," he said. "But when they don't, you don't know what kind of results you are getting. You don't know if it's high. You don't know if it's low. It's a crapshoot."

Pat Demers, a nationally known DWI defense consultant, said that though it is not unusual for state-run breath test programs to modify breath test protocols, he agrees that the manufacturer's voltage guidelines are there for a reason.

Delicate chain

More specifically, Dr. Stefan Rose notes that the Intoxilyzer depends on a stable electrical current.

"The instrument is like a daisy chain of several components all linked together," said Rose of University Medical and Forensic Consultants. "And if you have an error in any one of those, then your result is going to be incorrect. Any time you get a spike or a surge in the voltage going to the instrument, that can cause it to give an erroneous reading."

But Rose says he thinks the voltage measure and other issues he has with the Intoxilyzer's reliability are secondary to the issue of the accuracy of breath-alcohol tests in general. He says the breath-test machines should serve only as screening devices and that, for truly dependable evidence, police should use blood samples, which are more stable and more conducive to multiple testings than breath samples.

It is those questions and others that McKinney plans to continue raising, and encouraging other defense attorneys to raise.

"Without those (tests) being done in a scientifically valid way," he said, "there is no way to have scientifically valid results."