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NJ Supreme Court orders special hearing on new DWI test

By JEFFREY GOLD
Associated Press Writer

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TRENTON, N.J. -- The New Jersey Supreme Court on Wednesday appointed a special master to conduct a hearing on the reliability of the machine that is replacing the Breathalyzer throughout New Jersey.

The order also lifts the freeze on some of the hundreds of drunken driver prosecutions that were put on hold by judges after defense lawyers raised concerns about the new machine.

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The state's highest court entered the dispute on its own accord and changed a course set Dec. 1 by an appellate panel.

That panel had ordered a trial judge in Middlesex County to conduct a hearing on the new machine, the Alcotest 7110 MKIII-C.

The Supreme Court appointed a retired appellate judge, Michael Patrick King, as special master. No date was set for the hearing, after which he has 30 days to submit his findings to the high court, which would then schedule oral arguments.

The Supreme Court order was issued by Chief Justice Deborah T. Poritz and joined by five of the justices. The remaining member of the court, Justice Virginia A. Long, did not participate.

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Meanwhile, hundreds of DWI suspects have their cases on hold. Alcotest evidence has not been allowed in Middlesex County since the fall, and in Morris and Union counties since Monday. A similar order was pending for Burlington County this week.

The Supreme Court lifted the stay for Middlesex County cases, but made no mention of the other counties, perhaps because the court was not yet aware of the more recent actions.

A message for a court spokeswoman left after business hours was not immediately returned.

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The new directive demands an expedited resolution, but the lawyer for drunken driving suspects holds, Evan M. Levow, said the hearing probably not take place until midyear.

"Practically speaking, the issues are extremely complex," Levow said, noting the order give the special master greater authority than a trial judge, including the power to call his own experts. "I don't believe it can be ready before summer to properly set forth the issues from the defense perspective."

Levow this fall persuaded state Superior Court Judge Jane Cantor of Middlesex County not to take judicial notice of a 2003 ruling establishing the accuracy of the Alcotest by a Camden County trial judge, Francis J. Orlando Jr.

The state Attorney General's Office maintained that the 2003 hearing gave statewide recognition of the Alcotest machine and appealed Cantor's ruling, but was rebuffed in the Dec. 1 ruling by a state appellate court that ordered Cantor to have a hearing on Alcotest reliability. That hearing will now be conducted by King.

Since the 2003 ruling, the Alcotest has been deployed in 10 other counties besides Camden. The state's remaining 10 counties are to be using the device by November 2006, according to the state Attorney General's Office.

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As a result of Wednesday's order, Alcotest cases are now proceeding in eight counties: Camden, Cumberland, Gloucester, Hunterdon, Mercer, Middlesex, Salem and Warren.

Levov, a Cherry Hill lawyer whose practice is devoted to drunken driving defenses, contended he has seen erroneous readings of blood alcohol content in many of the 20 Alcotest cases he is handling.

The legal threshold for intoxication in New Jersey is 0.08 percent.

He said the machine, if properly configured, is probably "very good," but that the state's parameters are unfair to defendants.

Unlike the Breathalyzer, the Alcotest automatically takes readings. It uses two independent, simultaneous methods to analyze a suspect's breath to determine the level of intoxication: infrared light and an electrochemical reaction. It automatically produces a printout with both readings.

The Breathalyzer requires its operator to compare the difference in the amount of light coming from two tubes of chemicals. The suspect's breath is introduced to one tube, which darkens if alcohol is detected.

Statewide, 76,502 DWI cases have been brought over the past two years, and 6,505 are pending.

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