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OUT OF 'CONTROL':

ARGUING FOR A TOTALITY OF CIRCUMSTANCES APPROACH TO DETERMINE WHETHER DRIVER IS IN 'ACTUAL PHYSICAL CONTROL' OF VEHICLE

By **JOHN A. TARANTINO**

A recurring and controversial issue in driving under the influence of alcohol cases is what constitutes "actual physical control" of a motor vehicle for purposes of the jurisdiction's drunk driving statute. In most jurisdictions, the statute which creates the offense of driving under the influence does not specifically define what it means to "drive or be in actual physical control of any vehicle... [w]hile under the influence of intoxicating liquor." See e.g., A.R.S. sec. 28-692; R.I. Gen. Laws sec. 31-27-2.

Whether, and to what extent, a drunk driving arrestee is in "actual physical control" of a vehicle can mean the difference between a conviction and a judgment of acquittal. In fact, where it can be established by the defense that there is no issue of control or that no reasonable fact finder could find "actual physical control" under the circumstances, the defendant is entitled to a motion to dismiss, a directed verdict or a judgment of acquittal.

There have been, and likely will continue to be, various judicial interpretations of such drunk driving legislation. According to the particular jurisdiction's approach identical factual situations can lead to vastly different results, as to whether a motorist arrested for driving under the influence of alcohol was, in fact, in "actual physical control" of the vehicle so as to be charged with, and susceptible to conviction for, the offense.

This article will examine the concept of "actual physical control" and will advocate a "totality of circumstances" approach to determine whether a driver is, in fact, in "actual physical control" of a vehicle for purposes of a jurisdiction's drunk driving statute.

A "Typical" Situation

Consider the following: It is approximately 12:30 a.m. A police officer finds your client, Jim Smith, asleep in his car with its engine still running, in an emergency lane of an interstate. Your client is lying with his head near the passenger door and his legs underneath the steering wheel. The officer awakens your client and persuades him to move over to the car passenger side and then to turn off the ignition.

While the officer is doing this, he detects the smell of alcoholic beverages and also notices that Jim Smith's speech is slurred and his eyes are bloodshot. Your client performs poorly on field sobriety tests, is requested to take a chemical test, and after agreeing to do so, provides a breath alcohol test result in excess of the legal limit.

On the basis of the foregoing, your client, Jim Smith, is arrested and convicted of being in "actual physical control" of a motor vehicle while under the influence of intoxicating liquor, or while having a blood alcohol content in excess of the proscribed statutory limit.

In many jurisdictions, the drunk driving statute will provide, in pertinent part, that it "is unlawful for any person to drive or be in actual physical control of any vehicle... [w]hile under the influence of intoxicating liquor." Many drunk driving statutes also define "under the influence of intoxicating liquor" to include driving with an illegal blood alcohol content or, alternatively, create a separate crime, making it unlawful for a person to drive or be in actual physical control of any vehicle while having a blood alcohol content, or breath alcohol content, in excess of the statutorily proscribed amount.

In most jurisdictions, the legislature does not define "actual physical control," and, accordingly, courts have in a variety of circumstances determined that a motorist is "in actual physical control" even if the motorist is not at the time driving or otherwise putting a vehicle in motion. *E.g.*, State v. Webb, 274 P.2d 338 (Ariz. 1954) (defendant found sleeping inside a truck that was stopped in a traffic lane with high beam lights on and engine running).

In other cases, however, courts have looked to whether a motorist has "voluntarily ceased to exercise control over the vehicle prior to losing consciousness." State v. Zavala, 136 Ariz. 356, 666 P.2d 456 (Ariz. 1983).

Some courts, when dealing with the issue of what constitutes "actual physical control," have determined that it is best to apply a "rigid" or "mechanistic" approach, requiring, for example, that there be some "bright line" test or rule to determine whether a motorist is in "actual physical control."

In Zavala, the court reversed a drunk driving conviction, stating that "it is reasonable to allow a driver when he believes his driving is impaired, to pull completely off the highway, turn the key off and sleep until he is sober, without fear of being arrested for being in control."

Accordingly, certain courts may determine that a drunken motorist must remove himself from the flow of traffic and turn off the ignition and sleep in order to satisfy the bright line test. This kind of mechanical application, however, can lead to "highly questionable," if not absurd, results. For example, in McDougall v. Superior Court, 845 P.2d 508 (Ariz. App. 1992), a defendant had left a party at which he had been drinking and walked to a private parking lot where his car was located.

It was February and, therefore, cold. The defendant started the engine so the heater would keep him warm. He soon fell asleep behind the wheel, where he was later found. The undisputed evidence was that the defendant had not driven the car and that he had no intention of doing so.

The key to the ignition was kept on, however, and, accordingly, a DUI conviction was reinstated by the Court of Appeals, using a bright line test: since the ignition was not off, the defendant was guilty. However, had it been off, and had all of the other facts remained the same, the defendant presumably would have been found not guilty.

This kind of result is neither logical nor fair. This does not mean that in either case the defendant necessarily must be found guilty or not guilty; rather, it should be left to a trier

of fact to determine whether, under the totality of circumstances, the defendant should have been convicted or acquitted under either scenario.

Under this factual scenario, and indeed under most circumstances where a determination must be made as to whether the driver is in "actual physical control," the decision should properly be left to the trier of fact. It seems unfair, and almost capricious and arbitrary, to say that a simple "flick of the wrist" shutting off the ignition either automatically "absolves" a drunk driving defendant, or, alternatively, the failure to "flick the wrist" and shut off the ignition automatically leads to conviction. See State v. Love, 57 Crim.L.Rep. (BNA) 1374 (Ariz. 1995).

In Love, the facts were very similar to the hypothetical that began this article. Relying on the Webb and Zavala line of cases, the Court of Appeals in Love had concluded that unless a motorist pulls completely off the "traveled portion of the roadway and turns off the ignition, he or she cannot escape a presumption of actual physical control." Id.

The Supreme Court in Love wisely determined "that such a rigid, mechanistic analysis is neither appropriate nor in keeping with the rest of our criminal jurisprudence." Id. Most importantly (and refreshingly shocking), the Court made the following pronouncement:

"No valid reason has been shown why DUI cases should be accorded unique treatment."

Either the Arizona Supreme Court has not read many decisions from other jurisdictions, or, alternatively, perhaps courts are beginning to recognize that there is no valid reason to treat DUI cases differently than others.

The law is the law, and no matter how offensive a drunk driving offense may be or seem, a criminal defendant charged with a driving under the influence crime is entitled to the same rights as any other defendant, and

the law should be interpreted consistently with the way criminal charges would be handled in non-DUI cases.

What this means, for purposes of the issue of whether a driver is in "actual physical control," is that a totality of the circumstances test should determine whether a defendant was in actual physical control of a motor vehicle. See Atkinson v. State, 627 A.2d 1019 at 1027 (Md.Ct.App. 1993).

In determining whether a motorist is in actual physical control, the trier of fact should weigh a number of facts presented rather than using a mechanistic formula. Factors that should be considered in every case should generally include:

- o Was the vehicle running or was the ignition on?
- o Where was the key to the ignition located?
- o Where, and in what position, was the driver in the vehicle found?
- o Was the driver awake, asleep or unconscious?
- o Were the vehicle's headlights on?
- o Where was the vehicle stopped (in the road, in a breakdown lane, off the side of a road, legally parked, etc.)?
- o Did the driver voluntarily pull off the road and if so, for what purpose?
- o What was the time of day and what were the weather conditions?
- o Was the heater or air conditioner on, and was such condition consistent with weather conditions?
- o Were the windows up or down?
- o Were there any other facts that would provide an explanation of the circumstances advanced by the defense if the driver was not intending on driving a motor vehicle?

As the Love and Atkinson courts stated, under a totality of circumstances approach, any list proffered should not be intended to be "all inclusive." Rather, the list should serve principally to illustrate that "in every case the

trier of fact should be entitled to examine all available evidence and weigh credibility in determining whether defendant was simply using the vehicle as a stationary shelter or actually posed a threat to the public by the exercise of present or imminent control over it while impaired." *Id.* at 1028 (emphasis added).

Advantages of the Totality Approach

The "totality of circumstances" approach has distinct advantages in addition to basic fairness. For example, the "totality of circumstances" approach recognizes that "each situation may be different and requires the fact finder to weigh the myriad of circumstances in fairly assessing whether a driver relinquished control and no longer presented a danger to himself or others." *State v. Love*, 57 Crim.L.Rep. (BNA) at 1375.

Additionally, the "totality of circumstances" approach is the approach that is followed in typical criminal cases and is "neither so restrictive... as to thwart the obvious statutory aim of enabling the drunken driver to be apprehended before he maims or kills himself or someone else nor... so expansive as to permit a conviction where clearly not warranted." *State v. Lawrence*, 849 S.W.2d 761 at 765 (Tenn. 1993).

The mechanistic, or "bright line" approach can be advantageous to a defendant in certain circumstances, but it can also be dangerous and unfair.

Although under certain circumstances such a test may be more effective in removing impaired drivers from the highway, it is more reasonable to assume that in most cases the opposite result could occur. The totality approach:

- o Will permit drunken drivers to be prosecuted under a greater variety of situations; and

- o Even potentially where the vehicle is off the road and the engine is not running, it is at least conceivable that a drunk driver who

turns off the key, but remains behind the wheel, may still be able to "take command" of the vehicle and drive away;

- o Yet at the same time the "mechanistic approach" through its "flick of the wrist" standard would wrongly and unfairly punish a driver through conviction if he or she cannot show that the ignition was off, even where there was no intention of driving the vehicle, but rather the vehicle was being used as "stationary shelter."

Arguing Against "Actual Physical Control"

In any case where there is an issue of whether the client was in "actual physical control" of a motor vehicle, defense counsel must carefully review the statutory language, as well as any case law in the particular jurisdiction, in interpreting that language.

To the extent that an argument can be made, however, that the client was not "in actual physical control," defense counsel should focus on the following:

- o Proof that the defendant voluntarily relinquished control of the vehicle.

- o If available, proof that the defendant shut off the engine (which, can, under most circumstances, demonstrate that he or she had voluntarily relinquished control of the vehicle.

- o To the extent possible, demonstrate that the defendant had pulled completely off the highway and had fallen asleep or was otherwise unconscious.

- o To the extent possible, proof that the defendant had no intention of driving; and

- o To the extent possible, proof that the defendant intended to use the vehicle as a "stationary shelter" as opposed to a means of transportation.

The factors previously listed are those that should be weighed in determining whether under the facts of a particular case either the defense can establish that the defendant was not "in actual physical control" and thus is entitled to a dismissal, directed verdict

or judgment of acquittal or, alternatively, whether the defendant can establish that there is reasonable doubt about the issue of whether he or she was in "actual physical control" so as to convince the trier of fact that it should return a not guilty verdict.

The "bright line" or "mechanistic" test to determine whether a motorist is in "actual physical control" can, under certain circumstances, benefit the defendant. However, any "mechanistic" approach generally, (and usually in the long run) will usually infringe on rights and prove to be unfair, unjust and at times, arbitrary and capricious.

Although the "totality of circumstances" approach will in most circumstances require a determination by a trier of fact whether the defendant was "in actual physical control" (and, therefore, probably will result in less dismissals prior to trial), ultimately, it is the fairer and more logical approach and leaves the decision where it should be, with the trier of fact.

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AN INTOXILYZER 5000 PRIMER

By *RICK SWOPE*

Over the past several years countless articles have been written regarding the Intoxilyzer 5000 series. Numerous studies have been performed and evaluated with this machine, specifically blood/breath correlations, hundreds if not thousands of drinking experiments, countless testing by police agencies for breath test results and prosecutions and scientific experiments. This will be the first in a series of articles regarding the operation of the Intoxilyzer 5000 and some of its problems.

By now, many individuals are familiar with the operation of the 5000 series. Nevertheless, I will first briefly cover the operation of the machine.

The Intoxilyzer 5000 is basically an infrared breath alcohol analyzer. The heart of the machine is a sample chamber. The far end of the chamber contains a tungsten halogen lamp which emits infrared light energy which is then directed through the chamber by a lens.

At the opposite end of the chamber is a second lens which in turn focuses the light energy leaving the chamber, directing it through three (3) rotating filters which allow only a certain wavelength of light energy to pass through. [A newer model may have up to five (5) filters.]

The machine establishes a zero reference point which then measures the amount of infrared energy striking the detector when the sample chamber is completely filled with ambient air.

When a breath test is administered, the amount of alcohol vapor in the chamber in the chamber begins to rise and the amount of light reaching the detector decreases. At this time the machine locates the difference between the zero reference point and the breath test measurement. A reading is then given.

There is no doubt that the Intoxilyzer 5000 is the most popular machine used by law enforcement agencies today. When evaluating and comparing this model with previous machines, the Intoxilyzer is easier to operate, has more safeguards and is capable of data processing.

Although the above features are enticing to law enforcement agencies, these same features have duped police departments into believing that this machine is "error proof," can never make a mistake and that operators need only "push a button" to operate the machine.

Additionally many law enforcement agencies teach nothing more to their operators than to push the button and everything else will be okay.

Prior to the use of infrared models, operators were not only required to become familiar with administering a breath test, but were also required to show proficiency in the operation of the machine.

This training required operators to know how alcohol is absorbed into the body, the length of the alcohol absorption process and to become familiar with the Widmark formula. This training ensured that the operators administering breath tests were familiar with at least the basic questions asked by defense attorneys.

In effect, operators had a general understanding of what they were doing and if a problem occurred during testing, the operator was able to ascertain that a problem was occurring or had occurred.

Today, students are instructed that the Intoxilyzer will make no errors, will never break down and is "fail safe." In fact, I have personally observed prosecutors, police officers and breath operators become almost obsessed with the accuracy of this machine nearly to the point of fanaticism. To even dare to question that the machine could be in error is considered by them to be sacrilegious!

Without even going into every operational facet of the machine, this article will focus on the problems with the slope detector and the 2100:1 ratio.

What is extremely important in understanding the operation of this machine, is to grasp that a proportional relationship exists between the amount of alcohol in one's blood and the amount of alcohol in one's breath. The machine converts a breath reading into a blood/breath reading.

Depending upon the software, the machine will print out either a blood alcohol concentration (BAC) reading or breath al-

cohol concentration (BrAC) reading. Since the machine analyzes only breath, the reporting of any values requires an assumed conversion factor. That factor presently is (and most likely will remain) 2100 to 1.

Based upon studies by Kurt Dubowski and others, this 2100:1 ratio is clearly an approximation and, therefore, is suspect and subject to countless uncertainties.

No doubt, there are many other factors which affect the machine's accuracy. Such factors include, but are certainly not limited to, the presence of mouth alcohol, body temperature and other substances which may affect the reading as well as how a subject actually blows into the machine.

Of primary concern should be the subject's blood or breath alcohol concentration at the time he/she was stopped; however, most subjects are not administered a breath test until sixty (60) to (90) minutes following the stop and, in some cases, the delay can be as much as three (3) to four (4) hours after the initial stop.

The slope detector is designed to ensure that an adequate breath sample was taken by monitoring the rate of change in the alcoholic content of breath as it is being introduced into the machine.

The slope detector is looking for a plateau in the breath which is being introduced into the machine; the breath reading should not change rapidly. In other words, the machine is looking for residual mouth alcohol in the subject's breath sample.

CMI, the manufacturer of the Intoxilyzer, states: "Since normal body processes eliminate mouth alcohol within approximately fifteen (15) minutes, observe the subject for at least fifteen (15) minutes before beginning another breath analysis."

The State of Florida, for example, requires breath machine maintenance operators to conduct a test of the slope detector on a monthly basis. The test consists of the

operator rinsing his mouth with stock solution, spitting it out and then blowing into the machine. This causes the machine to end the test and print out on the card "INVALID SAMPLE."

During my 15 years in law enforcement I have never observed a subject, who has been placed under arrest, swish his/her mouth out with alcohol and blow into the machine.

Any first grade student can tell you that by rinsing your mouth out with alcohol and blowing directly into the machine, the slope detector will detect the presence of alcohol. A breath test in practice is done generally after the subject is taken into custody and sits for a period of time, supposedly being observed by the breath test operator or arresting officer.

Most prosecutors and police officers will argue that their observation of the subject is not important since the Intoxilyzer is equipped with a mouth alcohol detector.

In the State of Florida the observation time is 20 minutes. On many occasions, judges have ruled that the observation time can include the time the officer is transporting the subject to the police station. Obviously, during this time a defendant can burp, regurgitate, etc.

The state's response, however, is universally the same: "The machine is equipped with a slope detector or mouth alcohol detector and, therefore, the observation period is not necessary."

It is the experience of this writer that this safeguard simply does not work. In the past six months in which almost one hundred 100 tests were conducted with respect to the detection of mouth alcohol on the Intoxilyzer 5000R machine owned by Essen, Essen, Susaneck, Canet & Lipson, (of North Miami Beach and West Palm Beach, Florida), valid readings of at least 0.17% were recorded.

Subjects were screened prior to testing to ensure that they had not been drinking al-

coholic beverages. They were then given one ounce of alcohol with which they rinsed out their mouths and after spitting out the alcohol, they waited for periods ranging from five to over 38 minutes prior to blowing into the machine.

In most cases, the machine gave a "valid" reading with no warning that mouth alcohol was present.

Similarly, the machine was unable to distinguish mouth alcohol on those subjects who were wearing dentures or dental plates and rinsed with mouth alcohol, and then after waiting for periods of up to 50 minutes gave a breath sample.

I have also reviewed cases where individuals blew into the machine with periods of time approaching 90 minutes after arrest and the machine indicated mouth alcohol. At this time, the officers, knowing a problem existed, did not have the individual remove his dentures and rinse them off.

Instead, the officers waited an additional 20 minutes, assumed by then that the alcohol had evaporated, had the subject submit to another breath test and used the results as valid, never questioning why the mouth alcohol detector was activated approximately 90 minutes after the subject was arrested.

Prosecutors will argue that the detector in fact worked and did its job. What prosecutors won't question, but defense counsel should, is the possibility that the second set of tests, like the first, may be contaminated as well.

The test results also demonstrated that the machine was most likely to display "Invalid Test" with respect to those subjects who blew into the machine after waiting periods of one minute to 12 minutes.

These test results are of primary concern inasmuch as breath machine maintenance operators blow into the machine immediately after stock solution is introduced into their mouths.

Results similar to the above were

reported by Harding, et al., during their studies of dentures and denture adhesives. These studies indicated that the slope detector on the Intoxilyzer 5000 was not reliable under the conditions in their studies. Results of 0.18 BAC from mouth alcohol were reported by them.

Further research and testing is being performed with respect to the slope detector. At issue is the reliability of a working mouth alcohol detector. Both the unreliability of this detector and the insufficient training given breath operators today lead to disturbing conclusions.

One should further be aware that when the Intoxilyzer 5000 is operated in the deficient sample mode, it will not detect the presence of mouth alcohol.

This information should familiarize and assist the attorney with some of the facts regarding the slope detector and the operation of the same. Do not allow the state, the manufacturer of the machine or operator to put this machine on some type of pedestal and hail it as the best piece of equipment ever manufactured which can do no wrong.

Future articles will focus on other problems associated with the operation of the machine.

References

1. CMI is a registered trademark.
2. Operators Manual Intoxilyzer 5000/Florida Version Page 57
3. Harding, McMurray, Laessig, Simley, Correll & Tsunehiro, The Effect of Dentures and Denture Adhesives on Mouth Alcohol Retention, 37 *J. Forensic Science* 999 (1992)

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Case Law at a Glance

MINNESOTA

License revocation is not so "overwhelmingly disproportionate" to constitute punishment for double jeopardy purposes.

State v. Hanson

57 Crim.L.Rep. (BNA) 1351 (Minn. Ct. App. 1995)

The Minnesota Court of Appeals held that a 90-day revocation of a motorist's license revoked pursuant to Minnesota's implied consent law when the driver failed a chemical sobriety test, was rationally related to the remedial purpose of protecting public safety and, accordingly, was not so "overwhelmingly disproportionate" to a threat posed to public safety that it constitute "punishment" for purposes of the double jeopardy clause.

The Minnesota Court of Appeals was divided on its rationale, however. In the end, the court determined that irrespective of how "tenuous" the reasoning was, there was some remediation in the statute and, accordingly, there was a rational basis for the penalty and it was not so "overwhelmingly disproportionate" that it constituted "punishment" for purposes of the double jeopardy clause.

LITIGATION TIPS

The Hanson case was poorly decided. The Court of Appeals gave an extremely limited reading to United States v. Halper, 490 U.S. 435 (1989) and its progeny, determining that although Halper stated that civil sanction is a "punishment" unless it can "fairly be said to solely serve a remedial purpose," that statement was dicta and was not an explicit holding of the case. Rather, it interpreted the explicit holding of Halper as:

We, therefore, hold that under the double jeopardy clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or

retribution. *Id.* at 488-489.

The Hanson court also appeared to have avoided reconciling the language in Austin v. United States which also pointed to the "solely remedial" language as the holding of Halper. See United States v. Austin, 113 S.Ct. 208 (1993). Rather, the court cited Department of Revenue of Montana v. Kurth Ranch, 114 S.Ct. 1937, as referring to the above quoted language as the "explicit Halper holding."

One of the specially concurring judges, Judge Randall, who usually "calls them as he sees them," stated that the "more honest" way to look at the implied consent law is that like other civil sanctions it can "remediate," but does so by and through punishment.

According to Judge Randall, the Minnesota practice, as it applies to drunk drivers, has "gotten close to, but not past, the Halper breaking point of substantial punishment, deterrents and retribution, with remediation barely hanging on as an after-thought."

Judge Randall is generally correct in his statements. Where this commentator disagrees with him, however, is in his failure to read Halper as requiring that the purpose be "solely remedial" as opposed to "an after-thought" in order to satisfy the double jeopardy clause. See also State v. Young, 530 N.W.2d 2G9 (Neb.App. 1995) where the Nebraska Court of Appeals held that the double jeopardy clause did not preclude the defendant's conviction for driving under the influence where the State had already unsuccessfully tried to revoke the defendant's driver's license in an administrative proceeding.

The Young case has not been followed by all Nebraska trial courts as there is a question concerning the precedential value of the Nebraska Court of Appeals decisions and where the trial court determined that decisions that were cited by the Court of Appeals to support its holding had been effectively overruled by the United States Supreme Court's recent line of decisions from Halper on.

See also Lawyers Weekly USA, 95 L.W.U.S.A. 422 (May 22, 1995) (reporting on Omaha trial court case which approved a double jeopardy defense in two cases after the Young decision).

CALIFORNIA

Horizontal gaze nystagmus results may supply basis for police officer's conclusion that motorist was under the influence of alcohol.

People v. Joehnk

57 Crim.L.Rep. (BNA) 1382 (Cal. App. 4th Dist. 1995)

The California Court of Appeals for the Fourth District held that results of a horizontal gaze nystagmus (HGN) test may supply the basis for a police officer's conclusion that a motorist was under the influence of alcohol.

However, the court determined that the HGN test is only one of a number of field sobriety tests that may be administered to a suspected drunk driver. The court determined that on the record before it "a consensus drawn from a typical cross-section of the relevant, qualified scientific community accepts the HGN testing procedures used in this case as a useful tool when combined with other tests and the observations in reaching an opinion whether a defendant was intoxicated." *Id.*

Accordingly, the court determined that the tests could supply the basis for an "impression" that a motorist was under the influence of alcohol.

LITIGATION TIPS

In People v. Leahy, 8 Cal.4th 587 (1994), the court held that HGN testing was scientific evidence and, accordingly, had to satisfy the admissibility requirements of People v. Kelly, 17 Cal.3d 24 (1976). See also Tarantino, "Finally Seeing Straight: California Rejects HGN Evidence," 10 DWI Journal: Law & Science 1 (Jan. 1995).

In Joehnk, the court determined that based on the specific record before it, there was sufficient evidence that HGN testing procedures were a "useful tool" in reaching an opinion whether a defendant was intoxicated.

However, the court did not go so far as to say that HGN evidence testing alone can be sufficient to convict a motorist of driving under the influence of alcohol.

On the contrary, the court pointed out that HGN testing alone is not able either to determine whether a suspect is under the influence of alcohol nor can it determine what

the suspect's blood alcohol content is. Rather, the court determined that HGN is only one component of evidence that may be used to form an impression that the suspect is under the influence of alcohol and it is admissible solely when used for that purpose.

PENNSYLVANIA

Per se offense may only be proved by scientific BAC testing.

Commonwealth v. Loeper

57 Crim.L.Rep. (BNA) 1352 (Pa. 1995)

Pennsylvania's drunk driving statute, Pa.S.C. sec. 3731(a)(4), had been interpreted by the Pennsylvania Supreme Court as requiring the results of BAC tests be in certain cases supplemented with "relation back" or retrograde extrapolation evidence to show that the defendant's BAC exceeded the proscribed limit at the time of driving. See Commonwealth v. Jarmen, 601 A.2d 1229 (1992); Commonwealth v. Modaffare, 601 A.2d 1233 (Pa. 1992).

In Loeper, the majority agreed with a lower court that a defendant's BAC of 0.141g% had to be related back to the time he was driving, which was two hours prior to the test.

The trial court, however, allowed the State to "plug" the evidentiary gap through police officer testimony that the defendant had "slurred speech" together with testimony from a defense expert on cross examination that most illicit, visible signs of intoxication are at approximately 0.15%.

The Supreme Court rejected this attempt to "plug the gap" in the relation-back evidence, noting that the per se offense set out in subsection (a)(4) requires there be scientific testing in order to support that charge and where the Commonwealth is not advancing a charge pursuant to subsection (a)(1), which is "driving while under the influence of alcohol which renders the person incapable of safe driving," the only way to proceed under the (a)(4) charge is through scientific evidence and relation-back testimony.

LITIGATION TIPS

In Pennsylvania, there are different ways to prove a driving under the influence offense.

First, the State can attempt to prove a motorist was incapable of safely operating a motor vehicle in violation of subsection (a)(1). This kind of evidence does not require scientific evidence; rather, police officer testimony concerning physical signs and indicia of intoxication is admissible.

On the other hand, the Commonwealth can proceed under subsection (a)(4), which is the per se offense, and requires scientific evidence. The Jarmen and Modaffare cases said that in certain circumstances the State must relate back the evidence to show that a defendant's BAC exceeded the illegal limit at the time of driving.

When the Commonwealth proceeds under this subsection, it cannot rely upon police officer testimony or other "traditional" indicia of intoxication in order to meet its burden. Rather, it must provide the same kind of scientific evidence to meet its burden as is required to prove the per se offense.

Finally, Jarmen and Modaffare have, in fact, been legislatively modified as the legislature added a provision that eliminated the need for relation-back evidence so long as the testing was performed within three hours of driving.

ILLINOIS

Destruction of evidence can deny due process even in absence of bad faith.

State v. Newberry

57 Crim.L.Rep. (BNA) 1341 (Ill. 1995)

The Illinois Supreme Court determined that where a State's agent destroys outcome determinative evidence after the defense has asked to examine it, the State denies the defendant due process even where the agent acted without bad faith.

In Newberry, the substance tested was cocaine. An evidence technician found a computer record of an earlier non-prosecution and unaware that new charges had been brought, thought the case was over and destroyed the substance. By this time, however, the defendant had moved to examine whatever had been seized from the defendant.

The majority determined that Arizona v. Youngblood, 488 U.S. 51 (1988), which held

that the State's destruction of evidence that is potentially useful to the defendant, but not clearly exculpatory, violates the Fourteenth Amendment's due process clause, but only if the State acted in bad faith, was distinguishable. Here, as the critical nature of the evidence, as well as the fact of the discovery request, served to show that the defendant had no alternative means to prove his innocence.

Furthermore, the discovery motion placed the State on notice of the need to preserve the evidence and, therefore, freed the defense from any need to establish exculpatory value as part of the due process analysis.

In Youngblood, the Supreme Court determined that the disputed material was not essential to establish the defendant's guilt or innocence as its value was "speculative" and as it played no role in the prosecution's case.

Accordingly, since there was no bad faith on the part of the police, the Supreme Court rejected the defendant's due process challenge to the conviction.

In Newberry, however, the evidence in question was more than just "potentially useful:" it was both essential to, and determinative of, the outcome of the case.

The defendant could not be convicted of drug possession charges without proof of the content of the disputed substance. Additionally, he did not have a realistic hope to exonerate himself without having an opportunity to have

the disputed substance examined by his own experts.

NOTE: The Newberry case is potentially important for those who defend all criminal cases, particularly driving under the influence of alcohol cases. Where chemical test evidence, or other evidence, is destroyed, after the defense has filed a discovery request for it, there is at least an argument, based on Newberry that Youngblood should not control even in the absence of bad faith on the part of the State.

The discovery motion should be filed early on to put the State on notice for the need to preserve the evidence which will then, in the Newberry court's view, potentially "free" the defense from any need to establish the exculpatory value.

See California v. Trombetta, 467 U.S. 479 (1984) (DUI defendants unsuccessfully sought suppression of breath test results on grounds that police failed to preserve breath samples and thereby limited defendants' ability to challenge incriminating results; Supreme Court reasoned that due process was not violated where police acted in good faith and in accordance with known procedures in failing to preserve samples and because the testing devices had a "high degree of accuracy," making it extremely unlikely that further testing would have helped the defense, and where defendants had alternative means of attacking results).

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