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CROSS EXAMINING THE BREATH TEST TECHNICIAN

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We all know that breath test results are the most common "chemical test" admitted in driving under the influence of alcohol cases; and we also know that a breath test result in excess of the legal limit must either be suppressed in a pretrial motion or substantially called into question, to create reasonable doubt about the defendant's "guilt."

In a number of cases, the "target" of the motion to suppress will be the breath test technician because in many jurisdictions the courts have severely limited, if not entirely curtailed, direct attacks against the so-called "scientific principles" underlying breath test analysis.

Accordingly, defense counsel must be prepared to cross examine the breath test technician (almost always a police officer) on a variety of topics that have relevance to charges of driving under the influence of alcohol, driving with an illegal blood alcohol content, and refusal to submit to a chemical test. What follows are some suggestions on how to cross examine (and explicitly how not to cross examine) the breath test technician on these, and other, topics.

Cross Examining With A Purpose

One of the biggest mistakes that all lawyers make is to begin a cross examination of any witness without knowing what they want to accomplish. For example, many attorneys simply take the witness through the same areas and testimony covered in direct examination hoping to gain a concession or two. This is a mistake and a bad strategy.

First, in many cases it allows the witness to restate and ultimately to reaffirm his or her testimony.

Second, by tracking the same areas of testimony previously covered on direct by the prosecutor, the defense counsel, will at least implicitly, "legitimize" the prosecution's theory of "what happened."

My suggestion, and I believe a better practice, is to know what you want to accomplish during the cross examination and focus solely on those areas of inquiry. You need not cross examine the witness on every point made by the prosecutor. First, you may not be able to do so. Second, by focusing on the points that you need, and by stressing only those points, you will begin to convince the factfinder that those issues are the ones that are paramount in the case and, if you are successful in so doing, you will also create reasonable doubt.

Finally, remember that you need not accomplish everything through the cross examination of any one witness, particularly, the breath test technician. Rather, the cross examination of the breath test technician (and indeed the cross examination of any witness) should be part of an overall defense plan and should fit nicely within the defense theme. Certainly, there are a myriad of possible issues upon which to cross examine the breath test technician. For purposes of illustration, however, this article will focus on three.

In the first scenario, the breath test technician is also the arresting officer and the officer who completed the alcohol influence report form. The defense theme is to establish inconsistency between the physical observations of the police officer (or at least the "spin" on those physical observations that the defense wants to establish) and the "high" breath test results. In the second scenario, the defense theme focuses on a failure to follow procedures, and the cross examination focuses on problems with the observation period, machine set-up and rights advisories.

Finally, in the third scenario, a refusal case, the defense theme focuses on the so-called "physical inability" defense to a refusal.

Let's see how each of these cross examinations can be used effectively, where the cross examination questions are purposeful and limited to the points necessary to provide testimony helpful to establishing the defense theme.

Scenario No. 1 - Establishing Inconsistency

DEFENSE COUNSEL: Officer Smith, you arrested Bob Wilson, didn't you?

OFFICER: Yes.

DEFENSE COUNSEL: And you were the officer who transported Bob Wilson to the police station, correct?

OFFICER: Yes.

DEFENSE COUNSEL: You were also the officer who gave Bob Wilson his Miranda and implied consent rights, correct?

OFFICER: Yes.

DEFENSE COUNSEL: And you were also the officer who questioned Bob Wilson at the station?

OFFICER: Yes.

DEFENSE COUNSEL: You also were the officer who completed the Alcohol Influence Report Form?

OFFICER: Yes.

DEFENSE COUNSEL: And you obtained the information that is contained in this report directly from Bob Wilson, correct?

OFFICER: Yes, from him and based upon my own observations.

DEFENSE COUNSEL: You also were the officer who used the breath test machine on Bob Wilson, correct?

OFFICER: Yes. I was the breath test technician.

DEFENSE COUNSEL: It took you over an hour and a half to perform each of these functions, correct?

OFFICER: That's about right, yes.

DEFENSE COUNSEL: So you had a good opportunity to observe and interact with Bob Wilson, correct?

OFFICER: Yes.

DEFENSE COUNSEL: And you did your best in preparing your police report and the Alcohol Influence Report Form to take down information accurately, correct?

OFFICER: Yes.

DEFENSE COUNSEL: And you did your best in reporting accurately your observations, correct?

OFFICER: Yes.

DEFENSE COUNSEL: Officer Smith, you have had an opportunity to review your police report and the Alcohol Influence Report Form before testifying today, correct?

OFFICER: Yes.

DEFENSE COUNSEL: And you observed no significant errors or omissions in your police report or Alcohol Influence Report Form, correct?

OFFICER: I've noticed no errors or omissions.

DEFENSE COUNSEL: There's a lot of information in your police report and Alcohol Influence Report Form that appears to have come directly from Bob Wilson. Is that correct?

OFFICER: Yes, I obtained a lot of the information directly from Mr. Wilson.

DEFENSE COUNSEL: You had no difficulty understanding him when he gave you this information, did you?

OFFICER: Not really, no.

DEFENSE COUNSEL: Bob Wilson gave you his date of birth, social security number, home address, work address, name of employer, license and registration, insurance information, name of physician, and even my name as his attorney, correct?

OFFICER: Yes, that's correct.

DEFENSE COUNSEL: And when he gave you this information, Bob Wilson appeared to be coherent and to understand what was being asked of him, correct?

OFFICER: Yes.

DEFENSE COUNSEL: And the information that he gave to you, and the manner in which he reported it, are consistent with a lack of intoxication, correct?

OFFICER: I don't understand the question.

DEFENSE COUNSEL: Well, Officer, you have arrested a number of individuals throughout the years and charged them with driving under the influence of alcohol, have you not?

OFFICER: Yes.

DEFENSE COUNSEL: And have you not noticed that individuals who are under the influence of alcohol appear to be incoherent and may have difficulty in communicating?

OFFICER: Yes, I've noticed that.

DEFENSE COUNSEL: Bob Wilson had no such difficulty, though, did he?

OFFICER: No, he didn't.

DEFENSE COUNSEL: So, based upon your experience and your personal observations, his actions, and in particular his ability to provide information in an understandable way to you is inconsistent with intoxication?

OFFICER: It could be inconsistent, yes.

DEFENSE COUNSEL: In order to complete the Alcohol Influence Report Form, you had to ask a series of questions to Bob Wilson and he had to provide answers, did he not?

OFFICER: Yes.

DEFENSE COUNSEL: You wrote down the information carefully, did you not?

OFFICER: Yes.

DEFENSE COUNSEL: And you accepted as true the information that Bob Wilson gave you?

OFFICER: Again, I don't know what you mean.

DEFENSE COUNSEL: Well, he told you where he worked and you believed him?

OFFICER: Yes. And I have subsequently been able to confirm that the information he gave me is correct.

DEFENSE COUNSEL: And he also gave you his correct date of birth, social security number, home address and the like?

OFFICER: Yes.

DEFENSE COUNSEL: And he gave you other correct information, including his height

and weight, didn't he?

OFFICER: Yes.

DEFENSE COUNSEL: And you have no reason to believe that he gave incorrect information with respect to any of those questions asked, do you?

OFFICER: No.

DEFENSE COUNSEL: You also asked him whether he was under the influence of alcohol, didn't you?

OFFICER: Yes, I did.

DEFENSE COUNSEL: And Bob Wilson answered that he was not, is that correct?

OFFICER: Yes, that's what he answered.

DEFENSE COUNSEL: But you didn't believe him when he gave that answer, did you?

OFFICER: No.

DEFENSE COUNSEL: And the reason that you didn't believe him is because the machine result indicated a blood alcohol content higher than the legal limit, correct?

OFFICER: Well, that was a principal reason, yes.

DEFENSE COUNSEL: In fact, the breath test result on this machine indicated a blood alcohol content twice the legal limit, correct?

OFFICER: Yes, that's correct. The breath test result was .21, more than twice the legal limit.

DEFENSE COUNSEL: Officer, based upon your experience, training and knowledge, is it consistent or inconsistent with a blood alcohol content of twice the legal limit for an individual to be able to relate clearly, articulately and completely all of the information required on an Alcohol Influence Report Form?

OFFICER: I would say that it's unusual that someone would be able to do so with twice the legal limit.

DEFENSE COUNSEL: So it would be inconsistent with a blood alcohol content of .21, correct?

OFFICER: Yes.

DEFENSE COUNSEL: And, Officer, would it be consistent or inconsistent if a person's blood alcohol content was in excess of twice the legal limit for that person to be able to follow directions and instructions carefully and completely?

OFFICER: I would say it would be inconsistent.

DEFENSE COUNSEL: Bob Wilson had no difficulty following your instructions, did he?

OFFICER: He appeared to understand.

DEFENSE COUNSEL: Well, you advised him what he had to answer on the Alcohol Influence Report Form and he answered each question, correct?

OFFICER: Yes.

DEFENSE COUNSEL: And you instructed him on what he had to do in order adequately to provide a sample of breath for the breath testing machine?

OFFICER: Yes.

DEFENSE COUNSEL: And Bob Wilson was able to follow those instructions, correct?

OFFICER: Yes.

DEFENSE COUNSEL: So, based upon your knowledge, experience and expertise, and the particular knowledge of the facts of this case, Bob Wilson's conduct on the night of his arrest was inconsistent with the breath test results?

OFFICER: I would say it was unusual, that's all.

DEFENSE COUNSEL: So, usually, someone with a blood alcohol content in excess of twice the legal limit would not be able to answer questions and follow instructions the way Bob Wilson did, correct?

OFFICER: Yes, that's correct.

DEFENSE COUNSEL: No further questions.

This line of cross examination was not "devastating" to the police officer, but it helps to demonstrate the inconsistency between the defendant's conduct and a blood alcohol content of twice the legal limit, thereby allowing the defense to further its theme that the inconsistency between the defendant's conduct and the breath test results creates reasonable

doubt about the accuracy of these results.

Scenario No. 2 - Procedural Errors

DEFENSE COUNSEL: Officer, you're used to having to follow rules and regulations as a police officer, aren't you?

OFFICER: Yes.

DEFENSE COUNSEL: And in order to do your job correctly, you have to follow rules and procedures, isn't that right?

OFFICER: Yes.

DEFENSE COUNSEL: And it's important to follow those rules, isn't it?

OFFICER: Yes.

DEFENSE COUNSEL: You can be disciplined if you do not, isn't that correct?

OFFICER: In certain cases, yes.

DEFENSE COUNSEL: There are particular rules and procedures that apply to breath testing, correct?

OFFICER: Yes, there are a series of rules and regulations, both through the Department of Health and the police department.

DEFENSE COUNSEL: You are familiar with those rules and regulations, are you not?

OFFICER: Yes.

DEFENSE COUNSEL: One of the rules and regulations that is necessary for breath testing is a twenty minute observation period, correct?

OFFICER: Yes.

DEFENSE COUNSEL: We have admitted into evidence the specific regulation that relates to the observation period, it is Exhibit 4. I am handing it to you, please review it.

OFFICER: Thank you.

DEFENSE COUNSEL: Have you had an opportunity to review that regulation, Exhibit 4?

OFFICER: Yes, I have.

DEFENSE COUNSEL: You are familiar with it, are you not?

OFFICER: Yes.

DEFENSE COUNSEL: The regulation requires that you keep the suspect under observation for a period of 20 minutes before administering the breath test, correct?

OFFICER: Among other things, yes, that's what it says.

DEFENSE COUNSEL: And the reason is to make sure that the individual does not ingest anything, burp or belch or regurgitate, is that correct?

OFFICER: Yes.

DEFENSE COUNSEL: The reason it is necessary to make sure that none of those things happens is because if any of them does happen, the breath test result can be affected, correct?

OFFICER: Yes.

DEFENSE COUNSEL: And if the breath test result is affected by any of those things, then the result is flawed, correct?

OFFICER: It can be flawed, yes.

DEFENSE COUNSEL: You videotaped Gene Howard on the night of his arrest, did you not?

OFFICER: Yes.

DEFENSE COUNSEL: And isn't it a fact, as demonstrated on the videotape, that you left Gene Howard's presence on three different occasions prior to the administration of the breath test?

OFFICER: I'm not sure.

DEFENSE COUNSEL: Take a look.

(At this point in time, defense counsel plays portions of the videotape showing the officer leaving the room to take a call; turning his back for approximately 15 seconds apparently to fill out paperwork; and leaving the room a second time to obtain some forms.)

DEFENSE COUNSEL: Now that we've had an opportunity to review the videotape, is your memory refreshed whether on three occasions Mr. Howard was out of your sight during the twenty minute observation period?

OFFICER: Very briefly, yes.

DEFENSE COUNSEL: Let's take a look again at Exhibit 4.

OFFICER: Yes.

DEFENSE COUNSEL: You were required, were you not, to keep Mr. Howard under your observation for the entire twenty minute period, correct?

OFFICER: Yes.

DEFENSE COUNSEL: That didn't happen, did it?

OFFICER: Not for every second.

DEFENSE COUNSEL: Officer, I want to move to a different area of inquiry. This has to do with another rule and regulation about breath testing. Please take a look at Exhibit 7, and after you have had an opportunity to review it, let me know if you recognize it.

OFFICER: Yes. I know what this is.

DEFENSE COUNSEL: This is the officer's checklist for administration of breath tests, correct?

OFFICER: Yes. This is the department form that we use.

DEFENSE COUNSEL: In fact, this is the form that you went to retrieve, as indicated on the videotape?

OFFICER: Yes.

DEFENSE COUNSEL: Take a look at the instructions at the top. Do you see them?

OFFICER: Yes.

DEFENSE COUNSEL: It says that you are to check off each of the steps as they are conducted, correct?

OFFICER: Yes, that's what it says.

DEFENSE COUNSEL: You did not, however, check off each and every step as the breath test was administered, did you?

OFFICER: I missed one, yes.

DEFENSE COUNSEL: You missed one. The one that you failed to check off is that the machine's internal diagnostics indicate it was ready to proceed, correct?

OFFICER: It happened. I just didn't check it off.

DEFENSE COUNSEL: You didn't follow the rules and regulations, did you?

OFFICER: I forgot to check it off.

DEFENSE COUNSEL: That was a mistake, wasn't it?

OFFICER: Yes.

DEFENSE COUNSEL: No further questions.

Again, this cross examination did not in any way "destroy" the officer, but it laid the foundation necessary to show, consistent with the defense theme, that rules and regulations of the department were violated and those rules and regulations are required and in place in order to lay an adequate foundation for, among other things, the admission of chemical test results.

Scenario No. 3 - The Refusal That Wasn't Because Of Physical Inability

DEFENSE COUNSEL: Officer, I have a very simple question for you. Did Henry Marks try to give a breath sample?

OFFICER: I can't answer that.

DEFENSE COUNSEL: Did he try, yes or no?

OFFICER: He tried, but he didn't succeed.

DEFENSE COUNSEL: Did he appear to be blowing as hard as he could?

OFFICER: Again, he could have been faking it, but it looked like he was trying.

DEFENSE COUNSEL: Henry Marks told you that he has asthma, correct?

OFFICER: Yes.

DEFENSE COUNSEL: And Henry Marks asked to use his inhaler, didn't he?

OFFICER: Yes.

DEFENSE COUNSEL: And you told him that he could not during the 20-minute observation period, correct?

OFFICER: I asked him if he needed to see a physician and he said he didn't.

DEFENSE COUNSEL: He told you he didn't need to see a physician because all he needed was his inhaler, correct?

OFFICER: Yes, he wanted to use the inhaler.

DEFENSE COUNSEL: And you believed that he could not use the inhaler because that would affect the breath test results?

OFFICER: I don't know about affecting the breath test results, but he is not supposed to use anything for 20 minutes prior to the administration of the breath test.

DEFENSE COUNSEL: So you told him

he would have to wait to use the inhaler?

OFFICER: Yes.

DEFENSE COUNSEL: He told you he was having some difficulty breathing, correct?

OFFICER: A little, yes. He did not appear to be in severe distress. And I did ask him again if he wanted to see a physician.

DEFENSE COUNSEL: He tried as best he could without the use of his inhaler to complete the breath test, correct?

OFFICER: He tried, I don't know if it's as best as he could.

DEFENSE COUNSEL: Did his face turn red when he blew into the machine?

OFFICER: His face was flushed, but it could have been from the alcohol and not the effort.

DEFENSE COUNSEL: But his face was red?

OFFICER: Yes.

DEFENSE COUNSEL: Did he gasp or appear to be out of breath after trying to blow into the machine?

OFFICER: He asked to use his inhaler. I don't know if he gasped.

DEFENSE COUNSEL: You wouldn't let him use the inhaler at that time either, would you?

OFFICER: I asked if he wanted to try again or I would write him up as a refusal.

DEFENSE COUNSEL: And he told you that he couldn't blow any harder, correct?

OFFICER: That's what he said, but the machine wouldn't register. After two attempts, we write it up as a refusal.

DEFENSE COUNSEL: He subsequently did use his inhaler, didn't he?

OFFICER: Yes, I let him do so once I wrote him up for the refusal.

DEFENSE COUNSEL: Did he ask to take the test again now that he could breathe better?

OFFICER: He asked, but he had already been written up for a refusal. That's all we do.

DEFENSE COUNSEL: So after he could breathe, he didn't get another chance?

PROSECUTOR: Objection.

COURT: Overruled.

OFFICER: As I said, once we write up the refusal, that's it.

DEFENSE COUNSEL: No further questions.

This line of inquiry and the specific cross examination show that there is substantial doubt whether the defendant "refused" to submit to a chemical test, or simply had the physical inability to do so.

While there certainly were other areas of inquiry that could have been developed on cross examination, the real issue in the case (as it pertains to the refusal) is whether the defendant was physically unable to provide an inadequate breath sample. The examination focused clearly on that area and, accordingly, focused the factfinder on that area as well.

The breath test technician is a key witness in any driving under the influence of alcohol case involving breath test results.

How best to cross examine that witness will depend, of course, on the specific facts of any case. However, as a general rule, as with any other witness, the breath test technician should be attacked where most vulnerable and the focus of the attack should be direct, concise and targeted because when applied to the breath test technician, a scattershot approach may lead only to scatterbrained problems.

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ITS OKAY TO LIE, AS LONG AS YOU'RE THE STATE! PART I

By RICK SWOPE

As an expert witness on the Intoxilyzer 5000, I have testified in that capacity for the state well over 250 times and approximately the same number of times as a defense witness.

Since leaving police work in the middle of 1990, I have testified a limited number of times for the prosecution due primarily to the fact that prosecutors, as well as the courts, consider all police maintenance officers as expert witnesses .

The state has an ideal situation; they have witnesses who will be qualified by the courts under almost any circumstance, even if the witness knows only how to plug the machine into a wall socket. Furthermore, it costs the state nothing since the officer is most likely being paid by the police department as a result of the subpoena that was issued by the state.

When I was a law enforcement officer, the state rules and regulations required that numerous documents regarding the Intoxilyzer be filled out. These completed documents were then used by the state to prove the accuracy, reliability and integrity of the breath machine and breath test results. The documents are used in all prosecution cases and are admitted into evidence in most cases where a breath result from a defendant is obtained.

These documents are generally always handed to a defense witness or expert to review prior to trial; at trial the prosecutor proudly displays these documents, approaches the defense witness and almost dares that witness to deny the correctness of these documents and, indeed, deny that the intoxilyzer is working perfectly.

Without making a scientific comment on the maintenance performed by most police agencies and/or what is required by state law, another issue arises which is almost never thought of or considered: "What if the documents are in fact altered or falsified by an officer?"

The question I just raised regarding altered or falsified documents, in almost virtually every case, would in effect cause a prosecutor to have a self-induced heart attack. Making this kind of statement or even checking to determine whether such falsification or alteration occurred would have the prosecutor arguing that the defense expert is nothing more than a paid "prostitute" who would say anything to get his or her client off, no matter what.

I was involved in a case where in fact the documents and maintenance were falsified and the prosecutors attempted to cover it up. As of this date, the facts of the falsified documents are not in dispute; the event occurred and the maintenance officer admitted under oath that records were altered on a particular machine. The officer's punishment consisted solely of a written letter of reprimand!

The facts are as follows: An officer from the Metro Miami Dade Police Department in Miami, Florida was responsible for conducting maintenance tests and inspections of all machines in his custody, primarily those owned by Miami-Dade County.

Based upon the officer's testimony in numerous previous cases, I and several defense attorneys became suspicious of the officer's testimony and so called "knowledge" of the breath machines. After a week of perusing various documents, it was discovered that a particular machine was documented as passing a monthly maintenance test when in fact that machine had been taken out of service and was at the time out of the county for repairs.

Obviously, it is impossible for a machine that has been removed for repairs to have passed a maintenance indicating it was in good operating order. Moreover, how could the officer conduct a maintenance test on a machine that is not even in Miami-Dade County, but is in another county for repairs, hundreds of miles away?

Further checking revealed that the maintenance documents had to be altered and falsified. Armed with this information, defense counsel asked the maintenance officer countless

questions on the stand, to which the officer finally replied that he in fact did alter the maintenance documents.

When questioned why, the officer replied that the two assistant state attorneys in charge of the DUI prosecution division told him to "Do whatever it takes" in order not to have all of the breath tests results associated with this machine suppressed.

For years I have been stating that the altering of tests and results can be done, but have had no proof until this incident. Does this mean that the reliability of the test itself is in question, are all tests in question, or is this an isolated incident? My feeling would be that this is not an isolated incident and most likely occurs more often than we would like to believe.

Intoxilyzer results are used hundreds of times a day to convict persons who are accused of driving under the influence of alcohol. The prosecution will have the jury believing that this "instrument" as they call it, can do no wrong. It cannot and will not make mistakes. The integrity of the police officers performing monthly maintenance are above reproach. The results you see on the breath card is correct every time, no matter what a scientist or defense expert will tell you.

The prosecution repeatedly implies the above to the jury while simultaneously implying that if any lying or untruthfulness exists in the courtroom, it obviously is from the defense expert, defense attorney, the defendant or all of them. After all, the state is only trying to protect the rights of the citizens.

What the prosecution fails to tell the jury and court is that they will prosecute an individual, even if they know and are fully aware of the fact that the documents have been falsified and that the maintenance officer has previously perjured himself.

The question you most likely may be asking yourself is; "How is the state to proceed to trial knowing that the intoxilyzer test results have been tampered with, altered or fabricated?"

The answer is simple; the prosecution proceeds to trial stating two things:

1. The movement of the clock and falsification of the machine's maintenance did not affect the breath test.

2. The machine was working properly at the time of the test.

As an expert witness (note I do not refer to myself as a defense or state witness), any alteration of the documentation renders the breath test results inadmissible and certainly makes the results unreliable. Alteration of a document, especially the results of which the state heavily relies upon to prove beyond a reasonable doubt the commission of the offense of driving under the influence or while intoxicated, is despicable and is a criminal act.

As you can see, maintenance documents given to the defense mean little and amount to nothing more than the state's attempt at convincing a jury that the test results are scientifically reliable. The state spends a considerable amount of time and man power to ensure the machine is maintained properly. Reviewing all documents and documentation maintained by the state essentially means very little with respect to both the accuracy and reliability of the machine. What is scary, is that in almost all cases, this type of document falsification would not be detected, nor would anyone be aware that this occurs.

The situation which occurred in my case is certainly unique. Why is it unique? Only because the maintenance officer was caught in this instance.

The next article will deal with the state's investigation and attempted cover up of the machine's results, the failure to notify the defense and the actions taken by the state police department against the maintenance officer. Please "stay tuned" as the outcome will be of great interest.

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CASE LAW AT A GLANCE/LITIGATION TIPS

NEVADA

The Nevada statutes survives vagueness and over breath challenge.

Sereika v. State

62 Crim.L.Rep. (BNA) 1513 (Nev. 1998)

A defendant challenged, on constitutional grounds, a Nevada statute making it a crime to have a blood alcohol content (BAC) of 0.10g% or more within two hours after driving. See N.R.S. sec. 484.379(1)(c). Defendant argued that the statute was both vague and overbroad because ordinary persons would be unable to anticipate their BACs two hours after driving.

A majority of the Arizona Supreme Court rejected each argument because the defendant failed to provide evidence that this kind of "forecasting" is "any more difficult than knowing if their [BAC] has crossed the .10 threshold at the time of driving." Accordingly, the vagueness argument failed.

The majority of the court also rejected the overbreadth argument based on the "rising blood alcohol defense" with the defendant arguing that an individual could be guilty even though he did not drive with a BAC of 0.10 or greater if alcohol was still in his stomach at the time of driving, but in the bloodstream at the time of testing. The majority reasoned that by making it per se unlawful to have a BAC of 0.10 or more within the two hour post-driving period, the legislature had corrected what had been an improper mandatory conclusive presumption that BAC at time of driving and at time of testing were one and the same.

Accordingly, the majority of the court rejected the defense challenges to vagueness and overbreadth.

Litigation Tips

In McLean v. Moran, 963 F.2d 1306 (9th Cir. 1992), the court ruled that a previous version of the statute which relied on a mandatory conclusive presumption that BAC at time of driving and at time of testing were the same, was unconstitutional.

In Sereika, the majority determined that the real question in the case was whether a per se offense is constitutional. The court concluded that the State has "a legitimate interest in preventing people from driving after ingesting any substance that will render them incapable of driving safely at any time in the following several hours ..." and that "promotion of the rising blood alcohol defense, and the concomitant practice of rushing to one's car immediately after ingesting alcohol so as to get home before the alcohol is fully absorbed, is contrary to good public policy."

The majority of the court also reasoned that drivers have little control over traffic conditions and delays and, therefore, the State's legitimate interest in prohibiting people from driving at the onset of "impending intoxication" justifies the statute. Therefore, the court determined that N.R.S. 484.379(1)(c) is rationally related to the legitimate State interest and is not overcome based on the "rising blood alcohol defense."

One justice, Rose, concurred in the affirmance of the conviction after first noting that the legislature's response to McLean went "from the frying pan into the fire," but determining that there was sufficient evidence presented to show that the defendant actually was intoxicated when he drove.

For further information on constitutional challenges to per se statutes and the rising blood alcohol defense, respectively, see J. Tarantino, Defending Drinking Drivers sec. 132-132.2.6 and 204-204.1 (1998 Supp.).

VIRGINIA

Automatic suspension of driver's license upon conviction of drug crime upheld.

Walton v. Commonwealth

62 Crim.L.Rep. (BNA) 1512 (Va. 1998)

Virginia Code §18.2-259.1 was upheld by the *Virginia* Supreme Court against a constitutional challenge. That statute provides for an automatic six-month suspension of driving privileges upon a licensee's conviction of a drug offense even if the offense does not involve

driving.

The defendant argued that there was no rational basis to suspend one's driving privileges upon a drug offense where there was no evidence or indication that the offense involved driving.

The Virginia Supreme Court disagreed, reasoning that a rational basis standard of review required it to uphold the statute under a constitutional attack because even though the offense did not involve driving, "it is reasonable to conclude that the purpose of the statute is to protect persons using the Commonwealth's highways. Accordingly, the court determined the statute was enacted in the public's interest and for the public safety and, therefore, survived the constitutional challenge.

Litigation Tips

In Walton, the court recognized that the statute mandates suspension even if the offense does not involve driving; accordingly, in order to "rationalize" its decision in upholding the statute, the court had to determine that the legislature "could reasonably assume that a person who possesses illegal substances would use those substances and could operate a motor vehicle while under the influence of [the] substances ...". (emphasis added) This was the same rationale that had been used by the Virginia Court of Appeals in deciding the Walton case. See 485 S.E.2d 641, 643 (Va.Ct.App. 1997).

Although the legislature certainly has the ability to enact laws to protect public safety, what is rational and what is theoretically conceivable are not always the same.

Here, although it is theoretically conceivable that someone who possesses drugs would ingest those drugs when operating a motor vehicle and, accordingly, could be under the influence of those illegal substances when operating a motor vehicle, it is questionable whether each of these assumptions is truly "rationally" based in determining constitutionality of this statute.

It appears that there is no basis to conclude rationally that everyone convicted of a drug offense should lose his or her license to protect the public.

MARYLAND

Refusal of blood test was not "chemical test" refusal.

Hyle v. Motor Vehicle Administration
702 A.2d 760 (Md. 1997)

The motorist was arrested for driving under the influence of alcohol and was transported to a police station, agreeing to submit to a chemical test of his breath. There was, however, no technician available to administer the breath test and, therefore, the driver was informed he would be transported to a hospital for a blood test. He refused.

When he refused, his license was suspended for 120 days as required by sec. 16.205.1(b)(1)(i)(2.A) of the Maryland Code.

An administrative law judge upheld the suspension, determining that there was no technician available to administer the test which was the equivalent of there being no "equipment" available under sec. 10 305(a)(3), thereby allowing the police to require the driver to be transported to a hospital and submit to a blood test. When he refused to do so, this conduct amounted to a refusal.

The administrative law judge's findings were affirmed by a Circuit Court judge, but the Court of Appeals granted a petition for writ of certiorari, determining that the administrative law judge improperly suspended the driver's license because this was not a case where there was no equipment available, but rather there was no breath test technician available, and a breath test technician does not fall within the meaning of the term "equipment" as used in sec. 10-305(a)(3).

Litigation Tips

According to the specifics of the Maryland statutes, a motorist is only required to submit to a breath test under these circumstances, which he did. The fact that no qualified breath test technician was available does not mean that there was no "equipment" available. Indeed, as the court noted, the term "equipment" has a specific meaning in the statute and that the term "on its face would seem to encompass the apparatus or

machine used to test for alcohol levels and not the qualified technician necessary to administer the test." Additionally, the court found no basis in the statutory usage of the term "equipment" that would allow it to encompass a person trained to use that equipment, i.e., the qualified breath test technician.

Finally, other terms used in the applicable statutes showed the court that the legislature knew about the difference between terms such as "equipment" and a "qualified person," as the legislature had used those terms separately and distinctly. Even if the term "equipment" was otherwise ambiguous, the legislative history clarified that the term "equipment" was not meant to be expanded to cover a police officer who would serve as a "qualified technician" to administer the test.

OREGON

Officer "unlawfully searched" defendant's vehicle by leaning into vehicle to hand traffic ticket.

State v. Hendricks]
948 P.2d 740 (Ore.App. 1997)

The defendant was stopped by an officer and was given a citation for a lane violation. The officer handed the defendant the ticket and leaned into the defendant's vehicle, claiming to notice a strong odor of alcoholic beverage. He then observed the defendant more carefully and claimed to see bloodshot and watery eyes. He then asked the defendant how much alcohol he had consumed and the defendant responded "four beers."

The officer administered a horizontal gaze nystagmus (HGN) test, ordered the defendant out of the vehicle to perform other field sobriety tests which, in the officer's view, the defendant failed. The defendant was then arrested for driving under the influence of alcohol.

At trial, the defendant moved unsuccessfully to suppress the results of the field sobriety tests and was convicted. He then appealed the suppression issue.

The appellate court reversed, determining that the officer lacked reasonable suspicion at the point in time that he leaned into the defendant's vehicle and, accordingly, all of the evidence obtained from that "unlawful search" had to be suppressed.

Litigation Tips

The only violation that the officer suspected when he stopped the defendant's vehicle was a lane violation. Accordingly, the officer's insertion of his head into the defendant's vehicle amounted to an unlawful search because the officer invaded the defendant's privacy interest inside his vehicle.

The officer invaded that privacy interest unlawfully and, therefore, the evidence obtained, including the officer's observations, the results of the HGN test and the other field sobriety tests, should have been suppressed. The officer did not develop any reasonable suspicion that the defendant was intoxicated based on the lawful traffic stop; rather, all of the information obtained to charge, and eventually to convict the defendant, was based on the unlawful search.

PENNSYLVANIA

Defendant did not refuse breath test when he failed to provide adequate sample.

Todd v. Commonwealth, Dept. Transp.
701 A.2d 1384 (Pa.App. 1997)

The trial court sustained a statutory appeal of a motorist and rescinded a suspension of operating privileges where, after an arrest for DUI the driver agreed to submit to a breath test.

The driver blew into the machine, but the machine indicated there was an insufficient amount of air to constitute a valid breath test sample. The officer then warned the driver that he had to provide a sufficient sample or be charged with refusal. The driver tried again (two more times), but each time the machine indicated an inadequate air sample. After a third unsuccessful attempt, the officer charged the defendant with refusal.

The specific breath test machine used to test the motorist allows an officer administering the test to provide a three-minute time period to record the BAC. The officer testified that he did