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CONTENTS

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PREVENTING GRAND JURY ABUSE IN DRUNK DRIVING CASES

By JOHN A. TARANTINO
Adler, Pollock & Sheehan, Providence, RI

When people get arrested for driving under the influence of alcohol or drugs, they often end up in a hospital, either because they have been injured in an accident or because they are taken there for a blood test. At times, particularly when the suspect is transported to the hospital for medical reasons, the police either do not follow the statutory implied consent law and obtain the suspect's consent to chemical testing or, alternatively, they attempt to do so and the suspect refuses.

However, the blood alcohol, drug concentration or other test is still usually given by hospital personnel for treatment purposes. When the suspect is charged with driving under the influence of alcohol or drugs, and the police have not been able to obtain voluntarily a chemical test result, they often seek to obtain the medical records from the hospital through some other source.

This article focuses on several cases of abuse where police and the Attorney General attempted under the guise of grand jury proceedings to obtain by subpoena blood alcohol, drug concentration and other medical records from patients/suspects without complying with the requirements of the Confidentiality of Healthcare Communications and Information Act, R.I.Gen. Laws §537.6-6.1 (the "Act"). The article also examines how the conduct of the police and the Attorney General's office in this regard violated the Act, resulting in the court declaring this to be an improper and ill-conceived use of the subpoena power of the grand jury because the grand jury is designed for its own use and not to further any independent investigation of the prosecutor or the police.

Finally, the court concluded that this kind of abuse transformed the subpoenas for "immediate production of

documents" into something akin to the issuance of a warrant without the intervention of a neutral magistrate and, therefore, such conduct is also impermissible. See In re John Doe Grand Jury Proceedings, __ A.2d ____, Slip Opinion No. 97-283-M.P. (R.I. August 4, 1998).

Facts

On various dates between January 13, 1997 and April 23, 1997, the Providence County Grand Jury served subpoenas duces tecum on Rhode Island Hospital. These subpoenas sought medical records of twelve patients, each of whom was being "investigated" by the grand jury and each of whom had been treated at the hospital between May 1996 and April 1997. Of the twelve sets of records sought by these grand jury subpoenas, eight concerned tests for blood alcohol and drug concentrations; the other four requests sought "all medical records for treatment" on specified dates.

The hospital refused to produce the records and moved in the Superior Court to quash the subpoenas and/or for protective orders, maintaining that the grand jury failed to comply with § 5-37.3-6.1(a) of the Act by serving copies of the subpoenas on the individuals whose records were being sought together with a notice that the individuals each had a right to challenge the subpoenas. The State argued that it could not comply with the notice provisions of the Act without violating the secrecy requirements of Rule 6(e) of the Rhode Island Rules of Criminal Procedure and thereby risking contempt charges under R.I. Gen. Laws § 12-11.5-5.1 (dealing with "unlawful grand jury disclosure").

On May 22, 1997, a justice of the Superior Court heard the hospital's motions and after hearing argument of counsel and conducting an in camera proceeding with a representative from the Attorney General's office concerning both the necessity and the relevancy of the documents sought, the trial justice denied the hospital's motions, concluding that the medical records were material to the grand jury proceedings. The trial justice also concluded that the need for the records outweighed the privacy interests of the individual patients. Accordingly, he ordered that the information be disclosed, but solely for purposes of the grand jury's investigation.

The hospital then filed a petition for writ of certiorari and a motion to stay the Superior Court order. The Rhode Island Supreme Court granted the petition, issued a stay and directed the parties to brief the issue of the propriety of naming police officers as agents of the grand jury.

The Act's Requirements Of Rule 6(e) Versus Grand Jury Secrecy.

The subpoenas at issue identified names of patients and compelled production of medical records. The hospital argued that these matters did not constitute matters or events that occurred before the grand jury and, therefore, were not within the scope of Rule 6(e). Moreover, even if they were within the scope of Rule 6(e), the hospital argued that any reasons necessitating the imposition of secrecy over the grand jury proceedings simply do not apply under these circumstances.

The State argued that the case presented a direct conflict between traditional rules of grand jury secrecy and the notification provisions of the Act. Furthermore, the State argued that it could not meet its obligations under the Act without violating its duties under Rule 6(e) and thereby subjecting the disclosing grand juror or prosecutor to charges of criminal contempt. The State urged the court to resolve the conflict and to consider policies underlying the requiring of grand jury secrecy, asking ultimately that the secrecy requirements of Rule 6(e) be deemed paramount to any disclosure requirements of the Act.

The court reviewed Rule 6(e), as well as the recently amended notice provisions of the Act and the policies underlying both provisions, and concluded that "the legislature has made clear its intention to protect the privacy rights of individuals with respect to their medical records and that the secrecy provisions of the grand jury proceedings are not threatened by giving these individuals notice and an opportunity to object to the disclosure of their records." (Slip Op. at 4).

The Legal Analysis

Here, the court was faced with construing provisions of co-existing statutes. Accordingly, under general principles of law of rules of statutory construction, the court was required to construe each statute "such that they will harmonize with each other and be consistent with their general objective scope." Blanchette v. Stone, 591 A.2d 785, 786 (R.I. 1991); Singer, 2B Sutherland Statutory Construction, § 51.02 (5th ed. 1992).

Here, the Act represented the efforts of the Rhode Island legislature to create a physician-patient privilege that had not previously existed at state

common law. See State v. Guido. 698 A.2d 729, 734 (R.I. 1997). The Act, as originally drafted, prohibited the release of a patient's confidential healthcare information without the patient's written consent, though subject to certain enumerated exceptions. The Act, as originally drafted, also provided that the information was not subject to compulsory legal process.

In Bartlett v. Danti, 503 A.2d 515 (1986), the Rhode Island Supreme Court declared these original provisions of the Act to be unconstitutional and violative of the separation of powers mandated by Article III of the Rhode Island Constitution. Id. at 517. In this regard, the court stated that: "In addition to interfering with the subpoena power of the judiciary, [the Act] removes from the court's discretion the determination of the admissibility of otherwise relevant evidence." Id. The court concluded that the Act vested "the power to make such determinations in the hands of individual patients who can decide with impunity whether to permit access to such information." Id.

Some years later, in State v. Almonte, 644 A.2d 295 (R.I.1994), the court once again examined a similar provision of the Privileged Communications Act, R.I. Gen. Laws §9-17-24 addressing communications to, as well as information obtained by, healthcare providers.

Although this statute was enacted subsequent to the court's opinion in Bartlett, and "with an obvious intent to cure the constitutional infirmities of the [Act]," it failed to do so in the court's view, tracking "with little modifications the language set forth in the earlier statute." Almonte, 644 A.2d at 298. Accordingly, the court concluded that the Privileged Communications Act suffered from the same deficiencies as the original Act and thereby the court refused to "allow the legislature to create such a sweeping privilege with regard to healthcare information as to cripple the ability of the judiciary to try and determine a wide range of civil and criminal cases." Id. at 298.

In the Almonte opinion, however, the court made clear that it in no way intended to prohibit the legislature from enacting a statute "dealing with confidential communications between the physician and the patient;" rather, the court criticized the statute because it "unequivocally impinge[d] upon the power of the judiciary in carrying out its fact finding function." Id. at 299. In this regard, it is important to note that neither Bartlett nor Almonte eradicated the underlying privilege that was created by the statutes. Washburn v. Rite Aid Corp., 695 A.2d 495, 498 (R.I. 1997).

Once again, the legislature undertook the task of fashioning a statute that would both address the need for confidential communications between physician and patients and at the same time adhere to the authority of the judiciary to have appropriate access to this type of information. On August 6, 1996, the General Assembly enacted the current version of the Act and amended the Act to add a subsection 6.1 which provides:

> (a) Except as otherwise provided in § 5-37.3-6, a healthcare provider or custodian of healthcare information may disclose confidential healthcare information in a judicial proceeding if the disclosure is pursuant to a subpoena and the provider or custodian is provided written certification by the party issuing the subpoena that:
>
> (1) a copy of the subpoena has been served by the party on the individual whose records are being sought on or before the date the subpoena was served, together with a notice of the individual's right to challenge the subpoena; or, if the individual cannot be located within this jurisdiction, that an affidavit of that fact be provided; and
>
> (2) twenty (20) days have passed from the date of service on the individual and within that time period the individual has not initiated a challenge; or
>
> (3) disclosure is ordered by a court after challenge.
>
> (b) Within twenty (20) days after the date of service of a subpoena, an individual or his/her authorized representative may file a motion to quash the subpoena in the court in which the case is pending or, if no case is pending, in Superior Court. A copy of the motion to quash shall be served by the movant upon the party issuing the subpoena in accordance with the Rules of Civil Procedure.
>
> (c) The party issuing the subpoena may file with the court such papers, including affidavits and other sworn documents, as sustain the validity of the subpoena. The movant may file with the court reply papers in response to the issuing party's filing. The court, upon receipt of these papers, may proceed in camera. The court may conduct such proceedings as it

deems appropriate to rule on the motion, but shall endeavor to expedite its determination.

(d) The court shall grant a motion to quash unless the requesting party can demonstrate that there is reasonable ground to believe the information being sought is relevant to the proceedings, and the need for the information clearly outweighs the privacy interest of the individual.

(e) In determining whether the need for information clearly outweighs the privacy of the individual, the court shall consider:

(1) The particular purpose for which the information was collected;

(2) The individual's reasonable expectation of privacy in the information;

(3) The degree to which disclosure of the information would embarrass, injure or invade the privacy of the individual;

(4) The effect of the disclosure on the individual's future healthcare;

(5) The importance of the information to the lawsuit or proceeding; and

(6) Whether the information is available from another source, including Rule 35 of the Rules of Civil Procedure. (Note: That rule deals with requests for physical and mental examinations in civil cases.)

(f) If the court determines that a subpoena should issue, the information shall not be disclosed for any other purpose except as otherwise authorized by this chapter.

(g) Nothing contained herein shall be construed to bar a healthcare provider or custodian of healthcare information from filing a motion to quash a subpoena for such information in accordance with the Rules of Civil Procedure.

The legislature by and through this amendment provided a means to allow information to be disclosed in a judicial proceeding without diminishing or obviating a patient's right to contest the disclosure. In its most recent pronouncement, the Rhode Island Supreme Court concluded that this newly amended provision of the Act:

> adequately addresses the heretofore recognized constitutional infirmities and strikes a permissible balance between a party's interest in maintaining the confidentiality of his or her personal healthcare records and the Court's need to access relevant information. A presumption in favor of privacy exists, but the party seeking the disclosure may overcome this presumption by demonstrating a particularized need that clearly outweighs the privacy interest of the individual.

In re John Doe Grand Jury Proceedings, Slip Op. at 7-8.

We now know what the court concluded, but how did it get there? And specifically, and perhaps more importantly in the drunk driving context, how did the Court overcome the State's argument that disclosure would violate the grand jury's secrecy rules? Finally, why did the Court conclude that the police and the office of the Attorney General were abusing the grand jury process by attempting to subpoena these records of blood alcohol and drug concentration tests?

Grand Jury Secrecy

First, there are certainly strong policy considerations favoring grand jury secrecy. Douglas Oil Co. of California v Petrol Stops Northwest, 441 U.S. 211, 218 (1979). There is, however, no per se rule against disclosure of any and all information (and in whatever form) that has "reached the grand jury chambers." The Senate of the Commonwealth of Puerto Rico v. United States Department of Justice, 823 F. 574, 582 (D.C.Cir. 1987).

Notice to a target of a grand jury investigation or other person that a subpoena has been issued for his or her medical records and an opportunity to object to that subpoena, does not constitute disclosure of a "matter occurring before the grand jury" and thus does not undermine any of the reasons for grand jury secrecy. In this regard, the court was not persuaded that a subpoena issued by the grand jury in fact constitutes a "matter occurring before the grand jury." Rather, in determining the appropriate "veil of secrecy" over grand jury matters, the touchstone is whether the grand jury disclosure would "tend to reveal some secret aspect of the grand jury's investigation" including "the identities of witnesses or jurors, the substance of testimony, the strategy or direction of the investigation, the deliberations or questions of the jurors and the like." Id. at 582.

Where, as here, disclosure of the information will not reveal any of the inner workings of the grand jury investigation, Rule 6(e) is simply not

applicable and the information may be disclosed. United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978) ("[p]ersons may have a legitimate interest in documents so that disclosure to them does not constitute disclosure of matters occurring before the grand jury"). Accordingly, the issuance of a subpoena and its service upon a person is not, *per se*, a secret.

Although the notification of a patient that a subpoena has issued for his or her medical records could reveal the nature and course of the grand jury investigation, the court found such position and argument unpersuasive because it could "perceive no justifiable distinction between this instance and those in which an individual targeted by a grand jury investigation is subpoenaed and asked to provide a handwriting or voice exemplar, fingerprints or hair sample." (Slip Op. at 5). Therefore, any perceived threat of revealing the nature and course of the investigation to a potential grand jury target, such as a patient, would be no different than seeking subpoenas for such "physical evidence." Id.

Additionally, without giving notice of the subpoenas to the individual patients, there would be no means available to challenge the grand jury's use of its subpoena powers, which also are not limitless. United States v. Calandra, 414 U.S 338, 346 (1974). Accordingly, the Rhode Island Supreme Court refused to disregard the Act's requirement that a patient be given an opportunity to challenge the validity of the subpoena. Therefore, even if the patient could have no reasonable expectation that his or her medical history would remain completely confidential, this fact does not mean that person lacks interest in protecting, to a certain extent (and as there was no inconsistency between the Act and Rule 6(e), and the notification requirements of the Act do not improperly intrude upon the grand jury's power to conduct a criminal investigation; rather, the Act strikes an appropriate balance between the individual's privacy interests and the State's interests in prohibiting illegal activity.

Improper Agency

Finally, the Court addressed a very troublesome issue: the grand jury's use of police officers as their agents. In Guido, the court expressed misgivings about this practice and went so far as to issue cautionary directives against its continued use. Guido, 698 A.2d at 736-38. Nevertheless, the court concluded that the grand jury continued to utilize police officers as well as other law enforcement officers as its "authorized representatives" to serve subpoenas and to secure the return of service. The court found this practice both unacceptable and wholly improper. First, there is no rule or statutory procedure that expressly authorizes grand juries to appoint police officers or other governmental personnel as their agents. Rather, the State relied upon Rule 17(d) of the Rules of Criminal Procedure as well as "long standing practice in our jurisdiction." Rule 17 states:

> The subpoena may be served by the sheriff, by the sheriff's deputy, by a constable, or by any other person who was not a party and who was not less than eighteen (18) years of age. Service of a subpoena shall be made by delivering a copy thereof to the person named and by tendering to him the fee for one (1) day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the State or an office or agency thereof, fees and mileage may not be tendered.

This provision authorizes the police to serve subpoenas, but does not confer upon the officers the power to effectuate return of service or any other broad investigatory powers that are otherwise commensurate with the grand jury proceeding.

Additionally, the court found nothing in Rhode Island case law to indicate the approval of such an unauthorized practice. The court also distinguished Federal Rule of Criminal Procedure 6(e) as amended by Congress, which allows in its amended form disclosure to governmental personnel assisting in an investigation, but only after certain mandatory precautions have been taken to preserve grand jury secrecy, namely, that the federal prosecutor "properly provided the district court, before which was empaneled a grand jury whose materials have been so disclosed, with the names of the persons to whom such disclosure has been made, and *** certified that the attorney has advised such persons of their obligation of secrecy under this rule." Fed.R.Crim.P. 6(e)(3)(B).

The Federal Rule 6(e) also provides that persons to whom matters are disclosed may utilize the material only to assist the attorney for the government "in the performance of such attorney's duty to enforce federal criminal law." (Emphasis added). Fed.R.Crim.P. 6(e)(3)(B).

Rule 6(e) of the Rhode Island Rules of Criminal Procedure differs in this regard, containing no means by which a police officer can be appointed as an agent for the grand jury; nor is there any explicit authorization to disclose information to police officers. Finally, there are no procedural safeguards to underline the importance of grand jury secrecy or to the limit the scope of its disclosure.

In fact, at oral argument the State "was unable to describe the oath these agents are given or to explain its origin, nor was [the] court provided with any evidence concerning the existence of any policies or procedures that govern the conduct of these agents." In re John Doe Grand Jury Proceedings, Slip Op. at 16. Therefore, the court rejected any reliance on federal precedent as inappropriate and unconvincing.

The court also determined that even though there was no explicit statutory authority to allow utilization of police officers as agent of the grand jury, such utilization was also outside the power inherent in the grand jury process. This is particularly true where the grand jury's role is "usurped or the grand jury is used to expand the investigating authority or the prosecuting attorney and police to circumvent constitutional safeguards." Guido, 698 A.2d at 737.

The court's fears for abuse were well documented.

First, the subpoenas served upon the hospital stated that the police officer serving them was an agent of the grand jury and that "these records should be given directly to him." There is no procedure that allows such abuse: Simply stated, police officers, even if armed with grand jury subpoenas, cannot demand immediate surrender of records that may otherwise be privileged.

Additionally, once the officer has the records he or she has "complete and unfettered use of them, including the prosecution of misdemeanor crimes without any participation of the grand jury or the Attorney General." Id. at 17. The court declared this practice "to be well beyond the power of the grand jury and to be potentially abusive to the rights of citizens, resulting in a roving, investigating commission that is the very antithesis of the purpose of the grand jury." Id.

Finally, and of greatest concern in the court's view, "is the demonstrated abuse of the grand jury subpoena power and the usurping of that power by the State's prosecutors." Id. (emphasis added).

At oral argument, the court learned that the Attorney General's office utilizes the grand jury "for the issuance of subpoenas to obtain evidence concerning matters that are not before the grand jury and may never come before the grand jury." Id. at 17-18 (emphasis added). In fact, the prosecutor revealed that approximately 250 subpoenas had been issued by the grand juries in Rhode Island for investigations and cases that were not grand jury matters.

The sole basis upon which the State attempted to justify this practice was on the grounds of "management problems' that allegedly were "inherent in a procedure that limits grand jury subpoenas to grand jury matters." Id. The State claimed there would be a problem if its prosecutors needed to call additional grand juries and staff to handle the increased volume.

The court properly, rightfully and simply rejected this unlawful practice which "results in a total eradication of the independence of the grand jury and a merger of the identity of the grand jury with the prosecuting arm of the executive branch of government." Id.

The subpoena power of the grand jury is designed for its use and not to further any independent investigation of the prosecutor or police. This kind of conduct is improper and was properly stricken by the court. Whatever the offense is -- yes, even drunk driving and its many exceptions to the Constitution's otherwise recognized protections -- "enough was enough." The court was "constrained to declare that the grand juries of this state have no authority to appoint agents to recover documents in furtherance of investigations not related to the grand jury." Id. at 18.

At least on this occasion, the great and intimidating power of the State was checked. It is important for us to remember, and for courts to continue to recognize, that the Constitution and laws were designed to keep that state power in check, the unpopularity of drunk driving cases notwithstanding.

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ITS OKAY TO LIE, AS LONG AS YOU'RE THE STATE: PART II

By RICK SWOPE

My last article (DWI Journal, May 1998) centered on the facts leading up to the discovery that a police officer and the State Attorney's Office knew that the test results from a particular intoxilyzer had been falsified.

Nevertheless, no effort was made to inform defense counsel and/or persons who were arrested and administered breath tests on this machine; rather, the police and state attorney attempted to conceal this fact. This article will deal with the actions on the part of the police officer and the state attorney's office.

Preliminarily, I would like to point ut that this article is not- intended to attack or disparage all state attorneys or their assistants. In fact, Broward County, Florida was notified by their maintenance officer a few years ago that a problem was found to have existed with a machine and the monthly maintenance documents.

The state immediately notified defense attorneys and defendants who had pled guilty during the period of the machine's non compliance, resulting in the re-opening of several hundred cases. This is what is supposed to be done and later in this article we will address and comment on this particular issue.

As previously related, the police officer in court "freely admitted to changing the intoxilyzer clock to read the original test time" as part of his in court testimony. This change was made to eliminate a time discrepancy between the original time of testing and the second time of testing.

After this admission, the officer further testified that the stare attorney's office was notified of a time discrepancy in the test cards. In response, the state attorney's office told him to reset the clocks and "to do whatever it takes." The officer believed (and rightly so) that this statement gave him permission to change the card and clock errors, reset the times, etc and, in effect, to falsify the test and maintenance results.

At this point, the state at the very least had been made aware that several problems were present, not only with the intoxilyzer results, but the officer as well. Obviously, the ethical and right thing would be for the state to verify and pinpoint (I.) the time periods during which the problems occurred and (2) the criminal cases which were affected as a result thereof and thereupon, to notify defense attorneys that there were apparent problems with the maintenance on this machine.

In Florida, maintenance documents can be admitted in court without the maintenance officer's testimony. All that is required for admission is his or her signature. Readers of this article must now be thinking several thoughts.

First, the officer has committed a criminal act by falsifying a document. In addition, the officer on previous occasions had in fact testified in court to the reliability of this machine, in effect committing perjury. The officer was certainly aware of what he was doing, but did it anyway.

Moreover, the prosecutors in the state attorney's office who advised the officer to continue with the fabrication of documents should be investigated.Kathleen Rundle, the Miami-Dade County State Attorney, who is currently under fire herself, decided that the accused prosecutors should investigate themselves.

The importance of this decision is the basis for further criminal acts on the part of the state. These certainly appear to be criminal acts. Remember, by having the prosecutors investigate themselves and the officer, the potential existed for not only covering themselves, but also working out "a deal" with the officer.

A complete review of all documents associated with the investigation indicates such an obvious "cover up" that even a child could discover it. It goes as follows: The state altorney's office requested an internal affairs investigation of the officer by his police agency, the Metro Dade Police Department.

The police department fills out a disciplinary action report listing the "departmental violations" that the officer has violated, to wit: altering, forging or tampering with documents. The so-called criminal investigation would be handled by the same prosecutors in the state attorney's office who are investigating themselves.

The internal affairs investigation continues until such time as the state attorney's office notifies the Metro Dade Police Department that its criminal

investigation of the officer is completed. Subsequently, internal affairs was notified that the criminal investigation was completed and that no criminal charges would be filed since the officer did not act with "the corrupt intent" required by §839.25 of the Florida Statutes. The state attorney's office further stated that had the officer realized that what he was doing was wrong, he could have destroyed the cards and evidence he had falsely created.

Additionally, the prosecutors went even further, into outer space by indicating that the officer had no "criminal intent" and, therefore, simply had a "misplaced belief" in what he was doing. At this point, I expect readers to be falling on the floor or fainting however, that is exactly what happened!

Of course, since the state did not prosecute, internal affairs closed out its investigation with a letter of reprimand. Not bad, considering this officer should have been prosecuted, terminated from his job and removed from police work forever.

Without stating the obvious, countless questions come to mind. The state was aware that perjury likely had been committed, but did not investigate this matter. Neither did the state investigate any of the other machines in the officer's care. One would suspect that if the officer falsified the test results on one machine, then why not on the others which he was assigned to perform maintenance?

I further suspect that a deal was made between the officer and prosecutors involved in this matter. The officer, by virtue of the fact of not being prosecuted, would not then testify against these prosecutors as to what they told him to do. The prosecutors would not then be subject to another investigation which, of course would be extremely embarrassing to them and the state attorney's office.

I wonder what would happen if I, as an expert witness, took the stand and during cross-examination by the state, advised the court that defense counsel had requested me to change the results of a test card when I ran an experiment on the intoxilyzer. would further testify that it was no big deal, I had no "criminal intent," and did not know that it was wrong to alter a test card. I strongly suspect I would be in jail in a matter of minutes and defense counsel would be disbarred in record time!

The facts in this article are not in dispute and are a matter of record at the Metro Dade Police Department. It did take over two years to get all the information, since the police and state wanted it "covered up" for as long as possible. Rather than this being an embarrassment to the state and the police department, everything remains business as usual.

Remember, those accused of drunk driving are public enemy number one in today's society. Even if the state has to resort to criminal and illegal means to convict a drunk driver, it is because they are doing it for "us" , i.e. to protect us from the drunken drivers on the road.

As I indicated in the heading of this article, it is okay to lie, fabricate, alter, forge, perjure yourself, etc. as long as the state is doing it and condoning it!

My next article will continue to address these types of so called "misunderstandings" by other state agencies and jurisdictions. Be advised that falsification of court documents occur every day by the state; they just usually are not caught.

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CASE LAW AT A GLANCE/LITIGATION TIPS

ILLINOIS

Preliminary breath test results admissible at suppression hearing.

People v. Davis

63 Crim.L.Rev. (BNA) 417 (Ill.App.Ct. 3d Dist. 1998)

The defendant was arrested on suspicion of drunk driving. Among other "sobriety tests" he was given a preliminary breath screening test by the police officer. The defendant challenged the officer's probable cause for the arrest and the State attempted to use the results of the PBT to support a finding of probable cause.

The defendant argued that the PBT results were not admissible because the statute governing the

tests, 625 I.L.S.C. 5/11-501.5, requires the existence of reasonable suspicion and also provides that results may be used by an officer to determine whether further testing is required. Further testing must be supported by probable cause.

A majority of the Illinois Appellate Court, after reviewing the statute, deemed it ambiguous, but concluded, based on legislative history, that PBT results should be admissible if the officer's determination of probable cause is challenged.

Litigation Tips

The statute at issue authorizes defendants to use PBT results in court, but says nothing about courtroom use by the State. Accordingly, the defendant argued that since the legislature specifically allowed the defendant to use the results, but said nothing about its use by the State, such use was not permitted.

The majority of the court found the statute ambiguous in this regard, but based on its understanding and analysis of legislative history, determined that the main purpose of the statute was to aid officers in determining whether there is probable cause to arrest. Accordingly, the court reasoned that it follows from this purpose that the results of the PBT must be admissible where the officer's determination of probable cause is challenged.

Presiding Justice Holdridge dissented, arguing that the statutory language clearly forbids the State from introducing PBT evidence in court and, accordingly, regardless of the nature of the hearing (suppression hearing, preliminary hearing or trial), the PBT results should not be admissible.

MASSACHUSETTS

State constitutional rule barring admission of evidence of refusal to submit to field sobriety test is not limited to explicit refusals.

Commonwealth v. Grenier

63 Crim.L.Rep. (BNA) 418 (Mass.App.Ct. 1998)

The defendant recited the alphabet the officer requested, but when defendant was asked to balance on one leg, he said he could not perform the test, and argued that the officer, who had earlier demonstrated how to perform the test, had been specifically trained to do it.

The defendant was told by the officer that he had a choice of whether to perform the test or not. The defendant answered, however, that whether he failed to perform the test or tried and failed, the officer would still arrest him. The officer confirmed the defendant's understanding and the defendant then said, "take me."

At trial, the court characterized the defendant's statement as "negotiation" rather than refusal and, therefore, determined that the state constitutional rule barring admission of evidence of a defendant's refusal to submit to field sobriety tests announced in Commonwealth v. McGrail, 647 N.E.2d 712 (Mass. 1995), did not apply.

The appellate court disagreed, ruling that the defendant need not explicitly state that he was refusing to submit to a field sobriety test in order for McGrail to apply.

Litigation Tips

The appellate court criticized the lower court's determinations as legal conclusions based on the investigating officer's reports. Accordingly, they were open to de novo appellate review. The court then pointed out that the defendant presented, and expressly articulated the very dilemma upon which McGrail focused: the forced choice between risking the creation of physical evidence that would be used against the defendant if one takes the test, and also knowing that the officer will give adverse testimony if one refuses to perform.

Here, the defendant stated that he could not pass the test and that his "excuse" (i.e., that he was not trained to perform it) would have permitted the jury to infer that the defendant thought he could not pass because he had too much to drink. Accordingly, these statements were protected by the state constitutional privilege against compelled self-incrimination as the court interpreted McGrail.

GEORGIA

Georgia Administrative Procedures Act does not apply to test performed by Division of Forensic Sciences for drugs and alcohol.

Helmeci v. State

1998 WL 128502 (Ga.App.)

The court reconsidered (and ultimately vacated) its prior ruling in Helmeci v. State, 1997 WL 746175 (Ga.App.) [reported in the June 1998 issue of DWI Journal], when the court had held that the urine test administered to the defendant was inadmissible based on the Division of Forensic

Sciences' (DFS) failure to follow the rules of the state Administrative Procedures Act. The State had argued that the APA was not applicable to internal procedures of the DFS, but the court initially disagreed.

On reconsideration, in Helmeci, the court reviewed the recent amendment, OCGA §35-3-155 effective May 1, 1997, as part of a "comprehensive overhaul of the statutes dealing with DFS."

The new statute provides: "Unless otherwise specifically provided by law, technical, scientific and similar processes, procedures, guidelines, standards and methods for the collection, preservation or testing of evidence adopted by the Division shall not be subject to the provisions of ... the 'Georgia Administrative Procedures Act.'" (emphasis added).

Accordingly, the court determined that under the statute, as amended, the APA does not apply to the type of testing procedures used by the DFS in the Helmeci case.

Finally, because the court concluded that the amendment only modifies the scope of evidence that may be offered in a DUI trial and does not affect the manner or degree of punishment and does not alter any substantive rights conferred on the defendant by law, it could retroactively apply to the criminal defendant in this case. Therefore, the court determined that the trial court had properly denied Helmeci's motion to suppress on this ground.

Litigation Tips

The appellate court had "serious concerns" with the application of any statute that retroactively alters the rights of a criminal defendant, substantively or otherwise;" however, it deemed itself "bound by the decisions of our Supreme Court" which concluded where the amendment at issue does not affect the manner or degree of punishment and does not alter any substantive rights conferred on the defendant, it may be applied retroactively.

The court also rejected Helmeci's claims that the DFS toxicologist who testified at trial was not qualified to testify because he had admitted not seeing the design plans for the machine, and was only familiar with its internal electronics as an operator, but not as an electrician.

The court found this argument to be without merit, because the DFS toxicologist testified he was familiar with the machines and their operation and that they were in proper working condition. He also testified that DFS can determine whether the machine is working properly by working "controls" that are provided by the manufacturer.

Accordingly, the court determined that "the statute does not demand that the examiner have an expert's knowledge of the underlying scientific principles governing the functioning of the machine." Dotson v. State, 179 Ga.App. 233, 234, 345 S.E.2d 871 (1986).

Finally, the court noted that neither the State nor the defendant had brought this recent amendment in the law to the attention of the court in the original briefing. Nor was it raised by the parties in connection with a motion for reconsideration, but rather was first raised in an amicus curiae brief filed by the Attorney General's office in support of the State's motion for reconsideration.

The court "commended" the Attorney General's office for its efforts in bringing the issue to the attention of the court, stating that "[w]ithout the input of the Attorney General, there is a possibility that the change in the law would not have been considered in our decision in this matter."

ALASKA

HGN test not admissible to prove defendant had a particular blood alcohol content.

Ballard v. Alaska
1998 WL 150774 (Alaska App.).

The defendant challenged the HGN test on a number of grounds, including whether it was admissible under the Frye standard, admissible as evidence that he had a particular blood alcohol content, and whether the officer's testimony that the HGN test showed defendant was "a very impaired individual" was tantamount to an assertion that the test results correlated to a particular blood alcohol content.

The defendant also challenged whether the trooper who administered the test was qualified to testify concerning the defendant's performance.

The court ruled the HGN test was admissible under Frye, at least the circumstantial evidence that a defendant had consumed alcohol and was potentially under the influence of that alcohol. The court also ruled that an HGN test is not admissible as evidence that a defendant had a particular blood alcohol content. Finally, an officer may not testify that the HGN test particular blood alcohol content.

On this final point, the court determined that

the trooper should not have been allowed to so testify, but deemed the error harmless given the other evidence presented, indicating the defendant was, in fact, intoxicated, and also because the prosecutor did not appear, in the court's view, to highlight the trooper's improper testimony to the jury.

Litigation Tips

The court determined that the science underlying HGN testing, and specifically, the principle that alcohol consumption causes nystagmus, is "generally accepted" in the relevant scientific community and, therefore, satisfies Frye.

Although there may be a "considerable debate" about the ability of the HGN test to disclose or predict a person's blood alcohol content, the court determined "there is widespread agreement that [HGN] is a reliable and valid indicator of the presence of alcohol in a person's blood and, consequently, of the person's potential intoxication."

The court rejected the defense expert's citation to a study that indicated HGN testing was only reliable 59-66% of the time, with the court noting that other studies have shown higher reliability. It also found the difference among the studies to be insignificant. Finally, the court reasoned that "[e]ven assuming that the HGN test is reliable only 60% of the time, this is a sufficient level of reliability for the HGN test to be admitted as an indicator of potential intoxication."

Other problems with HGN testing could be challenged by the defendant on cross examination of the officer or other expert, but did not, in the court's view, mandate that the test results be admitted. The court cautioned, however, that HGN testing may not by itself establish intoxication; but rather, the test results are admissible only as a factor to be considered when determining intoxication.

Accordingly, if the HGN test is properly administered, it may be admissible on the issue of impairment, but only if the prosecution claims that HGN evidence has no greater reliability or weight than any other standard field sobriety test. Also, the prosecution can make no attempt to correlate the HGN test results with any particular blood alcohol content, range of blood alcohol content, or any particular level of impairment.

MISSOURI

Prosecutor may question defendant about prior inferences and statements without violating Miranda.

State v. Ogle

1998 WL 204747 (Mo.App. 1998).

The defendant was arrested for drunk driving after he was found in a damaged car with the engine running at an intersection, half on and half off the road. At the police station, he was given Miranda warnings and told the police that "he had been driving and he had been drinking and that there was nobody else with him."

At the trial, the defendant testified he had been in an accident earlier in the evening and that a tow truck had towed his car back to his girlfriend's house. He returned the tow truck and walked back to the girlfriend's house, stopping at a liquor store to purchase and consume two bottles of alcohol, i.e., "Hot Damn Cinnamon Schnapps." Once he arrived back at his girlfriend's house, the door was locked so he decided to sit in his car. He wanted to listen to the radio and, therefore, used the key in the ignition for it to work.

He was cross examined by the prosecutor at trial whether he had told law enforcement the same version of the facts prior to his trial testimony and the defendant admitted he had not. The defense attorney objected, arguing that the prosecution's line of questioning was a "comment" on the defendant's post-arrest silence. The trial court overruled the objection and the defendant was convicted and appealed.

On appeal, the court affirmed, determining that the defendant did not remain silent upon arrest, but rather, waived his right to silence, having admitted to driving the car and drinking. Accordingly, the prosecution's question did not regard any post-arrest silence and concerned only a prior inconsistent statement.

Litigation Tips

The State may not use a defendant's post-arrest silence either as substantive evidence of guilt or for impeachment. Once the defendant exercises his Miranda rights and constitutional rights and remains silent, that silence cannot be used by the State. Here, however, the defendant did not simply remain silent. He admitted, after being given Miranda warnings, that he had been drinking and driving. Accordingly, the court determined that the prosecutor properly questioned the defendant about these inconsistent statements given to the police and to the jury.

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