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DEMONSTRATIVE EVIDENCE: UNPLUGGED

By John A. Tarantino

Demonstrative evidence carries the connotation of being high profile, glitzy, high tech, usually electronic, and, almost always expensive. Computer animations, videographics, and sophisticated reenactments are all of the above and each can have an important place in modern day drunk driving defense. See Tarantino, "Using Computer-Generated Simulations in Alcohol Related Trials," 6 DWI Journal: Law & Science 8 (August 1991).

But demonstrative evidence in a drunk driving trial does not have to be glamorous to be effective. Just as rock musicians have started to capitalize on recreations of their 1970s and 1980s songs in 1990s "unplugged versions," so, too, can simple forms of demonstrative evidence be rediscovered in drunk driving trials.

The high tech demonstrative evidence will continue to play an important role in the defense of modern day criminal trials, but for those defense attorneys and clients who cannot afford to spend thousands of dollars on sophisticated demonstrative evidence (which, incidentally, may be excluded by some less than progressive thinking judges) here are several suggestions on how to prepare and present demonstrative evidence in modern day drunk driving trials, principally in the "unplugged" version.

Photographs

Photographs were some of the earliest, and most effective, forms of demonstrative evidence. One picture truly is worth a thousand words. Often there is no better way to illustrate a point than to present it to the trier of fact in photographic form.

For example, in a drunk driving trial, a photograph of the intersection where a traffic stop, and arrest, occurred can be useful in showing the jury lighting conditions, uneven roadway conditions, traffic signals (or the lack thereof),

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potential obstructions to vision and the like.

Photographs of the outside and inside of the defendant's vehicle can also be useful to show any defects, bangs or dents (the indicia of the accident); or the cluttered glove compartment where the officer claimed the defendant had a great deal of difficulty finding his or her license and registration.

Finally, photographs of the breath testing equipment (if the alcohol testing device will not be demonstrated to the jury) will help the jurors understand better, and, therefore, potentially demystify, the workings of the machine.

Beverage Glasses/Beer Bottles

One of the best forms of demonstrative evidence in drunk driving trials is the beverage glasses or liquor bottles from which the defendant consumed alcohol. In one case the author tried, the breath test result was 0.23g%.

Expert testimony indicated that for the defendant to have had an actual blood alcohol content (BAC) of 0.23g% at the time of the test, she would have had to consume 13 bottles of the beer she had been drinking. At trial 13 bottles of beer were placed on counsel's table facing the jury and then each bottle was poured into the same size glass in which the defendant had been drinking. Over 26 glasses of beer were necessary to deplete 13 bottles of beer.

The jurors apparently had a great deal of difficulty in accepting a BAC result of 0.23g% where that meant they also had to accept that the defendant, a relatively demure, young woman, had consumed 26 glasses of beer over a relatively short period of time.

The demonstrative evidence presented at this trial only cost about $25 in total (beer and glasses), yet was a major factor in obtaining an acquittal.

Maps and Diagrams

Simple maps and diagrams are also inexpensive to prepare and present, yet they are often very effective. Maps of the defendant's travel route showing where the journey began, anything unusual that occurred along the way, the traffic stop, the scene of roadside sobriety testing and the journey to the police station for chemical testing, can be useful in orienting the jurors to what happened, and where it happened.

The map can also be useful in helping to illustrate a defendant's direct testimony, or in cross examining the police officer or any lay witnesses.

Diagrams also have an important role to play in drunk driving defense. Consider using a diagram of the bar where the defendant was drinking, the areas of the police station where videotaping and breath testing occurred, and the jail block where booking and confinement took place. The limits of diagrams and their potential uses are left to the particular facts and circumstances of any given case, and the creativity and imagination of the defense lawyer.

Make sure that the client or other defense witness who is either preparing the diagram or map, or who will be referring to it during testimony, or using it to demonstrate a point at trial, is familiar with it and is comfortable in explaining the desired points at trial. Maps and diagrams can be very effective when used properly; however, like any other form of evidence, their use can lead to disaster when improperly prepared or utilized.

The Blackboard

The blackboard is one of the oldest, but still most effective forms of demonstrative evidence in drunk driving defense. All jurors can relate to the blackboard because use of this device is commonplace in every classroom.

When effectively used, the chalk and blackboard can transform the defense attor-

ney into a teacher of the jury; and just as students are conditioned to accept what is on the blackboard in the classroom as true, so, too, can the jurors come to accept the defense attorney's blackboard presentation as presenting "the truth."

For a thorough analysis of how the blackboard can be used in drunk driving cases, see J. Tarantino, "Using the Blackboard to Defend Drunk Driving Cases," 3 DWI Journal: Law & Science 10 (October 1988).

Articles of Clothing

The defense often makes an argument that the clothing worn by the defendant made it difficult for him or her to perform well on the field sobriety tests.

This argument can be effective, and the premise for the argument often has merit: there are certainly items of clothing, such as boots, high heeled shoes, various styles of dresses and the like that can make coordination-based field tests more difficult to "pass" or perform properly.

However, almost no defense attorneys do anything more than have the defendant (or worse, the officer) describe the clothing worn by the defendant on the night of the arrest. The true power of persuasion with this evidence lies in its presentation to the jury.

Allow the jurors to see, and, when appropriate, feel, the articles of clothing -- the boots, shoes, pants, dresses and the like. Consider having the defendant "model" the clothing for the jurors.

Jurors can readily understand how a well dressed woman in a tight fitting dress and high heeled shoes might have difficulty performing walk-and-turn, one leg stand, walk the line, and other coordination and balance tests.

This kind of demonstrative evidence makes the defense version of the case "come alive" and adds tremendous credibility to the defense theme, especially if the clothing can be used to impeach the officer's testimony about what the defendant was wearing or how he or she was dressed. If the officer is lying, or at least mistaken about these relatively mundane matters, it likely will not be difficult for the jurors to assume that the officer may be "mistaken" about other, perhaps even more important details of the arrest.

Other Physical Devices and Items

Eyeglasses, contact lenses, braces, canes, orthotics, items of jewelry and the like can also be used effectively as demonstrative evidence in a drunk driving trial.

For example, in one trial the author had, the defendant was asked to remove his eyeglasses before he took the field sobriety test, and the horizontal gaze nystagmus test in particular. Without corrective lenses the defendant was legally blind. He could not even see where he was going, let alone pass a field sobriety test.

Just presenting the testimony of the defendant's ophthalmologist was not enough to demonstrate this point. Rather, the author asked the judge to allow the defendant to remove his "coke bottle" glasses and had the eyeglasses passed from juror to juror so each could look through them and see how powerful the prescription was.

In another case, the defendant wore contact lenses. On cross examination of the arresting officer regarding the horizontal gaze nystagmus test, the officer was asked whether the defendant was wearing contact lenses at the time of the test administration, and whether the wearing of the lenses affected the HGN test.

The officer testified that he was aware that the defendant wore contact lenses, as she had so informed the officer. The officer also admitted that the contact lenses "might" have had some effect on the administration of the HGN test; but the officer claimed he did not allow the defendant to remove her lenses because it would have been difficult to do so as well as time consuming.

The author then had the defendant remove her lenses before the jury in a matter of seconds. The defendant had worn contact lenses for many years and was quite adept at removing them quickly, effortlessly and gracefully. This presentation helped the jurors understand and accept the defense argument that the officer was not interested in being fair -- rather, he just wanted to get the arrest over quickly and charged the defendant with a crime.

Other physical devices such as leg braces, shoe supports and other orthotics can also be extremely effective in illustrating defense oriented points. The better the jury can understand the defense argument, the easier it will be for the jury to accept those arguments.

Perhaps, one of the most interesting and amusing cases the author had where demonstrative evidence played an important part, was where the defendant wore dentures and, in an implied consent hearing, the defense was able to demonstrate that the defendant did not "refuse" to take a chemical test, but rather, as the defendant blew into the machine, his dentures kept loosening and falling out; and because for some unknown reason the officer refused to allow the defendant to remove the dentures before blowing into the machine, the defendant was unable successfully to complete the test.

Demonstration by the defendant of the difficulty he had blowing into the machine with the loose fitting dentures helped con

since the administrative judge that the defendant had not refused to take the test; rather, he could not blow hard enough to register a result without loosening the dentures.

Other Physical Demonstrations

Sometimes the best form of demonstrative evidence is the client. Although many attorneys spend thousands of dollars in computer reenactments of events, it is often easiest and most effective to ask the defendant to demonstrate for the jury how he or she performed the field sobriety tests, or how difficult it was for the defendant to blow hard enough to register a reading on the machine; or, to demonstrate some physical problem or abnormality such as a scar, limp or the like that made it difficult for the defendant to perform tests or that might have caused the officers to have concluded that the defendant was under the influence of alcohol.

Many defense attorneys are reluctant to have the defendant testify at drunk driving trials. Physical demonstrations may be self-serving, but that "problem" affects the weight the jurors may give to the evidence, not its admissibility.

Additionally, the defendant may be able to perform physical demonstrations without having to submit to generalized and open-ended cross examination. See Tarantino, "A Novel Way to Have the Defendant Testify," 1 DWI Journal: Law & Science 1 (March/April 1986) (article suggests ways to argue that because administration and performance of field sobriety tests is nontestimonial for purposes of Miranda, then they also should be nontestimonial for purposes of cross examination where the defendant merely demonstrates his or her performance.)

Videotapes

While the major thrust of this article is to present and examine non-electronic demonstrative evidence in drunk driving trials, there is a form of inexpensive demonstrative evidence that does have to be plugged in: videotapes.

The cost is usually minor: the cost of a blank tape to obtain a copy of the complete tape of the videotaped sequence of events, and then another tape for editing purposes. This evidence is so universal and so inexpensive (but potentially explosive) that it is an exception to the "unplugged" focus of this article.

The police often videotape the defendant's performance of sobriety tests in the station. They may also videotape the reading of rights, the defendant's oral completion of an alcohol influence report form, and the chemical testing process.

Generally, the police will offer the videotape if it is inculpatory and neglect to mention it if it is exculpatory. Always ask for the videotape in discovery and review it carefully.

Once it is reviewed, consider offering an edited version of it, both as demonstrative and substantive evidence of the defendant's non-intoxication. A carefully edited videotape can present dramatic evidence at trial. While the prosecution also will have the right to present any portions of the videotape it wants to in rebuttal, a tightly controlled and convincing video presentation can create the reasonable doubt necessary to obtain an acquittal.

The suggestions for using demonstrative evidence contained in this article show that an unplugged, basic form of demonstrative evidence can be used both to illustrate and for substantive purposes in drunk driving trials for next to nothing in cost.

The price of demonstrative evidence does not always relate directly to its effectiveness with the jury. Rather, the impact of the evidence in helping to illustrate a point that can help lead to an acquittal is what makes it important.

The "cost" of preparing the evidence can be minimal. The cost of not doing so can be severe. Remember, there is no price tag that

can equate to the successful use of demonstrative evidence. And while to some who offer demonstrative evidence money is no object, to those who defend drunk driving cases on a budget, the impact on the evidence and not its price tag is what is important because the words "not guilty" are ones money can't buy.

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ROADSIDE SOBRIETY TESTS, PART II

By Rick Swope

Our last discussion (DWI Journal, June 1993), centered on the reliability of training received by officers in the testing procedures of the roadside sobriety tests.

This discussion will concentrate on the traffic stop and the initial contact with the alleged violator at the roadside.

On patrol an officer is required to handle countless tasks and to observe everything that may be of some importance or suspect to him or her. The National Highway Traffic & Safety Administration devised detection phases in order to assist officers in apprehending the drinking driver.

The first phase, Vehicle in Motion, and the second phase, Personal Contact is what we will be concentrating on.

NHTSA devised a series of 20 cues to assist officers in detecting the driving patterns of drinking drivers. These patterns consist of turning with a wide radius, drifting, swerving, following to closely, etc.

These cues were arrived by the analysis of over 1000 DWI arrest reports. As any officer knows, there are countless other violations of which a drunken driver may be involved.

In relating this information to police recruits, I am often asked if the driving pattern alone is enough to justify a DWI conviction in court if the individual refuses the breath test. In the jurisdictions in which I have testified, the answer is no.

I have reviewed thousands of probable case affidavits during my years as a police officer, and generally find that officers concentrate less on the actual driving patterns than they do other parts of the arrest phase in completing their paperwork.

Simply put, officers fail to list the entire driving pattern(s) of the individual. Generally you will find the statement "subject failed to maintain a single lane". What exactly does this mean to a jury?

Most officers realize that the individual was driving erratically or swerving back and forth, however, if the officer did not indicate how many times the motorist swerved, what tires or how much of his vehicle entered the other lane, what will be remembered in court.

More disturbing is the fact that the defense attorney may ask the officer a questionregarding how many times the opfficer observed violations. The officer will then offer a vague type of answer such as "two or three times."

Most officers forget that while all aspects of the DWI arrest are vitally important, the driving pattern indicates the basis for the actual stop. Therefore, much more emphasis should be placed on evaluating the operators driving pattern, whether good or bad. NHTSA repeats over and over again that driving is a complex task, and that a driver performs countless tasks while operating the motor vehicle.

Yet most officers tend to ignore the majority of incorrect tasks performed by the operator.

After the stop is completed, the officer at some point will make personal contact with the operator. NHTSA calls this phase "personal contact."

Most jurisdictions, including the Broward

Police Academy in Ft. Lauderdale, Florida, train the officer to walk up to and approach the violators vehicle; however, it is my opinion that having the operator exit his vehicle and walk back to the officer is the safest and best approach to the traffic stop.

Although there are numerous experts and arguments for having the officer approach the vehicle, I have consistently found that the officer remains in total control of the stop while having the violator walk back to the officer's location.

There are times when this approach will not be effective, and officers must evaluate every situation accordingly, and be prepared for all circumstances which may arise on a particular stop.

Because NHTSA's DWI procedures involve the officer walking to the violator's vehicle, this is the manner in which the following information will be given.

Many officers feel more in control when the violator is inside the vehicle, and NHTSA has procedures for the pre-exit sobriety tests. However, many DWI violators go undetected at least in part because of flaws in this procedure.

NHTSA itself has found that thousands of DWI violators are released because the officer does not detect some or any signs of impairment. If the violator remains inside the vehicle, and no obvious signs of impairment are evident, such as slurring of speech or odor of an alcoholic beverage, the violator's chance of not being detected greatly increase.

By having the violator exit the vehicle, and by observing his balance and other factors, the officer will have a much better chance of detecting any clues of impairment that may have been missed had the violator not exited his vehicle.

Upon speaking with the driver of the vehicle, observations such as sight, smell, hearing, balance and other factors should be considered prior to the administration of the roadside tests.

Typically, officers use "key symptoms" and phrases such as bloodshot, watery eyes, slurred speech, and unsteadiness to describe the motorist. Although it may take some time to write out a concise DWI arrest report, the officer must explain exactly what he observed at roadside and during the arrest procedure.

How was the motorist unsteady on his feet? Did the motorist lean on an object for support? Did the motorist sway back and forth, and if so how bad was the sway. By detailing specific instances the officer's chances of conviction are greatly increased.

The initial traffic stop is one of the most important aspects in the DWI apprehension procedure. By detailing the events prior to the stop, the stop itself and the initial approach and conversation with the driver, including all of the officer's observations, not only will chances for a successful prosecution increase, but the ability for the officer to arrest an actual drunken driver will increase as well.

Conversely, defects in procedure and protocol as noted will offer the defense ammunition for cross examination and closing argument.

The next article will concentrate on the field sobriety tests and how they are conducted and evaluated.

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Case Law at a Glance

TEXAS

Trooper's threat of jail made consent involuntary.

Erdman v. State
__ S.W.2d __, 53 Crim.L.Rep. (BNA) 1212 (Tex.Ct.Crim.App. 1993).

A motor vehicle operated by the defendant was observed by a trooper weaving from lane to lane on a county highway. Defendant was stopped by the trooper and arrested for driving while intoxicated.

After the defendant was transported to the police station he was asked to submit to a breath test. The trooper explained to the defendant that if he "passed" the test, he would not be charged with DWI; however, if he failed the test, he would be charged with DWI.

The trooper next warned the defendant of four consequences of refusal to take the breath test: (1) evidence of the refusal would be admissible against him in court; (2) his driver's license would be suspended for 90 days; (3) DWI charges would be filed against him; and (4) he would be placed in jail that night.

After hearing of these consequences, the defendant elected to submit to the breath test which indicated that he was intoxicated.

The first two consequences of refusal to take the breath tests are contained in the Texas implied consent statute, Tex. Rev. Stat. Art. 6701 1-5, Sec. 2(a). The two additional warnings that were given by the trooper, i.e., that the defendant would be charged with DWI and would spend the night in jail, though factually true, were not part of any warnings mandated by law.

As a result, the defendant argued that his consent to take the breath tests was coerced and was involuntarily made as a result of the two nonstatutory warnings.

The court agreed with the defendant that where there was no record evidence showing that the nonstatutory information given to him had no bearing on his decision to consent, no rational fact finder could conclude that the state carried its burden of showing that the defendant's consent was voluntary.

Therefore, the court concluded that the defendant's consent to the breath test was obtained in violation of the Texas implied consent law and pursuant to Article 38.23 of that law, the test results were inadmissible in evidence. Therefore, the trial court abused its discretion in refusing to suppress the test results.

> LITIGATION TIPS

Erdman is an unusual, though correct, case. The trooper did not give any warning that was factually incorrect. However, a suspect's consent to a breath test must be "voluntary" and not coerced. See Turpin v. State, 606 S.W.2d 907, 914 (Tex.Ct.Crim.App. 1980).

Therefore, it is implicit in the implied consent statute that a suspect's decision to submit to the breath test must truly be his or her own and must be made freely and with a correct understanding of the actual statutory consequences of refusal.

The court, therefore, determined that for consent to be "voluntary" (and consistent with the statutory scheme), a suspect's decision to submit must not be the result of any physical or psychological pressures that may be brought to bear by the suspect by law enforcement officials.

Consistent with that rationale, the court concluded that if law enforcement officials were permitted to "warn" DWI suspects (even correctly) that a refusal to submit would result in consequences that were not necessarily contemplated or stated in the Texas implied Consent statute then suspects easily could be coerced into submitting to the test and the protections that were determined to be afforded by the statutory section would be undermined.

Therefore. the court held that "law enforcement officials must take care to warn DWI suspects correctly about the actual, direct, statutory consequences of refusal. Any

other information conveyed to DWI suspects may have the effect - either intended or unintended -- of undermining their resolve and effectively coercing them to consent." (Emphasis in original).

MINNESOTA

Motorist has right to consult with counsel of motorist's choice.

Delmore v. Commissioner of Public Safety
___ *N.W.2d* ___, *53 Crim.L.Rep. (BNA) 1196 (Minn.Ct.App. 1993)*

Under Minnesota law, a motorist faced with a decision to submit to a chemical test has the right to consult with counsel prior to making that decision. In Delmore, a police officer dialed the local public defender when the defendant indicated he wanted to speak with an attorney.

The Minnesota Court of Appeals determined that this conduct violated the motorist's right to consult with an attorney of his own choosing: because the police officer chose the public defender for the motorist, and the motorist did not have an attorney of his own choosing, the court determined that the constitutional right afforded to the motorist of counsel of choice was violated.

>LITIGATION TIPS

In Prideau v. State Dent. of Public Safety, 247 N.W.2d 385, 394 (Minn. 1976), the Minnesota Supreme Court stated that drivers required to decide whether to submit to a breath test have the right to consult with a lawyer of their "own choosing."

Here, however, the police officer "chose" the public defender for this particular motorist. The court correctly determined that the record supported the motorist's testimony that he was told this was "the procedure" and he had no reason to believe that he could insist on calling another attorney of his own choice.

Therefore, based on the record presented, the court was correct in determining that the motorist's right to choose his own attorney had been denied by the police.

CALIFORNIA

Article in newspaper announcing checkpoint satisfies advance publicity requirement.

People v. Squire
___ Cal.3d ___, 53 Crim.L.Rep. (BNA) 1199 (Cal.Ct.App. 4th Dist. 1993)

A single article in the community's most read newspaper that announced a sobriety checkpoint would be conducted that evening satisfied any requirement of "substantial advance publicity," assuming the Fourth Amendment demands such advance publicity.

Therefore, the California Court of Appeals for the Fourth District determined that a sobriety checkpoint passed the constitutional muster.

In Squire, before initiating the roadblock that led to the defendant's arrest for driving while intoxicated, the Riverside Police contacted local ethnic newspapers as well as Riverside's largest newspaper; but only the latter ran an ad to publicize the police plans for sobriety checkpoints.

The defendant argued that in Ingersoll v. Palmer, 43 Cal.3d 1321 (Cal. 1987), the state Supreme Court included advance publicity among the eight factors to be considered when conducting a sobriety checkpoint.

Assuming such a requirement to exist, here, the court determined that it would be impossible to establish any hard and fast rule to govern the sufficiency of advance publicity and that so long as the police acted reasonably with respect to advance notice, a determination must be made factually on a case by case basis as to whether the notice was sufficient. Under the circumstances presented, the court determined that such advance notice was sufficient.

> LITIGATION TIPS

Some lower appellate courts have interpreted Ingersoll as setting out an absolute requirement of "substantial advance publicity of a checkpoint." See People v. Morgan, 221 Cal.App.3d Supp. 1, 4 (Super.Ct. 1990). In Squire, the state argued that the advance publicity consideration that was identified in Ingersoll, unlike the seven other facts which have to do with the roadblock itself, was not required in every case.

The state also argued that the United States Supreme Court's opinion in Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) did not mention advance publicity and that Sitz was handed down after Ingersoll and Morgan.

The court in Squire disagreed with Morgan's conclusion that Ingersoll required "substantial advance publicity" for all roadblocks. However, it also noted that the California Supreme Court in People v. Banks, 11 Cal. App. 4th 165 (Cal. Ct. App. 4th Dist. 1992) had granted review in a case recognizing an advance publicity requirement.

That is why the court in Squire assumed that such a requirement existed. However, the Squire case will require a case specific analysis to determine the reasonableness and adequacy of advance publicity, thus leading to a possibility of pretrial evidentiary hearings in almost all sobriety checkpoint cases.

KENTUCKY

Pretrial license suspension statute based on age of driver found unconstitutional.

Commonwealth v. Raines
847 S.W. 2d 724 (Ky. 1993)

Defendant, who was under the age of 21, was charged with driving under the influence of alcohol. He challenged the constitutionality of a Kentucky statute that authorized pretrial suspension of a driver's license for refusal to submit to a blood alcohol test. The district court found the pretrial license suspension violated due process under the circumstances and the Commonwealth moved for certification of the law regarding its constitutionality.

In Kentucky there are a number of ways for pretrial license suspension to take place. For example, a pretrial license suspension is allowed for repeat offenders who refuse to submit to a blood alcohol test.

The court determined that this aspect of the statute does not violate an operator's due process guarantees. While a private interest in possessing a driver's license is important, the state also has a compelling interest in removing intoxicated drivers from the roadways.

Additionally, under such circumstances, any risk of erroneous deprivation of a license is low, especially where the state must present evidence to support its case; the mere statement that a driver had a prior offense is insufficient. Therefore, the court certified this portion of the statute regarding its constitutionality.

However, the pretrial license suspension also applies when the accused refuses to submit to a chemical test and the accused is under the age of 21. With respect to this aspect of the statute, the court determined that it violated state and federal protection guarantees and, therefore, refused to certify as to its constitutionality.

> LITIGATION TIPS

Under the federal and state equal protection guarantees, any classification that is based on age may be suspect, unless there is some compelling state interest that would allow for the classification. Here, KRS 189 A.20O (1)(b) mandated pretrial suspension based solely on a motorist's age, irrespective of the conduct, the reasons for refusal or the like. Therefore, the age classification, standing alone, was arbitrary and violated due process.

Raines demonstrates that in their efforts to "crack down" on intoxicated drivers, states often cross the line by enacting laws that