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Useful DUI Studies

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SPECIAL TOPICS SERIES

APRI

American
Prosecutors
Research Institute

Overcoming Impaired Driving Defenses

Targeting Hardcore Impaired Drivers

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November 2003

American Prosecutors Research Institute

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Bruce Plante, nationally syndicated editorial cartoonist & Past President of the Association of American Editorial Cartoonists

Introduction: The Art of Anticipating Defenses

"The criminal trial today is…a kind of show-jumping contest in which the rider for the prosecution must clear every obstacle to succeed."
—Robert Mark, Commissioner, London Metropolitan Police.
The Washington Post, November 1971

Many prosecutors may bristle at an analogy which reduces the criminal justice system to a steeplechase, but this analogy speaks an obvious truth. To successfully prosecute hard core impaired drivers, prosecutors must clear statutory and constitutional hurdles. Prosecutors must demonstrate that every element of the crime has been established beyond a reasonable doubt and that none of the defendant's constitutional rights were violated.

Impaired driving is a crime that cuts across all socio-economic lines, and a conviction for a multiple offense DUI has severe consequences. Many impaired driving defendants have resources to support a vigorous defense. Across the country, defense attorneys have risen to meet the challenge and serve their clients. For a prosecutor, nothing is better than encountering the best attorneys from the defense bar. But, anticipating defenses is generally an art form learned through experience—often painfully. Yet, there is a similarity of facts and constitutional issues in impaired driving cases that makes the job less painful.

This publication serves as a guide to the most common defenses in impaired driving cases, drawing on the expertise and experience of Herb Tanner, the 2003 Prosecutor Fellow with the National Highway Traffic Safety Administration (NHTSA). Currently working for the Prosecuting Attorneys Association of Michigan, Herb was formerly the Chief Deputy Prosecuting Attorney for Montcalm County, Michigan, and before that he worked as a criminal defense attorney. As the NHTSA Prosecutor Fellow, Herb has traveled the country teaching and speaking on impaired driving issues. He also teaches regularly at the Ernest F. Hollings National Advocacy Center in Columbia, South Carolina.

For their thoughtful review, insight and comments, APRI is grateful to Kimberly A. Fogarty of the Massachusetts District Attorneys Association, Jeff Kwiatkowski, Chief Assistant Solicitor General of Gwinnett County, Georgia and Tom Kimball of the Tennessee District Attorney Generals Conference. APRI also thanks Bruce Plante, nationally syndicated cartoonist and out-going president of the Association of American Editorial Cartoonists for his illustrations.

For other impaired driving defenses, be sure to check our other APRI Special Topics publications, including *Crash Reconstruction Basics for Prosecutors, The Admissibility of Horizontal Gaze Nystagmus Evidence* and *Alcohol Toxicology for Prosecutors.* These and other publications are available online at *www.ndaa-apri.org* click on *NTLC—Traffic Law*.

John Bobo
Director, National Traffic Law Center
American Prosecutors Research Institute
November 2003

Defenses in Impaired Driving Cases

By Herbert R. Tanner, Jr.
NHTSA Prosecutor Fellow, 2003

Suppose you've been diagnosed with a life-threatening illness that requires complex surgery. Now suppose that you have your choice of surgeons: one who has years of experience and a high success rate, and the other who is fresh out of medical school.

Add to that the urgency of the situation –the surgeon you choose will have little or no time to study and prepare for your surgery. It's a no brainer, right?

But in many prosecutors' offices a similar decision is made for impaired driving cases, and the new guy is chosen every time.

The facts of life are that many offices assign the newest prosecutors to the impaired driving cases, even though these cases can be among the most complex and challenging cases on the docket. Few other cases present the prosecutor with a more complex and wordy statute, a greater likelihood of technical, scientific evidence, or the very real likelihood of expert defense testimony.

Even so, some defense attorneys will occasionally use variations of a number of traditional defense tactics when trying DUI cases. Knowing these tactics, and being able to quickly respond to them, gives the prosecutor the advantage.

> *Rule of Thumb:* If you only have five minutes to prepare, go over the police report with the arresting officer. Is it reasonable to believe people will mislead to avoid jail time? Of course it is, so

take time to *spot untruths*. Figure out what the defendant will say. Preparation is key.

Pre-Trial Tactics

Invalid Stop Defenses

As the great Japanese swordsman Musashi said: "Pressing Down the Pillow means not letting your opponent's head up. In the Way of Martial Arts combat, it is wrong to let your opponent lead you around or push you into a defensive position. Above all you want to move him around freely." While the defense attorney may not be a student of Musashi, he may follow this advice and strike quickly and decisively. For the defense attorney, the plan is simple: no stop, no case.

CLAIM: The stop is invalid because there is *no reasonable and articulable suspicion*.

RESPONSE: Your response is fact-driven and relatively simple. All that is needed to make a valid stop is a *reasonable suspicion*. If, looking at the totality of the circumstances, an officer can establish that a fair-minded person in similar circumstances would suspect some violation was afoot, the stop is valid.

> *Remember*: In *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed.2d 660 (1979), the Supreme Court held that an officer must have reasonable and articulable suspicion of a violation of the law or that a driver is otherwise subject to seizure (as a fugitive, for example) before the officer can stop and detain a driver.

CLAIM: The stop was *pretextual*. The officer was on a fishing expedition and merely stopped someone at random in hopes of catching an impaired driver.

RESPONSE: The real challenge here is whether there was reasonable and articulable suspicion of a traffic violation to justify the stop. The officer must be able to *articulate* what caused him to stop the driver in the first place.

CLAIM: The stop is invalid because the officer's *detention of the driver exceeded the reasonable amount of time* for the purpose of the stop. For example, was it reasonable to keep the defendant at roadside for 30 minutes and subject him to field sobriety tests, all for a burned-out tail light?

RESPONSE: Officers often stop a driver for a minor traffic violation and then develop a suspicion that the driver is impaired during that initial, brief detention. Keep in mind that the officer's detention can only last as long as is reasonably necessary to resolve the purpose of the stop. If the detention continues for more than a brief period of time, the officer must establish reasonable suspicion for continued detention. Here again, the observations that led the officer to believe the driver is impaired must be reasonable and articulable. During encounters with suspects, reasonable and articulable suspicion is not a static property, but something that may continually rise to higher levels based on the totality of the facts. Prosecutors must skillfully conduct direct examination of the officers, building upon the events to demonstrate the rising level of proof that the officer encountered during the stop.

> *PRACTICE TIP*: When the defendant challenges an officer's continued detention of a driver stopped for a minor traffic violation, stress the following types of observations:
> - Responding inappropriately to the emergency equipment, such as failing to pull over immediately;
> - Parking incorrectly;
> - Physical observations (odor of alcohol, bloodshot eyes, slurred speech, etc.);
> - Open containers or drug paraphernalia;
> - Evidence that the driver vomited, urinated or defecated on himself;
> - Inability to produce a license and registration although in the defendant's wallet;
> - Inappropriate responses to questions;
> - Admission of drinking or drug use;
> - Inappropriate demeanor, e.g., excessively belligerent or abusive to the officer.

All of these behaviors and observations contribute to the rising levels of reasonable suspicion, allowing officers to continue their investigations.

CLAIM: The officer's stop of the driver for suspicion of impairment is based on all the *wrong observations*.

RESPONSE: When the officer stops a driver because he suspects the driver is impaired, the officer should be prepared for challenges to those observations. What the defendant is really challenging is whether the officer had reason to suspect that the driving he witnessed was due to alcohol impairment. This argument gets to the crux of DUI prosecutions. The challenges are behaviorally based because the driving behaviors known to be indicators of impairment are sometimes quite nuanced. When the motion to suppress is denied, many of these same arguments will be repeated for the jury (*see section on Common Trial Tactics*).

Practice Tips: NHTSA has published more than 20 specific driving behaviors that indicate possible impairment. Officers are trained to look for them, and you should be trained to spot them in the report. These are the clues that give the officer reasonable suspicion, together with all the other facts, to stop and investigate. Some of the more common indicators of impairment are:

- Weaving within one's own lane;
- Driving significantly slower than the posted speed limit;
- Stopping for an excessive time at a stop sign without an apparent reason;
- Failing to continue to drive when a light turns green;
- Following too closely;
- Making wide turns or cutting a turn too sharply.

While any of these behaviors might not be a traffic violation, in combination with other facts it can justify a stop. The response remains the same, however. The stop is justified if, based on the totality of the circumstances, the officer had a reasonable and articulable suspicion that the driving behaviors he saw were due to alcohol impairment.

CLAIM: The officer did not have reasonable suspicion to stop the defendant because the officer relied on a *citizen's tip*. The prosecutor has made no showing of the reliability of the citizen's tip or the caller's basis of knowledge.

RESPONSE: How you respond to this challenge depends on what kind of citizen tip it was. A citizen's tip that is truly anonymous may require the officer to corroborate the caller's information. A tip that describes the driver's location, the make and model of the car, the license plate number, and the specific driving behaviors may require less corroboration from the officer. Also, urge officers to call dispatch and determine the name of the caller. An anonymous tipster may later become a powerful prosecution witness.

Practice Tip: Widespread use of mobile phones makes it easy for citizens to alert law enforcement officers to suspected impaired drivers. A true citizen's tip can be defined as an identifiable caller who is not of the criminal element, e.g., a mailman who reports an impaired driver while delivering mail, a fast-food, drive-thru server who suspects a customer at the window is driving drunk, or a metro bus driver calling in someone who appears to be intoxicated, etc.

Remember that police have relied on true citizen tips for centuries, and keep in mind that the law makes a distinction between true citizen information and information that comes from people of the criminal element. Many defense attorneys argue that true citizen tips should be held to the higher level of scrutiny required of informants from the criminal milieu in determining probable cause in issuing search warrants, e.g., basis of knowledge, reliability, corroboration, etc. First, they are arguing for a level of scrutiny

> used in a probable cause analysis—not a reasonable and articulable suspicion analysis. And secondly, courts have held that "when an average citizen tenders information to the police, the police should be permitted to assume they are dealing with a credible person in the absence of special circumstances suggesting that such may not be the case." 2 Wayne R. LaFave, Search and Seizure Section 3.4(a), at 209-11 (3d ed. 1996). "[T]he skepticism and careful scrutiny usually found in cases involving informants, sometimes anonymous, from the criminal milieu, is appropriately relaxed if the informant is an identified victim or ordinary citizen witness." U.S. v. Patane, 304 F. 3d 1013 (U.S. 2003).

Invalid Arrest Defenses

CLAIM: The officer did not have probable cause to make an arrest.

RESPONSE: The major difference between challenges to the arrest and challenges to the stop is where on the continuum of proof the justification lies. Whereas a stop is justified by a reasonable suspicion, officers must have greater proof to arrest; they must have probable cause. This doesn't mean that all the evidence used to justify the stop now becomes irrelevant. On the contrary, that evidence, along with everything else that the officer developed during the course of his contact with the defendant, is relevant to the court's determination of probable cause.

Skillful defense attorneys often concede the officer had a basis for the stop, but then they mount a full attack on probable cause for arrest. Their strategy is based on the fact that at a motion hearing the judge would not hear any proof after the decision to make an arrest was made –i.e., the judge would never hear the results of the blood, breath or urine tests. Blood Alcohol Content tests are typically administered after the decision to make an arrest. Therefore, no arrest, no test.

> *PROBABLE CAUSE*: The courts have defined probable cause as the point when the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in believing that a crime has been or is being committed.

Like reasonable suspicion, probable cause is based on the *totality of circumstances*: all the facts known and the reasonable inferences that can be drawn from them.

CLAIM: The officer's observations were wrong; there are alternative explanations for what the officer saw. For example, the defendant may claim that his eyes where red and watery because he worked a double shift and was tired (see section on *Common Trial Tactics*).

RESPONSE: At this stage, whether there are alternative explanations for the officers observation doesn't matter, as long as the officer's observations can fairly be characterized as signs of impairment. Also, police are not required to eliminate all other possible explanations for the behavior.

CLAIM: The officer did not have probable cause to make the arrest based on his administration of the Standardized Field Sobriety Tests (SFSTs), and the results of the blood alcohol tests should be suppressed.

RESPONSE: The attack will be on how the officers developed probable cause and, in particular, on the SFSTs. The officer is typically cross examined from an SFST manual published by NHTSA. NHTSA has produced a CD-ROM of all SFSTs, their validation studies and digital video clips suitable for demonstrative purposes. Copies are available from APRI's National Traffic Law Center or from NHTSA at www.nhtsa.dot.gov.

CLAIM: The officer administered *non-standardized field sobriety tests*. Variations on the theme include:

- These tests are inadmissible because they are not scientifically validated.
- The standard battery of tests were administered but not in strict accordance with NHTSA guidelines and is therefore inadmissible.
- The officer never received formal SFST training on how to administer the tests in accordance to NHTSA guidelines. The officer testified that he learned them from other patrolmen; therefore, all the tests given are inadmissible.

RESPONSE: Courts have long held that even lay people can detect and express an opinion about impairment. The effects of alcohol on a per-

son's physical appearance and behavior are common knowledge and easily observable. Some of these familiar signs include lack of balance, poor coordination, exaggerated movements, poor motor skills, slurred speech and inability to follow directions.

Field sobriety tests merely allow the officer to make observations about these signs of impairment. There are a number of field sobriety tests that officers administer other than the SFSTs. Although these tests have not been subject to the same rigorous examination as the SFSTs, they are still useful in assisting the officer in determining impairment. This is where an officer's life experience and field experience become crucial. The fact that the tests are non-standardized or administered differently than NHTSA prescribes goes to the *weight of the evidence* rather than its admissibility. (See *Attacking Field Sobriety Tests* on page 17).

CLAIM: The officer did not have probable cause for arrest because the defendant refused all SFSTs and chemical tests.

RESPONSE: Hard core impaired drivers often will refuse blood tests when the consequences of refusal are not as harsh as the penalties for another DUI conviction. In those cases, developing probable cause is more difficult, and the officer's observations of other indicators of impairment gain in importance.

> *PRACTICE TIP*: In jurisdictions where a preliminary breath test can be used to establish probable cause, there are likely to be administrative rules governing how the test is given. A challenge to the test based on the officer's failure to follow the rules in the field, e.g., the officer did not observe the driver for the required time before giving the test, could mean the results are suppressed, and probable cause will be judged solely on the officer's remaining observations.

CLAIM: After investigating the wreck, the officer arrested the defendant for a DUI that occurred outside his presence.

RESPONSE: A number of states have statutes that prohibit officers from making arrests for misdemeanors that did not occur in their presence.

Generally, there are exceptions to the statute for crimes such as domestic violence and shoplifting. Some states have exceptions for DUIs, allowing arrests to be made within a certain time limit. Know your state's statute, the exceptions and case law surrounding the arrests. Experienced officers will often make a felony arrest of a defendant who left the scene and fill out an arrest warrant for the misdemeanor when booking the defendant into jail.

5th Amendment—Miranda Defenses

CLAIM: The SFSTs are not admissible because the defendant was not free to leave the scene during the investigation. Therefore, under *Miranda* guidelines, the defendant was in custody.

RESPONSE: In most states, the typical DUI traffic stop is considered non-custodial, even if the driver is briefly detained. If the SFSTs are given during that brief, non-custodial detention, *Miranda* does not apply.

Remember that for *Miranda* to apply, the defendant must be i) *in custody*, ii) *under interrogation*, iii) *by a police officer*. Obviously in traffic stops, drivers are not free to leave, but the U.S. Supreme Court passed a bright line rule in *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed.2d 317 (1984). The Court held that suspects on the roadside were not considered *in custody* for *Miranda* purposes until arrested by the officer or when the handcuffs go on the suspect.

Perhaps your jurisdiction doesn't follow *Berkemer* or hasn't ruled on the specific issue based on how your courts interpret your state's constitutional protections. If so, the defendant will try to push back the point of custody to the earliest time in the stop, subjecting everything that follows to *Miranda*. Remember that even if your court rules the defendant was *in custody* early in the stop, *Miranda* covers only verbal expression and is a protection designed to ensure voluntary and knowing confessions by suspects.

> *Practice Tip*: For a small minority of judges, *Miranda* is often scrutinized under the "focus of the investigation" standard, and the facts are often reviewed on a standard of when the officer knew he was going to make an arrest. Bring the law to court and be

ready to demonstrate the correct legal analysis, and if that fails, build your record for appeal.

CLAIM: The SFSTs are not admissible because they are *testimonial* in nature. The defendant incriminated himself with the SFSTs without the benefit of a *Miranda* warning.

RESPONSE: This argument applies only to non-standardized tests like reciting the alphabet or counting backwards, which are not part of the SFSTs. Most jurisdictions that have ruled on this issue have found that the physical portions of the SFSTs are non-testimonial. Remember that for *Miranda* purposes the suspect is still not in custody, so even the verbal portions should be allowed. Two states, Oregon and Florida, have found that the verbal portion of field sobriety tests are testimonial and cannot be given absent *Miranda*.

CLAIM: The defendant's response to the invitation to take a blood, breath or urine test occurred after arrest and violates *Miranda*. Those statements should be suppressed.

RESPONSE: Typically, officers will place defendants under arrest and read them the implied consent form for a blood alcohol test in the cruiser or in the booking area of the jail. Often, defendants' statements are extremely incriminating. Yes, the defendant is in custody, but *Miranda* does not apply because the defendant was not subject to interrogation by the officer.

In most states, officers are required by law to read the implied consent statute to suspects and note their response. This is not interrogation; rather, the officer is fulfilling a statutory duty. Anything a defendant chooses to say in response to the request to take a breath test is admissible. (Be sure to check the law in your jurisdiction; a minority of states interpret their constitutions to have heightened protections.) Spontaneous admissions and statements against interest are usually admissible. *But*, if the officer asks questions after reading the implied consent statute without a *Miranda* waiver from the suspect, those statements will be suppressed.

Common Trial Tactics

How any case is defended is unique to each case and each defense lawyer. To say that there are "common" tactics only means that there are certain recurring themes, and you should be prepared for them.

Attacking the Investigation

In many DUI cases, the best defense is to attack the investigation in some way. These defenses tend to fall into a few broad and often overlapping variations:

1. Alternative explanations for the officer's observations;
2. Attacks on the officer's observations;
3. Alternative explanations for the blood alcohol concentration (BAC);
4. Attacks on the BAC.

Many of the arguments try to exploit the difference between what the jurors think they know and what really goes on in the field. For example, many people believe that the SFSTs are extraordinarily hard to do and designed to generate a failure. How many in the general public believe that one standard field sobriety test is to say the alphabet backwards?

> *Practice Tip:* Defendants profit from the empathy that jurors may have for them. Many people have driven after a few drinks and truly believe that they were not impaired. **If the prosecutor doesn't do it for them, jurors will define what it means to be impaired**. And, their definition may be favorable to the defendant, if only because jurors are reluctant to admit that they may have driven while impaired and broken the law.

Attacking Observations of Driving

It makes sense that the defense will attack the officer's observations. Many acquittals have been achieved by the defense convincing a juror that his client's driving was not that bad or attributable to something other than the drinks he had on the way home.

CLAIMS:
WEAVING INSIDE THE LANE, SHARP OR WIDE TURNS: It is not illegal to stay within the painted lines, is it? There are many reasons for corrections of steering, like poor alignment? Lighting a cigarette? Putting in a CD? The crown of the road? It is not illegal to turn wide when there is no opposing traffic or hazard, is it?

SPEEDING OR GOING SLOWLY: Many people speed, don't they? Did you suspect each of them of drunk driving? Have you ever been lost?

BLACK AND WHITE FEVER: You testified to "bad driving," but you were in a marked patrol car, correct? No reason why the defendant couldn't have seen you in the rearview mirror? And if he did, he probably kept his attention on you a great deal? If he glances up to the mirror, he could swerve within his lane or even out of it, couldn't he? His speed could drift a little? And if you followed him for a mile, you would see every swerve? But, you never saw him drive once without your patrol car in his mirror, did you?

THE NHTSA CLUES: There are more than 20 different clues you are taught to look for, aren't there? That's virtually every possible driving behavior, isn't it? One of the clues is wide turns? And one is sharp or abrupt turns? Those are opposites, so no matter what the driver does he's looking like he's drunk?

RESPONSE: Watching an officer struggle to answer these questions on the stand is difficult; however, keep in mind that the defense attorney is not trying to raise doubt about what the officer saw in the field. Indeed, the tacit assertion of these questions is that the client really did weave. The defense wants the jury to believe that there might be another explanation for what the officer saw and that any driving behavior short of staying absolutely straight in one's lane is a DUI clue.

Attacking Observations During Personal Contact
CLAIMS:
Odor of Alcohol: Alcohol really doesn't smell, does it? The flavoring does? It's impossible to tell how much of any drink someone had by the smell,

isn't it? Some drinks with a low alcohol content, like red wine, can leave the breath smelling strong with just a few sips? Other very high proof liquors smell hardly at all, don't they? You can't tell when they drank from the smell, can you?

Disheveled clothing: Officer, you dressed appropriately for court today, didn't you? You wanted to show the court and jury the appropriate respect? And my client, he dressed appropriately, too. But he looked different the night you arrested him, didn't he? Before that night, you had never seen my client? You have no idea if he's usually a sloppy dresser, do you? Being a slob is not a crime, is it?

Blood-shot, watery eyes: There are many causes for blood-shot watery eyes, aren't there? Fatigue? Lack of sleep? Using the window defroster or blower while wearing contacts? Seasonal allergies and other medical conditions? You didn't ask about those, did you?

Fumbled with wallet and documents: Have you ever been scared? Your body reacted to that adrenaline dump, didn't it? Your heart beat faster? Maybe your hands shook?

RESPONSE: The first response to this line of attack is the officer still on the scene. Did he ask about mechanical problems? If the driving clues he saw *could* have been caused by bad alignment, he should ask about it to exclude it. This is anticipating the lie! By asking the question at roadside, the officer takes away from the defendant's testimony that the weaving was caused by poor alignment or some cause other than impairment.

The next response is to remind the jury that the clues are just that –clues. The driver's behavior should be analyzed in the context of all the other clues or evidence of impairment. The fact that weaving within one's lane is not illegal is completely irrelevant. It becomes relevant when considered together with all the other observations and evidence of impairment. Similarly, while the odor of alcohol, standing alone, may not prove impairment, taken with all the other evidence, it makes sense that we hear that the defendant smelled of alcohol.

Finally, don't forget at closing what the defense lawyer said and asked during trial. Chances are there was no evidence that the observable driving clues resulted from some other cause and the defense lawyer will not argue the point. That allows you to point out to the jury that there is no evidence of any of the alternative explanations.

SEVEN BLIND MICE- A CHINESE PARABLE. One day seven blind mice were surprised to find a strange *Thing* by their pond. *"What is it?"* they cried. Red Mouse said, "*It's a pillar.*" *"No, it's a snake!"* said Green Mouse. *"Can't be,"* said Yellow Mouse. *"It's a spear."* "*No, no*," said Purple Mouse. *"It's a great cliff."* "*Oooo, it's a fan,"* Orange Mouse cried. *"What's the big deal,"* said Blue Mouse. *"It's nothing but a rope."* Then, they all began to argue.

Until White Mouse, the seventh mouse, went to the *Thing*. She ran up one side and down the other. She ran across the top and from end to end. "*Ah*," said white mouse. *"Now, I see. The Thing is as sturdy as a pillar, supple as a snake, wide as a cliff, sharp as a spear, breezy as a fan, stringy as a rope, but altogether the Thing is…an elephant!"* The other mice ran up one side and down the other, across the *Thing* from end to end, and they agreed, too.

The Mouse Moral: *Knowing in part may make a fine tale, but wisdom comes from seeing the whole.*

The same can be said about messy clothing or other personal contact clues, like using the car for balance or stumbling when getting out of the

car. Taken alone, they can be relatively innocuous and innocent, but it's unlikely that all of the clues observed by the officer can be explained by anything other than the defendant was impaired.

> *Practice Tip*: Take great care in assessing cases in which the police stop a female driver at night. These situations can be particularly scary to women because they may be vulnerable. A clever defense attorney may cite this fear to explain the officer's observations of suspected impaired driving

Attacking the Field Sobriety Tests

CLAIM: *The officer failed to use approved SFSTs –i.e., he used non-standardized tests.* You're aware that NHTSA has approved only three field sobriety tests, aren't you? The alphabet test you gave is not among them? Having people guess the time is not one of the approved tests, is it?

RESPONSE: NHTSA has not "approved" any field sobriety tests. NHTSA has sponsored validation studies and created curricula to train officers in a standard procedure to make sure the three tests are conducted the same way every time. In other words, NHTSA has certified curriculum. **NHTSA does not certify tests and officers**. Furthermore, the defense has not claimed that other field sobriety tests are invalid. The other tests, such as reciting the alphabet, are still evidence of impairment. The simple argument is that a sober person can say the alphabet.

CLAIM: *How can a person fail a test when he doesn't know what's tested?* You didn't tell him that if he used his arms for balance he would fail the test, did you? Is that fair? Isn't that what the arms are for? Is it fair to judge him on things you didn't tell him about?

RESPONSE: The word "fail" in relation to a driver's performance on SFSTs carries more baggage than some airlines. The tests are not graded and provide only clues of impairment. The officer is simply making observations and noting those observations. A driver does not "fail" the test when he uses his arms for balance. However, considered with the totality of the evidence, using his arms is evidence of impairment, the

same as failing to follow directions in the Walk & Turn, or putting a foot down during the One-Leg Stand.

CLAIM: *SFSTs are subjective and insensitive.* You are the only one who decides when someone passes or fails, aren't you? What is the definition of "swaying?" How far does someone have to move?

RESPONSE: It is true that SFSTs don't discriminate well between levels of impairment, but they are designed to be insensitive so that the tests identify only the most impaired. In fact, the insensitivity favors those who are stopped.

It is also true that some of the SFSTs have subjective elements. That is why the tests are standardized, systematic and fairly easy to score, so that subjectivity is reduced. Also, to counter this argument, highlight the officer's experience and training.

CLAIM: *SFSTs don't test impairment.* My client did well on some tasks, didn't he? So what does the test really test if he can do some and not the others but still fail?

RESPONSE: Remind the jury at every opportunity that driving is the complex integration of many different skills and faculties: the eyes, the feet, the hands, the brain. We do most of that integration without ever thinking about it. SFSTs mirror the *divided attention skills* necessary to operate a car and examine whether the divided attention skills of the defendant were impaired to a point to affect his driving ability.

These defense questions also open the door for questions during redirect to the officer about why he does the SFSTs. He can explain SFSTs and the concept of divided attention tasks, which test whether a person can do two things at the same time—two tasks much simpler than driving. If not, how can that person engage safely in the much more complex task of driving?

Attacking Breath Test Instruments and Their Results

CLAIM: *The officer didn't follow the rules for administering the test.* Officer,

you're supposed to watch my client for 15 minutes before giving him the test? But you had to type his name and other information into the machine before giving the test? You didn't look at him while you typed, did you? So you looked away and violated the rule, didn't you?

RESPONSE: Virtually every state that uses some breath-testing instrument has made administrative rules governing how to give the test and maintain the machine. The first response to these attacks is to simply know your state's rules.

Second, remember that the rules exist to ensure the accuracy, and therefore, the relevancy and admissibility of the test. When the defendant makes challenges like this, the appropriate response is to ask how the alleged violation affects the accuracy of the test.

For example, officers are often required to observe defendants for a prescribed time period before a breath test. The defendant will argue that if the officer looks away for even the briefest time, the test must be thrown out because the officer violated the rules. Does that mean the test is inaccurate? If so, is it because the defendant had something to eat or drink, or he threw up while the officer looked away? Many of the new breath testing machines have technology sophisticated enough to detect mouth alcohol, including a quick shot of mouthwash. Of course, most breath tests are given in the jail, where there isn't anything to eat or drink on hand. The waiting period ensures that nothing gets tested other than the defendant's BAC. Unless the defendant can show that there's a reasonable chance that he ate or drank something or regurgitated during the officer's brief glance away this momentary lapse is a violation in only the most technical sense.

CLAIM: *Other substances can cause a positive result for alcohol:* You're aware, aren't you, that other things, like having diabetes, can cause the machine to show that people are drunk when they're not? Even white bread will show that a person's been drinking?

RESPONSE: It is often heard that everyday foods like white bread and M&Ms will give a false reading, and officers must be able to testify that nothing was in the defendant's mouth before he took the test.

CLAIM: The test is not accurate because the results can be affected by *Gastroesophageal Reflux Disease* (GERD), in which stomach acid contains alcohol and is brought into the mouth through the esophagus. This creates an artificially high BAC reading.

RESPONSE: Studies have shown this is a myth. The epiglottis actually closes when a person blows into the instrument, blocking stomach acid from being released. Also, unless the defendant has GERD, these questions are not even relevant. For more information, see www.gerd.com.

CLAIM: *The test is inherently inaccurate.* Someone tests the machine with a solution that has a known alcohol content and keeps records of that? That solution is supposed to be at .10, but the records show that solution sometimes reads more or less than that? Therefore, the machine is inaccurate.

RESPONSE: There is no evidence that the instrument's tests are inaccurate when administered properly. In every state, the breath test instrument (or any other testing instrument, for that matter) must be periodically tested for accuracy and calibrated to return accurate results. Records of those tests will often reveal that the instrument's reading of known sample varies from that known value. Usually that variance is quite small; for instance, a test sample known to have a concentration of .10 may result in a reading of .101 or .098. The defense argues that the results cannot be trusted because the machine cannot even give an accurate reading on a known sample.

This can be a persuasive argument. It may be fruitless to argue to a jury the concept of measurements within a scientific tolerance. It's equally challenging to talk in terms of statistically significant differences. Some jurors may ignore the test results entirely once they learn about the variance in known sample tests. It may be difficult to persuade them with scientific chatter.

Now is the time to pose logical questions to the jury. Let's say the instrument did give an inaccurate reading. How inaccurate does the defendant say the reading is? Does he really say he had no alcohol, and the reading is entirely false? The only evidence is that the reading varied from the known sample by what, .001?

Let's subtract .001 from his test results. Is that what the reading is? So, he's still over the legal limit.

Let's be real fair and subtract twice that amount (or more if your case will bear it). Is that the reading?

CLAIM: *The test is gender biased*. Is it not true that the machine will read higher for a woman than a man if they both drink the same amount? If a man and a woman are given the same amount of alcohol to drink, and then given a breath test after the same period of time, the woman's BAC results will be higher, right? Therefore, the machine is biased against women, isn't it?

RESPONSE: This is an example of a fallacious conclusion built upon an accurate premise. It is true in some cases, that a woman's BAC will be higher than a man's after drinking the same amount of alcohol. The instrument is accurately measuring that difference. On average, women have a higher percentage of body fat than men. Fat cells do not contain a great deal of water, and alcohol is completely water soluble. Therefore, women will not metabolize alcohol like men, who have a higher percentage of body water. (See APRI Special Topic Series, *Alcohol Toxicology for Prosecutors.*) The obvious question is: just how inaccurate is the test? How much higher is its reading for women? And, does that matter if the test provides an accurate reading of her blood alcohol concentration? Use the same argument that refutes the "inaccurate test of a known sample" defense.

More to the point, refocus the case on the real issue—impairment. If the BAC is .08, the driver is legally deemed impaired. It doesn't matter if the BAC belongs to a man or a woman, the impairment is still there. The bias is not in the instrument, but in the physiological differences between men and women.

Attacking Officer's Finding of Impairment

CLAIM: As a [friend / girlfriend / boyfriend / family member / family minister, etc.], I can testify that I did not think the defendant was impaired, and if I thought he was, I would never have let my loved one leave the [barbecue, reception, reunion, swimming pool, restaurant, bar, etc.].

RESPONSE: Bringing in another person to dispute the officer's ultimate finding that the defendant was impaired is a popular tactic for defense attorneys who wish to present the defendant's version of the case to the jury without having the defendant actually testify.

If the witness testifies that he did not think the defendant was impaired, he opens the door to a line of questioning about what the defendant looks like when he is impaired. Ask the witness how much it takes to get the defendant impaired. Ask how the witness knows when the defendant is impaired.

This is a line of questioning where the answers can help you. If the witness says he can tell by looking, so can the police or the citizens who saw the defendant. If he says that the defendant slurs his speech or staggers or has trouble driving, then that may confirm previous testimony by your witnesses. If the witness testifies that the defendant was not impaired because he was not passed out, then you can argue that the witness defines impairment differently than the law does. Rather than discredit this witness, you get farther by making him an unwitting witness for you.

Other Resources Available

For more help with common impaired driving defenses, be sure to check out other publications in the APRI Special Topic Series, such as *Crash Reconstruction Basics for Prosecutors, The Admissibility of Horizontal Gaze Nystagmus Evidence* and *Alcohol Toxicology for Prosecutors.* These publications and more are available online at *www.ndaa-apri.org*. Click on *NTLC—Traffic Law*.

APRI's National Traffic Law Center also provides research, training and technical assistance on a wide range of topics related to the prosecution of impaired driving cases. Brief banks and expert witness databanks are available on both prosecution and defense witnesses. Contact NTLC at 703.549.4253 or trafficlaw@ndaa-apri.org.

Conclusion

DUI prosecutions are among the most difficult criminal cases a prosecutor can handle. They almost always involve technical testimony, scientific testimony and juror empathy. Sometimes, too, they involve a dedicated, experienced, skilled and knowledgeable defense counsel who has done his or her homework on this and many other cases. The people we represent deserve nothing less from us. Hopefully, this guidance will enable you to present your case more skillfully and professionally.

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