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Traffic Laws & Courts

The newsletter of the Illinois State Bar Association's Section on Traffic Laws & Courts

Defending DUI refusals in jury trial cases—Practical tips

By Donald J. Ramsell

We've all had those cases where the driver refuses something—denies drinking, refuses field sobriety tests, or refuses blood, breath or urine tests. When the case is set for a jury trial, how do we answer the age-old prosecutorial argument that "refusal equals consciousness of guilt"? Here are some tried and true tips for a refusal case to help you get those two sweetest words—'Not Guilty'!

Each state has its own variations on the law when a driver refuses something in a DUI case. Some have jury instructions that tell the jury to infer guilt. Some states allow prior DUI's to come in as a 'state of mind' exception. Some even make refusing a breath, blood or urine test its own independent crime. Obviously, a single article cannot address every nuance under state laws, but perhaps the following will guide you through them. Since I am a practicing attorney in Illinois, where appropriate, I will use Illinois law and its criminal justice system as an example.

One quick note: Even though I use the term 'refuse or refused' throughout this article, it might be best to replace that term with 'decline or declined' as frequently as possible in the actual trial. Remember that setting the tone for the trial by choosing particular language can help frame your argument and influence the jury.

Pre-trial Suppression of Refusals

In many states, a refusal to submit to a post-arrest chemical test is only admissible if the req-

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Your client has been denied driving privileges by the Secretary of State. Now what?

By M. Christine Heins

The answer to that question is, it depends. It depends on whether or not your client had an informal or formal hearing, as the type of hearing the client was entitled to affects the type of post-hearing relief that you can consider.

If you and your client participated in an informal hearing, there is no right to an appeal. Under the Administrative Code, because the decision rendered pursuant to an informal hearing is not a final order it is not subject to administrative review pursuant to the Administrative Review Law.[1] In addition, your client is not entitled to another informal hearing until 30 days from the date of the last informal hearing.[2] Because of the requirements under the Administrative Code, the only alternative is for you and your client to prepare for another informal hearing after that 30-day period. Keep in mind that because of the volume of hearings before the Secretary it normally takes approximately six weeks for the decision to be made and sent to you and your client. Once the decision has been made[3] it will contain

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uisite implied consent warnings were first given. If they weren't, there may be a statutory basis to suppress a chemical test refusal. Additionally, most states hold that pre-arrest field sobriety tests are voluntary. Thus, a Defendant's refusal to participate in an investigation of himself for a crime may not be admissible. For example, refusing to consent to a search is generally inadmissible, since it is a right not to do so, and the prejudicial impact far outweighs its probative value (if there is any).[1]

Equally, some post-arrest sobriety tests are inadmissible unless the Defendant has been properly advised of his Miranda rights. In *Pennsylvania v. Muniz*,[2] the U.S. Supreme Court suppressed any tests post-arrest that might reveal the thought processes of an accused, such as asking the Defendant for his sixth-year birth date. The Defendant's response was testimonial because he was required to communicate an express or implied assertion of fact or belief. Thus, he was confronted with the "trilemma" of truth, falsity, or silence—the historical abuse against which the privilege against self-incrimination is aimed. The same may hold true for an alphabet test. *Muniz* otherwise held that responses to standard booking questions, and the accused's responses as to whether he understood the instructions of other field sobriety tests, remained admissible and not subject to *Miranda*. Further, *Muniz* reaffirmed that a Defendant's refusal to submit to a post-arrest breath, blood, or urine test is not subject to *Miranda*, citing *South Dakota v. Neville.*[3]

Preventing the State from Illegal Burden-shifting

No doubt, the State will try to shift the burden in refusal cases. This is illegal and unconstitutional and must be attacked at the outset. In advance of trial, obtain a ruling from the judge to prevent this tactic. As for the post-arrest alcohol test, most states allow the *fact* of a refusal to be admitted. However, a prosecutor's remarks during opening statement and closing argument, suggesting that the Defendant, by refusing to take a breath test, had failed to prove to the arresting officer that he was not guilty of the charged offense, are still improper.[4] For example, in *People v. Johnson* the Illinois Supreme Court held that such remarks went beyond the legitimate purpose of arguing defendant's consciousness of guilt, blurring the distinction between the Defendant's state of mind and the state's burden of proof, and the remarks conflicted with the constitutional principle that a Defendant is innocent until proven guilty.

Selecting a jury

In a refusal case, the first opportunity to defray or diminish the impact of a refusal starts with the *voir dire* of potential juror. Illinois law requires that each and every individual juror acknowledge that the prosecution must prove every element beyond a reasonable doubt; that the Defendant need not present any evidence, and the Defendant is presumed innocent throughout the course of the proceedings, including deliberations. The judge will always ask each and every potential juror to affirm these principles. Thereafter comes the defense lawyer's turn for questioning.

Defense counsel should also ask the judge to inform the jurors individually that drinking and then driving is not illegal—unless the Defendant is under the influence from drinking too much.

I like to start out by asking the first juror whether they heard the judge say these things. Then, I say, "Do you understand that over 200 years ago, real people gave their blood and their lives to give us these principles?" "Do you understand that citizens of our great country are still giving their blood and their lives (in Iraq, Afghanistan) to defend these principles?" "So, when the judge said those things, he wasn't talking about mere TV words, these are our cornerstones of democracy?" These types of questions tell the jurors the real and present importance of these principles.

It is important to make sure these principles become embedded in each juror. "And, for the last 200-plus years, each and every juror has preserved these principles, so they could be passed along to you, today, to do the same?" "And it will be your job to apply these principles here and now, so they continue to be applied for the next 200-plus years?"

Once defense counsel has made that clear, over and over again, the next job is to hone in on the fact that a Defendant is not required to prove his innocence, and that his actual innocence is presumed to be true. "Do you understand that an accused need never provide evidence of any kind, including evidence of his own innocence, because his innocence is already presumed to be true?" "And that you can never hold that against a Defendant?" "So, if you went into that deliberation room, and were thinking, 'I wish the Defendant had …' you are disregarding the law and our hard fought-for rights as citizens of America?"

Next comes the burden of proof. "Do you agree to hold the line, to compel the State to prove their case beyond a reasonable doubt?" "And if they don't, you must sign a verdict of Not Guilty?" "That if they prove the Defendant guilty a little, or a lot, but not 'beyond a reasonable doubt', that the only verdict you must sign is 'Not Guilty'? "That the Not Guilty verdict covers everything from innocent to guilty but not *proven beyond a reasonable doubt?"*

Further: "Do you promise to force the prosecutor to prove their case right here in this courtroom today, and not fill in the blanks in the back room?" "Do you understand that you are not here to solve a crime—you are here like a referee—to determine whether the prosecutor proved the case 'beyond a reasonable doubt?" "You are like umpires—you call balls and strikes only, based on the law of the land."

Then, couple it all up with the presumption of innocence. "Do you understand that the Defendant is presumed to be Not Guilty, and that you must presume him to be actually innocent unless the proof is beyond a reasonable doubt?" "That everything that they fail to prove beyond a reasonable doubt, is in fact to be presumed as actual innocence?" "Do you understand that, by default, your pen is sitting on the Not Guilty verdict, unless they prove otherwise beyond a reasonable doubt?"

Now, explain how they can be proud of a Not Guilty verdict. "You, as jurors, having inherited these principles, can be proud to sign a Not Guilty verdict, even in the worst of circumstances, because it means you have upheld the principles of law that our founding fathers died for and the judge has told you to apply?"

Sadly, some states do not allow the defense to question jurors. However, most of even those states allow the defense to at least submit questions for the judge to ask potential jurors. Don't let the judge just ask the standard one-and-out presumption and proof questions, if at all possible. And, of course, experienced defense counsel will have prepared these questions to fit right in to closing argument as well.

Gary Trichter, a well-known Texas DWI Attorney, suggests that you ask jurors whether they can think of reasons innocent people would refuse breath tests.

Opening Statement

Along with the other specifics of your case, try to 'weave in' your refusal defenses. First of all, take the wind out of the prosecutor's sails, and tell the jury that the Defendant said no. Say it loud and proud, looking at them as if they already know that it is every citizen's right to do so, especially when they are innocent and the government is trying to make a case out of whole cloth. Tell them that there was no reason for the Defendant to have to prove his own innocence, or to risk that by doing so, some police officer could or would misinterpret the facts to his benefit, etc.

The Trial

Frequently, the first (and perhaps only) witness called by the prosecution is the arresting officer. Use him to re-affirm the principles of law in the United States that you have prepared the jury for in your voir dire. Let's say the defendant denied drinking at all, or denied and then admitted. Ask the officer the following:

Q: So, officer, it isn't illegal to drink and then drive is it?

Q: And a driver, innocent of any crime, is never required to answer your questions, is he?

Q: You held the Defendant's right not to give evidence against him, didn't you?

Q: You arrested him for exercising one of his god-given rights as a U.S. Citizen?

No one is going to put a bumper sticker on their car that says "I drink and drive," even if it is legal to do so. An innocent driver would not want to spend thousands of dollars in court to prove he is Not Guilty—and that's why John Doe said no.

The same principles apply to the refusal to submit to field sobriety tests. Set out the fact that there are error rates for these tests, even when they are given to perfectly healthy people, of up to 35% (i.e. One Leg Stand).

Q: Why should an innocent person take a 35% risk that he could be wrongfully accused of a DUI, officer?

Q: (sarcastically) I suppose you made it clear to him that the test was 100% accurate, so it would never subject someone to a wrongful arrest?

Q: You say he refused the 'tests', but you never specifically identified the actual tests that you wanted him to perform, nor did you reassure him that these tests are of the utmost accuracy?

Q: You wanted him to do these tests so you could determine if he was under the influence, and since you did not gain evidence of either his innocence or his possible guilt, you arrested him anyway?

Q: (foreshadowing the prosecutor's consciousness of guilt argument) So, officer could you tell that he had a guilty mind? You can't read minds, can you?

Obviously, every defense lawyer's individual style and manner of questioning the officer might need to be less sharp or pointed than the above questions, but a line of questioning in these areas helps build your theme into your closing argument.

Refusing Blood, Breath, or Urine Testing

The United States Supreme Court has held that forced alcohol testing, when supported by probable cause to arrest, does not violate the U.S. Constitution.[5] The majority of states have followed this ruling. In states where there is a right to refuse, this line of questioning will not apply. But when the officer gives a person the *option* to refuse in a state where forced alcohol testing is allowed, take advantage. Here's a possible colloquy:

Q: Officer, you gave my client two options: submit or refuse, correct?

Q: When my client exercised the option of refusing that you gave him, you never told him that 6 months later, the government's lawyer might tell a jury that by declining the tests it means that he's guilty of a crime?

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Q: In fact, do you still agree that no person can be compelled to give evidence?

Q: That no person must prove his own innocence?

Q: That the government must prove a man guilty beyond a reasonable doubt?

Q: Where in this vehicle code does it say that it is illegal to drink and then drive with a guilty conscience, even if you are not, in fact, under the influence?

Reversing the Consciousness of Guilt Argument

Here's how to turn forced alcohol testing laws into your favor when a Defendant refuses:

Q: Officer, you were trained in DUI?

Q: And part of that training told you that one can predict a blood alcohol concentration based on the number of drinks a person has, over a certain timeframe, with a certain body weight?

Q: And that was specialized training, beyond what an ordinary person might know (pointing to your ordinary defendant)?

Q: And so, you knew that my client weighed "X" pounds from his license, and he told you he had 'X' drinks, over a time period from 'X' to 'X'?

Q: And with that in mind, rather than obtain the actual blood alcohol concentration of my client, you were satisfied with just marking it down that the defendant declined?

Q: And you understand that it is your job to collect all evidence that is necessary to prove someone guilty of a crime, if you know it exists and would actually prove it beyond a reasonable doubt?

Q: Wouldn't you be subject to embarrassment or ridicule in your department if a person that you had already accused of the crime of DUI, turned out to be at a .04? Wouldn't you be personally better off with a so-called refusal under those circumstances? Are you sure that your body language, even subconsciously, wasn't sending signals to my client to decline?

The point here is that you can argue that the failure to collect is a failure of proof. Or, that the officer wasn't sure that the Defendant was over the limit, and so he was 'better off' with a refusal. Or, that the officer was not doing his job correctly, etc.

If you are allowed to, take out the chart which would show that your client's information would have resulted in a BAC of less than .08, and that the officer had a 'consciousness of innocence' on your client's part.

Defendant's Reasons for Refusing Breath Tests

If the Defendant testifies, he will be asked about his refusal of breath, blood or urine tests. Since a Defendant's refusal to submit to these is admissible as consciousness of guilt in most states,that will allow a Defendant to testify about hearsay under the 'state of mind exception' to the hearsay rule. Defense counsel should not miss this opportunity if the Defendant takes the stand.

Examples of admissible 'state of mind' ex-

ceptions as to why an innocent Defendant refused a test include:

a. "I read a newspaper article about a prosecutor who got stopped and she refused the test and I figured if it's good enough for her, it's good enough for me." (courtesy of Thomas Hudson, Florida DUI Attorney)
b. "I am aware of the fact that breath testing is unreliable, and can over-report true alcohol levels."
c. "The officer told me I had a right to remain silent, so I didn't feel that I had to."
d. "My doctor told me not to trust those things."

Closing Argument

OK, here we go. You've run your theme(s), and now its time to raise the American flag. Several arguments are always available, and many are foreshadowed by the techniques described above. Here are a few I have successfully used.

The 13th Juror

The judge told you at the beginning that the Defendant need never present any evidence, and that no inference should be drawn against him for that fact. The Judge will further instruct you that the Defendant is presumed innocent, and that this presumption rests with him throughout the course of the proceedings, including during your deliberations. That means that declining to provide evidence, as the Defendant did, leaves the State with *no* evidence to rebut the presumption that the Defendant is innocent.

The Presumption of Innocence is like the 13th juror in the jury room. It stands by the door, and says 'You cannot leave this room with anything but a Not Guilty verdict until I have been completely destroyed.' It hangs over every juror's head, and it whispers in every juror's ear, and the Presumption of Innocence says 'Even if this or that fact was proven, the Defendant is innocent anyway.'

Even if the prosecutor proves that certain facts are true, the Presumption forces you to say, 'So what, innocent people can do that too.' And if it's possible, even remotely, that these things can happen to innocent people, then the Presumption of Innocence compels you to sign that Not Guilty verdict.

And innocent people have the right to decline a test. They have the right to not give evidence. And they do. The mere fact that my client declined to do anything, makes him no more guilty of a DUI than he would be guilty of any other crime. He did what our forefathers died for, which was to not be tricked into proving his innocence; he held his ground in the face of an aggressive government agent who tried to make an innocent man do otherwise.

Death of a Family Pet

There are very few decisions in life that people can make based upon proof beyond a reasonable doubt. Most decisions we make are based upon far less than that. We buy a stereo at the store. If it doesn't work right, we can always return it and get our money back. It is only those decisions, which once made, we will live with forever that require such a heavy burden, because the consequences are irreversible. Consider that one of those decisions might be whether to put a beloved family pet to sleep.

A person takes the pet to the veterinarian, because the pet has some symptoms. The vet comes out and says, 'I have determined that your pet has cancer, and must be put to death.' You pause, and take a deep breath. The veterinarian stares at you while you are asked to render that verdict. But first, you ask him:

'Mr. Veterinarian, how much training have you had in Family Pet Cancer. He answers, 'I took a three-day course and passed a 20-question, fill-in-the-blank, multiple choice test with a 75 percent pass/fail grading.' (i.e., Field Sobriety Tests). And Mr. Vet, did you administer these tests? 'No, because the pet declined the tests.'

And then you ask the Veterinarian 'is there one definitive test that would tell you for sure whether my family pet in fact has cancer and must be put to sleep?' And he says, 'Yes, it is called a blood, breath, or urine test.' 'And Mr. Veterinarian, did you have the means available to take that test.' And he says, 'I did not do so because the family pet exercised his option to decline.' 'But you know that it is up to you to prove beyond a reasonable doubt that this pet has cancer, and you're asking me to be convinced beyond a reasonable doubt, to just take your word for it with nothing more?' And the Vet says, 'yes.' And when I ask 'why?' he says 'Because I can infer that the pet has a guilty mind, and that he declined the tests because he knows he would have failed the cancer test and be put to sleep anyway.'

Now, who would at that moment put a family pet to sleep. Or rather put this man's (pointing to client) pet to sleep based on such testimony. An irreversible decision based on the lack of testing? But, that is what we have here.

And now, they ask you to find that they have proven beyond a reasonable doubt that my client is guilty simply because they have no test results at all.

Paying It Forward

The judge and I have both discussed the legal principles involved in this case—proof beyond a reasonable doubt, that the burden rests with the prosecution, and that the defendant is presumed innocent. We talked about the blood that was spilled and the lives that were given for the past 200 years to gain and keep these principles, and how every jury since then has passed these principles into your hands today.

Now is your chance to apply these principles. And when you sign that Not Guilty verdict, you will be placing your signature onto an historical record for all of your descendants to see—for your grandchildren's grandchildren to look, and say, 'this is where my forefather stood.' And when you sign a Not Guilty verdict, you can walk out of that room with your head held high, because you stood those grounds, even if it was with difficulty.

And you will be paying it forward, those great principles of our land. By saying Not Guilty, you will assure that tomorrow, and for some time to come, these principles will live on.

When the Prosecutor Says 'Find Him Guilty Because He Refused'

When the prosecutor tells you to 'Find him guilty for refusing' they are saying to you 'Find him guilty because we don't have the evidence.' They don't have the definitive test. Every time they mention it, it's them begging you to disregard the law, disregard their burden of proof, to excuse their obligations. If anyone had told my client, by declining the test you will be found guilty, he may have instead taken that test and proved his innocence. But they never gave my client that chance, did they?

Where is the proof that my client would have in fact failed the test? They want to argue that my client must have had a guilty mind? Where the proof that my client even knows how many drinks is more than .08? Where's the proof that they fully and fairly

explained how these machines even come up with an accurate number? Had they done so, then maybe, *maybe then*, a refusal would mean what they say. But they failed to do so here, and that is unfair.

The burden of proof here is the highest in the land—the same as a murder case. Would you find someone guilty of murder beyond a reasonable doubt if the prosecutor said 'Find him guilty because we don't have proof—he wouldn't talk to us, he wouldn't let us in his house, so he must be the one who did it?

Conclusion

Weaving a theme for refusals requires the defense lawyer to overcome many pre-conceived notions of the common juror. This dismantling of 'those that refuse must be guilty' has to start at the very beginning of the case, and doesn't end until the jury returns to the courtroom with a verdict of 'Not Guilty' in their hands. A careful crafting of the law and the rights of all U.S. citizens is your guide to a true and just verdict in these types of cases. I hope these suggestions will benefit you in your next refusal case. ■

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1. See, e.g. *People v. Brooks*, 334 Ill.App.3d 722, 778 N.E.2d 336 (Ill.App. 5 Dist.,2002) (holding that testimony regarding a defendant's refusal to submit to a portable breath test (PBT), as well as any evidence of the test's accuracy or availability, is inadmissible in the State's case in chief, in a prosecution for driving under the influence, because "breathalyzer machines do not inherently suffer from the same scientific uncertainty that affects PBT machines. The admissibility of Breathalyzer test results is well established, and therefore, to prove intoxication, the prosecution may utilize both the test results and the refusal to take the test.").

2. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990).

3. *South Dakota v. Neville*, 459 U.S. 553 (1983).

4. *People v. Johnson*, 218 Ill.2d 125, 842 N.E.2d 714 (Ill. 2005).

5. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826 (1966).

Your client has been denied driving privileges by the Secretary of State. Now what?

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a listing of all the reasons that the Secretary denied the application for driving relief, and will also direct the petitioner to provide a written response from the evaluator/treatment provider addressing all of the reasons for the denial. Once your client has met with the evaluator/treatment provider and has the document that addresses the reasons for denial, meet with your client prior to the informal hearing to make sure that he or she is able to verbalize the findings of the evaluator/treatment provider and be able to discuss the reasons for the denial, along with the steps taken by the client to remedy those issues, At the time of your next appearance before the informal hearing officer, it is likely that, in addition to addressing the reasons for the denial, the hearing officer will once again interview the petitioner from the same standardized form that was used during the initial hearing and cover all the facts surrounding your client's DUI arrests, drinking and/or drug history, symptoms, and steps taken by the client to assure the Secretary that he or she would be a safe and responsible driver if given the opportunity to do so.

If your client has had a formal hearing, then you have two choices: you can appeal the Secretary's decision under Administrative Review[4] or, you can request another formal hearing once 30 days have lapsed since the prior hearing, and your client will be entitled to appear for the formal hearing once ninety calendar days have passed since the date of the last hearing.[5] If you decide to appeal the Secretary's decision, you commence the appeal by filing a complaint and having a summons issued to the Secretary. The form of the summons is found in Supreme Court Rule 291(a). Supreme Court Rule 291 also directs the form of service, which is by registered or certified mail as provided in the Administrative Review Law.[6] The Secretary will appear by filing an answer consisting of the record of the proceedings before it.[7] The Administrative Code also directs that the findings and conclusions of the administrative agency on questions of fact are held to be prima facie true and correct.[8] Schedules for briefs, and oral arguments, if any are desired, will then be determined by the Court and counsel.

If you choose not to appeal the decision of the Secretary, then under the time frame as stated above, you can request another formal hearing for your client. All of the formal orders entered by the Secretary contain directions to the petitioner regarding what issues need to be addressed prior to any subsequent formal hearing. For example, in a recent order entered by the Secretary, the Secretary stated as follows:

> Petitioner minimized his drug use and history during the hearing. He should return to his evaluator to discuss the issue and be prepared to give a full disclosure of his substance use history at his next hearing.
>
> and
>
> Petitioner's evaluator is aware that the Petitioner currently consumes three drinks 1-2 times a week, but the Addendum does not indicate that the Petitioner disclosed that the drinks are actually double-shot drinks. Petitioner should return to his evaluator to discuss his current drinking pattern.
>
> and
>
> The current Uniform Report . . . fails to reflect the aforementioned indicators or symptoms admitted to herein by Petitioner which might support the following additional DSM IV symptoms of alcohol dependence: important social, occupational, or recreational activities are given up or reduced because of substance use; and persistent desire or unsuccessful efforts to cut down or control substance use. *This may result in a change of classification if the evaluator determines that the Petitioner has a clinically significant number of symptoms of chemical dependence, as defined by the DSM IV.*
>
> and
>
> Petitioner's minimization of his drug use history and/or related symptomatology supporting his classification indicates that Petitioner has been

less that successful in identifying and addressing his alcohol/drug problem, not withstanding the treatment provider's positive prognosis. Petitioner should return to his treatment provider for the purpose of addressing these issues and/or assessing the need for additional treatment. The Petitioner's response must be submitted in writing at the next formal hearing.

As shown by the above language, it is imperative that your client meet with the evaluator/treatment provider who prepared the initial evaluations and have the evaluator address each and every reason given by the Secretary for the denial. The Secretary will list the specific reasons for denial as follows:

> The reasons for the denial of driving privileges are as follows: minimization of drug use history, questionable current drinking pattern, dependency indicators, questionable classification, and possible need for additional treatment (see findings of fact number . . .).

The format in which the evaluator/treatment provider addresses each of the reasons for denial can be left up to that individual. Some evaluators that I have worked with prepare the document as a letter addressed to the Secretary of State, others prepare a document entitled "Addendum Addressing Order of Denial." The format really isn't important, it is the content, namely, documentation that your client has addressed with the evaluator all the reasons for denial, that is crucial. Again, meet with your client prior to the hearing as directed above (for subsequent informal hearings).

The Secretary is not bound by the findings of any evaluation or treatment documents and the Secretary may completely disregard the findings of any evaluation if the evidence indicates that it is unreliable or incomplete.[9] In order to obtain driving relief, your client must carry the burden of proof by clear and convincing evidence of the following three issues: the nature and extent of his or her alcohol/drug problem; second, whether his/her alcohol/drug problem has been resolved; and third, whether he or she will be a safe and responsible driver; your client cannot prove that he or she will be a safe and responsible driver unless and until he or she has proven that his or her alcohol/drug problem has been resolved.[10]

Prior to a change in the Administrative Code, you could file a formal motion for reversal due to a material misstatement of fact. Now the Administrative Code directs you to file an appeal or request a new hearing in order to correct the misstatement.[11] In spite of that directive, there is also a third option to address a denial of driving privileges. In limited instances, if the order contains a misstatement of fact, make it a point to document the misstatement of fact in writing and forward the error to your Regional Formal Hearing Officer. It has been my experience that when the Hearing Officer has made a misstatement of fact in the order, the Secretary will acknowledge that mistake, reverse the order, and award-driving privileges. Don't attempt to use this option in order to argue a point of law, because you will not be successful, (believe me, I've tried on numerous occasions and it doesn't work!) There must be a true misstatement of fact for the Secretary to reverse his own decision.

The options open to you and your client once a denial order has been issued are limited. When deciding whether or not to appeal a decision of the Secretary or wait the 90 days to have another hearing, determine what is most important to your client: spending time and money to "right" an incorrect decision or address the reasons for denial by having another hearing and, hopefully, be back on the road in the same amount of time it takes to appeal. ■

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1. 92 Illinois Administrative Code 1001.360(a)
2. 92 Illinois Administrative Code 1001.360(b)
3. 92 Illinois Administrative Code 1001.360(c)
4. 735 ILCS 5/3-101, et seq.
5. 92 Illinois Administrative Code 1001.
6. Supreme Court Rule 291(b).
7. 735 ILCS 5/3-106.
8. 735 ILCS 5/3-110.
9. *Cusack v. Edgar*, 484 N.E.2d 114, 137 Ill. App.3d 505, 484 N.E.2d 1145 (1st Dist 1985); *Christiansen v. Edgar*, 209 Ill.App.3d 36, 567 N.E.2d 696 (4TH Dist. 199).
10. See 92 Illinois Administrative Code 1001.400(b)(2).
11. 92 Illinois Administrative Code 1001.80.

Driving under the influence: Not just for alcohol anymore

By Erica Nichols

Drinking and driving is one of the society's greatest concerns. Over the years, attention to the offense has grown with the action of community and national groups calling for tougher sanctions to punish those who chose to get drunk and drive home and put others at risk. Every interstate and expressway has billboards touting law enforcements get tough approach and agencies run commercials on television warning motorists that if they drink and drive, they will be caught.[1] These public service announcements focus on intoxication from alcoholic beverages[2] and fail to warn that driving and using drugs—legally or not—can place you in the same place as too many drinks. That place may be the back of a squad car, jail or extensive alcohol and drug treatment.

Illinois has enacted a statute to address drug impaired driving. The Illinois Appellate court has been interpreting this statute and its subsections to decide what evidence is required to convict an individual of driving under the influence of something other than alcohol. The main debate centers around the quantum of evidence necessary and the expertise of the police officers in detecting drug influence.

Illinois' driving under the influence ("DUI') statute, 625 ILCS 5/11-501 has two essential elements. First, an individual must have actual possession and control of a vehicle; and second the individual must have been under the influence at the time he had possession or control of the vehicle. The statute has six different theories by which an individual can be under the influence. Only the first two are restricted to impairment by alcohol. The remaining four subsections involve drugs, either illicit or legal. The statute explicitly states that the fact an individual is legally entitled to use alcohol, drugs, or intoxicating compounds is not a defense to the charge under the DUI statute.[3]

Traditional DUIs

The first subsection is (a)(1), which requires that the "alcohol concentration in the person's blood or breath is 0.08 or more." The (a)(1) subsection is the most well known and common experience where an individual provides a breath sample into a breathalyzer machine at the police station or a blood test at the hospital. The second subsection is (a)(2), which requires that an individual be "under the influence of alcohol" to a degree that impairs the ability to drive. (A)(2) does not require a breathalyzer or other chemical test and most often standard field sobriety tests and officer observations of impairment are the only evidence presented.

Drug DUIs

The third subsection is (a)(3), which requires an individual to be under the influence of any intoxicating compound or combination of intoxicating compounds to a degree that renders the person incapable of driving safely. Intoxicating compounds are listed in 720 ILCS 690/0.02 and the drug alleged to have been causing the impairment must be on this list. The fourth subsection is (a)(4), which requires an individual to be under the influence of any other drug or combination of drugs to a degree that renders the person incapable of safely driving. The fifth subsection is (a)(5), which requires an individual to be under the combined influence of alcohol, other drug or drugs, or intoxicating compound or compounds to a degree that renders the person incapable of safely driving. Subsections (a)(3), (a)(4), and (a)(5) all require a third element of impaired or "bad" driving to be proven by the State. There must be evidence that the drug or substance rendered the individual incapable of safely driving.

The sixth and last subsection is (a)(6), which requires that there be any amount of a drug, substance, or compound in the person's breath, blood, or urine resulting from the unlawful use or consumption of: either (1) cannabis listed in the Cannabis Control Act, 720 ILCS 550/1, et seq., or (2) a controlled substance listed in the Illinois Controlled Substances Act, 720 ILCS 570/100, et seq., or (3) an intoxicating compound listed in the Use of Intoxicating Compounds Act, 720 ILCS 690/0.01, et seq., or (4) methamphetamine as listed in the Methamphetamine Control and Community Protection Act, 720 ILCS 646/1, et seq. (A)(6) does not require that the drug, substance or compound rendered the individual incapable of safely driving. This subsection has been construed as a "per se" violation in that it is a strict liability offense to have any amount of cannabis, methamphetamine or intoxicating compound in your system while behind the wheel of a vehicle.

Case Law

There is no generic offense of driving under the influence.[4] The state must specify in a traffic citation or information whether the individual is allegedly under the influence of alcohol, drugs, or both.[5] It is well-established that a layman is competent to testify regarding intoxication from alcohol because the observations and experience are within the knowledge of all adults of normal experience.[6] However, the opinion of whether someone is under the influence of drugs or intoxicating compounds requires expertise. This issue was first addressed in *State v. Jacquith*.[7] Jacquith was charged and convicted of driving under the influence of the combination of alcohol and drugs.[8] The arresting officer testified that based on defendant's hyperactivity, general appearance, slurred speech, performance on standard field sobriety tests, he concluded that he was under the influence of alcohol and something else.[9] The officer claimed no experience with drug arrests.[10] The court examined cases from other jurisdictions due to a lack of cases in Illinois addressing the issue of proving intoxication by drugs.[11] The court found that a level of expertise consisting of relevant experience, training and skills is required to sustain a conviction for driving under the influence of drugs that was not present in the instant case.[12]

The court clarified that the opinion testimony of the arresting officer is not the sole evidentiary source of proof of drug intoxication. In *State v. Bitterman*, the court stated that a qualified officer's opinion is circumstantial evidence, while defendant's own admission to smoking marijuana and being under the influence of marijuana while driving was direct evidence of his intoxication.[13] Thus, defendant's admission to being under the influence and the recovery of cannabis was sufficient to support his conviction of driving under the influence of drugs.

The combined influence of drugs and alcohol must render an individual incapable of driving safely under the (a)(5) subsection of the statute.[14] In *State v. Vanzandt*, the defendant presented evidence that he was a diabetic and had taken insulin the previous evening and argued that his behavior

was the result of a hypoglycemic attack and not alcohol or drug intoxication.[15] The court reversed his conviction because the officer was not qualified to give expert testimony on the complex physiological effects that alcohol produces in diabetics and found that there was no evidence that indicated that insulin either alone or in combination with alcohol would render a person incapable of driving safely.[16]

The court has applied their holding in *Jacquith* to require that a proper foundation be provided for an officer's opinion that the defendant was under the influence of drugs.[17] In *State v. Shelton,* the defendant was charged under the (a)(3) subsection—intoxicating compounds rendered defendant incapable of driving safely.[18] The arresting officer testified that he did not smell alcohol but found defendant to be off balance and very agitated.[19] An assisting officer described defendant as high strung and unable to sit still.[20] Defendant made admissions that he was on Tylenol 3 with codeine.[21] The officers gave defendant the standard field sobriety tests and concluded that he failed.[22] Defendant was not charged with any other traffic offenses.[23] The arresting officer testified that he had limited training in the academy concerning narcotics, and had arrested one other person for driving under the influence of drugs.[24] The officer explained that a person under the influence of drugs is a little more confused than those under the influence of alcohol.[25] It was also his opinion that his observations of defendant being off balance, very moody, agitated and very talkative were indicators of drug usage.[26] The court in *Shelton* interpreted *Jacquith* to require a law enforcement officer to have some training in how to detect drug users and, more importantly experience in dealing with drug users.[27] The court concluded that there was no basis for the arresting officer's opinion and no evidence of the effects of any drugs and reversed defendant's conviction.[28]

The court has also explained that there must be evidence that the drug at issue had some intoxicating effect.[29] In *State v. Workman*, an officer saw defendant stop his truck on the median and proceed to inspect his rear bumper.[30] The officer observed defendant to be swaying and stumbling and approached to find out why he stopped.[31] Defendant explained that he thought he'd been in an accident, but did not see any damage.[32] The officer noted that defendant's speech was slurred and he detected an odor of alcohol.[33] The officer had defendant perform the standard field sobriety tests and determined that he failed those tests.[34] At the station, the officer had defendant perform a breathalyzer test which revealed a result of 0.01 BAC.[35] After the breath test, the officer found a prescription bottle of lorazepam on the defendant's person.[36] Defendant stated that he had taken eight of the pills from the bottle—for his knee pain and that the prescription belonged to his wife.[37] The officer did not ask when the pills were taken and did not administer the HGN test, which he testified was a field sobriety test that could be used to detect persons under the influence of drugs.[38] The officer admitted he had no training or experience regarding how lorazepam would affect a person's ability to drive.[39] The court found that the officer did not display the level of expertise necessary to support a conviction.[40]

The (a)(6) subsection of the DUI statute has been unsuccessfully challenged as unconstitutionally vague.[41] It was argued that the statute was vague because it did not require a definite standard or specific proof of cannabis in the system and thus led to arbitrary enforcement.[42] In *State v. Briseno*, the appellate court upheld the statute.[43] The evidence in the *Briseno* case consisted of the following factors: "1) operation of motor vehicle; 2) officer's testimony smelled strong odor of cannabis in defendant's vehicle; 3) officer's testimony he smelled a strong odor of cannabis on defendant's breath; 4) defendant's admission that he smoked cannabis in his vehicle just before driving; 5) defendant's slurred speech; 6) defendant's dilated pupils; 7) defendant's motor skills being slower than average; and 8) defendant's performance on the field sobriety tests."[44] The court also found that the officer had extensive experience and training in drug detection.[45] That experience and training consisted of regular training and classes in cannabis detection at the academy and outside of the academy, training new recruits in cannabis detection and having made several dozen arrests for driving under the influence of cannabis and testimony in a couple dozen cases involving cannabis DUIs.[46] The court found the officer to be qualified as an expert and his opinion, along with defendant's admission was sufficient to sustain a conviction under subsection (a)(6).[47]

More recently, the appellate court has held that in order to sustain a conviction under subsection (a)(6) there must be evidence that cannabis was "in" the subject's breath, blood or urine.[48] The court explained in *State v. Allen*, that the statute makes it illegal to drive with any amount of cannabis in a person's breath, blood or urine, regardless of whether there is any visible impairment.[49] In *Allen*, the arresting officer encountered defendant at a roadblock and testified he smelled burnt cannabis emitting from the car.[50] Defendant admitted to the officer that he smoked cannabis the night before.[51] The officer testified that he had arrested people in the act of smoking marijuana and had correlated the smell of burnt cannabis to the actual lab result.[52] The officer did not ask defendant to perform any standard field sobriety tests, stating that in his opinion those tests were not valid to determine marijuana impairment.[53] No drug paraphernalia or residue were recovered and the officer testified there was nothing unusual about defendant's speech or the way he walked.[54] The officer testified on cross-examination that there was no way of indicating what amount of cannabis is in a person's blood by smelling his breath.[55] The court stated that there was no forensic test available to the officer to determine the chemical composition of what he smelled on defendant's breath.[56] The officer stated it was impossible to tell whether defendant had 0 or 100 milligrams of cannabis in his breath or blood.[57]

The court noted that the statute does not criminalize having breath that smells like burnt cannabis.[58] The court held the evidence was insufficient to find defendant guilty beyond a reasonable doubt that he had cannabis "in" his breath, urine or blood.[59] The court explained that defendant's admission was insufficient because there was no evidence that any amount of cannabis was left in his breath, urine or blood from the night before.[60] The state needed some evidence that defendant had at least some cannabis in his system at the time he was driving.[61]

The appellate court has clarified the issue around subsection (a)(6) by holding that the ultimate issue is whether there was sufficient evidence that any of the cannabis remained in defendant's breath, blood, or urine when he drove.[62] In *State v. McPeak*, the court held that defendant's statement that he smoked cannabis an hour or two before the stop and officer's testimony of a burnt cannabis odor about defendant's person is insufficient to address whether the cannabis was in his breath, blood or urine at the time he was driving.[63] The court distinguished *Briseno* by stating that there was no evidence that McPeak was impaired or any odor on his

breath.[64]

Conclusion

As you can see, there is some controversy regarding the evidence necessary to prove drug impaired driving under the DUI statute beyond a reasonable doubt. Strict statutory construction of the subsection (a)(6) requires evidence that the drug be in the subject's breath, blood or urine in the same manner alcohol must be in a subject breath or blood under subsection (a)(1). The argument can be made that the legislature used the word "in" only in sections (a)(1) and (a)(6), and the court must give effect to the statute's plain meaning.[65] Thus, a DUI charged under subsection (a)(6) requires a chemical test to prove the substance is in the person's blood, breath or urine.

Additionally, the standard for admissibility of expert testimony regarding drug intoxication is not clear. The use of Drug Recognition Experts would eliminate this controversy. The National Highway Traffic Safety Administration and International Association of Chiefs of Police offer certification to become a drug recognition expert (DRE).[66] The DRE training program requires 100 hours of training over four weeks and focuses on a 12-step protocol and the basic understanding of physiology, pharmacology and investigation techniques.[67] The officer must also successfully complete 12 DRE examinations and recertify every two years and attend an eight hour refresher course.[68] A DRE would first rule out any medical conditions by performing an eye examination, blood pressure tests, temperature, muscle tone exam, and inspections for injuries or injection sites.[69]

There is also an argument that when the National Highway Traffic Safety Administration ("NHTSA") designed standard field sobriety tests, the tests were only designed to detect impairment from alcohol, not drugs.[70] NHTSA's field studies, which validated the reliability of the standard field sobriety tests, correlated poor performance on the standard field sobriety tests to a BAC of 0.10.[71] NHTSA has approved the use of three standard field sobriety tests.[72] They are the Horizontal Gaze Nystagmus ("HGN"), Walk and Turn, and One Leg Stand.[73] The Illinois Supreme Court has stated that the HGN test is admissible if conducted according to standards and the officer is qualified to conduct the test, but that it shows alcohol consumption, not impairment.[74] As such, counsel should be aware of the history of the Standard field sobriety tests and challenge their use to detect impairment from drugs. Some officers may administer the Rhomberg Balancing Test or the Finger to Nose test. Neither of these tests have been validated and standardized by NHTSA as reliable indicators of drug impairment.[75] It is also advised that counsel should evaluate the use of a Motion to Quash the Arrest and Suppress Evidence. An officer unfamiliar with the alleged drugs may have insufficient probable cause to make the arrest.[76] An officer may be unable to rule out medical conditions that mimic intoxication, such as a stroke, head trauma, or diabetes.[77]

While society continues to focus their attention on drinking and driving, the occurrence of drug impaired driving will continue to rise. As members of the legal community, we must be aware of the law and its implications. The defense of drug impaired driving charges requires an awareness of the case law surrounding the statute and a creative approach to be zealous advocates for our clients. ■

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1. NHTSA, Stop Drinking and Driving, online at <http://www.nhtsa.gov/people/outreach/safesobr/ydydyl/call2act.html> (visited Sept. 23, 2010).
2. You Drink, You Drive, You Lose Campaign, online at <http://www.illinois.gov/ioci/psa.cfm>.
3. *See* 625 ILCS 5/11-501(b).
4. *State v. Utt*, 122 Ill. App. 3d 272, 461 N.E.2d 463 (3rd Dist. 1983).
5. *Id*.
6. *State v. Bobczyk*, 343 Ill. App. 504, 99 N.E.2d 567 (1st Dist. 1951).
7. 129 Ill. App.3d 107, 114, 472 N.E.2d 107 (1st Dist. 1984).
8. *Id.* at 108.
9. *Id*. at 109.
10. *Id*.
11. Id.
12. *Id*. at 114.
13. 142 Ill. Ap. 3d 1062, 1063, 492 N.E.2d 582 (1st Dist. 1986)
14. *See State v. Vanzandt*, 287 Ill. App. 3d 836, 843, 679 N.E.2d 130 (5th Dist. 1997).
15. *Id*.
16. *Id*. at 844.
17. *See State v. Shelton*, 303 Ill. App. 3d 915, 708 N.E.2d 815 (5th Dist. 1999).
18. *Id*.
19. *Id*. at 917.
20. Id.
21. *Id*. at 918.
22. *Id*.
23. *Id*.
24. *Id*.
25. *Id.*
26. *Id*. at 919.
27. *Id*. at 924.
28. *Id*. at 925.
29. *State v. Workman*, 312 Ill. App. 3d 305, 309, 726 N.E.2d 759 (2nd Dist. 2000) citing *Vanzandt*, 287 Ill. App. 3d at 845).
30. *Id*. at 307.
31. *Id*.
32. *Id*.
33. *Id*. at 308.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*.
38. *Id*.
39. *Id*. at 309.
40. *Id*. at 310.
41. *State v. Briseno*, 343 Ill. App. 3d 953, 799 N.E.2d 359 (1st Dist. 2003).
42. *Id*. at 959.
43. *Id*.
44. Id.
45. *Id*. at 959.
46. *Id*.
47. *Id*. at 961.
48. *See State v. Allen*, 375 Ill. App. 3d 810, 873 N.E.2d 30 (3rd Dist. 2007).
49. *Id.* at 811.
50. Id. at 811.
51. *Id*. at 812.
52. *Id*.
53. *Id*.
54. *Id.*
55. *Id*. at 812-13.
56. *Id*. at 815.
57. *Id.* at 813.
58. *Id.*
59. *Id*. at 815.
60. *Id.*
61. *Id*. at 816.
62. *See State v. McPeak*, 399 Ill. App. 3d 799, 927 N.E.2d 312 (2nd Dist. 2010).
63. *Id*.
64. *Id*.
65. *See Ramos v. City of Peru*, 333 Ill. App. 3d 75, 77-78 (3rd Dist. 2002). "A court will construe the language of the statute according to its plain and ordinary meaning and if the statutory language is clear and unambiguous, the statute's plain meaning will be given effect."
66. NHTSA, *Drug Impaired Driving: Understanding the Problem & Ways to Reduce It: A report to Congress*, 9 (December 2009) and available at: <www.NTIS.gov>.
67. ABA & NHTSA, *DRE Evidence: Moving Beyond Admissibility*, Highway to Justice 1-2 (Winter 2010).
68. *Id*.
69. *Id*.
70. U.S. Dept. Transp. & NHTSA, DWI Detection and Standardized Field Sobriety Testing-Student Manual, VIII-1 – VIII-2 (August 2006).
71. *Id*.
72. *Id*.
73. *Id*.
74. *State v. McKown*, 236 Ill.2d 278, 924 N.E.2d 941 (2010).
75. Donald H. Nichols & Flem K. Whited, *Drinking/Driving Litigation: Criminal and Civil*, 17:4 (2d ed. 1998), citing Adams & Victor, *Principles of Neurology* (2d ed. 1981).
76. *State v. Love*, 199 Ill.2d 269, 769 N.E.2d 10 (2002) (probable cause must be based on clear, articuable facts known prior to the arrest).
77. Defense of Drunk Driving Cases: Criminal, Civil, 1-12 § 12.11: *Conditions Mimicking Drug Impairment* (2010).

People v. Bruni, 2010 Ill. App. LEXIS 1274 (2nd Dist. 2010)

By David B. Franks, Lake in the Hills, IL

Arresting Officer observed no erratic driving or slurred, mumbled speech. Defendant's admission that he had consumed a beer, coupled with the Arresting Officer's testimony that he detected the "faint" odor of alcohol emanating from the passenger compartment of defendant's vehicle and the Arresting Officer's observation that defendant's eyes were "glossy," was sufficient to justify requesting that a properly stopped motorist step out of a vehicle to perform field sobriety tests.

At the hearing on defendant's petition to rescind statutory summary suspension, the Arresting Officer testified that he encountered defendant at a sobriety checkpoint at about 1:00 a.m. on May 2, 2009, and noticed nothing unusual about the manner in which defendant operated his vehicle. The Officer greeted defendant and asked him for his driver's license and proof of insurance. Defendant provided both items and the Officer noted that defendant's license was valid and his insurance was current. The Officer asked defendant where he was coming from. Defendant responded that he had been at a karaoke party at a friend's house. The Officer noticed a "faint" odor of alcohol coming from the passenger compartment of defendant's vehicle, and that defendant's eyes were "glossy." The Officer asked defendant if he had been drinking. Defendant responded that he had had one beer. The Officer asked defendant if he would step out of the car and perform field sobriety tests. Defendant stepped out of his vehicle and performed field sobriety tests. Based on defendant's performance on the field sobriety tests, the Officer concluded that defendant was under the influence of alcohol, and arrested defendant.

Defendant refused chemical testing to determine the content of alcohol in his blood. His refusal resulted in the statutory summary suspension of his driving privileges. See 625 ILCS 5/11-501.1(d) (West 2008). Defendant appealed from the Order denying his petition to rescind the suspension.

Defendant argued that the period during which he was detained at the checkpoint for initial screening, before the Officer asked him to step out of his vehicle and perform field sobriety tests, was unreasonably long and that his detention was, therefore, unlawful.

Writing for the Court, Justice Hudson noted that in determining whether stopping motorists at a sobriety checkpoint in the absence of individualized suspicion of wrongdoing is constitutionally permissible, courts have balanced the public interest against the intrusiveness to motorists who are stopped under a particular sobriety checkpoint program. *Michigan Department of State Police v. Sitz,* 496 U.S.444, 110 L.Ed.2d 412, 110 S.Ct.2481 (1990). Relying on *Sitz* and *People v. Bartley,* 109 Ill.2d 273, 93 Ill. Dec. 347 (1985), defendant argued that "the length of detention at a roadblock that has been found reasonable is between fifteen to twenty seconds." Defendant argued that, to pass constitutional muster, the "stop must be very brief as a general procedure in that the stop can be measured in a matter of seconds rather than minutes." The Appellate Court concluded that Defendant's reliance on these decisions was misplaced. The Court noted that in *Sitz,* the Supreme Court noted that the average delay for each vehicle was 25 seconds. *Sitz,* 496 U.S. at 448, 110 L.Ed.2d at 419, 110 S.Ct. at 2484. The Appellate Court pointed out that in *Bartley,* the Illinois Supreme Court noted that motorists stopped at a driver's license checkpoint "were detained for only 15 to 20 seconds, *as long as there was no need for additional questioning.*" (Emphasis added). *Bartley,* 109 Ill.2d at 287-288. The Appellate Court concluded that neither *Sitz* nor *Bartley* placed any arbitrary limit on how long a motorist may be detained when an officer's observations during the initial screening warrant a further investigation.

The Appellate Court pointed out that the *Sitz* court was careful to note that the case involved "only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers." *Sitz,* 496 U.S. at 450-51, 110 L. Ed. 2d at 420, 110 S.Ct. at 2485. The *Sitz* Court added that "[d] etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." *Sitz,* 496 U.S. at 451, 110 L.Ed.2d at 420, 110 S.Ct. at 2485. Relying on LaFave, "the leading fourth amendment scholar," the Appellate Court noted that LaFave has stated that "the officer [conducting the sobriety checkpoint stop] should have an articulable suspicion that the motorist is intoxicated before detaining the motorist for an extended [DUI] investigation." 5 W. LaFave, Search and Seizure § 10.8(d), at 378 (4th ed. 2004), quoting Note, 71 Geo. L.J. 1457, 1486 (1983). The Appellate Court reasoned that when such a suspicion exists, the detention is tantamount to an investigatory detention under *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S. Ct. 1868 (1968), which held that a police officer may effect a limited investigatory stop where there exists a reasonable suspicion, based upon specific and articulable facts, that the person detained has committed or is about to commit a crime.

In the matter at bar, defendant argued that the Officer unreasonably prolonged his seizure. Specifically, defendant challenged the length of the interval from the moment he entered the checkpoint until the Officer asked him to exit his vehicle to perform field sobriety tests. The Officer testified that he could not accurately recall how much time elapsed. According to the Officer's best recollection, he most likely detained defendant less than five minutes before he asked defendant to submit to field sobriety testing. The Appellate Court concluded that there was nothing in the record to suggest that the Officer engaged in any conduct that was not reasonably related to the objective of confirming or dispelling the suspicion that defendant might be impaired as a result of consuming alcohol. Although defendant protested that the Officer's "vague estimation of time cannot possibly render a roadblock stop "brief," the Appellate Court maintained that it was not the State's burden to establish the brevity of the stop. Rather, according to the Court, it was defendant's burden to establish that the stop was unreasonably prolonged. *People v. Paige,* 385 Ill. App.3d 486, 324 Ill. Dec. 803 (3rd Dist. 2008). The Appellate Court found that defendant had failed to establish that the Officer unreasonably prolonged the seizure.

Defendant also challenged the ruling of the trial court that the Officer did not have

a reasonable, articulable suspicion that defendant was under the influence of alcohol. Defendant first argued that "glossy" (as opposed to "glassy") eyes are not a sign of intoxication. The Appellate Court noted that the trial court, however, found that, in its experience, the terms are sometimes used interchangeably. The Appellate Court cited case law to support the trial court's observation. In *People v. Hood,* 213 Ill.2d 244, 290 Ill. Dec.207 (2004), one witness described the defendant's eyes as "glassy and bloodshot" (*Hood*, 213 Ill.2d at 248), while another described his eyes as "bloodshot" and "glossy." The Appellate Court noted that the *Hood* court, however, held that the evidence was sufficient to sustain the defendant's conviction of reckless homicide; the *Hood* court indicated that both witnesses had testified that the defendant's eyes were "glassy and bloodshot." *Hood,* 213 Ill.2d at 263.

Defendant further argued that the faint odor of alcohol coming from the passenger compartment of his vehicle, and his admission to the Arresting Officer that he had one beer, indicated only that he had consumed alcohol, and not that he was under the influence of alcohol. Because driving after consuming alcohol is not illegal in itself (see *People v. Brodeur,* 189 Ill. App.3d 936, 137 Ill. Dec. 292 (2nd Dist. 1989), defendant maintained that the Arresting Officer had no basis for administering field sobriety tests. The Appellate Court acknowledged that it was not aware of any Illinois decisions that addressed the propriety of administering field sobriety tests to a motorist stopped at a sobriety checkpoint under circumstances similar to those in the matter at bar. The Appellate Court noted, however, that it had approved the administration of field sobriety tests based on similar indicia of intoxication following a stop for a routine traffic violation. In *Village of Lincolnshire v. Kelly*, 389 Ill. App.3d 881, 329 Ill. Dec. 849 (2nd Dist. 2009), the motorist was stopped for speeding. During the officer's initial conversation with the motorist, she exhibited no problems with her speech and was able to comply with the officer's orders without any problems. In that case, the officer, however, noted a "strong" odor of alcohol and the motorist admitted having one glass of wine. The officer asked the motorist to exit the car and perform field sobriety tests. Based on this evidence, the Appellate Court determined that the officer had a reasonable articulable suspicion that the motorist had committed the offense of DUI, and thus the Officer's administration of the field sobriety tests was justified.

The Appellate Court reviewed cases from other jurisdictions for instruction regarding the circumstances under which the administration of field sobriety tests to a motorist stopped at a sobriety checkpoint is warranted. In *Commonwealth v. Bazinet*, 76 Mass.App.Ct. 908, 924 N.E.2d 755 (2010), the court held that the "mere odor of alcohol" gives rise to reasonable suspicion warranting further detention of a motorist stopped at a sobriety checkpoint. The *Bazinet* court noted that the Supreme Judicial Court of Massachusetts had upheld the constitutionality of a checkpoint procedure under which a motorist would be subjected to further screening after the initial stop if the screening officer observed " 'any articulable sign of possible intoxication.' " Relying further *on Commonwealth v. Murphy*, 454 Mass. at 320, 328, 910 N.E.2d at 284, 289, the *Bazinet* court noted that "the *Murphy* court said that the 'odor of alcohol' was one of the 'clues of impaired operation' for which the screening officers were to check and which, if observed, would provide a basis for further screening and investigation."

In *People v. Rizzo,* 243 Mich.App. 151, 622 N.W.2d 319 (2000), the court held that a strong odor of an intoxicant on a motorist's breath, standing alone, is a sufficient basis for detaining the motorist to conduct field sobriety testing. Although the *Rizzo* court agreed with the defendant's argument that the odor of alcohol on her breath did not necessarily mean that her blood alcohol content exceeded the legal limit, it held that in order to detain a motorist for field sobriety tests, the officer "merely must have a reasonable suspicion that the motorist has consumed intoxicating liquor, which may have affected the motorist's ability to operate a motor vehicle."

In *Thompson v. State,* 303 Ark. 407, 797 S.W.2d 450 (1990), a police officer approached a parked vehicle occupied by the defendant and a woman, and began speaking with the defendant. The officer smelled alcohol on the defendant's breath, and asked the defendant to exit the vehicle. The defendant stumbled and was unable to perform a field sobriety test. The *Thompson* court rejected the defendant's argument that an unlawful seizure occurred when the officer approached his vehicle. The court explained that the encounter was consensual, and stated:

> The 'seizure' of [the defendant] occurred only after the officer addressed [the defendant] and noticed the odor of alcohol after [the defendant] volunteered that he had been at a club. Then, the officer had a reasonable suspicion that [the defendant] had committed or was about to commit a DWI and properly asked him to exit his car.

The Appellate Court acknowledged that courts in Kansas and Ohio had reached the opposite conclusion: *City of Hutchinson v. Davenport,* 30 Kan.App.2d 1097, 54 P.3d 532 (2002), where the court ruled that the smell of alcohol on defendant's breath while he was at a police station combined with his false statement that he was walking and not driving home, did not give rise to a reasonable suspicion that defendant was intoxicated and too impaired to drive); *State v. Dixon,* No. 2000-CA-30 (Ohio App. December 1, 2000) (unpublished), where the court ruled that the mere detection of an odor of alcohol, unaccompanied by any basis, drawn from the officer's experience or expertise, for correlating that odor with a level of intoxication that would likely impair the subject's driving ability, is not enough to establish that the subject was driving under the influence.

The Appellate Court chose to accept and follow the decisions from Massachusetts, Michigan, and Arkansas, believing that those cases "reflect the better view." The Appellate Court concluded that defendant's admission that he had consumed a beer, together with the officer's testimony that he detected the odor of alcohol emanating from the passenger compartment of defendant's vehicle and the officer's observation that defendant's eyes were "glossy," "was sufficient to justify the relatively minor intrusion of requesting that a properly stopped motorist step out of a vehicle to perform field sobriety tests." Citing language from *Village of Plainfield v. Anderson,* 304 Ill.App.3d 338, 342, 237 Ill. Dec. 507 (3rd Dist. 1999), the Appellate Court stated: "'Indeed, an officer faced with these facts would be derelict in his duties if he chose not to conduct a further investigation.'"

The Court found that the circumstances were sufficient to create a reasonable articulable suspicion that defendant was driving under the influence of alcohol, and affirmed the judgment of the circuit court of Du Page County. ■

New grounds for challenging red light tickets after PA 96-1016 and *Melendez-Diaz*

By Nate Nieman

I. Introduction

If you have ever been sitting in traffic at an intersection with red light cameras, you have probably thought, at least once, about how you would challenge a red light ticket, should you be so unfortunate to receive one. There is something that, to lawyers and layman alike, seems inherently unfair and even Orwellian about receiving a red light ticket from a discretionless automated camera system instead of a warm-blooded police officer. PA 96-1016, which amends 625 ILCS 5/11-208.3, the statute dictating the procedural processes for producing evidence for red light tickets, or, "photo enforcement" citations, has added new procedures that allow for more discretion and review of the photo produced by the red light camera, giving defendants new grounds on which to challenge photo enforcement citations.[1] This new Act, which became effective on January 1, 2011, will undoubtedly be welcomed by defendants, who before had few statutory grounds available for challenging the validity of photo enforcement citations. And while the recent amendments to §5/11-208.3 provide opportunities to challenge photo enforcement citations on grounds which were previously unavailable, these challenges become even more potent in light of the U.S. Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*,[2] which allows defendants to require lab technicians to testify as to the contents of their reports.[3]

II. Section 11-208.3 of the Illinois Vehicle Code

Section 11-208.3 of the Illinois Vehicle Code sets forth the procedural rules for adjudicating photo enforcement citations.[4] On January 1, 2011, §5/11-208.3 was amended by PA 96-1016 to provide additional due process rights to drivers being charged under the statute.[5] The recent amendments, however, only apply in "the counties of Cook, DuPage, Kane, Lake, Madison, McHenry, St. Clair, and Will and to municipalities located within those counties."[6] In Cook County, "Chicago's automated traffic enforcement scheme employs 'cameras at traffic intersections' throughout the city designed to photograph vehicles 'that enter an intersection against a red traffic light or make a turn in the face of a red light when turning is prohibited,'"[7] a system which is representative of the other photo enforcement systems throughout Cook County and the collar counties.[8] Among the most notable amendments[9] to §11-208.3 is the amendment to §11-208.3(b)(3), which adds the following language:

> In municipalities with a population of less than 1,000,000 inhabitants and counties with a population ofless than 3,000,000 inhabitants, the automated traffic law ordinance shall require that all determinations by a technician that a motor vehicle was being operated in violation of Section 11-208.6 or 11-1201.1 or a local ordinance must be reviewed and approved by a law enforcement officer or retired law enforcement officer of the municipality or county issuing the violation. In municipalities with a population of 1,000,000 or more inhabitants and counties with a population of 3,000,000 or more inhabitants, the automated traffic law ordinance shall require that all determinations by a technician that a motor vehicle was being operated in violation of Section 11-208.6 or 11-1201.1 or a local ordinance must be reviewed and approved by a law enforcement officer or retired law enforcement officer of the municipality or county issuing the violation or by an additional fully-trained reviewing technician who is not employed by the contractor who employs the technician who made the initial determination.

Before this recent amendment, a single technician reviewed the photographs from the red light camera to determine whether the driver violated the Illinois Vehicle Code or a local ordinance.[10] The State would then use the photo technician's determination as evidence against the driver.[11] After PA 96-1016, however, a police officer, retired police officer, or, in some cases, another, unaffiliated technician, must now review and approve the determination of the first technician.[12] The PA 96-1016 amendment, therefore, provides defendants receiving photo enforcement citations significantly increased due process rights. But might defendants, under the recent *Melendez-Diaz* decision, be entitled to even greater due process rights? While *Melendez-Diaz* has yet to be applied to recently amended §11-208.3(b)(3), the answer seems to be "yes."

III. *Melendez-Diaz v. Massachusetts*

In *Melendez-Diaz v. Mass.*, No. 07-591, slip op. (U.S. June, 20 2009), the defendant was involved in what turned out to be a drug deal.[13] The defendant was arrested and charged with "trafficking in cocaine in an amount between 14 and 28 grams," in violation of Massachusetts law.[14] At trial, the State submitted into evidence bags of white powder that the officers had recovered from the squad car which had transported defendant to the police station.[15] With the baggies, the State also submitted three "'certificates of analysis' showing the results of the forensic analysis performed on the seized substances," which contained the weight of the substances and a finding that it was cocaine.[16] The defendant objected to the introduction of the technician's certificates on grounds that the "Confrontation Clause decision in *Crawford v. King*, 541 U.S. 36 (2004), required the analysts to testify in person."[17] The objection was overruled, however, and defendant was convicted.[18] The defendant appealed the conviction on the basis that he was denied the opportunity to confront the technicians in violation of the Sixth Amendment's Confrontation Clause.[19] The appellate court affirmed the trial court; the Supreme Judicial Court denied review; and the U.S. Supreme Court granted certiorari.[20]

The Sixth Amendment to the U.S. Constitution, "made applicable to the States via the Fourteen Amendment…provides that '[i]n all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him.'"[21] *Crawford* established that the Confrontation Clause guarantees a defendant's right to confront those who "bear testimony" against the defendant.[22] A "witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination."[23] There-

fore, the issue in *Melendez-Diaz* turned on whether the lab technician's "certificates" qualified as "testimony" for Confrontation Clause purposes.[24] The *Melendez-Diaz* court held that the certificates qualified as "testimony" because "They are incontrovertibly a 'solemn declaration or affirmation made for the purpose of establishing or proving a fact.'"[25] The *Melendez-Diaz* court found that the lab technician's certificates "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination,'"[26] and that it was therefore unconstitutional under the Sixth Amendment's Confrontation Clause to deny the defendant an opportunity to cross-examine the lab technicians.[27]

IV. Analysis: *Melendez-Diaz* Applied to §11-208.3

PA 96-1016 modified §11-208.3 to require that the first technician's determination be reviewed and approved by a police officer or another technician.[28] But does the Confrontation Clause require the technicians or officers to appear in court to testify? The issue, as in *Melendez-Diaz*, will turn on whether a "determination" qualifies as "testimony" for Confrontation Clause purposes. In *Melendez-Diaz*, the lab technician chemically reviewed a seized substance to determine whether the substance was, in fact, cocaine.[29] Thereafter, the lab technician submitted to the court "'certificates of analysis' showing the results of the forensic analysis performed on the seized substances," which "were admitted pursuant to state law as 'prima facie evidence of the composition, quality, and the net weight of the narcotic…analyzed."[30] Similarly, in the case of photo enforcement citations, a photo technician visually reviews the photograph taken by the camera to determine whether the driver did, in fact, run the red light or turn on a red light.[31] Thereafter, the photo technician submits a "notice" to the court (which includes the technician's "determination") as evidence of the traffic violation, which, by statute, "shall be prima facie correct and shall be prima facie evidence of the correctness of the facts shown on the notice. The notice, copy, or computer generated record shall be admissible in any subsequent administrative or legal proceeding."[32]

In both cases, a technician is given seized material (either cocaine, captured by the police, or a photo, captured by a camera) and asked to determine whether this material is evidence of a crime. If the technician determines that the material is evidence of a crime (cocaine or a photo of a driver running a red light), that determination is then memorialized and submitted to the court as prima facie evidence that the defendant has committed a crime. Whether the technician's finding is in the form of a "determination" of "affidavit," both are testimony for Confrontation Clause purposes because they "are functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination'"[33]—that is, testify as to the technician's finding that the substance or photo is evidence of a crime.

V. Impact of Applying *Melendez-Diaz* to §11-208.3

If Illinois courts rightfully extend the holding of *Melendez-Diaz* to photo enforcement citations, this will almost fatally reduce the economic benefit of employing red light cameras. As of yet, red light camera tickets have been virtually immune to legal challenges.[34] Red light cameras provide photographic evidence of a crime being committed—evidence rarely available in criminal cases. Photo enforcement citations, therefore have provided an impressive return-on-investment for counties and municipalities because with a nominal initial investment for the cameras and technicians to review photos, the tickets have been more or less unchallengeable, providing municipalities and counties with a steady non-tax income source.

However, this was before PA 96-1016 and *Melendez-Diaz*. If even a small minority of drivers now receiving photo enforcement citations move the court to have the first technician and the reviewing officer or second technician testify regarding their "determinations," this will require technicians and police officers to be constantly testifying as to the veracity of their findings. This, in turn, will become inordinately expensive for municipalities and counties because they will need to remunerate technicians and officers for time spent in court—time which technicians could be using to review images and time which police officers could be using to protect the public. Inevitably, the resources that local governments will expend on technicians and police officers to testify in court will eventually surpass the revenue that local governments have enjoyed prior to the wave of challenges that is sure to come. This may force local governments to rethink the economics of using red light cameras, even when these cameras seem, at first blush, to be a long-awaited panacea to government deficits.

VI. Conclusion

Prior to PA 96-1016 and the *Melendez-Diaz* decision, red light cameras appeared to be an ironclad way to produce nearly irrefutable evidence of traffic violations, which, in turn, promised to fill local government coffers in a time of economic strain. However, as the Illinois Legislature and the Supreme Court have erected greater due process barriers for the State to overcome in proving those traffic violations, the economics of employing red light cameras could ultimately render this law enforcement method untenable. This could mean that the assembly line citation factory that is red light cameras could come to a halt when it becomes more economically to station a human police officer at a stoplight to observe traffic violations and personally testify as to the veracity of their observations in court. ■

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1. *See generally* PA 96-1016.
2. No. 07-591, slip op. (U.S. June 25, 2009).
3. *See Melendez-Diaz*, No. 07-951, slip op. at 5.
4. *See generally* 625 ILCS 5/11-208.3(b)(3) (West).
5. *See id.*
6. 625 ILCS 5/11-208.6(m) (West).
7. Jeffrey Parness, "Red Light Cameras: Innocent But Guilty," 98 Ill. B.J. 158 (2010). (quoting *Idris v. Chicago*, 2008 WL 182248 (N.D.), *aff'd*, 552 F.3d 564 (7th Cir. 2009)), *available at* <http://www.isba.org/ibj/2010/03/civilpractice>.
8. *See* 625 ILCS 5/11-208.6(a)
9. *See, e.g.*, §§ 5/11-208.6(b-5); 5/11-208.6(c-5); 5/11-208.6(k-3).
10. *See* 625 ILCS 5/11-208.3(b)(3)
11. *See* 625 ILCS 5/11-208.6(f); 625 ILCS 5/11-208.3(b)(3).
12. *See* 625 ILCS 5/11-208.3(b)(3).
13. *Melendez-Diaz*, No. 07-951, slip op. at 1-2.
14. *Id.* at 2.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Melendez-Diaz*, No. 07-591, slip op. at 3.
20. *Id.*
21. *Id.* (quoting *Pointer v. Texas*, 380 U.S. 400, 403 (1965)).
22. *Id.* (quoting *Crawford*, 541 U.S. at 51).
23. *Id.* (citing *Crawford*, 541 U.S. at 54).
24. *Id.* at 4.
25. *Melendez-Diaz*, No. 07-591, slip op. at 4 (quoting *Crawford*, 541 U.S. at 51) (internal citations omitted).
26. *Id.*
27. *Id.* at 5.
28. *See* 625 ILCS 5/11-208.3(b)(3).
29. *See Melendez-Diaz*, No. 07-591, slip op. at 2.
30. *Id.* (quoting Mass. Gen. Laws, ch. 111, §13).
31. 625 ILCS 5/11-208.3(b)(3).
32. *Id.*
33. *Melendez-Diaz*, No. 07-591, slip op. at 4.
34. Parness, *supra* note 7 ("A variety of theories have been advanced to challenge automated traffic enforcement. Thus far, the challenges have largely failed.").

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Tuesday, 4/12/11- Chicago, ISBA Chicago Regional Office—Recent Developments in IP Law. Presented by the ISBA Intellectual Property Section. 9:30-11:30.

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