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Traffic Laws & Courts

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

Summary suspension notice through the mail

By Edward Maloney

More and more police departments are relying on blood and urine tests after an arrest for DUI. Unlike a breath test where the notice of summary suspension is delivered to the defendant immediately, the officers need to wait until the lab reports come back before issuing a notice of suspension. It seems to be taking even longer and longer now and in some cases there seems to be delay of up to four months before the lab results are returned to the officer.

According to Section 11-501.1 of the Motor Vehicle Code at Section (f), where the blood alcohol concentration of .08 or greater or any amount of drug consumption of cannabis is established by subsequent analysis of blood or urine collected at the time of the arrest, the arresting officer or the arresting agency shall give notice either personally or by deposit in the United State mail of the notice of summary suspension in an envelope with postage pre-paid and addressed to the person at his address as shown on the uniform traffic ticket. The statutory summary suspension shall begin 46 days from the mailing of the notice or the personal service on the defendant. Personal service on the Defendant could normally take place on a court date where Defendant would appear and be handed the summary suspension notice by the officer.

However, if the officer decides to mail the summary suspension notice to the defendant, the statute allows this to be done by regular mail.

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Sixty-two days means exactly that!

By J. Brick Van Der Snick

On November 29, 2011, the Second District Appellate Court affirmed the trial court's decision barring the results of the breath tests based on improper certification of the breath machines. *People v. Clairmont & Fernandez*, 2011 IL. App. (2d) 100924 (a joint appeal).

Facts

Each of the Defendants' were charged with numerous offenses including driving while under the influence of alcohol, 625 ILCS 5-11/501a(1), (*per se)*. Both Defendants at the trial level in DuPage County were represented by one of our esteemed members of the ISBA Traffic Courts Section Council, Donald Ramsell, at the hearing on the Motion in Limine to bar the introduction of the breath tests results at trial. Defendants' motions alleged that the breath test machines were not certified as accurate in accordance with Section 1286.230 of Title 20 of the Illinois Administrative Code, because they were not checked and certified within 62 days, as required by regulation.

The trial court heard arguments on Defendants' motions at the same time. The parties agreed that the breath test machine used for Clairmont was checked and certified 60 days before he was tested and not again until 11 days after. Therefore, a total of 71 days passed between

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Summary suspension notice through the mail

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If it is sent by regular mail, it is deemed to be proper service even if the defendant has moved or claims that he has not received it. Use of the mail has been deemed adequate service by Illinois Courts. *Elmhurst Stamping and Manufacturing Company*, 67 Ill.App.3d 257, 384 N.E.2d 839 (1978). Regular mail is sufficient means of providing notice, *Village of Bensenville v. Buto*, 39 Ill.App.3d 634, 350 N.E.2d 239 (1976). In fact, use of regular mail by the Secretary of State has also been upheld. *Guerrero v. Land*, 272 Ill.App.3d 945 (1995).

Further, Illinois Supreme Court Rule 11 controls the matter of serving papers other than process. Rule 11 provides for deposit through the postal service. There is a presumption of delivery if sent by regular mail directed to a proper address. Where the rules provide that method of service, notice is thus satisfied by use of regular mail. *Bernier v. Schafer*, 11 Ill.2d 525, 144 N.E.2d 577 (1957).

Some police departments actually feel that the proper way to serve the notice of summary suspension is by certified mail. However, if the defendant does not sign for the certified mail and the envelope is returned to the police department, the question becomes was the defendant properly served. The argument can be made that having undertaken more than what was actually required by the statute (mailing the notice of summary suspension by certified mail) the police department was obligated to follow through on that method by submitting a return receipt as proof of service. Failure on the State to do so would indicate that the defendant was not properly served. In Re *Marriage of Betts*, 159 Ill.App.3d 327 (1997).

Accordingly, counsel should advise clients that if they receive a post card indicating that they have a letter for certified mail, they should contact their attorney first before accepting and signing for the letter. Without proper notice, defense counsel should be able to argue for a rescission of the statutory summary suspension because the defendant was not advised of the pending suspension and the opportunity for a hearing date. ■

Sixty-two days means exactly that!

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the two checks and certifications.

The parties also agreed that for Fernandez, the machine was checked and certified 3 days before he was tested and not again until 62 days after. Therefore, a total of 65 days passed between the two checks and certifications.

Based on this evidence, the trial court granted both Defendants' Motions in Limine and the State filed a timely Notice of Appeal.

On appeal, the State contended that the trial court erred by granting both Defendants' Motions in Limine and barring the results of the breath tests from being introduced at trial. They argued that the results of Defendants' breath tests were admissible because the breath test machines were checked no more than 62 days prior to Defendant's tests pursuant to Section 1286.200 of Title 20 of the Illinois Administrative Code. The State argued that Section 1286.200 is the only section addressing the timing of breath test machine, checking that affects admissibility. On the other hand, the Defendants argued that Section 1286.230 requires breath test machines to be checked, "at least once every 62 days" to ensure accuracy, and this section must also be complied with, together with Section 1286.200.

Opinion

When a motorist files a Motion to Bar Breath Test Results, the State must establish a sufficient foundation for admission of the evidence, *People v. Ebert*, 401 Ill. App. 3d 958 (2010). Further, to lay a proper foundation, the State must establish that the test was performed in accordance with Section 11-501.2(a) of the Illinois Motor Vehicle Code (625 ILCS 5/11-501.2(a)) and the regulations promulgated by the Illinois Department of State Police. *People v. Orth*, 124 Ill.2d 326 (1988). Failure to comply with Section 11-501.2(a) and the regulations renders the result of the test unreliable and, thus, inadmissible. *People v. Emrich*, 113 Ill.2d 343, 350 (1986).

The Appellate Court cited Section 1286.230 of Title 20 of the Illinois Administrative Code, which provides in part as follows:

> "To ensure the continued accuracy of approved evidentiary instruments, a BAT or automated system shall perform accuracy checks.
>
> Checks shall be performed *at least once every 62 days*."

(Emphases added) 20 Ill. Admin, Code 1286.230 (2011).

The Court found that the breath test machines were not checked in compliance with Section 1286.230(a). Therefore, no more than 62 days between accuracy checks is exactly what that statute means.

The State argued that pursuant to Section 1286.200(d), the regulations require only that no more than 62 days pass since the last check of a breath test machine prior to a Defendant's test. The Appellate Court found this to be without basis.

Conclusion

The Appellate Court found that Sections 1286.230(a) and 1286.200(d) must be read in harmony and that the State's interpretation would render 1286.230 superfluous; that such evidentiary instruments must be tested for accuracy once every 62 days. Lastly, Section 1286.200(d) provides "a timely manner means not more than 62 days has passed since the last accuracy check prior to the subsequent test." 20 Ill. Admin Code 1286.200 (d) (2011). ■

People v. Barwan, et al

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

The trial court improperly assessed the evidentiary support for the allegations contained in the indictments, that the present offense was each defendant's third DUI "violation," rather than assessing the legal sufficiency of each indictment. The trial court erred when it considered the pending status of defendants' second DUI cases in granting defendants' motions to dismiss. 954 N.E.2d 427, 2011 IL App (2d) 100689 (2011).

Three unrelated cases, involving the same issue, were consolidated for decision. Each of three defendants were charged by indictment with driving under the influence of alcohol (DUI) pursuant to 625 ILCS 5/11-501(a)(2), and aggravated DUI as a repeat offender pursuant to 625 ILCS 5/11-501(d)(2)(B), a Class 2 Felony. The charges constituted the third DUI case for each defendant, as each previously had been convicted of DUI and each had a second DUI case pending before the Trial Court. In each case, the defendant moved to dismiss the aggravated DUI charge pursuant to 725 ILCS 5/114-1(a) (8) for failure to state an offense and denial of due process. The defendants argued that although he previously had been convicted of one DUI, his second DUI charge was still pending and, therefore, did not constitute a "violation" under the statute. Each defendant argued that the Prosecution impermissibly used the second prior pending DUI charge to elevate the third pending DUI offense to aggravated DUI. The Trial Court granted the motions, dismissing the felony charge in each indictment, finding that, although the term "violation" had broader meaning than the term "conviction," a "violation" did not include a pending charge. The Trial Court later denied the State's motions to reconsider. In each case, the State filed a certificate of impairment and appealed pursuant to Illinois Supreme Court Rule 604(a) (1). On appeal the State argued that the Trial Court erred in dismissing the aggravated DUI charges against the defendants. The State argued that the Trial Court erred in assessing information beyond the indictments that had no bearing on the sufficiency of the indictments, and the term "violation" in the aggravated DUI statute included pending DUI charges.

Writing for the Court, Justice Jorgensen cited *People v. Sheehan,* 168 Ill.2d 298, 303, 213 Ill.Dec. 692 (1995): "The purpose of a motion to dismiss for failure to state an offense is to challenge the sufficiency of the allegations in the complaint, not the sufficiency of the evidence." The Appellate Court noted that a reviewing Court must determine whether the complaint complies with the statutory requirements that a charge be in writing, that it set forth the nature and elements of the offense, and that it allege the provision violated, the name of the accused, and the date and county of commission. See 725 ILCS 5/111-3(a).

The Appellate Court reviewed *de novo* the dismissal of a charge for failure to state an offense, citing *People v. Soliday,* 313 Ill.App.3d 338, 342, 246 Ill.Dec. 154 (2000), and also assessed *de novo* an issue of statutory construction, citing *People v. Taylor,* 221 Ill.2d 157, 162, 302 Ill.Dec. 697 (2006).

The Appellate Court analyzed and relied upon *Sheehan* for guidance. In *Sheehan*, the Supreme Court addressed whether an aggravated DUI charge was properly dismissed where the State had alleged as one of the two required enhancing offenses a prior DUI violation that resulted in a sentence of Court Supervision. In *Sheehan*, the Supreme Court held that the term "committed" (Ill.Rev.Stat.1991, Ch. 95 ½, par. 11-501(d) (1) (now 625 ILCS 5/11-501(d) (1) (A)) permits the use, as an enhancing offense under the felony DUI statute, of a prior DUI violation resulting in a sentence of court supervision. The Appellate Court noted that the Supreme Court rejected a defendant's argument that the term "committed" in the felony DUI provision is limited to formal judgments of conviction. The Supreme Court specified that one commonly-used definition of "commit" is " '[t]o perpetrate, as a crime; to perform as an act.' " The Supreme Court concluded that the term "committed," which is not defined by statute, has, in its ordinary sense, a broader scope than the term "convicted."

The *Sheehan* court also rejected defendant's argument that the supervision statute's provision that successful completion of a term of supervision is deemed "without adjudication of guilt" precludes the use as an enhancing offense of a charge for which supervision was imposed and completed. According to the *Sheehan* court, the fact that "one who successfully completes a term of supervision is not adjudicated guilty does not mean that he or she did not commit the offense for which supervision was imposed." The *Sheehan* court noted that charges resulting in supervision have been treated as "prior committed offenses" for purposes of imposing subsequent penalties. The *Sheehan* court noted that a person who has received a sentence of court supervision for DUI is no longer considered a first offender.

The *Sheehan* court also criticized the appel-

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late court's analysis, noting that the Appellate Court, in addressing issues concerning proof of prior offenses, had considered questions that were improper in an appeal from an order dismissing the charges for failure to state an offense.

In the matter at bar, the State argued that the Trial Court's rulings ran counter to *Sheehan* and that the Trial Court "transgressed" the boundaries of information it could assess in ruling on a motion to dismiss. The State maintained that the indictment complied with all of the statutory requirements: the indictments alleged as to each defendant that he had previously committed the offense of DUI on two prior occasions, on the relevant dates and counties in violation of the felony DUI statute (625 ILCS 5/11-501(d) (2) (B)). The indictments further stated that the aggravated DUI was a Class 2 felony. The State maintained that, by having the defendants' second DUI cases pending on its call, the Trial Court impermissibly took into consideration that the cases had not yet proceeded to adjudication.

The State also relied on *Soliday*. In *Soliday*, the defendant was charged with criminal damage to property. The defendant moved to dismiss the charge, asserting that he could not be found guilty of the offense, because the dog was his property and not the property of another. The defendant attached a copy of a written agreement, between himself and a rescue group, that obligated him to satisfy various conditions and provided that violations would result in the return of the dog to the rescue group. The Trial Court granted the defendant's motion to dismiss. The Appellate Court reversed, holding that the dismissal was improper because the information sufficiently pleaded the offense. The Appellate Court noted that "neither a trial court nor an appellate court can evaluate the evidence that the parties might present at trial when determining whether dismissal under section 114-1(a)(8) of the Procedural Code is appropriate." The Appellate Court rejected the defendant's claim because whether, under the agreement, the rescue group maintained a property interest in the dog was a factual issue.

In the matter at bar, defendants did not dispute that the term "violation" is broader than the term "conviction," but they argued it would be unprecedented for a prior *pending* charge to be used to enhance a misdemeanor DUI charge to a felony. Defendants argued that *Sheehan* was distinguishable because, in that case, the prior charge that resulted in a sentence of court supervision necessarily meant that the defendant had either pleaded guilty or been found guilty of DUI. In the matter at bar, however, their second prior DUI cases were still pending and they had not pleaded guilty to, or been found guilty of, the offenses. Each defendant argued that he could not be found to have "committed a prior violation" (625 ILCS 5/11-501(d)(1)(A)) until a proceeding had taken place at which he was found guilty or he was otherwise found to have actually committed the prior offense. Each defendant argued that to hold otherwise would subject him to a recidivist enhancement without affording the procedural due process rights to the safeguards of a trial, a guilty plea, or even a bond forfeiture proceeding.

Addressing the State's argument that the Trial Court impermissibly looked beyond the language of the indictments, defendants argued that *Sheehan* held only that a prior DUI offense that resulted in a sentence of court supervision could be considered a prior committed offense for purposes of enhancing a misdemeanor DUI charge to an aggravated DUI charge. Defendants argued that they had not been found guilty of their second DUI charges, and the State could not justifiably charge them with aggravated DUI based on the pending DUI charges.

The Appellate Court concluded that the Trial Court erred when it considered the pending status of defendants' second DUI cases in granting defendants' motions to dismiss. The Appellate Court noted that the Trial Court assessed whether the allegations that defendants had committed DUIs on two prior occasions were negated by the fact that the second DUI cases were still pending. The Appellate Court concluded that the Trial Court improperly assessed the evidentiary support for the allegations contained in the indictments that the present DUI offense was each defendant's third "violation," rather than assessing the legal sufficiency of each indictment.

The Appellate Court did not address whether the term "violation" encompasses a pending DUI charge, "because any determination would be speculative as to the nature and extent of the proof to be made by the State at the time of sentencing." The Appellate Court expressed no opinion as to whether the term "violation" encompasses a pending DUI charge. The Appellate Court concluded only that the Trial Court's consideration of the circumstances of each defendant's second prior DUI violation and its finding that a pending DUI does not constitute a violation were "premature and impermissible in the context of assessing defendants' motions to dismiss."

The Appellate Court reversed the judgments of the circuit court of Boone County, and remanded the causes. ■

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Review of *People v. Hall*

By Donald J. Ramsell

In the case of *People v. Hall,* 2011 IL App (2d) 100262, --- N.E.2d ----, 2011 WL 6175606 (Ill.App. 2 Dist.,2011), the defendant was arrested on April 26, 2008 and charged with DUI, improper turn resisting arrest and improper lane usage. According to the opinion, during the arrest, the police officer pepper-sprayed the defendant and forcibly removed him from his vehicle. Paramedics were brought to the scene, and after about 25 minutes of tending, the defendant was transported to a hospital. The police officer left the defendant at the emergency room, telling him to pick up his citations after the defendant was discharged. Eventually, after the defendant was transferred from the emergency room to a hospital room, several vials of blood were drawn to be tested for heart-related issues. The next day the defendant was released.

Because the defendant was a judge, the Illinois Attorney Generals' office was brought in to handle the matter. Two and one-half weeks later, after the assistant attorney general (AAG) learned that the blood samples were still at the hospital,[1] they were ordered to be released to authorities for testing at the Illinois State Police (ISP) laboratory. The samples did not contain a preservative.

A subsequent analysis by the ISP revealed a concentration of 0.107 g/dl.

The defendant files several motions relating to the admissibility of the blood alcohol test result. The court ordered a full evidentiary hearing, where the State was instructed to lay a complete factual foundation to prove its admissibility at trial. The State called witnesses from the hospital, the police department, and the ISP laboratory regarding the drawing, storage, handling, transportation and testing of the blood sample. The defense called a pharmacologist who testified about the possible false positives that can occur where no preservative is added to the sample.

The trial court barred the use of the results, finding that the samples were not collected in compliance with the Illinois State Police Standards entitled "Testing of Breath, Blood and Urine for Alcohol, Other Drugs, and Intoxicating Compounds" found at 20 Ill.Admin.Code 1286. The court also granted a motion to dismiss the DUI charge of .08 or more under a compulsory joinder speedy-trial analysis.

On appeal, the appellate court noted that the Vehicle Code requires compliance with the ISP Standards in order for a result to be admissible at trial, citing to 625 ILCS 5/11-501.2. The first problem noted by the court was that the sample was not drawn in the presence of the arresting officer. 1286.320(a) states that:

> The blood sample shall be collected in the presence of the arresting officer, * * * or an agency employee who can authenticate the sample.

The court also noted that 1286.320 (d) stats:

> Officers shall use DUI kits provided by the Department, if possible. If kits are not available, officers may submit two standard grey top vacuum tubes. (Pursuant to industry standards, grey top vacuum tubes contain an anticoagulant and preservative).[2]

The facts established that three tubes allegedly containing samples of the defendant's blood were sent to the ISP lab, including one with a purple top. Purple-top tubes contain an anticoagulant but no preservative, according to industry standards. The purple top tube was selected by the ISP for testing. The ISP lab tech stated that it was not unusual to test a sample 18- or 19-days-old.[3] The defense expert testified that the samples were tainted because of a lack of proper storage and that there was a significant probability that microbial growth in blood untreated with a preservative would lead to a false positive.[4] The opinion further noted that preservatives do not kill bacteria—they limit their growth.

The State tried to argue that only "substantial compliance" with the regulations was required, rather than "strict compliance," citing to another case entitled *People v. Ebert* 401 Ill.App.3d 958 (2010). Thus, they argued that the results were admissible under a "substantial compliance" analysis. The court reviewed *Ebert* and noted that *Ebert* stated:

> The standards exist, not for their own sakes, but in service of the truth-seeking function, which they promote by ensuring that blood, breath, and urine tests are conducted in a manner that produces reliable results. If the standards are to serve this purpose, the rule of substantial compliance must be one that neither blithely ignores the standards nor enforces them in a purely rote manner. *We are therefore reluctant to relax the standards when doing so would require inquiry into the scientific basis for a particular standard.* However, when it is clear that a particular deviation from the mandated procedures does not pertain to a matter of science, a court is perfectly competent to determine whether, in a given case, the deviation compromised the integrity of the testing process.

(Emphasis added in *Hall* opinion). *Ebert*, 401 Ill.App.3d at 965, 341 Ill.Dec. 671, 931 N.E.2d 279.

The court distinguished the facts of *Ebert* (a case involving the failure to perform a 20 minute observation period where the defendant admits that he did nothing to effect the result of the test) from the present case, and then held that *Ebert* actually supported a strict compliance approach in the instant case:

> Here, however, the issue of whether the failure to include preservative in the tube of blood used for defendant's BAC test requires an inquiry into the scientific basis for the requirement. The blood was not tested for almost three weeks after it was drawn; neither the trial court nor this court is "perfectly competent," in the words of *Ebert*, to determine whether the failure to include the preservative compromised the integrity of the testing process. See *Ebert*, 401 Ill.App.3d at 965, 341 Ill. Dec. 671, 931 N.E.2d 279. The legislature has assigned to the Department of State Police the responsibility to promulgate standards for chemical analyses of blood, urine, and breath and to "prescribe regulations as necessary to implement" section 11–501.2. 625 ILCS 5/11–501.2(a)(1) (West 2006). We will not second-guess the reasoning behind these regulations by considering conflicting testimony regarding scientific matters that are within

> the purview of the Department of State Police. We cannot conclude that failure to strictly comply with subsection (d) is *de minimis*. Under the facts of this case, *Ebert* does not support the State's argument that substantial compliance with the regulation would be sufficient. Instead, the *Ebert* analysis reinforces our conclusion that the trial court did not err in excluding the BAC evidence because the State did not comply with subsection (d).

People v. Hall, 2011 WL 6175606, 4 (Ill.App. 2 Dist). (Ill.App. 2 Dist.,2011).

Holding that the trial court's ruling to exclude the results was correct based upon a violation of 1286.320(d)(requiring a preservative to be added to the sample) the court chose not to address whether the violation of 1286.320(a) (not collected in the presence of the arresting officer or other agency employee) would also have been cause for exclusion.

The State also argued that exclusion of the blood should only have been granted for the DUI counts, and that the State should be allowed to use the results in the other non-DUI counts. The court held that, since the State failed to include that issue in its motion to reconsider, that matter was considered forfeited, and the exclusion was therefore upheld on the remaining counts.

Finally, the State argued that the dismissal of the 0.08 per se DUI count as a speedy trial violation was also in error. The appellate court agreed, finding that since the defendant had never filed a speedy trial demand, a dismissal was not proper. Thus, the per se .08 charge was reinstated.[5]

An interesting aspect to the case that was not addressed is whether the results of the blood test could have been admissible under other sections of the DUI statutes, such as 625 ILCS 11-501.4. Since the blood was drawn *after* the defendant was removed from the emergency room, 11-501.4 was probably not applicable. Additionally, whether a violation of the ISP standards would still render the result inadmissible under 11-501.4 has not been resolved. Finally, a court is free to exclude results which it finds to be unreliable even if no ISP standards have been violated, since the threshold of admissibility has always dealt first with reliability (see, e.g., *People v. Bertsch,* 183 Ill.App.3d 23 (1989) and *People v. Bonutti*, 212 Ill.2d 182 (2004) The failure to make such an argument now deems those issues forfeited under the "law of the case" doctrine. ■

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1. It is this author's experience that blood samples drawn at the hospital under similar circumstances are ordinarily destroyed the same day after they are tested. Additionally, issues regarding the breach of confidentiality in medical care of defendant were not addressed in the opinion.

2. For more information about industry standards regarding blood collection tubes, see <http://vacutainer.com>.

3. The opinion does not mention that the samples normally tested by the ISP are required by ISP laboratory internal rules to be refrigerated during the 18-19 day delay and that they generally contain preservatives in order to allow for such a delayed analysis.

4. This is a well-documented phenomenon. See, Chang et.al., "The Effect of Temperature on the Formation of Ethanol by *Candida Albicans* in Blood," Journal of Forensic Sciences, Vol.34 No. 1 pp. 105-109 (Jan 1989); Blume et.al., "The Effect of Microbial Contamination of the Blood Sample on the Determination of Ethanol Levels in Serum" American Journal of Clinical Pathology Vol. 60 No. 5 (Nov. 1973).

5. Even though the charge of driving with a BAC of 0.08 or more was reinstated, the exclusion of the blood test result makes the defendant's acquittal on that charge an absolute certainty.

You think your client is going to lie on the stand—The classic dilemma of a criminal defense lawyer

By Juliet Boyd

Confidentiality, embodied by the attorney-client relationship, is a bedrock principle of our legal system. It contributes to the trust that is the hallmark of the client-lawyer relationship. Pursuant to comment [1] to R.P.C. 1.6, a client is encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.[1] However, these confidences can create problems for lawyers. A case in point is where a criminal defendant client tells his lawyer that he intends to lie on the witness stand. The lawyer is torn between his duty of confidentiality under R.P.C. 1.6 and his duty of candor towards a tribunal pursuant to R.P.C. 3.3. Pursuant to the requirements of R.P.C. 3.3, a lawyer may have to take action adverse to his client. This is contrary to the comfortable model of the adversarial system and creates a dilemma for which there are no clear answers.

Ethical Rules Collide With The Defendant's Constitutional Rights

To further complicate matters, the analysis of this dilemma must include, not only a lawyer's ethical obligations to the court and his client, but also a criminal defendant's Constitutional Rights. The right of the criminal defendant to be represented by counsel is guaranteed by the Sixth Amendment to the U.S. Constitution. A criminal defendant also enjoys the right to testify. This right did not exist at common law where the defendant's self-interest deemed his testimony suspect. The Constitutional sources for the criminal defendant's right to testify were announced by the United States Supreme Court in *Rock v. Arkansas,* 483 U.S. 44 (1987). In *Rock v. Arkansas,* the Supreme Court held that the right to testify was protected by the Fifth, Sixth and Fourteenth Amendments. In discussing the Compulsory Process Clause which grants the defendant the right to call witnesses in his favor, the Court stated as follows: "In fact, the most important witness for the defense in many criminal cases is the defendant himself. There is no justification for a rule that denies an accused the opportunity to offer his own testimony."[2] Many courts have recognized the interaction between these two constitutional rights. "The right to be heard would be, in many cases, of little

avail if it did not comprehend the right to be heard by counsel."[3] As such, a criminal defendant has the right to testify and the right to zealous representation by a lawyer. In *United States v. Scott*, 909 F.2d 488, the 11th Circuit Court of Appeals held that it was impermissible to force a defendant to choose between these two constitutional rights. The Scott Court reversed a trial court decision which gave a defendant a choice of either proceeding *pro se* or proceeding through counsel who could prevent Scott from testifying. In Scott the defendant's lawyer informed the court that she had an ethical obligation to the court to withdraw from the case.

Candor Towards the Tribunal

R.P.C. 3.3 states as follows:

(a) A lawyer shall not knowingly:

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client or a witness called by the lawyer offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Comment [6] to R.P.C. 3.3 offers the following direction:

If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false testimony. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

What does this mean? It is clear based both on R.P.C. 1.6 and R.P.C. 3.3, that a lawyer may seek to withdraw from the representation. This is a good solution for the lawyer if the issue arises far enough in advance, and the lawyer can withdraw without alerting the court to the issue and so preserve the client's confidence. Often this dilemma does not arise until the eve of trial, or worse, in the middle of trial. At that point, the Court may not permit the lawyer to withdraw. Moreover, it may be impossible to withdraw in a manner that does not breach the confidence. What is the lawyer to do? There are a number of different approaches to this problem:

A. The "Full Advocacy Approach"

The "full advocacy approach," is promoted primarily by Professor Munroe Freedman. Under this approach, a lawyer, to protect client confidences, may knowingly present perjured testimony, if the lawyer cannot dissuade his client from committing perjury.[4] Freedman rejects the idea of withdrawing in the midst of trial because this is tantamount to blowing the whistle on the client. The full advocacy approach comes down on the side of confidentiality. *Ergo,* the only reason that the lawyer believes that the client is going to lie as because of a confidential attorney-client communication. It also recognizes the loss of trust and the corresponding impact of the disclosure on the attorney-client relationship. Instead of vigorous advocacy, the client perceives that their lawyer has switched sides and is playing for the prosecution.

B. The Narrative Approach

The Defendant takes the stand and delivers his statement in narrative form. The defense attorney does not elicit the perjurious testimony by questioning and cannot argue the false testimony in closing argument. Under this procedure the defendant is afforded both his right to speak to the jury under oath and his constitutional right to assistance of counsel. In addition, the defense attorney did not elicit false testimony.

This approach was followed by the Florida Supreme Court in *The Florida Bar v. Rubin*, 549 So. 2d 1000 (1989). The *Rubin* case offers a cautionary tale that illustrates the predicament that befalls a lawyer when he believes his client is going to lie on the stand. Ellis Rubin was representing Russell Sanborn on a charge of first-degree murder. Prior to jury selection, Rubin asked the court for permission to withdraw without providing specific reasons. The Florida Supreme Court interpreted this conduct as Rubin informing the court that his client was planning to testify untruthfully. The court denied Rubin's motion to withdraw and ordered him to proceed to trial. Rubin sought certiorari, which was denied. When the case returned to the trial court, Rubin refused to proceed to trial. He believed that he was bound by the ethical rules and could not participate in presenting false evidence to the court. Rubin was held in contempt and served thirty (30) days in jail and was later publicly reprimanded through a disciplinary proceeding. The *Rubin* Court held that the lawyer must obey the orders of the court, even when it believes them to be incorrect. The *Rubin* Court approved the narrative approach as a way to balance the rights of the defendant and the ethical concerns of the lawyer.

The 11th Circuit Court of Appeals took this a step further in *United States v. Long*, 857 F.2d 436. In *Long,* the lawyer disclosed to the court the possibility that his client would commit perjury. The *Long* Court held that the trial court should conduct an evidentiary hearing to determine whether counsel had a firm basis for his belief and to determine whether the defendant understood his rights, the consequences of his actions and any waivers of those rights.

There are obvious problems with the narrative approach. As an initial matter, it is premised on the disclosure of the confidence - with the lawyer as whistleblower. It is hard to imagine how an evidentiary hearing regarding the basis for the lawyer's belief, would be anything but a full-scale invasion of the confidential communication. With the breach of the privilege, would come the corresponding loss of trust between the attorney and the client. Moreover, this untenable situation would exist where the lawyer would not be allowed to withdraw. The lawyer's reward for this would likely be a claim of ineffective assistance of counsel by the client. The Supreme Court held in *Nix v. Whiteside*, that the Sixth Amendment right of a criminal defendant to assistance of counsel is not violated when the attorney refuses to cooperate with the defendant is presenting perjured testimony.[5] However, based on the strained relationship between the lawyer and the client, there would be a litany of additional complaints. The most obvious problem with the narrative approach is the result of the case. It is hard to believe that after being telegraphed the lawyer's suspicions of perjury, the trier of fact would rule in favor of the criminal defendant - even if the defendant ultimately testified truthfully. As such, this balancing approach seems to pay lip service to the protection of the defendant's rights while ignoring the obvious result.

C. The "Knowledge" Based Approach

In drafting Rule 3.3 of the Model Rules

of Professional Responsibility, the American Bar Association ("ABA") agreed with the critics and rejected the narrative approach. The ABA also rejected the "full advocacy" approach.[6] ABA Model Rule 3.3 requires a lawyer to reveal the perjury, if necessary to rectify the situation. The Illinois Rules of Professional Conduct are based on the ABA Model Rules. The comments to R.P.C. 3.3 provide the following guidance:

> [8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.
>
> [9] Because of the special protections historically provided criminal defendants, however, this rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes, but does not know that the testimony will be false.

The key to this approach is knowledge. Pursuant to this approach, how does the lawyer "know" what is the truth and what is the lie? Moreover, just because the lawyer thinks the client will lie, does not mean they will. This philosophical exercise in epistemology seems a little disingenuous. To avoid the invasion of the privilege and the defendant's Constitutional Rights, it seems to encourage the lawyer to bury his head in the sand. The lawyer must try and persuade the client not to perjure himself and explain the consequences of the proposed course of conduct to the client under R.P.C. 1.2(d). Arguably, the lawyer would try and avoid gaining any actual knowledge during this process. The lawyer would then allow the client to testify because he would not "know" what the client was going to do. However, if the client did commit perjury, and the lawyer "knew" the lawyer is required to take remedial measures which may include disclosure—if necessary.

While R.P.C. 3.3 is the operative rule, the lawyer must still determine whether the information can be disclosed pursuant to R.P.C. 1.6.

R.P.C. 1.6 Confidentiality of Information

Pursuant to R.P.C. 1.6:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.
>
> (b) A lawyer may reveal information relating to the representation of the client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);
>
> (2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interest or property of another and in furtherance of which the client has used or is using the lawyer's services.
>
> (c) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

If the lawyer reasonably believes the client has committed perjury, the analysis seems to fall under R.P.C. 1.6(c). This perjury does not constitute a future crime pursuant to R.P.C. 1.6(b)(1) because the conduct has already occurred. In addition, it does not involve fraud which will result in substantial injury to the financial interests or property of another. As such, the lawyer must analyze the facts of their individual case and determine whether disclosure is necessary to prevent reasonably certain death or substantial bodily harm.

Moreover, research shows that R.P.C. 1.6 is strictly construed. The case of Alton Logan is instructive. Two attorneys, Dale Coventry and Janie Kunz, knew that their client, Andrew Wilson, had committed the murder for which another man, Alton Logan, was serving a life sentence.[7] Wilson had confessed to the crime while Alton Logan was being tried. Unsurprisingly, Wilson did not authorize his lawyers to disclose this information and ethical rule 1.6 required the lawyers remain silent. Twenty-six years later, after Wilson died, the two lawyers signed affidavits revealing the information on the basis that Wilson had agreed to the disclosure after his death. There was no question that the two attorneys could reveal the information without the consent of their client.

Similarly, a North Carolina lawyer, Staple Hughes, revealed his client's confession in 2004, hoping to free Lee Wayne Hunt from his life sentence in prison.[8] According to Hughes, twenty-two years earlier his client confessed to Hughes that he had committed the murders for which Hunt was convicted. Hughes' client had also died. The judge refused to admit Hughes information because "Mr. Hughes has committed professional misconduct." Hughes was referred to the North Carolina bar for disciplinary action for violating the attorney client privilege.

These stories provide a gloss which will be helpful in any analysis under R.P.C. 1.6. The lesson is that it is no small matter to breach the privilege.

Conclusion

There is no simple solution to this dilemma. The approaches seem to vary based on their sources. From the lawyer's perspective, they want to be released from this nightmare as quickly as possible. The "full advocacy" approach is mostly supported by academics who give more weigh to the rights of the defendant. It is not surprising that judges were the biggest proponents of the "narrative approach." By this approach the judge keeps the lawyer in the case and does not have to deal with a difficult *pro se* litigant. In addition, judges ensured they got all the information. The ABA approach attempts to balance the competing rights and duties but is not that intellectually honest. However, there are some principles that can be applied to the analysis:

- Always advise your client to tell the truth;
- Advise your client, pursuant to R.P.C. 1.2 regarding the consequences of their course of conduct. Namely, if they tell you they are going to lie, you will have to withdraw or disclose the untruth to the court;
- If you choose to withdraw, do so early in the case;
- Make the reasons for the withdrawal as discrete as possible to protect the privilege;
- If the court will not allow you to withdraw, you may ask the defendant about things you believe to be true;
- If there are facts that you are uncomfortable with, pose only general questions to

avoid intentionally suborning perjury;
- You cannot refuse to allow the defendant to testify;
- If you know the client will perjure himself, it is easier under R.P.C. 1.6 to disclose this before the client testifies because under R.P.C. 1.6(b)(1), it would be necessary to prevent the client from committing a crime;
- If the perjury is discovered, after the fact, it is harder to disclose the confidence under R.P.C. 1.6(c);
- You cannot refer to any false facts testified to by your client during your closing argument;
- The duty to disclose under R.P.C. 3.3 terminates at the conclusion of the proceeding. *See* R.P.C. comment [13].

If faced by this dilemma, a lawyer should review the cases, the approaches and the rules of professional conduct. The lawyer must carefully analyze the facts of their situation. It may also be helpful to call the confidential hot line at the ARDC for advice or to pose a hypothetical to an experienced colleague. Unfortunately there is no simple resolution to this question. ■

1. R.P.C. 1.6 comment 1.
2. *Rock v. Arkansas*, 483 U.S. 44, 52 (1987).
3. *United States v. Scott*, 909 F. 2d 488 (1990)
4. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev 1469 (1966).
5. *Nix v. Whiteside*, 475 U.S. 157 (1986).
6. DC Bar opinion 234, Defense Counsel's Duties when Client Insists on Testifying Falsely.
7. Hasbani, When The Law Preserves Injustice: Issues Raised by Wrongful Incarceration Exception To Attorney-Client Confidentiality. The Journal of Criminal Law & Criminology Vol 100 No.1.
8. *Id.*

People v. Price

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

The arresting officer's testimony regarding the size of the air freshener, how it swayed back and forth, and that it would have obstructed defendant's view based on defendant's sitting position, provided the arresting officer reasonable suspicion, based on a material obstruction, to justify the arresting officer stopping defendant's vehicle.

Background

Defendant was arrested and charged with the offense of DUI. The State also charged Defendant with one count of unlawful possession of drug paraphernalia and one count of unlawful possession of cannabis. The State later charged Defendant with driving with an unlawful substance (tetrahydrocannabinol metabolite) in his urine pursuant to 625 ILCS 5/11-501(a) (6).

Defendant filed a motion to quash arrest and suppress evidence regarding the traffic stop of his vehicle, and a petition to rescind the statutory summary suspension of his driver's license. The Trial Court conducted a hearing on both motions.

The Arresting Officer testified he observed Defendant driving a Dodge Caravan on July 21, 2010 between approximately 8 and 10 a.m. He first noticed the vehicle had a broken rear taillight on the driver's side. The Arresting Officer followed the vehicle and noticed an air freshener hanging from the rearview mirror, which he had seen when he first observed the vehicle.

He guessed the air freshener was three inches in width and four to five inches in length. It was hanging from a string and the top was "approximately two or three inches below the bottom of the mirror." The Arresting Officer testified that he had no specific training with regard to air fresheners and whether they constitute a material obstruction. Because of the broken taillight and the air freshener, the Arresting Officer executed a traffic stop.

The Arresting Officer requested Defendant's driver's license and proof of insurance. After checking the materials, the Arresting Officer advised Defendant he could smell burnt cannabis inside the vehicle. Defendant exited the vehicle and consented to a search of his person. The Arresting Officer searched the vehicle and discovered a substance resembling cannabis, and paraphernalia.

On cross-examination, the Arresting Officer testified that he observed the air freshener hanging from the mirror, "for a great deal of time" and also saw it swaying. Based on Defendant's sitting position, the Arresting Officer testified that the air freshener "would have to impair his ability to - obstruct his view." The Arresting Officer estimated there were a minimum of five times that Defendant would have been required to look to his right, the same directing in which the air freshener obstructed his view.

When the Arresting Officer asked Defendant whether anybody had smoked in the vehicle, Defendant stated his brother had smoked earlier in the day. Defendant later admitted the vehicle contained cannabis and/or paraphernalia. A search of the vehicle revealed a green leafy substance believed to be cannabis and a glass smoking pipe containing residue. Defendant later admitted that he smoked cannabis less than an hour before the stop. The Arresting Officer placed Defendant under arrest.

Defendant testified that the "Yankee Candle" air freshener was about three inches wide and four inches long. He stated that it hung from a string, and the top of the cardboard was approximately 1.5 inches from the bottom of the mirror. Defendant did not recall the air freshener obstructing his view and he "never has a problem with it at all."

The Trial Court denied Defendant's motions. The Trial Court found that the Officer had an articulable and reasonable suspicion to effectuate a stop based on the evidence. The Trial Court found Defendant guilty of DUI, unlawful possession of drug paraphernalia, and unlawful possession of cannabis.

On appeal, Defendant argued that the Trial Court erred in denying his motion to suppress evidence and his motion to rescind his statutory summary suspension.

Analysis

Writing for the Court, Justice Turner noted that to be constitutionally permissible, an "investigating stop must be justified at its inception." *People v. Close,* 238 Ill.2d 497, 505, 345 Ill.Dec. 620 (2010). "The police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" *Close*, 238 Ill.2d at 505.

(quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

On appeal, Defendant argued that the traffic stop was not justified because the evidence failed to show the air freshener constituted a material obstruction.

The Appellate Court then reviewed the material-obstruction statue found in section 12-503(c) of the Illinois Vehicle Code, which states:

> No person shall drive a motor vehicle with any objects placed or suspended between the driver and the front windshield ***which materially obstructs the driver's view. 625 ILCS 5/12-503(c) (West 2010).

The Court noted that it had been confronted, over the last several years, with multiple cases concerning whether items hanging from a rearview mirror constitute a material obstruction.

The Appellate Court reviewed its decision in *People v. Cole*, 369 Ill.App.3d 960, 314 Ill.Dec. 171 (4th Dist. 2007). In *Cole*, the Defendant was stopped because the officer observed a single strand of opaque beads, which were one-fourth of an inch in diameter, hanging four inches in length from the rearview mirror at eye level. The Arresting Officer, however, believed "anything suspended between the driver and the front windshield violated section 12-503(c)." *Cole*, 369 Ill. App.3d at 966. The Officer never testified that the beads constituted a material obstruction but only that they "hindered [the] Defendant's ability to observe other drivers." *Cole*, 369 Ill.App.3d at 969. Because the Arresting Officer did not have a reasonable suspicion or probable cause to believe the beads constituted a material obstruction based on his mistake of law, the Appellate Court reversed the Trial Court's denial of the Defendant's motion to suppress.

The Appellate Court then reviewed its decision in *People v. Johnson*, 384 Ill.App.3d 409, 323 Ill.Dec. 261 (4th Dist. 2008). In *Johnson*, the Arresting Officer stopped the Defendant's car after observing from the rear and side, at night, an air freshener shaped like two life-sized cherries hanging from the rearview mirror. The Officer testified that the air freshener created a material obstruction of the Defendant's view of the roadway, but he did not tell that to the Defendant during the stop. When confronted with photographs of the car, with the air freshener hanging from the rearview mirror, the Officer concluded the driver's view was not obstructed. Considering at the time of the stop the Officer did not inform the driver that the air freshener was a material obstruction, the Officer's fleeting view of the air freshener in the dark, and the Officer's lack of understanding as to what constituted a material obstruction, the Appellate Court affirmed the Trail Court's granting of Defendant's motion to suppress.

The Appellate Court also reviewed its decision in *People v. Mott*, 389 Ill.App.3d 539, 329 Ill.Dec. 314 (4th Dist. 2009). In *Mott*, the Arresting Officer pulled over the Defendant's vehicle, which contained a leaf-shaped air freshener hanging from the rearview mirror. The Officer estimated that the air freshener was 3 ½ to 4 inches wide and 4 to 5 inches tall. The Officer believed that the air freshener hung about 1 inch below the mirror on a string which swung side to side. The Officer had no formal training as to what constituted a "material obstruction," and the Trial Court found the Officer "mistakenly believed any object the size of a fingernail or larger hanging between the driver and the windshield constituted a 'material obstruction' providing reasonable suspicion for a traffic stop." In addition to noting the air freshener was smaller than that estimated by the Officer, the Court found the Officer did not testify to the relationship between the air freshener and the Defendant's eye level. In affirming the Trial Court's decision to grant the motion to suppress, the Appellate Court noted the Officer "failed to articulate any specific facts giving rise to an inference [the] Defendant's view was obstructed." The Appellate Court noted, however, "size alone does not determine whether an object materially obstructs the driver's view," and maintained that "all of the objects listed could be material obstructions in the proper situation."

The Appellate Court maintained that in making its decision on a motion to suppress, the Trial Court's focus is not on "whether an offense was actually committed but whether an arresting officer reasonably suspected at the time of the stop that criminal activity was taking place or about to take place."

Turning to the matter at bar, the Appellate Court noted that the Arresting Officer testified he saw the air freshener as soon as he saw Defendant's vehicle. He estimated the air freshener to be three inches wide and four to five inches in length. The air freshener hung by a string, and the top was approximately two to three inches below the bottom of the mirror. The Officer believed the air freshener was "at least a few inches below [Defendant's] eye level" and he observed it swaying. From Defendant's sitting position, the Arresting Officer believed "it would have to impair his ability to – obstruct his view." He estimated Defendant passed at least five intersections that would require Defendant to look to the right and in the path of the air freshener.

The Appellate Court noted that the Trial Court found the air freshener was about three inches wide and three to four inches high, and hung by an elastic string. The top of the air freshener was about two inches below the mirror. The Trial Court also found the Arresting Officer believed the air freshener did constitute a material obstruction based upon its placement in the vehicle and in relation to Defendant's eye level. The Trial Court stated it reviewed the *Cole, Johnson,* and *Mott* opinions and found the Arresting Officer's recitation of the facts and details as to why the air freshener constituted a material obstruction was sufficient to establish a reasonable suspicion of a material obstruction.

The Appellate Court concluded that the evidence sufficiently established the Arresting Officer had a reasonable suspicion that the air freshener constituted a material obstruction thereby justifying the traffic stop. The Arresting Officer testified to the size of the air freshener, how it swayed back and forth, and that it would have obstructed Defendant's view based on Defendant's sitting position. The Arresting Officer did not testify he pulled Defendant over simply because he had an air freshener hanging from his rearview mirror. The Officer was not mistakenly of the view that anything larger than a fingernail constituted a material obstruction. Rather, the Officer had a good view of the air freshener and testified to specific facts as to why he believed the air freshener constituted a material obstruction. The video entered into evidence showed the air freshener hanging down from the mirror and swaying side to side.

Ruling

In light of the Arresting Officer's observations and the video evidence, the Appellate Court held that a reasonable Officer could conclude the air freshener violated section 12-503(c). The Appellate Court found a reasonable suspicion existed, based on the material obstruction, to justify the Arresting Officer stopping Defendant's vehicle.

The Appellate Court affirmed the Trial Court's judgment. ■

People v. Price can be found at 2011 Ill.App. LEXIS 1257; 2011 IL App (4th) 110272.

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