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Traffic Laws & Courts

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

Defense Must Prove Blood Draw Was Carried Out by State Actors

BY DAVID B. FRANKS

Facts

After causing a motor vehicle accident, the state filed a bill of indictment charging Defendant with three counts of alcohol-related driving offenses. *People v. Mueller*, 2021 IL App (2d) 190868. Count I of the indictment charged Defendant with aggravated driving under the influence of alcohol (11-501(a) (2), (d) (2) (D), (d) (1) (G)), alleging that Defendant drove under the influence of alcohol at a time when Defendant had four prior violations of driving under the influence of alcohol. Count II charged Defendant with aggravated driving under the influence with an alcohol concentration of 0.08 or more (11-501(a) (1), (d) (2) (D)) at a time when Defendant had four prior violations of driving under the influence of alcohol. Count III charged Defendant with aggravated driving under the influence of

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Breathalyzer Challenge Toppled by Lack of Credibility

BY ADAM MILLER

In *People v. Sokolowski*, 2021 IL App (4th) 190074-U the court upheld the denial of a motion in limine asking to bar a preliminary breath test (PBT) result as well as a guilty verdict following a stipulated bench trial. In *Sokolowski* the defendant was charged with DUI following a single vehicle accident after he struck the cable barriers along the interstate. When the trooper arrived on scene the defendant was outside his vehicle in a grassy area with two cans of beer next to him. The defendant claimed to have missed his exit due to the rainy and foggy weather and left the roadway due to a squall of rain. The trooper made

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alcohol (11-501(a)(2), (d)(1)(G)), alleging that Defendant drove under the influence of alcohol at a time when her driving privileges were revoked for a violation of section 11-501 of the Illinois Vehicle Code, or a similar out-of-state offense.

Defendant filed a motion to quash her arrest and suppress evidence, seeking to suppress the results of three separate blood alcohol tests from blood draws that all had been taken at the hospital following the accident. Regarding the first blood draw (the medical blood draw), Defendant argued that her Fourth Amendment rights were violated when paramedics, who were acting as state agents, took her to the hospital against her will, where her blood was drawn "for no medical reason but instead to assist police."

Regarding the second blood draw (the administrative blood draw), Defendant argued that her Fourth Amendment rights were violated when her blood was drawn "without authority and without consent." Although Defendant acknowledged that she gave a police officer her "purported consent" after being read the "Traffic Crash Warning to Motorist" (the faulty warning) pursuant to 625 ILCS 5/11-501.6, she argued that this consent was invalid because it was predicated on false information.

Regarding the third blood draw that was taken at the hospital (the jail blood draw), Defendant argued that there was no medical purpose justifying the blood draw, the blood draw was not grounded in statute, and Defendant had not consented to the draw, which was obtained without a warrant.

The state responded to Defendant's motion, arguing that "neither the State, nor any of its agents, played any part" in obtaining the medical blood draw and that the draw was "made in the regular course of providing medical treatment." The state argued that based on the paramedics' observations, Defendant was "not suitable to refuse care." The state conceded that the arresting officer read the wrong warning to Defendant before obtaining her consent to complete the administrative blood draw. The state argued, however, that the only available remedy for this error was to rescind Defendant's statutory summary suspension, and not to suppress the results of her blood test. The state further argued that the question of consent was misplaced because "the appellate court held that consent is no longer a requirement for the admission of the results of chemical tests into evidence." In response to Defendant's arguments concerning the legality of the jail blood draw (third blood draw at the hospital), the state reported that it would not seek to admit that final blood draw in to evidence.

The trial court held a hearing on Defendant's motion to suppress. Five witnesses testified. An emergency room nurse testified, in part, that Defendant told her that she had been drinking, she observed a skin tear to the Defendant's right forearm, and that Defendant was belligerent and had slurred speech. Defense counsel questioned the emergency room nurse about the other driver involved in the accident, who also received treatment at the hospital. When the state questioned the relevance of this evidence, defense counsel indicated that the other driver's injuries were directly relevant to the statutory warning that the arresting officer read to Defendant before obtaining her purported consent for the administrative blood draw. Specifically, defense counsel indicated that the section 11-501.6 warning "only applies in accidents when somebody other than the defendant has a category A injury" and that, if the other driver did not have such an injury, section 11-501.6 "should not have been dealt with" and was "improperly a mechanism" by which the state obtained consent for the administrative blood draw. The state acknowledged that the arresting officer read the incorrect statutory warning to defendant. The emergency room nurse testified that the other driver experienced pain in his chest and shin following the accident. She also testified that the other driver had "bruising and a hematoma" on his shin, and that the airbags in his vehicle

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deployed as a result of the accident.

Another emergency room nurse testified. The other emergency room nurse testified, in part, that Defendant was belligerent, had slurred speech, and challenged staff when asked questions. He testified that Defendant's gait was unsteady, and Defendant initially attempted to refuse transport to the hospital. He testified that the administrative blood draw was "obtained at the request of the Illinois State police," and he personally participated in that blood draw. He confirmed that the blood draw "was done per the police request." On cross-examination, he testified that his job was to assess the patient for medical needs, and not to assist the police in legal proceedings. To the best of his recollection, other than the administrative blood draw, no police officer told him what to do.

An EMT testified, in part, that when he first approached Defendant at the scene of the accident, Defendant was unsteady, and was not bleeding. He did not observe any life-threatening injuries. Defendant did not ask to go to the hospital or refuse treatment. Based on Defendant's behavior and mannerisms, the EMT determined that she was not suitable to refuse care. The EMT testified that Defendant "was confused about the day of the week, and was confused about what month it was." Defendant did not answer the EMT's questions appropriately. The EMT found no signs of a head injury. He remembered only the skin tear on Defendant's arm. When the EMT attempted to ask Defendant more questions about her medical history, Defendant became abrasive and used an expletive when speaking with him. He testified that Defendant became very uncooperative when he was about to transport her to the hospital.

On cross-examination, Defense counsel asked more questions about the EMT's interactions with Defendant. He testified that he detected "a heavy scent of alcohol" when speaking with Defendant. Defendant eventually agreed to enter the ambulance. Defendant asked for assistance when getting into the ambulance and when walking into the hospital, because "she could barely stand up on her own." Defendant admitted to the EMT that she had been drinking alcohol earlier that day. The EMT conceded that Defendant's behaviors could have also reflected a possible head injury. He testified that no police officer or member of the fire department requested that he take Defendant to the hospital.

A paramedic testified that she responded to the scene and spoke with the occupants of the other car involved in the accident. The paramedic did not notice any injuries that required the occupants to be transported to the hospital by ambulance. Both occupants refused care by transport.

An emergency room physician later testified that he observed only one injury on Defendant's body, the skin tear on her arm. He testified that Defendant's speech was slightly slurred, yet clear, and according to the ambulance crew, Defendant initially refused transport to the hospital. The emergency room physician opined that Defendant's slurred speech could have been indicative of a head injury. He testified that Defendant had informed him that she had been drinking before the accident, and that slurred speech was consistent with alcohol consumption. The emergency room physician testified that he ordered a redraw of Defendant's blood (third blood draw) to reassess her alcohol level so that the hospital could safely discharge Defendant, who would still be intoxicated. He testified that the medical purpose of the blood draw was to determine, in the case of blunt trauma, whether or not a patient has suffered internal injuries.

On cross-examination, the emergency room physician testified that he ordered Defendant's medical blood draw. He testified that no police officer told him to order a blood draw. His decision to order blood tests "went to the care of defendant."

The state moved for a directed finding, arguing that Defendant failed to make a *prima facie* case that her Fourth Amendment rights were violated by the blood draws. After hearing the parties' arguments, the trial court advised the parties that it would take the matter under advisement.

The trial court granted the state's motion for a directed finding. The trial court provided a written decision. When addressing the admissibility of the medical blood draw, the trial court found that Defendant failed to make a *prima facie* case of a Fourth Amendment violation. Specifically, the trial court found that Defendant failed to show any evidence supporting a finding that the ambulance personnel or the hospital medical staff were agents of the state or acting as an arm of the state. The trial court rejected Defendant's arguments concerning the lack of consent leading up to the medical blood draw, because Defendant's arguments relied on case law that pertained to tort cases involving medical batteries, and not criminal cases involving the admissibility of evidence. The trial court noted that the EMT's testimony had established that Defendant was unsuitable to decline treatment.

The trial court also found that Defendant failed to make a *prima facie* case of a Fourth Amendment violation with regard to the administrative blood draw. The trial court recognized that the arresting officer did read an incorrect warning to Defendant prior to obtaining her consent, but nonetheless found that "defendant has not provided any authority to sustain her argument that an improper warning negates a motorist's consent resulting in the barring of evidence." The trial court further noted that "no evidence presented by defendant suggested that she did not provide her consent to Officer Zapf or that her consent was invalid for purposes of admission of evidence."

The case proceeded to a stipulated bench trial before a different judge. Prior to the bench trial, the parties specified that, over Defendant's objections, the trial court would rely on the decision on Defendant's motion to suppress. The trial court would admit the medical and administrative blood draws results into evidence. After reviewing the parties' stipulations, adopting the trial court's previous findings, and noting that the results of the medical blood draw showed an alcohol concentration of .374, the trial court found Defendant guilty of all three charges.

The trial court denied Defendant's motion for a new trial, and the matter proceeded to sentencing. At sentencing, the trial court merged all three counts and sentenced Defendant to eight years in the Illinois Department of Corrections. After the trial court denied Defendant's motion to reconsider her sentence, Defendant timely appealed.

Analysis

On appeal, Defendant argued that the trial court erred in denying her motion to suppress and admitting the test results from both the medical and administrative blood draws. Defendant argued that the trial court incorrectly found that she had not made a *prima facie* case of a Fourth Amendment violation resulting from either blood draw. The state argued that Defendant failed to make *prima facie* case to show that the government violated her Fourth Amendment protections, because both blood draws were conducted by private actors. The state argued that Defendant "failed to establish a *prima facie* case that her Fourth Amendment rights were violated where the [administrative] blood draw was not only completed by private actors, but also, that she gave her consent for her blood to be drawn." The state also argued that even if the test results were erroneously admitted, any inclusion of the test resulted in harmless error.

The appellate court found that the trial court properly denied Defendant's motion with respect to the medical blood draw because Defendant failed to show that the blood draw was carried out by state actors. Because the medical blood draw was properly admitted, even if the administrative blood draw was improperly admitted, the appellate court ruled that the trial court's mistake resulted in harmless error.

The appellate court found that since Defendant failed to show that the medical blood draw was performed by state actors, Defendant failed to make a *prima facie* case that the draw violated her Fourth Amendment protections. According to the appellate court, to make a *prima facie* case for suppression of a blood draw, Defendant was required to prove two things: "first, that a search occurred in the form of a blood draw and, second, that the draw violated the fourth amendment." (Citing *People v. Brooks*, 2017 IL 1321413) The appellate court acknowledged that a blood draw constitutes a search under the Fourth Amendment. Therefore, the appellate court reasoned, to make a *prima facie* case with regard to the medical blood draw, Defendant was required to establish only that the blood draw violated the Fourth Amendment. *Id*

The appellate court noted that the Fourth Amendment's "proscription against unreasonable searches and seizures does not apply to searches or seizures conducted by private individuals." Citing *People v. Heflin,* 376 N.E.2d 1367, 71 Ill.2d 525, 17 Ill. Dec. 786 (1978). A search conducted by a private actor may nonetheless implicate the Fourth Amendment "when the individual conducting the search can be regarded as acting as an agent or instrument of the state "in light of all of the circumstances of the case." *Id*.

The appellate court found that Defendant failed to establish that the hospital staff or the ambulance personnel acted as state agents when obtaining the medical blood draw. According to the appellate court, the record established a contrary conclusion. The appellate court noted that no portion of the record indicated that any police officers were present at the hospital when the medical blood draw was conducted. The emergency room physician testified that the medical blood draw was procured solely for medical purposes and without police encouragement. The emergency room nurse confirmed this portion of the record by testifying that the police were only involved with the administrative blood draw. The appellate court ruled that, for these reasons, Defendant failed to make a *prima facie* case that the blood draw violated her Fourth Amendment protections.

Defendant argued that when private medical professionals divulge chemical test results to police, according to section 625 ILCS 5/11-501.4-1, they become state agents for Fourth Amendment purposes. Relying on *Skinner v. Railway Labor Executives Association*, 490 U.S. 602 (1989), Defendant argued that the language of 625 ILCS 5/11-501.4-1 carries Fourth Amendment implications. Defendant argued that section 11-501.4-1 was analogous to the various regulations in *Skinner.* Therefore, Defendant argued, the appellate court should follow the *Skinner* court's guidance and find that section 11-501.4-1 places private hospitals within the purview of the Fourth Amendment.

The appellate court rejected Defendant's argument. The appellate court noted several meaningful distinctions between the *Skinner* regulations and section 625 ILCS 5/11-501.4-1.

In contrast to the *Skinner* regulations, the appellate court noted that section 11-501.4-1 neither mandates nor authorizes any type of alcohol or blood tests. Rather, section 11-501.4-1 addresses the disclosure and admissibility of chemical tests that were *already* independently performed by hospitals. Citing *People v. Jung*, 733 N.E.2d 1256, 192 Ill.2d 1, 248 Ill.Dec. 258 (2000), the appellate court reasoned that because section 11-501.4-1 contains no language removing any legal barriers that hospitals may face prior to testing patients for drugs or alcohol, the Statute differed from the *Skinner* regulations because it did not show a "strong preference for testing." Instead, the appellate court reasoned, Illinois case law plainly confirms that the purpose of section 11-501.4-1 and its subparts is not to encourage chemical testing, but rather to "permit the direct disclosure of blood-alcohol test results by medical personnel to law enforcement agencies" without having to resort to "judicially authorized methods of court discovery." Citing *People v. Ernst*, 725 N.E.2d 59. 311 Ill. App. 3d 672, 244 Ill.Dec. 264 (2nd Dist. 2000)

In rejecting Defendant's argument, the appellate court concluded that the *Skinner* regulations completely differed from section 11-501.4-1 in language, scope, and purpose, and that the only similarity between the provisions is that both the *Skinner* regulations and section 11-501.4-1 have passed constitutional muster. The appellate court ruled that because the *Skinner* regulations and section 11-501.4-1 are almost completely distinct, *Skinner* was inapplicable to the matter at bar.

The appellate court concluded that the medical blood draw was conducted at a private hospital following a car accident, and the blood test was performed by medical staff, for medical reasons, and not at the direction of law enforcement. section 11-501.4-1 allowed the hospital to disclose the results of the test to police. Applying the

reasoning in *People v. Wuckert*, 44 N.E.3d 1227, 2015 Il App (2d) 150058, the appellate court determined that section 11-501.4-1 did not convert any medical staff into state agents. Because Defendant failed to prove that the medical blood draw was procured by state action, she failed to make a *prima facie* case that the blood draw violated her Fourth Amendment protections.

The appellate court also concluded that if the trial court erred in denying Defendant's motion to suppress the results of her administrative blood draw, such admission was harmless error. The appellate court reasoned that, even if the administrative blood draw result was improperly admitted, the results from that blood draw were cumulative to the result from the medical blood draw, which was properly admitted into evidence. The medical blood draw result alone conclusively proved that Defendant drove with an alcohol concentration of 0.08 or greater.

The appellate court noted that other evidence also supported Defendant's convictions: Defendant admitted to three witnesses that she had been drinking prior to the accident; four witnesses testified that Defendant was belligerent and exhibited slurred speech; two witnesses noted that Defendant was having difficulty walking, or that she could barely stand; and one witness testified that, while speaking with Defendant, Defendant was unable to recall either the day or month. There was testimony that while Defendant's difficulty walking, slurred speech, and erratic behavior prompted hospital personnel to treat Defendant in order to rule out any head injuries, these symptoms were also evidence of defendant's intoxication. Multiple witnesses reported smelling alcohol when interacting with Defendant. The appellate court ruled that all of this evidence, in conjunction with the properly admitted medical blood draw test result, proved Defendant's guilt of all three counts beyond a reasonable doubt. The appellate court ruled that even if the administrative blood draw test results were admitted in error, such a mistake resulted only in harmless error.

Ruling

The appellate court affirmed the ruling of the circuit court.■

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the standard observations of bloodshot, glassy eyes, and a moderate odor of alcohol coming from defendant's breath. After a poor performance on the standardized field sobriety tests, defendant was offered a preliminary breath test, which he refused.

Subsequently, the trooper placed the defendant in his squad, read him the Warning to Motorist, and conducted a 20-minute observation period. Following the observation period defendant was asked again to perform a PBT and this time he complied. The trooper never checked defendant's mouth prior to administering the PBT which registered a result of 0.087.

At a pretrial hearing the defendant testified that he had a dental appointment earlier in the day during which he had two crowns put in and a molar surgically extracted. As a result, defendant had gauze packed into the bloody socket where is tooth was removed. Further, defendant testified to both rinsing his mouth once with Heineken prior to his dental appointment and to periodically rinsing his mouth with Listerine and repacking gauze following his procedure.

Additionally, the defendant called Dr. Ronald Henson as an expert witness in blood-alcohol testing. Dr. Henson testified that the PBT used in this case, the RBT-IV, was incapable of detecting mouth alcohol and that the trooper erred in his administration of the PBT by not checking defendant's mouth prior to and following the 20-minute observation period. He was then provided a hypothetical that mirrored defendant's version of the events in this case. Dr. Henson opined that a PBT administered on a subject with gauze packed into a bleeding tooth socket and periodically rinsed with Listerine would not yield a reliable result. Noting the absorbent material of the gauze in the hypothetical, Henson indicated that the only proper way to obtain a reliable result in the hypothetical would be remove the gauze and conduct at least a 20-minute observation period prior to administering the test.

At the conclusion of the evidence the trial court denied the motion in limine. Later, the court found the defendant guilty at a stipulated bench trial. The defendant appealed arguing the evidence was insufficient at trial due to medical issues impacting the ability to do SFSTs and the unreliability of the PBT.

In reviewing the record, the appellate court relied heavily on the credibility determinations of the trial court, notably that of the defendant. Defendant had testified to having bloody gauze in his mouth and periodic rinsing with Listerine prior to the accident. However, he is overheard on the squad video acknowledging that he doesn't know where the gauze went following the accident and speaking with ease despite advising that the gauze required him to bite down quite hard to keep them in place. Additionally, the defendant denied consuming alcohol entirely and testified the only exposure to alcohol that day was using Heineken to rinse his mouth prior to his dental appointment. However, on the squad video he admits to consuming one or two beers at his brother-in-law's house after the tooth extraction.

In addition to the lack of credibility found in defendant, the court noted that defendant

failed to show that blood or another foreign matter in the mouth would hinder the reliability of the PBT. Dr. Henson did testify that an alcohol-based mouth wash could call into question the reliability; however, the squad video revealed that defendant made no mention to the trooper of using Listerine, nor was he seen using it to rinse out his mouth for over an hour he was recorded. In fact, there is no mention that Listerine was ever found on the scene despite defendant's testimony that he had used it while running errands earlier in the day. Ultimately, the appellate court affirmed the trial court's denial of the motion in limine as well as the guilty verdict.

Curiously, this opinion raises a number of questions. First, the opinion speaks of a PBT and breath test interchangeably. However, under Section 1286.240 of the Illinois Administrative Code the RBT-IV is not listed as an approved PBT. Similarly, under 1286.210 the RBT-IV is only approved for evidentiary purposes if used in conjunction with a printer. There is no mention in the opinion that a printer was used and likewise no printer was addressed in testimony. The confusion in the opinion is likely explained by noting that the RBT-IV is just a Alcosensor IV analytical system placed into a docking port, which "converts" the Alcosensor IV PBT, approved under 1286.240, into an evidentiary breath machine by providing memory and printing capabilities. However, this does not change how the actual machine operates or analyzes a breath sample leading some to argue that whether it's approved under 1286.210 or not, the machine is still a PBT masquerading as an evidentiary breath machine.

A clear distinction between PBTs and evidentiary breath tests are necessary for purposes of analyzing admissibility at both evidentiary hearings and trials. For example, PBTs are generally admissible for purposes of determining probable cause under 11-501.5, but not admissible during the State's case in chief at a trial. *People v. Davis*, 296 Ill. App. 3d 923 (3d Dist. 1998); *People v. Rose*, 268 Ill. App. 3d 174 (4th Dist. 1994). Further, a PBT result is not admissible in rebuttal as impeachment of defendant's testimony under 11-501.5(a). *People v. Bass*, 351 Ill. App. 3d 1064 (4th Dist. 2004). As such a PBT result would be admissible at a motion in limine, but not at a trial. Here, if no printer was used as is required under the administrative code, the device used to obtain the result of 0.087 would revert back to a PBT and admissibility would be greatly shifted at both the motion in limine and the trial.

The opinion further muddies the waters in paragraph 47 when assessing the sufficiency of evidence at trial and noting that the defendant refused to submit to the pre-arrest PBT which may be considered as circumstantial evidence of a consciousness of guilt. However, the court misapplies *People v. Johnson*, 218 Ill. 2d 125 (2005) in its consideration as *Johnson* deals with an evidentiary breath test, not a pre-arrest PBT. Unlike an evidentiary breath test that is admissible at trial, a PBT is not admissible at trial as previously mentioned. Similarly, a refusal to submit to a PBT is not admissible at trial. *People v. Brooks*, 334 Ill. App. 3d 722 (5th Dist. 2002). Consequently, the refusal of the pre-arrest PBT and any "consciousness of guilt" would be irrelevant and inadmissible in assessing the circumstantial evidence at trial.

Another noteworthy conclusion by both the trial court and the appellate court was that the defendant failed to establish that blood in his mouth at the time of the PBT would somehow cast doubt on the accuracy or validity of the result. Oddly enough, the opinion cites the very case, *People v. Ernsting*, 2018 IL App (5th) 160330, that establishes that blood in the mouth can be considered a foreign substance that can invalidate the results of a breath sample. Interestingly, the same expert witness, Dr. Henson, testified in both cases. It is unclear from the opinion the depth and specificity of testimony on this topic from Dr. Henson. However, based on the trial court's heavy reliance on the defendant's lack of credibility, it concluded the presence of gauze or active bleeding in defendant's mouth at the time of the PBT was unclear. As a result, the appellate court upheld the trial court's reliance on the PBT.■

Recent U.S. Department of Justice Funded Study Raises Constitutional Issues & Prosecution Challenges in Cannabis-Related DUI Cases

BY LARRY A. DAVIS

Since July 29, 2016, Illinois, like many other states, has provided for a per se level of THC, the active substance in cannabis, as a basis for presuming impairment.[1] This amendment to the DUI law was part of a negotiation which eliminated trace levels of cannabis metabolites, including those that are non-psychoactive or non-impairing, as a basis for a DUI charge. In Illinois the per se THC level is 5 nanograms or more per milliliter of whole blood or 10 nanograms per milliliter of any other bodily substance.[2]

Additionally, with the passage of the Medical Cannabis Act[3], the legislature statutorily recognized standardized field sobriety tests (SFSTs), which include the walk and turn, one-leg stand and nystagmus tests as determinative of cannabis impairment.[4] However, as discussed in my article in the Illinois Bar Journal in July 2020 "*Too High Too Drive?*", there was little to no evidence that THC levels or SFSTs were reliable indicators of cannabis impairment.[5]

Recently, in a study funded by the U.S. Department of Justice,[6] researchers state that "Our work indicates that THC is not a reliable marker of cannabis impairment." Furthermore, the study finds that the field sobriety tests "were not sensitive to cannabis intoxication."[7]

In designing the study, the researchers conducted 6 double-blind dosing sessions using oral administration of 0,10 and 25 mg of THC (contained in cannabis brownies) and vaporized inhaled administration of 0, 10, and 20 mg of THC. Each dosing session involved the same participants and were conducted at least one week apart. Samples of blood, saliva and urine were collected before dosing and then almost every hour for eight hours thereafter. Participants were tested for THC as well as the non-psychoactive metabolites cannabidiol and cannabinol.

Cognitive and psychomotor tests were administered before and after dosing including SFSTs designed to detect alcohol impairment including the one leg stand, walk and turn and HGN as well as the non-standardized modified Romberg test. Participants were also assessed using cognitive tests such as paced serial addition, digit symbol substitution test and a divided attention test. Additionally, participants were administered the four tasks used in the DRUID (Driving Under the Influence of Drugs) iOS phone app including: reaction time/decision making, reaction time, motor tracking and balance.

While negative cognitive and psychomotor effects were seen at all dosing levels (except for the lowest vaped dose of 5mg of THC) 0-2 hours after vaping and 1-5 hours after oral administration, the SFSTs as well as the modified Romberg were not sensitive to cannabis intoxication for any participant and were ineffective in detecting marijuana intoxication. Furthermore, the test levels for THC, cannabidiol and cannabinol did not correlate with either the cognitive or psychomotor impairment measures. In fact, the researchers also noted that many of the subjects had impaired levels of functioning even at low levels of THC.[8]

These conclusions bolster an argument made in the Bar Journal that such laws that rest on the assertion that impairment occurs at a certain THC level or that SFSTs are evidence of cannabis impairment lack a scientific underpinning.[9] In turn, this provides a basis to challenge such laws on constitutional due process grounds. The lack of a basis to presume impairment in the case of a legislated per se level may be found to constitute an improper exercise of the State's police power and therefore a due process violation. Similarly, the legislature's express finding that SFSTs are a determinant of cannabis impairment despite the lack of evidence supporting such a determination may also constitute a due process violation.

Short of a direct challenge to the constitutionality of such laws, these findings allow the defense to challenge such evidence in motion-practice or at trial in a cannabis-related DUI prosecution. Furthermore, do not forget that statutory summary suspensions pursuant to Section 11-501.9 which imposes a suspension for refusing or 'failing' SFSTs in cannabis-related DUIs would also be open to challenge.[10]

Expect to see ongoing research that challenges the assumptions upon which these laws are based. Remember that they exist in the first place due to the difficulties inherent in demonstrating impairment in cannabis DUI cases unlike alcohol-based DUIs where there is wide scientific consensus establishing .08 as a per se level of alcohol impairment as well as the validity of SFSTs establishing such impairment.■

1. Pub. Act 99-697 (Effective July 29, 2016).
2. 625 ILCS 5/11-501.2 (b-5).
3. Pub. Act 98-0122 (effective Jan.1, 2014); Pub. Act 101-363 (effective August 9, 2019).
4. 625 ILCS 5/11-501.2 (a-5).
5. Larry A. Davis, *Too High Too Drive?*, Illinois Bar Journal (July 2020) Vol.108, No.7.
6. Although funded by the U.S. Department of Justice and cited on its website, the reader should be cautioned that the study does not necessarily reflect the official policy of the Department of Justice. See https://nij.ojp.gov/topics/articles/field-sobriety-tests-and-thc-levels-unreliable-indicators-marijuana-intoxication.
7. Megan Grabenauer, *Differences in Cannabis Impairment and its Measurement Due to Route of Administration*, RTI International, Document Number 255884 (March 2020), pages 10 and 4.
8. *Id*. at page 10.
9. *Illinois Bar Journal*, supra note 4 at pages 28 and 31.
10 *Id*. at page 31.

Does State Commit a Discovery Violation When Evidence Does Not Exist?

BY ANISA JORDAN &VICTORIA BUCHHOLZ

Case Overview

People v. Althoff, 2020 IL App (2d) 180993 discusses whether a discovery violation occurs when the state fails to produce evidence requested by the defendant that normally would exist in the context of a DUI investigation but, for whatever reason does not exist. The defendant in this case requested 1) squad car video of his DUI arrest and stop, and 2) the booking room video. However, the state did not produce these items. While the officer believed he had made the recording of his investigation and arrest of the defendant, he discovered that the video had not been recorded. The defendant argued that the prosecution shouldn't be allowed to admit testimony with respect to anything on the video as a sanction for a discovery violation by the state. The prosecution countered that since the evidence never existed, no discovery violation occurred. Ultimately, the trial court agreed with the state and did not grant defendant's request to bar the testimony of the officer. The defendant was found guilty after a jury trial and subsequently filed an appeal. (For brevity, the authors have decided to discuss only the missing squad car video of the DUI arrest in this article. It should be noted, however, that the court applied the same reasoning with respect to the portion of the booking video that was missing in this case.)

Proceedings & Testimony in Trial Court

Officer Greyson Scott's Testimony

In October of 2016, Officer Greyson Scott, employed with Sycamore Police Department, observed the defendant commit some traffic violations.[1] Scott testified that he turned on his strobing lights to conduct a traffic stop and, to his knowledge, this automatically activated his in- squad video camera.[2] Scott testified that there was no indication on his end that the camera had not been activated.[3] In addition, Scott testified that prior to the beginning of his shift he checked both his camera and microphone.[4] Scott testified that his pre-shift inspection of his camera included checking that the camera and the microphone lights were blinking, which he believed meant they were working.[5]

After conducting a stop on defendant's vehicle and observing what he believed to be signs of intoxication, Officer Scott testified that he repositioned his squad car to record defendant's performance on the standardized field sobriety tests.[6] He verified that both the camera and microphone were activated by observing that both the lights on the camera and microphone were blinking.[7] Scott testified that the blinking lights were consistent with everything being in working order and that he did not observe anything to the contrary.[8]

Officer Scott testified that upon the defendant's completion of the standardized field sobriety tests, he placed the defendant under arrest and transported him back to the police station.[9] Upon arriving at the station, Officer Scott testified that both the camera and microphone shut off automatically and he placed the microphone in its cradle to charge.[10] Scott testified that when the camera and microphone shut off, any video or audio captured automatically syncs to the department's main system called VuVault.[11]

Officer Scott testified that while completing his report documenting the DUI investigation and stop, he checked VuVault to see if his video had uploaded to the system.[12] Not seeing the video in the system Officer Scott testified that he continued to fill out his report and a few minutes later, he checked a second time.[13] Again, there was no sign of the video.[14] At this point, in accordance with department policy, Officer Scott testified that he contacted Detective Joseph Meeks about the issue.[15] Scott asked Detective Meeks to remove the SIM card from the squad camera as he was not authorized to do so himself.[16] Subsequently, Officer Scott left work for the night.[17]

Officer Scott testified that he returned to work on November 2nd, 2016.[18] Scott testified that he again checked VuVault for the DUI arrest and investigation of the defendant and observed that the video still was not uploaded to the system.[19] At this point, Scott testified that he contacted Commander Cook, who also looked for the missing video to no avail.[20]

Detective Joseph Meeks' Testimony

Detective Meeks testified that he retrieved the SIM card from Scott's squad car.[21] He testified that while anyone could access the SIM card, the only authorized parties permitted to do so were himself and Commander Cook.[22] Upon pulling Scott's SIM card, Detective Meeks noted that he did not observe anything that indicated tampering had occurred with the squad car.[23]

Meeks testified that he put the SIM card into his computer to manually upload the video to VuVault.[24] When the upload was completed, Meeks testified that not only was the defendant's DUI arrest investigation missing from the SIM card, but additionally, he observed the last recording on the card dated back to October 16th, 2016.[25] Detective Meeks testified that after making this observation he formatted and activated the card and placed it back in the squad-car camera, and tested it to make sure it was working properly.[26]

Detective Meeks was asked to testify about the process in which the video is transferred to the VuVault system.[27] Detective Meeks informed the jury that when the cars pulls into the station, a wireless antenna on the squad car connects to the server.[28] Meeks further testified that once the server processes the video from the car it is available via the VuVault system.[29]

After the video has been uploaded to VuVault, Meeks testified that the recording is removed from the camera.[30]

The Trial Court's Ruling

At the conclusion of Detective Meeks' testimony, the defendant moved for directed finding which was denied.[31] The trial court also denied defendant's motion to bar Officer Scott's testimony because of the missing video of his DUI arrest and investigation.[32] The trial court noted in its ruling that there was no evidence that video of defendant's arrest ever existed.[33]

The defendant was found guilty of DUI and the trial court denied defendant's motion to reconsider. The defendant argued that the trial court erred in admitting any testimony by Officer Scott that would have been captured on Officer Scott's in-squad camera.[34] The defendant appealed.[35]

Appeals Court Analysis

The court framed the issue on appeal, in relevant part, as whether the defendant should have been afforded any relief for the state's failure to produce video of the stop.[36] The court stated that at the outset it needed to determine if the prosecution's failure to provide defendant with the video was a discovery violation.[37] After making clear that the video in defendant's case was discoverable, the court stated that **"[T]he mere fact that the evidence was discoverable does not mean that the State's failure to produce it amounted to a discovery violation**."[38] The court went on to say that a discovery violation can occur as a due process violation or under Illinois Supreme Court Rule 415(g)(i)(eff. Oct. 1, 1971).[39] The court addressed each prong as follows.

Prong I: Due Process Violation

The court ruled that there was no discovery violation under the due process analysis in the defendant's case. The court noted that when evidence is only potentially useful, and not materially exculpatory, there must be a showing by the moving party that the prosecution acted in bad faith when it failed to produce the evidence sought by the defendant.[40] The court noted that the trial court record did not contain any information that would lead the court to believe the missing part of the video contained anything but potentially useful information.[41] Moreover, the court noted that the defendant had made clear in the lower court that he didn't believe the state had acted in bad faith.[42] Accordingly, the court ruled that the defendant could not establish a discovery violation under a due process analysis.[43]

Prong II: Illinois Supreme Court Rule 415(g)(i)

At the outset, the court noted that under Illinois Supreme Court Rule 415(g)(i), neither the material exculpatory value of the evidence or a showing of bad faith is required for a discovery violation under this rule.[44] The court noted that the moving party must only show that the state's failure to produce was in contradiction to an applicable discovery rule or an order issued pursuant to an applicable discovery rule.[45]

However, the court reasoned, the prosecution does not commit a discovery violation under this rule if the evidence sought never existed to begin with.[46] To illustrate the court's reasoning, the court went on to discuss three cases. The authors will discuss each in turn.

Failure to Produce Evidence That Existed vs. Evidence That Never Existed

In *People v. Aronson*, 408 Ill. App. 3d 946, 948 (2011) the state could not give the defendant the video from her traffic stop because the video recording was 'not viewable.'[47] A technical problem in downloading the video from the camera had rendered the video unable to be produced for viewing.[48] There was no explanation as to why this issue had occurred from the officers involved and the court noted that it was troubled by the fact that a video had in fact existed.[49] The court noted that in affirming the lower court's decision in *People v. Aronson* it noted that just because the technical issue prevented the video from being viewed, the fact that it couldn't' be produced was not the same as saying the video did not exist.[50]

In *People v. Strobel*, 2014 IL App (1st) 130300 ¶¶ 1, 4, the state was able to produce a video of the defendant's stop but it did not contain any audio because the arresting officer had failed to turn on the audio recording equipment. The trial court entered a discovery sanction that barred the state from entering any testimony or video of the field sobriety tests in their argument.[51] The state then appealed as they believed the trial court erred in sanctioning them due to lack of audio because the audio never existed. The court explained that in overturning the trial court's ruling it had found that the audio was never recorded and therefore, reversed and remanded the trial court's decision.[52]

In *People v. Moises*, 2015 IL App (3rd) 140577, ¶ 4, the state gave the defendant a video that did not show his performance on the field sobriety tests because the officer had the defendant do the tests off camera. The court noted that while the trial court ruled the state had committed a discovery violation, it had disagreed because the evidence never existed in the first place.[53]

Application of *Strobel* and *Moises* to the Case at Bar

The court reasoned that in *Althoff,* like *Strobel* where the officer forgot to turn the audio equipment on, or in *Moises* where the actions of the defendant were not in view, the evidence never existed for the state to produce.[54] The court pointed out that Officer Scott's testimony in the trial court only noted that he observed a blinking light on the camera and microphone that he assumed meant that the equipment was in working order.[55] The court ruled that this fact was not sufficient, without more, to establish that the camera and microphone were properly functioning on the day of the defendant's arrest.[56] In addition, the court noted that no video was uploaded to VuVault and that Detective Meeks found no video of the defendant's DUI arrest after he attempted to manually upload it to the VuVault system.[57] The court opined that defendant's case was distinguishable from *Aronson,* where there was a showing in the trial court that a recording was made and downloaded, but it was not viewable.[58]

Appellate Court Holding

The court affirmed the trial court's determination that no discovery violation occurred in defendant's case.[59] In making its decision to affirm the trial court, the court ruled that the trial court's ruling

was not against the manifest weight of the evidence that the video recording of the stop never existed.[60] The court ruled that the prosecution could not produce what never existed.[61] Therefore, the court ruled, the defendant was not entitled to the relief he sought.[62] ■

1. *People v. Althoff*, 2020 IL App (2d) 180993, ¶ 7.
2. *Id.*
3. *Id.*
4. *Id. at ¶ 6.*
5. *Id.*
6. *Id. at ¶ 8.*
7. *Id.*
8. *Id.*
9. *Id.* at ¶ 9.
10. *Id.*
11. *Id.*
12. *Id.* at 10.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id. at ¶ 11.*
19/ *Id.*
20. *Id.*
21. *Id.* at ¶ 16.
22. *Id.*
23. *Id.*
24. *Id.* at ¶ 17.
25. *Id.*
26. *Id.*
27. *Id. at ¶ 18.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at ¶ 19.
32. *Id.* at ¶ 20.
33. *Id.*
34. *Id.* at ¶ 21.
35. *Id.*
36. *Id.* at ¶ 23.
37. *Id.*
38. *Id.* at ¶ 24.
39. *Id.* at ¶ 25.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at ¶ 26.
45. *Id.*
46. *Id.*
47. *People v. Aronson*, 408 Ill. App. 3d 946, 948 (2011).
48. *Id.* at 950.
49. *Id.*
50. *Id. at 952.*
51. *Strobel*, at ¶¶ 5, 12.
52. *Id.* at ¶ 11.
53. *Id.* at ¶ 15.
54. *Althoff*, at ¶ 30.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at ¶ 34.
60. *Id.*
61. *Id.*
62. *Id.*