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ILLINOIS STATE BAR ASSOCIATION

Traffic Laws & Courts

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

A primer on breath, blood, and urine testing when performed for law enforcement purposes

By Nancy Easum

Where do I find the rules about chemical testing for law enforcement purposes? How often do those breath testing instruments need to be certified anyway? What in the world is a BAO? Answers to these questions—and more—can be found in 20 Illinois Administrative Code 1286, which was developed and administered by the Illinois State Police (ISP) in accordance with Section 11-501.2 (a)(1) of the Illinois Vehicle Code (625 ILCS 5/11-501.2 (a)(1). This article will explore these rules and highlight the answers to frequently asked questions.

First of all, what instruments have been approved for use in Illinois? The list of evidential instruments approved for use in Illinois can be found by checking 20 Ill. Adm. Code 1286.210, and include the Intoximeters EC /IR, EC/IR II, RBT-IV, and the Intoxilyzer 8000. Approved preliminary breath testing instruments include the S-D2, S-D5, Alcosensor III, Alcosensor IV, and FST, as indicated in Section 1286.240. What procedures have been established to ensure the approved instruments are functioning properly? Pursuant to Sections 1286.230 and 1286.250, respectively, the evidential devices must be checked for accuracy at least one every 62 days while the preliminary instruments require certification at least once every 93 days.

Since the instruments are required to be checked for accuracy, who is responsible for this function and what qualifications do they have? Breath Analysis Technicians (BATs) check the evi-

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People of the State of Illinois v. Marina Kladis, No. 1-09-0686. Discovery sanctions in a misdemeanor DUI case can bar testimony of an arresting officer when a videotape has been discovered

By Ava George Stewart

The 1st District ruled that the trial court did not abuse its discretion in partially barring the testimony of the arresting officer in a misdemeanor DUI as a sanction for the destruction of the videotape after the State was served with defendant's Supreme Court Rule 237 written notice to produce the videotape. This notice was filed by the defendant prior to the first court date (about five days after the defendant's arrest). *People v. Kladis*, No. 1-09-0686 (2010) at 3. Unfortunately, and unbeknownst to the State, the videotape had been destroyed in the wee hours of the morning of the first court date, approximately 17 hours before the parties were due to appear in court. *Kladis* at 2.

Defendant Marina Kladis' motion was granted for sanctions against the State for destroying the in-car videotape of her arrest for DUI. She was

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Back to the basics: Challenging the accuracy of field sobriety tests

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dential units for accuracy and are ISP employees with specialized training and knowledge of the instruments and breath testing procedures. BATs must demonstrate proficiency on the evidential instruments before being certified and granted a three year license to perform the certification, maintenance, and repair processes. (See Section 1286.130). Preliminary testing devices are certified accurate by BATs or other individuals specially trained to conduct these accuracy checks. (See Section 1286.250). Both types of devices must quantitate a reference sample within 10 percent of the reference sample's value, as adjusted for environmental factors. (See Sections 1286.220, 1286.230, and 1286.250).

Where can these evidential instrument accuracy checks be found and what information do they contain? Accuracy check records include the type of instrument used, serial number, test date, reference sample value, and the readings of the two accuracy check tests. (See Section 1286.10). These records are maintained either in the instrument's logbook or its memory. The accuracy checks will not appear in the logbook if the instrument performs self-accuracy checks. (See Sections 1286.220 and 1286.230). However, the last accuracy check prior to a subject test is printed on the test record. Both the EC/IR and EC/IR II instruments, as well as the I-8000, have the capability to perform self accuracy checks; this feature has been enabled on some, but not all, instruments. The accuracy check itself consists of two tests using the .082 dry gas standard and utilizes the same procedure as an accuracy check performed by a BAT. If the instrument is unable to perform the accuracy check or fails the test, the instrument takes itself out of service. Any BAO can access accuracy check records from the instrument's memory. These documents can also be obtained from the ISP Alcohol and Substance Testing Section as described below.

If the instrument has been properly certified, what if it has not been working properly? Service records are maintained by the Alcohol and Substance Testing Section or may be found in the instrument's memory. Service records document repairs for items affecting the instrument's analytical capability which required the removal of the instrument's cover and do not include items such as the replacement of breath hoses or keyboards and resolving date and time issues. (See Section 1286.70).

Once an evidential instrument has been approved and certified as accurate, who can administer tests using the instrument? Only Breath Analysis Operators (BAOs) licensed by ISP can operate evidential breath testing devices. In order to become a BAO, an individual must be employed by a law enforcement agency, Circuit Court Probation Department, or accredited law enforcement training academy. The person must successfully complete a 24 hour course, including demonstration of proficiency on approved evidential instruments as well as attaining a minimum score of 70 percent on a written examination. Applicants are then issued a BAO license which is valid for three years. (See Sections 1286.100 and 1286.10). These classes are taught by Breath Analysis Instructors (BAIs) who have attended specialized classes and demonstrated proficiency on the evidential instruments as well as achieving at least 90 percent on the written instructor's examination. BAIs must also obtain 100% on the BAO test before being granted a BAI license. The BAI license is valid for the same three-year time period as a BAO license. (See Section 1286.150).

What are the procedures for administration of a breath test? As stated in Section 1286.310, the BAO or another agency employee must observe the subject for at least 20 minutes prior to the test. During that time, the person shall be deprived of alcohol, other foreign substances, and shall not have vomited. If the subject vomits or puts some foreign substance in his mouth during the 20 minute period, the subject should be instructed to rinse his mouth with water and the 20 minute observation period should begin anew.

What if a blood test is taken? What laboratories can evaluate the samples and what qualifications are required to perform the testing? As stated in Section 1286.170, only laboratories certified by ISP can analyze samples for law enforcement purposes. These laboratories must employ technicians working under the supervision of a pathologist, toxicologist, or other person with at least five years experience in the specialty of analytical chemistry. Proficiency documentation must be submitted by the laboratory at least twice a year. Each individual laboratory technician also receives a license. Laboratory and technician licenses are valid for three years.

If the laboratory and technician are licensed to perform these analyses, what is the proper procedure for obtaining blood and urine samples? Blood samples must be collected in the presence of the arresting officer, another law enforcement officer, or an agency employee who can authenticate the sample. The sample itself must be collected by a licensed physician, registered nurse, trained phlebotomist or certified paramedic using proper medical techniques. A disinfectant that does not contain alcohol shall be used. While DUI kits provided by ISP can be used, they are not required. If a DUI kit is not available, two standard grey top vacuum tubes should be used. (According to generally accepted industry standards, grey top vacuum tubes contain an anticoagulant and preservative). The tubes should be labeled with the subject's name and date the sample was drawn. (See Section 11-501.2 of the Illinois Vehicle Code and 20 Ill. Adm. Code 1286.320). If the test result is reported in blood serum or blood plasma alcohol concentration, rather than in whole blood, divide the serum or plasma result by 1.18 to determine the whole blood equivalent. (See Section 1286.40).

Urine samples must be analyzed by a licensed technician and laboratory but what are the requirements for collection of urine? Urine testing is often used to determine the presence of drugs other than alcohol The collection of urine should be done in a way to preserve the dignity of the individual and the integrity of the sample. The sample must be collected by the arresting officer, another law enforcement officer, an agency employee, or hospital nurse of the same sex as the subject undergoing testing. A 60 ml sample should be collected and divided into two clean, dry containers containing no preservatives. The containers should be labeled with the subject's name and date of collection. (See Section 1286.330).

Further information about breath, blood, and urine testing for law enforcement purposes is contained in 20 Illinois Administrative Code 1286. These administrative rules can be found on various Web sites including under the "Traffic" tab of <www.isp.state.il.us>. Information on BAT and BAO licenses, as well as accuracy checks and instrument service reports, is available by contacting the ISP Alcohol and Substance Testing Section, 3700 East Lake Shore Drive, Springfield, Illinois 62712 or telephone 217/786-6925. ■

The Illinois Supreme Court rules on the constitutionality of suspension of driving privileges if a person receives court supervision for unlawful consumption of alcohol under 21 years of age

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charged with violating section 11-501(a) (2) of the Illinois Vehicle Code (625 ILCS 5/11-501(a) (2).

In this matter, a Statutory Summary Suspension (SSS) was filed and scheduled for the first court date where the parties learned that there was an outstanding videotape that was not available for the defendant prior to the SSS Hearing. The State agreed to mail discovery, including the videotape to the defendant and the SSS Hearing was continued for two weeks by agreement. Discovery was mailed but it did not include a videotape. At the agreed date for the SSS Hearing the State tendered two pages of business records to defendant from the police department indicating the requested videotape of the defendant had been purged. *Kladis* at 5.

Defendant then filed an oral motion for sanctions and was granted leave to file a written motion. At the hearing on the Motion for Sanctions, solely on the SSS Petition the court stated "the trial assistants have so much work to do and so many cases to handle, that I don't find any bad faith here." Still the court ruled that the State received notice to produce based on the Rule 237 request, which the court construed as a motion for discovery. Therefore the destruction of the videotape was a discovery violation. The court recognized it had discretion in determining the appropriate sanction and ruled that no testimony would be allowed that would be on the videotape. The court did specify that the arresting officer could testify about his observations anytime prior to five seconds before the actual stop and any actions by defendant after being formally arrested. *Kladis*, at 5-6. The petition to Rescind Statutory Summary Suspension was granted. The defendant had a subsequent court date for a hearing on defendant's motion for sanction on the criminal case, motion to quash the arrest and suppress evidence, and trial.

One of the difficulties facing practitioners stems from the dual nature of a DUI case. A DUI offense has both a criminal component and the quasi-civil matter of driving privileges that is addressed separately through a Statutory Summary Suspension Hearing.

At the Motion for Sanctions in the criminal case the parties stipulated that the officer's testimony would be the same as it was at the Motion for Sanctions and Petition to Rescind Statutory Summary Suspension". The court then granted the defendant's Motion for Sanctions in the criminal case.

> So my ruling will be exactly the same. I have no evidence different here, that the Motion for Sanctions pertaining to the case in chief will be granted, the video may not be used, or any testimony regarding what is on the video pertaining to just before the officer stopped the defendant and the time that the defendant was placed in the squad car, which would mean anything that happened on the street prior to her being placed in the squad car. If there was something that she did in the squad car or anything else after that when she got out of the squad car at the police station, or anything that happened in the police station pertaining to this matter which is relevant it will be admitted into evidence.

Kladis at 7.

The State appealed on the basis that the trial court's sanction was an abuse of discretion. They relied primarily on case law discussing whether the destruction of evidence violated due process. Specifically, *Illinois v. Fisher*, 540 U.S. 544, 548-659, 157 L. Ed 2d 1060, 1066-1067, 1254 S. Ct. 1201, 1202-1203(2004), where the court ruled that when evidence is potentially useful, but not material exculpatory evidence, then failure to preserve does not violate due process without a showing of bad faith on the part of the State. That argument was weighted by the court against Illinois Supreme Court Rule 415 (g) (1).

In this case the court rejected the State's reliance on there being a discovery violation based on due process. This was in large part because the trial court did *not* base its ruling on due process but on The Rule 237 written request to produce the videotape was

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deemed a motion for discovery.

In Illinois, a discovery violation under Illinois Supreme Court Rule 415(g) (1) only requires a showing that "a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto." *Kladis* at 8.

One of the challenges faced by the Court in rendering its decision was how much discovery a defendant is entitled to receive in a misdemeanor case. The majority of cases on point regarding discovery sanctions were felony matters, *e.g. People of the State of Illinois v. Koutsakis*, 255 Ill. App. 3d 306(1993), *People of the State of Illinois v. Kizer*, 365 Ill. App. 3d 949, 959-61 (2006). *Kladis* at 14.

The scope of discovery in a misdemeanor case in Illinois is limited pursuant to *People v. Schmidt*, 56, Ill. 2d572 (1974). The First District went on to state, "Considering the limited scope of the discovery the Sate is required to furnish under *Schmidt* in a misdemeanor case, we find no reason to create a 'material and exculpatory' prerequisite in order for the defense to obtain the videotape at trial for impeachment of the prosecution witness who prepared it." *Kladis* at 19.

Practitioners may wish to heed the suggestions noted by the court in its decision. "We caution, however, that to eliminate any question about whether the State is required to preserve and produce evidence, a signed protective order from the judge could be obtained and then served on the State at the same time the Rule 237 request is served on the State." *Kladis* at 19. Additionally, the court also makes clear what types of sanctions a defendant can request. "[T]hat a sanction should be proportionate to the magnitude of the discovery violation." *Kladis* at 27.

> Defendant did not seek dismissal of the misdemeanor criminal case. The trial court did not completely bar the officer's testimony and did not dismiss the charges in the criminal case; instead, consistent with the principles articulated in *Schambow, Petty, Camp, Koutsakis,* and *Johns*, the court entered a sanction that was limited and proportionate to the magnitude of the discovery violation. The entire testimony of Office Gaske was not barred. The court only barred Officer Gaske from testifying regarding matters on the videotape, while testimony regarding defendant's driving or other conduct not on the videotape would be admissible.
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> *Kladis* at 29.

Kladis provides a roadmap for practitioners to avoid the destruction of discovery as well as how to ask the court for relief, via sanctions, in the event the discovery is inadvertently destroyed. ■

People v. Maldonado

932 N.E.2d 1038, 342 Ill.Dec.577 (2nd Dist. 2010)

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

The appellate court held that Public Acts 94-114 and 94-116 created a statutory ambiguity that must be resolved in favor of the more lenient provision. The court held that subsection (c-1)(4) controlled over subsection (c-16) of the DUI statute. The appellate court affirmed defendant's conviction of DUI, but reduced the offense to a Class 1 felony, vacated defendant's sentence, and remanded for resentencing.

Defendant was indicted for driving under the influence of alcohol (DUI) (625 ILCS 5/11- 501(a)(2). Because the defendant had at least five prior convictions for DUI, the offense was charged as a Class X felony under section 11-501(c-16) of the Illinois Vehicle Code (625 ILCS 5/11-501(c-16) (West 2006)). After a jury trial, defendant was convicted and sentenced to 20 years of imprisonment. The trial court denied defendant's motion to reconsider sentence. Defendant appealed.

On appeal, defendant argued that his conviction must be reduced to a Class 4 felony and the cause remanded for resentencing. According to defendant, Public Act 94-114, which raised a sixth or subsequent DUI from a Class 2 felony to a Class X felony (Pub. Act 94-114, §5, eff. January 1, 2006), was implicitly repealed by Public Acts 94-116 (Pub. Act 94-116, §5, eff. January 1, 2006) and 94-963 (Pub. Act 94-963, eff. June 28, 2006) and that, under Public Act 94-963, his offense is a Class 4 felony.

The appellate court analyzed the laws involved in this case, all of which directly or indirectly, affected section 11-501 of the Illinois Vehicle Code (625 ILCS 5/11-501 (West 2006)). Writing for the court, Justice Hutchinson noted that Public Acts 94-114 and 94-116 were both enacted on July 5, 2005, and took effect January 1, 2006. Previously, a third or subsequent DUI was a Class 4 felony. 625 ILCS 5/11-501(d)(1)(A), (d)(2) (West 2004). Public Act 94-114 added subsection (c-16), reading: "Any person convicted of a sixth or subsequent violation of subsection (a) [(625 ILCS 5/11-501(a) (West 2006))] is guilty of a Class X felony." Public Act 94-116 amended subsection (c-1)(2) by making a third DUI a Class 2 felony; amended subsection (c-1)(3) by making a fourth DUI a Class 2 felony with no eligibility for probation or conditional discharge; and, added subsection (c-1)(4), reading: "A person who violates subsection (a) a fifth or subsequent time is guilty of a Class 1 felony and is not eligible for a sentence of probation or conditional discharge." Public Act 94-116 omitted subsection (c-16) entirely.

The appellate court noted that Public Act 94-963, enacted June 28, 2006, and effective that date, did not amend any of the foregoing provisions or affect the penalties for a fifth or subsequent DUI. Public Act 94-963 amended subsections (j) and (k) of the DUI statute by creating new uses for DUI fines and fees. 625 ILCS 5/11-501(j), (k) (West 2008).

The appellate court also reviewed the Statute on Statutes (5 ILCS 70/6 (West 2006)) which states, in pertinent part:

> Two or more Acts which relate to (the) same subject matter and which are enacted by the same General Assembly shall be construed together in such manner as to give full effect to each Act except in case of an irreconcilable conflict. In case of an irreconcilable conflict the Act last acted upon by the General Assembly is controlling to the extent of such conflict.
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> ***
>
> An irreconcilable conflict between 2 or more Acts which amend the same section of an Act exists only if the amendatory Acts make inconsistent changes in the section as it theretofore existed.

5 ILCS 70/6 (West 2006).

Defendant argued that Public Acts 94-114 and 94-116 are irreconcilably inconsistent. The former, by adding subsection (c-16) to the DUI statute, elevated defendant's offense to a Class X felony. The latter did no such thing (not including subsection (c-16) at all) but instead made the offense a Class 1 felony. The court noted that from this inconsistency, defendant did not conclude that Public Act 94-116 controlled and made his offense a Class 1 felony. Instead, the defendant argued that Public Act 94-963 controlled because it was the last act that pertained to the subject matter, and it included neither of the amendments made by the other two acts.

After reviewing its analysis in *People v. Prouty*, 385 Ill.App.3d 149, 324 Ill.Dec. 48 (2nd Dist. 2008) and *People v. Maldonado*, 386 Ill.App.3d 964, 325 Ill.Dec. 315 (2nd Dist. 2008), as well as the decisions of other appellate courts in *People v. Gonzalez*, 388 Ill. App.3d 1003, 329 Ill.Dec. 189 (3rd Dist. 2009) and *People v. Harper*, 392 Ill.App.3d 809, 331 Ill.Dec. 282 (1st Dist. 2009), the appellate court rejected any contention that Public Act 94-963 controlled. The appellate court noted that as did Public Act 94-329, Public Acts 94-114 and 94-116 affected a portion of the DUI statute wholly separate from and unrelated to that affected by Public Act 94-963. The earlier acts amended subsection (c) of the DUI statute to increase the sentencing range for certain types of DUI; the later one amended subsections (j) and (k) to broaden the permitted uses of DUI-related fines and fees. The appellate court concluded that Public Act 94-963 did not make inconsistent changes in the DUI statute as it had existed (5 ILCS 70/6 (West 2006), and it did not repeal either earlier act.

The court then addressed the more difficult issue: whether Public Act 94-116, which was enacted on the same day as Public Act 94-114 and had the same effective date, implicitly repealed Public Act 94-114.

The court agreed with defendant that the two acts are inconsistent. The court stated that both acts amended the DUI statute as it existed before either was passed, and did so in contradictory ways. Public Act 94-114 specifically made a sixth or subsequent DUI a Class X felony. The appellate court noted that Public Act 94-116 specifically made a fifth or subsequent DUI—and thus a sixth or subsequent DUI—a Class 1 felony. Thus, unlike in *Prouty* or *Maldonado*, the second act did not merely omit the amendments that the first act made, but affirmatively included amendments that could not be reconciled with the first act. The court reasoned that the inconsistency was one of commission, not mere omission. The court concluded that the acts irreconcilably conflicted, and that the Statute on Statutes required the court to

prefer the later act over the earlier one.

The court also addressed the rule of lenity, which requires that any ambiguity in a criminal statute must be resolved in the way that favors the accused. *People v. Jones*, 223 Ill.2d 569, 308 Ill.Dec. 402 (2006). The court maintained that applying the rule was especially appropriate with an enhancement provision. *People v. Davis*, 199 Ill.2d 130, 262 Ill. Dec. 721 (2002). The court noted that the DUI statute as written was ambiguous because it is internally contradictory: it states both that a sixth or subsequent DUI shall be a Class 1 felony (subsection (c-1)(4)) and that a sixth or subsequent DUI shall be a Class X felony (subsection (c-16)). Both subsections were enhancement provisions. Thus, the court reasoned, it must prefer subsection (c-1)(4) over subsection (c-16).

The court stated that its holding was supported by *People v. Hillenbrand*, 121 Ill.2d 537, 118 Ill.Dec. 423 (1988). In *Hillenbrand*, the defendant was sentenced to consecutive prison terms of 50 to 150 years for one murder and 80 to 240 years for a second murder. He committed the offenses in 1970 and pleaded guilty that year. The defendant escaped and was a fugitive for 13 years, so he was not sentenced until 1984. Under the law as it existed either at the time of his offenses or at the time of sentencing, consecutive sentences were mandatory. However, between January 1, 1973, and July 1, 1974, section 5-8-4(c) of the Unified Code of Corrections was phrased so as to bar the defendant's sentences from running consecutively, because their aggregate minimum would have exceeded 28 years. The defendant contended that he was entitled to be sentenced under the more lenient intervening provision, so that his sentences would have to be concurrent rather than consecutive.

The Illinois Supreme Court agreed that the crucial point was that which sentencing scheme applied was governed by sections 8-2-4(a) and 8-2-4(b) of the Code, but, by their plain language, these provisions both applied to the defendant's unique situation. Under subsection (a), he could elect to be sentenced under the statute in effect between January 1, 1973, and July 1974, but under subsection (b) he would have to be sentenced under the harsher law in effect either in 1970 or after the 1977 amendment took effect. The court ruled that the defendant was entitled to the benefit of subsection (a). The court reasoned that it had "repeatedly held that an ambiguity in a penal statute as to which of two possible penalties is to be imposed is to be resolved in favor of lenity."

In accordance with *Hillenbrand*, the appellate court applied the rule of lenity. The appellate court concluded that the DUI statute was ambiguous because it prescribed mutually exclusive sentencing schemes for a defendant, who has been convicted of committing a sixth or subsequent DUI. Under the rule of lenity, the appellate court concluded that defendant must be sentenced for a Class 1 felony offense. The court affirmed defendant's conviction under subsection (c-1)(4) of the DUI statute, not subsection (c-16). The court vacated defendant's sentence, and remanded the cause for resentencing.

The appellate court affirmed in part and vacated in part the decision of the Circuit Court of DuPage County, and remanded the cause for resentencing. ■

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Friday, 1/21/11- Teleseminar—Ethics in Representing Elderly Clients. 12-1.

Friday, 1/21/11- Chicago, ISBA Regional Office—The Health Care Reform Act- An Overview for the Health Care Attorney. Presented by the ISBA Health Care Section. 9-12.

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