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Defending the DUI charge

by W. Edward Riley, IV and Mitchell M. Wells

The key to winning any case, especially a DUI, is preparation. Preparation means communicating with your client, because the more information you have, the better you are positioned to deal with the case. Preparation requires developing *all* aspects of the case, including an intimate knowledge of the facts, applicable statutory and case law and even the economics of taking on the case by ensuring that your fees are reasonable and adequate.

Also key in preparation when defending a DUI is understanding the scientific evidence such as the breath test, blood test and Field Sobriety Tests. The documents necessary to investigate and challenge these issues can be acquired through requests for the breath test information from the Department of Forensic Science, Va. Code §19.2-187 and Virginia's limited discovery rules. Scientific experts can also provide a great deal of insight in DUI cases and should be consulted when necessary. Furthermore, preparation includes knowing your prosecutor, judge or jury composition, and effectively communicating that information to the client so that he can make the best choice on how to move forward in his case.

In a DUI case, the two elements the Commonwealth must prove are: (1) that the accused was operating a vehicle, (2) while under the influence of alcohol, a .08 percent or higher BAC or any other self administered intoxicant. Be aware that Va. Code §18.2-266 has been amended to reflect minimum blood levels for certain chemicals other than alcohol to prove intoxication. The statute also specifically includes mopeds as a motor vehicle. It is also important to know that the rebuttable presumption that has long been allowed in favor of the Commonwealth when a certificate of analysis has been entered into evidence pursuant to Va. Code §18.2-269 has been determined unconstitutional. To avoid the shifting of the burden of proof away from the Commonwealth, it has been held that the rebuttable presumption should now be instead viewed as a permissible inference.[1] For reckless driving under Va. Code §46.2-852, the Commonwealth must prove that the accused drove his vehicle on a highway in a manner so as to endanger the life, limb, or property of any person.

Reasonable stop?

When defending the DUI case, typically the first question is whether there was reasonable, articulable suspicion to stop the defendant's vehicle. In this case, Steve had an accident and the police were called; therefore, there was no "stop" for which reasonable, articulable suspicion must be found. Nonetheless, this is always an area to explore. In the event one files and argues a Motion to Suppress the Stop, and the Motion is overruled, you may still be successful in laying the groundwork to challenge the evidence beyond a reasonable doubt. The next question is whether there was probable cause to arrest the defendant.

Probable cause?

Va. Code §19.2-81 permits a police officer to make warrantless arrests for misdemeanor offenses that occur in his presence. That statue also carves out an exception for police officers to make warrantless arrests for certain offenses that do not occur in the police officer's presence, which include accidents, DUI, and other situations. Specifically, a police officer may determine at the scene of any accident involving a motor vehicle, upon reasonable grounds to believe, based upon personal investigation and information obtained from eyewitnesses, that a crime has been committed by a person then and there present, apprehend such person without a warrant of arrest. In addition, the police officer may, within three hours of the occurrence of any such accident involving a motor vehicle, arrest without a warrant at any location any person whom the police officer has probable cause to suspect of driving or operating such motor vehicle while intoxicated in violation of Va. Code §18.2-266. This statute is to be read in conjunction with Va. Code §19.2-73, which allows a summons to be issued in certain circumstances for a DUI offense.

In this case, Steve was arrested more than three hours after the accident and it is not known exactly where the police arrested Steve. If Steve was arrested at the scene, then the warrantless arrest was proper; however, if Steve was not arrested at the scene and that DUI arrest was more than three hours after the accident, then a warrant would be required.

In addition to the warrantless arrest being procedurally proper pursuant to Va Code §19.2-81, the arrest must be based on probable cause. The fact pattern indicates that Steve was asked to complete a number of Field Sobriety Tests (FSTs), including the 9-Step Walk and Turn, the One-Leg Stand, Finger to Nose Touch, Horizontal Gaze Nystagmus (HGN), ABCs and the Finger Count. These FSTs attempt to test for impaired coordination and neurological deficiencies which may be due to alcohol or drug intoxication. Although it is not known how Steve performed, we will assume that he did not perform these tests to the satisfaction of the police officer. This coupled with his admitting to drinking alcohol and the accident make a successful challenge to probable cause unlikely. Nonetheless, a thorough cross-examination of the officer concerning the FSTs can often prove helpful when challenging the case. This is often the most overlooked aspect of the Commonwealth's case.

The only FSTs that have been subjected to some level of scientific examination authorized by the National Highway Traffic Safety Administration (NHTSA) are the Nine Step Walk and Turn, One Leg Stand and HGN. These tests are commonly referred to as the Standardized Field Sobriety Tests (SFST). There are three studies that were sponsored by NHTSA indicating that if the battery of tests are done correctly, then there is a probable cause basis to indicate that a person's BAC is greater than .10 percent. It is important to note that these tests were determined to be reliable only as evidence for probable cause purposes and not as evidence to prove beyond a reasonable doubt that a person is intoxicated. Also of significance is that the SFST's do not include commonly used tests such as the Finger-to-Nose Touch, ABCs, Finger Count or general counting because these tests have proven to be unreliable as sobriety tests.

At least one scientific review has been published which is critical of the basis for the creation and use of the SFSTs. In *The Psychometrics and Science of the Standardized Field Sobriety Tests*,[2] Steve Rubenzer, Ph.D., points out several serious problems with the valid-

ity of the SFSTs. The most important problem is that the SFSTs fail to meet relevant professional standards regarding validation of scientific testing. Standardization is crucial if research findings are used to support the validity of the tests, since a test that is modified is no longer the same test. As NHTSA states, "If any one of the standardized field sobriety test elements is changed, the validity is compromised." The SFSTs suffer from serious reliability and validity problems. Reliability data is lacking or below accepted standards for psychological tests used for making decisions about individuals. The SFSTs have not been subjected to a rigorous "blind" assessment for their validity. None of the studies of the SFSTs have been truly double blind, as expected in medical research. Standard errors of measurement are not provided, and even NHTSA claims the SFSTs, when optimally used, are less than 80 percent accurate. The SFSTs have been evaluated primarily by NHTSA supported researchers, with no rigorous evaluation by disinterested researchers in a field settings.

The proponents of the SFSTs claim that the tests are standardized and validated psychological tests. The first claim has some justification if the SFSTs are strictly administered, scored, and interpreted in line with NHTSA guidelines. Many more serious questions, however, arise regarding their validation and other psychometric properties. The SFSTs have been evaluated primarily by their proponents and there have been no studies of the SFSTs as a group in either laboratory or field studies by disinterested researchers."[3] At least one state court has undertaken a thorough analysis of the SFSTs barring their admission into evidence if the officer in the field deviates from the procedures described in the NHTSA Manual.[4]

The HGN test is a neurological test characterized as a non-divided attention test. It is based on the premise that consumption of alcohol will cause nystagmus in the eyes. There are three primary parts to the test with the purpose of testing the ability of each eye to follow a stimulus smoothly from side to side, to measure for nystagmus of the eyes at 45 degrees and maximum deviation. There are a number of issues to consider when examining an HGN exam by a police officer that will affect the validity of the test results. One concern is that a small percentage of the population has a natural nystagmus of the eyes. A second concern are external factors such as fatigue and the ingestion of aspirin that can cause nystagmus in most subjects. Third, and probably the most common, is the incorrect administration of the HGN by the police officer. A common example of this is passing the stimuli too quickly which will cause what is known as rebound nystagmus.

The One-Leg Stand and the Walk and Turn tests are "divided attention tests" and are the most common tests utilized by police in the field. These tests have limitations indicating when they should not be given due to a person's age, weight or physical condition. The Finger-to-Nose Touch, ABCs, and Finger Count tests are also divided attention tests; however, there is no scientific basis or underlying empirical data to support their reliability in testing for the effects of alcohol. Despite this lack of reliability, these tests are commonly given and can be very damaging to a defendant. As Steve's attorney, I would challenge the officer's FST findings through either a Motion *in Limine*, a *Daubert*-type Motion, or thorough cross-examination of the officer at trial.

A suspect's ability to perform the FSTs will be affected by the numerous external factors going on around them. A few of the more common factors are lighting conditions, the strobe effect from the police vehicle and moving headlights; grade, type and condition of the testing surface; proximity to highway and volume of traffic; shoes and clothing worn by the accused; and the weather. The ability of a suspect to perform the SFSTs will also be affected by their physical condition including medical problems such as injury, inner ear problems and disease or illness such as diabetes, multiple sclerosis, or cystic fibrosis. It is also important to be aware of other health issues of the client that can affect the FSTs and the breath test such as acid reflux or GERD.

Steve also submitted to a PBT which registered a blood alcohol content of .14 percent. Va. Code §18.2-267 states that a Preliminary Breath Test (PBT) is inadmissible as evidence in the prosecution of a DUI. An exception has been carved out by the Court of Appeals by which a Motion to Dismiss based on lack of probable cause does not constitute a "prosecution" under the statute. In this circumstance, the PBT can be admissible for purposes of establishing probable cause.[5]

As Steve's attorney, if I intended to challenge the arrest for lack of probable cause, then I would be prepared to attack the PBT. The best way to block the admission of a PBT result into evidence is to challenge its validity, accuracy, or its approval by the Department of Forensic Science. I would determine if the PBT had been properly operated, calibrated and maintained. I would also try to prove that the PBT is not equipped with safeguards to prevent false or incorrect results due to mouth alcohol or other interferents. This is typically accomplished through cross-examination questions of the police officer but can be done with an expert. You may also consider questioning the police officer on whether the PBT is specific for ethanol alcohol or if it has any processes or mechanism to screen out substances that are similar to alcohol.

Upon arrival at the police station, Steve submitted to an Intoxilyzer 5000 breath test. The test protocols set out by the Department of Forensic Science for this machine require an observation time of 20 minutes before an accused should start to give at least two samples. During this period, the accused should be closely observed by the test operator and instructed not to belch, burp, or vomit. If the accused does belch, burp or vomit during the wait period, then the 20-minute observation period should be restarted. The accused should provide two samples and, if the test is

successful, then the accused should be given a copy of the certificate of analysis.

In this case, after the 20-minute observation period, Steve provided two samples as instructed, but the Intoxilyzer 5000 reported the second attempt as an "invalid sample." This result required the operator to go through another 20-minute wait period before Steve can provide another sample. A reading of "invalid sample" indicates that there is mouth alcohol present, which affects the accuracy of the machine's reading. Instead of waiting the prescribed 20 minutes as required by the testing protocols, the operator simply waited five minutes before having Steve give two more samples. This is directly in conflict with the prescribed procedures for this machine and draws into question the validity of the test result.

The results of Steve's breath test should not be admitted into evidence because the operator improperly administered the test, drawing into question its accuracy and reliability. This will significantly harm the Commonwealth's case, since the breath test is their strongest piece of evidence. A second defense to the certificate of analysis is that Va. Code §18.2-268.2 requires that any person who operates a motor vehicle upon a highway shall submit to a breath and/or blood test if arrested within three hours of the offense. In this case, the arrest was more than three hours from the time of the offense. A third defense to the certificate of analysis coming into evidence is whether the offense occurred on a public highway. Steve's "pulling out of the campsite" may not meet the definition of a *highway* as defined by Va. Code §46.2-100 or the case law. Be aware that this last defense affects only implied consent and the admissibility of the breath or blood test. A person can still be convicted of a DUI on private property even if a certificate of analysis cannot be used by the Commonwealth.

If Steve is convicted of a DUI under Va. Code §18.2-266, then turn to Va. Code §18.2-270 for the punishment. A DUI is a Class 1 misdemeanor with a mandatory minimum fine of $250. The amount of jail time, if any, that Steve may be required to serve will depend on if this is a first or subsequent offense and the level of any BAC that was admitted into evidence. If the BAC is .15 percent to .20 percent, then the court is required to impose at least a five-day minimum mandatory jail sentence. If the BAC is .21 percent or above, the minimum mandatory jail sentence goes up to 10 days. For any BAC of .15 percent or above, there is also the requirement of the ignition interlock device being placed on the vehicle for at least six months. There is an additional punishment for transporting a person 17 years of age or under while in violation of Va. Code §18.2-266 with an additional minimum fine of $500 and a mandatory minimum jail sentence of five days. Regardless of the BAC, the driver's license will be suspended for one year and the Alcohol Safety Action Program (ASAP) must be completed successfully. Va. Code §18.2-271.1 allows for a restricted license.

If Steve is convicted of Reckless Driving, then he will be guilty of another Class 1 misdemeanor. It is important to note that the mere happening of an accident does not give rise to an inference of reckless driving. Furthermore, Steve may not have been driving on a *highway,* which is an element the Commonwealth must prove. Va. Code §19.2-294.1 states that whenever any person is charged with a violation of Va. Code §18.2-266 and with reckless driving in violation of Va. Code §46.2-852, growing out of the same act or acts and is convicted of one of these charges, the court shall dismiss the remaining charge. As Steve's lawyer, perhaps he should plead guilty to reckless driving and not guilty to DUI. If the plea is accepted, this can result in the Commonwealth being barred from further prosecution of the DUI. Otherwise, if the court, after hearing all the evidence and argument, then intends to find Steve guilty of DUI, argue that Va. Code §19.2-294.1 requires the court to dismiss the DUI.

Endnotes

1. *Yap v. Commonwealth*, 49 Va. App. (2007).
2. Rubenzer, Steve, Ph.D., "The Psychometrics and Science of the Standardized Field Sobriety Tests," *The Champion*, National Association of Criminal Defense Lawyers, May and June 2003.
3. *Id.*
4. *State v. Homan*, 89 Ohio St. 3d 421, 732 N.E.2d 952 (Ohio, 2000).
5. *Stacy v. Commonwealth*, 22 Va. App. 417 (1996).

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The authors can be reached through their website, www.rileywells.com

W. Edward Riley IV is a partner with Riley & Wells in Richmond, practicing primarily in criminal and traffic defense. He graduated from the University of Virginia in 1987 and the T.C. Williams School of Law at the University of Richmond in 1991. Mr. Riley is a member of the Steering Committee for the Virginia Criminal Justice Commission and current president of the Virginia Fair Trial Project. He is active in numerous community service activities, including Special Olympics.

Mitchell M. Wells is also a partner in Riley & Wells, practicing primarily in the areas of criminal law, DUI and traffic violations. He is a graduate of Virginia Military Institute and he received an M.P.A. from Virginia Commonwealth University and his law degree from William & Mary School of Law. Mr. Wells served as an Assistant Attorney General in the Health Care Fraud section of the Office of the Attorney General and served as a Virginia State Trooper for 8 years prior to entering the legal field.

Editor's Note

Few law practices have an exclusive focus. For this issue, the Publications Committee presented the authors with a hypothetical set of facts showing how a criminal practice might cross into the domestic area and the domestic case might dabble in some criminal issues.

Thanks to Ronald R. Tweel of *Michie Hamlett Lowry Rasmussen & Tweel*, we devised a fact pattern which would challenge the most diverse firm in the land.

- Sherry and Steve are married. He is a private security guard and works closely with the county Sheriff's department. Sherry is unemployed and has received treatment from her physicians and psychologist for a bipolar disorder. She is unemployed and has been the primary caretaker of the parties' 3 children.
- Sherry has a 17-year-old daughter from a previous relationship. She and Steve have three other children: a daughter who is 15, a son who is 12, and a daughter who is 8. The children attend public school, have average grades and a spotty attendance record. The spotty attendance record is a result of the parents' disharmony and inability to transport their children to school on time.
- Steve has been an active and involved parent with his children. He has been a Boy Scout leader and a coach of his son's baseball team.
- On a recent occasion, Sherry was attempting to get the children ready for school. Steve, who has a violent temper, became angry when his son was not ready to go to school, as he was prepared to drive him there. Steve began yelling at his son in the downstairs kitchen. Sherry remained upstairs in the master bedroom and could hear Steve yelling at their son. She yelled at her husband to stop it and he ran upstairs to the master bedroom. Sherry slammed the bedroom door shut prior to Steve gaining access. Steve kicked the master bedroom door open which struck Sherry and caused significant bruising on her back and buttocks. Sherry retreated to the other side of the bedroom and grabbed a baseball bat. Steve lunged at Sherry and she swung at him with the baseball bat, missing him. Steve then left.
- Steve thought his 15-year-old daughter observed her parents' altercation in the master bedroom because she had been there fixing her hair before going off to school. She yelled at her father and cursed at him, as he retreated from the master bedroom.
- Sherry was able to obtain a protective order for the events that occurred in the master bedroom. The protective order provided that Steve would remain away from the marital residence for two years; that she would be given exclusive possession of the marital residence; that the children would see their father.
- Sherry, in her youth, had been intimately fondled by her paternal uncle. This uncle had also babysat her 15-year-old daughter. Sherry has concerns that her daughter may have also been abused by this uncle.
- Sherry believes that her husband, Steve, is having an affair with a Sheriff's Deputy, Gail. Sherry has recorded telephone conversations between Steve and Gail that have occurred on the residential phone. She has also taken Steve's cell phone and recorded on a tape recorder the voice messages left for Steve by Gail. In addition, she has reviewed Steve's email on the home computer and seen many love notes from Gail addressed to him. Sherry knows Steve's password because they use this password for Sherry to pay monthly bills through the internet.
- Sherry has other concerns about Gail's behavior. On a weekend when Steve was taking the parties' son on an overnight camping trip, Sherry's automobile, which was parked in their residential driveway, had been vandalized with someone having etched profanity on the side of the car. During the night before this vandalization, a car had stopped at the top of their driveway and a female voice had yelled profanity down the driveway, waking up the 15-year-old daughter and the neighbors. In addition, Sherry had received anonymous notes in the mail, calling her a variety of profane names. When Sherry inquired of Gail's ex-husband about Sherry's concerns regarding the mysterious vandalism and threatening behavior, Gail's husband, Bob, confirmed that he too had had his car vandalized in a similar fashion and had been awakened by voices in the middle of the night from a car parked at the top of his driveway. He also was a recipient of anonymous notes.
- Sherry would like to have the notes and vandalism on Bob's car compared to the notes and vandalism on her car, by some scientific procedure to confirm that both were accomplished by the same individual. Bob has given to Sherry a handwriting sample of Gail's and a screwdriver, which he believes was used to vandalize his car.
- Steve accompanied his 12-year-old son on a camping trip with a number of others. Steve enjoyed multiple beers with the other boys' fathers that evening. In the morning, the dads made Bloody Marys before they broke camp. Steve left camp with his son and an adult passenger in his car. As Steve pulled out of the campsite, he swerved to avoid hitting a child who darted into the street, veered off the road and hit a tree. The adult passenger was injured although Steve and his son were unharmed. The accident occurred at 9:05 a.m.
- The police received a call from a campsite official about the accident and arrived within an hour and began to investigate. The officer found Steve outside his car and the engine was off. Steve admitted to the officers that he had been drinking the night before and that he had one Bloody Mary earlier in the morning. The officer had him perform a number of field sobriety tests (FSTs). Steve was offered a Preliminary Breath Test (PBT) which he took and it registered a blood alcohol content (BAC) of .14 percent. He was arrested without a warrant for DUI and reckless driving at 12:15 p.m. Steve had never been arrested before.
- Steve was transported to the police station where he submitted to a breath test on the Intoxilyzer 5000. After a 20-minute waiting period, the breath test operator instructed Steve to blow twice into the machine. After the second sample was provided, the machine indicated it was an "invalid sample". The operator let the machine clear, waited five minutes and had Steve give two more breath samples. Steve's final BAC was registered at .15 percent. He was given a copy of the breath test result and taken before the Magistrate. The resulting charges were DUI pursuant to Va. Code §18.2-266 with a BAC of .15-.20 percent, while transporting a person age 17 or younger, and reckless driving pursuant to Va. Code §46.2-852.