

Checklist for the Prosecution: How to Prove a DWI

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Drunk driving cases are complicated and the prosecution of a DWI covers many areas of trial practice. Accordingly, all prosecutors should have ready understanding of the methods of proving a DWI. This article will attempt to simplify the process.

A successful drunk driving prosecution often relies on chemical test results and observation testimony. For the purposes of this article, it is assumed that the defendant voluntarily submitted to a chemical test,¹ was under the influence of alcohol (as opposed to drugs), that the police officer had an opportunity to observe the defendant operating a motor vehicle in Rhode Island and that the same police officer administered the chemical test to the defendant.

If chemical test results are going to be utilized, the prosecution must show that the defendant's blood alcohol concentration ("BAC") was .10 percent or more by weight as shown by chemical analysis of the defendant's blood, breath or urine.² The officer's observation testimony will prove vehicle operation, indicia of alcohol and impairment. The prosecutor's goal is to prove that the defendant operated while under the influence of liquor to such a degree that the defendant was incapable of safely operating. The prosecution can prove a major portion of its case by showing:

- 1) a BAC of .10 percent or greater;
- 2) by proving the defendant's physical impairment resulted from the ingestion of alcohol and because of the alcohol, the defendant was incapable of safely operating a motor vehicle; or
- 3) by showing a combination of a BAC of .10 percent or greater and alcohol-induced physical impairment.

This article will discuss the combined approach of introducing chemical test results and observation testimony. In order to prove its case, the prosecution

will need at least two witnesses — the first witness will be from the Rhode Island Department of Health and the second witness will be the officer who observed the vehicle operation, indicia of alcohol, impairment and administered the chemical test results.

The DOH representative will lay the foundation for the chemical test results and the officer's training. The police officer will testify as to vehicle operation, cause to stop, probable cause to arrest, observations, physical dexterity test results, instructions, administration and (on scene and at station) chemical test results, and the officer's opinion as to the defendant's condition.

In the district court, motions to suppress are usually combined with the actual trial. Thus, the prosecution should proceed as follows:

A. The Department of Health Representative

- Rules and Regulations³ (State's Exhibit #1-full)
- Certification of Breathalyzer Operator⁴ (State's Exhibit #2-full)
- Certification of Breathalyzer Machine⁵ (State's Exhibit #3-full)
- Often, the operational checklist for breath testing equipment is marked for identification only until connected-up by breathalyzer operator (State's Exhibit #4 for identification).
- Often, the DOH representative will testify as to other matters regarding the breath testing machine, training of officers, etc.

B. Arresting officer/breathalyzer operator

- Occupation, training, DWI training, trained as a breathalyzer operator, social experience with alcohol, professional experience with alcohol-related cases.

- Recalls that he/she was on duty on the night in question. Recalls where defendant was stopped, recalls stopping the defendant's vehicle and why. (Probable cause to stop? See, *In Re: John N. 463 A.2d 174* (R.I. 1983). The officer's initial testimony will lay the foundation for first-hand observations of defendant.
- Observations regarding erratic driving, slurred speech, smell of alcohol, bloodshot eyes, etc.
- Officer's request to defendant to step from car and description of walk from the driver's side to the rear of the car.
- Prior to "in custody" interrogation by the officer, the instruction phase and administration and results of field sobriety tests. (Permitted by *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed. 2d 317 (1984).)
- The reading of the Rights For Use At Scene card — compliance with R.I. Gen. Laws § 31-27-3. Officer advised defendant immediately after arrest of the right to a physical examination by a physician of defendant's choice at defendant's expense. (State's Exhibit #5-full)
- Defendant was taken into custody. (Probable cause to arrest? See, *In re: John N. 463 A.2d 174* (R.I. 1983).)
- Officer maintains visual observation of defendant for 15 minutes prior to first phase of breath test.
- Rights For Use At Station form read to defendant (State's Exhibit #6-full)
- Testimony regarding right to physical examination-notice, opportunity to exercise right given to defendant, etc., R.I. Gen. Laws § 31-27-3.

- Breathalyzer checklist used, followed, completed (State's Exhibit #4—now full exhibit if it has been connected-up).
- First test results obtained (State's Exhibit #8—full exhibit only after testimony re: proof of mailing — R.I. Gen. Laws § 31-27-2(c) (2)).
- Second test results obtained (State's Exhibit #9—full exhibit only after testimony re: proof of mailing — R.I. Gen. Laws § 31-27-2(c) (2)).
- Testimony re: mailing the test results within 72 hours. (A copy of the notice as sent is State's Exhibit #7—full). (Now state offers test results as State's Exhibit #8 and #9 full.)
- Testimony regarding instruction phase and administration and results of stationhouse sobriety tests (or videotape of instruction phase and administration of stationhouse sobriety tests as State's Exhibit #10—full).
- Testimony regarding entries made by officer on Alcoholic Influence Report Form and/or other police report forms (or videotape as State's Exhibit #10—full).
- Factual basis for opinion (foundation per *State v. Bruskie*, 536 A.2d 522 (R.I. 1988)).⁶
- Opinion as to intoxication.
- (Optional) Opinion as to the defendant's inability to safely operate a motor vehicle as a result of alcohol-induced impairment.⁷

CONCLUSION

A good trial lawyer simplifies complicated cases. Pre-trial preparation helps streamline cases. Hopefully, this article will be of assistance to all of those interested in the prosecution of a DWI.

Footnotes

¹ Consent as required by R.I. Gen. Laws § 31-27-2(c) (1) means actual consent and may not be implied. *State v. Berker*, 120 RI 849, 391 A.2d 107 (1978). But see, *State v. Guido*, Case No. W2/93-0254A, (Super. Ct. 1995) (Goldberg, J.) (State lawfully obtained results of the test of the defendant's blood from his hospital records. Blood test done by hospital personnel without State or police involvement.).

² Although R.I. Gen. Laws § 31-27-2 requires proof that the defendant's BAC was .10 percent or greater at the time of operation, the trier of fact is allowed to infer that the BAC examination results obtained afterwards were the same at the time of operation. The defense, through expert testimony, can rebut this inference. *State v. Lusi*, 625 A.2d 1350 (RI 1993).

³ See R.I. Gen. Laws § 31-27-2 (g).

⁴ R.I. Gen. Laws § 31-27-2 (c) (4) and (5).

⁵ *Id.*

⁶ Sample "wind-up" questions necessary for the foundation and opinion can be found in *The Midnight Call - Advising the Client to Submit to a Chemical Test*, *Rhode Island Bar Journal*, March 1991.

⁷ Some judges will not allow this testimony because it embraces the "ultimate issue." See however, that line of cases beginning with *State v. Kozukonis*, 100 RI 298 (1965), *State v. Shilo*, 101 RI 533 (1967), *State v. DeCristafaro*, 102 RI 193 (1967) where the physician called by the police was allowed to testify on the defendant's ability to drive. On the other hand, in *State v. Bruskie*, 536 A.2d 522 (1988) the prosecutor stopped short of asking the ultimate issue question of the State Police troopers. ■

Get Your Excuses Ready

Calendars Suspended for One Day of Annual Meeting

Deborah Tate, chairperson of the Annual Meeting Committee, announced for the benefit of lawyers who plan to attend the annual meeting on June 15 and 16, that sessions in all the state courts will be suspended on Friday, June 16. On Thursday, June 15, the courts will give every consideration to excuses requested by attorneys planning to attend the meeting. You are encouraged to make your request as soon as possible.

Attorneys and Legal Secretaries to Sponsor Second Annual CLE Seminar

Just as continuing legal education is an important aspect of an attorney's professional development, so it is, or should be, for legal secretaries and other legal support staff. This was proved true last year when the Rhode Island Bar Association and the Providence County Legal Secretaries Association co-sponsored their first seminar together. On Saturday, April 29, the Bar Association and the Legal Secretaries Association will once again co-sponsor a seminar at the Radisson Hotel in Warwick.

In response to many requests, Donald S. Akins, president of Hildebrandt, Inc., a nationally recognized consulting firm to the legal profession, will return for this full-day seminar. His topic will be practice management. He will describe how practice management fits in with current trends in the profession, covering such topics as (1) the impact of current trends; (2) strategic planning; (3) the interrelationship of practice management, marketing and compensation; (4) the personal development of attorneys and staff; and (5) obstacles to implementing practice management. Attorneys will receive 6.5 RICLE credits for this program. Legal support staff will receive a CLE certificate from the National Association of Legal Secretaries.

In addition to our full-day seminar, we will be holding two concurrent, half-day seminars. The morning session "Do You Know What Your Staff is Doing?" will feature the Hon. Mary M. Lisi, United States District Court, in a panel discussion on ethics, with respect to Rule 5.3 of the Supreme Court Rules of Professional Conduct. Other members of the panel include George Salem, Esq., John

E. McCann III, Esq., and Daria Kreher, personnel director, Edwards & Angell. Attorneys will receive 3.0 RICLE ethics credits; legal support staff will receive a CLE certificate from the National Association of Legal Secretaries.

The afternoon session will feature Daniel P. Coursey, president of Professional Development Group, Inc., speaking on technology in the law office. Coursey will discuss and present an overall view on the latest computer technology available and its importance to and potential impact on the practice of law.

These programs offer useful information for both attorneys and legal support staff, and attorneys are encouraged to register members of their staffs for the ethics and technology portions of this CLE presentation. Education — for attorneys and staff — is the key to meeting the challenges facing everyone in the legal profession today.

For attorneys, the all-day fee is \$125 (includes lunch) and \$70 for an individual session. For non-lawyers and for lawyers admitted fewer than 5 years, the all-day fee is \$80 (includes lunch) and \$55 for an individual session.

For more information or to register, call Karin Schrott, Goldenberg & Muri, 421-7300.

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