Defending Dual Prosecutions — The Driver Who Has Refused the Chemical Test

*by Richard S. Humphrey, Esq.

When a suspected drunk driver has been arrested and thereafter refuses to submit to a chemical test in violation of R.I.G.L. §31-27-2.1 ("The Implied Consent Law"), the drunk driver suspect can be, and very often is charged criminally with Driving While Intoxicated ("DWI") and with the civil violation of Refusing to Submit to a Chemical Test ("Refusal").[1]

Thus, the situation arises that a client comes to you who has been charged with DWI and with Refusal. Immediately, you should provide the client with copies of the DWI Law and the Implied Consent Law. Your client will now have the sobering experience of recognizing the implications of dual prosecutions.

Generally, a license to drive is essential to a client. Therefore, your client may ask about the possibility of a work license or some other type of a conditional license. In this state, there are no conditional/work licenses. Moreover, it is often difficult to have the charges reduced.

The client may inquire as to the possibility of a plea bargain. Ordinarily, most prosecutors will agree to drop one charge if your client agrees to admit to the other. In most circumstances, prosecutors would prefer that your client plead guilty to DWI. However, it is generally more advantageous for your client to admit to the Refusal violation and have the DWI dismissed — the rationale being that the Refusal violation is a civil infraction while the DWI is a criminal charge. It is best to avoid a criminal conviction.

The situation does arise, of course, where the prosecutor refuses to offer you an "either/or" disposition. Also your client may decide to proceed with the trial of the DWI charge *and* the contested hearing on the Refusal charge. A discussion of those scenarios follows.

The DWI

The DWI will be tried in the district court. Therefore, you should immediately move for discovery and inspection pursuant to Dist. Ct. R. Crim. P. 16. In addition, you should consider filing a motion for a Bill of Particulars pursuant to Dist. Ct. R. Crim. P. 6(e).

Richard S. Humphrey, Esq.

Because there will be no chemical (breath, blood or urine) evidence involved, the prosecution will rely on the observations of your client by the police officers.[2] The prosecution will first introduce evidence of your client's driving (usually alleging that the client drove erratically, was speeding, was operating recklessly, etc.).[3] The observations of the client's driving will be used to justify the stop and in some circumstances, to substantiate the claim that your client was intoxicated to such a degree that the client was incapable of safely operating a motor vehicle. See, R.I.G.L. §31-27-2 and King v. DOT.

It is important to determine in advance whether or not the police have issued a summons for the offense allegedly giving rise for the reason for the stop.[4] The Rhode Island Supreme Court relies on the "totality of the circumstances" to justify an investigatory stop. See, In Re John N. 463 A.2d 174 (R.I. 1983). In the event that a traffic ticket was issued, determine if your client has already paid the traffic ticket.[5]

As part of the police officer's testimony regarding the stop, the officer will be asked to describe your client's demeanor and ability to understand instructions and retrieve the license and registration. The officer will also offer testimony as to any odor of alcohol emanating from your client, whether or not your client's eyes were bloodshot, and your client's ability to step out of and walk to the rear of the car when requested by the officer.

Next, the prosecutor will attempt to introduce the results of field sobriety tests administered by the arresting officer at the scene of the stop. Although nothing in the law requires a suspected drunk driver to submit to field sobriety tests, ordinarily the suspected drunk driver complies with the officer's request.[6] Not surprisingly, the police officer will probably testify that your client failed every aspect of the field sobriety test. Naturally, you will seek to discredit the results of the field sobriety test by citing poor lighting, broken pavement, the proximity of speeding traffic, stress, unfamiliarity with the tests, etc.

Ordinarily, after the field sobriety tests are administered and if your client fails, the police will arrest and place your client in custody. At this point, your client is entitled to the Miranda safeguards. See, Berkemer v. McCarthy, 468 U.S. 420 (1984), 104 S.Ct. 3138, 82 L.Ed 2d 317, 335.

The police officer will comply with the requirements of Miranda by reading the suspect the "Rights for Use at Scene" card issued by most police departments. The "rights" card will inform your client of the following:

1. That your client has been arrested "for suspicion of driving under the influence of intoxicating liquor and/or drugs";[7]

*Richard S. Humphrey, Esq. is the principal attorney in the Tiverton-based law offices of Richard S. Humphrey, a general practice firm with emphasis on litigation.

2. The Miranda warnings; and

3. That your client has a right to be immediately examined by a physician of the client's choice at the client's expense.[8]

Next, the prosecution will seek to introduce the results of the sobriety tests administered at the police station. Again, your client was not required to take those tests. The police station coordination tests are usually administered in a fairly controlled atmosphere. Often, the testing procedure is videotaped. It is your responsibility to obtain a copy of the videotape (if one exists). Police departments are usually willing to provide a copy if you provide the blank cartridge. Viewing the videotape will assist you in the preparation of your client's defense.

Finally, after the admission of evidence regarding your client's operation of a motor vehicle, the stop, compliance with R.I.G.L. §31-27-3, the field sobriety test results, and the police station sobriety tests results, the prosecution will seek to elicit the opinion testimony of the police officer(s) regarding your client's intoxication. You must attempt to block that opinion.

In order to block the opinion, you must analyze and attack the foundation offered prior to the opinion. In State v. Bruskie, 536 A.2d 522 (R.I. 1988), the foundation litany covered the officer's prior training in the detection of DWI, personal experience with alcohol, and his social and professional experience with people under the influence of alcohol.[9] If the officer has deficient experience or training with people under the influence of alcohol, the officer may be precluded from giving the opinion testimony that your client was intoxicated.[10]

The Refusal

Your client has also been charged with Refusal. Immediately after your client has been arrested and processed, the police will complete the necessary paperwork including the sworn report of the law enforcement officer pursuant to R.I.G.L. §31-27-2.1 ("the affidavit"). Next, the police will forward the summons, the affidavit and other related papers to the Administrative Adjudication Division ("AAD") for processing.

Once the police officer's affidavit and related papers arrive at the AAD, an AAD judge will review the affidavit and thereafter will probably issue a suspension order. Thus, the police officer's affidavit sets the suspension wheels in motion.

Your client will then receive a notification from the AAD. The notification will require your client to immediately surrender the driver's license.[11] Your client should do so and should also comply with all other AAD requirements in order to receive immediate credit for the period that operating privileges are suspended.

Because your client's operating privileges have been suspended, you should immediately file a demand for a speedy hearing. R.I.G.L. §31-27-2.1(b) provides that "a hearing [shall be held] as early as practical upon receipt of such request in writing." In addition, in Mackey v. Montrym, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed. 2d 321 (1979) the Supreme Court approved a post-suspension hearing that was available immediately after license suspension. If your client is not granted an immediate hearing after the license is suspended, you should move to dismiss based on the lack of a speedy hearing.

Next, you should file a discovery demand with the AAD. On occasion, the AAD discovery materials differ from the materials that you received via the discovery demand filed in the district court. Any attempt by the prosecution to supplement the AAD materials at the time of the contested hearing should be blocked.

At the hearing, according to R.I.G.L. §31-27-2.1, the prosecution is required to prove the following:

1. [That] the law enforcement officer making the sworn report had reasonable grounds to believe that the arrested person had been driving a motor vehicle within the state while under the influence of intoxicating liquor, toluene, or any controlled substance as defined in Chapter 28 of Title 21, or any combination thereof, and

2. that the person while under arrest refused to submit to the tests upon the request of a law enforcement officer,

3. that the person had been informed of his rights in accordance with [Sec.] 31-27-3, and

4. that the person had been informed that the penalties incurred as a result of non-compliance with [R.I.G.L. 31-27-2.1].

Therefore, at the hearing you must attack the police officer's affidavit. The usual grounds of attack concern the probable cause for the stop and the

subsequent arrest, whether or not the defendant was read the rights in accordance with R.I.G.L. §31-27-3, and if the defendant was fully apprised of the penalties for refusal. Each of the four elements will provide you with ample areas for cross examination.

In general, prior to the hearing you should investigate every aspect of the technical requirements for a sworn affidavit. Was the affidavit actually sworn to in front of a notary? Was the notary actually a valid notary at the time that the oath was taken? A review of the Secretary of State's *Notary Public Guide* will be helpful.

During cross examination you should elicit testimony as to whether or not your client was coerced into refusing to submit to the chemical test. If your client was informed that he or she would be allowed to go home if he or she refused the chemical test, but would be forced to spend the night in jail if he or she submitted to and failed the chemical test, the action of the police can be characterized as coercion. Coercion is a complete defense.

Conclusion

Defending dual prosecutions is expensive, time consuming and sometimes risky. Hopefully, this article will have clarified the process.

Footnotes

[1] Significantly, District Court Chief Judge DeRobbio has indicated that a drunk driver who refuses to submit to a chemical test need only be advised of the consequences of Refusal. The drunk driver need not be advised of "the penalties that may be imposed" if he is also charged with drunk driving, a criminal charge. See, Keller v. Bessett, A.A. 90-201.

[2] In King v. DOT, A.A. 90-203, Judge Pirraglia stated that the law does not prohibit ". . . driving after drinking per se; but conditions guilt in the case of driving after drinking on a finding that such operator was operating a motor vehicle while under the influence to a degree that rendered such person incapable of safely operating the same."

[3] The prosecution must prove vehicle "operation." It is not sufficient to prove mere "actual physical control." See, State v. Capuano, 591 A.2d 35, 37 (R.I. 1991).

[4] Once arrested, your client has the right to a confidential telephone call within one (1) hour of detention. R.I.G.L. §12-7-20.

[5] In Commonwealth v. Kline, 592 A.2d 730 (Pa. Super. 1991), headnote #2 states: "Double Jeopardy Clause barred prosecution of defendant for driving under the influence of alcohol (DUI) because defendant had previously pled guilty to summary traffic violation for failure to drive on right side of roadway and because she was charged DUI to a degree which rendered her incapable of safe driving and only conduct relevant to her degree of intoxication was her weaving back and forth across center line, Commonwealth had to prove defendant's failure to drive on right side of roadway in order to convict her of DUI." (Statutory cite omitted.)

[6] However, a suspected drunk driver is required to submit to a preliminary breath test at the scene if requested by the arresting officer. See R.I.G.L. 31-27-2.3.

[7] The Newport Police Department utilizes a card that indicates that the suspect is "detained" as opposed to "arrested."

[8] See, R.I.G.L. §31-27-3.

[9] The Midnight Call - Advising the Client to Submit to a Chemical Test, Rhode Island Bar Journal, March 1991.

[10] At least one court has held that the officer's testimony should not "parrot" the language of the statute. In State v. White, 747 P.2d 613, 618 (Ariz. App. 1987) the court analyzed Fuenning v. Superior Court, 139 Ariz. 590, 680 P.2d 121 (1984) and stated that: "testimony which parrots the words of the statute moves from a permissible opinion to an impermissible opinion of guilt or innocence. Fuenning's supplemental opinion stated that, "when, in a DWI prosecution, the officer is asked whether the defendant was driving while intoxicated, the witness is actually being asked whether the defendant was guilty" 139 Ariz. at 605, 680 P.2d 131 (emphasis added).

[11] In addition, lately the AAD has been requiring that people accused of Refusal surrender the license plates and registrations until they provide proof of financial responsibility. See, R.I.G.L. §31-32-4.