The Midnight Call — Advising the Client to Submit to a Chemical Test

by Richard S. Humphrey, Esq.

The drunk driving laws are getting tougher every year. In July, 1990 RIGL 31-27-2 (hereinafter "The DWI Law") was amended once again. In addition, RIGL 31-27-2.1 underwent some change. Some of the minor changes to both laws involved enhancing penalties. However, the major change to the DWI law was the addition of the following:

> Proof of guilt under this section may also be based on evidence that the person charged was under the influence of intoxicating liquor, drugs, toluene, or any controlled substances defined in Chapter 28 of Title 12, or any combination thereof, to a degree which rendered such person incapable of safely operating a vehicle.

That is to say, in its present version, the DWI law provides that even if a drinking driver refuses to submit to a chemical test, he can still be charged with driving while intoxicated (based on observation testimony of the arresting officer) *and* also charged with failure to submit to the chemical test.

If the individual does not agree to take the test, he/she risks criminal prosecution for driving while intoxicated, as well as a civil charge for refusal to submit to a chemical test. Because the DWI laws are criminal in nature and the Implied Consent Law, a civil proceeding, the courts have deemed the bar against double jeopardy inapplicable.[1]

Thus the dilemma of the midnight call presents itself.[2] When a general practitioner gets a call from his neighbor, sister-in-law or colleague who has been stopped late at night for driving under the influence, the inevitable question is "should I submit to the chemical test?" If this is a first offense and not an accident involving serious personal injuries, my advice is yes, by all means, take the chemical test.

The purpose of the DWI and Implied Consent Laws is to get drunk drivers off the highways. Accord, DiSalvo v. Williamson, 106 RI 303, at 305-306 (1969), Dunn v. Petit, 120 RI 486, 489, (1978) and State v. Locke, 418 A.2d 843, 850 (RI 1980). Toward that end, double charging a defendant with violations of both the DWI and Implied Consent Laws is allowed. See Dunn v. Petit at 490. Nonetheless, a defendant must be fully apprised of all consequences of "Refusal to Submit" State v. Locke at 850. A suspected drunk driver should therefore be advised that not only will certain mandatory sanctions occur in the civil Implied Consent proceeding, but that a criminal DWI charge will also be brought.

If your client ignores your advice to submit to chemical test, more than likely, he/she will be charged with both driving while intoxicated and refusal to submit to a chemical test. To prepare a defense for the Implied Consent hearing, several of the necessary requirements can be gleaned from DiSalvo v. Williamson, supra, State v. Locke, supra, and Mackey v. Montrym, 443 US 1, 99 S.Ct. 2612, 612 L.Ed 2d 321 (1979).

This analysis, however, concerns DWI. It is therefore necessary to look at the method of proof used by the prosecution in a drunk driving case wherein chemical test results are unavailable. Prior to the common use of breathalyzer apparatus, the prosecution often depended on the testimony of the police surgeon. See, e.g. State v. DeCristofaro, 102 RI 193 (1967). The police surgeon would be called to the police department to examine the defendant. He would question the defendant and ask him to perform a variety of sobriety tests. The physician would then form an opinion as to the sobriety of the defendant and later, at trial, that same physician would be asked to reiterate his opinion.

Under the new rules of evidence and emerging case law, lay persons can now advance their opinions in court based on their own observations combined with their training and professional experience. In State v. Fogarty, 433 A.2d 972 (RI 1981) lay witnesses — all relatives of the defendant — were allowed to offer their opinions of the defendant's intoxicated condition based on their observation of his alcohol consumption and his physical appearance and mannerisms.

In the context of a DWI case, opinion evidence as to intoxication was elicited and allowed in State v. Bruskie, 536 A.2d 522 (RI 1988). In that case, chemical test results were introduced into evidence. The prosecutor then introduced expert testimony to relate back ". . . the defendant's blood-alcohol concentration at the time of [driving] . . ." Bruskie at 523.[3]

In Bruskie, the prosecutor elicited testimony from the arresting state trooper regarding the defendant's sobriety. For example, Corporal Bilodeau testified as follows:

Q. Corporal Bilodeau, are you a certified breathalyzer operator?

A. Yes.

Q. Did you attend a school in order to receive that certification?

A. Yes.

Q. And did you receive any training at that school?

A. Yes.

Q. And that training consisted of observing people under the influence of alcohol?

A. Yes.

Q. And in fact, didn't you, yourself, get put under the influence of alcohol in order to make firsthand knowledge of what the effects are?

A. Yes.

Q. And Trooper, in your seven years as a member of the State Police, how many arrests for driving under the influence have you made?

A. Over fifty.

Q. And have you ever had occasion to observe individuals under the influence of alcohol in any other

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capacity, work related, besides drunk driving cases?

A. Yes.

Q. How many times?

A. Numerous times. I was assigned to the Block Island detail one summer, and we did numerous liquor checks.

Q. And have you ever had occasion to observe individuals under the influence of alcohol in a social capacity?

A. Yes.

Q. And, Corporal, do you have an opinion, based upon your training and professional experience, and your own social experience, as to this defendant's condition on the night in question?

MR. BARENSE: Objection.

THE COURT: Allowed.

A. Yes.

Q. What is that opinion, Corporal?

A. He was intoxicated. (Tr. v. 3pp 304-306).

An additional trooper, Trooper Ferreira, offered his opinion:

Q. Now, you have testified earlier you have been a member of the State Police for nineteen years, is that correct, sir?

A. That's correct.

Q. And in your nineteen years, Trooper Ferreira, how many arrests for D.W.I. have you made?

A. Approximately fifty.

Q. And in your nineteen years as a member of the State Police, have you ever been involved with the arrests or complaints of people under the influence of alcohol?

A. Yes, I have.

Q. How many, sir, approximately?

A. A hundred.

Q. Have you ever had the occasion to observe individuals under the influence of alcohol socially, Trooper?

A. Yes, I have.

Q. Now, do you have an opinion, based upon your training, professional experience, and own social experience, as to this defendant's condition?

MR. BARENSE: Objection.

A. Yes, I do.

Q. What is that opinion?

A. Under the influence of alcohol. (Tr. 344-340).[4]

CONCLUSION

The new amendment to the DWI law now mandates that the drinking/driving suspect, with no prior DWI or "Refusal" convictions and who has not been in an automobile accident, should submit to the chemical test.

It is clear that police officers will now be given greater latitude to render an opinion on the ultimate issue.[5] Therefore, it is wise to advice your drinking driving client, under the circumstances described herein, to submit to the chemical test to avoid the risk of dual prosecutions under the criminal DWI Law and the civil Implied Consent Law.

Footnotes

[1] Nichols Drinking/Driving Lit. section 20:12 citing Raymond v. Department of Motor Vehicles, 219 Neb 821, 366 NW2d 758 (1985).

[2] RIGL 12-7-20 provides that any person arrested should be provided with the opportunity to make a telephone call within one hour after detention. The law also provides that the telephone call should "... provide confidentially between the arrestee and the recipient of the call."

[3] Retrograde extrapolation is required in certain states. See e.g., State v. Gray, 552 A.2d 1190 (Vt. 1988).

[4] These excerpts from the trial transcript are contained within the State's brief.

[5] See, State v. DeCristofaro, 102 RI 193, 199, note 3 (1967).

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