

THE TRAFFIC BEAT

Volume 3, Issue 2

Summer 2008



UNIVERSITY of
WISCONSIN
LAW SCHOOL

Published by:

The Resource Center on Impaired Driving

with grant funding provided by the Bureau of Transportation Safety, Wisconsin State Patrol, Wisconsin Department of Transportation.

Visit us at:

www.law.wisc.edu/rcid

Staff:

Nina J. Emerson
Director
(608) 265-3411
ninaj@wisc.edu

Tara Jenswold-Schipper
Assistant Director,
Traffic Safety Resource Prosecutor
(608) 262-6882
jenswold@wisc.edu

Room 2348
UW Law School
975 Bascom Mall
Madison, WI 53706

Inside This Issue:

Case Law Update	1-2
From the SLH	3-5
Countering Drivers Excuses	5-6
Ignition Interlock	6
Upcoming Events	7

WELCOME to *The Traffic Beat*, a newsletter brought to you by the University of Wisconsin Law School's Resource Center on Impaired Driving. *The Traffic Beat* is distributed to key players in the traffic safety arena and is designed to provide readers with a variety of information relevant to traffic safety. If you have suggestions for future topics or would like further information on any of the featured articles, please contact Tara Jenswold-Schipper via e-mail at jenswold@wisc.edu or by telephone at (608)262-6882.

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OWI-RELATED CASE LAW UPDATE

Below is a summary of recent OWI-related cases. For a more exhaustive case law summary, or to read the decisions in their entirety, visit our website at www.law.wisc.edu/rcid.

State v. Jorgensen, 2008 WI 60

Decided: June 13, 2008

Jorgensen was in court for a plea and sentencing hearing, when it was discovered he was intoxicated and in violation of the no alcohol terms and conditions of his bond agreement. As a result, he was charged with bail jumping, operating after revocation, and OWI. The State prosecuted Jorgensen for these offenses and allowed the same prosecutor and judge who witnessed the alleged intoxication at the court hearing to handle the trial on the new charges. Jorgensen was convicted of all charges but appealed on three grounds: (1) plain error, (2) ineffective assistance of counsel, and (3) in the interest of justice. The circuit court denied the motion for relief and the court of appeals affirmed. Jorgensen argued that the reading of the hearing transcript during the trial and the prosecutor's closing arguments were prejudicial. The court of appeals found that the defense's failure to object to the closing remarks was not ineffective counsel but was a defense strategy and the reading of the transcript out loud in court was not enough to impact the jury's verdict.

The Wisconsin Supreme Court reversed after reviewing the case under the plain error doctrine, Wis. Stat. § 901.03(4). An appellate court can review errors that were waived by a party's failure to object. *State v. Mayo, 2007 WI 78, ¶29, 301 Wis. 2d 642, 734 N.W.2d 115*. However, the defendant

must show based on the evidence that the error was “fundamental, obvious, and substantial.” *Id.* The State then has the burden of proving the errors were harmless and did not have a bearing on the verdict. The State in this case failed to meet this burden.

The Supreme Court found that reading the transcript was highly prejudicial because the jury heard the judge and prosecutor’s conclusions about Jorgensen’s guilt and the defense was not given the opportunity to cross-examine. Furthermore, the Court concluded that the prosecutor’s closing statement, particularly the prosecutor’s assertion that Jorgensen was a “chronic alcoholic,” violated the Confrontation Clause because he was not allowed an opportunity to confront any witnesses against him. *State v. Jensen*, 2007 WI 26, ¶13, 299 Wis. 2d 267, 727 N.W.2d 518. The Court found that the errors were “obvious and substantial” and the State did not prove the errors were harmless to the outcome. *State v. Sonnenberg*, 117 Wis. 2d 159, 177, 344 N.W.2d 95 (1984).

FROM THE WISCONSIN STATE LABORATORY OF HYGIENE

The following is an excerpt from a chapter written by Patrick Harding, Toxicology Section Supervisor, WSLH, for *Alcohol Toxicology for Prosecutors*, published by the American Prosecutors Research Institute (APRI), July 2003. To view the article in its entirety go to http://www.ndaa.org/publications/apri/traffic_law.html.

Alcohol Concentration (AC) Estimates

The prosecutor may need to establish an AC at time of driving, rather than at the time that the test sample was obtained. Sometimes a sample cannot be taken until several hours after the driving, requiring the expert testimony to relate the AC to the time of driving. The estimate may be complicated by allegations that additional alcohol was consumed after crash or traffic offense and prior to obtaining the sample. The defense may claim that the alcohol concentration at the time of the offense was lower than the time of the test due to the consumption of alcohol just prior to the offense (the so-called rising curve defense). The defense may also use an AC estimate based on the drinking history in an attempt to discredit the test result (i.e. “I only had two beers”). Conversely, the prosecutor may wish to discredit the defendant’s drinking history by using the test result. Other scenarios, some quite imaginative, may be posed as defenses. A basic understanding of the principles of alcohol pharmacokinetics will aid in effectively dealing with these issues in court.

Note: By itself, the measured AC cannot be used to reliably estimate an AC at any other time, but the measured AC can be used as the foundation of an estimate when knowledge of how alcohol is absorbed, distributed and eliminated is combined with the facts surrounding the case.

Absorption

Absorption is the process of moving alcohol from outside the body into the bloodstream where it can be distributed throughout the body. As a small completely water-soluble molecule, ethyl alcohol is readily absorbed into the mucous lining of the digestive tract. When it comes into contact with the digestive tract, alcohol is absorbed via simple diffusion into the mucous lining and then into the blood. The amount absorbed at any given site depends upon the surface area, the thickness of the lining and the blood supply. Unlike most other ingested substances, alcohol is not digested and can be absorbed unchanged directly through the stomach lining. Only about 20%-25% of ingested alcohol is absorbed in this manner because the stomach has a relatively small surface area and limited blood supply. The remaining 75-80% of the alcohol is rapidly and efficiently absorbed when it leaves the stomach and enters the small intestine which has a large surface area and rich blood supply.

Rate of Absorption and Time to Peak

Because alcohol is rapidly absorbed once it reaches the small intestine, anything that delays the stomach from emptying its contents into the small intestine will slow the rate of alcohol absorption. The most rapid absorption takes place when a 20% solution of alcohol is consumed on an empty stomach. Diluted drinks take somewhat longer to absorb. In concentrated drinks (greater than 40% by volume) alcohol acts as an irritant to the gastric lining and will be retained in the stomach until it can be diluted. Alcoholic beverages containing ingredients that require digestion, such as carbonated beverages, may also slow absorption somewhat. Absorption may also be affected by emotional state, shock and medications that impact stomach function and the general condition of the gastrointestinal tract. The most important factor affecting absorption is the presence of food in the stomach concurrent with alcohol. Food requires digestion and any alcohol trapped in food particles will take longer to be absorbed. The extent of the effect depends on the amount and type of food. The delay in absorption causes a lower peak alcohol concentration that lasts longer compared to consumption on an empty stomach.

Absorption rates and times vary considerable between subjects-even within the same subject at different times under similar conditions. The rate of alcohol absorption is non-linear. An initial rapid rise in AC is followed by a gradual tapering off until a peak concentration is attained. Of greatest forensic use is the time it takes for alcohol to reach its peak concentration after consumption. Peak concentrations are generally attained within 30 -60 minutes of the cessation of drinking. Because of the initial rapid rise of AC after drinking, most of the peak AC is reached within the first 30 minutes. This is true whether or not food is present, even though food can affect the magnitude of the peak concentration. When alcohol is consumed successively over time, as in a social drinking situation, peak concentrations are generally attained with-in 30 minutes of the last drink and may even be attained before the last drink is finished.

Distribution

Once absorbed, alcohol is transported by the blood and distributed throughout the body. As blood flows to the body's organs and tissues, alcohol diffuses across membranes into all areas that contain water. Alcohol always moves by simple diffusion from a higher concentration to a lower concentration. Because alcohol is completely soluble in water, the AC in the whole body is directly proportional to total body water content. Water content varies from person to person. Obese individuals have less water per pound body weight than individuals of average build because fat cells contain little water. Females tend to have a higher proportion of body fat than males. About 68% of an average male's body weight is due to body water, while the percentage is 55% for average females. In general, the heavier a person is, the greater the amount of alcohol that must be consumed to reach a specific alcohol concentration in the body. The relative alcohol concentration in any fluid or tissue is also directly related to its water content. The higher the water content, the higher the relative alcohol concentration.

Elimination

Alcohol is eliminated from the body though metabolism, excretion and evaporation. Metabolism accounts for approximately 95% of alcohol elimination. Enzymes act on alcohol molecules to change them into other compounds; these by-products are further metabolized. Alcohol dehydrogenase (ADH) in the liver is the enzyme that is primarily responsible for alcohol metabolism. ADH is also located in the stomach lining, causing a small portion of an alcohol dose to be eliminated before it has a chance to be absorbed. Other enzyme systems also act on alcohol, coming into play especially at higher alcohol concentrations. Alcohol is also excreted unchanged through urine, tears, sweat, semen and saliva. Each drop of urine that is produced and pooled in the bladder reflects the alcohol concentration of the circulating blood at that time. Because alcohol has a high vapor pressure at body temperatures, alcohol will evaporate from the blood into the lungs and be excreted in breath, allowing it to be measured in a breath sample.

Rate of Elimination

The average rate of elimination (combining metabolism, excretion and evaporation) is between 0.015 to 0.018% per hour. Expressed in terms of common alcohol measurement units this is 0.015 – 0.018 g/100ml or g/210 L per hour. Although the range of rates reported in the scientific literature can be quite large, as a practical matter you can expect a range of rates from 0.01 to 0.025% per hour in drinking drivers. Inexperienced drinkers tend to have a lower average rate than moderate drinkers while chronic drinkers and alcoholics will have the highest average rates of elimination. Elimination rates do not vary significantly within the same person at different times, although alcohol will be eliminated more rapidly during periods of heavy drinking. At low ACs (0.02 and below), the rate of elimination slows considerably as the enzymes no longer have enough alcohol available to work at peak efficiency.

Because metabolism accounts for the vast majority of elimination, there is no practical way for a subject to alter it. As long as blood is flowing to the liver, alcohol will continue to be metabolized.

Countering Drivers' Excuses

By W. Clay Abbott

TDCAA DWI Resource Prosecutor in Austin, Texas.

“What can we do with a defendant’s silly explanation at trial for various signs of intoxication?” While every case demands an individualized response, I have some solid suggestions for officers and prosecutors to nullify these last-minute trial explanations.

The best counter to a defendant’s explanation for her bad driving (lately, cell phone conversations or texting is a popular explanation) is officers’ solid questioning at the scene of the initial traffic stop. Often officers are afraid to ask drivers to explain their actions, but that is a serious misstep. Fear that the offender will have an excuse for a traffic violation, nystagmus, lack of mental abilities, lack of physical coordination, and the refusal to take a breath test is misplaced. The roadside stop is the exact place for such questioning! At the traffic stop, a driver doesn’t have time to concoct a believable story, but you can bet that after several months with capable defense counsel, the defendant will have a halfway reasonable explanation for every clue the officer notes in the police report and video. The best time to get to the truth is when the defendant is most likely to TELL the truth, and if not the truth, then at least the most ineffective lie.

Conduct “Mom’s Sobriety Tests”

Remember that all jurors had mothers, just like yours, who conducted their own field sobriety tests when those jurors came home as teenagers, just like your own mom did. My mother made me wake her up and give her a hug; then she asked me silly questions about my night, all while smelling my breath for alcohol, scanning for bloodshot eyes, and checking my ability to converse with all of my faculties. Mom’s sobriety tests, while not as well researched, tested, and verified as the SFSTs, are far better accepted by and understandable to the average juror. So before officers on the stand ever get to SFSTs, they must fully explain that they conducted Mom’s sobriety tests on the defendant too. This is where DWI cases are won. While defense counsel will always put OFFICERS on trial for their execution of SFSTs, the DEFENDANT is the focus of Mom’s sobriety tests. As a note to prosecutors, don’t forget how important an officer’s initial observations are during jury selection. And officers, nothing in a DWI investigation is as important as this first contact and conversation you have with the defendant. Don’t rush it. Spend as much energy developing this set of skills and techniques as you do any other.

Countering Drivers' Excuses Cont.

When an officer stops a vehicle for poor driving performance or a traffic violation, he must ask the driver to explain why she committed the violation or dangerous behavior. The question should be conversational, not accusatory—it should provide a fair opportunity to explain. The officer should confirm or rebut this excuse with his own observations. Later (after arrest) it is also very helpful to broach the issue again; it is amazing how easy it is for the suspect to remember the truth and how hard to remember a lie. Remember that the jury should and does expect the officer's investigation to be fair, and his ability to explain why he pulled the defendant over is the very essence of fairness. Will the defendant lie? Perhaps—but ask yourself whether the lie at the scene will be better or worse than the one crafted for trial. The explanation the defendant gives on the roadside can be investigated, but it can't once it is made in court. Ask to see the dropped soda, cigarette burn, cell phone, or whatever the defendant says took her attention away from the road and caused the bad driving.

Three Possible Responses

The defendant has only three responses to an officer's request for an explanation. First, she can deny what the officer saw. Such a response is not a problem in court—the officer should win this battle of credibility. And denying the officer's observations also suggests that the defendant is unaware of her dangerous driving behavior. What better evidence of impairment? Secondly, she can admit the behavior with an explanation. This response is certainly not a disaster for the prosecution—the defendant just admitted to the probable cause for the stop. Prosecutors DREAM of this kind of evidence in a suppression hearing. Finally, the well-coached and experienced drunk driver can invoke her right to silence. Such is her right; so be it. Jurors will still view the officer as very fair and concerned that the truth comes out, which is a better result than if the officer had never asked the question.

Remember too that the officer's questions are documented on video. His observations are now locked into our main piece of evidence along with the defendant's unrehearsed and probably most frank explanation. This documentation helps the officer put essential details in his reports and recall details at trial, which is very valuable. Officers and prosecutors are doomed to fail if they are, or appear to be, afraid of the truth.

“Why” Questions

The officer should also ask “why” questions during the SFST performance. For example, an officer observing HGN should ask, “Have you ever been diagnosed with any eye problems?” Again, every defendant ever tried for DWI has “natural nystagmus”—just listen to any defense cross-examination. Investigate if a driver claims eye trouble at the scene: Who is her doctor, when did the eye injury happen, what treatment is she receiving, etc. Again, a suspect's initial excuse will not be as believable as the one defense counsel makes after discovery or on cross when the defendant sits silently, cloaked in the 5th Amendment.

All suspects on the roadside want one thing more than anything in the universe: They want to go home, not to jail. Most will avail themselves of every opportunity to talk their way out of an arrest. If in answering these “why” questions, they establish legitimate explanations for their bad driving (other than intoxication), the officer can make the right call and let them go. Being open to such options makes the officer much more credible.

All of these questions should be asked before the officer finishes his roadside investigation and makes an arrest decision. That being the case, the defendant is not in custody. Because she cannot be the target of custodial interrogation when not in custody, the defendant's statements should be admissible without MIRANDA warnings or waiving her rights. These techniques must be applied as early as possible in the investigation and as completely as the stop will allow.

Prosecutors, make sure that all of this information gets in front of the jury on direct. It will drain the effectiveness of those defense-favorite “isn't it possible” questions on cross.

Wisconsin is State Most Affected by Alcohol, Analysis Shows

A state-by-state comparison by a Wisconsin newspaper concluded that the Badger State is the most deeply affected by alcohol use in the U.S.

The Appleton Post-Crescent reported July 6, 2008 that the analysis included 10 key measures of each state's drinking culture, including price, availability, consumption, and related criminal-justice, social and health impacts of use.

"Looking at the measures the way you did, Wisconsin is the worst," said Traci Toomey, an associate professor and epidemiologist at the University of Minnesota.

Wisconsin has some of the lowest alcohol prices in the U.S. (the beer tax hasn't been raised since 1969), and 17,500 bars, taverns and stores licensed to sell alcohol. The state also has the highest rates of binge drinking and alcoholism in the country. The alcohol industry employs more than 200,000 people in the state, but 320 Wisconsin residents died in drunk-driving crashes last year.

The above information was derived from an article written by Susan Squires, for Gannett Wisconsin Media on July 6, 2008. The Appleton Post-Crescent ran a series of articles that delved deeper into Wisconsin's drinking.

Ignition Interlock Devices Proposed for First-Time OWI Offenders

On June 13, 2008, Representative Tony Staskunas (D-West Allis) announced a bill requiring anyone convicted of first-offense OWI with a blood-alcohol level of 0.16 or more to install an ignition interlock device for a year. Also backing the change were Sen. Jeff Plale (D-South Milwaukee) and Reps. Terese Berceau (D-Madison), Andy Jorgensen (D-Fort Atkinson) and Jeff Smith (D-Eau Claire). As a component of the bill, Rep. Staskunas proposed that the \$365 surcharge imposed after an OWI conviction be raised by \$50 to pay for the cost of overseeing the new system, including follow-ups necessary when drivers fail the interlock test.

Under current law, Wisconsin judges may order an IID device for offenders convicted of a second offense, and they must order the device for offenders convicted of a third or subsequent offense. The proposed legislation would subject first offenders to the device, provided they had a blood-alcohol level of 0.16 or higher.

Mothers Against Drunk Driving (MADD) joined Rep. Staskunas in announcing the proposed legislation. Requiring ignition interlock devices for all convicted drunk drivers is one of the four components of MADD's Campaign to Eliminate Drunk Driving. For more information on the Campaign visit <http://www.maddwisconsin.org/>.

Drunk Driving. Over the Limit. Under Arrest. Crackdown

August 15 through September 1, 2008

During this period, Wisconsin law enforcement agencies will join forces with agencies across the country in participating in the annual Drunk Driving, Over the Limit. Under Arrest. nationwide enforcement effort to crack down on impaired driving and reduce roadway fatalities. The law enforcement effort is supported by \$31 million in national and State advertisements funded directly or indirectly through Congress. The national ads, produced by NHTSA in English and Spanish, are targeted to young male drivers and motorcycle riders who are the most common perpetrators of this deadly crime.

Upcoming Events

10th Annual Wisconsin Prosecutors Seminar on OWI

October 30-31, 2008, The Osthoff Resort, Elkhart Lake, Wisconsin.

The 12-hour program is designed to assist prosecutors in addressing current issues and questions which arise in OWI prosecution. All prosecutors are encouraged to attend. There is no registration fee and the Osthoff Resort is offering discounted rates for prosecutors who wish to stay at the resort. Registration information will be available soon.

15th Annual Traffic and Impaired Driving Law Program

April 14-15, 2009, The Radisson Paper Valley, Appleton, Wisconsin

Have Training, Will Travel

Are you up to speed on the impaired driving and traffic laws?

Is your agency or office in need of a legal update or refresher course?

Is there other OWI-related training you need?

If so, The Resource Center may be able to help. The Resource Center frequently conducts training as part of scheduled in-service or as stand-alone training sessions. Contact Tara Jenswold-Schipper at 608-262-6882, jenswold@wisc.edu, or Nina Emerson at 800-862-1048, ninaj@wisc.edu, for more information.



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