

COMBATING COMMON DUI DEFENSES¹

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I. Reasonable Articulate Suspicion (RAS)

- a. Standard Traffic and Equipment Violations – Good to go
 - i. See 2015 NHTSA Participant Manual, Session 5 “Phase One: Vehicle in Motion” for common indicators of impairment that officers are trained to look for. Bringing out nationally established standards in testimony bolsters RAS and probable cause.
- b. RAS is an objective standard, making an officer’s subjective belief irrelevant. A stop is justified so long as officer observes conduct that objectively creates RAS of a traffic offense, even if it is a different offense than what officer originally thought. – *State v. Juma*, 2012 UT App 27.
- c. Community Caretaker Doctrine – *State v. Anderson*, 2015 UT 90.
 - i. Seizure under 4th Amendment occurred when officer noticed a vehicle with hazard lights on side of the road late at night and pulled up to vehicle to assist with his overhead lights flashing.
 - ii. Seizure was reasonable due to likelihood that occupants of vehicle may need assistance, i.e. – the community caretaker doctrine.
- d. Automatic Plate Readers/Running License Plates
 - i. No Insurance
 1. Officer has RAS to make stop when insurance database indicates the vehicle does not have valid insurance
 - a. *Snedeker v. Rolfe*, 2007 UT App 395.
 - b. *State v. Biggs*, 2007 UT App 261.
 - ii. DL/Registration – The GRAMA Issue
 1. Defendant lacks standing to challenge the search
 - a. No property, possessory, or controlling interest in the DMV records
 2. Suppression under 4th Amendment is not a valid remedy under GRAMA
 - a. Remedies are in Part 8 of GRAMA Statute
 - b. *Virginia v. Moore*, 553 U.S. 164 (2008)
 - i. State may not create an expectation of privacy via statute. Expectation of privacy comes from the 4th Amendment.

¹ This document is current as of August 1, 2016. It may be updated as new issues arise or new case law is published.

3. Lawful access by officer under 63G-2-206(1)
 - a. Accessed (shared) for enforcement and investigation of criminal law, and the record is necessary to the proceeding or investigation.
4. Statute authorizes the use of automatic plate readers for this very purpose.
 - a. 41-6a-2003(2)(a) - “An automatic license plate reader system may be used: by a law enforcement agency for the purpose of protecting public safety, conducting criminal investigations, or ensuring compliance with local, state, and federal laws;”
 - b. 41-12a-805(d)(i) – Specifically says database may be shared (IE - accessed by law enforcement) “for the purpose of investigating, enforcing, or prosecuting laws or issuing citations ... related to (i) registration and renewal of registration of a motor vehicle...”

II. Extension of the Scope of the Stop

- a. Officer may ask a driver to step out of vehicle during traffic stop without violating 4th Amendment. See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) and *State v. Weaver*, 2007 UT App 292.
- b. Odor of alcohol alone is enough to extend stop and investigate DUI. – *State v. Morris*, 2011 UT 40

III. Standardized Field Sobriety Tests

- a. Strict Compliance with NHTSA Standards not Necessary
 - i. Common citation is *State v. Homan* out of Ohio
 1. *Homan* ruled that SFSTs must be done in “strict compliance” with NHTSA standards to be admissible.
 2. Ohio Legislature subsequently passed law requiring only “substantial compliance” with NHTSA standards for SFST evidence to be admissible, therefore, superseding *Homan* and making it no longer applicable case law. See *State v. Boczar*, 113 Ohio St. 3d 148 (Ohio 2007).
- b. Officer Left Front-facing Over-head Lights Flashing
 - i. Optokinetic Nystagmus - Caused by quickly flashing/rotating lights.
 - ii. Will usually not be present when subject focuses on the stimulus as instructed. See Session 8 page 18, 2015 NHTSA Participant Manual
 - iii. You can use OKN Drum as demonstrative evidence.

IV. Probable Cause

- a. Standard is not stringent: Glassy, bloodshot eyes, slight swaying, defendant was belligerent and refused SFSTs was enough to establish PC. *American Fork City v. Singleton*, 2004 UT App 172. (unpublished opinion)
- b. SFSTs are not required for PC under totality of the circumstances. – see also *State v. Despain*, 2007 UT App 367, 173 P.3d 213 (Utah Ct. App. 2007).
- c. Officer need not rule out all innocent explanations for observations before determining probable cause. – *State v. Poole*, 871 P.2d 531 (Utah 1994).

V. Breath Tests

a. Baker

- i. Undivided attention from the officer is not necessary, however, the following factor must be met:
 1. The suspect was in the officer's presence for the entire period;
 2. It is clear that the suspect had no opportunity to ingest or regurgitate anything during the observation period; and
 3. Nothing impeded the officer's powers of observations during the period. *State v. Vialpando*, 89 P.3d 209 (Utah Ct. App. 2004).
- ii. Rechecking the mouth for foreign objects is not necessary where the suspect had no opportunity to introduce a foreign object when the *Baker* observation period was interrupted. *State v. Relyea*, 2012 UT App 55.

b. GERD

- i. Gastroesophageal Reflux Disease (severe acid reflux)
- ii. 15 minute Baker observation period is key.
 1. If properly observed, no mouth alcohol will be present.

c. Officer's Intoxilzyer Certification Lapsed

- i. Prosecution may still admit evidence of breath test result if proper foundation is laid for the evidence. See *State v. Keith*, 2005 UT App 445. (unpublished decision)
 1. Officer may still testify to previous training and how he/she operated the breath test instrument. Need to show that although not certified, still complied with proper procedures.
 2. Use UHP intox techs to come and establish how the instrument is maintained and how accuracy is ensured.

VI. Blood Tests

a. Chain of Custody

- i. There is a presumption that the evidence was handled with regularity when evidence is in the hands of the state, and affirmative evidence of bad

faith or tampering is required to suggest otherwise. – *State v. Wynia*, 754 P.2d 667 (Utah Ct. App. 1988).

- ii. There is no need to subpoena every individual in the chain of custody that touches evidence for that evidence to be admissible. See *Wynia* and also *State v. Smith*, 2012 UT App. 370.
- b. Swab Contaminated the Sample
 - i. The two things that would have to occur for contamination:
 - 1. Liquid from swab would have to enter needle; and
 - 2. Substance would have to be measured as ethyl alcohol.
 - ii. Many swabs are not alcohol based at all
 - 1. Use officer testimony to establish if they used non-alcohol based swabs.
 - iii. Even alcohol based swabs are isopropyl alcohol, not ethyl alcohol
 - 1. Toxicologist can testify that isopropyl alcohol will not measure in the ethyl alcohol test.
 - 2. Even if ethyl alcohol was used, if arm was dry when needle was inserted, there will be no contamination.
 - a. Again, officer/phlebotomist testimony used to establish this.

VII. Drug Concentration Falls within Therapeutic Range

- a. First and foremost, our statute does not care about therapeutic ranges:
 - i. Drug: any substance that, when knowingly, intentionally, or recklessly taken into the human body, can impair the ability of a person to safely operate a motor vehicle. See Utah Code 41-6a-501(c)(iii)
- b. You need to have a working knowledge of the drug and its effects. Use a drug handbook, Physician Desk Reference, or even Google to find out as much as you can about the drug.
 - i. Some drugs by their very nature, even when therapeutic, are impairing substances.
- c. Work with toxicologist
 - i. Can therapeutic range (or even lower) have impairing effects on individuals?
 - 1. Won't be able to testify about specific defendant, but in general.
 - ii. What do quantitative amounts mean?
- d. Utilize a DRE
 - i. Use expertise to discuss the drug classification's impairing effects and how it impacts driving
 - ii. Tie together with officer observations and toxicologist general information
 - iii. Can make for a very strong case!

VIII. Marijuana – Prescription or Legal Use Affirmative Defense

- a. FDA has not approved marijuana for prescriptive use, therefore these are not prescriptions.
- b. Marijuana is still federally prohibited under 21 U.S.C. 801 et seq. Federal law trumps state laws, and therefore any use of marijuana is still technically illegal.
 - i. Schedule I controlled substance
 - 1. No current accepted medical use; and
 - 2. High potential for abuse.
 - ii. Banks can't loan or accept money from marijuana industry.
 - iii. Marijuana shops can only receive cash. No check or credit card payments for product.

IX. Self-Incrimination - *Miranda*

- a. Traffic stops are temporary and brief, and not tantamount to a formal arrest, therefore, a suspect is not 'in custody' for purposes of *Miranda*. See *State v. East*, 743 P.2d 1211 (Utah 1987) and *Salt Lake City v. Carner*, 664 P.2d 1168 (Utah 1983).
- b. Inculpatory statements made about DUI while in car are not subject to *Miranda*. Subject not in custody while she performed SFSTs. *Salt Lake City v. Womack*, 747 P.2d 1039 (Utah Ct. App. 1987).
- c. Requiring a suspect to submit to breath test under threat of losing license was not *Miranda* violation. *American Fork City v. Crosgrove*, 701 P.2d 1069 (Utah 1985).

X. Implied Consent Generally - After *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016).

- a. Nature of the Case: Three consolidated cases where multiple states' implied consent laws criminalizing a refusal to submit to breath and blood tests were challenged under 4th Amendment.
- b. Breath test – valid warrantless search under search incident to arrest doctrine:
 - i. Refusal for breath test can be criminalized under 4th Amendment.
- c. Blood test – much more invasive than breath test, so you need a warrant,
 - i. See also *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).
 - 1. Per se exigency due to natural metabolism of alcohol in the blood was rejected by Court.
 - 2. Did not hold that exigency for a blood draw could not exist. Exigency determined on a case-by-case basis, depending on the facts.
- d. Most important takeaway for Utah:
 - i. “Our prior opinions have referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary

consequences on motorists who refuse to comply. Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.” *Birchfield* at 2185.

- ii. Don’t let defense argue that the implied consent admonition coerced consent for a blood draw. We do not criminalize the refusal, so the analysis of *Birchfield* is not applicable when it comes to blood draws and warrants under implied consent.