Meeting Defense Challenges In DUI Prosecutions

August 21, 2013 – Logan, Utah

Driving pattern and traffic stop

Reasonable suspicion for DUI

Equipment violation

Moving violation

Citizen tip

Reasonable suspicion for DUI

Old fashioned weaving over line / outside lane

Utah Code Ann. § 41-6a-710(1)(a).

Distinguish *State v. Bello*, 871 P.2d 584 (Utah Ct. App. 1994), *cert. denied*, 883 P.2d 1359.

Equipment violation

State v. Spurgeon, 904 P.2d 220 (Utah Ct. App. 1995).

Any equipment or moving violation justifies stop).

Other quirky reasonable suspicion

State v. Anderson, 732 So. 2d 605 (La. App. 1999) (**stopped at green light** is reasonable suspicion).

Russell v. Anchorage, 706 P.2d 687 (Alaska App. 1985) (**backing up with mist on rear window** is reasonable suspicion).

Moving violation

Variations

State v. Gibson, 665 P.2d 1302 (Utah 1983) (where officer knew three months earlier D's license revoked for one year RS existed for DOR).

Moving violation

Variations

Snedeker v. Rolfe, 2007 UT App 395 (computerized check indicating vehicle registered to a business and not insured is reasonable suspicion for stop, *even where driver of vehicle actually has personal insurance covering vehicle*).

See also, *State v. Biggs*, 2007 UT App 261.

Insurite: "NO INSURANCE", "INSURANCE NOT FOUND"

Officer relies on another officer's knowledge

State v. Houston, 2011 UT App 350.

On-duty officer in parking lot talking with off-duty trooper in November 2008.

Trooper sees defendant driving from parking lot and, knowing from past dealings that defendant was revoked until 2012, says "That's Patricia Houston driving that vehicle, and she's revoked for alcohol if you want to go stop her."

Officer relies on another officer's knowledge

State v. Houston, 2011 UT App 350.

"[I]f one officer ha[s] reasonable suspicion to effectuate a level two traffic stop and pass[es] that information along to a second officer, under the **collective knowledge doctrine**, that reasonable suspicion [is] imputed to the second officer and justifie[s] the second officer's level two traffic stop."

At suppression hearing, first officer needs to be able to say why s/he has reasonable suspicion.

Citizen tip / caller to 911

Kaysville City v. Mulcahy, 943 P.2d 231 (Utah Ct. App. 1997), *abrogated on other grounds*, *State v. Saddler*, 2004 UT 105 (identified caller, "drunk," wrong but similar make, direction of travel, stopped w/ no observed driving pattern).

Citizen tip / caller to 911

Mulcahy, cont'd: three-factor test analyzed (1) the reliability of the informant, (2) whether the informant gave enough detail about the observed criminal activity to support a stop, and (3) whether the police officer's personal observations confirm the [information in] the informant's tip.

Citizen tip / caller to 911

Mulcahy, cont'd:

Reliability: identified caller is more reliable since they are subject to prosecution if false allegation.

Sufficient detail: conclusory statements "he's drunk" is sufficient; average person can tell if somebody is drunk.

Officer confirms: officer found car in area; no independent RS. Stop upheld.

See also, State v. Van Dyke, 223 P.3d 465 (Utah App. 2009).

Citizen tip – abrogation issue

under *Saddler*

Test is "totality of the circumstances" test, and not a "rigidly exact[]" test.

Citizen tip – *Bountiful v. Maestas*,
788 P.2d 1062 (Utah Ct. App. 1990).

Officer issuing citations, 'There's a drunk guy asking for directions to a liquor store,' officer meets D coming out of store.

Initial encounter.

See also, *St. George v. Carter*, 945 P.2d 165 (Utah Ct. App. 1997); *State v. McBride*, 1999 UT App 111 (unpublished).

Rule 37, U.R.Crim.P.

SLC v. Street, 251 P.3d 862
(Utah App. 2011).

Unidentified but not truly anonymous tipster flags down officer in Liberty Park.

Officer's subjective state of mind

State v. Lopez, 873 P.2d 1127 (Utah 1994).

End of reasonable suspicion to stop DUI driver

Questions

Extension of stop for DUI investigation

State v. Bissegger, 2003 UT App 256. "However, at this point [o]fficer…testified he smelled alcohol. This justified a continuation of the detention to conduct a field sobriety test."

"I continued to smell the odor of alcohol once the suspect was out of the vehicle."

See also, State v. Van Dyke, 2009 UT App 369.

State v. Adamson, 2013 UT App 22.

Extending stop based on what a computer check indicates is lawful.

Detection of odor of alcohol on second officer-driver interaction sufficient to extend stop.

State v. Beckstrom, 2013 UT App 104.

Where reasonable suspicion existed for DUI and suspect did not have adequate clothing for existing harsh, snowy conditions, transporting her in patrol vehicle to police station garage for SFSTs was lawful.

Defendant consented and was told explicitly she was not under arrest.

Actual physical control

Richfield City v. Walker, 790 P.2d 87 (Utah Ct. App. 1990) (lists actual physical control factors:

(1) whether defendant was **asleep or awake** when discovered;

(2) the **position of the automobile**;

(3) whether **motor was running**;

(4) whether **defendant was positioned in the driver's seat**;…

Actual physical control

(5) whether defendant **sole occupant**;

(6) whether defendant had **possession of ignition key**;

(7) defendant's **apparent ability to start and move the vehicle**;

(8) **how the car got to where it was found**; and

(9) **whether defendant drove it there**.

See also, State v. Hutchings, 2003 UT App 409 (unpublished).

Administration of SFSTs – **deviation from NHTSA manual**

Johnson v. State, 1997 WL 256828, 1997 Ark. App. LEXIS 360 (Ark. App.) (unpub.).

Still admissible at trial – **question of weight not admissibility.**

See also, State v. Thomas, 420 N.W.2d 747 (N.D. 1988) (question is weight not admissibility).

Utah's closest decision is *Rosengreen v. State Dept. of Public Safety*, 2003 UT App 183 (unpublished) (inferential support for substantial compliance is sufficient).

Administration of SFSTs

State v. Homan, 732 N.E.2d 952 (Ohio 2000) (stating minority view that the SFSTs must be administered in strict compliance with the NHTSA manual or they are inadmissible).

Ohio Rev. Stat. 4511.19(D)(4)(a), (b).

IF ANY ONE OF THE STANDARDIZED FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED.

2006 NHTSA SFST Manual, Session VIII-19.

Probable cause to arrest
without SFSTs

American Fork City v. Singleton, 2004 UT App 172 (unpub.).

(Where it was undisputed that defendant was operating a motor vehicle and that defendant had **glassy, bloodshot eyes** and was **slightly swaying** as he talked and that he **became belligerent and refused to cooperate when the officer attempted to administer SFSTs** there was **probable cause** to arrest for DUI).

Probable cause when D "passes" some of the SFSTs

State v. Grier, 791 P.2d 627 (Alaska App. 1990).

(Defendant **passed all SFSTs except for HGN** on which defendant showed six out of six clues. Arrest upheld: officer could rely on the **HGN results and plus odor of alcohol, watery and bloodshot eyes, unsteady balance, bouncy gait, confusion, talkativeness, and difficulty in showing vehicle registration.**

Probable cause when D refuses SFSTs

State v. Sanchez, 36 P.3d 446 (N.M. App. 2001).

(At DWI checkpoint officer requested defendant submit to SFSTs and defendant refused **("I'm not gonna do nothing. Let's go to jail.")**. Appellate court held refusal to submit to SFSTs can be considered, in combination with other factors, to constitute probable cause. **Other factors were minimal: odor of alcohol; blood-shot, watery eyes; admission of drinking two beers.**

See also, *State v. Wright*, 867 P.2d 1214 (N.M. App. 1993); *Commonwealth v. McConnell*, 591 A.2d 288 (Pa. 1991).

Motion to dismiss at close of prosecution's case – sufficiency of evidence

Standard: is the evidence **"so [ ] inconclusive or inherently improbable that reasonable minds must [have] reasonable doubt."** *State v. Puerto*, 2002 UT App 112 (unpublished).

Strong odor of alcohol

Slurred speech

Glassy eyes

Strange conduct/impaired judgment (looking in billfold for registration; talking to child D did not know).

State v. Van Dyke, 2009 UT App 369.

Refusal of SFSTs - prosecution entitled to jury instruction

Orem City v. Longoria, 186 P.3d 958 (Utah App. 2008).

Inferences – argument why D did not submit to SFSTs.

Decision contains the jury instruction.

SFST manual session 8 only included in materials (2006 edition)

2006 is the most recent

Probable cause where no PC finding in civil driver license case – collateral estoppel

City of Orem v. Crandall, 760 P.2d 920 (Utah Ct. App. 1988). Defendant claimed city was estopped from proceeding with the criminal action because of the decision at the driver's license hearing not to suspend defendant's driver's license. Court rejected argument, citing the elements of collateral estoppel.

See also, City of Napierville v. Morgan, 466 N.E.2d 1349 (Ill. App. 1984) ("[municipality] was neither a party to the implied consent proceeding nor can it be said to be in privity with the state.")

PBT (portable/preliminary breath test) admission/exclusion

PBT admissible for probable cause, presence or absence of alcohol, not level.

State v. J.N., 2001 WL 1630456, 2001 Wash. App. LEXIS 2753 (unpublished).

State v. Klingelhoefer, 382 N.W.2d 481 (N.D. 1992); *State v. Orvis*, 465 A.2d 1361 (Ver. 1983); *Marshall v. State*, 824 A.2d 323 (Pa. 2003).

Caution: *Patrick v. State*, 750 S.W.2d 391 (Ark. 1988)(PBT admissible to show negative result).

Becker v. Sunset City, 2012 UT App 99.

"PBT results were shown to be sufficiently reliable to be admissible for purposes of this administrative proceeding. We caution, however, the our decision here is not a holding that PBT results are universally admissible in municipal proceedings or in any other context."

Discovery of officer's field notes

Owens v. State, 2001 Del. Super. LEXIS 247. (Police officer made contemporaneous and subsequently unintelligible DUI field notes on scrap of paper from a vest pocket notebook, which he transferred to Alcohol Influence Initial Report (AIR - similar to Utah's DUI REPORT FORM). Officer referred to those notes at trial though they had not been provided by the state in discovery.

Content is important, not the medium.

Discovery of officer's field notes

Killian v. United States, 368 U.S. 231 (1961) (Where FBI agents destroyed preliminary notes after transferring them to a formal report the due process clause was not violated.

While this may seem an old case, it was cited favorably in *California v. Trombetta*, 467 U.S. 479 (1984), a DUI destruction-of-evidence case holding the state is not required to preserve breath tests for them to be admissible at trial.)

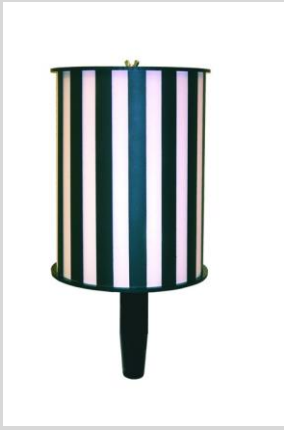
Discovery of officer's field notes

State v. Johnson, 233 P.3d 290 (Kan. App. 2010), (in DUI destruction of officer's notes after transcription is not a due process violation (there was video)).

HGN testimony

Salt Lake City v. Garcia, 912 P.2d 997 (Utah Ct. App. 1996).

("He's observed the test before. And he's made arrests based upon that. **He's observed a strong correlation between people who he has concluded otherwise were under the influence of alcohol and presence of that, of those indicia.**")



OKN drum demonstration

Travis v. State, 724 S.E.2d 15 (Ga. App. 2012), affirmed a trial court's decision "permitting the jury to view a law enforcement training videotape about the HGN sobriety test[,]" *id.* at 23, "hold[ing] that the trial court did not abuse its discretion in allowing the HGN test training video to be played to the jury[,]" *id.*, "given its purpose of illustrating the state trooper's testimony[.]" *Id.* In so holding, the court stated that when "the trial court has exercised its discretion to admit materials for the purpose of illustrating testimony, it will only rarely be found in error[.]" *Id.* (brackets in original omitted).

Hartsock v. State, 322 S.W.3d 775 (Tex. App. 2010), affirmed a trial court's decision to admit "for demonstrative purposes only–a DVD featuring videos of an individual's eyes with and without nystagmus." *Id.* at 778.

See also Edward J. Imwinkelried, Evidentiary Foundations § 4.07 (8th ed. 2012) ("The only limits on the use of demonstrative evidence are the trial judge's discretion and the trial attorney's imagination.").

OKN drum availability info

www.richmondproducts.com

sales@richmondproducts.com

genek@good-lite.com Tel: 847 841 1145

$195.00 plus shipping

HGN demonstrative evidence

AnnMarie Howard, Juab County Attorney's Office.

Motion to admit demonstrative HGN video clip available.

Travis v. State, 724 S.E.2d 15 (Ga. App. 2012).

Baker 15-minute rule still applies in Utah

State v. Relyea, 2012 Utah App 55.

Implied consent – non-English speakers

State v. Cabanilla, 273 P.3d 125 (Or. 2012) (state not required to prove defendant, a **native Spanish speaker** with limited English-speaking skills, understood oral notice of consequences and rights).

State v. Garcia, 756 N.W.2d 216 (Iowa 2008) (adopted **reasonableness standard** of communication for implied consent law).

Implied consent – non-English speakers

Warner v. Comm'r, 498 N.W.2d 285 (Minn. App. 1993) (construing implied consent law held state's failure to provide **deaf motorist** with interpreter and telecommunications equipment did not require DL reinstatement).

Yokoyama v. Comm'r, 356 N.W.2d 830 (Minn. App. 1984) (**Japanese language speaker who did not understand English** did not have statutory right to have implied consent advisory read in Japanese prior to chemical test).

Tongue piercings - decision

Guy v. State, 823 N.W.2d 274 (Ind. 2005), decided "**whether a tongue stud** inserted in [defendant's] mouth more than twenty minutes before the test **renders the results of the test inadmissible**"

and "conclude[d] that it does not, and affirm[ed]" the trial court's decision.

Tongue piercings - study

Barry K. Logan & Rodney G. Gulberg, *Lack of Effect of Tongue Piercing on an Evidentiary Breath Alcohol Test*, 43 J. Forensic Sci. (2004).

Two female subjects with piercings, two without. Listerine (28% alcohol) rinse 30 seconds. "Each subject had readings of less than BAC 0.002 [on a Datamaster breath testing instrument] by 15 min. [after rinsing] illustrating both the effectiveness of the waiting period, and the absence of any additional effect from piercing."

Intoxilyzer – "insufficient sample"

State v. Dukes, 2002 WL 31999218, 2002 Del. C.P. LEXIS 18 (unpublished).

(Intoxilyzer 5000 test … gave alcohol reading of .146 … the test indicated "insufficient sample - value printed was highest obtained." State chemist testified this did not invalidate the .146 reading but rather the **probability is that a true reading of a full sample would have been even higher**. Defendant found not guilty on other grounds.)

Intoxilyzer – clerical errors

Salt Lake City v. Emerson, 861 P.2d 443 (Utah Ct. App. 1993) (clerical errors on checklist to not render results inadmissible).

State v. West, 350 N.W.2d 512 (Neb. 1984) (typo on officer's certification to operate instrument does not invalidate his certification: **"a scrivner's error…[will be] ignored, and the truth instead considered.")**

Use of Intoxilyzer **calibration certificates**

a/k/a "Intoxilyzer affidavits"

Has survived all post-Crawford challenges as new U.S. Supreme Court cases have been decided.

Matthies v. State, 85 So.3d 838 (Miss. 2012).

Intoxilyzer calibration certificates
under *Crawford*

Salt Lake City v. George, 189 P.2d 1283 (Utah Ct. App. 2008), *cert. denied*, 200 P.3d 193 (Utah 2008)(use of calibration certificates in lieu of live testimony by alcohol maintenance technician does not violate confrontation under *Crawford*).

Melendez-Diaz v. Massachusetts, 125 S.Ct. 2527 (2009) n. 1 ("Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records.").

If you don't have calibration certificates
see State v. Turner, 2012 UT App 189.

Very long way of saying a UHP alcohol technician can establish foundation for admission of a breath test in lieu of calibration certificates.

The case thinks it leaves open constitutionality of 41-6a-515, but that was favorably ruled on eons ago.

See also, State v. Vigil, 772 P.2s 469 (Utah App. 1989) ("bookending" not necessary; instrument working before test, on test day, but not after).

Defense counsel routinely subpoena UHP alcohol techs to trial

41-6a-515 unconstitutional?

In Re: Rules of procedure and evidence to be used in the courts of this state, 18 Utah Adv. Rep. 3, 1985 Utah LEXIS 889 (Utah 1985):

"PER CURIAM: Pursuant to the provisions of Article VIII, Section 4, Constitution of Utah, as amended, the Court adopts all existing statutory rules of procedure and evidence not inconsistent with or superseded by rules of procedure and evidence heretofore adopted by this Court. Effective as of July 1, 1985."

41-6a-515 unconstitutional?

- *Layton City v. Bennett*, 741 P.2d 965, 968-69 (Utah Ct. App. 1987):

  We reject the argument that the adoption of evidence rules on admissible hearsay automatically repealed other statutory exceptions. Utah R. Evid. 802 provides that: hearsay is not admissible except as provided by law or by these rules. Utah Code 41-6-44.3 [now 41-6a-515] was enacted as a statutory exception to the hearsay rule and its validity was affirmed in *Murray City v. Hall* [cite omitted]. Rule 802 clearly contemplates that other statutory provisions may similarly apply as valid exceptions to otherwise inadmissible hearsay. [citations omitted] Moreover ... in September 1985, the Utah Supreme court formally adopted all statutory rules of evidence not inconsistent with the Court's rules. The creation of an additional exception to the hearsay rule by § 41-6-44.3 [now § 41-6a-515] is supplemental to and not inconsistent with Rule 802.

Pre-trial ruling in limine
on admissibility of breath test

Legislative history of Utah Code Ann. § 41-6a-515, formerly numbered at Utah Code Ann. § 41-6-44.3:

"The Utah Highway Patrol provides a technician to appear in court and to certify the breath test instrument used. In some instances these officers may explain the tests they perform on the instruments several times to the same judge on the same day. This bill requires the Commissioner of Public Safety to establish standards for administration and interpretation of the breath test results. This bill quotes, almost verbatim, the exception to the hearsay rule and also creates a presumption that the test result is valid without further foundation when done in a specified manner."

See 1979 Senate Journal, 43rd Legislature, General Session, vol. 1, pp. 713-14.

Utah R. of Evidence 104(a)

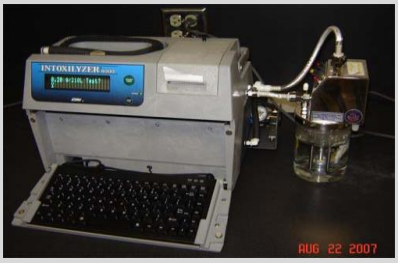
"[T]he admissibility of evidence shall be determined by the court."

Pre-trial ruling in limine
on admissibility of breath test

Gary Searle, Chief Deputy Tooele County Attorney.

Memorandum of law available from me.

Simulator solution certificate –
Guth laboratories



State v. Britt, 813 N.W.2d 434 (Neb. 2012).

Defendant claimed simulator solution certificate was testimonial.

Held: "The certificate was not created in preparation for trial and did not pertain to any particular pending matter."

Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011).

Warrant blood-draw case per breath test refusal.

Held: testing/certifying analyst must appear live at trial and be subject to cross examination.

Surrogate testimony violates 6th amendment right to cross examine.

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Missouri v. McNeely, 133 S.Ct. 1552 (2013).

Is metabolic dissipation of blood alcohol evidence an exigent circumstance?

"[W]e hold…that the exigency in this context must be determined case by case based on the totality of circumstances."

Missouri v. McNeely, 133 S.Ct. 1552 (2013).

"In those drunken-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so."

Missouri v. McNeely, 133 S.Ct. 1552 (2013).

"We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol…will support an exigency justifying a properly conducted warrantless blood test [sic]."

"That…is a reason to decide each case on its facts, as we did in *Schmerber*…."

Chain of custody witnesses in blood draw DUIs

State v. Boyer, 805 N.W.2d 736 (Wis. App. 2011) (unpublished); *Deeds v. State*, 27 So.3d 1135 (Miss. 2009) (couldn't even ID blood-draw nurse).

Contrary decisions: *State v. Sorensen*, 814 N.W.2d 371 (Neb. 2012); *State v. Herauf*, 819 N.W.2d 546 (N.D. 2012).

Boyer and *Deeds* consistent with underlying analysis of all post-*Crawford* SCOTUS 6th amendment decisions.

DUI case from before November 1, 2011.

Rule 15A. Scientific, Lab, and Analytical Reports -

When prosecution required to produce foundation and **chain of custody witnesses.**

Repealed effective November 1, 2011 (repeal order available from me).

Repeal applies retroactively

Blood draw kits/I-cups

Demonstrative exhibits/educational

Training video showing blood draw available

Soon PowerPoint available with images of tox lab check-in procedures

Both are to show seamlessness of process and no contamination/tampering possible

Subpoena of medical records –
notice to defendant

State v. Yount, 182 P.3d 405 (Utah App. 2008).

Accident case - D refused blood draw at hospital.

State subpoenaed the blood draw the hospital took to treat defendant.

But did not provide notice to defendant.

Held: due process violation and evidence suppressed.

Refusal to submit to chemical test is admissible

Sandy City v. Larson, 733 P.2d 137 (Utah 1987) (defendant's refusal to submit to breath test is admissible and does not offend either rights against self-incrimination or due process).

State v. Hawley, 2001 UT App. 284 (unpublished) (court rejected argument that refusal to submit could only be admitted at subsequent criminal trial if there was full compliance with DUI statute including an administrative hearing where the hearing officer rules there was in fact a refusal to submit).

Orem v. Longoria, 2008 UT App 168.

Jury instruction re refusal to submit to ***field sobriety tests*** is proper.

"[Y]ou may take notice of and give whatever weight you determine to the fact that [defendant] refused to perform any field sobriety tests."

Retrograde extrapolation

State v. Eumana-Moranchel, 277 P.3d 549 (Or. 2012).

"We hold that the state should have been permitted to offer the expert's testimony explaining retrograde extrapolation to establish that the defendant's BAC was over .08 percent at the time he was driving."

Constitutional challenge to

DUI metabolite statute § 41-6a-517

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Spice and bath salts update / testing availability

Utah state crime lab

Utah state toxicology lab

www.nmslab.com

Advocacy – opening statement

Save the intro

SFST's in opening, ***not*** "the officer will tell you…"

Practice out loud before trial

Case won in opening, direct, cross, closing, best haircut, best shoes, etc., who cares…

Advocacy – generally

"Therapeutic range" – Ambien e.g., therapeutic to what?

Maps from city engineer and red tacks

Photo of Intoxilyzer 8000 to counter
"mystery box" (demonstrative evidence)

Advocacy – closing / marker board

driving pattern
speech
odor
eyes
skin (body diagram for these)
lack of awareness
SFSTs
chemical test
statements/admissions

Advocacy – closing

Reyes reasonable doubt instruction

Refusals – two people already "firmly convinced" defendant was under the influence

Human element – duty to convict

Resources – Utah / national database – just ask

The (merciful) end

"Inside every defense attorney there's a prosecutor screaming to get out."

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