

Basic DUI Case Law and Advocacy

August 20, 2014 – Logan, Utah

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.

Moving violation

Officer's personal knowledge based on past dealings

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

Moving violation

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.

“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.

Computer check of license plate, then check of registered owner shows DOS, was reasonable suspicion *State v. Pike*, 551 N.W.2d 919 (Minn. 1996).

Computer check of license plate showed registered owner had a warrant, was reasonable suspicion in *State v. Setinich*, 822 N.W.2d 9 (Minn. App. 2012).

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.

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).

SFST manual session 8 only
included in materials (2013 edition)

**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: **whether 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.

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).

See also, City of Napierville v. Morgan, 466 N.E.2d 1349 (Ill. App. 1984).

DL hearings – solutions (my job, our job, your job).

Use of driver license hearing transcripts

Taylor Electric Inc., v. Fox Construction, Inc., 2012 UT App 325. (“an official transcript – one prepared by a disinterested “official court transcriber” – may appropriately be considered by a court in making a summary judgment determination.” However, the court said one reason for its decision was that the testimony in an official transcript will have been subject to cross-examination, which driver license hearings are not, at least in the sense that cross-examination happens in court. Nor are driver license hearings “judicially-supervised adversarial proceeding[s].” *Id.* at ¶ 5.

PBT (portable/preliminary breath
test) admission/exclusion

People v. Santana, 930 N.Y.S.2d 176 (N.Y.City Crim.Ct. 2011):
“The portable SD–2 Intoxilyzer test and the Intoxilyzer 5000EN
are used differently, the latter is used at trial to establish the
level of alcohol in the defendant's body while the first is used in
the field to determine if alcohol was consumed.”

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, that our decision here is not a holding that PBT results are universally admissible in municipal proceedings or in any other context.”

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 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), (tongue stud inserted in [defendant's] mouth more than twenty minutes before the test does not render the breath test inadmissible).

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.)

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.

Salt Lake City v. George, 189 P.2d 1283 (Utah Ct. App. 2008), *cert. denied*, 200 P.3d 193 (Utah 2008); *Matthies v. State*, 85 So.3d 838 (Miss. 2012).

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.

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).

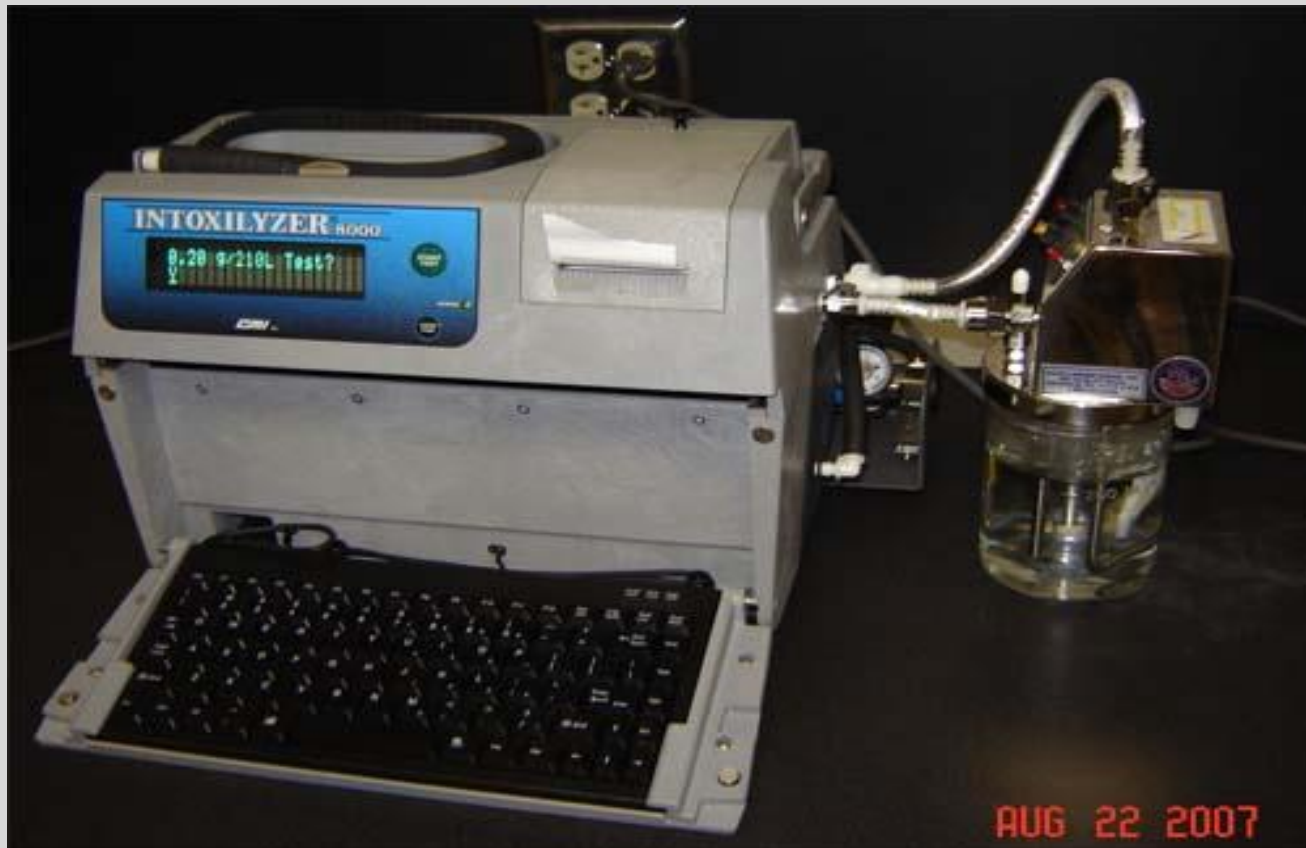
Defense counsel routinely subpoena UHP alcohol techs to trial

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).

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

Surrogate testimony violates 6th amendment right to cross examine.

However, Lexi May is famous!

Commonwealth v. Yohe, 79 A.3d 520 (Penn. 2013).

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

“[S]ome circumstances will make obtaining a warrant impractical [so] 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

Deeds v. State, 27 So. 3d 1135 (Miss. 2009) (no confrontation violation where state could not even identify blood draw nurse).

Blood draw kits/I-cups

Demonstrative exhibits/educational

Training video showing blood draw available

Tox lab training video on jump drive

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

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

Defense experts

The End

“Inside every defense attorney there’s a prosecutor screaming to get out.”

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