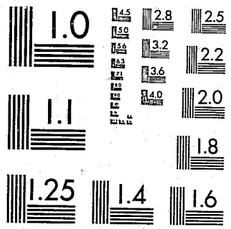

MARYLAND DWI/VEHICLE HOMICIDE

TRIAL MANUAL

DWI/VEHICLE HOMICIDE MANUAL

INTRODUCTION FOR DWI/VEHICLE HOMICIDE MANUAL

In addition to their other constitutional responsibilities for the prosecution of crime in their respective jurisdictions, Maryland State's Attorneys also perform a vital role as a member of this state's driver control system. It is important, therefore, that prosecutors be aware of and appreciate the impact their decisions to prosecute or not to prosecute as well as ultimate trial verdicts may have on the ability of other driver control system components to take appropriate remedial action.

This manual is designed to assist State's Attorneys in all phases of driving while intoxicated and vehicle homicide cases from the decision to charge through sentencing. I contains a broad range of information including statutes, case law, and technical information necessary for evaluating whether or not charges should be brought in these cases as well as to assist them in the preparation for trial of such cases and to acquaint them with the wide range of sentencing alternatives currently available for convicted offenders.

The publication of this manual was made possible by a grant of National Highway Traffic Safety Administration funds from the Maryland Department of Transportation. The text was researched and written by Stuart A. Liner, Esquire. David H. Hugel, Maryland State's Attorneys' Coordinator, was responsible for editing and publishing the manual.

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I.

REVIEWING THE OFFENSES

OF SEC. 21-902

I. Driving while intoxicated or under the influence of alcohol, a drug, a combination of alcohol and a drug, or a controlled dangerous substance -- sec. 21-902 of the Maryland Transportation Article.

Preparation for a case involving drunk driving* begins with an understanding of the statutory language of sec. 21-902, Transportation Article. This section contains the elements of the relevant offenses that the state's attorney will have to prove in order to obtain a conviction.

The relevant offenses of sec. 21-902 are:

(a) Subsection 21-902(a) -- driving while intoxicated;

(b) Subsection 21-902(b) -- driving under the influence of alcohol;

(c) Subsection 21-902(c) -- driving under the influence of a drug(s) or combination of a drug and alcohol, and

(d) Subsection 21-902(d) -- driving under the influence of a dangerous controlled substance.

*Unless specifically noted to the contrary, all references to drunk driving will refer generally to the provisions of subsections (a) and (b) of sec. 21-902.

While each subsection contains the elements of a separate and distinct offense, the common requirement of each provision is the act of a person "driving or attempting to drive" a vehicle. In 1977 the definitions of "drive" and "operate" were amended to allow the terms to be used interchangeably and to overcome a judicial interpretation which placed a narrower construction on the word "drive".[1] "Drive" is now defined to mean " . . . to drive, operate, move, or be in actual physical control . . ."[2] And the word "operate," when used in the Transportation Article, is defined as "to drive."[3]

Other key words or phrases relative to sec. 21-902 are "intoxication" and "under the influence of". Despite the lack of precise definitions, both terms were upheld by the Maryland Court of Special Appeals as not being constitutionally vague and a violation of due process. Rather, each were given its common generally accepted meaning. The factfinder should therefore resolve the issue of intoxication based on the evidence disclosed in accordance with the common meaning of that term.[4] "Being under the influence of intoxicating liquor (alcohol)" was deemed to be sufficient to affect a person's judgment and discretion or impact the normal conditions of a person's nervous system, but not amounting to intoxication.[5]

There are statutory standards for determining the degree of a motorist's intoxication whenever a chemical test is administered.[6] A reading of less than 0.05 percent gives rise to a legal presumption of no intoxication. No legal presumption exists whenever the chemical test results are at least 0.05

percent but less than 0.08 percent. A legal presumption of driving or attempting to drive while under the influence of alcohol will exist if the test results are at least 0.08 percent but less than 0.13 percent. Any test result of 0.13 percent or more will give rise to a presumption that the individual was driving or attempting to drive while intoxicated.

Footnotes

1. Thomas v. State, 277 Md. 314, 353 A.2d 256 (1976).
2. Sec. 11-114, Transportation Article.
3. Sec. 11-141, Transportation Article.
4. Brooks v. State, 41 Md. App. 123, 395 A.2d 1224 (1979).
5. U.S. v. Channel, 423 F. Supp. 1017 (D. Md. 1976).
6. Sec. 10-307(3), Courts and Judicial Proceedings Article.

II.

COMPARISON OF DWI OFFENSES IN MARYLAND

There are two DWI offenses in Maryland as can be noted from the provisions of sec. 21-902 of the Transportation Article; namely, a person cannot drive or attempt to drive any vehicle while intoxicated (sec. 21-902(a)) and a person cannot drive or attempt to drive any vehicle while under the influence of alcohol (sec. 21-902(b)).

Driving while intoxicated is the more severe offense than driving while under the influence of alcohol. Prima facie evidence of violation of this offense requires a chemical test analysis of 0.13 percent or more of alcohol concentration in the blood (sec. 10-307(e)), while prima facie evidence of driving or attempting to drive while under the influence of alcohol requires a chemical test analysis of 0.08 percent of alcohol concentration in the blood (sec. 10-307(d)).

Conviction of driving while intoxicated will result in an assessment of 12 points on the individual's driving record (sec. 16-402) and loss of license (sec. 16-404). Conviction for driving or attempting to drive while under the influence of alcohol will result in a point assessment of six points.

Conviction of driving while intoxicated will result in a fine of not more than $1,000 or imprisonment up to one year or both for a first offense and a fine of not more than $1,000 or imprisonment for not more than two years

or both (sec. 27-101(i)) for a second or subsequent violation. Conviction for driving while under the influence of alcohol will result in a fine of not more than $500 or imprisonment for not more than two months or both for a first offense (sec. 27-101(c)) and a fine of not more than $500 and imprisonment for not more than one year or both for a second or subsequent violation of this provision (sec. 27-101(j)).

III.

COURT JURISDICTION

Original jurisdiction for violations of sec. 21-902 lies exclusively with the District Court; however, a demand for jury trial will have the matter transferred automatically to the Circuit Court.[1] This authority is granted to the District Court in criminal cases involving violations of the vehicle laws and generally for all misdemeanors with incarcerations of less than three years or a fine of less than $2,500.

A jury trial may be demanded whenever imprisonment may be more than 90 days. Once a demand has been made for a jury trial, the DWI charge and all lesser included offenses are transferred to the Circuit Court for trial. The Circuit Court will retain jurisdiction over all charges even if the charge of driving while intoxicated is subsequently nolle prosqued leaving only offenses which would normally be tried in the District Court. Appeal to the Circuit Court of a District Court conviction for a trial de novo provides the defendant with a second opportunity to request a jury trial.[3]

If a case involves charges of both driving while intoxicated and negligent driving, a demand for a jury trial on the driving while intoxicated charge will result in both charges being certified from District Court to Circuit Court for trial.[4]

Procedurally, it should be noted that the charging document may be amended at any time prior to trial to allow the prosecution to proceed under

sec. 21-902(a) (driving while intoxicated) rather than sec. 21-902(b) (driving while under the influence). Sec. 21-902(b) is normally not deemed to be a lesser included offense of sec. 21-902(a) unless the charging document includes both offenses.[5] However, a person charged with a violation of sec. 21-902 may be found guilty of any lesser included offense under any subsection of that provision.[6]

The District Court also has exclusive original jurisdiction over a child 16 years of age or older who is charged with a violation of any provision of the Transportation Article or a traffic law ordinance with two exceptions. If the offense provides for a penalty of incarceration exclusive jurisdiction will vest in juvenile court.[7] Exclusive jurisdiction will vest in juvenile court if a child 16 years of age or older is charged with two or more violations of any Transportation Article provision or traffic law ordinance resulting from the same incident and which would place the child before both the juvenile court and the court exercising criminal jurisdiction.[8] While juvenile court may have exclusive jurisdiction, waiver of this jurisdiction is authorized to permit the prosecution of a juvenile as an adult.

Footnotes

1. Sections 4-301 and 4-302, Courts and Judicial Proceedings Article; Dixon v. State, 23 Md. App. 19, 327 A.2d 516 (1974); and Wilson v. State, 21 Md. App. 557, 321 A.2d 549 (1974).

2. Thompson v. State, 278 Md. 41 (1976).

3. See Hardy v. State, 279 Md. 849 (1977).

4. Hart v. State, 51 Md. App. 341, 443 A.2d 653 (1982).

5. Hardy v. State, 32 Md. App. 46 (1975).

6. Sec. 26-405, Transportation Article .

7. Sec. 3-804(d)(2), Courts and Judicial Proceedings Article.

8. Sec. 3-804(e), Courts and Judicial Proceedings Article.

IV.

USE OF CHECKPOINTS TO APPREHEND DWI OFFENDERS

Since roadblocks or sobriety checkpoints have been used in this state for detecting possible drunk drivers, it is important to understand the underlying legal basis.

Although the United States Supreme Court has held that a law enforcement officer may not randomly stop a motorist for the purpose of checking the driver's license and registration,[1] that Court has recognized that some type of systematic checkpoint program may be established.

The systematic checking of the license and registration of every vehicle, excluding trucks which were periodically checked at a port of entry, until there was a back-up of ten vehicles at which time the vehicles were waved through, was upheld as a valid exercise of police power and not unconstitutional.[2]

While there are no Maryland appellate cases governing the use of roadblocks in this state, other state courts have approved roadblocks to detect drunk drivers provided specific guidelines are followed.

After disapproving a roadblock at a city park victimized by vandals, an Iowa court suggested the following guidelines for a valid roadblock: location selected for safety and visibility to oncoming traffic; adequate advance

warning signs, illuminated at night, to inform the approaching motorist of the impending police action; and uniformed officers and official vehicles to show the police power of the community.[3]

A New Jersey court upheld the stopping of every fifth vehicle for the purpose of checking license, registration and any apparent outward manifestation of intoxication.[4] In balancing the State's interest in promoting highway safety against the individual motorist's interest in privacy, the Court concluded that the police practice constituted reasonable law enforcement procedure and a reasonable intrusion into the motorist's expectation of privacy. The factors constituting reasonable law enforcement procedure included the program being in writing prior to its implementation; empirical data revealing the checkpoint location as an area with a high incidence of traffic fatalities in which alcohol abuse by a driver was a substantial contributing factor in a majority of the accidents; the policy of stopping of vehicles when traffic was light and discontinuance of the program whenever traffic increased; and the actual manner of stopping the vehicle (the use of flares with police officers in uniform and marked police cars) designed to promote traffic safety and reduce anxiety by the motorists.

Another element to be considered is that the roadblock or checkpoint be of a permanent nature for the hours of operation rather than part of a moving patrol policy.[5]

The effective prosecution of DWI cases resulting from the utilization of roadblocks or checkpoints may well depend upon whether the factors considered

by the courts as enumerated in this section have substantially been adhered to by the apprehending enforcement officials.

Footnotes

1. Delaware v. Prouse, 440 U.S. 648 (1978); Goode v. State, 398 A.2d 801 (1979).
2. U.S. v. Prichard, 645 F.2d 854 (10th Cir.) (1981).
3. State v. Hilleshiem, 291 N.W.2d 814 (Iowa, 1980).
4. State v. Coccomo, 427 A.2d 131 (1980).
5. Martinez-Fuente v. U.S., 428 U.S. 543, 9 S.Ct. 3074 (1976).

V.

ESTABLISHING PROBABLE CAUSE FOR A DWI ARREST

Initial Police Observations

Traditionally, a police officer must have probable cause to believe that a motorist is driving while intoxicated or under the influence of alcohol or drugs prior to making an arrest. Probable cause is based on the actions of the motorist that give rise to the officer's determination that the driver may be in violation of the drunk driving laws. Information concerning the arresting officer's observations of the defendant prior to arrest must therefore be elicited by the state's attorney during the direct examination of that witness.

When the police officer actually observes the motorist's driving actions, the manner in which the driving activities are performed should be noted. Driving actions such as irregular speeds, frequent lane changing, unreasonably high speeds, disregarding traffic control devices or signals, and so on, serve as the basis for the police officer to initially stop the motorist.[2]

The next phase is the observation of the motorist after being stopped for any preliminary signs of intoxication. Such signs include the producing of the license and registration, the fumbling or dropping of any cards from the wallet, or the failure in locating the license. The preliminary observations should also make note of the condition of the driver's clothes (sloppy, disheveled), any smells in the car or the driver, any beer bottles or other open alcohol containers, etc.

After the driver is requested to get out of his automobile, the police officer should observe the driver for any smells of alcohol on the clothes or breath, the condition of the eyes, and whether the driver was standing or swaying in an unsteady condition. Additionally, the officer should note the degree of difficulty of the driver exiting the vehicle. Throughout the preliminary stage, the driver's demeanor (talkative, sullen, combative, obscene) should be observed. Any unusual actions such as hiccupping, belching, vomiting, etc. should be noted.

Footnotes

1. Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).
2. See Appendix A for list of observable driving actions.

Roadside Sobriety Testing

Additional information on the driver's degree of intoxication may be obtained from the administration of roadside sobriety tests. These physical performance tests generally include the following: balance test, walking and turning test, finger-to-nose test, coin test, speech test, and handwriting test. A more detailed discussion of these tests as to their probative value and vulnerability to cross-examination will be developed in the section on case preparation. For each test that was administered, the police officer should note the directions that were given, the performance of the driver, and the physical conditions (condition of sidewalk or pavement, lighting and

weather condition) directly affecting the test(s). Since the effect of alcohol consumption declines at a uniform rate after reaching its peak about one to one and one-half hours after the last drink, the time that the physical performance tests are administered should be established.

Prior to the tests, questions should be asked of the driver that would eliminate other possible causes of the driver's present physical condition and establish recent consumption of alcoholic beverages as the cause. Other questions should be asked to determine if the individual may be suffering from a condition of alcohol and another drug. Ascertaining information that the individual is under medication from a doctor or dentist may indicate that the degree of intoxication resulted from a combination of alcohol and another drug and not solely from alcohol. This, of course, would affect the type of charges brought and the evidence to be introduced at trial. The police officer should also try to determine where the defendant has been, how many drinks were consumed and with whom the defendant was drinking.

VI.

PRE-ARREST BREATH TEST

A recent innovation to assist police officers in screening suspected drunk drivers is the preliminary breath test. Authorized by Transportation Article sec. 16-205.2, effective July 1, 1981, police officers may request an individual to submit to a preliminary breath test prior to an arrest or the issuance of a citation. Because it is a hand-held device, the police officer is able to use it at the site where the motorist has been stopped and obtain an immediate indication as to the person's degree of intoxication. The results of the test may only be used to assist the officer in determining whether there is probable cause to arrest the individual for drunk driving.

Whether or not the driver takes the preliminary breath test, the individual must be advised that he or she may be required to submit to a subsequent chemical test, if so requested. Refusal to submit to a preliminary breath test may not be used as evidence in any court action, nor constitute a refusal to submit to a chemical test in violation of Transportation Article sec. 16-205.1. The State may not use the results as evidence in any litigation, however, the results may be used by the defendant in any criminal action. No evidence pertaining to the test may be introduced into a civil case.

Before using the breath-testing device, the police officer must have successfully completed a special training course conducted by the Maryland State Police and have been issued a preliminary breath test certificate.

The preliminary breath test device should not be used in lieu of the traditional methods of determining the state of intoxication of the motorist. As noted earlier, the police officer's observations of a person's driving behavior, speech, balance, eyes, and reactions are the basis for determining probable cause. The preliminary breath test device is simply another screening device for determining whether or not an arrest should be made for drunk driving and should be considered in addition to all other observations of the police officer.

Any pre-breath test device that is approved for use by the state toxicologist must be checked and calibrated once every 14 days. The results of the calibration must then be recorded.

VII.

APPLICABILITY OF MIRANDA TO DWI SUSPECTS

While there is no clear consensus among the states which have decided the issue[1] as to whether or not a motorist stopped for traffic offenses must be advised of their Fifth Amendment right against compulsory self incrimination prior to questioning as mandated for felony cases by the U.S. Supreme Court in Miranda v. Arizone[2], such warnings are clearly not required prior to requesting a motorist to submit to chemical testing for intoxication[3] or other non-testimonial sobriety testing.[4] The gratuitous advisement of Miranda rights prior to post testing questioning or following a test refusal should therefore be discouraged.

Clearly too, the Miranda decision was never intended to apply to general on the scene questioning.[5] Examples of such questioning associated with DWI investigations include asking the motorist why they fled the scene of an accident,[6] if they had been drinking,[7] if they had permission to drive the vehicle,[8] why their license plates were expired,[9] or asking a group of people at an accident scene who was driving the vehicles involved.[10] Thus general factfinding questioning, without significantly interfering with the right of movement of the person or persons to whom the questions are directed, is noncustodial in nature.[11]

Miranda warnings are required, however, once the motorist is subjected to a custodial police interrogation. Such questioning should follow the completion of any chemical or physical sobriety testing or the motorist's refusal to be tested.

The key factor determining whether an interrogation is custodial or non-custodial is the presence or lack of presence of any physical constraints on the individual; that is, if that person's freedom to depart is or is not restricted. The existence of physical restraint would almost invariably result in a finding of custody, while the absence of any restraints would be a manifestation of noncustody.[12]

The place of interrogation is another important factor but in and of itself would not be determinative of custody.[13] For example, the Maryland Court of Special Appeals has held that a motorist undergoing treatment in a hospital at the time of questioning but whose freedom has not otherwise been restrained was not in custody and need not therefore have been given the Miranda warning.[14] Questioning a person in his own home would be a non-custodial interrogation unless evidence is introduced to show the presence of physical restraint on that person.[15] Even the questioning of a person in a police station can be a non-custodial interrogation if the person is permitted to leave without hindrance.[16]

Factors considered by the courts in holding that interrogations are non-custodial include the presence of the suspect's friends and relatives, the brevity of the questioning, the friendly demeanor of the police officer, and the short and central nature of the inquiries.

Footnotes

1. Caly v. Riddle, 541 F.2d 456 (Ca. 4th. 1976, Va. 1976).
State v. Neal, 476 S.W.2d 547 (Mo. 1972).
State v. Macuk, 268 A.2d 1 (N.J. 1970).
State v. Bliss, 238 A.2d 848 (Del. 1968).
County of Dade v. Callahan, 259 So.2d 504 (Fla. 1972).
State v. Gabrielson, 192 N.W.2d 792 (Io. 1971) cert. den. 409 U.S. 912.
State v. Pyle, 249 N.E.2d 826 (Oh. 1969), cert. denied 396 U.S. 1007.

2. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

3. Schmerber v. California, 384 U.S. 759, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

4. State v. Mendenback, 616 P.2d 543 (Ore. App. 1980).
City of Wahpeton v. Skogg, 300 N.W.2d 243 (N.D. 1980).
City of Highland Park v. Black, 362 N.E.2d 1107 (Ill. 1977).
People v. Rosenthal, 384 N.Y. S.2d 358 (N.Y. 1976).
State v. Sykes, 203 S.E.2d 849 (N.C. 1974).
City of Mercer Island v. Walker, 458 P. 2d 274 (Wash. 1969).

5. Love v. United States, 407 F.2d 1391 (Ca. 9th 1969).

6. State v. Henson, 541 P.2d 1085 (Ore. 1975).

7. State v. Dubany, 167 N.W.2d 556 (Neb. 1969).

8. See Love, supra.

9. United States v. Chadwick, 415 F.2d 167 (Ca. 10, N.M. 1969).

10. People v. Morgan, 180 N.W.2d 508 (Mich. 1970).

11. Whitfield v. State, 287 Md. 124, 411 A.2d 415 (1980).

12. Cummings v. State, 27 Md. App. 361, 341 A.2d 294 (1975).

13. Burton v. State, 278 Md. 302, 363 A.2d 243 (1976).

14. See Cummings, supra.

15. Bernos v. State, 10 Md. App. 184, 268 A.2d 568 (1970).

16. Oregon v. Mathiason, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977).

VIII.

SEARCH AND SEIZURE

The Fourth Amendment to the U.S. Constitution provides for the right of the people to be protected against unreasonable searches and seizures and that no search and seizure should occur prior to the issuance of a warrant based upon probable cause. Generally, a warrant application is submitted to a judicial officer detailing the facts giving rise to probable cause. Only those facts listed in the application will be considered by the judicial officer in determining if there is probable cause to issue the search warrant.[1]

While warrantless searches are per se unreasonable, a few well-defined exceptions have evolved through case law decisions authorizing warrantless searches.[2] This section will focus on those exceptions which a police officer would most likely rely upon during the investigation of a drunk driving incident or vehicle homicide case.

Search incidental to lawful arrest - Once an individual has been formally detained by the police, a warrantless search may be conducted of the person of the arrestee and the area within the immediate control or wingspan of that person.[3] Where the defendant is arrested inside an automobile, the interior of that vehicle may also be searched.[4] Placing the individual under full custodial arrest will permit the search and seizure to be conducted without a showing of probable cause.[5] For this exception to apply, however, the

search must be contemporaneous with the arrest and not conducted at a later time.[6] The search would include clothing, cigarette packages, pocketbooks, or any other containers found on the person arrested.[8]

Automobile searches - A warrantless search of an automobile stopped by police officers who had probable cause to believe the vehicle contained an illegal substance was held to be not unreasonable within the meaning of the Fourth Amendment.[9] The scope of an automobile search has now been expanded to permit warrantless searches where the police officers -- who have legitimately stopped an automobile and who have probable cause to believe that the vehicle contains something illegal -- may conduct a probing search of the entire vehicle including compartments and containers whose contents are unknown.[10]

The probable cause determinations must be based on objective facts that could justify the issuance of a warrant by a magistrate and not merely on the subjective good faith of the police officer.[11] The scope of a warrantless search of an automobile is defined by the object of the search and the places in which there is probable cause to believe that it may be found.[12] For example, probable cause to believe that illegal aliens are being transported in a vehicle will not justify a search of the vehicle's glove compartment.

The automobile exceptions will not apply where the police have probable cause to search an immovable container prior to the transfer of the container to an automobile. Once the transfer has been made a warrant for the search will be required.[13]

The police may seize a vehicle for a limited external examination whenever there is probable cause to believe that the vehicle was the instrumentality of a crime.[14]

Inventory searches - The contents of an automobile or other property lawfully in the possession of the police may be inventoried without a warrant.[15] Any property found on the person of an arrestee may also be inventoried,[16] including property lawfully in police custody,[17] however, the search may only be for protective and not investigative purposes.[18] An inventory may not be used as a subterfuge for an otherwise illegal search.[19]

Searches for evidence with disappearing or vanishing properties - Evidence that may disappear before a warrant is obtained can be seized by the police without a warrant, provided probable cause exists for the police to believe that seizable evidence is present and will be uncoverable if they fail to take immediate action to recover it.[20]

Under this authority the warrantless taking of blood to determine alcohol content is a permissible search and blood may be withdrawn from an individual in custody under appropriate conditions.[21] It should be noted, however, that the taking of blood in DWI cases is governed by Maryland's implied consent statute discussed on page 55 of this manual.

Plain and open view searches - A plain view search is authorized where there has been a prior valid intrusion by the police officer and the officer inadvertantly observes the seizable evidence.[22] The prior intrusion may be

justified by a warrant or an exception to the warrant requirement and the police officer must have probable cause to seize the evidence at the moment the officer viewed it.[23]

Stop and Frisk - Individuals may be stopped on less than probable cause and frisked for weapons whenever circumstances warrant.[25] A police officer making a traffic stop may frisk a motorist and any occupants of the automobile when there is reason to fear for the officer's safety.[26] The justification for the frisk must be more than a hunch; the officer must present articulable facts warranting the intrusion.[27]

Consent - A warrant is not required when a person not in custody voluntarily consents to an inspection of that person's property. The consent is valid only if voluntary and not the result of duress or coercion.[28] Determination of this issue of voluntary consent by a court is based on the totality of the circumstances.[29]

Hot pursuit search - The police may search any premises without the need for a warrant whenever they are in hot pursuit of a dangerous felon and have probable cause to believe that the felon is on the premises.[30]

Abandoned property - A warrantless search may be conducted by the police of any property abandoned by a person. This would include abandoned vehicles and expelled body waste.[31]

Footnotes

1. Fourth Amendment, U.S. Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

3. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

4. New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860 (1981).

5. Individuals that may be searched include arrested traffic offenders. United States v. Robinson, 444 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); Gustafson v. Florida, 444 U.S. 260, 94 S.Ct. 488, 38 L.Ed.2d 456 (1973).

6. Dixon v. State, 23 Md. App. 19 (1974).

7. United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974).

8. Dawson v. State, 40 Md. App. 640, 395 A.2d 160 (1978).

9. Carroll v. United States, 267 U.S. 132, 45 S.Ct. 1975, 69 L.Ed. 543 (1925).

10. United States v. Ross, 102 S.Ct. 2157 (1982).

11. Ibid.

12. Ibid.

13. United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

14. Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974).

15. South Dakota v. Opperman, 425 U.S. 909, 96 S.Ct. 3092, 47 L.Ed.2d 759 (1976).

16. United States v. Edwards, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974).

17. Waine v. State, 37 Md. App. 222, 327 A.2d 509 (1977).

18. Herring v. State, 43 Md. App. 24, 404 A.2d 1087 (1979).

19. Manalansan v. State, 415 A.2d 308 (1980).

20. Cupp. v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973); Franklin v. State, 18 Md. App. 651, 308 A.2d 752 (1973).

21. Schmerber v. California, 384 U.S. 759, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

22. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d. 564 (1971).

23. State v. Wilson, 279 Md. 189, 367 A.2d 1223 (1977).

24. Colorado v. Bannister, 449 U.S. 1, 101. S.Ct. 42, 66 L.Ed.2d. 1 (1980).

25. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

26. Adams v. Williams, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).

27. Terry v. Ohio, supra. at footnote 25.

28. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.2d. 2d 854 (1973).

29. Whitman v. State, 25 Md. App. 428, 336 A.2d 515 (1975).

30. Abel v. United States, 362 U.S. 317, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); Venner v. State, 279 Md. 47, 367 A.2d 949 (1977); Duncan v. State, 281 Md. 247, 378 A.2d 1108 (1977).

IX.

RIGHT TO COUNSEL

An individual has the right to counsel under the United States Constitution in order to protect the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right to assistance of counsel of that individual.

When a person has not been formally charged but is subject to custodial interrogation, that person is entitled to assistance of counsel to protect the Fifth Amendment privilege against self-incrimination.[1]

Once an individual has been given his Miranda warnings that individual then has the right to private consultation with counsel and the police must provide every reasonable opportunity for this to occur. Refusal to so provide will result in a denial of the person's Sixth Amendment right to counsel.[3]

With respect to a formally charged defendant, any statement that the individual made is admissible only if the State satisfied the burden of proving that the defendant waived the Sixth Amendment right to counsel.[3]

Although there has not yet been a Maryland case directly on point, recent cases in other jurisdictions have established the right of an individual to confer with counsel in person or by telephone prior to the administering of the chemical tests.[4] This right of consultation must, however, be exercised

in conjunction with the established statutory period within which testing must be conducted, or the defendant may be subjected to administrative penalties for refusing to be tested.

Footnotes

1. Kirby v. Illinois, 406 U.S. 682 (1972).

2. Fowler v. State, 6 Md. App. 651, 253 A.2d 409 (1970).

3. Watson v. State, 282 Md. 73, 382 A.2d 574 (1978).

4. People v. Montoya, 114 Cal. App. 3d 556 (1981); State v. Fitzsimmons, 610 P. 2d 893 (Wash. 1980); Price v. Dept. of Motor Vehicles, 245 S.E.2d 518 (N.D. App. 1978); Prideaux v. Dept. of Public Safety, 247 N.W.2d 385 (Minn. 1976); People v. Gursey, 292 N.Y. 2d 416 (1968).

X.

REVIEW OF IMPLIED CONSENT LAWS

Sections 10-302 through 10-309, inclusive, Courts and Judicial Proceedings Article, provide the statutory authority for the administration of chemical tests to determine the alcohol content of blood.

Sec. 10-302

A chemical test of a motorist's breath or blood may be administered to determine if that person was drinking while intoxicated in violation of sec. 21-902 of the Transportation Article.

Sec. 10-303

The chemical test must be administered within two hours of the apprehension of the motorist.

Sec. 10-304

The blood test may only be administered by a qualified medical person at the request of a police officer. The equipment used and the laboratory in which the test is administered must have been approved by the toxicologist of the Office of the Chief Medical Examiner. A statement signed by the toxicologist certifying approval of the examiner is prima facie evidence of the approval and the toxicologist need not appear in court.

The breath test may be administered by a police officer, police employee or employee of the Office of the Chief Medical Examiner after completing a

program approved by the toxicologist. The equipment that is used must also receive the approval of the toxicologist.

The person being tested may have a physician of his or her own choosing perform an additional test. If no test is offered or administered, the individual may direct the police officer to have one of the chemical tests given to him.

Sec. 10-305

The defendant has the right to choose the type of chemical test to be administered. If the lack of facilities or equipment prevents the taking of the test within two hours, then no test shall be administered. The guilt or innocence of the defendant shall not be affected by the lack of a test nor shall it constitute a refusal. If the defendant chooses a test that can be taken within the two hour time frame but later requests a change to another type of chemical test that cannot be administered within the two hour period, the police officer has the authority to choose whatever test can be taken within the designated time. Failure to do so by the defendant will constitute a refusal. A person who is dead, unconscious or otherwise unable to refuse to take a chemical test is considered as not having withdrawn consent.

Section 10-306

Maryland law permits the results of a chemical test to be admitted as substantive evidence through the introduction of an official copy of the test results without requiring the presence or testimony of the technician who administered the test, provided that the defendant or the defendant's attorney is notified at least 15 days prior to trial of the State's intent. If the

defendant notifies the state at least five days prior to trial that the defendant requests the presence of the technician at trial and if the technician fails to appear, the results are inadmissible. If the defendant fails to provide timely and proper notice, the defendant waives the presence and testimony of the technician.

Section 10-307

If the person's chemical test result is 0.05 percent or less by weight of alcohol, it shall be presumed that the person was not intoxicated or under the influence of alcohol. A test result of more than 0.05 percent but less than 0.08 present by weight of alcohol will not give rise to any presumption of intoxication or being under the influence of alcohol; however, the result can be admitted with other evidence to prove that the defendant was intoxicated or under the influence of alcohol. A reading of 0.08 percent or more by weight of alcohol is prima facie evidence that the individual was driving while under the influence of alcohol. A reading of 0.13 percent by weight of alcohol is prima facie evidence that the person was driving while intoxicated.

Section 10-308

Introduction of the chemical analysis evidence does not limit the introduction of other evidence relating to whether the defendant was intoxicated or under the influence of alcohol.

Section 10-309

With one exception (Transportation Article sec. 16.205.1(c)), no person is compelled to take the chemical test. With respect to a violation of Transportation Article sec. 21-902, no inference or presumption as to the person's guilt or innocence may arise as a result of the refusal, nor is the refusal admissible as evidence. Chemical analysis evidence that is improperly obtained is also not admissible.[1] This section has no bearing on the consequences of the refusal as it relates to retention of the driver's license. Nor does this section affect the admissibility of chemical analysis evidence obtained as provided in sec. 16-205.1(c).

Sec. 16-205.1

Under Transportation Article sec. 16-205.1, any person who drives or attempts to drive impliedly consents to submit to a chemical test to determine if that person should be detained for driving while intoxicated or under the influence of alcohol. This provision applies to persons driving or attempting to drive on private property or a highway.

Except for subsection 16-205.1 (c), no person is required to take the chemical test. If there is a refusal, the police officer, who has detained the individual, must then inform the individual that the Motor Vehicle Administration will suspend the driver's license for not less than 60 days nor more than six months upon receipt of a sworn statement from the police officer as to the person's refusal. (In the case of a nonresident, the driving privilege for Maryland will be suspended).

Whenever the police officer has reasonable grounds to believe that a person has been driving or attempting to drive while intoxicated or under the influence of alcohol, the officer will detain the individual, request the taking of a chemical test of his blood or breath, inform the individual of the administrative penalties that would be imposed for a refusal, and, if there is a refusal, file a sworn statement within 48 hours with the Motor Vehicle Administration that the officer had reasonable grounds to believe the individual had been driving while intoxicated or under the influence of alcohol and that the driver refused to take the chemical test after being informed of the administrative penalties that would be imposed for a refusal.

Any motorist involved in a motor vehicle accident that resulted in the death of another person must submit to a chemical test of the blood or breath at the direction of the police officer if that officer has reasonable grounds to believe that the motorist was driving or attempting to drive while intoxicated or under the influence of alcohol. The test will be administered by medical personnel who will not be liable for any civil damages for any act or failure to act provided there is no gross negligence.

If a police officer has reasonable grounds to believe that a person has been driving or attempting to drive while intoxicated or under the influence of alcohol and decides that that person is unconscious or otherwise incapable of taking a chemical test, the police officer:

(1) Must obtain prompt medical attention,

(2) Remove the person to a nearby medical facility, if necessary, and

(3) Direct a qualified medical person to withdraw blood if this would not jeopardize the person's health or wellbeing. If the person regains consciousness or is otherwise capable of submitting to a chemical test, the police officer is required to follow the procedures of Transportation Article sec. 16-205.1(b)(2).

As noted in State v. Moon,[2] no consent is required if blood is withdrawn from the defendant for medical reasons. The blood sample may be used to ascertain the blood alcohol content and the results of the analysis are admissible into evidence.

The Maryland State Police provide an extensive training program for the individuals who will administer the chemical tests and certify those individuals who successfully complete the training program.

Opportunity to attend a hearing to show why the driver's license should not be suspended is afforded any person who refused to take the chemical test. At the hearing the individual may give the reasons for the refusal. Failure to attend the hearing will result in a suspension of not less than 60 days nor more than six months. Any suspension may be modified or a restricted license issued if the person can show the need of a motor vehicle for work, or to attend an alcoholic prevention or treatment program, or no alternative transportation is available and, without the driver's license, the person's ability to work would be severely impaired. Any suspension of the driver's license may be appealed.

Footnotes

1. Loscomb v. State, 435 A.2d 764 (Md. 1981).

2. 436 A.2d 420 (Md. 1981).

XI.

ALCOHOL AND ITS EFFECTS[1]

PROPERTIES OF ALCOHOL. The term "alcohol" means the substance called "ethyl alcohol," which is the primary constituent of alcoholic beverages. As a pure chemical, it is clear, colorless, and practically odorless. It has a burning sensation in the mouth and mixes freely with water. It is generally harmless when consumed in moderate quantities, but when consumed in sufficiently large quantities, it can be lethal. Although there are numerous other types of alcohol, ethyl alcohol is the only type suitable for human consumption, thus, the only type found in alcoholic beverages.

Alcohol is produced by the fermentation of such organic substances as fruit, fruit juices, malt, cereal grain extract, vegetable pulp, and molasses. But neither grain nor grapes actually produce alcohol. Alcohol, in fact, is a waste product of the microscopic plant yeast, and is produced when yeast reacts with sugar. In the manufacture of grape wines and beer the process of fermentation produces a product with only about 15 percent alcoholic content, and in order to produce a higher alcoholic content, the fermented mixture must be distilled.

Alcoholic beverages contain, in addition to alcohol and water, numerous compounds or impurities called "congeners." Congeners typically impart a characteristic flavor and odor to the beverage and are the cause of the smell of alcohol on a person's breath. Congeners constitute a very small proportion of the total volume of an alcoholic beverage. There is no evidence the

congeners contribute to the depressant effect of alcoholic beverages. The proof number of a beverage represents twice the percent of alcohol by volume (e.g., 100 proof beverage contains 50 percent alcohol by volume).

Alcohol, though technically a food since it is a source of calories, has no nutritional value, and is harmful when used in excess. In addition to diminishing the appetite for nutritious foods, a diet of alcohol deprives the body of the vitamins, minerals, and proteins required for good health.

ALCOHOL IN THE BODY - (A) Absorption. Alcohol requires no digestion. Alcohol is absorbed into the blood through the mucous lining of the entire gastrointestinal tract, the mouth, esophagus, stomach and small intestine. By the time the drink gets to the large intestine, all of the alcohol has been absorbed. The rate of absorption from the various surfaces differs. Absorption from the mouth is very slow, from the stomach, somewhat more rapid (particularly when there is no food in the stomach to slow the process), and very rapid from the upper end of the small intestine. After a drink has been swallowed, the presence of alcohol persists in the mouth for about 15 minutes. The rate of absorption varies slightly from person to person and even differs at times for the same person. Alcohol passes into the blood stream within one or two minutes after consumption. Most alcohol is absorbed within 15 minutes and nearly 90 percent is dissipated within one hour.

Alcohol is absorbed into the blood stream unchanged through the walls of the stomach and small intestine. It travels via the portal vein to the liver. Thereafter, it travels via the circulatory system to the heart, lungs and back to the heart, and is then pumped to all parts of the body. Organs

such as the brain, liver and kidney, which have a large blood supply, initially receive a considerable amount of the circulating blood containing alcohol. When absorption and distribution are complete, alcohol is distributed in areas of the body proportional with their fluid/water content.

(B) Metabolism (elimination of alcohol from the body). After absorption, the process of oxidizing the alcohol is started by the liver. The most important aspect of this process is that the alcohol is altered by oxidation in such a way that it no longer causes intoxication. Time is a significant factor here. Although alcohol is absorbed rapidly, the body will oxidize alcohol at a slow fixed rate (approximately .015 percent per hour). There is no known method of increasing the rate at which alcohol is oxidized. Neither hot coffee, cold showers, nor brisk walks speed up the process. Only time sobers an intoxicated person. About 90 percent of the alcohol is eliminated through the liver in this manner, with the rest being excreted unchanged through the breath, urine, tears, saliva, and perspiration.

(C) Endigenous Alcohol. It was mistakenly believed for many years that alcohol was a normal constituent of the body. If present at all, it is a concentration of much less than 0.001 percent. The highest concentration ever medically reported was 0.003 percent.

EFFECTS OF ALCOHOL ON BEHAVIOR. From its earliest action to final alcoholic paralysis, alcohol is a nerve poison. The major activity of alcohol is to numb, depress, and finally paralyze nerve activity (it is a depressant; not a stimulant). The first step of impairment affects the part of the brain that controls a person's judgment, reasoning, morals, and powers of

attention. As a result, one's self-confidence is falsely increased. If alcohol is ingested in sufficient quantities, the part of the brain which automatically controls a person's body function will be impaired. A person will lose control of himself, pass into a coma, and ultimately die if the respiratory center of the brain is depressed. Between the mild and severe effects of alcohol there is a progression of deterioration in performance.

Some of the common symptoms of alcoholic influence are an odor of alcoholic beverage of the breath, swaying or unsteadiness, staggering, poor muscular coordination, confusion, lack of response to stimulation, sleepiness, disorderly appearance, speech impairment, dizziness, nausea, aggression, depression, visual disorders, and a flushed face.

Footnotes

1. For additional comments on this subject, see A Study of Chemical Tests for Alcoholic Intoxication, 17 Md. L. Rev. 193 (1957); The Compulsory Use of Chemical Tests for Alcoholic Intoxication -- A Symposium, 14 Md. L. Rev. 111 (1954).

XII.

CHEMICAL TEST LEVELS FOR MARYLAND DWI OFFENSES

If an individual produces a chemical test reading of 0.13 percent or more, the State will have prima facie evidence that the individual was driving or attempting to drive while intoxicated (sec. 10-307(e) of the Courts and Judicial Proceedings Article). Test results of at least 0.08 percent and below 0.13 percent will be prima facie evidence that the individual was driving or attempting to drive while under the influence of alcohol (sec. 10-307(d)). Under Maryland Law these statutory levels apply at the time of testing provided the test is administered within two hours of arrest. There is no presumption of intoxication if the chemical test reading is between 0.05 percent and 0.08 percent. Test results of less than 0.05 percent give rise to a presumption of no intoxication.

Prima facie evidence is merely the minimum amount of evidence required to be admitted into evidence by the State to sustain the charge against the defendant. Transportation Article sec. 10-307 categorizes the chemical test analyses as presumptions of the degree of intoxication which are rebuttable by the defense.

For a presumption to withstand constitutional muster it must be shown that a logical reasonable connection exists between the fact proven and the fact presumed.[1] This type of relationship has been held to exist in blood alcohol concentrations[2] with the fact proven being the chemical test result and the fact presumed being the degree of intoxication.

Footnotes

1. Leary v. U.S. 395 U.S. 6, 89 S.Ct. 1532 (1970); Turner v. U.S., 396 U.S. 398, 90 S.Ct. 642 (1970).

2. State v. Childress, 78 Ariz. 1, 274 P.2d 333 (1954); Commonwealth v. DiFrancesco, 329 A.2d 204 (Pa. 1974).

XIII.

AUTOMATIC TEST RESULTS STIPULATION STATUTE

By statute the test results of a chemical test analysis are admissible without the need for accompanying testimony from the technician who administered the test.[1] An official copy of the test results may be admitted into evidence without the technician's testimony provided that the State so notifies the defendent in writing at least 15 days prior to trial. If the defendent wants the technician to testify, he must notify the State and the court in writing of his request no later than five business days before trial. A timely and proper notice by the defendant will prevent the submission of the test results into evidence without the technician's testimony. Failure to provide a timely and proper notice by the defendant will constitute a waiver of the right to have the technician present to testify.

If the State voluntarily notifies the defendant that the technician or chemist will appear, the defendant is not required to comply with the requirements of this provision.[2]

Footnotes

1. Section 10-306, Courts and Judicial Proceedings Article.
2. Knight v. State, 41 Md. App. 691 (1979).

XIV.

OPERATION OF THE BREATHALYZER

Once it was established that a close correlation existed between the concentration of alcohol in the body and the degree of intoxication, the next step scientifically was to ascertain what body substance would provide the most accurate and the most practicable examinations.[1]

Because breath is probably the easiest obtained body substance and the results known within minutes of testing, it is the preferable substance for testing. The scientific basis for breathtesting is the well established critical relationship which exists between the concentration of alcohol in the blood and the concentration of alcohol in the air in the lung -- called alveolar air. Since the amount of carbon dioxide in air exhaled from the lungs is relatively constant, by measuring the carbon dioxide content of a given breath sample, the fractional amount of alveolar air present in the sample can be ascertained. The amount of alcohol in the blood is then determined by measuring the amount of alcohol in the sample.

The Breathalyzer[2] uses the relationship between alveolar (lung) air and blood. It is based upon the principle that the ratio between the amount of alcohol in the blood and the amount in the alveolar breath (lung air) is a constant 2100 to 1. A fixed volume of deep alveolar (lung) air is collected and then passed through an alcohol sensitive reagent. A color change in the

reagent will result if alcohol is present in the sample. The color change is photometrically measured and the blood alcohol concentration (BAC) is indicated.

The chemical reagent that is used consists of three (3) milliliters (ml) of 50 percent by volume sulphuric acid and water, 0.025 percent potassium dichromate, and 0.025 percent silver nitrate. The sulphuric acid and water are 50 percent by volume. The sulphuric acid and water are 50 percent by volume. The purpose of the sulphuric acid and water is to trap and hold the alcohol from the sample that is passed through it. The potassium dichromate is the active ingredient. It is a yellow substance, which, when it reacts with alcohol changes color from yellow to green resulting from a reduction of the dichromate. The degree of color change is proportional to the amount of alcohol that has been oxidized. The change in color (reduction of the dichromate) is measured by the Breathalyzer. The silver nitrate is the catalytic agent used to speed up the reaction time of the potassium dichromate.

To activate the Breathalyzer, the defendant blows into the device through a mouthpiece until he has emptied his lungs in one breath.[3] The instrument is so designed that only the last 52 1/2 cubic centimeters of air that has been blown into it has been trapped. This air is called alveolar or lung air. This air is then forced, by weight of a piston, through a test container (ampoule) that has a solution of sulphuric acid, potassium nitrate, and silver nitrate. The color of the substance is yellow. As the breath sample passes through the solution in the test ampoule, the alcohol, if any, is extracted by the sulphuric acid and the potassium dichromate oxidizes the alcohol, thereby

causing the test solution to lose some of its yellow color. The greater the alcoholic content of the breath sample, the greater will be the loss in color of the test solution. By causing a light to pass through the test ampoule and through the control ampoule, which remains sealed and therefore unaffected by chemical changes resulting from exposure to the breath sample, the amount of the color change can be measured by photoelective cells which are connected to a galvanometer. By balancing the galvanometer, a reading can be obtained from a gauge which has been calibrated in terms of percentage of alcohol in the blood.

Footnotes

1. For additional comments, see Watts, Some Observations on Police Administered Tests for Intoxication, 45 N.C. L. Rev. 34 (1966).

2. See Appendix C for identification of the Breathalyzer instrumentation panel and test result chart.

3. For a detailed explanation, see State v. Baker, 355 P.2d 806 (Wash. 1960).

XV.

TESTING PROCEDURE FOR CONDUCTING A BREATHALYZER TEST

Since by statute the breath test must be administered within two hours,[1] testing procedures must be completed within this time period.

The authorized method for administering the chemical test on the Breathalyzer instruments was approved by the state toxicologist.[2] The technician who administers the test should adhere to every step of the procedure, otherwise, the test results will be invalidated. The steps of the approved method[3] for conducting the chemical test on the Breathalyzer instrument are as follows:

1. The subject to be tested must have nothing to eat or drink and should not smoke within 20 minutes prior to the time a breath sample is taken.

2. The instrument must be allowed to warm up to its operational temperature which is $50^{o} \pm 3^{o}C$.

3. Approved Breathalyzer Solution ampoules must be used as reference ampoule and test ampoule.

4. A reference ampoule must be selected and checked with an approved ampoule gauge. The ampoule must fit into the large end of the gauge and must not fit into the small end of the gauge. The menicus of the solution must be above the top of the gauge when the ampoule is seated in the gauge. There must be no fluid in the top of the ampoule. The ampoule is placed in the left ampoule well of the instrument.

5. A second ampoule is then selected as a test amoule and checked as in the case of the reference ampoule.

6. The top of the ampule is then broken off and a clean bubbler tube inserted. The ampoule is then placed into the right ampoule well of the instrument and connected by a rubber tube to the metal capillary tube.

7. The control knob is turned to the TAKE position: The retractable breath tube is then connected to the purging bulb and room air is pumped through the collection chamber. After the chamber has been flushed, the control knob should be turned to the ANALYZE position.

8. When the room air sample has left the collection chamber and bubbled through the test ampoule a red "empty" indicator light is illuminated. Wait for 90 seconds then turn the photometric light on and balance the photometric system. After this is completed, the photometric light should be turned off.

9. After balancing the photometric system, the blood alcohol pointer must be set on the START LINE.

10. A new mouthpiece should be selected and attached to the retractable breath tube. The control knob must be turned to the TAKE position. The subject who is being tested must deliver deep lung breath into the instrument by blowing into the mouthpiece and retractable breath tube for as long as possible. The time this sample is delivered must be recorded.

11. The control knob must be turned to the ANALYZE position. When the last of the sample enters the test ampoule, a red "empty" indicator light is illuminated. A 90 second waiting period must then be observed. After the waiting period, the photometric light should be turned on. If there is any alcohol in the sample, the galvanometer or panel meter needle will move off center. The photometric system is then rebalanced. The blood alcohol pointer will indicate the blood alcohol concentration. The result from this test must be recorded by depressing the pointer and imprinting the result on the test record form. The result is reported to the second decimal place, the third decimal place is to be dropped (for example, a reading of 0.148 percent is reported as 0.14 percent). If the results of the test exceeds 0.40 percent, record the result as 0.40 percent plus and conduct the remaining steps using another ampoule having the same Breathalyzer Solution Control Number (Lot #).

12. The control knob must then be turned to the TAKE position: The retractable breath tube is then connected to the purging bulb and room air is pumped through the collection chamber. After the chamber has been flushed, the control knob should be turned to the ANALYZE position.

13. When the air sample has left the collection chamber and bubbled through the test ampoule a red "empty" indicator light comes on. After the 90 second waiting period, the photometric light should be turned on and the photometric system balanced. After this is done, the photometric light should be turned off.

14. After balancing the photometric system, the blood alcohol pointer must be set on the START LINE.

15. The retractable breath tube is then connected to the delivery tube of a Breath Alcohol Simulator containing the validation test solution (0.100 percent). The control knob must be turned to the TAKE position. A sample from the Breath Alcohol Simulator is delivered into the instrument.

16. The control knob must be turned to the ANALYZE position. When the last of the sample leaves the collection chamber and bubbles through the test ampoule, a red "empty" indicator light will illuminate. A 90 second waiting period must then be observed. After the waiting period, the photometric light should be turned on. The photometric system is then rebalanced. The value and result of this test must be recorded by depressing the pointer and imprinting the result on the test record form. The result is reported to the third decimal place. The Breath Alcohol Simulator result must not be lower than 0.090 percent or greater than 0.110 percent. This validates all components of the testing procedure and assures the accuracy of the test conducted on the subject.

17. After completing the breath alcohol test as described, the control knob must be turned to the OFF position and all ampoules removed from the instrument. The test results should be recorded in the Breathalyzer Operators Log and the Log of Tests for Alcohol Influence Arrests.

Footnotes

1. Section 10-303, Courts and Judicial Proceedings Article.

2. For assistance on this subject the state's attorney should contact Dr. Yale H. Caplan, the State Toxicologist, and Lt. David Yohman, Maryland State Police.

3. Appendix 1, Rules and Regulations of the Toxicologist, Office of the Chief Medical Examiner, Department of Post Mortem Examiners, State of Maryland, Regarding Tests of Breath and Blood for Alcohol.

XVI.

PRESERVATION OF AMPOULES AND BREATH SAMPLES

In Brady v. Maryland[1], the United States Supreme Court held that evidence in the possession of the prosecution favorable to the defendant and material to the guilt or innocence of the defendant must be released to the defendant upon request. Failure to do so constitutes intentional suppression of the evidence and a violation of the defendant's right to due process of law.

The California Supreme Court, in People v. Hitch[2], held that the test ampoule which had been exposed to the defendant's breath was material evidence as to the issue of the defendant's guilt or innocence on the charge of driving while under the influence of intoxicating liquor. According to the court, the state's failure to preserve this evidence constituted an intentional but nonmalicious violation of the defendant's right to the evidence and therefore a denial of the defendant's right to due process. The sanction imposed on the state was the suppression of the chemical test results.[3]

While there has been no unanimity in state court decisions throughout the United States since the Hitch decision, the great majority of states ruling on the issue have refused to follow the California Court's holding in that case.

The state court decisions rejecting the Hitch rationale have concluded that no scientific basis exists for an effective preservation of the test ampoule and the breath sample.[4] A scientific principal from which

deductions are made must be sufficiently established to have gained general acceptance in the scientific community.[5] This has not occurred with respect to preserving breath samples and test ampoules. In fact the Committee on Alcohol and Drugs of the National Safety Council passed a resolution in 1975 stating ". . . a scientifically valid procedure is not known to be available for the reexamination of a Breathalyzer ampoule, that has been used in the breath test for ethanol, in order to confirm the accuracy and reliability of the original breath analysis."[6]

Footnotes

1. 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

2. 12 Cal.3d 641, 117 Cal. Rptr. 9, 527 P.2d 361 (1974).

3. See also People v. Municipal Court, Herbert Ahneman, 12 Cal.3d 658, 117 Cal. Rptr. 20, 527 P.2d 372 (1974).

4. State v. Cantu, 116 Ariz. 356, 569 P.2d 298 (1977); People v. Godbout, 42 Ill. App.3d 1001, 356 N.E.2d 865 (1976); People v. Stark, 73 Mich. App. 332, 251 N.W.2d 574 (1976); State v. Hanson, 493 S.W.2d 8 (Mo. App. 1973); State v. Shutt, 116 N.H. 495, 363 A.2d 406 (1976); State v. Bryan, 133 N.J. Super. 369, 336 A.2d 511 (1974); State v. Watson, 48 Ohio App.2d 110, 355 N.E.2d 883 (1975); Edwards v. State, 544 P.2d 60 (Okla. Crim. App. 1975); and State v. Canaday, 90 Wash.2d 808, 585 P.2d 1155 (1978).

5. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)

6. Reeder, The Hitch Case - Saving Ampoules for a Defendant from a Chemical Test for Alcoholic Intoxication, NHTSA, DOT HS-4-00965, 1977.

XVII.

QUALIFYING THE TECHNICIAN AND EQUIPMENT

As noted previously, the technician who administers the chemical test of breath or blood must be qualified and the equipment used must be approved; otherwise, the evidence derived from the chemical tests will be inadmissible.[1] This can be accomplished by the introduction into evidence of documents from the designated official who certifies the qualifications of the technicians and the equipment that has been used.

This document will certify that the equipment used was approved by the toxicologist of the Office of the Chief Medical Examiner of the Department of Postmortem Examiners. It may be introduced into evidence by the technician, if he is present to testify; otherwise, by the arresting police officer. The toxicologist is not required to be present and his signed statement is prima facie evidence that the equipment has been approved.

Similarly, there should be a document certifying that the technician administering the test was qualified. This certification document should state that the technician received training from a program approved by the toxicologist and administered by the Maryland State Police and is either a police officer, a police employee, or an employee of the Office of the Chief Medical Examiner.

The technician, if present to testify, or the arresting officer should also testify that the Breathalyzer instrument is serviced on a regular basis.[2]

Footnotes

1. Section 10-304, Courts and Judicial Proceedings Article; sec. 16-205.1(e), Transportation Article.

2. See testimonial checklist for technicians beginning on page 81.

XVIII.

REFUSAL TO TAKE CHEMICAL TEST

Every person who drives or attempts to drive in Maryland has impliedly consented to take a chemical test to determine the alcohol content of his blood or breath.[1] After the police officer detains the individual, he shall request that the individual take the chemical test and advise the individual of the administrative sanctions for refusal.

With one exception which will be discussed below, the individual may refuse to take the test, and may not be compelled to be tested. If the individual does in fact refuse to take the test, the police officer has 48 hours to submit a report under oath, stating that there were reasonable grounds to stop the person for driving or attempting to drive a motor vehicle while intoxicated or under the influence of alcohol and that the individual refused to take the test after being advised of the administrative sanctions for a refusal.

The one exception, under which an individual may be compelled to take a chemical test is where a police officer has reasonable grounds to believe the individual was driving or attempting to drive a motor vehicle while intoxicated or under the influence of alcohol and the individual was involved in a motor vehicle accident resulting in the death of another person.[2] The test shall be administered by qualified medical personnel at the direction of

the arresting police officer. The medical personnel will not be liable civilly for any damages unless such action or failure to act constitutes gross negligence.

If the individual is unconscious or otherwise incapable of consenting to take the chemical test, the police officer is directed to obtain prompt medical attention and, if necessary, to arrange for transportation to the nearest medical facility. The police officer is also authorized to request that the person undergo a chemical test by qualified medical personnel if the test can be administered without jeopardizing the health or well-being of the individual.[3] If the individual regains consciousness or is otherwise capable of taking the test, the police officer shall proceed normally as for any person who has been stopped on suspicion of driving while intoxicated or under the influence of alcohol. A Maryland statute specifically prohibits the State from mentioning that the defendant has refused to be tested.[4] Neither may a judge inquire as to whether the defendant refused to submit to the chemical analysis.[5]

Where a person voluntarily consents to take a chemical test, but later alleges that this consent was not free and voluntary due to being incapable of giving such consent, this objection must be made at the time the evidence is offered; otherwise, the defendant is deemed to have waived the objection.[6] Even if a suspect is unconscious, the absence of refusal does not bar the test results' admission into evidence.[7] Therefore, unless there is an affirmative refusal, consent is valid.

For refusing to take the chemical test, an individual is subject to a driver's license suspension for a minimum period of 60 days but not more than six months. The motorist, of course, has the opportunity for a hearing to explain the reason(s) for the refusal and to be represented by an attorney. Failure to appear at a hearing constitutes prima facie evidence that the information in the police officer's statement as to the individual's refusal is correct and an immediate suspension of the driver's license will result. The length of suspension may be modified or a restrictive license issued if the individual can show the need to use a motor vehicle for work purposes, the need for a motor vehicle to attend an alcoholic prevention or treatment program, or that no alternative means of transportation are available and this would severely affect the motorist's ability to earn a living. The motorist has a right to appeal any suspension imposed.

Footnotes

1. Section 16-205.1, Transportation Article.

2. Subsection 16.205.1(c), Transportation Article.

3. Since the effective date of this amendment to section 16.205.1 is July 1, 1982, no case law exists to interpret the phrase". . . jeopardizing the health and well-being of the individual."

4. Section 10-309, Courts and Judicial Proceedings Article.

5. Davis v. State, 8 Md. App. 327 (1969).

6. Mauldin v. State, 239 Md. 592 (1964).

7. Ibid., see also Breithaupt v. Abram, 352 U.S. 432, 1 L.Ed.2d 448 (1957).

XIX.

DIRECT TESTING OF BLOOD

While breath testing is the most efficient and expedient form of testing, Maryland law does authorize the selection of blood testing by the defendant or officer under certain situations.

If the chemical test is to be performed on a blood speciman, the withdrawal of blood may only be accomplished by a qualified medical person who is defined in sec. 10-304, Courts and Judicial Proceedings Article, as ". . . any person permitted by law to withdraw blood from humans." This has been interpreted to permit only a physician or other medical personnel to withdraw the blood and then only under clinical-like conditions.[1]

The chemical test of the blood must be performed by a person who has received training in a program and on equipment approved by the toxicologist and is either a police officer, police employee, or an employee of the Office of the Chief Medical Examiner.[2] The equipment used must also have been approved by the toxicologist.[3]

Statutory immunity has been created to protect physicians and other authorized medical personnel as well as the licensed hospital from being civilly liable for taking a blood sample without the consent of the individual where the sample was withdrawn at the request of a police officer.[4] This immunity provision also applies to any resident, intern, registered nurse, or health career technician who would handle the blood sample in the course of

their duties.[5] However, any test that is performed negligently or blood sample taken in a negligent fashion or not in accordance with accepted medical practices may result in the responsible person being held civilly liable.[6]

Statutory immunity has also been extended to medical personnel performing any chemical testing or the taking of blood samples at the direction of a police officer from a driver of a motor vehicle involved in an accident resulting in the death of another person, unless the action or omission to act amounts to gross negligence.

Maintaining the Chain of Custody

Since the defendant's attorney may request the presence of the technician and not permit the State to simply admit an official copy of the chemical test results, the chain of custody must be maintained. Failure to do so can result in the exclusion of the test results.

The chain of custody may be proved by a witness other than the individual who actually withdrew the blood, if that witness were present at the taking of the blood sample and can accurately testify to its custody and identity.[8] The testimony of the police officer who was present at the withdrawal of the blood is sufficient to identify the blood sample and the testimony of the physician is not necessary.[9] The chain of custody is sufficiently proved whenever a police officer testifies to being present at the withdrawal of the blood and that the officer sealed and labeled the container which was then sent to the appropriate state agency for analysis.

Under Maryland law, the chain of custody is not required to be established beyond the possibility of any doubt, rather, the standard is one of reasonable probability wherein it can be shown that the evidence is properly identified and it is unlikely that the evidence was tampered with.[10]

Taking of Blood Speciman without Consent of the Individual

The taking of a blood sample without the consent of an individual most often occurs after a motor vehicle accident involving the individual as a driver and who is transported unconscious to a medical facility for treatment. In the landmark decision, Schmerber v. California,[11] objections to the taking of blood without the defendant's consent were based on violations of the defendant's right against self-incrimination (Fifth Amendment) and the right against unreasonable searches and seizures (Fourth Amendment). The United States Supreme Court held that the right against self-incrimination applied only to testimonial or communicative evidence and that the taking of blood was neither. The Court also held that the taking of blood constituted a search, however, for the purpose of ascertaining the blood alcohol content of the person, the taking of blood did not constitute an unreasonable search. The Court reasoned that since the presence of alcohol in the blood diminishes once drinking has ceased that an emergency existed. Where there is a danger of the destruction of evidence (the diminishing of alcohol in the blood), an emergency is present and the search (the taking of the blood) is permitted.

While this constitutional principle is well established, it has been legislatively modified by state implied consent laws which prohibit the

nonconsensual taking of blood and apply a statutory exclusionary rule to evidence so obtained.[12] This exclusionary rule was held to apply to prosecutions for violations of vehicule homicide as well as DWI offenses,[13] however legislation now authorizes compulsory alcohol testing of individuals involved in motor vehicle accidents resulting in the death of another person and restricts the exclusionary rule of section 10-309 to violations of section 21-902 (driving while intoxicated).[14]

The sec. 10-309 exclusionary rule has also been held inapplicable to situations where the driver is transported to a medical facility and blood is withdrawn without the driver's consent as part of the medical treatment of that person.[15] In such cases, the test results of the alcohol content of the blood are admissible into evidence.[16]

Footnotes

1. Robinson v. State, 18 Md. App. 678, 308 A.2d 734 (1973).
2. Section 10-304, Courts and Judicial Proceedings Article.
3. Ibid.
4. Sec. 20-110, Health General Article.
5. Ibid.
6. Ibid.
7. Section 16-205.1(c) Transportation Article.
8. Section 665, 2 Wharton's Criminal Evidence (12th Ed.).
9. Mora v. State, 263 S.E.2d 787 (Tex. 1954). See also State v. Fornier, 167 A.2d 56 (N.Y. 1961) where the chemical analysis is admissible even though neither the physician nor the police officer testified; however, the officer had signed a transmittal slip to the blood sample that identified the person arrested and the officer.
10. Nixon v. State, 204 Md. 475, 105 A.2d 243 (1954); Brooks v. State, 24 Md. App. 334, 330 A.2d 670 (1975).
11. 384 U.S. 757, 86 S.Ct. 1826, 16 L.E.2d 908 (1966).
12. Section 10-309, Courts and Judicial Proceedings Article.
13. State v. Loscomb, 435 A.2d 764 (Md. 1981).
14. Effective July 1, 1982.
15. State v. Moon, 436 A.2d 420 (Md.1981).
16. Ibid.

XX.

SUBSEQUENT OFFENDERS

Case preparation should also include a check of the defendant's driving record to determine if the defendant is a subsequent offender. A person with at least one prior conviction for driving while intoxicated could, if found guilty of driving while intoxicated again, receive up to two years imprisonment rather than one year.[1] The same applies to a subsequent conviction for driving while under the influence of alcohol with possible imprisonment of one year rather than two months.[2]

It is important to remember that a plea of guilty or nolo contendere for violating either sec. 21-902(a) or (b), Transportation Article, will not result in the imposition of a probation sentence unless the defendant agrees to participate in an alcohol treatment or education program as a condition of the probation or the court states on the record that this condition need not be imposed. There can be no probation before judgment for a second or subsequent conviction.

Footnotes

1. Section 27-101(1), Transportation Article.
2. Sections 27-101(c) and (f), Transportation Article.
3. Article 27, Md. Ann. Code, sec. 641.

XXI.

CHARGING DOCUMENT

The charging document should be carefully reviewed to determine its sufficiency and to correct any mistakes prior to trial. Although the state's attorney may move to amend at any time before final judgment,[1] careful review prior to trial will enable the state's attorney to uncover any mistakes in the charging document and either amend or nol pros and initiate corrected charges.

A charging document may be amended as to matters of form on motion of either party; however, amendments as to matters of substance may only occur upon consent of both parties.[2] Matters of substance include the characterization of the crime as well as the essential facts which must be proved to make the act complained of a crime; all else are matters of form.[3]

The charging document for DWI should be reviewed to ascertain if the essential requirements for a DWI charge are correctly set forth in the document. The essential requirements are:

- o The name of the defendant;
- o The offense charged; that is, driving while intoxicated and/or driving while under the influence of alcohol;
- o The correct statutory citation; and
- o Brief recitation of the offense.

As long as the identity of the accused is not in question, any error as to the defendant's name is correctable on motion.[4]

The charging document must charge an offense; that is, the act that constitutes the crime. The language of the statute may be used so long as the elements of the crime are contained in the statute.[5] Although the statute need not be cited whenever the elements of the crime are sufficiently particularized,[6] it is recommended that the applicable DWI statutory provision be cited as a cautionary measure. The charging document should also contain a verbatim rendition of sec. 21-902, Transportation Article,since the applicable provisions of this section contain the requisite elements of the DWI offense.

In preparing the case, the state's attorney should make sure that the evidence not vary from the allegations in the charging document, since any material variance will result in a dismissal of the charges.[7]

Footnotes

1. Gyant v. State, 21 Md. App. 674, 321 A.2d 815 (1974).
2. Rule 713, Maryland Rules of Criminal Procedure.
3. Brown v. State, 285 Md. 105, 400 A.2d 1133; Bolden v. State, 410 A.2d 1085 (1980).
4. Dunlop v. Warden, 229 Md. 619, 182 A.2d 51 (1962).
5. Baker v. State, 6 Md. App. 148, 250 A.2d 277 (1969).
6. Kirsner v. State, 24 Md. 579, 332 A.2d 708 (1975).
7. Green v. State, 32 Md. App. 567, 363 A.2d 530 (1976).

XXII.

TRIAL PREPARATION

Opening Statements

The primary purpose of an opening statement is to present, in a succinct manner, the issues involved and the evidence that will be presented. While the state's attorney is allowed a reasonable latitude, the opening statement should be confined to the facts that can be proved.[1]

A strong, precise, and skillfully presented opening statement places the state's attorney in an excellent position to establish courtroom leadership and impress the jury with command of the facts of the case. It provides the state's attorney with an opportunity to show commitment to the case and to establish a basic rapport with the jury. The strengths of the case can be maximized and the weaknesses minimized. For these reasons an opening statement should not be waived by the state's attorney, although this tactic is within the discretion of counsel in a criminal prosecution.[2]

In the introduction the state's attorney should explain why and what the State intends to do; namely, prove each and every element of the DWI charge. The charging document should be explained and the jury informed that it is not evidentiary material. The state's attorney should then begin a narrative of what occurred. Within the narrative the state's attorney should weave the facts of the case. The facts of the case should include date and time of occurrence, road conditions, traffic, weather, and the events that took place. A vivid, colorful word picture should be conveyed so that the interest

of the jury is maintained and increased as the narrative builds to the climatic moment. The elements of the offense should then be reviewed and related to the facts of the case to show the defendant's guilt.

Closing Statements

The essence of a closing statement is persuasion. It is the final opportunity for the state's attorney to persuade the jury that the defendant is guilty of the offense charged. It is a time to be creative and imaginative in interpreting the evidence for the jury.

The state's attorney is given the opportunity to speak first and then to respond to the defense's closing argument in rebuttal. The state's attorney should therefore decide tactically if some key evidence should be reserved for rebuttal or simply respond to the statements of the defense that may have been harmful.

The closing statement should review the charge of DWI and the elements of that crime and how the State's evidence proved each and every element. The testimony of each witness should be reviewed with emphasis on the major points of that testimony. The State's exhibits should be carefully reviewed with stress placed on the chemical test results.

Essentially, the state's attorney's closing argument represents a cumulation of the entire trial -- an opportunity to summarize, to tell the jury what it has been told, to refresh memory of telling arguments, to intepret the case with respect to the law, and to convince the jury that the

defendant is guilty beyond a reasonable doubt. The state's attorney's review of fact, case elements, witnesses, substance of testimony, and the compelling requirements of law should be a forceful and aggressive presentation.

During closing argument it is imperative that the state's attorney react to any feedback generated from the jury during the trial and resolve any negatives.

Jury Instructions

Case preparation should also include preparation of the jury instructions that the state's attorney will most likely submit to the court for presentation to the jury.

Tactically, the state's attorney may wish to prepare instructions on the presumption of innocence and burden of proof. Coming from the state's attorney will impart a manifestation of fairness to the jury.

Since reasonable doubt is an integral factor in every criminal case, it is essential that every trial attorney prepare their own instruction on reasonable doubt. In this fashion, the state's attorney can develop a clear understanding and belief of what is reasonable doubt and communicate that belief to the jury not only in the jury instructions but also in the opening and closing statements.

Specific instructions should be developed concerning the offenses of driving while intoxicated and under the influence of alcohol. The state's attorney should prepare instructions as to the elements of drunk driving

necessary for conviction, the degree of intoxication necessary for conviction, the chemical test for breath or blood and the test results, and the statutory presumptive levels of intoxication.

Footnotes

1. Wilhelm v. State, 272 Md. 404, 326 A.2d 707 (1974).
2. White v. State, 11 Md. App. 423, 274 A.2d 671 (1971).

XXIII.

WITNESS PREPARATION

The primary witness in almost every drunk driving case is the arresting officer. In reviewing a DWI case prior to trial, the state's attorney should obtain the following information.

1. If the police officer personally observed the driving behavior of the defendant, a complete report of the officer's observations, including arrest report, the results of any physical tests that were administered, and the results of any preliminary breath test if one was administered;
2. If the police officer did not directly observe the driving behavior of the defendant, a list of witnesses who can testify that the defendant was driving, or, if none, the circumstantial evidence by which it can be concluded that the defendant was driving;
3. A copy of the accident report, if any;
4. A copy of the chemical test report, if administered and, if so, where the chemical test was given, the name of the technician, and the approximate time from the arrest to the taking of the chemical test.

The technician who administered the chemical test should be contacted prior to trial so that the state's attorney has on file the necessary documentation certifying the training of the technician, the equipment, and the test results.

The lay witnesses should be subpoenaed to place them on notice as to when they will have to appear. In reviewing the testimony of the lay witness, the state's attorney should explain what will happen in the courtroom, the role of the witness at the trial, and that the witness should dress appropriately. The witness should be counseled to tell the truth and to answer every question simply and directly. The witness should also be prepared for cross-examination.

In any review of a witness's testimony, the state's attorney should prepare a checklist of the points on direct examination that are essential for proving the elements of driving while intoxicated. In this way the testimony of the police officer, the technician (if necessary) and the lay witness, can be outlined and the required documentation obtained.

XXIV.

TESTIMONY OF THE POLICE OFFICER

The critical witness in practically all DWI cases is the arresting police officer. If the technician is not required to appear at trial, the State's case will usually consist of the arresting officer's presentation on the witness stand although other witnesses may be called if their testimony would be relevant. Proving the elements of the DWI offense must therefore be accomplished through the officer's testimony and admission into evidence of the relevant documentation. Prior to trial the state's attorney should review and have on file:

- o The professional background of the officer including training and experience related to detection and handling of intoxicated drivers.
- o Background and training to administer the Breathalyzer.
- o The observations of the police officer as to the defendant's driving behavior.
- o If no direct observation, the indirect or circumstantial evidence showing the erratic driving behavior of defendant, including testimony of witnesses and accident reports.
- o Documentation required for trial including forms certifying acknowledgement by defendant of penalties for refusing to take the Breathalyzer Test, arrest report, alcoholic influence report,[1] chemical test results, results of physical tests performed at the scene, accident report, and prior driving record.

The essential elements of driving while intoxicated and driving while under the influence of alcohol are:

- o Location (venue).
- o Identification of defendant.
- o Driving of vehicle by defendant.
- o Intoxication of defendant.

Location -- While this element is not difficult to prove, one potential problem that could arise is the stopping of the defendant by a police officer out of the officer's jurisdiction. An illegal arrest could result in suppression of all evidence incident to the arrest.

Identification -- No special problem of proof inherent in this element, however, this issue could be contested particularly where the defendant had no identification and the police officer had to indirectly verify the driver's identity. The photographing of DWI suspects at the time of arrest may facilitate the identification of the defendant at trial.

Driving -- In Thomas v. State[2] the State did not prove that the defendant was driving a motor vehicle while intoxicated, and accordingly, the conviction was reversed.[3]

Intoxication -- This element will almost always be contested. The direct examination of the police officer will often be the sole basis for proving this element. It is imperative that the testimony as to the officer's observations, experience, and training, involving intoxicated persons, and the officer's opinion as to the degree of intoxication of the defendant be presented in a strong, clear, and concise manner.

The initial questions to the police officer should cover the following topics:

- o Name and occupation.
- o Length of time in that occupation.
- o Assigned duties on the date in question.
- o Marked or unmarked police car (If unmarked, the officer should state how visible the lights were).
- o In uniform or not (If not, the officer should indicate the manner of police identification to the driver).
- o Location of the offense.

Actual Observation

The next series of questions cover the actual observations of the defendant by the police officer. The state's attorney should guide the officer through the testimony on the erratic driving behavior of the defendant that gave rise to the officer's reasonable belief that the defendant was driving while intoxicated. If appropriate, and time permitting, diagrams can

be prepared showing the location of the incident and allowing the officer to graphically illustrate the defendant's driving behavior. For example, the officer could diagram change of lanes, following too closely, running a red light or stop sign, going off the edge of the roadway, etc. The officer should also testify as to the weather conditions, traffic conditions at the location, and the lighting conditions when the vehicle was first observed and at the location of the roadside tests, if given.

The next set of questions cover the stop of the vehicle and include identifying the driver. Topics covered should include the following:

- o Distance the officer followed the vehicle before the stop.
- o Exact location of the stop.
- o Descriptions of how the defendant stopped the vehicle, noting any unusual behavior that would indicate unsafe operation of the vehicle.
- o Approaching the defendant's vehicle and initial contact.
- o Request for identification.
- o Description of how the defendant produced the identification.
- o Identification of the defendant in court as the driver and, for the record, how the driver was dressed.
- o Whether the defendant was requested to get out of the vehicle and, if so, the manner in which that task was accomplished.
- o Description of the defendant's physical appearance and demeanor.

The police officer should testify as to any conversation with the defendant. Questions could include:

- o Where defendant had been.
- o Where the defendant was going.
- o Where the defendant was.
- o If an accident, what happened.
- o Any admission of drinking.
- o If so, how much, where, and the time and place of the last drink.

It is at this point in the narrative that the officer would testify as to the administration of any roadside sobriety tests. The following areas should be covered for every roadside test:

- o Request to perform roadside test.
- o Description of the physical location where the tests were given.
- o Identification, explanation, and instructions of the roadside test.
- o Demonstration to the court by the officer of how the test was to be performed.
- o Analysis of defendant's performance.
- o Demonstration in court by the officer of how the defendant performed the test (Objections on grounds of accuracy can be rebutted by the officer testifying that the reenactment was substantially accurate).
- o Observations of the defendant for any injury affecting the defendant's driving performance.
- o Questioning defendant as to any possible injury.
- o Questioning defendant as to any medication.

The next line of questioning should set the foundation for the police officer's opinion as to the degree of intoxication of the defendant and the placing of the defendant under arrest.

- o Training of the officer in dealing with persons consuming alcoholic beverages.
- o Description of the training program.
- o Experience of the police officer in arresting persons who had been drinking.
- o Experience of the police officer in arresting drivers of motor vehicles who had been drinking.
- o Opinion of the police officer based on the officer's training, experience, and observations of the defendant (Ask the officer to explain use of terms such as mildly, moderately, extremely, etc. in describing the defendant's degree of intoxication).
- o Placing the defendant under arrest.

Indirect or Circumstantial Evidence

In investigating an automobile accident, the police officer may not have had any direct observation of the defendant's driving behavior since the officer's initial observations of the defendant were at the accident scene.

If there were witnesses to the accident and the defendant's prior driving behavior, the police officer should have identified the witnesses and taken their statement. The state's attorney should have this information prior to

trial so that the witnesses may be summoned and properly prepared to testify at trial. The testimony of lay witnesses is discussed in Chapter XXVI on page 78 of the Manual.

Where there are no witnesses, the police officer's investigations as to the cause of the accident and establishing that the defendant was driving while intoxicated is critical. Once at the accident scene the officer can actually observe the defendant; however, the police officer will have to provide indirect or circumstantial evidence that the defendant was driving. If circumstantial evidence can show that the defendant was in actual physical control of the vehicle at the time of the accident, the element of driving will have been proven. The police officer could then testify as to what occurred subsequent to the officer's arrival.

The circumstantial evidence will involve a reconstruction of the accident showing the location of the defendant's vehicle, the location of the defendant in or near the vehicle, and the presence of any physical conditions, such as skidmarks, knocked-over utility poles or trees, and so on. From the physical evidence present at the accident, the police officer should be able to provide an analysis of the cause of the accident and whether the intoxicated condition of the defendant was the probable cause.

Footnotes

1. See Appendix B for the Alcohol Influence Report used by the Maryland State Police.

2. 277 Md. 314, 353 A.2d 256 (1976).

3. Since the Thomas decision, the definition of "drive" was amended to include " . . . be in actual physical control of a vehicle . . . ." In upholding a DWI conviction, the Virginia Supreme Court in Lyons v. City of Petersburg, 221 Va. 10, 266 S.E.2d 880 (1980) stated that the defendant was in possession of the vehicle even though the defendant was found, intoxicated, seated behind the steering wheel with no evidence of the engine running or the car in gear. There are no Maryland cases on this point.

4. See the Vehicule Homicide section of Manual, Chapter XXIX, for further discussion of presenting indirect or circumstantial evidence.

XXV.

VIDEO TAPE RECORDINGS

The video taping of DWI suspects often graphically illustrates the defendant's degree of intoxication and is particularly effective when no chemical test has been taken.

A video tape recording is accorded the same status as a sound motion picture film and is admissible in evidence if the recording satisfies the rules applicable to photographic evidence.[1] For authentication, there must be a fair and accurate representation of what is shown in the recording.[2] It is within the trial court's discretion to determine if the recording is inflammatory, of any practical value, or improperly prejudicial.[3]

A video tape recording depicting the influence of intoxicating liquor has been held admissible in evidence upon the same basis as a photograph.[4]

Footnotes

1. Tobias v. State, 37 Md. App. 605, 378 A.2d 698 (1977); Bremer v. State, 18 Md. App. 291, 307 A.2d 503 (1973).; State v. Newman, 4 Wash. App. 588, 484 P. 2d 473 (1971).

2. State v. Thurman, 84 N.M. 5, 498 P.2d 697 (1972).

3. Carroll v. State, 11 Md. App. 412, 274 A.2d 677 (1971).

4. People v. Ardella, 276 N.E.2d 302 (Ill. 1971); Tobias v. State, 37 Md. App. 605, 614 (1977).

XXVI.

TESTIMONY OF THE LAY WITNESS

In DWI cases involving accidents, the actual observation of the defendant's driving behavior leading to the accident may be provided by a lay witness. This could be a person in the vehicle of the defendant, in another vehicle involved in the accident, or someone present at the accident scene.

The state's attorney, after reviewing the accident report, should contact each witness and request an interview. At the interview the state's attorney should advise the witness as to what happens in the courtroom so that the witness will have some understanding as to what will occur. The witness should be cautioned to dress appropriately, speak clearly and respond directly to questions. On cross-examination the witness should respond truthfully. If the witness doesn't know, the answer should be "I don't know." If the witness is asked if the witness met with the state's attorney, the answer should be in the affirmative if a meeting did in fact occur.

The questions asked should assist the witness in the narration of what occurred. Careful questioning of the lay witness can result in a detailed description of the defendant's driving behavior.

XXVII.

CHEMICAL TEST EVIDENCE

General

Because of the significance courts place on blood alcohol testing results in DWI cases, it is important that state's attorneys be knowledgeable about every aspect of such testing procedures so potential trial problems may be avoided. In addition, an in-depth knowledge of the scope and function of chemical testing will enable the state's attorney to anticipate defense tactics and prepare the State's case accordingly.

As has already been noted, every driver of a motor vehicle in Maryland is deemed to have given the driver's consent to submit to a blood alcohol test.[1] The defendant may submit to either a chemical test of breath or blood,[2] but except in vehicle homicide cases may not be compelled to such testing.[3] Preparation of testimony for both types of testing will be covered in this section.

The Arresting Officer

Since the defendant's refusal to submit to a chemical test of breath or blood is inadmissible at trial, the state's attorney should emphasize to the arresting officer that no mention be made of this fact during the trial on the DWI charge.[4]

The chemical test must be administered within two hours of the defendant's apprehension.[5] The arresting officer's testimony must set forth:

- o The time of arrest.
- o The time of the chemical test administration.
- o Relationship of the time of arrest to the time of driving the motor vehicle by the defendant.

Additionally, the officer should testify to the following:

- o Whether or not the defendant was in the custody and control of the officer from the time of apprehension to the time the test was given.
- o Whether the defendant consumed any alcoholic beverage during that time.
- o Whether the defendant was advised of the Implied Consent Law.[6]
- o Whether the defendant signed the Implied Consent form and was given a copy. The state's attorney should hand the officer the Implied Consent form signed by the defendant, asking the officer to identify it, and move that it be admitted into evidence.
- o Whether the defendant understood what was being signed and whether this understanding was communicated to the officer.
- o Whether the defendant was advised of the test procedures and that the defendant could select the type of chemical test that the defendant desired.
- o Whether the officer was present during the testing procedures.
- o Disclosing the name of the person conducting the test.

If the technician is not required to be present, an official copy of the test results[7] can be admitted into evidence.[8] The arresting officer can be used to identify the official copy and present the information contained therein. The state's attorney would then move for its admission.

If the defendant requested and was given a chemical test of blood, the arresting officer should testify to the following if the officer were present at the test and was given the sample for delivery to the laboratory for analysis:

- o Observation of the test.
- o Identification of the person conducting the test.
- o Procedure for marking and identifying the sample, sealing the container, and delivery of the sample to the laboratory. At this point the officer should identify the container of the defendant's blood sample and the state's attorney should move for its admission.

The critical factor in this line of questioning is establishing the chain of custody of the sample.

Technician

Whenever the technician is required to testify, the technician should be prepared to state that:

- o The equipment was approved and in proper working order.
- o The technician was properly trained and certified to conduct the test.
- o The test was properly conducted.

The first series of questions concern the technician's experience and should elicit testimony as to:

- o Training of the technician.
- o Certification of the technician to conduct tests.
- o Prior number of tests conducted.

The next set of questions involve the chemical test administered to the defendant:

- o Time of the test.
- o Whether the defendant had anything in the mouth, belched, or vomited within 20 minutes of the administration of the test.
- o Whether the technician used the approved operational checklist.
- o Whether the technician marked and identified the checklist used for the defendant's test.
- o The procedure followed to determine if the Breathalyzer instrument was in proper working order.
- o Identification of the instrument, its model number, date of last maintenance check, description of maintenance program on the instrument, and when equipment that was used was approved, when and by whom.
- o Clean mouthpiece for the defendant.
- o Recording the test results.
- o Marking and identifying the document containing the test results.

During the course of this questioning, the technician should identify the documents that will be used as exhibits for the State. These will include any certification as to the technician's training, approval of the equipment, maintenance check, consent form, operational checklist,[9] and test results form. Upon completion of the testimony, the state's attorney should move for their admission as exhibits for the State.

On cross examination, the technician must be prepared for challenges on any part of the procedures followed once the defendant was present. Minor procedural errors should be identified as such and it should be emphasized that the test results would not be affected by them. Substantive procedural errors which would affect the admissibility of test results should be analyzed by the state's attorney prior to trial to determine whether admission of the test results should be attempted at all since chemical test results are not a prerequisite for a DWI conviction. A conviction can still be obtained on the basis of other evidence, such as the testimony of the arresting officer.[10]

Toxicologist

In some DWI and vehicle homicide cases the State may wish to have the toxicologist testify to explain testing procedures, and to provide an expert interpretation of blood alcohol levels and their effect on the body. Since the toxicologist will be an expert witness, the initial line of questioning will be designed to elicit testimony as to the toxicologist's training, education, experience, and duties so that the toxicologist may be qualified as an expert. The questions should cover the field of toxicology, what it

CONTINUED

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is, what the toxicologist's specialty is within this field and what studies the toxicologist has pursued. The toxicologist should be asked if there have occasions to perform blood-alcohol examinations, the number of tests performed, the number of times the toxicologist has testified as an expert in this area, and the identity of the courts in which the toxicologist has testified as an expert. At this juncture the state's attorney should offer the toxicologist as an expert. The same line of questioning should be pursued to qualify the toxicologist as an expert on the effects of alcohol on the body, particularly as it affects the mobility of persons to drive a motor vehicle.

In discussing the blood sample, the toxicologist should discuss the following on direct examination:

- Identification of the defendant's blood sample by name, initials, notation, number, etc.
- How and when the toxicologist received the blood sample.
- How the toxicologist marked the blood sample container for identification.
- Establish the complete chain of custody by discussing the sealing of the blood sample, the present condition of the seal and the blood sample container, and any other factor showing that there was no tampering.
- Use of approved equipment and in an approved laboratory.
- Analysis of blood sample and method used.
- Opinion as to the toxicologist's findings. The opinion of the toxicologist is elicited after the official test results are admitted into evidence.

Once the toxicologist has been qualified as an expert on the effects of alcohol on the body, the state's attorney can ask for an opinion as to::

- The correlation between the blood alcohol content and intoxication from alcohol.
- The minimum concentration of alcohol in the blood at which all persons are intoxicated.
- The effect of alcohol on the body, particularly the ways it can affect the brain.
- Given the blood alcohol concentration of the defendant, the ways a person is affected by that quantity of alcohol consumed, specifically, the ability to drive a motor vehicle.
- Whether a person has the ability to compensate for the alcohol consumed.

Hypothetical questions can be used to get an opinion from the toxicologist as to whether a person with a blood alcohol concentration such as the defendant's would be capable of driving safely. Before a hypothetical question may be asked, the state's attorney should be sure that all of the facts of the case are in.

Qualified Medical Personnel

If a qualified medical person performed the blood test, the state's attorney must present evidence that shows the equipment that was used was approved, the laboratory in which the test was conducted was an approved laboratory, and that the person had the requisite education, training and experience to conduct the test.

Footnotes

1. Section 16-205.1, Transportation Article.

2. Section 10-304, Courts and Judicial Proceedings Article.

3. See Chapter XXIX for a discussion of Vehicle Homicide and the recently enacted compulsory testing law.

4. See Section 10-309, Courts and Judicial Proceedings Article.

5. Section 10-303, Courts and Judicial Proceedings Article.

6. Section 16-205.1, Transportation Article.

7. See Appendix B for the official test results form used by the Maryland State Police.

8. Section 10-306, Courts and Judicial Proceedings Article.

9. See Appendix B for the Breathalyzer Operational Check List used by the Maryland State Police.

10. Major v. State, 31 Md. App. 590, 358 A.2d 609 (1976).

XXVIII.

ANTICIPATING THE DEFENSE

Careful case preparation enables the state's attorney to review case material and measure the weaknesses, if any, in the State's case. The state's attorney can then anticipate defense attempts to attack any weaknesses and counteract the attack through careful preparation with the appropriate witness.

For example, the arresting police officer may have limited experience in arresting persons who have been driving while intoxicated. Careful review of this point with the officer can result in counteracting a possible defense thrust by testimony on direct that, although the experience of the officer is limited, the officer's work in this case was thorough and detailed. Additionally, the officer should testify as to the intensive training that the officer underwent.

The following are some of the common issues that the defense may contest:

- Probable cause to stop the vehicle.
- Arrest outside the officer's jurisdiction.
- Driving a motor vehicle.
- Identification of the driver.
- Chemical test results.
- Chain of custody of the blood sample.
- Presumption of intoxication.
- Failure to follow prescribed procedures in administration of the chemical test.

- o Administration of chemical test within 20 minutes of the defendant's last drink or vomiting episode.
- o Validity of roadside tests.
- o Technician properly certified to administer the chemical test.
- o If a blood test were administered, the conditions where the test was taken and the certification of the person administering the test.
- o Condition of the defendant due to a cause other than consumption of alcohol.
- o Officer's opinion as to the intoxication of the defendant.
- o Causes other than intoxication affecting the defendant's condition.
- o Odor of alcohol, slurred speech, injury, illness, medication, and bloodshot, watery eyes.
- o Rate of absorption of alcohol.
- o Voluntariness of the defendant's statements.

XXIX.

HOMICIDE BY VEHICLE

In automobile accident cases resulting in the death of an individual that was caused by the driving of a person who was intoxicated, that person could be charged with manslaughter by automobile[1] or homicide by motor vehicle while intoxicated.[2] Since the investigating police officer will most likely have not observed the driving behavior of the accused individual, the state's attorney will have to build the case on indirect or circumstantial evidence. Another problem facing the state's attorney concerns the degree of intoxication of the driver and its effect in the causation of the accident.

Negligence

The elements relating to the charge of homicide by motor vehicle while intoxicated that must be proved are the negligent operation of the motor vehicle by the defendant and the degree of intoxication. The state's attorney must prove the elements of negligence -- duty, breach of duty, and causation -- and that the negligence resulted from the intoxicated state of the defendant.

To prove manslaughter by automobile the state's attorney must prove that the defendant's negligence was gross negligence. Gross negligence is defined as "a wanton or reckless disregard for human life."[3] The trier of fact has to consider the facts of the entire case to determine if this statutory standard had been violated.[4] Intoxication alone was normally entitled to some weight but was not controlling.[5] Where, however, the degree of

inebriation would sustain a conviction of driving while intoxicated (section 21-902(a)), the level of negligence was raised from simple to gross negligence. In Blackwell v. State[6] the Court held that the trier of fact may infer a wanton intoxication was so extreme as to numb the nervous system thereby ". . . adversely affecting his reflexes, coordination, discretion and judgment, to drive an automobile. . . ."

To prove gross negligence, the state's attorney should prepare the State's case in the same manner as a DWI case and prove the elements of driving while intoxicated. In doing so, the state's attorney should be careful to tie in the elements of driving while intoxicated with the elements of negligence -- duty, breach of duty, and causation. Particular emphasis should be placed on the closing argument in relating the normal factors constituting negligence and how the defendant's intoxicated state while driving constituted not just negligence but gross negligence -- a wanton or reckless disregard for human life.

Gross negligence may also be proven where the degree of intoxication is not at the level that would show driving while intoxicated. For such cases, the degree of intoxication may be a contributing factor that, along with other factors, such as speeding, stop sign violations, etc., will prove gross negligence.[7]

Chemical testing

As noted earlier in this manual, as of July 1, 1982, legislation amending sec. 16-205.1, Transportation Article, and sec. 10-309, Courts and Judicial Proceedings Article, now compels a driver of a motor vehicle involved in an automobile accident, to submit to a chemical test of breath or blood whenever the police officer, in investigating the automobile accident that resulted in the death of an individual, has reasonable grounds to believe the driver to have been drinking. Determining who was at fault is not a factor, only involvement in the accident.

What happens if the driver refuses to comply? How much pressure may the police officer apply so that the test is administered? The state's attorney should carefully review the course of conduct undertaken by the police to compel the driver to submit to a chemical test whenever the driver initially refused. An unreasonable application of pressure will undoubtedly result in the inadmissibility of the test results and dismissal of the criminal charges.[8]

Since a chemical test may provide a significant part of the evidentiary material in the State's case, the state's attorney should carefully review the chemical test procedures so that the test results will be admitted into evidence.

Blood test results will also be admissible when the test was not administered in accordance with the provisions of sections 10-307 to 10-309, Courts and Judicial Proceedings Article, inclusive, if the test was performed for medical purposes and not primarily to determine the blood alcohol content.[9] In such cases, however, the statutorily established presumptive levels for intoxication of sec. 10-307, Courts and Judicial Proceedings Article, may not be relied upon and this fact must be proven by expert testimony such as that of the state toxicologist.

In most cases involving manslaughter by automobile and homicide by motor vehicle while intoxicated, the investigating police officer does not directly observe the driving behavior of the defendant. Proof that the defendant did in fact cause the accident resulting in the death of another must occur through evidence that is circumstantial and indirect.

In this regard, an accident reconstruction expert may be helpful in establishing the defendant's culpability and, where possible, a qualified expert should review and analyze the accident data. As with any expert witness, the state's attorney must qualify the witness through questioning designed to elicit the witness's experience and training. Provided the police officer has the proper qualifications, the officer may qualify as an expert and give an opinion as to the cause of the accident. Otherwise, the officer's testimony on the accident would be limited to the investigation without providing any expert opinion testimony.

One advantage of using expert witnesses is the opportunity for the state's attorney to perform tests, experiments, and demonstrations. In this manner and through the utilization of maps, diagrams and photographs, the state's attorney can in effect present evidence that will recreate the accident scene and how the defendant's driving behavior was the primary causation.

In reviewing the police reports of the accident investigation, the state's attorney should look for evidence relating to skidmarks. Through skidmark evidence, the State can compute the speed of the defendant's vehicle at the time of the crash. Lay witnesses to the accident will be able to testify as to their observations, however an accident reconstruction expert will be able to express an opinion as to the cause of the accident based on the skidmark testimony already presented by the investigating officer and any eyewitness to the accident. The investigating officer could testify as an expert witness provided the officer has had the proper training and experience.

The defendant's activities prior and subsequent to the accident may also prove relevant to establishing the degree of intoxication and negligence required to prove these two offenses. A thorough investigation should therefore be conducted to determine not only what the defendant was doing but who the defendant may have been with, how much alcohol may have been consumed, and what if anything may have been said.

The state's attorney should be alert to the acceptance of certain facts by judicial notice of the court. Through judicial notice certain scientific facts, such as reaction time, stopping distance, and speed charts can be admitted into evidence.

Footnotes

1. Art. 27, Section 388, Md. Code. Conviction could result in imprisonment for not more than three years, a fine up to $1,000, or both.

2. Art. 27, Section 388A, Md. Code. Conviction could result in imprisonment for not more than two years, a fine up to $1,000, or both.

3. Montague v. State, 3 Md. App. 66, 237 A.2d. 816 (1968).

4. State of Maryland v. Chapman, 101 F. Supp. 335 (1951); Boyd v. State, 22 Md. App. 539, 323 A.2d 684 (1974).

5. Lilly v. State, 212 Md. 436 (1957).

6. Blackwell v. State, 34 Md. App. 547, 369 A.2d 153 (1977).

7. Clay v. State, 211 Md. 577 (1957); Pierce v. State, 227 Md. 221 (1961); Cummings v. State, 27 Md. App. 361 (1975).

8. See Rochin v. People of California, 342 U.S. 165, 72 S.Ct. 205 (1952).

9. State v. Moon, 436 A.2d 420 (Md. 1981).

XXX.

SENTENCING ALTERNATIVES

An effective tool in plea bargaining negotiations is provided by the provisions of Art. 27, section 641, concerning the imposition of probation before judgment. Under this section, in return for a plea of guilty, the state's attorney may recommend probation and, as a condition of probation, participation in an approved alcohol treatment or education program. If the court accepts the recommendation, it would accept the guilty plea and stay the entering of the judgment. Treatment as a condition of probation must be imposed unless the court states on the record that imposition of this condition would not be in the interests of the defendant and the State. The alcohol treatment or education program selected must, however, have been approved by the Administrative Office of the Courts. The provisions of section 641 also apply to individuals found guilty or who plead nolo contendere.

The Alcoholism Control Administration of the Department of Health and Mental Hygiene, is primarily responsible for the state-wide administration of the DWI treatment and education program. Referrals from the courts of DWI offenders into the program have significantly increased since section 641 was amended as noted above. A recent amendment, effective July 1, 1982, prohibits judges from staying judgment and placing second or subsequent DWI offenders on probation under this section.

Generally, the DWI program can be broken down into the following component parts:

- Identification - Identification occurs when an individual is charged with a DWI offense. The individual is encouraged to undergo an assessment as part of a pre-sentence investigation that is available to the Courts.

- Assessment - Either voluntarily or through referral by the Courts, the individual's drinking problem is assessed and a determination made as to how it should be treated.

- Treatment - The type of treatment is then selected and the individual, depending on the severity of the drinking problem, will be placed into either an inpatient (detoxification, residential or halfway house care) or outpatient (individual, group, or family counselling) program. Utilization of Alcoholics Anonymous is also encouraged.

- Education - Nonproblem drinkers will be placed in a county education program which consists of six weekly two-hour sessions.

- Case Management - A follow-up program is designed to monitor and reenforce the positive rehabilitative gains acquired during treatment. This program is for a period of six months unless otherwise directed by the Court. After one year, a report is submitted to the Court in which a judgment is made as to the potentiality of future driving offenses and the current functional level of the individual. Factors to be considered include: legal involvement, employment, personal functioning, and alcohol use.

Violators of agreed upon probationary terms may have their probation revoked and the original sentence imposed.

XXXI.

ADMINISTRATIVE SANCTIONS

Point System

The Point System is set forth in sec. 16-402 of the Transportation Article. Conviction for driving while under the influence of alcohol (sec. 21-902(b)) will result in the imposition of six points on the driving record of the defendant. Conviction for driving while intoxicated (sec. 21-902(a)) will result in the imposition of 12 points.

At the five point level the driver is scheduled for a conference or administrative hearing at the Motor Vehicle Administration (MVA). Twelve points on the driving record could result in the revocation of the driver's license. The driver is sent a letter by personal service or registered mail in which the driver is notified of the length of the revocation and the opportunity for a hearing. A license revoked will not be reinstated until the driver passes an examination of a type specified in section 16-110 of the Transportation Article. Section 16-405 of the Transportation Article permits the hearing officer to cancel or modify the revocation if the revocation would adversely affect the driver's employment. While a person who drives in the course of employment would not normally have their license suspended under the Point System unless there is an accumulation of 16 points or have the license revoked unless there is an accumulation of 19 points on the driving record, this point extention provision is not applicable if the subsequent conviction for which points are assessed results from a violation of sec. 21-902.[1]

Refusal to Take a Chemical Test

Refusal to take a chemical test to determine the blood alcohol content will result in the driver being notified within 48 hours that the driver's license will be suspended for not less than 60 days nor more than six months.[2] The driver is given the opportunity for a hearing at which time the length of suspension will be determined, if warranted. Section 16-205.1, Transportation Article, authorizes the issuance of a restrictive license if:

1. The driver needs the vehicle in the course of employment;
2. The driver needs the vehicle to attend an alcoholic prevention or treatment program; or
3. The driver has no alternative means of transportation and the driver's ability to earn a living would be severely impaired.

Footnotes

1. Sec. 16-405, Transportation Article.
2. Sec. 16-205.1, Transportation Article.

APPENDIX A

Observable Driving Actions

- o Unreasonably high speed
- o Irregular speeds (slow/fast/slow)
- o Frequent lane changing and excessive speed
- o Improper passing with insufficient clearance
- o Taking too long when passing, or swerving too much when overtaking and passing (i.e., over-steering)
- o Overshooting or completely disregarding traffic control devices or signals
- o Approaching signals unreasonably fast or slow
- o Stopping with uneven motion of vehicle
- o Driving at night without headlights, or excessive delay in turning them on
- o Failure to dim headlights (slow responses)
- o Driving in a lower gear without shifting
- o Jerky driving or stopping
- o Driving too slowly
- o Driving too close to shoulder or curb, or hugging the edge of the road
- o Straddling the center line
- o Driving with windows open in cold weather
- o Driving with head partially or completely out of the window
- o Weaving across lanes or within a lane
- o Aiming the vehicle (oblivious to other traffic)
- o Failure to start when a traffic light turns green

- Driving over or across median strips
- Driving on wrong side of road
- Unsafe backing up
- Driving wrong way on one-way street
- Failure to stop for emergency vehicle
- Any accident or collision (especially a hit-and-run)
- Any other driving action which seems irregular or any traffic violation, or combination of actions

APPENDIX B

FORMS FOR DWI OFFENSES

Alcohol Influence Report Form

Official Copy-Results of Chemical Test

Breathalyzer Operational Check List

STATE OF MARYLAND

ALCOHOL INFLUENCE REPORT FORM

NO.	COMPLAINT CONTROL NO.	ACCIDENT REPORT NO.	CITATION NO.	DATE AND TIME OF ARREST AM PM

ME	DRIVER'S LICENSE NO. AND STATE

DDRESS	SEX	DATE OF BIRTH

SIGN OF ILLNESS OR INJURY

ARE YOU TAKING MEDICATION?	WHAT KIND OF MEDICATION?	DATE AND TIME OF LAST DOSAGE

SON FOR STOPPING DEFENDANT'S VEHICLE OR INITIAL CONTACT – INCLUDE LOCATION AND DIRECTION OF TRAVEL, WHERE ACCUSED WAS STOPPED – DESCRIPTION OF INDIVIDUAL

Oh

FC

ARI

OBSERVATIONS

FIELD PERFORMANCE TESTS			☐ NOT PERFORMED				
BALANCE:	☐ FALLING	☐ NEEDED SUPPORT	☐ WOBBLING	☐ SWAYING	☐ UNSURE	☐ SURE	OTHER
WALKING:	☐ FALLING	☐ NEEDED SUPPORT	☐ WOBBLING	☐ SWAYING	☐ UNSURE	☐ SURE	OTHER
TURNING:	☐ FALLING	☐ NEEDED SUPPORT	☐ WOBBLING	☐ SWAYING	☐ UNSURE	☐ SURE	OTHER
FINGER TO NOSE:	RIGHT HAND:		☐ COMPLETELY MISSED		☐ HESITANT	☐ SURE	OTHER
	LEFT HAND:		☐ COMPLETELY MISSED		☐ HESITANT	☐ SURE	OTHER
PICKING UP COINS:		☐ UNABLE	☐ FUMBLING	☐ SLOW	☐ SURE		OTHER

BALANCING WHILE PICKING UP COINS

HOW MANY PASSENGERS WITH ACCUSED (SOBRIETY IF KNOWN)

EVIDENCE IN VEHICLE – DISPOSITION (PROPERTY HELD NO.)

NOTE: MIRANDA WARNING MUST BE GIVEN TO ACCUSED BEFORE CONDUCTING INTERVIEW.

ANSWERING QUESTIONS IS VOLUNTARY, IF ACCUSED REFUSES TO ANSWER, SO STATE.

FIELD INTERVIEW

MIRANDA WARNING GIVEN: ☐ YES ☐ NO — TIME — AM PM

DR-15 FORM READ: ☐ YES ☐ NO — TIME — AM PM

WERE YOU DRIVING A VEHICLE? — WHERE WERE YOU GOING?

WHAT STREET OR HIGHWAY WERE YOU ON? — WHAT DIRECTION WERE YOU TRAVELING?

WHERE DID YOU START FROM? — WHAT TIME DID YOU START?

DO YOU HAVE ANY PHYSICIAL DEFECTS? IF SO, WHAT

ARE YOU A DIABETIC? — DO YOU HAVE EPILEPSY?

HAVE YOU BEEN DRINKING?	WHAT	HOW MUCH?	WHAT TIME DID YOU START?	STOP

PBT

WAS PRELIMINARY BREATH TEST OFFERED?	PRELIMINARY BREATH TAKEN	PBT SERIAL NO.
☐ YES ☐ NO	☐ YES ☐ NO	

CHEMICAL TEST DATA

CHEMICAL TEST PERSONNEL

DATE AND TIME TEST GIVEN	TYPE TEST	ALCOHOL (BY WEIGHT OF ALCOHOL)
	☐ BLOOD ☐ BREATH	O. %

DISPOSITION

TRIAL DATE	COURT	PLEA	VERDICT

JUDGE — STATES ATTORNEY

FINES AND COSTS

DISPOSITION

ARRESTING TROOPER – ID # — REVIEWING SUPERVISOR – ID #

COMMENTS

MSP 32 (6/81)

HARRY HUGHES
GOVERNOR

THOMAS W. SCHMIDT
SECRETARY
PUBLIC SAFETY AND
CORRECTIONAL SERVICES

STATE OF MARYLAND

DEPARTMENT OF
PUBLIC SAFETY AND CORRECTIONAL SERVICES

MARYLAND STATE POLICE
PIKESVILLE, MARYLAND 21208-3899
AREA CODE 301 486-3101
TTY FOR DEAF AREA CODE 301 486-0677

WILLIAM M. LINTON
DEPUTY SECRETARY

COLONEL W. T. TRAVERS, JR.
SUPERINTENDENT
MARYLAND STATE POLICE

Case No. _____

Summons No. _____

OFFICIAL COPY - RESULTS OF CHEMICAL TEST

In accordance with the Annotated Code of Maryland, Article of Courts and Judicial Proceedings, 10-306, .s certification is hereby presented.

This is to certify that the _____ *sample obtained using equipment approved by the*
(Blood/Breath)

Toxicologist, Office of the Chief Medical Examiner, Department of Post Mortem Examiners from
_____ *under the direction of* _____ *on* _____
(Defendant) *(Arresting Officer)* *(Date of Arrest)*

_____ *was tested by me with equipment approved by the Toxicologist on* _____
(Time of Arrest) *(Date of Test)*

In accordance with the Courts and Judicial Proceedings Article of the Annotated Code of Maryland (1974) Section ... and in accordance with approved chemical analysis procedures.

Said sample was found to contain _____ *percent ethyl alcohol by weight.*

_____, *you are hereby notified that the results of the chemical test will be*
(Defendant)
presented as evidence at the criminal prosecution without the presence or testimony of the technician who inistered the test unless you or your attorney notify the State's Attorney and the Court in writing no later five (5) business days before trial that you desire the technician to be present in court.

I, the undersigned, am a qualified person to administer the above indicated chemical test within the ...rements of Courts and Judicial Proceedings Article, Section 10-304.

_____
Chemical Test Technician and No..

_____
Defendant Signature (Breath test only)

_____ _____
Date *Time*

_____
Arresting Officer

...tion, - Original - Arresting Officer for Court
1st copy - State's Attorney Office
2nd copy - Defendant

Form #33 (7-79)

State of Maryland

CASE NO.

Breathalyzer Operational Check List

PLEASE PRINT

NAME OF PERSON TESTED

DATE OF TEST | LOCATION OF TEST | INSTRUMENT SERIAL NUMBER | MODEL NUMBER

OPERATOR | CERTIFICATE NO. | WITNESS

OPERATING PROCEDURE

I. PREPARATION

1. ☐ POWER SWITCH ON. Wait until THERMOMETER shows 50 ±3°C.
2. ☐ Gauge REFERENCE AMPOULE and insert in left hand holder.
3. ☐ Record AMPOULE LOT NUMBER. Gauge TEST AMPOULE, open and regauge solution level. LOT NO. _____
4. ☐ Place TEST AMPOULE containing bubbler with connector sleeve attached in right hand holder and connect to outlet.

II. PURGE

5. ☐ Insert test record. Turn CONTROL KNOB to TAKE, flush, turn CONTROL KNOB to ANALYZE.
6. ☐ When RED empty signal appears, wait 1½ min., turn on LIGHT and BALANCE.

III. SUBJECT ANALYSIS

7. ☐ Disengage POINTER and set on START LINE.
8. ☐ Turn CONTROL KNOB to TAKE, collect BREATH sample, turn CONTROL KNOB to ANALYZE. Record time. _____ (TIME OF TEST)
9. ☐ When RED empty signal appears, wait 1½ min., Turn on LIGHT and BALANCE. Mark test record. Record BLOOD ALCOHOL RESULT.
10. ☐ Remove and LABEL test record. _____ % (BY WEIGHT ETHYL ALCOHOL)

IV. VALIDATION TEST - SOLUTION VALUE 0.100%

11. ☐ Wait until simulator thermometer shows 34 ± 0.2° C.
12. ☐ Insert new test record. Turn CONTROL KNOB to TAKE, flush, turn CONTROL KNOB to ANALYZE.
13. ☐ When RED empty signal appears, wait 1½ min., turn on LIGHT and BALANCE.
14. ☐ Disengage POINTER, set on START LINE.
15. ☐ Turn CONTROL KNOB to TAKE and collect VALIDATION Sample. Turn CONTROL KNOB to ANALYZE.
16. ☐ When RED empty signal appears, wait 1½ min. Turn on LIGHT and BALANCE. Mark test record. Record RESULT. _____ % (IF VALIDATION TEST RESULTS ARE LESS THAN 0.090% OR GREATER THAN 0.110%, TEST OF PERSON MUST BE VOIDED.)
17. ☐ Remove and LABEL test record.

V. DISCONNECTION

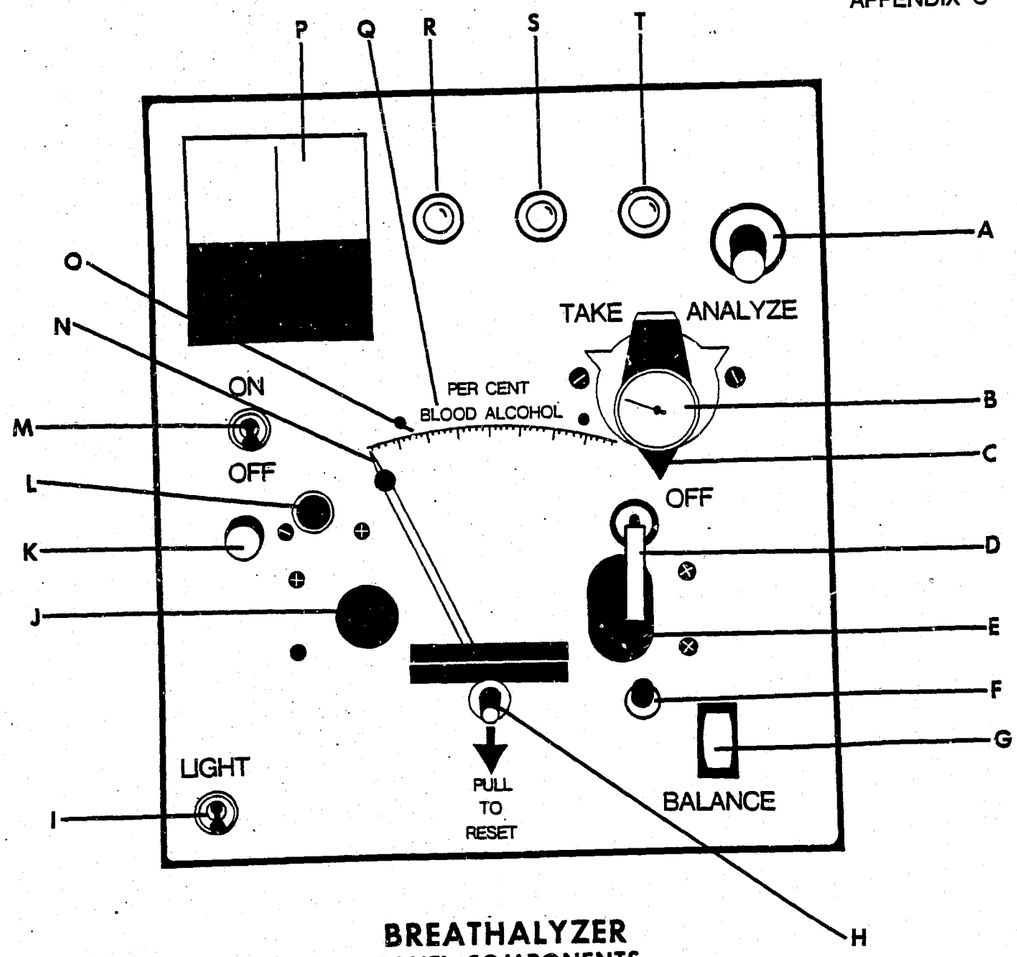
18. ☐ Turn CONTROL KNOB to TAKE, flush, turn CONTROL KNOB TO ANALYZE.
19. ☐ When RED empty signal appears, dispose of TEST AMPOULE, BUBBLER, and MOUTHPIECE. Remove REFERENCE AMPOULE. Turn CONTROL KNOB to OFF, run balance wheel to END of SCALE.

REMARKS: _____

BREATHALYZER OPERATOR SIGNATURE

MSP FORM #35 (7-69)

APPENDIX C



BREATHALYZER
PANEL COMPONENTS

A) Retractable breath tube
B) Sample chamber thermometer
C) Control knob
D) Delivery tube
E) Test ampoule
F) Ampoule lift
G) Balance wheel
H) Blood alcohol pointer adjustment
I) Light switch
J) Control ampoule
K) Pointer positioner
L) Ink pad
M) Power switch
N) Blood alcohol scale pointer
O) Blood alcohol scale
P) Null meter
Q) Plastic shield
R) Read light
S) Empty signal light (red)
T) Full signal light (green)

END