

Common Challenges and Defenses in an OWI Case

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Objectives

- Identify the main challenges and defenses in an OWI case.
- Formulate responses to combat defense challenges.

Defense

The stop was invalid

Response

- Standard: Reasonable Suspicion
- Test: Objective – reasonable articulable suspicion
- Strategy 1: Traffic violation
- Strategy 2: Totality of circumstances (suspicion of OWI)

Defense

No justification to prolong detention

Response

- Standard Reasonable suspicion
- Test Objective – reasonable articulable suspicion (of impairment)
- Strategy Totality of the circumstances/officer's observations

Defense

Officer stopped driver based on an
anonymous tip.

Responses

- Truly anonymous tips The more specific and detailed the information, the more likely the stop will be justified.

Must corroborate information

Officer usually must develop own reasonable suspicion.

Responses

- Citizen Informant Officer does not necessarily need to develop own probable cause.

Willingness of citizen to identify self typically makes this a valid basis for the stop.

Defense

The stop was pretextual.

Response

- Pretext is irrelevant
- *Whren v. United States*, 517 U.S. 806 (1996)

Challenges to Standardized and Non-Standardized SFSTs Tests

Response

- There are three standardized FSTs by NHTSA-HGN, Walk and Turn, and One-Leg Stand
- *People v. Berger*, 217 Mich App 213 (1996)
(The court held that as to HGN the officer must be properly trained and that the test be properly administered.)
- A defendant's performance on a non-standardized test FST is admissible. *People v. Hanna*, 223 Mich App. 466 (1997).

Response – No Miranda

Custody

Must rise to the level
of formal arrest

Interrogation

Must be designed to
elicit an incriminating
response

Responses – No Miranda

■ Preliminary Investigation in Non-Custodial

- *Berkemer v. McCarty*, 468 U.S. 420 (1984); *People v. Jelneck*, 148 Mich App 456 (1986);
- Routine questions and SFSTs are investigatory to determine whether a crime was committed

■ SFSTs are Non-Testimonial

Defenses Raised at Trial

- No Moving Violation, Bad Driving or Crash
- Alternative Explanations for Signs of Intoxication
- Alternative Explanations for Breath Test Results
- Incomplete Arrest Report
- The Phantom Driver

Defenses Raised at Trial

- Rising BAC/Retrograde Extrapolation/
The Last Gulp
- Field Sobriety Tests do not Relate to
Driving
- Affirmative Defenses
 - Necessity
 - Entrapment

Response: No Moving Violation/ Bad Driving/Crash

- Response: Only need to show that because of drinking alcohol defendant's ability to operate a motor vehicle in a normal manner is substantially lessened, and/ or that defendant operated the vehicle with a bodily alcohol level of 0.08. CJI 15.3

Response: No Moving Violation/ Bad Driving/Crash

- Strategy
- In jury selection:
 - Educate jurors on elements.
 - Elicit feelings on non-moving violation stop.
 - Commit them to following law.
- In opening statements
 - Remind them of the elements
- In jury instructions
 - Definition of Impairment
- In closing
 - Remind them of their commitment
 - Remind them of your burden

Alternative Explanations for Impairment

- Diabetes
- Fatigue
- Medication
- Physical Condition
- Nerves



Responses – Alternative Explanations

- Is the defendant challenging that he drank?
- Would the alcohol he/she did drink affect the person to a greater degree?
- Is the medical condition/medication documented by defendant?
- Did defendant let the officer know of the problem at the time of investigation?

Responses – Alternative Explanations

- “I wasn’t drunk – just tired.”
 - Is the defendant challenging the observations of intoxication?
 - Did the defendant tell the officer this?
 - Did the defendant admit to having *some* alcohol?
 - Effects of alcohol more pronounced when tired!

Alternative Explanations for Breath Test Results

- Mouth alcohol
- Substances other than alcohol

Response – Mouth Alcohol

- Issue
- How long is this alcohol detectable?
- Strategy
- Studies show it is virtually undetectable after 10 minutes.
 - Why we have an observation period
 - Newer instruments detect mouth alcohol.
 - Prepare you breath test technician and toxicologist

Alternative Explanations for Breath Test Results

■ Claim:

Interference elevated the reading.

■ Responses:

– Modern instruments can detect interference.

Incomplete Arrest Report

- What is the purpose of the arrest report?
- Has the report served its purpose?

The Phantom Driver

- What is the definition of actual physical control?
- Other evidence that the defendant was the driver?
 - Who is the registered owner?
 - Who has the car keys?
 - What is the position of the driver seat?
 - Injuries in a crash?

Rising BAC/Retrograde Extrapolation/The Last Gulp

Breath test results do not accurately reflect driver's BAC at time of driving.

Response – Rising BAC

- What is defendant being tried for?
- Are you required to prove BAC at time of driving or time of test in per se trials?
- Based on BAC result, do you need retrograde extrapolation evidence?
- Defendant's statements?

Field Sobriety Tests Don't Relate to Driving

- What are some of the things we have to do when we drive a car?
 - Maintain control of a 1500 lb. + machine
 - Know where you are going
 - Watch out for other cars, pedestrians, other obstacles
 - Know when to turn, slow, stop, accelerate

Field Sobriety Tests

Don't Relate to Driving

- How do the field sobriety tests relate to driving?
 - Divided attention activities
 - They show impairment!
- Go back to the burden of proof.
 - Less safe to drive
 - Physical or mental capabilities impaired to any degree

Creative Defenses

- Entrapment

- Necessity

- The harm that would have occurred had the defendant not driven was so much greater that he/she ought to be exempt from criminal liability.

Strict Compliance vs. Substantial Compliance

Breath Tests

■ Recent Florida Decision

- Breath tests from Intoxilyzer 5000 calibrated using tap water vs. distilled water thrown out.

Strict Compliance vs. Substantial Compliance

Blood Tests

- Compliance with Department of Health Regulations
 - Jury verdict set aside where state presented no evidence of compliance
 - People v. Giresbeck, 2005 N.Y. App.Div. LEXIS 3620
 - People v. Miller, 2005 N.Y. App.Div. LEXIS 3627

In Conclusion. . .

- Be Vigilant
- Be Thorough
- Be Prepared

