DRIVING UNDER THE INFLUENCE

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TABLE OF CONTENTS

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The driving under the influence (hereinafter "DUI") case involves issues that run the gamut from probable cause to arrest and testing through constitutional matters such as search and seizure. There is also a concurrent administrative proceeding which involves possible revocation of driving privileges.

1. Overview of the West Virginia Statutory Scheme

West Virginia Code 17C-5-2 sets forth the statutory framework for the offense of DUI. The seriousness of the punishment increases with injury or death to persons other than the driver [W.Va. Code 17C-5-2(a)-(c)]. Punishment is also increased for second and third offenses [W.Va. Code 17C-5-2(i) and (j)], with the third offense being a felony. The same code section also addresses DUI in the context of a person who is under twenty-one years old [W.Va. Code 17C-5-2(h)] and the separate offense of "Permitting DUI" [W.Va. Code 17C-5-2(g)]. It is also worth

noting that in West Virginia Code 17C-5-2(l), that convictions in a municipal court which meet certain requirements may be used as enhancements.

Succeeding sections of the same chapter of the code address other areas which are inherent in the DUI case. West Virginia Code 17C-5-2a addresses the definition of "in this State," as said term is set forth in West Virginia Code 17C-5-2. The term is defined as meaning "Anywhere within the physical boundaries of the State," not just upon the highways. West Virginia Code 17C-5-4 addresses implied consent, or the failure to submit to a designated test. West Virginia Code 17C-5-6,7,9 and 10 all relate to the testing procedures and the consequences of refusing or failing the tests. This list is an abbreviated review and any practitioner defending a DUI case should certainly review the code themself in detail.

As stated previously, West Virginia Code 17C-5-2 does set forth the penalties for each offense of DUI. West Virginia Code 17-5-2(d) states that for first offense any person may be sentenced to not less than one day nor more than six months in jail and fined not less than $100.00 nor more than $500.00. Court costs will be in addition to the fine which is imposed. A person convicted of DUI must serve a minimum of twenty-four hours in jail.

A second offense DUI charge carries a penalty of not less than six months nor more than one year in jail and a fine, at the discretion of the court, of not less than $1,000.00 nor more than $3,000.00 [W.Va. Code 17C-5-2(j). Third offense is a felony which is punishable by a prison sentence of not less than one year nor more than three years and a discretionary fine of not less than $3,000.00 nor more than $5,000.00 [W.Va. Code 17C-5-2(k)].

Independent of the criminal charge which has been outlined in the preceding paragraphs, the Department of Motor Vehicles conducts an administrative proceeding which focuses on the suspension of driving privileges. A guilty plea or verdict of guilty which is not appealed will

result in the revocation of driving privileges without a hearing, as will the failure to timely request the same after receiving notice from the Department of Motor Vehicles. The suspension for a person convicted of first offense (and they submitted to the test) is currently six months with the opportunity to lessen that by three months if a safety class is taken promptly. There are often waiting lists for these classes and early attention to them is advised. Refusal of the designated test (or also known as an implied consent violation) results in a one year suspension which cannot be lessened. Similar to the criminal proceedings, suspension of privileges is for longer periods based of time if the charge is a second or third offense.

It must be emphasized that the administrative proceeding at the Department of Motor Vehicles is **completely** independent of the criminal proceeding, with the exception of the impact of a plea of guilty prior to the administrative proceeding. A person may be found "not guilty" criminally and still have their driving privileges revoked. Likewise, a person may retain their driving privileges and subsequently be convicted of the criminal charge. An out of state conviction forms the basis for suspension on a separate ground [W.Va. Code 17B-3-5(6)]. See Shingleton v. City of Romney, 382 S.E. 2d 64 (W.Va. 1989).

2. Criminal Charge

Effective representation of a person charged with DUI requires a working knowledge of criminal procedure in magistrate courts. West Virginia Code Chapter 50, articles one through 5 concern magistrate court. There are also specific rules of criminal procedure for magistrate courts. Some of the more important code sections relate to continuances [W.Va. Code 50-5-2], transfer to another magistrate [W.Va. Code 50-4-7], time limitations for requesting a jury trial (If the jury is not requested within a period of time, a jury trial is waived)[W.Va. Code 50-5-8] and appeal of convictions in magistrate court to circuit court [W.Va. Code 50-5-13]. Sentences

may not be increased in circuit court in the event of an unsuccessful appeal of a bench trial. State v. Bonham, 317 S.E. 2d 501 (W. Va. 1984). Discovery is permitted in magistrate court and should be sought by defense counsel in all cases.

Once representation is undertaken, investigation of the facts must begin. The defendant should be questioned thoroughly concerning all activities, including meals or eating, both leading up to and after the arrest. Persons who had contact with your client should be interviewed to ascertain their knowledge of your client's condition and anything else which might be helpful. Any medical condition, including past surgeries, should be garnered as it may relate to he ability to perform a sobriety test. All documentary evidence should also be collected, including: Intoxilyzer slips, test designation, accuracy inspection tests, the officer's DUI Information Sheet, jail records, hospital records, and calibration logs, just to name a few.

Next, a review of the proper procedures must be undertaken. By consulting the code as well as applicable State regulations, a determination may be made that proper procedures were not followed. For instance, West Virginia Code 17C-5-8 mandates that a designated test be administered within two hours of the arrest. Regulations require that a twenty minute observation period take place prior to having a subject undertake the designated test. If the proper procedures were not undertaken, a motion in limine to prevent mention or introduction of the test result may be appropriate. The result may be the ability to force the State to prove actual intoxication rather than a presumption arising due to a test result of .10 or greater.

If the designated test was refused, counsel should file a motion in limine to prevent any mention of the refusal at trial. State v. Cozart, 352 S.E. 2d 152 (W. Va. 1986).

In preparing for trial, counsel should consider attempting to gain a working knowledge of the Intoxilyzer or other designated testing device. These machines measure alcohol in the breath

and then extrapolate the amount of alcohol in the blood from that. As a result, there are grounds to challenge the accuracy of the test in that the underlying chemical assumptions do not apply equally to all persons. There are several treatises listed at the end of this chapter which should aid in this preparation.

At trial, voir dire should be utilized to the fullest extent. Probe into people's feelings as they relate to alcohol use. It is a good time to constantly emphasize that the law does not forbid drinking alcohol and driving, but does forbid driving while legally under the influence.

The designated breath testing equipment should be referred to as simply a machine. Jurors understand that machines do not always perform as expected. That point needs to be emphasized throughout.

The testimony of the arresting officer may be attacked on many grounds. Among those are that he or she has already formed an opinion and are not objective. Tainted objectivity can then be argued to the jury. Field sobriety tests are not infallible. They must be administered properly to provide credible results: a proper foundation includes each step in the administration of field sobriety tests. Other areas to attack include the documentary evidence and any inconsistencies that may arise there. The experience of the officer is directly relevant. So is the limited exposure to your client and the basis for the stop.

A tactic for the defense is to have the officer describe in graphic detail all of the events leading up to the arrest. By going through these steps in great detail, it can often be shown that the defendant drove for several miles without error; or as stated previously, may have only been followed for a short distance.

There are many other fertile grounds for challenge. Why was the defendant stopped? A sobriety checkpoint, or roadblock, may not be constitutionally set up. Cline v. Carte, 460 S.E.

2d 48 (W.Va. 1995). Reasonable suspicion is required for all stops. Did the officer actually observe the defendant driving so that the offense occurred while he or she was present or did the officer arrive after an accident? If so, was the defendant Mirandized? See Berkemer v. McCarty, 104 U. S. 3138 (1984). If a prior conviction is alleged, is it valid? See State v. Armstrong, 332 S.E. 2d 837 (W.Va. 1985), Sniffin v. Cline, 456 S.E. 2d 451 (W.Va. 1995). Did the accused request an attorney before any sobriety tests were performed? Were chemical samples preserved for testing by the defendant? Contra State v. Sandler, 336 S.E. 2d 535 (W.Va. 1985). Was the defendant denied an independent chemical test? See State v. York, 338 S.E. 2d 219 (W.Va. 1985). Did the officer have probable cause to arrest the defendant? See State v. Davis, 464 S.E. 2d 598 (W.Va. 1995) and Donahue v. Cline, 437 S.E. 2d 262 (W.Va. 1993).

3. Administrative Proceeding

When a person is arrested for DUI, his or her driving privileges are put in jeopardy. An affidavit must be sent to the Department of Motor Vehicles within a forty-eight hour period of the arrest. This affidavit actually begins the suspension proceeding. A suspension notice is then sent to the concerned operator by certified mail at the address listed in the Department's records. It is for this reason that the Department should be notified of all address changes. Lack of notice is no defense if the Department has not received the new address. See State ex rel. Mason v. Roberts, 318 S.E. 2d 450 (W.Va. 1984). Upon receipt of the notice, the driver has ten days to request a hearing on the suspension by certified mail. If the tenth day is a Saturday, Sunday or a holiday, the next judicial day will be permitted. West Virginia Code 2-2-2. By requesting the hearing the suspension order is stayed and the defendant may continue to drive while awaiting the hearing and decision therefrom.

The hearings are conducted in a somewhat informal manner under the auspices of the

West Virginia Administrative Procedure Act. See West Virginia Code 29A-1-1. There is almost always a delay of at least one month prior to the hearing date; West Virginia Code 17C-5A-2 provides that the hearing shall be within 180 days. Hearings are held in the county of arrest; for good cause, the hearing site may be changed to a new location.

It is essential that the Department of Motor Vehicles be informed of the intent to challenge the designated sobriety test result. If not, the test result will be admissible without further need for foundation. The hearing will be tape recorded before an examiner appointed by the Department. The hearing examiner does not make the decision. Thus, the procedure may be subject to challenge. The ultimate decision maker has little with which to assess the credibility of witnesses.

The issue to be decided, by a preponderance of the evidence, involves either (1) did the operator drive a motor vehicle while under the influence of alcohol, or (2) did the operator refuse the designated secondary chemical test. See Hinerman v. West Virginia Department of Motor Vehicles, 431 S.E. 2d 692 (W.Va. 1993). An unfavorable decision may be appealed to the circuit court within thirty days under the grounds enumerated in the Administrative Procedures Act. The circuit court may enjoin the suspension for only thirty days.

Work permits are not given under any circumstances. A new auto lock device which requires the defendant to place a monitor on his or her ignition may be utilized to reduce suspensions.

If the action to stay the suspension is unsuccessful, the concerned driver must begin his license suspension. Driving while your privilege to drive is suspended for DUI results in additional criminal and administrative sanctions which can be more severe than the DUI consequences. See West Virginia Code 17B-4-3.

A safety and treatment program must be completed before the driving privileges will be restored. The programs are administered on a regional basis. All administrative hearing costs and the cost of the treatment program must be borne by the defendant. They must be paid before the privileges will be restored.

If the concerned driver lives out of state, the Department will suspend driving privileges in West Virginia. The Department will usually permit the driver to enroll in a treatment program in their home state. Counsel should ascertain what impact the conviction/suspension will have on their client in their home state.

4. Conclusion

This brief overview should assist in preparation and the defense of a driver in both administrative and criminal proceedings.

FOR FURTHER REVIEW

"Drinking and Driving Law Letter," Chandler Publishing, Minneapolis, MN.

Richard Erwin, Defense of Drunk Driving Cases, Matthew Bender Publishing Company.

Dr. Walter J. Frajola, Ph.D., Defending Drinking Drivers, James Publishing, Corona del Mar, CA.

Reese I. Joye, Jr. and Jim Lovett, Drunk Driving, Kluwer Publishers, New York, NY.

Stephen M. Brent and Sharon P. Stiller, "Handling Drunk Driving Cases," Lawyers Co-Operative Publishing Company, Rochester, NY.