

DWI TROUBLE?

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I win most of my DWI cases!!

Let's talk about why.

Driving Impaired Offenses

■ DWI **5-65-103.**

- It is unlawful for any person who is *intoxicated* to operate or be in actual physical control of a motor vehicle.
- It is unlawful for any person to operate or be in actual physical control of a motor vehicle if at that time the alcohol concentration in the person's breath or blood was eight-hundredths (0.08)

DWI "Intoxicated" 5-65-102

- means influenced or affected by the ingestion of alcohol, a controlled substance, any intoxicant, or any combination thereof, to such a degree that the driver's reactions, motor skills, and judgment are substantially altered and the driver, therefore, constitutes a clear and substantial danger of physical injury or death to himself and other motorists or pedestrians;

DWI “Controlled Substance”

5-65-102

- Controlled substance means a drug, substance, or immediate precursor in Schedules I through VI. The fact that any person charged with a violation of this act is or has been entitled to use that drug or controlled substance under the laws of this state shall not constitute a defense against any charge of violating this act;

DWI Penalties

■ 1st Offense

- 24 hours to 1 year in jail
- \$150 up to \$1,000 fine
- Alcohol education class and VIP class
- DL suspension for 180 days. Must get an interlock if alcohol related.
- If drug related must get a work permit.

Non-legal DWI Penalties

- Possible deportation (If not a US Citizen)
- Termination of employment
- Interference with future employability
- Increased or cancelled auto, home, and health insurance
- Public ridicule or scorn
- Loss of professional licensure
- Loss of concealed carry permit

Discovery – What you need

- Police reports
- Machine Radar and EC/IR II certificates
- Officer certificates
- Roadblock plans
- BAC logs
- DRE logs
- Department of Health litigation package
- Act 106 form
- ALS form
- Chromatogram raw data
- Blood draw sheet
- Chain of custody

SFST

Designed for conviction!

Beware of “Trial Tips and Techniques” as outlined in officer’s training manual

- “The person on trial is never a lady or gentleman, but always the defendant.” HS 178 R2/06 page 2, paragraph 13.
- Always demonstrate how you conducted field sobriety evaluations... Be certain, however, that you can do in court all the evaluations you asked the defendant to perform the night of the arrest. If you cannot do them, the jury will not expect the defendant to have done them properly. HS 178 R2/06 page 3, paragraph 2.

- “Do not bring operators manual or logs to court unless instructed to do so by the prosecutor and discuss any subpoena to produce with the prosecutor before complying with the subpoena.” HS 178 R2/06 page 3, paragraph 4.
- “The officer doesn’t have to know the numbers, or care, because in *this* case, *this* defendant was impaired. HS 178 R2/06 page 4, paragraph 8.

3 Standardized Field Sobriety Tests

- Horizontal Gaze Nystagmus
- Walk and Turn
- One leg stand
- No other tests have been standardized by the NHTSA
- NHTSA has advised that any test which helps the officer determine intoxication may be used
- Courts have ruled that other tests have no scientific reliability

Development & Validity

Six tests were given to 238 volunteers by 10 different law enforcement officers

- one leg stand
- finger to nose
- finger count
- walk and turn
- Tracing (paper and pencil test)
- Nystagmus

SFST Research

- The research indicated that only three tests were reliable *if administered in a standardized fashion*
 - One leg stand
 - Walk & turn
 - HGN

SFST Validity

■ Logistics of the research

- 296 test subjects
- 10 police officers testing an average of 44 subjects

■ Results

- Walk and Turn = 68% accurate
- HGN = 77% accurate
- One leg stand = 65% accurate
- They suggest that a walk & turn/HGN matrix could yield 80% accuracy

SFST Standardization

- In 1983 NHTSA validated the battery of tests in the field rather than a laboratory setting and determined a need for a standard scoring process
- In 1995 NHTSA researched the issue of the target BAC being .08% instead of the previous .10%.

SFST Common Links

- All three tests have these similarities
 - Divided attention tests
 - Intended use is identifying persons that are intoxicated
 - Can be used as evidence of impairment
 - Are subject to individual officer's interpretation
 - If done improperly, will result in false positives

HGN

- Four or more clues indicates a BAC at or above .08%
- There are 3 clues available for each eye and you will rarely see a client with fewer than 6 clues on the HGN
- Most officers fail to:
 - give proper instruction
 - do the required preliminary tests (equal tracking and pupil size)
 - check each eye twice
 - correctly estimate the 45 degree angle
 - Follow the proper speed of pass protocol

HGN

■ Works for:

- CNS Depressants
- PCP
- Inhalants

■ Does not work for:

- CNS Stimulants
- Hallucinogens
- Narcotic Analgesics
- Cannabis

Other things that cause HGN

- Systemic Diseases
- Eye Disorders
- Congenital Defects
- Diabetes (when the blood sugar gets too low)
- Diabetes (Diabetic neuropathy)
- Myasthenia Gravis (Nerve transmission disorder)
- Multiple Sclerosis
- Seizure Disorders
- Head trauma
- Strokes
- Fatigue (holding the stimulus in the extreme gaze position for 15-30 seconds)
- Optokinetic Nyst.
- Many other things...

Walk & Turn Clues

- It only takes two clues to fail this test
- There are eight clues of impairment for the walk and turn. Two of those clues are in the instructional phase:
 - Cannot keep balance
 - Starts too soon
- The other clues are in the walking phase:
 - Steps off the line
 - Lifts arms more than six inches from side
 - Fails to touch heel to toe by more than 1/2 inch
 - Stops walking
 - Improper turn or loses balance during turn
 - Takes improper number of steps

Walk & Turn Common Mistakes

- Officer's failure to give proper instructions
 - Failure to demonstrate the turn and to tell the person that they must perform the turn specifically as shown
 - Failure to ask if the person understands the instructional phase
 - Failure to ask if the person understands the turn
 - Improperly marking cues
 - Failure to tell the person to wait for instruction to begin test

One Leg Stand Clues

- Sways while balancing
- Uses arms to balance
- Hops
- Puts foot down
- Two or more clues is a failure

One Leg Stand Mistakes

- Failure to adequately give instructions for the test
- Giving the test to persons that are not physically able to complete them, such as:
 - People wearing heels higher than two inches
 - People who cannot see out of both eyes or have depth perception problems
 - People over 65 or who have injuries that would keep them from performing the test

Other FST

- Nose touch
- Coin drop
- Finger count
- ABC's
- Flying Eagle
- Leg Swing
- Altered SFST

Chemical Testing

Breath Testing

- How it works

 - Electro-chemical test

 - Relatively new in Arkansas

 - Based on averages

- Biological variability rate = .02%

- Rising BAC

Breath Testing

■ Average person

- Breath/blood partition ratio (can double the result)
- Breath Temperature (8.6%)
- Water content
- Breathing pattern (15%)

■ Common defenses

- Stage of testing; Absorption vs. Elimination
- Mouth Alcohol
- The averages above

Blood Testing

- How it works (Gas Chromatography)
- Preservatives (Fermentation)
- Whole blood vs. Serum
- By what authority are they drawing blood
 - A.C.A. 5-65-208

Blood testing defenses

- Collection
- Transport
- Storage
- Testing
 - Calibration
 - Raw Data
 - Contamination
 - Fermentation

Urine Testing

- How it works
- Detection of substance; not level of impairment (qualitative vs. quantitative)
- Least accurate method of testing
- Urine accumulation
- Urine/blood 1.33:1 ratio; ranges .8:1-2:1

Saliva Testing

■ Its coming!!!!

DWI Drugs

DRE Certification

■ Three Phase Program

- Phase 1: Preliminary Training
 - 2 days of learning basic drug terminology and the 7 drug categories and clinical and psychophysical examination procedures.
- Phase 2: Main Training
 - 7 day school; usually taking place 3 or 4 weeks after preschool. Includes overview of drug evaluation process, legal issues, case preparation, and testimony preparation.
- Phase 3: Certification Training:
 - OJT: Must identify 12 people found to be positive for drugs. The trainee must identify at least 3 of the 7 categories. Then take a test. The OJT is to be monitored by a DRE instructor.

DRE 12 Steps

- Step 1: Alcohol Concentration
- Step 2: Interview Arresting Officer
- Step 3: Preliminary Examination
- Step 4: Eye Exam
- Step 5: Divided Attention Tests
- Step 6: Vital Signs Examinations
- Step 7: Darkroom examinations of pupil size (includes an examination of the nasal and oral cavities)
- Step 8: Muscle Tone
- Step 9: Examination of Injection Sites
- Step 10: Statements
- Step 11: Opinions
- Step 12: Toxicology

DRE Equipment

- Pupillometer
- Sphygmomanometer (Blood pressure cuff)
- Stethoscope
- Thermometer: oral, digital, with disposable covers.
- Penlight: low power, medical style.
- Magnifying light: generally five to ten magnification power, similar to those used by stamp collectors and model builders.
- Pen or Pencil: used to conduct eye examinations.
- Evidence containers: for blood or urine
- Protective gloves, latex and/or rubber.

Tips for Trial

Tips for trial

- **Don't assume that the Judge knows the law**
 - Read the Statute – Bring a copy with you
 - Keep up with current Arkansas decisions – Bring copies with you
 - Keep up with decisions in other jurisdictions
 - Narrow the issues you are arguing – Before evidence is presented
 - Bring an expert if necessary

Be aware of what is going on

- Is the officer still employed there?
- Are there problems with the equipment?
- Are there problems with the forms used by the Arresting Agency?
- Are all of the Certifications up to date? Do you have the Certificates?

When directing the police officer your job is to persuade.

- The Statute is a good Road map to cross
 - Take the officer through everything that defendant did wrong
 - The defendant didn't pull over when you turned on the blue lights
 - He had trouble getting out of the car
 - He was not cooperative
 - He didn't understand his rights
 - Etc.
- Address each field sobriety test
 - If any tests are given that are not NHTSA approved tread carefully.

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