The People's Guide to Fighting Like An Expert

W.F. "Casey" Ebsary Jr

Do You Need a DUI Lawyer? You may be considering a team to defend you from the harsh punishment imposed under Florida's strict driving under the influence laws. From your arrest, to your day in court, it all can seem overwhelming. But there is information you can use, and there is hope for you, a friend, or a loved one. Knowledge lies within.

W. F. "Casey" Ebsary, Jr. has been a defense attorney in hundreds of cases. He is a former Assistant State Attorney / Prosecutor. Casey is a Board Certified Criminal Trial Lawyer, Member of the National College of DUI Defense, Editorial Board Member of the Stetson Law Review, AV rated. That is the highest rating by this nationally recognized lawyer rating service.

ISBN 978-1-329-12333-5
90000
9 781329 123335

#DUI: The People's Guide to Fighting Like An Expert

By W.F. "Casey" Ebsary Jr.

Centrallaw.com

813-222-2220

ISBN: 9781329123335

PREFACE

Do You Need a DUI Lawyer? You may be considering a team to defend you from the harsh punishment imposed under Florida's strict driving under the influence laws. Beginning with the arrest at the roadside, to the county jail, a vehicle being impounded, the posting of bond, and the realization that the driver's license office is going to try to keep you off of the road. It all seems overwhelming.

W. F. "Casey" Ebsary, Jr. has been attorney of record in hundreds of cases. He has represented clients in driving under the influence (DUI) and driving while intoxicated (DWI) cases in Florida. He is a former Assistant State Attorney (Prosecutor). Casey is a Board Certified Criminal Trial Lawyer, Member of the National College of DUI Defense, Editorial Board Member of the Stetson Law Review, AV rated by the Martindale Hubbell Directory. That is the highest rating issued by this nationally recognized lawyer rating service.

If you need help with a DUI case call Casey at 813-222-2220.

ACKNOWLEDGEMENTS

Special thanks to Jodi Ann Baudean for layout and graphics.

Thanks also to Kenneth Siegel, Esquire for editorial support

DEDICATION

This book is dedicated to my mentor
Marcelino “Bubba” Huerta III
and to my Son
W.F. “Sonny” Ebsary III

TABLE OF CONTENTS

Introduction: Do You Need a DUI Lawyer?

You may be considering a team to defend you from the harsh punishment imposed under Florida's strict driving under the influence laws. Beginning with the arrest at the roadside, to the county jail, to the vehicle being impounded, to the posting of bond, and the realization that the driver's license office is

going to try to keep you off of the road. It all seems overwhelming.

3-Step Roadmap to Getting Back on the Road

ONE - Get you back on the road. That begins with navigating the archaic and complicated rules under Florida's Administrative Code and the Florida Statutes. A competent DUI attorney can personally guide you through all the steps to regain your freedom to drive again. An attorney, who has been there before, knows how to get your driving privilege restored as quickly as possible.

TWO - Let Prosecutors know that you have a defense team. A criminal defense attorney can request all the evidence that can be used against you in court. Sometimes that investigation will find evidence is missing or may not be allowed to be used against you in Court. Your lawyer has been here before and knows how to uncover weaknesses in the case.

THREE - Resolve the case and close it, either through persuasion of the prosecutor to make an attractive offer or asking a jury to consider the facts of the case. A defense attorney knows how to convince opponents and jurors to do the right thing.

The Traffic Stop

DUI cops need a valid reason for a traffic stop. Sometimes anonymous tipsters alert police to alleged bad driving via cell phone. Calls to 911 are recorded and sometimes are available to help with defending against an invalid traffic stop. If the traffic stop is invalid, DUI Driving Under the Influence or other criminal charges can be avoided.

DUI Checkpoints

DUI Checkpoints or safety checks are part of the strategy encouraged by Mothers Against Drunk Driving, the federal government, and DUI enforcement equipment manufacturers. Grants and prizes are awarded to law enforcement agencies that utilize these roadblocks. The agency tries to avoid illegal seizures of drivers and their vehicles by formulating a plan and a story that they are checking vehicles for safety and drivers for licenses. They are seizures without a search or arrest warrant, so they must appear to the courts to fall under an exception to the general rule that absent a Warrant, there must be suspicion that the driver is committing a crime.

Some data suggests these tactics cast a wide net and sometimes capture zero drunk drivers. One Florida DUI Checkpoint yielded the following results - the checkpoint had 10 arrests but none of them were for DUI! The Florida Highway Patrol set up the checkpoint. There were actually 1,131 vehicles checked.

Here was the Tally:

Zero arrested for DUI
Two arrested on outstanding warrants.
Seven arrested on felony charges, including six on drug-related charges.
One arrested for misdemeanor drugs.
104 traffic citations issued.
10 faulty equipment warnings were issued.
10 warnings were issued.

Source: http://www.dui2go.com/2009/07/florida-dui-checkpoint-results-1000.html

Vehicle Seizures and Forfeitures

In Pinellas County, Florida, these checkpoints can be a revenue generator. Police sometimes seize vehicles stopped checkpoints. According to an after action report in the form of a press release, cops took 4 vehicles. Here are the facts. There was only 1 DUI Arrest; 4 Vehicles were seized; 774 vehicles were run through the DUI Checkpoint. Curiously there were 8 physical arrests, but as noted only one was for DUI.

Source: http://www.pcsoweb.com/news-release/14-254-pinellas-deputies-to-conduct-sobriety-checkpoint-this-weekend/

Checkpoint Invalidated

In a Florida DUI Checkpoint decision in a driving under influence case, DUI Checkpoint procedures were not followed and a Court tossed the charges for that failure. Usually there are guidelines that must be followed. The Court found support for the argument that testimony of the officer was insufficient to establish that he operated the checkpoint within guidelines and without exercising discretion. In this case, the state failed to show that officers attended a pre-deployment meeting to be advised of guidelines. The trial court Order granting motion to suppress was affirmed.

Source: 17 FLWSupp 434a

DUI Checkpoint Invalid

Sometimes a DUI checkpoint can be invalidated and those snared by the trap go free. The problem with some cases is not with the plan itself, but rather the lack of evidence that the plan was complied with in conducting the traffic stop of the defendant.

Competent substantial evidence is evidence "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." See Department of Highway Safety and Motor Vehicles v. Trimble, 821 So.2d 1084, 1087 (Fla. 1st DCA 2002) (citing DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla. 1957)).

One Pinellas County, Florida DUI checkpoint plan stated that it was to begin at 12:30 a.m. and end at 3:30 a.m. The Police reports completed by the Deputy stated that the defendant was placed under arrest at 12:35 a.m. after failing the field sobriety tests. The Deputy was not called to testify and there is no other evidence to refute the time of arrest. The court found that such an exchange would necessarily take longer than 5 minutes. Hence, the Court found that the defendant was stopped before 12:30 a.m. in violation of the Plan.

The opinion is available as a free download here;

http://www.jud6.org/LegalCommunity/LegalPractice/opinions/appellatedivisionopinions/2005/04-0078AP-88A%20Schreiber.htm

Law Enforcement DUI Checkpoint or Roadblock Manual

Here is an excerpt from a Tampa Bay Area DUI Checkpoint Manual:

I. DISCUSSION: Officers may occasionally use a motor vehicle checkpoint, commonly referred to as a roadblock, as a lawful means of traffic law enforcement. Checkpoints must be carefully organized and implemented to ensure the safety of citizens and officers and to ensure compliance with requirements of the law.

II. DEFINITION: Checkpoint or Roadblock: The systematic brief stopping of motor vehicles at a designated location for the purpose of determining compliance with traffic, licensing, and registration laws.

III. PROCEDURE:

A. The implementation of a motor vehicle checkpoint shall be conducted only with the approval of the appropriate district major.

B. Written guidelines shall be prepared for each operation and will serve as directions to all participating personnel.

Significant deviations from the guidelines will not be made absent compelling circumstances and supervisory approval. The guidelines shall include the following:

1. The location of the checkpoint;

2. The time of commencement and duration of the checkpoint;

3. Vehicle selection criteria, (i.e., every vehicle, every fifth vehicle). The selection criteria shall not be discretionary or random;

4. The number of personnel required and the specific duty assignments of each;

5. Specific plans to remove detained vehicles from the roadway for ticketing or additional investigation; and

6. The anticipated duration of a selected vehicle stop, based on the operational guidelines (assuming no enforcement action required).

C. Only uniformed officers shall be utilized at checkpoints to make the actual vehicular stop.

D. Consideration shall be given to ensuring the safety of officers and citizens as well as to ensuring a minimum of inconvenience to momentarily detained citizens.

E. If reasonable suspicion arises with respect to a particular vehicle, that vehicle may be stopped despite the selection criteria established in the written guideline. Source: Tampa Police Department.

Wolf Packs

I have witnessed wolf packs or tough enforcement of traffic laws by large numbers of patrol cars that saturate neighborhoods or highways. Unlike a DUI Checkpoint where cops decide to stop a certain number vehicles without cause, sometimes police use several patrol cars to stop numerous vehicles for minor traffic infractions.

DUI Arrest Contests

The seemingly minor traffic stops lead to DUI investigations and possible arrests. These traffic rodeos may be caused by DUI arrest contests sponsored by various law enforcement equipment manufacturers and the Mothers Against Drunk Driving. We have written about this several times in other articles on our DUI news website. DUI2Go.com No other crimes seem to generate the desire on the part of law enforcement to win prizes for arresting people.

No Bad Driving

In one recent case, a trial court threw out charges where the police blocked a car that was legally stopped at an intersection for a stop sign. The court found that a police officer who conducted an investigatory stop blocked the defendant's parked vehicle with his patrol car. The court noted the vehicle was parked at stop sign in high crime area for 90 seconds, an insufficient amount of time to provide reasonable suspicion for a traffic stop where the officer did not observe anything that showed the defendant was DUI or ill. Source: State v. Koehler, Circuit Court, 17th Judicial Circuit (Appellate) in and for Broward County. Case No. 09-000093AC10A .

Case Excerpts:

"Deputy Avery testified that on April 21, 2008, between 2:00 a.m. and 3:00 a.m., he was on duty when he observed Appellee's vehicle stopped and parked at an intersection in Deerfield Beach, in an area with a high crime rate, known for prostitution and drug dealings. (Tr. at 15-16, 19). Deputy Avery further testified that he could not tell if the vehicle was occupied, so he drove around the block to approach it at a different angle. (Tr. 15-16). It took him forty-five seconds to a minute to go around the block and he estimated that Appellee's car was parked at the intersection for at least one minute and a half. (Tr. at 16, 17). When Deputy Avery pulled in front of Appellee's vehicle, he could see that there was at least one person in the car. (Tr. at 17). The lights of Appellee's vehicle were on and the engine was running. (Tr. at 17). Deputy Avery had his spotlight on Appellee's vehicle and approached the vehicle with a flashlight. (Tr. at 17, 18, 38). He testified that the reason why he approached the vehicle was because he had no idea why Appellee was parked on the road and he was concerned that Appellee was ill. (Tr. at 18,
37). "

"[T]his Court finds that the trial court did not err in granting Appellee's Motion to Suppress, since there was a seizure when the police officer pulled in front of Appellee's vehicle and shined his spotlight on Appellee's vehicle, and the seizure was not supported by reasonable suspicion or probable cause. "

The trial Judge "made the following findings based on the case law and arguments presented by the parties: (1) pursuant to Stennes v. State, 939 So.2d 1148 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2605b], there was a seizure when Deputy Avery pulled in front of Appellee's vehicle and shined his spotlight on Appellee's vehicle, thus blocking his way and leading a reasonable person to believe that he would not be free to leave (Tr. at 82); (2) the obstruction of traffic was not at issue in this case, since the deputy testified that there was no traffic on the road and, therefore, there was no probable cause to stop Appellee's vehicle for obstructing traffic (Tr. at 82-83); and (3) the wellbeing argument made by the State pursuant to State v. DeShong, 603 So.2d 1349 (Fla. 2d DCA 1992) was factually insufficient because there were no articulable facts on the record to support Deputy Avery's conclusion that Appellee might have been ill, other than the fact that Appellee had stopped at the stop sign for a minute and a half. (Tr. at 83). Based on these findings, the court granted Appellee's Motion to Suppress."

"The Supreme Court of Florida recognized three levels of police-citizen encounters. Popple v. State, 626 So.2d 185, 186 (Fla. 1993). The first level is that of a consensual encounter and involves minimal contact with the police. Id. The second level is that of an investigatory stop, which allows a police officer to reasonably detain a citizen temporarily if the officer has a reasonable suspicion that a person has committed, is committing, or is about to commit a crime. Id. For an investigatory stop to be legal, the police officer must have well-founded, articulable suspicion not just a mere suspicion of criminal activity. Id. The third level of encounter involves an

arrest for which the arresting officer must have probable cause that a crime has been or is being committed. Id. "

See Also: Stennes v. State, 939 So.2d 1148 (Fla. 4th DCA 2006) [31 Fla. L. Weekly D2605b]

Anonymous Tips

In one recent case there was an anonymous tip of bad driving and then a video which revealed no such bad driving. The video and other identifying information have been removed from the filing to protect the privacy of the defendant. Yet another court recently held that a Vehicle Traffic Stop based upon an anonymous tip was invalid. The court ruled that a simple report of reckless driving was not a reasonable basis for a traffic stop, even though the vehicle matched the description provided by the tipster. Notably, illegal conduct was not corroborated by any observations of police. The cops claimed that a Wooden bumper and missing driver's side exterior mirror were not traffic infractions and did not provide lawful basis to support traffic stop. The court noted that although other facts might have provided reasonable suspicion for an investigatory stop, the prosecutors did not present or argue those facts. Motion to Suppress granted. Source: 17 FLW 1112a

Here is another case that should help with "Anonymous Tip" traffic stops.

Appellant, George McKelvin, appeals the trial court’s order adjudicating him guilty of possession of a firearm by a convicted felon (Count I) and possession of cocaine (Count II). McKelvin pled no contest to the charges following the trial court’s denial of his motion to suppress. The court sentenced McKelvin to concurrent terms of three years in prison followed by two years probation on both counts. We hold that the trial

court erred in denying McKelvin's motion to suppress and reverse.

At the hearing on McKelvin's motion to suppress, Detective James Gibbons and Detective Leonard Tinelli testified that on September 23, 2008, they received information from an unidentified anonymous source who approached them while they were on an unrelated stop. The source told them that a black male in a burgundy or red Dodge Charger with 23 or 24-inch chrome rims was engaged in "narcotics activity." The person specifically described a black male who was between 50 and 55 years old, about 5'9" or 5'10", who had short cropped hair and who weighed between 180 and 195 pounds. Detective Tinelli specified that the source told the officers that the car "continuously drove into the Budget hotel/motel . . . five or six times a day." The source gave them the tag number of the vehicle. Finally, the source told the officers that s/he had witnessed "hand-to-hand transactions" in which the occupant of the Charger would take money from a person and give the person an object. The detectives were dressed in police tactical gear which contained clear markings identifying them as police officers.

The source wanted to remain anonymous. . .

Without contact information or some other way to locate the informant if necessary, the informant in the present case is no different than an anonymous informant who provides detailed information over the phone to the police dispatch. The tipster approached the officers while they were engaged in an unrelated stop. There is no record evidence of how long the police interacted with the informant or whether they were able to discern his/her credibility during their encounter. As the police admitted they did not witness so much as a traffic infraction before initiating the stop, the officers did not have reasonable suspicion, and the trial court erred in denying the motion to suppress.

Reversed and Remanded. Source: McKelvin v State , No. 4D09-4719

We have included a sample Motion to Suppress based upon an allegation of an invalid DUI Traffic Stop. If the traffic stop is invalid, DUI Driving Under the Influence or other criminal charges can be avoided.

Here is a sample memorandum of law for a winning Motion to Suppress:

MOTION TO SUPPRESS AND INCORPORATED MEMORANDUM OF LAW

The defendant, Xxxx Xxxxxx, by and through undersigned counsel, and respectfully files the following supplemental memorandum of law in support of Mr. Xxxxxx's Motion to Suppress Evidence:

Cases discussing the issue raised herein are many, and consistent. The below-noted opinions hold that police may not stop a motorist driving as nearly as practicable within a lane (or) safely changing lanes.

Police may stop a citizen driving a car if there is probable cause the citizen has committed a traffic violation. Holland v. State, 696 So.2d 757 (Fla. 1987).

Again, cases discussing probable cause in the context of a F.S. 316.089(1) traffic violation are many, and consistent. The below-noted opinions hold that police may not stop a motorist driving as nearly as practicable within a lane (or) for safely moving to another lane.

Please note that in Mr. Xxxxxx' case, the police report listed only three "visual detection cues" to support the stop. There was an anonymous tip. He was not cited for any of the alleged violations. The "cues" in the following cited cases have also been counted to better compare Mr. Xxxxxx's case with the prevailing case law. The Video of Mr. Xxxxxx's driving is here. The actual driving begins at about twelve minutes (omitted for privacy reasons).

1. State v. Labra, 5 Fla. L. Weekly Supp. 556 (11th Judicial Circuit, Dade County Court, 4/15/98). Defendant was driving at 5:10 a.m. along a five-lane road, two northbound, two southbound, one common turn lane, "swerving from lane to lane, straddling the line between the lanes, zigzagging, and swerving into the common turn lane." The other traffic was not affected. Defendant was stopped and cited for an alleged violation of F.S. 316.089(1) and F.S. 316.193(DUI).

Held: No violation of F.S. 316.089(1). Motion to Suppress, granted.

(Visual detection cues: 4)

2. Staley v. State, 6 Fla. L. Weekly Supp. 761 (19th Judicial Circuit Court, Indian River County, 8/18/99). Defendant was driving at 12:00 a.m. along a five lane road, two northbound, two southbound, one common turn lane, when police observed her drift from the right lane or the outer lane across the lane divider line into the inside lane or the left lane and then back into the right lane. Her left tires crossed the divider line. She continued southbound for approximately one minute in the right lane, and then changed lanes from the right lane into the left southbound lane without using a turn signal. She then made a left turn, again without using a turn signal. The other traffic was not affected, but police suspected she was impaired, sleepy, or sick and stopped her.

Held: "Ms. Staley did not commit any traffic infraction nor was she involved in any erratic driving giving rise to a founded suspicion to justify stopping her vehicle. The stop was illegal." Motion to Suppress, granted.

(Visual detection cues: 5)

3. DeJesus v. State, 7 Fla. L. Weekly Supp. 508 (15th Judicial Circuit Court, Palm Beach County, 4/4/00). The police report (probable cause affidavit) alleged appellant was weaving, but, it did not indicate how many times or to what degree.

Held: Evidence insufficient to prove defendant violated the "weaving statute" or to prove police had an objectively founded suspicion defendant was impaired. Motion to Suppress, granted.

(Visual detection cues: 1)

4. State v. Alford, 2 Fla. L. Weekly Supp. 483 (17th Judicial Circuit Court, Broward County Court, 9/14/94). Defendant was traveling eastbound at 9:30 p.m. in the inside lane. The police officer was following directly behind him for nearly 1 mile. Defendant crossed back and forth into the outside lane six or seven times, in a weaving pattern. Videotape evidence conflicted with the policeman.

Held: If a driver's movement from a lane can be accomplished without endangerment, there is no violation of F.S. 316.089(1). Motion to Suppress, granted. The Court went on to explain,

"Indeed, several analogous cases instruct that in order to justify the stopping of an automobile, more than minor deviations from the traffic law must exist. For example, in Collins v. State, 65 So.2d 61 (Fla. 1953), the Florida Supreme

Court held that a defendant who drove on the wrong side of the road on three occasions in the course of a mile by driving one foot over the center line of the highway was insufficient to justify the police officer's stop of the defendant ... See also, Kehoe v. State, supra., 521 So.2d at 1097 ("It is difficult to operate a vehicle without committing some trivial violation …")."

(Visual detection cues: 1)

5. State v. Crawford, 9 Fla. L. Weekly Supp. 562 (15th Judicial Circuit, Palm Beach County Court, 6/25/02). Defendant was driving eastbound at 12:35 a.m. at a speed of 25 MPH, in a 45 MPH zone. She braked abruptly twice, drifted, hugged the extreme right side of her lane, and then moved to the left side of her lane. The other traffic was not affected. The police officer suspected the driver was ill or impaired and stopped her.

Held: Motion to Suppress, granted. In granting the motion, the court briefed 13 cases in support of its ruling: [Bailey v. State, 319 So.2d 22 (Fla. 1975); Esteen v. State, 503 So.2d 356 (5th DCA 1987); State v. Carrillo, 506 So.2d 495 (5th DCA 1987); State Department of Highway Safety and Motor Vehicles v. DeShong, 603 So.2d 1349 (2nd DCA 1992); Crooks v. State, 710 So.2d 1041 (2nd DCA 1998); Roberts v. State, 732 So.2d 1127 (4th DCA 1999); Finizio V. State, 800 So.2d 347 (4th DCA 2001); State of Florida v. Meyers, 6 Fla. L. Weekly Supp. 646 (County Court, Pinellas County, 1999); State v. Townley, 6 Fla. L. Weekly Supp. 531 (9th Judicial Circuit in and for Orange County); Staley v. State, 6 Fla. L. Weekly Supp. 761 (19th Judicial Circuit in and for Indian River County, 1999); Noorigan v. State, 2000 WL 291557 (4th Judicial Circuit, 2000); Dobrin v. State DMV, 9 Fla. L. Weekly Supp. 355 (7th Judicial Circuit, 2002); Bell v. State DMV, 9 Fla. L. Weekly 354 (9th Judicial Circuit in and for Volusia County, 2002)]. The Court concluded its opinion with the following:

"This Court will not grant police officers blanket authority to conduct investigatory stops for DUI, by virtue of a 'well being check' on motorists who simply are lost, unfamiliar with the vicinity, or pose no danger to surrounding traffic." Bell, supra.

(Visual detection cues: 5)

6. State v. Wainberg, 4 Fla. L. Weekly Supp. 669 (11th Judicial Circuit, Dade County Court, 1/24/97). The policeman was traveling 60 mph in a 55 mph zone when the defendant passed him. The defendant could not keep his car in a single lane. He traveled from the left lane, to the center lane, to the right lane, to the center lane, to the right lane, and then exited. While exiting, he drove into the emergency lane then back to the exit lane. The other traffic was not endangered.

Held: No probable cause to stop defendant's car. Motion to Suppress, granted.

(Visual detection cues: 3)

7. Delafe v. State, 8 Fla. L. Weekly Supp. 594 (11th Judicial Circuit Court, Miami Dade County, 7/24/01). Police followed defendant's car for 10 ½ blocks, as he weaved within his lane, while driving at a slow speed.

Held: Evidence of weaving within a lane is alone an insufficient reason to stop a motorist. Motion to Suppress, granted.

(Visual detection cues: 2)

8. State v. Gschwendtner, 9 Fla. L. Weekly Supp. 620 (11th Judicial Circuit, Miami Dade County Court, 7/18/02). Police

were following defendant as he was driving northbound at 1:30 a.m. The defendant stopped at a red light just after crossing the pedestrian crosswalk. He proceeded northbound, drifting back and forth within his lane. He also tapped his brakes several times. When the police activated the overhead lights of the cruiser, the defendant traveled several blocks before stopping. The other traffic was not affected.

Held: Motion to Suppress, granted.

(Visual detection cues: 4)

9. State v. Gonzales, 3 Fla. L. Weekly Supp. 701 (17th Judicial Circuit, Broward County Court, 12/26/95). Defendant was driving at 1:30 a.m., weaving within his lane, and crossing the lane divider by a foot over a two-mile distance. The other traffic took no evasive action. See also Gonzales 5 Fla. L. Weekly Supp. 661b

Held: Since the other traffic was not affected by defendant's driving pattern, there was no violation of F.S. 316.089(1). Motion to Suppress, granted.

(Visual detection cues: 2)

10. Noorigan v. State, 7 Fla. L. Weekly Supp 369 (4th Judicial Circuit, Duval County Court, 2/23/00). Police were driving behind defendant, who was driving at 12:00 a.m. Defendant drifted out of his lane and into the center turn lane, before making a slow correction to his original lane. Other vehicles were on the road but took no evasive action.

Held: Motion to Suppress, granted.

(Visual detection cues: 2)

11. State v. Stahr, 4 Fla. L. Weekly Supp. 225 (4th Judicial Circuit, Clay County Court, 7/16/98). Police were driving behind defendant, who was driving in the middle of 3 lanes. Defendant crossed and drifted one foot into the right lane then drifted back to touch the left line of the middle lane. No evasive action was taken by the other vehicles.

Held: Motion to Suppress, granted.

(Visual detection cues: 2)

12. Crooks v. State, 710 So.2d 1041 (Fla. 2nd DCA 1998). Police were driving behind defendant who drove over the right hand lane lines, into the emergency lane three times.

Held: Motion to Suppress, granted. There was no basis that defendant was outside the "practicable" lane mentioned in F.S. 316.089(1), and even if he was outside the margin of error, the movements could be made with safety.

(Visual detection cues: 2)

13. Jordan v. State, 27 Fla. L. Weekly D2651 (Fla. 5th DCA 12/13/02). The Jordan case provides the most recent treatment of the Second District's opinion in Crooks, supra. In Jordan, the defendant's driving included crossing traffic lanes and swerving back and forth for no reason.

Held: F.S. 316.089(1) "recognizes that it is not practicable, perhaps not even possible, for a motorist to maintain a single lane at all times and that the crucial concern is safety rather than precision." Motion to Suppress, granted.

(Visual detection cues: 2)

14. United States v. Smith, 799 F.2d 704 (11th Cir. 1986). The police were following defendant for one mile at 3:00 a.m.

when he crossed into the emergency lane and then weaved and drifted within the right lane.

Held: The police did not have probable cause, under Florida law, to stop defendant for a traffic violation.

(Visual detection cues: 2)

15. Graham v. State, 60 So.2d 186 (Fla. 1952). Defendant drove across the centerline between Ft. Meade and Bartow two or three times. The policeman had to use his siren three times before defendant stopped. The other traffic was not heavy and was not endangered.

Held: The Court stated, "If one is to be charged with reckless driving for crossing the center line of the road, except where 'no passing lanes' have been plainly marked, then we are all going to jail, sooner or later." Motion to Suppress, granted.

(Visual detection cues: 2)

16. Bell v. State, 9 Fla. L. Weekly Supp. (7th Judicial Circuit, Volusia County Court, 4/10/02). Defendant was driving westbound at 2:29 a.m., "tapping his brakes, stopping and going, and continuing to travel down the center of the road." Defendant then made an erratic swerve into the eastbound lane, drove back down the middle of the road, then began a big looping turn to the left, veered right, then turned left. The other traffic was not affected.

Held: Motion to Suppress, granted.

(Visual detection cues: 4)

17. State v. Myer, 2 Fla. L. Weekly Supp. 484 (17th Judicial Circuit, Broward County Court, 9/29/94). Defendant was driving northbound at 9:34 p.m., going 45 mph in a 55 mph

zone. The police followed defendant for 3 miles, over which defendant made several safe lane changes.

Held: Motion to Suppress, granted.

(Visual detection cues: 2)

Based upon the foregoing precedent, undersigned respectfully suggests Mr. Xxxxxx's Motion to Suppress should be granted, as the basis for the stop was insufficient.

Traffic Stop by Non Law Enforcement

At least one court considered investigatory stops by on-duty fire department personnel in a county fire rescue vehicle. A county firefighter had a paramedic passenger. They saw a car going eastbound, in westbound lanes, and running off the roadway. The court found this provided founded suspicion of medical emergency which justified an investigatory stop. The court approved detention of the driver until law enforcement officers arrived. The detention was lawful. Refusal to submit to breath test after being requested to do so by DUI officer was supported by competent and substantial evidence, so said the court. Source: FLW Supp 1710 loza

FIELD SOBRIETY TESTS (FST)

Horizontal Gaze Nystagmus Test: driver is to follow the lighted red tip of a pen with his eyes, without moving his head

Nine Steps Test: driver walks a straight line heel-to-toe for nine steps, makes a tight turn around, and walks back nine steps

Balancing On One Leg: driver stands on one foot for about 30 seconds

Touching The Nose: driver with hands at his side, and closed eyes, must lean his head back, and touch his nose with the tip of each finger

Reciting The Alphabet

The Roadside Encounter

Field Sobriety "Tests" | Not Really

Defense Attorneys continue to look at whether or not Courts view Roadside Field Sobriety investigations as "tests." One court has instructed the State not to refer to Field Sobriety Exercises as tests and does not allow testimony about whether or not a Defendant passed or failed Field Sobriety Exercises.

The only limited testimony will be:

What exercises Defendant requested to perform;
What instructions were read to Defendant;
What physical actions Defendant took in completing exercises.

The court even ruled the State will not be permitted to bolster testimony by again testifying in summary, exercise by exercise, whether Defendant followed the instructions.

Source: State v. Gholston, 4 Fla. L. Weekly Supp.594a (9th Cir. Ct., February 19, 1997).

Another Court has ruled that the State cannot elicit testimony that a Defendant did not perform FSEs “up to standards.” Mercado v. State, 15 Fla. L. Weekly Supp. 125a (11th Cir. Ct., December 13, 2007). Yet another court ruled that an officer’s testimony that there are times when he would NOT arrest a motorist if the motorist performed up to “standard” was improper and found a trial court’s ruling was reversible error.

Source: Mestrealfaro v. State, 16 Fla. L. Weekly Supp. 140a (11th Cir. Ct., December 17, 2008).

It is clearly established under Florida law that while officers' observations are admissible, their opinions based upon Field Sobriety Exercise are quite limited.

Video Recording of Police Encounters

Sometimes where a Video Recording of a Police encounter is lost or destroyed, a DUI Case can be dismissed. In one such case, charges were dismissed with prejudice (legal speak for permanently) where evidence including statements of the defendant were obtained when a defendant was not advised of Miranda rights at conclusion of traffic crash investigation. The cops began a DUI criminal investigation and tried to use statements made by the defendant during the DUI investigation. The statements were suppressed when the video went missing or was never created due to "broken" video equipment.

The Court ruled that a Videotape and other evidence of defendant's performance during field sobriety exercises were suppressed (thrown out) where a Sheriff's deputy intentionally confused and unduly influenced defendant's decision to withdraw an initial refusal to perform exercises. This is called acquiescence to lawful authority and renders consent to exercises involuntary.

Finally, after these two serious violations of the rules by the Police, the cops failed to preserve the DUI videotape. The Deputy knew videotaping equipment in his vehicle had been malfunctioning for an extended period of time and was malfunctioning at the time of the stop. Police may have policies requiring review of videos and replacement of unsatisfactory videos with new recordings or take other action to ensure satisfactory recording. The Deputy's actions were tantamount to bad faith. Bad faith conduct by cops unfairly tilts the process in favor of the police. The case was dismissed. Source: FLW 1804mili (2011).

Roadside Policy on DUI Arrests

Up until recently roadside field sobriety tests (FST) were given (and usually "failed") solely at the discretion of an officer. The DUI cops in some Florida towns cut one of their own a break and gave him a ride home with no FST. The public found out and now almost everyone with a hint of alcohol on their breath can expect a run-around that almost always ends in arrest.

Minor punishment for a few weeks for these cops. Major punishment for citizens for the citizens who are later cleared after "failing" these "tests" and later passing a breath test or are cleared by a jury. The Clearwater, Florida Police Department is now requiring all officers to conduct field sobriety tests if they suspect a driver is intoxicated.

Source:

http://www.tampabay.com/news/publicsafety/crime/clearwater-officers-disciplined-for-failure-to-report-fellow-officer-who/2177477

Refusal of Roadside Testing for DUI

Research on Driving under influence DUI cases involving refusal to perform Field Sobriety Exercises FST / FSE. Evidence of a Refusal to perform field sobriety exercises establishes that refusal can be used against DUI suspects. In one case the suspect refused and then changed his mind.

The defendant changed his mind “moments after refusal, defendant was continuously in presence of officers between refusal and recantation, allowing defendant to perform exercises after recantation would not have inconvenienced officers . . . ." Motion to Suppress evidence of refusal was granted.

Refusal Case Excerpts

"The Florida Supreme Court ruled in State v. Taylor, 648 So.2d 701 (Fla. 1995) [20 Fla. L.Weekly S6b], that although field sobriety tests are voluntary, the refusal to submit to them may be admitted in evidence against a defendant if defendant is advised that adverse consequences would result from refusal to perform them only because such refusal may be "probative of the issue of consciousness of guilt." Taylor, at 705."

"Recantation of a refusal to submit to a breath test vitiates the initial refusal and is inadmissible against a defendant if the prior refusal would not materially affect the test result, or would substantially inconvenience the police. Larmer v. DHSMV, 522 So.2d 941 (Fla. 4th DCA 1988). The court found it significant that retraction of Mr. Larmer's initial refusal came moments after his refusal, while he was continuously in the presence of the police officers, and under circumstances that would not result in inconvenience by permitting him immediately thereafter to take the test, and the results would not be affected. Larmer, at 944."

Five Field Sobriety Exercises

What are Five DUI Field Sobriety Tests used in Florida DUI Investigations?

There are five commonly used field sobriety tests (DUI Standardized Field Sobriety Testing) or field sobriety exercises used by police in DUI cases. Sometimes these methods are called Standardized Field Sobriety Exercises (SFSE). Many law enforcement agencies have policies requiring these interactions, as well as the driving pattern to be captured on an uninterrupted video recording that

automatically activates when the police car's overhead emergency lights are activated. Here is what at least one court has said about these tactics.

Are Roadside Field Sobriety investigations really tests?

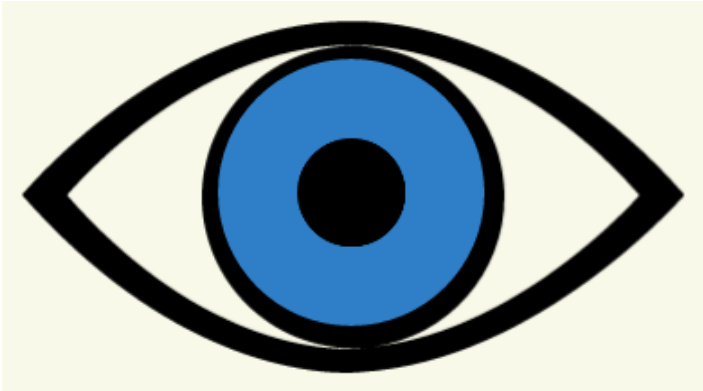
One court has ruled the State cannot refer to Field Sobriety Exercises as tests and will not allow testimony about whether or not a Defendant passed or failed Field Sobriety Exercises. The court did allow limited testimony as to:

Exercises the Defendant requested to perform;
Instructions that were read to Defendant;
Actions the Defendant took in completing exercises.

The State will not be permitted to bolster testimony by again testifying in summary, exercise by exercise, whether Defendant followed the instructions. See State v. Gholston, 4 Fla. L. Weekly Supp.594a (9th Cir. Ct., February 19, 1997).

What are Five DUI Field Sobriety Tests used in Florida DUI Investigations and how can they be described by law enforcement in court?

HGN - Horizontal Gaze Nystagmus



HGN - Horizontal Gaze Nystagmus test. In this commonly used test, the driver is asked to follow the lighted red tip of a pen with his or her eyes, without moving the head. If a driver has been drinking his eyes will jerk, instead of following the light smoothly. Some doctors cannot accurately determine impairment using this method. Almost none of the officers we see in court are qualified to speak about this "test", since they are not qualified to do so by most courts in Florida.

Are Field Sobriety Exercises Really Tests? DUI Attorneys, clients, and people who call, frequently ask questions like this one. Field Sobriety Exercises should not be referred to as a "test," "pass," "fail," or "points". This minimizes the danger that a jury will attach greater significance to Field Sobriety Exercises to any thing other than a lay witness' observations of impairment. State v. Meador 674 So.2d 826, 833 (Fla 4th DCA 1996).

Horizontal Gaze Nystagmus is not admissible into evidence unless the State establishes a traditional scientific predicate, i.e., the test's general reliability, qualifications of the administrators,

and the meaning of the results, prior to admission of the HGN evidence.

Florida Drug Recognition (DRE) Experts and medical professionals use the HGN evaluation to make a determination of the mental state of drivers. Using Drug Recognition Experts (DRE), in Florida DUI cases and across the nation, law enforcement and prosecutors are trying to circumvent the ability of jurors and Judges to reach their own conclusions as to the impairment, if any, of criminal suspects. We have obtained training manuals and reviewed the evidence used to support these "experts" and you may also conclude the ability of these witnesses to meet the stringent requirements for admissibility of "scientific" evidence is far from generally accepted within any communities other than law enforcement. Such witnesses should be stricken from Prosecutors' witness lists. In five minutes you will know: What is the History and Origin of the DRE? What is done during DRE training? Who does the DRE training? What special skills are DRE taught that judges and jurors don't already have? Does DRE "evidence" meet the standard for admissibility under Florida law and the Daubert standard ? Here is most of what drivers, police, prosecutors and defense attorneys should know.

Five Things to Know About Drug Recognition Experts

What is the History and Origin of the DRE?

The Los Angeles Police Department developed this area of alleged expertise in the 1970's. The federal law enforcement agency, the National Highway Traffic Safety Administration (NHTSA) soon jumped on the bandwagon. Strikingly, the "certification" is now issued by the cops' own International Association of Chiefs of Police (IACP) and not by a generally recognized educational or scientific institution.

What is done during DRE training?

A Seven (7) day school is supposed to cover a 706 page manual. The curriculum begins by citing the Frye standard for admissibility, a standard that was abandoned in Florida in 2013 A key issue can be does Drug Recognition Expert (DRE) "evidence" meet the standard for admissibility under Florida law.

During the 7 day romp, cops are allegedly trained in the following areas: Eye examinations; Physiology; Vital signs; the Central Nervous System; Depressants; Stimulants; Physician's Desk Reference; Dissociative Anesthetics; Narcotic Analgesics. That is only half of the allegedly scientific in-depth training.

Let's visit the second half of this highly accelerated educational program: Inhalants, Vital Signs, Cannabis; Signs and Symptoms; Drug combinations; Writing a resume (Curriculum Vitae); and wrap it up with a list of questions defense attorneys will ask when the newly minted expert tries to spew this garbage in court. Street cops become quasi-medical professionals in only one week.

Who does the DRE training?

The National Highway Traffic Safety Administration (NHTSA) and the International Association of Chiefs of Police (IACP).

What special skills are DRE taught that judges and jurors don't already have?

None. Generally, witnesses are not allowed to opine on the guilt or innocence of the accused. When police try to use these "experts" they are attempting to tell the jury how to rule and why. Since the alleged expert issues a highly prejudicial opinion on an ultimate issue in the case, courts must allow only legally admissible evidence to reach jurors.

Does DRE "evidence" meet the standard for admissibility under Florida law and the Daubert standard ?

No. In July 2013, Section 90.704, Florida Statutes, was amended to read: "Facts or data that are otherwise inadmissible may not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Since, 2013, there has been little guidance from courts and judges on the validity of this testimony.

Florida Rule of Criminal Procedure 3.220 requires disclosure of "reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments, or comparisons . . . ." The rules also discuss, "expert witnesses who have not provided a written report and a curriculum vitae or who are going to testify . . . ." In 1996, the rules also contemplated, "experts who have filed a report and curriculum vitae and who will not offer opinions subject to the Frye test." FRCP 3.220 at 151 Note (July 1, 2014).

Florida Drug Recognition DRE Experts are only alleged experts who issue highly prejudicial opinions on ultimate issues in the case, courts must allow only legally admissible evidence to reach jurors under Florida law and the ruling of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), General Electric Co. v. Joiner, 522 U.S. 136 (1997), and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), and to no longer apply the standard in Frye v. United States, 293 F.2d 1013 (D.C. Cir 1923) . See generally, http://laws.flrules.org/2013/107.
Source: http://www.wsp.wa.gov/breathtest/dredocs.php

Walk and Turn

Walk and Turn - The nine steps test. In this process, the driver must walk a straight line heel-to-toe for nine steps, make a tight turn in a very unusual manner, and then walk back nine steps. This exercise is commonly used, with officers frequently noting errors that may include using the hands to balance, an incorrect manner of turning, and incorrect number of steps.

One Leg Stand

One Leg Stand - Balancing on one leg. The driver stands on one foot for about 30 seconds. The one-leg stand is commonly used with officers frequently note errors including putting the foot down, unable to maintain balance, and driver cannot keep foot in the air for thirty seconds. Health issues unrelated to impairment can affect the completion of this one.

Finger to Nose

Finger to Nose - Touching the nose. With hands at his side, the driver is asked to close his eyes, lean his head back, and touch his nose with the tip of each finger. This one frequently has cops calling out errors on where on the finger and where on the face the finger makes contact. Seldom can these "errors" be seen on video.

ABC - Reciting the alphabet

ABC - Reciting the alphabet. This test is seldom seen or used in Florida DUI cases.

Failure to Follow Proper Procedures

There is at least one case where the court threw out the results and observations of Field Sobriety Exercises / Tests in a Driving under the influence / DUI case. The court based its ruling on destruction or loss of evidence that could have helped the defendant.

Apparently the police had failed to follow their standard operating procedures (SOP) for collecting evidence. -- The stopping officer failed to follow an SOP that required an officer wait for a back-up officer to act as second observer of the administration of field sobriety exercises. The court found that violation resulted in loss of exculpatory evidence. Notably, the defendant testified that he performed exercises without difficulty. The court suppressed all evidence gathered by law enforcement after initial observations of the defendant.

Source: 17 Fla L Weekly Supp 637a

Phony Reporting Roadside Sobriety Investigation

One Florida DUI investigator, a Polk County Deputy, admitted to using Cut, Copy, and Paste in reporting results on roadside sobriety exercises. Once uncovered there were 54 Cases Tossed. Reports that DUI cases were thrown out because of what has been suspected by DUI experts for years - since computers have been used to write DUI arrest reports:

1. Cops use a template to write report(s);
2. Cops take a previous DUI report(s) and change the name, leaving details the same;
3. Cops use the same language when talking about the field sobriety exercises.

Unfortunately this Polk County Sheriff Deputy had made made about 124 arrests for DUI before he was caught.

Source:
www.theledger.com/article/20090808/news/908085027

Illegal Detention

A Florida Administrative DUI License Suspension has been overturned where there was no evidence presented to show that law enforcement had reasonable suspicion to detain the Suspect to perform field sobriety exercises. In that case the Department of Highway Safety and Motor Vehicles (DHSMV) argued that the Suspect was not detained by Deputy. The only evidence presented to the hearing officer regarding Suspect's interaction with Deputy showed that a detention occurred. The Suspect testified that Deputy asked for his license and that he waited approximately an hour for a second Deputy to arrive after giving first Deputy his license. The Driver also testified that he felt that he was not free to go and that he never got his license back.

The Appeals Court recognized that retention of a driver's license for such things as conducting a warrants check does not always constitute detainment; however, the Court found that holding Petitioner's license for an hour while waiting for backup to arrive turned into a detention, and absent evidence in the record showing a lawful basis for such detention, the hearing officer departed from the essential requirements of the law in upholding Petitioner's license suspension.

The Court notes that though the second Deputy's affidavit, a statement the cop made under oath, may have provided facts constituting reasonable suspicion to detain Suspect to perform field sobriety exercises, the first Deputy's unlawful detainment

of Suspect prior to the second or backup Deputy's arrival rendered the arrest unlawful.

Source: Case No. CA08-1236

DUI Detention After a Crash

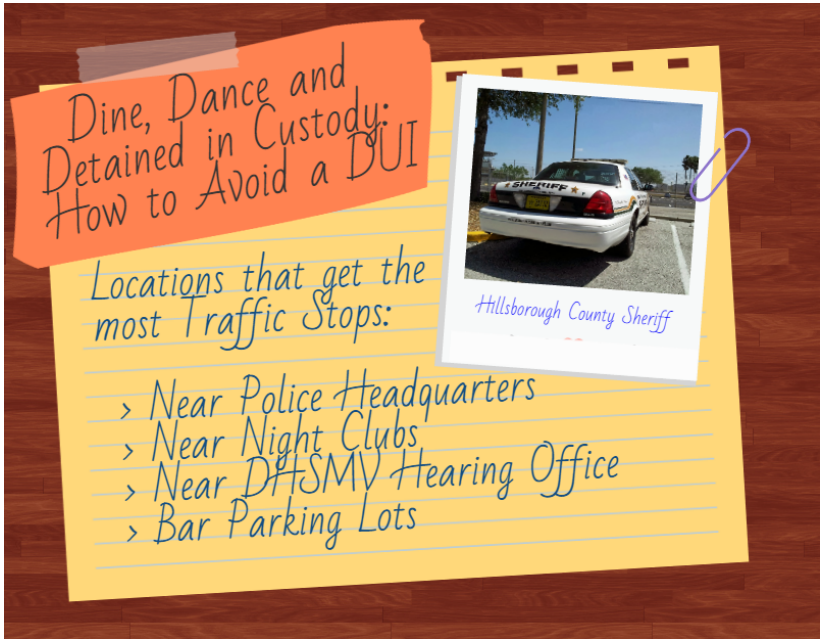
Under Florida law the statements made during an accident investigation are not always available for prosecutors to use in a criminal prosecution. The Latin term and legal concept of "Corpus Delicti" can be used in defending DUI cases involving a crash. Specifically Statements of Identification made by a DUI suspect, including comments on who was in Actual physical control of vehicle, Evidence and Statements of defendant, including Identification of defendant as driver can be suppressed.

Recently a court ruled that there were inadmissible statements made during an accident investigation. The Court ruled there was an invalid identification of a driver in alleged DUI using driver's license and documents provided to trooper investigating accident. The defendant's admission that he was driver was protected by accident report privilege. Post-Miranda statements which restated admissions made during accident investigation are inadmissible to establish Corpus Delicti.

A court recently ruled that where prosecutor failed to prove existence of legitimate independent source identifying defendant as driver of vehicle at time of crash, any evidence as to identity of the driver is inadmissible in the DUI criminal case. Finally, the court destroyed the State's case when it found that where the cop did not observe evidence of impairment and the odor of alcohol until after he had requested that defendant submit to field sobriety exercises and had demonstrated the first exercise, any evidence related to field sobriety exercises was inadmissible. Source: FLW Vol 16 / 863a

The Arrest

Targeting Restaurants and Bars



Police use mapping technology and other databases to target certain areas for DUI enforcement actions. In summary these are plans by cops for drivers to Dine, Dance, and Detain. Certain locations generally and several bars, specifically that generate much of the DUI traffic stop action for law enforcement agencies. Police are tracking the places where arrested drivers reported having their last drink.

Unfortunately, for the bars on the lists published by the Tampa Tribune newspaper, these bar owners cannot control the police or the surveillance of their locations and their customers. Not surprisingly, in general, the neighborhoods close to the Tampa Police Department headquarters are also hot spots for DUI

arrests. Hyde Park and Ybor City are frequent entries on incident reports according to the media. Best advice - make sure to arrange a ride home.

Video of a driving under the influence traffic law enforcement officer from court proceedings at the Hillsborough County Courthouse told drivers what many already knew - cops watch bar parking lots. Now drivers and visitors to the area can know statistically what geographic areas are targeted and which bars they may be watching.

Court proceedings in many Florida courts can be videotaped. We have seen and republished sworn testimony from a Tampa Police Department Sergeant who was well-versed in police tactics in Tampa Bay. The police officer candidly admits the obvious - cops sit on bar parking lots. DUI Defense Attorneys have suspected this for years. The video tells us they watch parking lots, act on tips received by phone and other types of electronic messages. We have protected the identity of the officer and give him credit for testifying so candidly (he was later fired). Tips to watch locations come from Phone Calls from Bar Managers, letters, pictures says the soon-to-be former lawman, "I get all kinds of stuff."

Assume this is the practice everywhere. One DUI attorney has said "as there was a basis for the traffic stop and probable cause for the arrest, how or why an officer got involved in a DUI stop is irrelevant." Be warned.

Source: http://www.dui2go.com/2015/03/dui-attorney-tampa-bars-and-restaurants-map.html (video of testimony posted here)

Citizen's Arrest

Curiously, a suspect must be placed under arrest before a valid breath test or refusal to submit to a breath test may be used

against the driver in court. In one interesting case of DUI there was a Citizen's Arrest by a lady who saw bad driving / parking by a driver who smelled of alcohol. A citizen's arrest is sometimes proper and can result in a DUI traffic stop being upheld by Florida DUI courts. Here is a summary of that Florida DUI Driving Under the Influence case.

In one Florida case, the driver "drove up to where [citizen] was sitting, drove onto the sidewalk and parked her car. The [driver] sat in her car for a minute, then stumbled out of the vehicle and began crying. [The citizen] approached her and asked if she was okay. [The driver] looked at [The citizen]'s son, looked at [The citizen] and then looked at her son again. [The citizen] asked the [The driver] what was wrong and the [The driver] responded that she was looking for her son. [The citizen] asked [The driver] where her son was and the [The driver] pointed at [The citizen]'s son. [The driver] smelled of alcohol."

The citizen took the car keys and effectively prevented the driver from continuing on her way. She called the cops and they arrived on the scene and arrested the driver for DUI Driving under the Influence. The driver blew over a .08. The issue before the court - can a citizen arrest a driver for DUI? This is known as a citizen's arrest.

The appeals court reasoned in the case Excerpts below:

"The Supreme Court adheres to the view that a person is “seized” only when, “by means of physical force or a show of authority, his freedom of movement is restrained.” U.S. v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). In other words, a person is “seized” within the meaning of the Fourth Amendment “only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,” even if the person did not attempt to leave. Id.; see also Hill v. State, 39 So. 3d 437, 439-440 (Fla. 3d DCA 2010) [35 Fla. L. Weekly

D1455c]. Applying the reasonable person standard to determine whether a seizure has occurred is a fact-intensive analysis in which the reviewing court must consider the totality of the circumstances. Golphin v. State, 945 So.2d 1174, 1184 (Fla. 2006) [31 Fla. L. Weekly S845a]."

"In Florida v. Royer, 460 U.S. 491, 494-495, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), a plurality of the United States Supreme Court held that when the officers identified themselves as narcotics agents, told Royer that he was suspected of transporting narcotics, and asked him to accompany them to the police room, while retaining his ticket and driver's license and without indicating in any way that he was free to depart, Royer was effectively seized for the purposes of the Fourth Amendment. Citing to cases such as Royer and Mendenhall, the Florida Supreme Court has also found that "the retention of identification during the course of further interrogation or search certainly factors into whether a seizure has occurred." Golphin, 945 So. 2d at 1185."

The appeals court reviewed the DUI case and stated:

"Appellant cites to Boermeester v. State, 15 Fla. Law Weekly Supp. 576a (Fla. 13th Cir. Ct. 2008), in support of her case. In Boermeester, the defendant approached the gate at MacDill Air Force Base and was stopped by Technical Sergeant Jorde Rosario whose duties that morning included ensuring that only authorized personnel be permitted to enter the base. Boermeester, 15 Fla. L. Weekly Supp. 576a. Believing that Boermeester might be impaired, Tech. Sgt. Rosario ordered him to exit his vehicle, to surrender his keys and then contacted the Tampa Police Department. Id. Boermeester was subsequently charged with DUI and filed a motion to suppress which was denied by the trial court. Id. Boermeester then appealed the denial of the motion to suppress. Id."

"On appeal, the Boermeester court stated that the trial court did not indicate the basis for its finding that there was not a citizen's arrest. Id. The trial court did not file a written order, nor did it state the grounds for its decision at the moment it denied the motion. Id. The trial court simply stated there was not a citizens' arrest and denied the motion to suppress. Id."

"The Circuit Court in Hillsborough opined, “[i]t is therefore with some difficulty that this Court reviews the trial court's determination” and then proceeded to reverse the county court's denial of the motion to suppress. Id. Based on the fact that the military guard had testified that he confiscated Boermeester's keys for the man's safety and that Boermeester was free to leave at any time, the court held that a citizen's arrest did not take place. Id. The Boermeester court focused on the intent of Tech. Sgt. Rosario in depriving Boermeester of his right to leave. Id."

The court ruled:

"The critical point is that based on the totality of the circumstances, a reasonable person in the Appellant's position, having had her vehicle moved while she sat in the passenger seat and then deprived of her keys, would not have felt free to leave the scene at that time."

"The trial court correctly found that the Appellant's conduct, which occurred in front of the civilian witness, constituted a breach of the peace. See Edwards v. State,462 So. 2d 581 (4th DCA 1985). This private citizen took the type of action the law would encourage a private citizen to take in order to prevent an obviously intoxicated individual from continuing to drive on our streets. See Id. The civilian witness' actions in lawfully detaining the Appellant until police arrived constituted a proper citizen's arrest."

Source FLW Supp 1902 ESTR

The Breath Test

Refusal to Submit to Chemical Test

For a valid refusal to submit to a breath test that will be usable in court and driver's license suspension hearings, the driver must be given Florida's Implied Consent warning given prior to requesting a suspect to take a breath test on an Intoxilyzer breath machine.

Refusal to submit to a breath test is of interest to many drivers. The breath test is voluntary, if the arresting officer properly informs suspects of their options. One court ruled that where the cop misinformed a DUI suspect that he would be eligible for hardship license if he submitted to breath test, the refusal was invalid. The cop also told the driver he would not be eligible if he refused the test. Due to misinformation, it could not be proven that suspect's decision to submit to test was not influenced by misinformation; the state had failed to prove that submission to test was voluntary. Motion to Suppress test results granted.

Source: FLW Supp 1703Perd

When police fail to properly inform suspects of their options under the implied consent law, a defense may be available for

DUI in Florida. Under Florida DUI law refusal to submit to a breath, urine, or blood test can be used and may be admissible as evidence in a DUI criminal case. Let's go behind the scenes and into an interrogation room at a local jail where a DUI cop is informing the suspect of his options. Video of this refusal to submit to a breath test can be seen here: http://youtu.be/iDmX_f8nAGw

Implied Consent Warning

Florida Law Requires: "The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the suspension of the person's privilege to operate a motor vehicle for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests, and shall also be told that if he or she refuses to submit to a lawful test of his or her breath and his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, he or she commits a misdemeanor in addition to any other penalties. The refusal to submit to a chemical or physical breath test upon the request of a law enforcement officer as provided in this section is admissible into evidence in any criminal proceeding." 316.1932 (1)(a)1.a. (Tests for alcohol, chemical substances, or controlled substances; implied consent; refusal.)

What Does a Cop Suspected of DUI Do When Asked?

There is at least one report of a police officer's refusal of a Breath Test. The DUI Cop was arrested. According to a media report, a Florida Highway Patrol State Trooper was arrested for DUI. It made me wonder what would a professional DUI

enforcement officer do when faced with the choice of whether or not to take a breath test? The answer - the trooper refused to take a breath test. The Hillsborough County Sheriff's Deputy spotted the driver on a road near Tampa, Florida.

Source:

http://www.theledger.com/article/20120217/NEWS/120219433

What About a Driver's Miranda Rights?

An interesting issue that has been dubbed "The Confusion Doctrine." In that case, a breath test operator had read Miranda warnings to the defendant right after reading Florida's implied consent warnings. The defendant invoked the right to remain silent, and officer did not clear up confusion by advising defendant that right to remain silent is irrelevant to question of whether defendant is going to submit to breath test, defendant's verbal refusals of test were suppressed.

The Complete Miranda Refusal Breath Test Opinion is below:

ORDER SUPPRESSING ILLEGALLY OBTAINED EVIDENCE

THIS CAUSE came before the Court upon the Defendant's Motion to Suppress. At the hearing, the Court heard testimony from Officer M. Potter and Officer J. Spills of the Jacksonville Sheriff's Office and the Defendant himself. The State and Defense stipulated that the Court would receive into evidence the transcripts of Officer Potter's and Officer Spill's testimony taken at a previous DHSMV Formal Review hearing. Based upon a review of the transcripts, consideration of the testimony of the officers and Defendant, and after hearing legal argument of counsel, the Court finds the Defendant's Motion to Suppress

is well taken and the Defense's assertions therein persuasively proven. The Court finds as follows:

On December 19, 2009, the Defendant was arrested by the Jacksonville Sheriff's Office for the offense of driving under the influence of alcohol. Upon being admitted into the Duval County Pretrial Detention Facility, the Defendant was escorted by Officer Potter, the breath test operator in this case, to the breath testing room. Per standard Jacksonville Sheriff's Office procedure, Officer Potter introduced himself, requested that the Defendant submit to a breath test, and advised the Defendant of the standard implied consent warnings as contained on the Jacksonville Sheriff's Office Constitutional Rights and Implied Consent Form. Immediately following the implied consent warnings, Officer Potter continued reading through the form and advised the Defendant of his constitutional Miranda rights.

Those warnings included the right to remain silent, the right to the presence of a lawyer before and during any questioning, the right to a Court appointed attorney if he could not afford one, and a warning that any statements can and will be held against him in the subsequent prosecution. Once these warnings were read to the Defendant, he immediately became silent, refusing to answer any questions. The record before this Court shows that Officer Potter believed the Defendant clearly invoked his right to remain silent just after being read his Miranda rights. Should the Defendant not have invoked his right to remain silent, Officer Potter would have continued with interrogation-type questions as contained on the Jacksonville Sheriff's Office Constitutional Rights and Implied Consent Form.

Once the Defendant fell silent, Officer Potter continued by giving the Defendant the benefit of the entire twenty minute observation period as required before administering a breath test. The Defendant remained steadfastly quiet making no statements for the entire twenty minute observation period. At the conclusion of the twenty minute observation period, Officer

Potter pressed the Defendant for a verbal answer. At that time, the Defendant stated, “Well, I guess I'll hire a driver for the next year.” When asked if the Defendant was refusing, the Defendant replied, “Yes.”

From the testimony and evidence adduced, it is apparent that the Defendant was under arrest, in custody for Miranda purposes, and subject to interrogation. Officer Potter warned the Defendant of his Miranda rights, and immediately thereafter, he invoked his right to remain silent. When these factors are all present, law enforcement officers must immediately stop questioning. Traylor v. State, 596 So.2d 957, 966 (Fla. 1992). Law enforcement did not stop in this case however, and, therefore, violated the Defendant's right to remain silent.

Whether the Defendant actually had a right to refuse at that moment because of confusion on his part is of no consequence given the specific factual situation presented here. In this case, the officer specifically told the Defendant that he had the right to remain silent and, as a direct result of this warning, the Defendant invoked his right to remain silent. Law enforcement in this case did not clear up any confusion that the Defendant may have had as to whether his right to remain silent applied during the breath testing procedure.

The Court notes that the Fourth District Court of Appeal has recently decided Kurecka v. State, in which the Court discusses what has become known as the “Confusion Doctrine.” 2010 WL 1050008. (Fla. 4th DCA 2010) [35 Fla. L. Weekly D666a] This Court notes that Circuit Court and County Court opinions across the state have reached very mixed results over the years when addressing the “Confusion Doctrine.” Essentially, the doctrine holds that if an arrestee refuses a breath test because of confusion caused by law enforcement in advising a suspect of his or her Miranda rights contemporaneously with a request for a breath test, then the refusal will be suppressed as

inadmissible [sic] . The doctrine is underpinned by the notion that it is patently unfair for law enforcement to cause confusion on the part of a suspect regarding certain cherished constitutional rights thereby causing them to believe they have some sort of Constitutional right to refuse the breath test, and then to hold that refusal against the arrestee.

In Kurecka, a consolidated appeal, the two DUI arrestees

In the case at bar, Officer Potter read the Defendant his Miranda warnings immediately after reading the implied consent warnings. This procedure is laden with potential for confusion. This Court finds that since law enforcement did not clear up the Defendant's confusion by advising him that his right to remain silent is irrelevant to the question of whether he is going to submit to breath testing, the Defendant's confusion was not his own fault and his resulting refusals should not be held against him.

Therefore, it is ORDERED AND ADJUDGED:

The Defendant's Motion to Suppress is GRANTED to the extent that the Defendant's verbal refusals, “Well, I guess hire a driver for the next year” and “Yes” are hereby suppressed and held inadmissable [sic] in further proceedings.

Source: 18 Fla. L. Weekly Supp. 78a

Breath Test Results Report

The breath test results are reported using the form below. If the police and the breath testing personnel comply with all of the rules, then a presumption that the driver was operating a motor vehicle illegally may used to convict a driver in court and for the state to suspend the driver's license.

One requirement for a valid breath test is that the driver "was observed for at least twenty-minutes prior to the administration of the breath test to ensure that the subject did not take anything orally and did not regurgitate.

Although the document must be notarized, there is an interesting twist. Law enforcement officers, correctional officers, traffic accident investigation officers and traffic infraction enforcement officers are notaries public when engaged in the performance of official duties. This completed form is admissible without further authentication and is presumptive proof of the results herein.

FLORIDA DEPARTMENT OF LAW ENFORCEMENT
ALCOHOL TESTING PROGRAM
BREATH ALCOHOL TEST AFFIDAVIT

Instrument Type: Intoxilyzer 8000
Instrument Registered To:

Instrument Serial Number: Software:
Date of Test:
Date of Last Agency Inspection:
Observation Period Began:
Subject's Name:
DOB:
Sex:

The subject was observed for at least twenty-minutes prior to the administration of the breath test to ensure that the subject did not take anything orally and did not regurgitate.

Results:

[Results are Printed Here]

State of Florida, County of _____,

Personally appeared before me the undersigned authority, who (__) is personally known to me or (__) produced _____ as identification, and who after being placed under oath, states:

I _____ , hold a valid Breath Test Operator permit issued by the Florida Department of Law Enforcement, I administered the above breath test to the subject named above in accordance with Chapter 11D-8, Florida Administrative Code, and this form is a true and accurate report of that breath test.

Breath Test Operator:

_____

Date: _____

Signature

Sworn to (or affirmed) before me this _____ day of _____, _____

Signature of Notary Public-State of Florida

_____

Printed Name of Notary Public-State of Florida

Note: Pursuant to section 117.10, Florida Statutes, law enforcement officers, correctional officers, traffic accident investigation officers and traffic infraction enforcement officers are notaries public when engaged in the performance of official duties. In accordance with section 316.1934(5), F.S., this completed form is admissible without further authentication and is presumptive proof of the results herein. To be used in accordance with Section 316.1934(5), F.S., and in administrative proceedings pursuant to 322.2615, F.S.

Witnesses Required For Court

Recently a couple of breath test operators went missing from the Hillsborough County Sheriff's Office. The Intoxilyzer 8000 used in Florida DUI Driving Under the Influence cases requires a properly licensed operator to administer a breath test. These missing witnesses also sign the Breath Test Results Affidavit. A few lucky defendants got breaks when these essential DUI Prosecution witnesses went missing.

Broken Breath Machines

Courts sometimes find that inspection and maintenance of the Intoxilyzer 8000 breath testing machines, specifically replacement of the dry gas regulator was not maintenance but in fact constituted a repair. Once repaired, the Intoxilyzer 8000 must be inspected by the Florida Department of Law Enforcement - FDLE before machine is returned to evidentiary use.

Breath tests administered after repair without post-repair FDLE inspection do not substantially comply with administrative rules and are not admitted into evidence at trial. Examination of all the supporting documents in a breath case is now mission-critical. Most machine records and data are available pursuant to Florida's Public Record law, Chapter 119. Ask your lawyer for more details on how to get these records.

Calibration of the Breath Machine

Intoxilyzer 8000 cases have been attacked when DUI Defense Counsel found that during mandatory testing of the machines, technicians were violating test protocols, when they unplugged the machines when test results were not going according to plan. The testing / inspection is designed to determine the accuracy of a breath test. Generally these tests are conducted monthly and annually.

When the Plug was Pulled During Testing / Inspection, one court ruled, "Based on evidence that is now before the Court, including the Affidavit of Thomas E. Workman, Jr., this Court finds that on October 19, 2006, three months before the Defendant's breath test, Dwite Hackney, an FDLE employee performed a Department Inspection on Intoxilyzer, serial number 80-000869 where he pulled the plug on the machine while it was going through the testing mechanism." Beyond

that the court found, "Since the time that the Defendant initially plead and was sentenced, the issue of the plug pulls have been the subject of extensive litigation before the Honorable County Court Judge, Peary S. Fowler who has entered an order finding that the plug pulls were contrary to FDLE rules and may well have effected the veracity and admissible of the intoxilyzer results."

DUI defendants and their lawyers should remain concerned that the rules are not being followed and officials are thwarting the inspection process. This Judge saw through the efforts to hide inaccuracies in the testing process. By the way, this Judge also allowed the defendant to withdraw his previous Plea to the DUI charge.

The court concluded, "The evidence before this Court is that an employee of FDLE, Sandra Veiga did not follow the rules and regulations and that she was terminated as a result of her actions. There is now evidence that another FDLE employee, Dwite Hackney, engaged in the same conduct as Ms. Veiga." The court finally ruled that "the Defendant's entire sentence which was imposed upon her by this Court is hereby vacated and set aside and the Department of Highway Safety and Motor Vehicles - Division of Driver Licenses shall reinstate the Defendant's driver's license"

Source: 17 Fla. L. Weekly Supp. 212a

Tinkering with Intoxilyzer 8000 Breath Machines

Florida State officials have made modifications to breath machines and their software for years. Courts have looked the other way until now. For years the breath results in DUI cases were admitted into evidence and shown to a jury with no

scientific evidence presented in court as to the machine's accuracy. Recently, a Florida Driving Under the Influence court ruled that the State Attorney must establish the admission of an Intoxilyzer Breath Test result.

Prosecutors must use the traditional scientific predicate to introduce breath test results from Intoxilyzer 8000 in a trial. One court ruled that it could not determine whether the modified Intoxilyzer 8000 used in Florida was same machine / instrument approved by NHTSA (National Highway Traffic Safety Administration) for use in Florida.

Complete Text of the Opinion

State v. Garcia, (20th Cir Aug 20, 2014) (appeal of consolidated county court cases).

This interlocutory appeal represents twenty-six Collier County appeals that have been consolidated into one because they involve identical issues regarding the Intoxilyzer 8000, appealed from identical non-final orders issued in each of the county court cases by a single judge. We have jurisdiction pursuant to Fla. R. App. P. 9.030(c). Appellate review of a trial court's ruling on a motion to suppress is a mixed question of fact and law. State v. Busciglio, 976 So. 2d 15 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D267c]. “The trial court's findings of fact are presumed correct and will be reversed only if they are not supported by competent, substantial evidence.” Id. at 18. The appellate court's review of the trial court's application of the law to its determination of facts is de novo. Id. We affirm the decision of the trial court.

Appellants presented two issues for appeal after the trial court denied suppression of the breath test results and required the Appellants to establish the traditional scientific predicate prior to admitting the results at trial. As to Issue I, whether the Appellees sustained their burden of proving that the State of

Florida did not perform the breath tests in question on an approved breath test instrument, thereby depriving the State of the benefit of the implied consent law, we affirm the trial court's ruling without further discussion.

As to Issue II, whether the trial court erred in ordering the State of Florida to establish the traditional scientific predicate in order to introduce breath test results at trial, this Court holds that: (1) the trial court made the correct legal conclusion that FDLE regulations required that the Intoxilyzer 8000 be in continued compliance with NHTSA's model specifications; and (2) competent substantial evidence supported the trial court's ruling that the State was required to establish the traditional scientific predicate. In its initial brief, the State requests that this Court rule on whether the modified Intoxilyzer 8000 is the same instrument as the one listed on the NHTSA conforming products list. However, the Appellate Court has no authority to make such a factual finding. Farneth v. State, 945 So. 2d 614 (Fla. 2d DCA 2006) [32 Fla. L. Weekly D65a] (holding that a fundamental principle of appellate procedure is that an appellate court is not empowered to make findings of fact).

The State further asks this Court, if it were to find that the modified Intoxilyzer 8000 was a different instrument, whether FDLE must resubmit the device for retesting in order to continue to use the machine. However, this issue misstates the trial court's ruling. In its Order, the lower court did not exclude the use of the breath test results; rather, the lower court ordered that the State must establish the traditional scientific predicate in order to introduce the results at trial. In addition, the lower court did not order that the State must resubmit the machine to NHTSA.

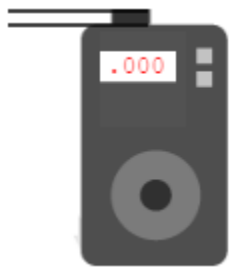
The determination of whether the State showed substantial compliance with the Implied Consent law is a factual finding by the trial court. The appropriate standard of review for factual findings is whether the findings are supported by

competent substantial evidence. The trial court did not err in concluding that the State failed to demonstrate substantial compliance with the Implied Consent law. The trial court ruled that it could not determine whether the instrument was the same as the one approved for use in Florida in light of all of the modifications that occurred and the fact that those modifications were not reported to NHTSA. The presumption of correctness is strongest when reviewing a judgment based upon factual findings of the trial court. Palm Beach Polo Holdings, Inc. v. Equestrian Club Estates Prop. Owners Ass'n, Inc., 949 So. 2d 347 (Fla. 4th DCA 2007) [32 Fla. L. Weekly D605b]. The trial court's ruling on Issue II is affirmed.

Accordingly, we AFFIRM. (CARLIN, STEINBECK, M.O., and VOLZ., JJ., concur.)

Tinkering with Intoxilyzer 8000 Breath Machines used in Florida DUI Prosecutions may be over.

Roadside Breath Testing Not Used



Florida, unlike some other states does not use Alcohol Screening or Screening Breath Test Devices. Screening breath test devices are designed to test the breath for the presence of alcohol. The machine displays and actual estimated breath result by a number or by issuing a Pass or Fail indication.

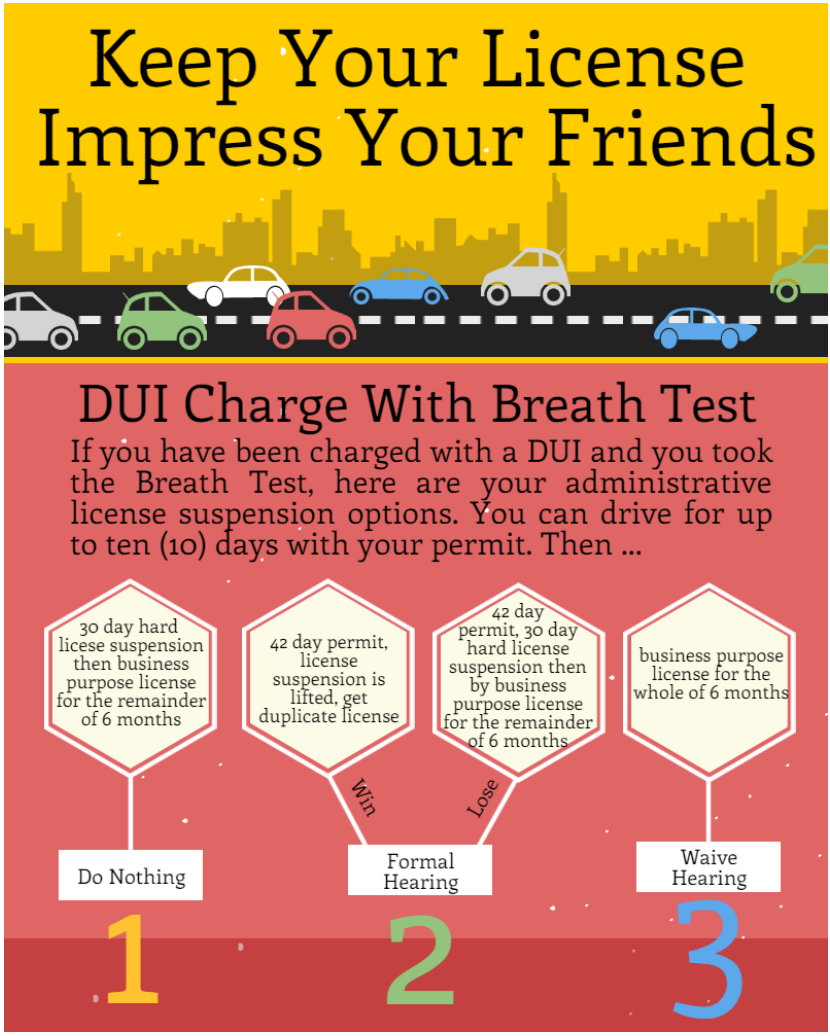
Some police use these devices at the roadside to see if a driver has consumed alcohol. The results are then used to decide if probable cause for a DUI arrest exists. Screening test results are not used in Florida criminal prosecutions. These machines are used in 'fitness for duty' applications for commercial transportation vehicle operators and to test suspected underage drinkers.

Finally, Portable Alcohol Breath Testing is authorized by for cases against persons under the age of 21 who may be subjected to a license suspension for underage drinking and driving. The reading is admissible as evidence in the administrative hearing where the state tries to suspend the young driver's license.

Portable Breath Testing for Under Age 21

Portable Alcohol Breath Testing Device be used under Florida Law for persons under 21? Yes Florida law.322.2616, provides that drivers under the age of (Twenty-One) 21. The reading is admissible as evidence in any administrative hearing conducted under s. 322.2616, F.S."

The Driver's License



Florida DUI License Suspension

Under Florida DUI laws and regulations, "[i]f your driving privilege is suspended or revoked you may be eligible to apply

for a hardship license or reinstatement. For eligibility information [a driver can] contact the local Bureau of Administrative Reviews Offices, Driver License Office or Bureau of Customer Services in Tallahassee." This is not as easy as it sounds, a visit by you or your lawyer to the local Bureau of Administrative Reviews within 10 days of the DUI arrest is frequently the best course of action.

The authorities in the State of Florida have stated, "You can be charged with DUI if you are found to be driving or in actual physical control of a motor vehicle in the state while under the influence of alcoholic beverages or controlled substances. Controlled substances include narcotic drugs, barbiturates, model glue and other stimulants - whether taken by swallowing, by sniffing, by smoking, by injection or by other means. You will be administratively suspended if you have a breath or blood alcohol level of .08 or above or refuse to submit to a chemical test."

DUI Conviction on Driving Record for 75 Years

The Department of Highway Safety and Motor Vehicles enforces the suspension. "This suspension is a mandatory period without a license. If you wish to appeal this suspension, you must apply for a formal or informal review hearing at the appropriate Division of Driver Licenses, Bureau of Administrative Reviews Office within 10 days of your date of arrest. This suspension is in addition to any penalties directed by the court. A DUI conviction will remain on your driving record for 75 years."

Summary of Florida DUI License Suspension Laws

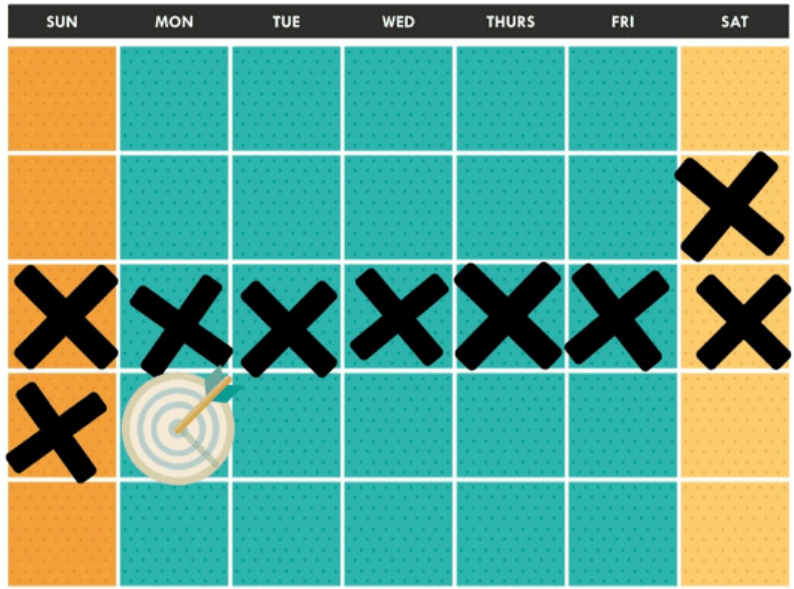
Refusal to submit to a breath, urine, or blood test is admissible as evidence in Florida DUI criminal proceedings. Second or subsequent refusal is a misdemeanor of the first degree. Suspension for First Refusal, suspended for 1 year. Second Refusal suspended for 18 months.

Commercial Driver License Suspension Periods: First refusal in a commercial motor vehicle, disqualified for 1 year. Second or subsequent refusals in a commercial motor vehicle, disqualified permanently. No hardship reinstatement permitted.

Blood Tests: If necessary, blood may be withdrawn in DUI cases involving serious bodily injury or death by authorized medical personnel with the use of reasonable force by the arresting officer, even if the driver refuses.

Portable Alcohol Breath Testing: Authorized by s.322.2616, F.S., for persons under the age of 21. Reading is admissible as evidence in any administrative hearing conducted under s. 322.2616, F.S.

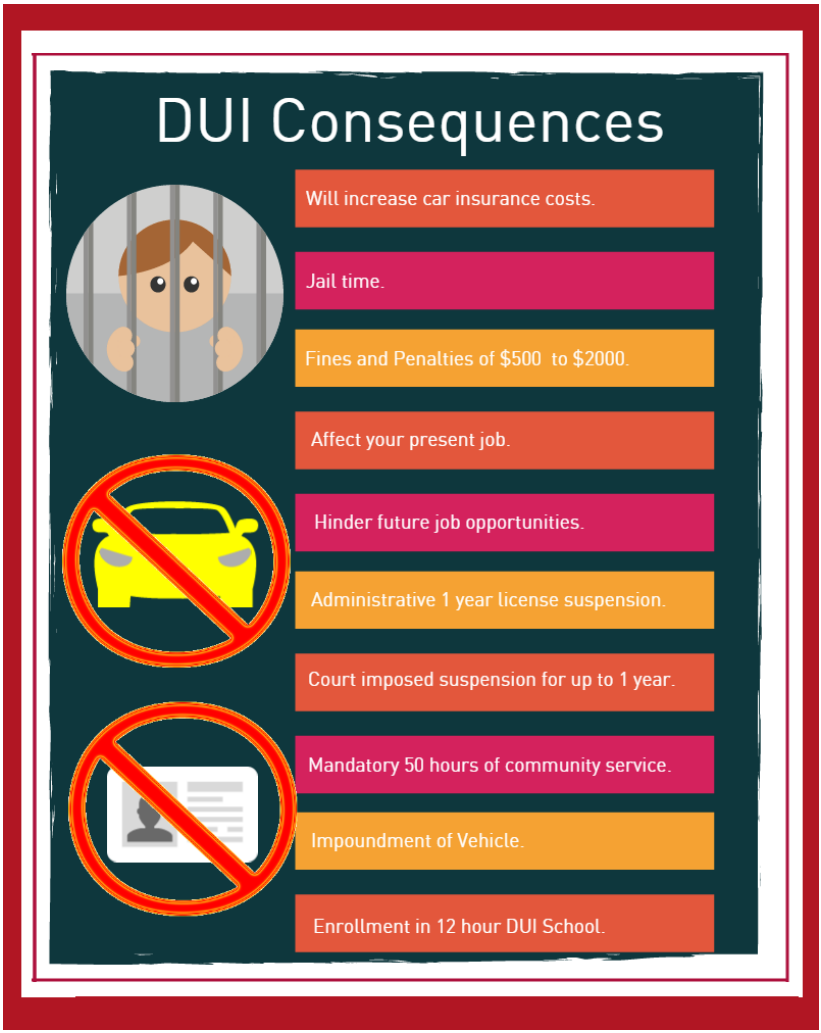
Failure to Challenge Suspension Within 10 Days



A driver has ten days from the date of arrest to request a Review Hearing For Administrative Suspension of license. The Department of Highway Safety and Motor Vehicles is authorized upon request to conduct formal and informal reviews for the purpose of sustaining, amending or invalidating administrative suspensions for allegations of DUI.

Failure to challenge a suspension within 10 Days automatically validates Suspension. The refusal to submit to a breath, urine, or blood test is admissible as evidence in Florida DUI Administrative Hearings and criminal proceedings. The Second or subsequent refusal is a misdemeanor of the first degree.

Consequences of a DUI



First Refusal Suspension suspended for 1 year. Second Refusal suspension for 18 months.

CDL - Commercial Driver License Suspension Periods: First refusal in a commercial motor vehicle, disqualified for 1 year.

Second or subsequent refusals in a commercial motor vehicle, permanent disqualification. No hardship reinstatement.

DUI Blood Tests: Blood may be drawn in Driving Under the Influence DUI cases involving serious bodily injury (BI) or death by with the use of reasonable force by the arresting officer, even if the driver refuses.

Portable Alcohol Breath Testing: For persons under the age of 21. a portable reading is admissible as evidence in any Administrative Hearing.

Business or Employment Reinstatement

1. Suspension for Driving With an Unlawful Breath Alcohol of .08 or above or Refusal: Driver must show proof of enrollment in DUI school and apply for an administrative hearing for possible hardship reinstatement. If unlawful alcohol level must serve 30 days without driver license or permit prior to eligibility for hardship reinstatement. If first refusal must serve 90 days without driver license or permit prior to eligibility for hardship reinstatement. No hardship reinstatement for two or more refusals.

2. Suspension - Driver Under Age of 21 Driving With a Breath Alcohol Level of .02 or above: Must complete a Traffic Law and Substance Abuse Education course before hardship reinstatement. .05 or higher, must complete DUI program prior to eligibility for hardship reinstatement. Must serve 30 days without driver license or permit prior to eligibility for hardship reinstatement.

Refusal of a Blood Test

A license suspension for alleged refusal to submit to a blood test can be overturned. Refusal to submit to blood test can be used by the Department of Highway Safety and Motor Vehicles to sustain a Driver's License Suspension. One court ruled that the mere appearance of a driver at a hospital emergency room is insufficient to establish that a DUI breath test was impracticable or impossible. The court overturned an Administrative license suspension when the appeals court ruled it was Error to sustain a suspension for refusal of blood test. The Circuit Court found there was no competent substantial evidence that administration of a breath test to driver who was transported to hospital after crash and then cleared for entrance into jail was impracticable or impossible.

Case Excerpts:

Doran's driver's license was suspended for refusing to submit to a blood test to determine his blood alcohol content. Florida Statute section 316.1932(1)(c) (hereinafter, the Implied Consent Law) provides, in pertinent part:

Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by operating such vehicle, deemed to have given his or her consent to submit to an approved blood test for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances or controlled substances as provided in this section if there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and the person appears for treatment at a hospital . . . and the administration of a breath or urine test is impractical or impossible.

§ 316.1932, Fla. Stat. (2011) (emphasis added). The Department argues that the mere fact that Doran was at the hospital rendered a breath test impractical or impossible, however, the Implied Consent Law clearly requires a showing that a breath test was impractical or impossible in addition to the person's appearance at a hospital.

There is no competent, substantial evidence in the record that a breath test was impracticable or impossible. Officer Owen's Probable Cause Affidavit simply states that he requested the blood test at the hospital, but does not provide any details indicating that a breath test was impractical or impossible. For example, Officer Owens did not state that Mr. Doran was awaiting treatment, that he was unconscious, or that he was strapped to a gurney when he requested the blood test. See, e.g., State v. Kliphouse, 771 So. 2d 16 (Fla. 4th DCA 2000) [25 Fla. L. Weekly D2309f] (finding that a breath or urine test was impractical or impossible to administer because defendant was unconscious at the hospital). As Doran's mere appearance at the hospital is insufficient to establish that a breath test was impracticable or impossible, the Petition for Writ of Certiorari is hereby GRANTED and the order of suspension is QUASHED.

Source FLWSUPP 1901DORA

The Court

A driver is entitled to a Jury trial for DUI charges in Florida. The Judge may also hear the facts of the case and make a decision. This is called a trial by Judge or a bench trial. For a trial by the judge, the defendant and the Prosecutor must agree. Then the defendant must formally waive the right to trial by jury.

Florida Standard Jury Instruction for DUI Breath Alcohol

The Florida Jury Instruction that informs DUI trial jurors of the significance of a breath test BRAC result that has been properly obtained by law enforcement. Defending DUI Breath test cases involves a full investigation that the breath samples were obtained in compliance with the Constitution, Laws, Statutes, Rules, and Regulations applicable to Search and Seizure and collection of breath samples.

Documentation of most, if not all data uploaded from Florida's Intoxilyzer 8000 machines, correspondence from the Florida Department of Law Enforcement breath test officials, and correspondence from CMI, the manufacturer are available for review by the defense attorney and experts.

The Florida Supreme Court has proposed the following instructions to jurors deciding DUI cases:

"If you find from the evidence that while driving or in actual physical control of a motor vehicle, the defendant had a blood or breath-alcohol level of .08 or more, that evidence would be sufficient by itself to establish that the defendant was under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired. But this evidence may be contradicted or rebutted by other evidence demonstrating that the defendant was not under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired."

Source: 316.1934, Florida Statutes (2009), and the Florida Supreme Court.

There is a presumption of impairment when a breath test of over .08 is used at a trial. Due to the importance of these jury instructions, it is prudent to carefully investigate the machine used to perform the test. I have access to the calibration data and test results reported by each law enforcement agency, uploaded by each breath machine.

Here are the precise words read to every Florida juror in every jury trial where a breath test is used.

Florida Standard Jury Instruction for Driving with Unlawful Breath Alcohol Level | DUBAL

1. If you find from the evidence that the defendant had a blood or breath alcohol level of 0.05 or less, you shall presume that the defendant was not under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired.

2. If you find from the evidence that the defendant had a blood or breath alcohol level in excess of 0.05 but less than 0.08, you may consider that evidence with other competent evidence in determining whether the defendant was under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired; or

3. If you find from the evidence that the defendant had a blood or breath alcohol level of 0.08 or more, that evidence would be sufficient by itself to establish that the defendant was under the influence of alcohol to the extent that [his] [her] normal faculties were impaired. However, such evidence may be contradicted or rebutted by other evidence demonstrating that the defendant was not under the influence to the extent that [his][her] normal faculties were impaired.

These presumptions may be considered along with any other evidence presented in deciding whether the defendant was under the influence of alcoholic beverages to the extent that [his] [her] normal faculties were impaired.

Jury Trial Victories

DUI defense firms sometimes post their recent victories. It appears very impressive at first glance doesn't it? Some of these firms have several offices and several lawyers with

varying degrees of experience. They may handle hundreds, if not thousands of cases. They may post several wins per month.

What is their definition of "win"? Is it a reduced charge? Is it an invalidation of an administrative suspension? Is it a win at a jury trial?

The plain truth is these firms do not post all of the case results, including their recent defeats. For example they may have 2,000 cases per year and post 2 wins a week. That is only about 5 (.052) percent. A smaller firm that handles 200 cases per year and wins 2 cases per month actually has a higher win percentage of 10 percent (.10). The plain truth is that each client and each case has unique facts and circumstances. Clients and cases are not statistics with results posted as if criminal defense is a game. Defense of criminal charges is not a game to me.

Acquittal of a DUI Charge

A DUI trial can be won a couple of different ways. The obvious way is for the jury to find the driver not guilty. The Judge can also clear the defendant. The Judge can grant a defense motion for Judgment of Acquittal. In either event, the driver can never again be tried for the charges, since the Constitution prohibits Double Jeopardy or being tried more

than once for the same alleged crime. Here is the Definition of Judgment of Acquittal (JOA)

A judgment of acquittal is an order by the Court that the Defendant be acquitted. Usually, a request for judgment of acquittal is made at the close of the state's case and at the close of all evidence presented. A motion for judgment of acquittal is made when "the court is of the opinion that the evidence is insufficient to warrant a conviction." The state may have little or no right to appeal.

Here is the Florida Criminal Rule on Acquittal Rule 3.380

(a) Timing. If, at the close of the evidence for the state or at the close of all the evidence in the cause, the court is of the opinion that the evidence is insufficient to warrant a conviction, it may, and on the motion of the prosecuting attorney or the defendant shall, enter a judgment of acquittal.

(b) Waiver. A motion for judgment of acquittal is not waived by subsequent introduction of evidence on behalf of the defendant. The motion must fully set forth the grounds on which it is based.

(c) Renewal. If the jury returns a verdict of guilty or is discharged without having returned a verdict, the defendant‘s motion may be made or renewed within 10 days after the reception of a verdict and the jury is discharged or such further time as the court may allow.

The Impact

A DUI conviction will remain on your driving record for 75 years. There have been over 840,000 DUI Convictions in Florida. Enhanced penalties are an option when the BAC is above .15. The driver's vehicle may be impounded.

Vehicle Impounded

A Florida DUI can result in Vehicle Immobilization or Impound. Florida DUI law sometimes requires a vehicle immobilization. If you need to have this service as a condition of a DUI sentence of probation, immobilization services offer a quick and discreet way to immobilize your vehicle using a club that attaches from the steering wheel to the brake. Payment is accepted at the beginning or at the completion of the immobilization. The service must be performed by a licensed service provider.

Florida DUI Vehicle Immobilization Laws

Impoundment or Immobilization of Vehicle may be ordered and is mandatory unless the family of the defendant has no other transportation. For the First conviction, Impoundment or Immobilization of Vehicle is for 10 days; Impoundment or Immobilization of Vehicle for a second conviction within 5 years is 30 days; Impoundment or Immobilization of Vehicle for a third conviction within 10 years is 90 days. The court may also dismiss the order of Impoundment or Immobilization of Vehicle for any vehicles that are owned by the defendant if they are operated solely by the employees of the defendant or any business owned by the defendant.

Here are the details directly from the Florida Statutes section 316.19. Driving under the influence; penalties. (6) With

respect to any person convicted of a violation of subsection (1) . . . [the court must] order the impoundment or immobilization of the vehicle that was operated by or in the actual control of the defendant or any one vehicle registered in the defendant's name at the time of impoundment or immobilization, for a period of 10 days or for the unexpired term of any lease or rental agreement that expires within 10 days. The impoundment or immobilization must not occur concurrently with the incarceration of the defendant. The impoundment or immobilization order may be dismissed in accordance with paragraph (e), paragraph (f), paragraph (g), or paragraph (h).

(e) Aperson who owns but was not operating the vehicle when the offense occurred may submit to the court a police report indicating that the vehicle was stolen at the time of the offense or documentation of having purchased the vehicle after the offense was committed from an entity other than the defendant or the defendant's agent. If the court finds that the vehicle was stolen or that the sale was not made to circumvent the order and allow the defendant continued access to the vehicle, the order must be dismissed and the owner of the vehicle will incur no costs. If the court denies the request to dismiss the order of impoundment or immobilization, the petitioner may request an evidentiary hearing.

(f) A person who owns but was not operating the vehicle when the offense occurred, and whose vehicle was stolen or who purchased the vehicle after the offense was committed directly from the defendant or the defendant's agent, may request an evidentiary hearing to determine whether the impoundment or immobilization should occur. If the court finds that either the vehicle was stolen or the purchase was made without knowledge of the offense, that the purchaser had no relationship to the defendant other than through the transaction, and that such purchase would not circumvent the order and allow the defendant continued access to the vehicle, the order

must be dismissed and the owner of the vehicle will incur no costs.

(g) Thecourt shall also dismiss the order of impoundment or immobilization of the vehicle if the court finds that the family of the owner of the vehicle has no other private or public means of transportation.

(h) Thecourt may also dismiss the order of impoundment or immobilization of any vehicles that are owned by the defendant but that are operated solely by the employees of the defendant or any business owned by the defendant.

First Time DUI Penalties

The minimum Fine for a Florida DUI is $250. There is no such thing as a pre-trial diversion program to avoid a conviction. If guilty of DUI, there will be a mandatory conviction and the driver will have a permanent criminal record that cannot be sealed. First-time offenders face the following possible punishments;

With regard to the driver's license, hardship, any licenses are for Business Purposes Only - Employment Purposes Only. Reinstatement for a First Conviction requires people to complete the DUI School and then apply to the Department of Highway Safety and Motor Vehicles for a hearing about a possible hardship or business purpose only reinstatement. The Department of Highway Safety and Motor Vehicles can sometimes impose a mandatory ignition interlock device for up to six months for BAL of .15 or higher. If the breath result is greater than .15, there is an increased fine. Jail is an option for the judge with Imprisonment for up to six (6) months. There is a possibility of performing at least Fifty (50) hours of community service. In any event there will be at least a six (6)

months' revocation of the driver's license. The convicted driver must also complete a substance abuse education course.

Second Time DUI Penalties

Second-time offenders face the following possible, even stricter, punishment. A Second Conviction allows no hardship license except as provided below. The second time around, there will be a mandatory ignition interlock device for one (1) year. If the Second Conviction occurs within five (5) Years, there will be a 5-Year Revocation. There are provisions to apply for hardship business purposes only reinstatement hearing after one (1) year. Strict requirements of DUI school completion and participation in the DUI supervision program is mandatory for the remainder of the revocation. Be careful, because failure to report for counseling or treatment will result in cancellation of your hardship license. The DUI supervision program demands that the driver may not have consumed any alcoholic beverage or controlled substance or driven a motor vehicle for twelve (12) months before reinstatement. Finally there is a Mandatory ignition interlock device for one year or for two years if test result was greater than .15.

How to Go to Jail

There will be a mandatory terms of county jail if a second DUI occurred within 5 Years; Ignition Interlock device is possible and probable; Increased fines and revocation periods; Mandatory attendance of a substance abuse education course usually include counseling; Refusal to submit to a required breath, urine, or blood test can result in at least six and possibly 12 months' suspension of the driver's license.

Third time DUI Penalties

The driver cannot apply for hardship reinstatement hearing for two years. The driver must complete DUI school and remain in the DUI supervision program for the remainder of the revocation period. Notably, failure to report for counseling or treatment shall result in the cancellation of the hardship license). Finally, to keep the hardship license the driver cannot consume any alcoholic beverage or controlled substance or driven a motor vehicle for 12 months prior to reinstatement. There will be a mandatory ignition interlock device for two years.

How to Get a Felony DUI

Three-time offenders face the following possible, even stricter, punishment. If a Third Conviction occurs Within 10 Years the case will be prosecuted is a Felony with a 10-Year Revocation. If convicted of a felony DUI, the driver will become a felon, since courts are not allowed to with hold adjudication. A fourth DUI is a felony. A DUI with Serious Bodily Injury or Death is also a Felony.

Three Important Chemical or Physical Test Provisions

1. Refusal to submit to a breath, urine, or blood test is admissible as evidence.
2. Second or subsequent refusal is a misdemeanor of the first degree and is a new a separate crime. License Suspension Period for First refusal is 1 year.
3. License Suspension Period for second or subsequent refusals is 18 months. No Hardship license permitted.

Commercial Drivers and DUI

The rules are different for Commercial Driver's Licenses. License Suspension Period for First refusal is in a commercial motor vehicle 1 year. License Suspension Period for Second or subsequent refusals in a commercial motor vehicle results in a driver being disqualified permanently. For Commercial Driver's Licenses, there will be no hardship reinstatement permitted.

A conviction for driving a commercial motor vehicle with a blood alcohol level of .04 or above or refusing to submit to a test while driving a commercial motor vehicle, driving a commercial motor vehicle while under the influence of alcohol or controlled substance, or driving a commercial motor vehicle while in possession of a controlled substance cannot operate a commercial motor vehicle for a period of 1 year. A second conviction yields a permanent disqualification from operating a commercial motor vehicle. There is no hardship license.

Blood Testing

Blood from a driver or alleged driver can be used instead of or in addition to other tests. This means there can be a forceful withdrawal of blood. Courts have supported and the Florida DUI law provides that blood may be taken in DUI cases involving serious bodily injury or death. The blood sample is taken by authorized medical personnel and the arresting officer can use reasonable force if the driver refuses.

Hardship License Prohibited

A Driver under Florida DUI law may be prohibited from obtaining a Hardship License when there has been a second (2nd) or subsequent suspension for refusal or if driver has been convicted of (DUI) two (2) or more times. In any event, drivers disqualified from operating a commercial motor vehicle cannot obtain a hardship license to operate a commercial motor vehicle.

Notes