Thursday, May 8. 2008

The risks of refusing a test that should be fully refusable.

Â Bill of RightsÂ (From public domain.)Â Field sobriety tests are junk science administered by cops who have noÂ expertise to administer them, because junk science precludes having expertise. See how poorly is the performance when asking even a fully sober and awake person to follow unfamiliar instructions for standing on one leg for a count of thirty and walking heel to toe ("don't miss heel to toe") nine times and pivoting correctly on the way back. If a person has even had a glass of wine two hours ago and is somewhat tired, s/he will be between a rock and a hard place to take or not take the field sobriety tests in the following states that Virginia's intermediate appellate court has joined for considering the results of field sobriety tests for determining probable cause to arrest for violating drunk driving laws. Â In Jones v. Com., _ Va. App. _ (May 7, 2008), Virginia's Court of Appeals upheld a thirty-day jail sentence for unreasonable refusal to take a breathalyzer test, where the defendant had previous drunk driving convictions, and allowed consideration of the defendant's refusal to take the field sobriety tests for the probable cause determination. Moreover, the court was silent about the cop's repeated requests for field sobriety tests, which sounds like such test requests were demands rather than the simple requests they should have been (just as cops are not permitted to demand that a person submit to a "consent" search; they may only request it). In reaching this conclusion, Jones detailed the situation in the following states that permit consideration of refusal to perform field sobriety tests, Jones at n.4:Â See, e.g., State v. Ferm, 7 P.3d 193, 197 (Haw. Ct. App. 2000) (affirming conviction when officer arrested appellant for DUI based on his â€œimpaired demeanor, the smell of alcohol on his breath and his refusal to undergo a field sobriety testâ€•); State v. Sanchez, 36 P.3d 446, 449-50 (N.M. Ct. App. 2001) (holding that, while refusal to perform field sobriety tests would not, standing alone, provide probable cause, it is a legitimate factor in the probable cause determination). Far more courts have decided the analogous issue of whether refusal to perform field sobriety tests may be used as substantive evidence to establish intoxication in criminal trials. See, e.g., Longley v. State, 776 P.2d 339, 345 (Alaska Ct. App. 1989) (holding evidence admissible because â€œ[a] refusal to take the [breath] test is . . . probative of guilt . . .â€•); Johnson v. State, 987 S.W.2d 694, 698 (Ark. 1999) (â€œThe refusal to be tested is admissible evidence on the issue of intoxication and may indicate the defendantâ€™s fear of the results of the test and the consciousness of guilt.â€•); State v. Taylor, 648 So. 2d 701, 704 (Fla. 1995) (Appellantâ€™s â€œrefusal [to take field sobriety tests] is relevant to show consciousness of guilt.â€•); People v. Johnson, 819 N.E.2d 1233, 1237 (Ill. App. Ct. 2004) (Refusal evidence is admissible because â€œ[t]he trier of fact can infer that a defendant refused to submit to the test because it would confirm that he wasâ€• driving under the influence.); cf. State v. Mellett, 642 N.W.2d 779, 786-89 (Minn. Ct. App. 2002) (refusal evidence admissible; no Fifth Amendment violation); State v. Hoenscheid, 374 N.W.2d 128, 129 (S.D. 1985) (refusal evidence admissible; no Fifth Amendment violation); Seattle v. Stalsbroten, 978 P.2d 1059, 1061 (Wash. 1999) (refusal evidence admissible; no Fifth Amendment violation); but see Commonwealth v. Grenier, 695 N.E.2d 1075, 1078-79 (Mass. App. Ct. 1998) (holding that refusal evidence is inadmissible on the issue of intoxication based on state constitutional grounds).Â Jones v. Com., _ Va. App. _ (May 7, 2008),Â Â I hope Jones filesÂ and wins a petition for appeal to Virginia's Supreme Court in this case. Jon KatzÂ ADDENDUM: Thanks to a lawyers' listserv member for bringing this Jones case to my attention.

Posted by Jon Katz in Drunk driving/DWI/DUI at 00:00