

Wednesday, December 20, 2006

Field sobriety tests: Junk science.

Field sobriety tests (FST's) for drunk driving stops are junk science. Administration of the FST's are often preceded by the following alleged circumstances, as often parroted back in a police report Law Enforcement-ese: "Upon approaching the subject, I immediately detected a strong odor of an alcoholic beverage on the subject's breath. The subject had slurred speech and bloodshot and watery eyes. The subject fumbled to find his license and registration. I asked the subject to exit his vehicle so that I could perform standard field sobriety tests." One of the detailed court opinions acknowledging the serious limitations of FST's is U.S. v. Horn, 185 F. Supp. 2d 530 (D.Md. 2002). A recent arrest confirming the unreliability of FST's is that of former mayor Marion Barry in May 2006. After a car collision, the police claimed to have smelled alcohol on Mr. Barry's breath, administered field sobriety tests, and claimed he failed them. What happens when he takes a breath test at the police station? The result turns out to be well under the legal limit of 0.08. Many reasons unrelated to alcohol can determine less than perfect performance on field sobriety tests (typically, the junk-science horizontal gaze nystagmus (HGN) test, the walk and turn test, and the one leg stand). The HGN test -- at best for the prosecution -- only shows the presence of alcohol in one's body, but does not show the level of alcohol present. Horn, 185 F. Supp. 2d 530. People easily can perform poorly on the walk and turn test and one leg stand for such factors as police exaggeration and prevarication, nervousness by the suspect, physical and psychological impairment -- unrelated to alcohol -- that interferes with understanding the instructions for the test and performing the test, poor coordination and poor physical shape, fatigue, poor physical surroundings and conditions, cars whizzing by, and the list goes on. Most people are not practiced nor skilled in doing walk and turns (nine steps forward, pivot, and nine steps back) nor one leg stands (counting the seconds aloud while not putting a foot down nor hopping); these tests are unreliable. Too many judges are too quick to accept the field sobriety test results as sufficient to find probable cause to arrest the suspect and to request a breath or blood alcohol test, and, often, for many judges, to enter a guilty verdict for driving while impaired or under the influence of alcohol. Sometimes we can convince judges that reasonable doubt remains after considering the FST's, including those circumstances recounted above. Here are a few examples. I won a drunk boating case after showing that our client's swaying on the dock could easily have been from the movement felt after getting on land after being in a small boat all day, rather than from alcohol. On another occasion, I convinced a judge that less-than-perfect performance on the FST's -- even after crossing the yellow line more than once -- was not enough to convict. On numerous occasions, I have convinced judges that FST evidence and the other evidence was insufficient to establish a driving under the influence conviction in Maryland, where the judge then convicts of the less serious driving while impaired charge. I talk more here about aggressively defending drunk driving cases. Jon Katz.

Posted by Jon Katz in Drunk driving/DWI/DUI at 02:00