

Thursday, November 8, 2007

### **Blood alcohol content test results can be higher than the BAC at the time of driving.**

When it comes to drunk driving prosecutions, blood alcohol content test results are subject to attack from all sides, including attacks on the accuracy of the test results in the first place. Moreover, judges and juries need to be educated that it is not a truism that blood alcohol content at the time of testing is no higher than at the time of driving. As alcohol absorbs into the bloodstream, an accurately-taken breathalyzer test will show an increase in blood alcohol content. This point can be best driven home through the testimony of a qualified expert witness (I list some of them here). Perhaps as a relevant example of increased absorption of alcohol in the bloodstream as time passes, perhaps not, one summer evening in my late teens, I joined some friends for many beers downtown in the town I was visiting for a few weeks. My friends wanted to take a taxi back, but I refused to go in the taxicab being driven by the same person who was fishtailing all the way to our original destination. A long distance runner at the time, I ran up a steep and long hill that took me back to my residence over a mile away. As I ran, I moved from feeling buzzed originally to feeling downright drunk. Not only was the alcohol moving through my bloodstream more as time passed, but it went into my bloodstream all the faster from my vigorous run. (As a tangent, were I still a drinker, I would enjoy duplicating this experience, as well as my experience playing one-on-one basketball after drinking several beers). Consequently, state drinking and driving laws may not penalize drivers for their blood alcohol content at the time it is tested, but only for their blood alcohol content at the time of driving, particularly where police arrive after the driving has finished (for instance, in the case of a collision) and see open alcoholic beverage containers in the defendant's car (which can indicate that the defendant drank alcohol after finishing driving and before submitting to a blood alcohol test). Unfortunately, Virginia law talks of a permissible inference that the blood alcohol test result shows the blood alcohol content at the time of driving. Va. Code § 18.-269. Allowing such an inference is particularly problematic when considering that Virginia law imposes a mandatory minimum five-day sentence for driving with a 0.15 BAC or over, and a mandatory minimum of ten days in jail for a BAC over 0.20. In any event, the Virginia Court of Appeals has confirmed that only a permissible inference -- but not a rebuttable presumption -- exists that the blood alcohol test result shows the blood alcohol content at the time of driving. As I blogged on April 25, 2007: Virginia's drunk driving Va. Code § 18.2-266 provides the basis for a permissive inference "that the blood alcohol concentration while driving was the same as indicated by the results of the subsequent test." Davis, 8 Va. App. at 300, 381 S.E.2d at 16. Yap v. Com., 49 Va. App. 622, 631 (April 24, 2007). Yap appears to clarify that the above-quoted language from Davis, 8 Va. App. at 300, refers to a permissive inference, and not a rebuttable presumption. Jon Katz.

Posted by Jon Katz in Drunk driving/DWI/DUI at 00:01