

Friday, January 11, 2008

**Holding breath technicians and their machines to the fire.**

Image from National Institute of Standards & Technology. When administered properly, blood tests are more accurate than breath tests in determining a person's blood alcohol content (BAC). Nevertheless, in the state courts where I practice, police ordinarily choose the breath test over the blood test. The breath test may save time and money over the blood test (and remove the need for the testimony at trial of the people who drew and analyzed the blood, and remove challenges by the defense about the chain of custody and handling of the blood sample between the time periods that the blood is drawn and analyzed). However, hanging in the balance is the defendant's liberty, which deserves giving the defendant a choice between a blood and breath test (the defendant should have the option, for instance, if s/he reacts adversely to needles or learns that the alcohol analysis will be quicker by blowing into a machine at the police station rather than being transported to a hospital to have a medical technician draw blood). In any event, a few battlegrounds are level and fair. Until legislators and courts fix the unfair state of affairs over laws prohibiting driving with a 0.08 BAC or higher together with permitting breath tests that are insufficiently accurate, criminal defense lawyers, as always, are left with the available playing cards and rules. In that regard, as I blogged on January 8, I recently went into a Virginia court where I overcame the risk of a five-day mandatory jail sentence for an alleged BAC over 0.16 by arguing reasonable doubt whether the BAC at the time of the breath test was higher than at the time of driving; on November 8, 2007, I blogged about how the BAC can rise as the alcohol absorbs into one's bloodstream. In another instance, the documentation about the Intoxylizer 5000 breathalyzer machine for another client (the key is to obtain such documentation by subpoena, written request or both, as needed) facing a mandatory minimum for a BAC over 0.15, showed that the Intoxylizer 5000 had been repaired prior to being used on my client, without having been recalibrated. Since my client was likely to be found guilty of drunk driving even without the breath test results and to get jail for having a DWI conviction on an arrest that took place only about two weeks later, we got a very good result in convincing the prosecutor to a DWI plea involving a suspended sentence only at a doubled length from what is ordinarily offered in that courthouse to people without other convictions and with lower BAC's. It also helped in that instance that we had a hired forensic toxicologist to show the prosecutor our firepower to convince the judge to keep out the breath testing results. As with all criminal defense, a key in defending drunk driving cases is to take every opportunity to use the governing rules and evidence to the defendant's advantage. Although Virginia law provides such escape routes for prosecutors as only requiring "substantial compliance" with the administrative rules governing BAC tests, no such escape hatch exists in Maryland. In any event, no matter where one defends a drunk driving case, two of the several technical defenses in such cases include determining whether the suspect's oral cavity was sufficiently monitored for at least twenty minutes to be free of foreign substances, and whether the breath or blood sample was taken within the statutorily or regulatorily mandated time period (in Maryland the time period is two hours for a breath test, and in Virginia the time period was extended a few years ago to three hours). In Maryland, it is essential to go to court with a current copy of the state toxicologist's manual for administering BAC tests. I will provide a free copy to anybody who asks (until I arrange to have it scanned onto this website). Even better is to have a certified copy, which can be obtained by sending a \$40 check made payable to DHMH-OCME, and sent to Barry Levine, Ph.D., Toxicologist, Office of the Chief Medical Examiner, 111 Penn Street, Baltimore, Maryland 21201. By now in Maryland, I have obtained full or partial victories a few times on the toxicologist's direction to assure that the oral cavity is free of foreign substances for at least twenty minutes before the test. In one instance, with the help of a forensic toxicologist, we convinced the judge that the twenty minute observation must be performed by the breath technician and not the arresting officer (who, in that instance, was not certified as a breath technician; also, in Maryland the arresting officer may not administer a breath test). As a result, our client was convicted of the less serious charge of driving while impaired rather than the more serious charge of driving under the influence, and the judge gave him a probation before judgment (which avoided points off his license). In another instance, our client was stopped after allegedly driving over the dividing yellow line. The cop testified that he observed our client had not put anything in his mouth (how was the cop able to observe this while still keeping his eyes on the road while transporting our client to the station?) and the breath technician confirmed the same (a warm belch or regurgitation can also lead to an inaccurate Intoxylizer result), but the prosecutor's witnesses did not establish that my client was not at any time out of the site of both the cop and the breath technician before taking the test (e.g., to go to the bathroom, or for the cop to do the same). The judge kept out the breath test results, and found my client not guilty. In a more recent incident, the testimony of the arresting officer and breath technician showed no testimony by the arresting officer about an empty oral cavity and the breath technician's testimony of observing my client for nineteen minutes. I successfully argued to keep out the results by arguing close but no cigar. I drew the judge's attention to Md. Cts. & Jud. Proc. Code sect. 10-304, which requires breath technicians to have received training in the use of the Intoxylizer 5000 in a training program approved by the toxicologist under the Postmortem Examiners Commission. I then argued that, as a consequence, Intoxylizer 5000 results are only admissible when the state

toxicologist's training manual is followed. Because the training manual mandates a twenty-minute observation, twenty minutes means twenty minutes, and anything less is unreliable. The prosecutor and I went back and forth with the judge on this, but ultimately the judge agreed not to admit the BAC results. Once again, instead of being found guilty of DUI, the judge found my client guilty of the lesser offence of DWI, and gave him a probation before judgment on the DWI. Of course, none of these great results can happen without being fully prepared for trial and fully able to try a case. Particularly with bench trials, judges often want counsel to "move it along" so that the full docket can be handled. The more that the defense lawyer streamlines such trials -- without prejudice to the client -- the more the judge will listen to the lawyer, so that the lawyer has a chance to win. Jon Katz.

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