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Upcoming Events

ADAA Summer Conference July 5-8 Orange Beach

May 2011

THE *CRASH* C O U R S E

No Breath Test? No Problem: Winning the Refusal Case

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Admit it. The first thing you do when you get a DUI case file is tear through it looking for the Draeger report. Just how drunk was the defendant? BAC equals plea, right? You find the report, scan the page, then...there it is in black and white:

“****TEST RESULT: SUBJECT REFUSED, TEST ABORTED****”. From zero to not guilty quicker than you can say onomatopoeia.

Everyone involved in a DUI case from the prosecutor to the defense attorney, the judge and even the jury has come to place entirely too much

emphasis on the offender’s blood-alcohol content (BAC). As a result, any case in which the defendant’s BAC is unknown is considered at best weak and perhaps even unwinnable. This mentality discounts the work of the law enforcement officer who investigated the case and subsequently made his decision to arrest the defendant for DUI.

Why is the evidence of impairment gathered by the officer during the investigation not enough?

Do you as a prosecutor need the BAC in order to validate the officer’s arrest decision? What if we applied this standard to other criminal cases? Would you dismiss a murder charge simply because there was no confession despite all other evidence pointing to guilt? What

about a burglary case getting nolle prossed for the sole reason that fingerprints weren’t taken? Of course not, so why do we take that approach with DUI cases without a chemical test? The fact is that many prosecutors look at refusal cases with a jaundiced eye.



To be honest, I would much rather prosecute a refusal than I would a .08 or .09 case. In low blow cases, the issue becomes about the number and the number alone. You spend most of your time justifying the .08 while the other evidence of the defendant's impairment just becomes white noise. Often refusals may also be preferable in the case of the high BAC offender who is a functioning alcoholic. You know the type. They can stand without too much difficulty, their speech is understandable and their performance on standardized field sobriety tests (SFSTs) isn't what you would expect from a person with such a high blood-alcohol level. The defense attorney argues that the "machine" was clearly wrong because a .22 is "gross intoxication" (which he will deftly get the officer to agree to) and the video is clearly NOT showing a person who is "grossly intoxicated". You all have seen it happen or at least heard the stories: You know as soon as you see the video that it is going to be a tough case despite the high BAC. The jury stays out several hours before rendering a guilty verdict because the case becomes about the Draeger and whether or not it was working properly. Sure, you bring in DFS to testify that the Draeger was working properly and the .22 was an "accurate" reading, but the jury still has to reconcile what they saw in a video to a BAC that was made out to be deadly by the time the defense attorney was done. If that case were a refusal, there would not have been a number to confuse the jurors. The officer's testimony and video would likely be sufficient, resulting in a substantially quicker guilty verdict.

I realize this mentality is generated by judges and juries who like cases nice, neat, perfectly wrapped and topped with a bow, but that just is not reality. No case is perfect but that doesn't mean justice can't still be achieved. You win these cases the same way you win any case. By giving the fact finder the evidence necessary to reach the conclusion that justice demands: guilty as charged. These cases are made on the roadside before the defendant is transported to the jail, put before the Draeger and given the opportunity to blow. If the driving behavior is the cake and the officer's observations are the icing on the cake, then the BAC is just the sprinkles. The confession, if you will. Winning the refusal case is simply about presenting the officer's observations and all the evidence gathered during the three phases of the investigative process.

Remember: **Word choice matters.**

Phase One: Vehicle in Motion

What did the officer observe while the defendant was driving? Crossing the center line, driving into opposing traffic, slow response to traffic signals, accelerating/decelerating rapidly, headlights off, drifting in his or her own lane, driving well below the posted speed limit, stopping without reason in his or her lane,

etc...The list goes on, but you get the idea. Make sure you present these observations to the fact finder in a clear and concise manner. Have your officer explain his observations in detail. For example, crossing the center line is just not enough. How far across the center line did he travel? Two inches or two feet? Did he go completely in to the other lane and in to oncoming traffic? Your job is to create an image so the judge or the jury can visualize exactly what the officer saw. You paint the picture that the driver's behavior was clearly not normal and the officer made contact with them to determine what was causing this odd driving behavior.

Phase Two: Personal Contact

Upon making personal contact with the defendant, what did the officer SEE? Bloodshot and/or watery eyes, inability to locate driver's license, fumbling fingers, alcohol containers in the vehicle, drugs or drug paraphernalia, prescription pill bottles, disheveled appearance, vomit on his or her clothing, a drunk passenger, club wrist bands on the defendant, etc...

What did the officer HEAR? Slurred speech, admission of drinking, inconsistent or inappropriate responses to questioning, unusual statements, abusive language, etc...

What did the officer SMELL? Odor of alcohol or no odor of alcohol, (keep in mind that sometimes what the officer doesn't smell is just as important as what he does smell), burnt marijuana, chemical odors, cover-up odors such as cologne, perfume, **felony forest**, etc...

Did the officer observe anything when the defendant exited the vehicle? Seatbelt still buckled, leaves car in gear, trouble opening the door, falls upon exiting the vehicle, leans on the car, etc...

This is evidence gathering. All of these observations goes toward proving the defendant was driving under the influence of alcohol to the point he could not safely operate his vehicle.

Phase Three: Pre-Arrest Screening

How did the defendant perform the SFSTs? How you approach this section is critical. First and foremost, these tests are NOT pass/fail. Remove pass/fail from your DUI lexicon. But "fail" just sounds so good, right? You want the jury to hear that he "failed"; sounds dreadful. Fair enough, but you've been warned. First, if the defense attorney asks the officer if his SFST training included the words pass/fail in regards to someone's performance of the SFST battery, he will have to answer no. If asked why he then uses that terminology if he wasn't trained that way, who knows how he will answer, but rest assured it won't be good for you. *Strike one.* Secondly, what does "fail" even mean in this context? Let's say there are 20 steps in the Walk & Turn (Standing during the instruction phase, nine steps up, the turn, then nine steps back). Say the defendant makes six "mistakes" and the officer counts that performance as "failing". Well, if I were defending

the case, I would point out that the defendant did 14 steps *correctly*. That is a 70% success rate which was passing when I was in school. *Strike two*. Lastly, if asked how many “mistakes” are needed to be “failed”, the officer could not give a definitive answer because one does not exist. Now the test sounds arbitrary which calls in to question any conclusions drawn by the officer as a result of the defendant’s performance. *Strike three*.

Ok, so if not pass/fail then what? Use the phrase “clues of impairment” which is more consistent with the officer’s training. Taking the above Walk & Turn example, the officer is trained that two or more clues indicate a BAC of .08 or higher. Armed with that information, wouldn’t you rather point out that the defendant actually showed six “clues of impairment” as opposed to simply stating the defendant “failed” the test? That is substantially more definitive than this abstract idea of “failing” a standardized field sobriety test. “Clues of impairment” also makes for a more compelling closing argument. Especially after the defense attorney has told the jury that you want to convict this poor defendant simply because he couldn’t stand on one foot or because he couldn’t walk heel-to-toe in a straight line (which he will argue has absolutely nothing to do with driving a car). You then get up and tell the jury that the defendant was arrested for and charged with DUI because the officer observed numerous “clues of impairment” throughout the three phases of the investigation. Judges and jurors understand this. Presumably, they have all been around a drunk person at some point in their lifetime and they formed the opinion that the person was drunk without the benefit of a single field sobriety test and without any clue as to what their BAC was. This is a great point to make during your closing argument. Also during your closing, consider going through each of the “clues of impairment” that was brought out during trial. You can hammer these “clues of impairment” making the point that there was no one particular reason the defendant was charged with DUI; that it was the sum total of everything. This is particularly effective when the defendant has a reason for each and every clue. He has 10 different excuses for the 10 “clues” brought out in trial. You tell the jury that although he has given them 10 different excuses, you are giving them one reason: he was DUI. By arguing that the officer based his decision to arrest on all of the “clues of impairment” observed as he was trained to do, it becomes clear that he could not safely release that person back on the roadways of Alabama.

Alcohol DUI refusal cases are pretty simple when we allow them to be. You only have to prove two elements:

1. The defendant was driving or in actual physical control of a vehicle

2. The defendant was under the influence of alcohol to the degree that the defendant could not safely operate his vehicle.

Understand that the officer's arrest decision and the guilty verdict you are seeking will be based on the same information. It is all based on the observations of the officer from the moment he first observed the defendant's vehicle until he placed the defendant in jail. Remember the phrase "clues of impairment" and be careful when using the term "drunk" which is more term of art than legalese. You may just increase your burden. Ask 10 people to describe a "drunk" person to you and you are liable to get 10 different descriptions, many of which would probably be describing a person in worse condition than your defendant. Stick with the term "impairment" which is defined as diminished ability. It is a much easier proposition to prove someone's ability to safely operate a vehicle was diminished due to the intake of alcohol than proving someone was drunk. Also, make certain that you find out from your officer the nature of the refusal. Unless it was an "I ain't takin your test" refusal, there very well **could be evidence** of the defendant's BAC on file with the Department of Forensic Sciences. This is very important.

Finally, make it clear to the jury that the reason we don't know the defendant's BAC is because of the defendant's refusal to give a breath sample; however, whatever their BAC was, it was undoubtedly too much on that night to safely operate a vehicle.





No, I don't have a backup!

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Files. We all have them. Casework, family photographs, check registers, email messages, music, presentations, and any other imaginable file all exist on your hard disk, thumb drives, CD's, and file servers. These files represent how we work, live, and play. They represent hours of work product, contain a photographic history of your family, and is a virtual scrapbook of your life since you entered the digital age. Consider the headaches and heartaches you would experience if this data were suddenly gone. It happens every day, even to those of us who "should" know better.

I should have known better, but because data loss always happened to "other people", I did not bother to back up the hundreds of files that I created during my years with the police department. Gone are my photographs taken while "on the job". Gone are all my memorandums, investigative reports, and other work products. Gone are my arrest files, mug shots, and records of other various curiosities that you may or may not expect to see roaming the streets at 3AM. These files were my virtual scrapbook of a career that is now relegated only to that non-digital "memory" between my ears.

Data loss can occur by mechanical failure, electronic failure, corruption of the data itself, or loss of the storage device. Successful recovery of this data depends on exactly what has caused the loss and how much user activity occurred after the loss. Improper recovery techniques or continued use of the device can render the data irrecoverable all together. So what should you do when you have lost your data? Rule number one is to stop doing anything! Do not continue to try to access the files or let that guy who is "good with computers" attempt to recover them. Rule number two is to find someone that can do data recovery and let them process the device. Did I mention that your ACFL's, in many situations, can recover your data?

Recognizing that you have potentially lost data is often obvious. Grinding or scratching noises usually indicate a mechanical failure of the device. Immediately remove power and do not attempt to access it further. Every grind or scratch you hear is, in essence scraping your data away. These types of failures require that the device be sent to a facility with a clean-room and specialized tools. It is also very expensive with a capital \$.

You may also hear a “clicking” sound emanating from your hard disk. This can be caused by a mechanical failure or by an electronic failure of the controller card. Recovery might be possible by replacing the controller card with an exact duplicate. Although not a guarantee, this has worked in the past for the ACFL’s. Again, follow rule number one.

Many of us use flash (or thumb) drives to store and carry our files. These devices primarily cause their owners heartaches by taking their data with them when they run away from home (surely none of us would leave them plugged into someone else’s computer or in the pants pocket of the trousers we just dropped off at the cleaners). One way to deal with this potential form of data loss is to place a text file on the device with a file name similar to “Read me if found”. Place your contact information within the file and hope that an honest person finds your device. The other implication of losing your data like this is someone else having access to the information. I will be addressing ways to protect your data with encryption in an upcoming article.

Thumb drives and memory cards also often loose data due to accidental formatting or erasure by their user. In the cases of accidental formatting or deletion, the data itself typically still resides on the device; only the “pointers” to where the data resides is formatted or erased. This data will stay on the device until it is overwritten with new data. It is therefore important that you do not do anything else to the device and get it to someone who can do the data recovery.

Regardless of the type of device, sometimes data becomes corrupted. Removing a device from a system without “stopping” it, a power spike, static electricity, viruses, telekinetic data manipulation by your enemies, can all corrupt data. In the case of data corruption, data recovery techniques may be able to recover a duplicate of the data. Some computer applications create backups as you work and these might be recoverable even if the primary file is completely corrupted.

The ACFL’s are equipped to conduct some types of data recovery. The same techniques we use to recover evidence from computers can also be used to help get your data back. If you find yourself with a failing device and no backup, give us a try.



Alabama Computer
ACFL
Forensic Laboratories



SORNA News

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Frequently Asked Questions: Sentences for Sex Offenders Convicted of a Criminal sex Offense Involving a Child

A criminal sex offense involving a child is a conviction for any criminal sex offense in which the victim was a child under the age of 12 and any offense involving child pornography.

Q: Are there mandatory minimum sentences for a sex offender convicted of a criminal sex offense involving a child?

A: Yes. Pursuant to Section 13A-5-6(a)(4) and (5), a person convicted of a Class A felony criminal sex offense involving a child must receive a mandatory minimum of 20 years. A person convicted of a Class B or C felony criminal sex offense involving a child must receive a minimum of 10 years.

Q: Can a sex offender convicted of a criminal sex offense involving a child receive probation?

A: According to Section 15-18-8(b), a person convicted of a criminal sex offense involving a child which constitutes a Class A or B felony may not be granted probation.

Q: Is a sex offender convicted of a criminal sex offense involving a child subject to any additional post-release supervision?

A: Pursuant to 13A-5-6(c), an offender designated as a sexually violent predator or a sex offender convicted of a Class A felony criminal sex offense involving a child who is sentenced to the county jail or DOC shall receive an additional penalty of not less than 10 years of post-supervision release.

Q: Can a sex offender convicted of a criminal sex offense involving a child receive good time?

A: No. According to Section 14-9-41(e), no person may receive the benefits of correctional incentive time if he or she has been convicted of a criminal sex offense involving a child.

Q: Can a sex offender convicted of a criminal sex offense involving a child be paroled?

A: Section 15-22-27.3 states that any person convicted of a criminal sex offense involving a child which constitutes a Class A or B Felony is not eligible for parole.

Q: Can a sex offender convicted of a criminal sex offense involving a child receive a split sentence?

A: Section 15-18-8 prohibits a person who is convicted of a criminal sex offense involving a child which constitutes a Class A or B felony from receiving a split sentence.

Gavel Glinns



Compiled by: Supernumerary District Attorney Tom Sorrells

Collateral Evidence

Ex parte State Of Alabama (In re:Kuvertte Williams v. State Of Alabama) [1090759, March, 18, 2011] - Jefferson County
Evidence-Rape 1st- Reversed and Remanded-Cobb , Chief Justice

HOLDING: On April 10, 2008, the defendant was convicted of rape in the first degree. He was sentenced to 30 years imprisonment. He appealed his conviction to the Alabama Court Of Criminal Appeals, which reversed his conviction. The State petitioned the Alabama Supreme Court for a writ of certiorari. The petition was granted on June 17, 2010. The Supreme Court reversed the decision of the Court Of Criminal Appeals and remanded the case.

The Court Of Criminal Appeals in reversing the trial court ruled that the admission of evidence of collateral bad acts by the defendant was in violation of the general exclusionary rule prohibiting such evidence and was also in violation of the ruling in Lee v. State, 18 So.2d 706 (1944). The defendant in this case did not dispute that the victim was raped but contended that the State had not proved that he committed the rape.

The evidence in this case showed that the defendant was involved in a long time sexual relationship with the victim's sister J.W. In February 2004, J.W. conceived a child by the defendant, and the baby was born in November, 2004. The defendant admitted being the father and moved into the house with J.W. to assist with the baby. Also in the house was W.M , J.W.'s sister and their mother. W.M. testified that the defendant raped her several times. A doctor testified that the victim had blunt force trauma to her vagina and she had chlamydia, a sexually transmitted disease. Evidence, showed that the defendant was the father of J.W.'s child. The evidence also showed that J.W. and the defendant tested positive for chlamydia.

In Lee v. State, there was testimony that the defendant raped three of the

victim's sisters. The testimony also maintained that the defendant got one of the sisters, Ruby, pregnant though there was a possibility that someone else could be the father. In Lee v. State, the court upheld the admission of the evidence that the defendant raped the sisters. The case was reversed because the fatherhood of the sister's child by the defendant was in doubt and whether he was or was not the father was not relevant.

The Supreme Court pointed out that not only did the Court in Lee v State not lay down a blanket rule but clearly stated that no certain rule can be laid down. The court pointed out that the evidence was relevant in showing the defendant was the person who committed the rape in question, including the fact that it proved he had sex with J.W. and that she had chlamydia as did the victim. Therefore, the Supreme Court reversed the case and remanded it to the lower court.

JURIES.

SHARP V. STATE [CR-05-2371, February, 25, 2011] Madison County

Juries, Batson, -Capital Murder-Reversed-Kellum, Judge

HOLDING:- The defendant was convicted of capital murder and sentenced to death. After his conviction was affirmed by the Alabama Court Of Criminal Appeals his case was reviewed by the Alabama Supreme Court and remanded to the Court Of Criminal Appeals to examine in light of Batson v. Kentucky, 476 U.S. 79 (1986). The Alabama Supreme Court stated that the basis for their remand was their finding that the record raised an inference that the State had used their peremptory strikes in a racially discriminatory manor requiring a hearing at which the State would be required to articulate the reasons for its strikes against African-American veniremembers.

The Court Of Appeals noted that in evaluating a Batson claim, a three stage process must be followed. First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. If that showing is made, the prosecution must offer a race-neutral reason for striking the jurors in question. The court must then determine if the defendant has shown purposeful discrimination. The Court Of Appeals found that the Supreme Court had found that a prima facie case of discrimination existed in the record meeting the first step requirement. The Court Of Appeals found that the reasons given by the prosecution at the hearing were facially race-neutral. After such a finding the other side can offer evidence showing that the reasons or explanations are merely a sham or pretext. The Court Of Appeals narrowed the issue down to two jurors. One of these jurors had a criminal record. The court noted that several issues can be looked to in determining if facially race-neutral reasons were pretextual including the amount of time the prosecution took with the juror on voir dire with the juror or how the prosecution treated other jurors with the same problem. In this case the court found the prosecution did not strike another juror with a conviction and reversed the case.

NOTE This case is useful for its very extensive explanation of the process under Batson and Ex Parte Branch. However, it appears to put a heavy burden on the state.

CONFRONTATION

WARE V. STATE [CR-08-1177, March 25, 2011] Tuscaloosa County

Confrontation, Crawford v. Washington, Affirmed, Welch, Judge
HOLDING: The defendant appealed his convictions for first-degree burglary. First degree robbery, and first-degree rape. A rape kit examination was performed on the victim. The case remained unsolved for some time. In 2004 The Alabama Department Of Forensic Sciences obtained a grant to investigate cold cases involving tests for the presence of DNA. In 2004 The Tuscaloosa Police Department turned over several rape kits involving unsolved rapes including the case at bar. The kits were sent to Orchid Cellmark Laboratory. The lab technicians processed the biological material. Records show as many as six technicians performed tests on the materials A" Report of Laboratory Examination" was compiled. It documented the items tested, provided information and scientific conclusions about the tested material, and stated the evidence would be returned to the DFS. The DNA profile report was reviewed and approved by the Lab's director as well the lab's molecular geneticist, Jason E. Kokoszka, Ph.D who testified at trial. Kokoszka testified that he was the custodian of the records.

The defense contended that allowing the admission of the report and allowing Kokoszka to testify to the examination of the evidence violate the U.S. Supreme Court's holding in Crawford v. Washington , 541 U.S. 36 (2004) and its progeny which required that a defendant had a right to confront witnesses against him. The Court of Appeals went into great detail in reviewing the holding in Crawford and cases that followed it. The court gave great weight to its examination of the votes and comments of Justice Thomas in these case since his vote was essential to the five vote majority. The Court Of Appeals noted that Justice Thomas adhered to his position that "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial material such as affidavits, depositions, prior testimony or confessions," Melendez-Diaz, U.S. at _____, 129 S.Ct. At 2531. Therefore, if a document is to be a witness, under the meaning of Crawford, It must be testimonial in character. There for the Court of Criminal Appeals affirmed.