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GEORGIA traffic PROSECUTOR

A Publication of the Prosecuting Attorneys' Council of Georgia Traffic Safety Program

···> our mission

The goal of PAC's Traffic Safety Program is to effectively assist and be a resource to prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.

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Unlike other criminal suspects in Georgia, those suspected of impaired driving had the right to refuse the officer's request to submit to chemical testing in order to confirm or disprove that the person was driving while under the influence of an impairing substance. Legislation that became effective in July of 2006, amended Georgia's Implied Consent Law and now allows officers to obtain testing either by consent or by obtaining a search warrant.

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http://www.pacga.org/training/pac.shtml

Back to the Basics: DUI Cases

By Elizabeth Earleywine, Traffic Safety Resource Prosecutor, Illinois Department of Transportation, SFST/DRE program Coordinator

Trials are boring. Police officers and attorneys focus on the evidence; jurors don't. Real-life trials are not what jurors think they should be; they expect them to look like something they see on television or in the movies. Juries expect trials to look like *Law and Order* or *My Cousin Vinny*. They expect the evidence to look like that found in the CSI style shows. These shows give their audience something to pay attention to, to remember and to talk about – visual imagery.

Most people do not retain words, most of us are visual. People think in pictures. Once your audience, be it the prosecutor, hearing officer, judge or jury, can visualize what you relate, then understanding, credibility and believability are assured. A visual depiction of the incident will grab and keep the listener's attention. Not only are your words important, but tone, delivery and style are critical as well.

LAYING THE GROUNDWORK

A successful DUI prosecution begins at the first observations of the suspected impaired driver and continues throughout the DUI investigation and arrest procedures, culminating at the trial. The use and presentation of visual information starts with the officer's documentation of these events and is the foundation for everything that comes after. Throughout your entire case, think about the ultimate audience. Who is it you need to convince?

DUI cases are among the most difficult a patrol officer or a misdemeanor attorney will handle, particularly so early in their careers. Defense attorneys routinely take advantage of this. Additionally, popular culture has raised the burden of proof in all types of criminal cases. Jurors expect to be presented with "scientific" evidence even where none should be expected to exist. Law enforcement officers and prosecutors must answer these challenges proactively, by educating themselves in the science and the law and presenting their information in a manner that will be remembered and believed by the finders of fact.

So, if these are the challenges we face, how do we meet them? Get back to basics. Conduct a thorough, complete investigation. Record the evidence in detail, don't assume an in-car camera video will be available by the time of trial. Prepare before court. Use detail and words with impact to paint the picture for the judge or jury. It starts with the officer making the arrest and ends with the prosecutor giving the closing argument. The following are some reminders for getting back to basics at each stage in the investigation and prosecution.

DETAIL THE TRAFFIC STOP

The DUI investigation starts with the traffic stop. Focus on your observations of the defendant's driving behaviors and any evidence that may suggest impairment. Was your attention drawn to the defendant's vehicle by a moving violation, an equipment violation, an expired registration or inspection sticker, unusual driving actions, (i.e., weaving within a lane or moving at slower than normal speed), and/or evidence of drinking in the vehicle (alcoholic beverage containers, coolers, etc)? Was your attention drawn to the defendant's personal behavior or appearance by such things as eye fixation, tightly gripping the wheel, slouching in the seat, gesturing erratically, face close to windshield, drinking in the vehicle and/or driver's head protruding from vehicle? These are just some of the indications that can paint that picture necessary for conviction

Articulate the manner in which the defendant responded to your signal to stop, and how the defendant handled the vehicle during the stopping sequence, such as attempting to flee; no response; slow response; an abrupt swerve; sudden stop; and/or striking curb or other object.

BE DESCRIPTIVE

Describe your personal contact and interview of the defendant, focusing on SIGHT: bloodshot eyes, soiled clothing, fumbling fingers, alcohol containers, drugs or drug paraphernalia, bruises, bumps or scratches, and/or unusual actions; HEARING: slurred speech,

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admission of drinking, inconsistent responses, abusive language, unusual statements, and SMELL: alcoholic beverages, marijuana, "cover up" odors like breath sprays, and/or unusual odors. Once you decide to instruct the defendant to step from the vehicle, how the defendant stepped out of and walked from the vehicle also will provide evidence of impairment, such as angry or unusual reactions; inability to follow instructions; inability to open the door; leaving the vehicle in gear; "climbing" out of the vehicle; leaning against the vehicle for balance; keeping hands on vehicle; and/or inability to remain in an upright, standing position. These are observations that everyone can relate to, as opposed to field sobriety tests that some jurors may think they "couldn't do sober."

Standardized field sobriety tests are not to be discounted, of course. But when analyzing them and presenting them at trial, focus should be on common place observations, as opposed to "clues" and "points." Why is a field sobriety test important to driving? Not because the subject cannot stand on one leg for 30 seconds without putting their foot down or raising their arms. They are important because they are divided attention activities. What is driving? A divided attention activity. If a person cannot follow simple instructions and maintain attention to the task at hand when that task is a relatively easy one, how can they expect to maintain attention to the task at hand when driving a 2000 pound vehicle? Tell the story in terms of the observations made in the field sobriety tests. It paints the picture and tells the story much more vividly than talking about them in the standardized manner.

PREPARE EARLY

Next come hearings and trial. The importance of preparation cannot be overstated. Make it a habit to prepare as early as possible. The prosecutor must first read and then re-read the case file. This should be a thorough evaluation of the overall strength of the case. The case review should include the following:

- Verify that you can prove each element of DUI beyond a reasonable doubt, and develop your case theory.
- Ensure the officer had legal justification for the stop of the vehicle and had probable cause to believe that each element of the offense was present.
- Identify witnesses whose testimony will be required to prove the elements of DUI.
- Identify evidence or other necessary relevant information that is mentioned in the reports, but is not in your case file.

Each case is only as strong as the facts of the case, and the witnesses and exhibits that will establish those facts. Even strong cases may not always remain good; for instance, a necessary witness may refuse or become unable to testify. It is extremely important to know your community, your jury pool, and your judge. What will it take to convince your judge and jury that the defendant is guilty? What defense arguments are you likely to face? Some pieces of evidence do not, by themselves, make a case stronger or weaker. However, when viewed together, even seemingly innocent facts may add something to your theory of the case. Therefore, don't ignore any of the facts in the officer's report.

DEVELOP A THEORY

You must develop a theory of the case. The theory of the case is simply your unified approach to all of the evidence that explains what happened. You have to integrate the undisputed facts with your version of the disputed facts to create a cohesive, logical position. Your theory must remain consistent during each phase of trial. The jury must accept your theory of the case as the truth. Thus, you need both a factual and a persuasive theory of the case to intelligently select a jury, prepare your opening statement, conduct witness examinations, and prepare your closing argument.

After you do this, you should have a good idea of what evidence will be contested. You should gather as much additional evidence as you can, both direct and circumstantial, to bolster your weaknesses and attack the defendant's theory of the case. After you have reviewed all the evidence, you can formulate your theory of the case. Once you have your theory of the case, you should try to determine the defendant's probable theory of the case. This will help you prepare both your case in chief and to cross-examine defense witnesses. A theory of the case will also help you convey the picture to the fact finder. Once the judge or jury can picture the incident in their own mind, credibility and believability are assured.

Remember your ultimate goal, to present the evidence, direct and circumstantial, in such an overwhelming manner that the fact finder has no choice but to convict. GTP

····> fact

In 2009, there were 10,839 fatalities in crashes involving a driver who was alcohol-impaired*, which accounts for 32 percent of total traffic fatalities for the year.

The most frequently reported BAC was 0.17. The rate of alcohol impairment among fatally involved drivers was four times higher at night than during the day.

** BAC of .08 g/dl or higher*

(Courtesy NHTSA)

DUI: Search Warrant & Consent

By Fay I. McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council of Georgia

It is now the law in Georgia that if after being given the Implied Consent warning, a person refuses to submit to the state chemical test, a police officer is still able to obtain a chemical test using a search warrant. This is in spite of ***O.C.G.A. § 40-5-67.1 (d)*** which states: ***"If a person under arrest or a person who was involved in any traffic accident resulting in serious injuries or fatalities refuses, upon the request of a law enforcement officer, to submit to a chemical test designated by the law enforcement officer as provided in subsection (a) of this Code section, no test shall be given…".***

The decision to amend the law came after the decision of the Georgia Supreme Court in ***State v. Collier, 279 Ga. 316 (2005)***. Steven William Collier had driven his pickup truck through a red light, colliding with a car, which resulted in the deaths of the car's driver and passenger. When police arrived at the scene, Collier let his passenger claim that she had been driving the truck. After being read the implied consent notice, Collier's passenger declined to submit to tests of her blood and urine. The police obtained a search warrant and later at a hospital procured blood and urine samples from the passenger.

Upon witnessing his passenger being taken to the hospital for the tests, Collier fled the scene, but was caught by police and placed in a patrol car. The police informed Collier that they would have to test his blood and urine because there was a question about who had been driving the truck at the time of the crash. Collier was given the implied consent warning, and he refused to consent to the testing. Collier eventually consented after the police threatened to get a search warrant and to use a catheter to obtain the samples. Collier's blood and urine samples contained amphetamine and methamphetamine.

Following his convictions, Collier claimed that his trial counsel was ineffective because counsel failed to move to suppress evidence of the blood and urine tests on the basis that his consent to the tests was coerced. He argued that he was misled by the police because they could not compel him to submit to the tests that he refused to undergo voluntarily. The Court of Appeals agreed that Collier's refusal to take a State-administered test did not authorize the police to obtain a search warrant and forcibly conduct such tests.

Georgia's Supreme Court held that the implied consent law, ***O.C.G.A. §§ 40-5-55 and 40-5-67.1(d)***, prohibited forced testing, even if the investigating officer had the probable cause necessary to support the issuance of a search warrant. The court interpreted ***O.C.G.A. § 40-5-67.1(d)*** (*above*), as clearly prohibiting the giving of any chemical test

once the suspect refused to submit to the requested one. The Court pointed out that the legislature expressly contemplated the possibility of refusal and provided adverse consequences, other than the involuntary taking of a specimen from the non-consenting suspect. The plain language of ***§ 40-5-67.1(d)*** restricted the ability of law enforcement to forcibly obtain that which had been refused.

As a consequence of the decision in ***Collier*** the Legislature passed ***O.C.G.A. § 40-5-67.1 (d.1)*** , which became effective on July 1, 2006: **"Nothing in this Code section shall be deemed to preclude the acquisition or admission of evidence of a violation of Code Section 40-6-391 if obtained by voluntary consent or a search warrant as authorized by the Constitution or laws of this state or the United States."**

Photo courtesy: State of Arizona, Department of Public Safety

The closest Georgia's appellate courts have come to interpreting O.C.G.A. § 40-5-67.1 (d.1) is in the Screven County case of ***Williams v. State, 297 Ga. App. 626 (2009)***. In May 2006, Shawn Williams was involved in a fatal car accident. One of the investigating officers suspected that Williams might be under the influence of drugs. The officer asked Williams for a blood sample, but did not advise him of his implied consent rights. Williams agreed to give the sample, which showed the presence of marijuana in his system.

Williams moved to suppress the test results based on the Court of Appeal's previous decision in ***State v. Morgan, 289 Ga. App. 706 (2008)***, which held that in all cases in which police request a chemical test of a person's blood for the purpose of determining whether the driver was under the influence of alcohol or drugs, they must give the notice required by the implied consent statute. In ***Morgan,*** the Court noted that the implied consent statute affords a suspect the opportunity to refuse testing, and stated that it will not permit or encourage police to circumvent the mandatory implied consent statute by simply asking individuals, without reading the notice, if they will consent to testing.

The state argued that the amendment to the implied consent laws ***(O.C.G.A. § 40-5-67.1 (d.1),*** which became effective after the sample was obtained from Williams, permitted the state to use samples where implied consent warning was not given but the defendant ultimately provided a sample voluntarily. The state argued that the amendment should apply retroactively. The appellate court disagreed, finding that the state's implied consent rights were substantive and the change could not apply retroactively under established case law on substantive rights. The Court of Appeals ruled that since the officer did not give defendant the requisite notice prior to obtaining his consent for the blood sample, the test results should have been suppressed.

Notably, addressing ***O.C.G.A. § 40-5-67.1 (d.1)***, the Court stated: **"This amendment not only changes the substance of the implied consent warning, it does away with the requirement that the warning be given at all where an officer manages to otherwise lawfully obtain consent to testing. This is not merely a procedural or evidentiary change, but one eliminating a defendant's substantive right to refuse to submit to testing."** Although the Court omitted to include the words, "search warrant" in its dicta, the case must be construed as including that part of the law since there was nothing stating otherwise.

This Court of Appeals opinion glaringly conflicts with ***Morgan, supra, Harrelson v. State, 287 Ga. App. 664 (2007) and other cases*** where the Court of Appeals consistently insist that failure to give a suspect the statutorily mandated Implied Consent Warnings renders the results of the state-administered chemical test inadmissible in evidence, even though the suspect may otherwise consent. Until this holding is specifically overruled, many agencies require that officers continue to administer the Implied Consent warnings even if they eventually obtain testing under ***O.C.G.A. § 40-5-67.1 (d.1).***

Law enforcement officers should be very careful about obtaining consent in impaired driving cases as was demonstrated in ***State v. Stephens, 289 Ga. App. 167 (2008).*** Although Stephens signed the consent form, the trial court suppressed the result of the blood and urine, finding that the state failed to prove that he freely and voluntarily consented to the search. The Court of Appeals affirmed the judgment, stating:

"The transcript in the case at bar reflects that Stephens's mental condition was obviously vulnerable. Further, Stephens could not read, had to be forcibly restrained while the consent form was being read to him initially, was weeping on his wife's shoulder while the remainder of the form was read to him, and never signed the form. Although Mrs. Stephens signed the form, the trooper admitted that she never indicated that Stephens understood it. (1) Construing the evidence most favorably to uphold the trial court's findings and judgment, the trial court's conclusion that Stephens did not make a free and voluntary decision to consent to giving blood and urine samples was not clearly erroneous. (2) Even if Stephens submitted to the withdrawal of his blood, and did give a urine sample, these acts would not demonstrate voluntary consent within the meaning of search and seizure jurisprudence. '[A] prosecutor who seeks to rely upon consent to justify the lawfulness of a search has the burden of proving that the consent was, in fact, freely and voluntarily given, and this burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.' In this case, the trial court correctly determined that the evidence cannot be construed as anything more than mere acquiescence. The court did not err in granting the motion to suppress." Stephens, supra at 169-170.

Bear in mind that the state still has a right to obtain medical or hospital blood tests. The Supreme Court of Georgia has held that a defendant's rights are not violated when the State obtains private medical records through a search warrant without notice to the defendant or a hearing on the request. ***King v. State, 276 Ga. 126 (2003)***

A defendant's exercise of his statutory right to refuse a state-administered test is entirely independent of the State's prerogative, pursuant to a warrant obtained in accordance with the Fourth Amendment, to obtain other evidence of a crime - here, the results of a blood test administered in the course of medical treatment. ***Rylee v. State, 288 Ga. App. 784 (2007)***. A document of the results of a hospital-administered blood test is admissible at trial under the routine business record exception to hearsay, provided the proponent lays the proper foundation. A proper foundation includes testimony of a witness familiar with the method of record keeping, stating that it was the regular course of business to keep such records, that this record was kept in the regular course of business, and that it was made at or within a reasonable amount of time after the event it records. ***O.C.G.A. § 24-3-14***. Writings may be admitted into evidence under this exception if they contain routine facts whose accuracy is not affected by bias, judgment or memory of the author. ***Daniel v. State, 298 Ga. App. 245 (2009).*** GTP

visit the PAC website to download a DUI search warrant template

http://www.pacga.org/downloads/traffic_safety_resources/dui_search_warrant_template.doc

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Prosecuting Attorneys' Council of Georgia
Traffic Safety Program
104 Marietta Street, NW
Suite 400
Atlanta, Georgia 30303

····> traffic safety program staff

Fay McCormack
Traffic Safety Coordinator
404-969-4001 (Atlanta)
fmccormack@pacga.org

····> fact:

Every day, 32 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This amounts to one death every 45 minutes. The annual cost of alcohol-related crashes totals more than $51 billion.

-Statistics courtesy NHTSA (www.nhtsa.gov)

The "Georgia Traffic Prosecutor" addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic-related matters. If you have suggestions or comments, please contact Editor Fay McCormack at PAC.