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President's Column

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From the President

By Cynthia Hujar Orr

Fast Food Justice

It is just a misdemeanor driving while impaired (DWI) case. Easy does it, anyone just out of law school can handle it. Just plead it out for probation, no problem. But it is a problem — a very big problem. The consequences of a DWI/DUI conviction are far-reaching. Commercial license holders lose the ability to earn a living. Law school graduates confront obstacles with the board of law examiners certifying their fitness to practice. Then firms refuse to hire them because they do not want to take on a lawyer with a drinking problem. Secondary and postgraduate programs reject persons with DWI convictions. The cost of automobile insurance increases. An expensive and unreliable ignition interlock device is required equipment in order to drive. And do not forget the costs of a lawyer, fines, court costs, and classes. DWI defendants can lose their jobs, families, and reputations.



Cheeseburger, Cheeseburger

Some defense lawyers cut their teeth on DWI cases because these cases are seen as insubstantial. Many prosecutors see these cases as routine. Elected officials see them as budget and public safety burdens. But the truth is, these cases are very important. A drunk driving case, no less than any other criminal offense, can be life-altering. The second-rate evidence involved leads to many wrongful convictions. Opportunities to end addiction and provide treatment for repeat DWI defendants are also missed because these cases are viewed and treated as assembly-line problems or fast food that must be processed expediently.

Subpar Evidence

I am not saying that subpar evidence is improperly accepted only in DWI cases. One need only look to reports over the years regarding lead bullet analysis, hair and fiber comparisons, and forensic odontology.¹ Junk in, junk out. What will they think of next? Dog sniff lineups? In Florida, Texas, New York, and Alaska, dog scent lineups have caused their share of wrongful convictions.² Not heeding the warnings about cross-scent contamination by those who use dogs professionally, courts are admitting dog sniff evidence to convict.³ The application of a little common sense ought to prevent this.

Likewise, a little common sense and decency ought to prevent what goes on in DWI cases every day. In no other type of case will we countenance the use of hard science without testing

the validity of its methodology. In the interest of industry trade secrets, however, defense lawyers in DWI cases are stymied from determining the validity of the latest breath test machines. “Look the other way” proficiency testing is tolerated. Recently in Houston, Texas, a technician faked hundreds of machine validation tests. She flat out was not performing the necessary validation testing of the machines.⁴ Nobody was auditing her work. Was it not important enough?

Courts also routinely admit evidence of “failed” horizontal gaze nystagmus tests that are wrong 70 percent of the time. Moreover, improperly administered field sobriety tests (that most people over 50 or in high heels cannot pass while sober) are routinely admitted over objection. Most of the time, the officers administering the tests do not give proper instructions, do not provide a correct example, cannot perform the tests themselves, and do not score the test performance correctly.

Further, novice lawyers — or ones who just do not care — neglect seeking the exclusion of invalid blood, breath tests, or extrapolation evidence. Breath alcohol tests can be overstated as much as 290 percent. A blood alcohol test can be skewed by improper sample collection, failing test tube supplies, slipshod gas chromatography machine operation, or quality control procedures. *Daubert* and *Kuhmo Tire* should be vigorously employed in DWI cases.⁵ Wrongful convictions are obtained when breath/blood alcohol testing is not performed correctly or goes unchallenged by the defense.

Improper Courtroom Influence

Mothers Against Drunk Driving (MADD) started out with a laudable goal — the prevention of drunk driving and the injuries, property destruction, and deaths that it causes. But after the group was appropriated by corporate interests, it strayed from its drunk driving prevention roots. In my opinion it has come to focus less on drunk driving prevention and more on prejudicing defendants in DWI trials.⁶ In some cases the group engages in scorched-earth campaigns to crucify the accused before he or she has had a fair trial. Sometimes MADD’s influence on a trial is blatant; other times it is more insidious. Either way, its presence in the courtroom constitutes an improper influence on the elected officials conducting and prosecuting the trial. Jurors notice this too.

Were this to occur in any other type of trial, lawyers and judges would insist upon somber courtroom decorum or would obtain a venue in which such decorum could be achieved. MADD should get back to its roots and endorse problem-solving courts as advocated by NACDL’s groundbreaking report, *America’s Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform*. Then it would better serve the goal of preventing drunk driving and recidivism. MADD should stop trying to put its thumb on the scales of justice and leave trials to the experts who are charged with ensuring due process of law.

Just imagine the public uproar that would ensue if prosecutors and their staff comforted, conferred with, and tended to the defendant’s family and friends in front of a jury during a trial. Such blatant displays of favoritism infect a trial with prejudice that cannot be overcome. No matter how well-intentioned, similar conduct with the family and friend of a person injured or killed in an automobile accident is testimonial conduct that improperly influences the jury. It is unethical as well. A prosecutor’s office calls into question its trustworthiness when it acts in this manner. The trial of a case should take place in the well of the court, not in the media and not in the gallery behind counsel’s back.

The High Court

In a recent denial of certiorari, the Supreme Court declined the opportunity to apply *Florida v. J.L.*⁷ to an anonymous tip that somebody is driving drunk.⁸ In *J.L.*, the Supreme Court permitted the Terry stop of automobiles when there was reasonable suspicion to believe that a crime was being committed. Chief Justice Roberts and Justice Scalia dissented, noting the split among the states on this issue and advocating that the public safety problem presented by drunk driving overcame the need for the officer to observe evidence of drunk driving before making a stop based upon an anonymous tip. At least the High Court is not willing to diminish Fourth Amendment protections in these cases.

DWI cases should not be processed in a “one size fits all,” convenient, and expedient manner at

the cost of fairness and integrity. These cases are not fungible. They each involve individual human beings with no less right to redress in the courts than anyone else. Each case affects life in an inalterable manner. We need to remind ourselves, prosecutors, and courts that in DWI cases we are not dispensing assembly line fast food, but are striving to provide real justice.

Notes

1. A fancy name for bite mark evidence.
2. See John Schwartz, Picked From a Lineup, on a Whiff of Evidence, N.Y. Times, November 3, 2009, at A1.
3. See *id.*
4. Over 1,000 Houston DWI Convictions Invalid (Oct. 12, 2009), <http://www.duiattorney.com/news/5903-over-1000-houston-dwi-convictions-invalid>.
5. This is no less true in drug cases. See James M. Shellow, Cross-Examination of the Analyst in Drug Prosecutions (2009).
6. Evan Cotten, MADD Ensures Swift, Efficient DUI Trials, http://www.maddnebraska.org/news_and_numbers/view?article_id=16059 (last visited Nov. 12, 2009).
7. 529 U.S. 266, 270 (2000).
8. Virginia v. Harris, 558 U.S. ____ (2009).

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