

Defeating Attacks on the Police Reconstructionist - Part II

by John Kwasnoski and Patricia Gould

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Two common attacks used to challenge the testimony of the police reconstructionist are:

1. The drag factor of the road was not measured correctly, and 2. The equations used to calculate speed are theoretical and have not been validated in the field.

Reliability of Drag Factor

Specifically, the attack is that the method of measuring the drag factor is unreliable thereby overestimating the defendant's speed. If a drag sled was used the attack is very subjective, and the defense expert simply declares, "the drag sled is not widely accepted." The defense expert may offer that accelerometers (electronic measuring devices attached to cars used in skid tests) are more accurate than the drag sled, or are preferred by engineers. In fact, drag sleds are widely used, and measurements with drag sleds have been shown to consistently underestimate speed in staged tests.

Equations Are Theoretical

Many law enforcement agencies do "skid tests" in which vehicle speeds are measured by radar immediately before the vehicle is stopped abruptly. The length of the resulting skidmarks and the drag factor are then measured to calculate the speed the vehicle was traveling and compare it to the radar reading. The result is that the calculated speeds based on the skidmarks and drag factor of the road always underestimate the true speeds. Most reconstructionists know of such tests and can cite them in their testimony. The prosecutor should ask the police reconstructionist to be prepared to do so.

The bottom line is that whether the calculated speed of a vehicle is based on using a drag sled, accelerometer or other measurements of the drag factor, all have consistently been shown to underestimate speed.

This is due in part to the fact that skidmarks themselves are always shorter than the true skid distance because tires do not mark immediately upon brake application.

So, when the defense suggests that the state is overestimating or exaggerating the speed of the vehicle, be sure to elicit testimony from your reconstructionist highlighting the fact that all calculations, when done correctly, will always err to the benefit of the defendant.

Enhanced Penalties for High BACs

Ten states (Arizona, Colorado, Florida, Idaho, Maine, Minnesota, New Hampshire, New Mexico, Tennessee and Washington) have enacted legislation to address excessive BAC levels ranging from .15 to .20. In comparison to the minimum mandatory penalties for a DWI offense, these statutes impose enhanced penalties including increased fines, longer terms of imprisonment and license suspension/revocation. For example, in Arizona, imprisonment extends from 24 hours to up to 30 days or more. In Florida, mandatory fines of \$500 to \$1000 replace the lower non-mandatory range of \$250 to \$500 and in Maine license revocation increases from 60 to 90 days.

Each state outlines the elements for enhanced penalties differently. In two states, Florida (> .20) and New Hampshire (> .16), the enhanced penalties only arise when the driver is accompanied by a child under the age of 18 or 16, respectively. Minnesota has a tiered approach to enhanced penalties. A

person is guilty of a gross misdemeanor if his or her BAC is .20 or more. This charge becomes an enhanced gross misdemeanor with harsher penalties if the person has a BAC level of .20 or more and one or more prior impaired driving convictions or prior license revocations within the past ten years.

When Did the Car Become a Phone Booth?

You see it everyday - careless drivers weaving in and out of traffic, changing lanes without signaling, braking erratically, and failing to maintain a consistent speed while the driver talks on the phone. A recent study reported in the New England Journal of Medicine found that people who use cell phones while driving quadruple their chances of being involved in a crash.

Michael Goodman, a psychologist and project director of a National Highway Traffic Safety Administration (NHTSA) investigation on cell phone use, reports cell phone conversations appear to create a greater problem than the actual use of the phone. Drivers become lost in conversation and fail to pay attention to driving.

In the 1998 legislative sessions, bills were introduced in the Colorado and Nebraska legislatures to restrict the use of cell phones while driving. These bills did not pass, but there are many laws already available to curb cell phone use while driving. Some states are using reckless driving statutes when a crash results. Other applicable statutes are failure to maintain control of the vehicle, following too closely, or making an unsafe lane change.

It is estimated that one in every 10 vehicles will have a cell phone by the year 2000. With increased use comes increased risk. Do not wait for new laws to respond to the dangers of conversing commuters. Use the laws currently available to remove hazardous drivers from the road.

Arresting Developments

Madison, Wisconsin - Guenther Kirchhuebel's driver's license was revoked for failing to take a breath test. Contesting his revocation, Mr. Kirchhuebel claimed he was physically unable to take the test. He argued that he could not blow enough air into the tube of the machine because air escaped through gaps in his mouth from missing teeth. The trial court rejected the "dental defense" but the 4th District Court of Appeals held Mr. Kirchhuebel had a valid physical disability. However, the defendant never told the arresting officers of his dental dilemma and, therefore, the appellate court upheld the license revocation.

Pomona, California - Keith Cook was on probation for a prior DUI when he crashed his truck into a car stopped along the side of the road. Three people including a police officer were seriously injured. Jadine Russell, a practicing Jehovah's Witness, refused a blood transfusion at the hospital and later died from her injuries. Mr. Cook was charged with the murder of Ms. Russell. A jury deliberated for three and a half days before finding Mr. Cook guilty of the lesser offense of gross vehicular manslaughter.

Detroit, Michigan - As a condition of probation, Judge Michael A. Marone requires convicted DUI offenders to attach bumper stickers to their cars. The blue and red stickers read, "Drunk Driving, You can't afford it." Judge Marone is considering stronger messages to be printed on bumper stickers for repeat offenders.

Challenges Inside and Outside the Courtroom

In this column NTLC will highlight some of the old, new and recurring questions we receive from prosecutors regarding issues that surface both inside and outside the courtroom. To start, we have selected a fairly common DUI defense. Some of the same old defenses are used time and time again in DUI cases, but if you are a new prosecutor or don't handle many DUI cases, chances are some of them will be new to you.

Q: Can mouthwash affect the accuracy of a breath test result?

A: In order for a substance to be detected and interfere with a breath test, it must have a high vapor pressure so that it can appear in the breath at a high concentration. In addition, the body must be able to take up the substance in such a way that it can appear in the breath as a persistent component. Some

mouthwashes contain alcohol and can cause interference if taken within ten minutes of the breath test. Assuming that the required observation period was conducted, usually 15-20 minutes, the alcohol from the mouthwash will clear from the suspect's mouth and have no effect on the subsequent breath test reading.

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