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Limitations in Transdermal Alcohol Monitoring

By Michael P. Hlastala, PhD

PART 2:

Weaknesses of AMS Methodology

Another concern is the impact of human variability of skin diffusion properties. The relationship between the BAC profile and the TAC profile is governed by the diffusion properties of the skin. The skin resistance varies amongst subjects and within the same subject depending on the part of the body. Figure 2 shows the variation in TAC profile for a given BAC profile. In order to create a TAC plot so that the amplitude of the TAC plot resembles the amplitude of the BAC plot, AMS chooses to multiply the TAC values by an average of 1.4, an average reduction of TAC from the BAC after diffusion through the skin. However, this correction factor varies amongst individuals [6]. This is similar to the concept of using an average 2100 blood-breath ratio in a breath test instrument when an individual's blood-breath ratio varies depending on a variety of physiological factors. So any slope measured has a considerable variation causing uncertainty in the reliability of the slope measurement. Thus AMS used qualitative data to make quantitative decisions.

Figure 5 shows an example of TAC curve in an individual. In this case AMS's approach would be to draw a line from the peak to the point where TAC reached zero. The line has a slope of 0.008 %/hr which is less than 0.025 %/hr. However, if one examines the shape of the TAC curve after the peak, it is clearly exponential. The slopes calculated from the peak to the point after the peak and the first point after to the second point after the peak are 0.04 %hr and 0.062 %/hr. Both of these slopes are greater than the maximum 0.025 %/hr used by AMS. This TAC curve does not resemble a typical TAC curve shown in Figure 4. It has an exponential appearance of a contaminant.

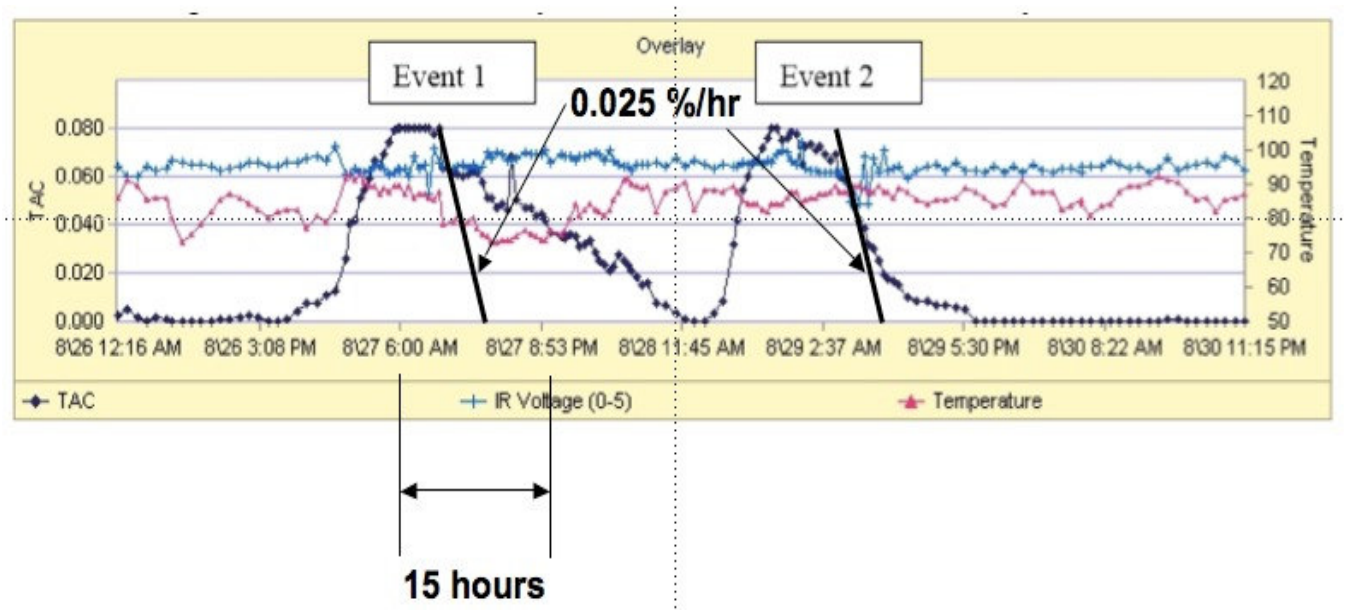

Figure 4. Data from a volunteer, wearing a SCRAM device over two periods of alcohol consumption. Solid lines designate a 0.025 %/Hr elimination rate. Both profiles have an elimination rate < 0.025 %/ Hr.

It is clear that an improved method must be developed to differentiate ethyl alcohol from contaminants. It is also important to evaluate data on the linear portion of the fuel cell output. There is a dearth of information about linearity of fuel cells at the low end (<0.02 gm/210 liters). This may be because there is very little interest in low breath alcohol readings. However, the linearity at low readings becomes very important with SCRAM because many of the values are in the low range.

In order to avoid wrongful determinations in court that a drinking episode has occurred when it has not, a new effort is needed to find an algorithm that separates ethanol from contaminants. Readings used must be in the linear range. AMS indicates that fuel cell linearity begins for readings greater than 0.02. However, the SCRAM fuel cell readings are adjusted by a correction factor of 1.4 to be able to correlate with BAC levels. Thus a 0.02% limit can be corrected to 0.02 times 1.4 or .028%. In addition, the normal variation in skin diffusion properties (see Figure 2) brings the range of non-linearity up to a 0.040%. The TAC is determined by the fuel cell with it's 0.02 % limit on linearity and then multiplied by a correction factor of 1.4. Ethyl alcohol elimination is linear in shape. But contaminant elimination is non-linear in shape (see Figure 3). An appropriate method is to follow the actual TAC curve to check for linearity in the elimination phase. Of course, any two consecutive points will be linear when a line is drawn between the two. So linearity must be determined from at least three consecutive points. But more would be preferred. When contaminants are being eliminated, it would be impossible to find three consecutive points that fall in a straight line.

The SCRAM device is qualitative in nature and yet AMS used quantitative methodology to attempt to determine whether an alleged drinking event is truly ethanol. A methodology used by AMS cannot separate ethanol from other contaminating alcohols and therefore is not a reliable method.

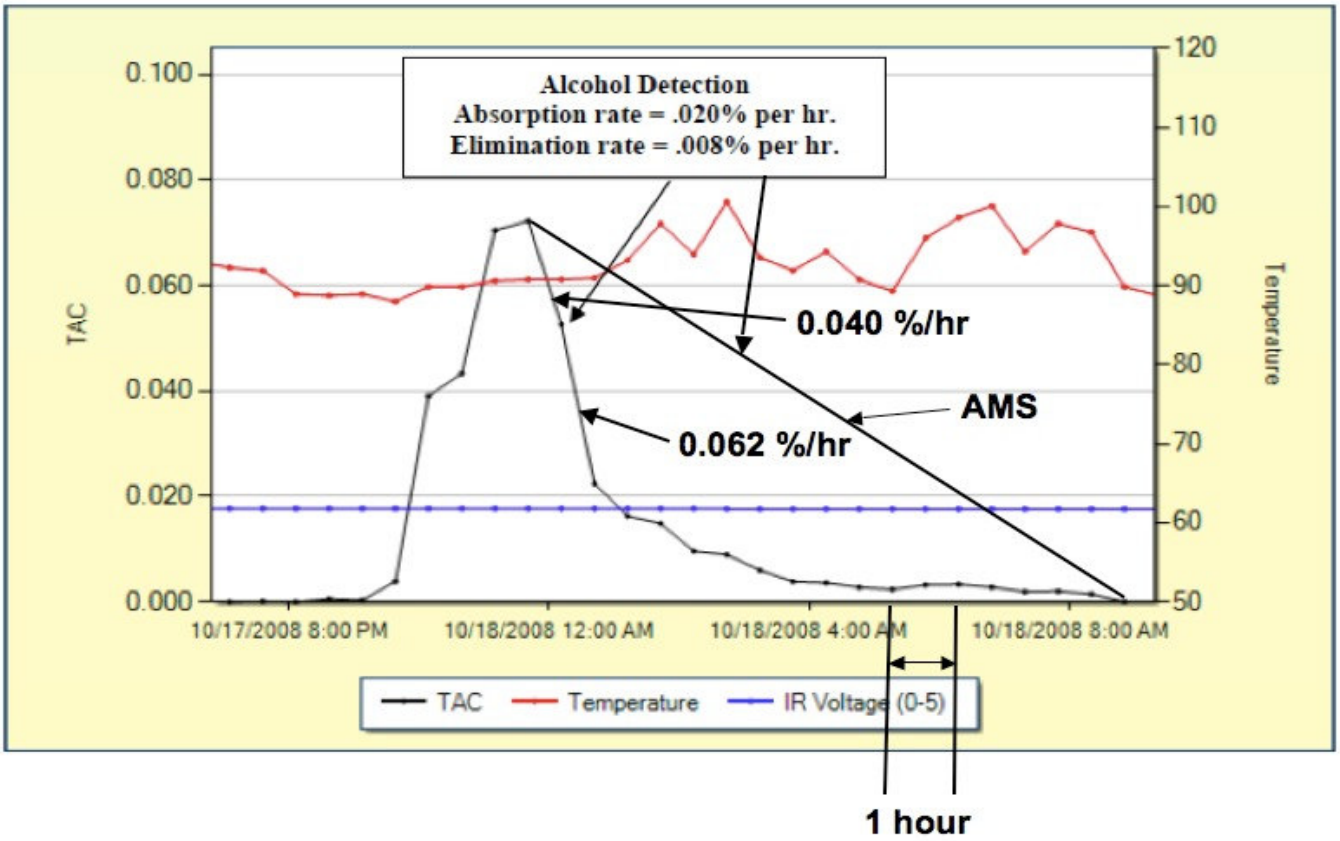

Figure 5. TAC profile from a subject who denied consumption of ethanol. The solid arrow drawn between the peak of the TAC profile and the point when TAC reaches zero, used by AMS to identify the elimination rate of EtOH shows a slope of 0.008 which fits the criteria of being less than 0.025 %/Hr. The slopes of the TAC elimination rates are 0.040 %/hr from the peak to the first point after the peak and slope of 0.062 %/hr from the second to third points. Both of the direct measurements of slope ex-

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Michael P. Hlastala of Seattle, Washington is a Professor Emeritus of Physiology and Biophysics and Medicine at the University of Washington. He has extensive training in the field of Respiratory Physiology. He offers Consulting Services for DUI-DWI cases involving chemical testing and field sobriety testing. He has authored or co-authored over 400 papers and articles. He can be reached at mphlastala@comcast.net.

A DUI Lawyer's Duty to Preserve Client Confidences Should Take Precedence Over Candor to the Court

Patrick T. Barone
Barone Defense Firm, Birmingham, MI

The basic premise of this article is that the public policy and professional responsibilities of DUI lawyers are unique; because persons charged with drunk driving -- especially repeat offenders -- often rely on their attorneys for assistance with getting treatment. Properly advising clients in this regard requires knowing the complete history of prior alcohol-related offenses. This, in turn, requires the highest level of client confidentiality, lest the client be seemingly betrayed at sentencing when the lawyer's duty of candor to the court requires revealing these prior offenses. This discussion presents a new approach to discerning the age-old question of when a lawyer must, or should, reveal his or her client's confidentiality to the court.

Like all learned professions, the confidences and secrets disclosed by your client must be protected. In fact, any confidence or secret learned during representation must be held inviolate. This rule of professional responsibility, written in mandatory language, states that a lawyer shall not knowingly reveal a confidence or secret.

Certainly, excellent public policy supports this rule. For example, as stated in the comments to Model Rule 1.6:

> [2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. *See* Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

Understand, however, that while mandatory, this non-disclosure rule does not appear to be absolute. In fact, one may argue that, under certain circumstances, you do have an obligation, if not a duty, to disclose to the court a client's confidence or secret. For example, the rule indicates that "confidences or secrets may be revealed … when required by law or by court order."

Notice, however, that this exception is permissive ("may") rather than mandatory ("shall"). That said, while you shall not reveal secrets or confidences, you may reveal them if required by other rules of professional conduct, such as the rule pertaining to candor to the court. This rule states that a lawyer "shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer."

The interplay of these rules creates a tension. According to Professor Monroe Freedman:

> [A]s we explored the issue of client perjury, we found that the American Bar Association's Canon's of Professional Ethics were internally contradictory. A lawyer was required to "endeavor to obtain full knowledge of his client's cause before advising him." As explained in an early ABA opinion: "[C]ounsel cannot properly perform their duties without

> knowing the truth." In order to encourage clients to be candid with their lawyers, therefore, the Cannons required lawyers to preserve their confidences. Nevertheless, the Cannons also required lawyers to be candid with the court. Thus, the trilemma: to know everything possible, and to keep it in confidence, but to divulge it to the court if candor to the court required it.

Provided that you thoroughly interviewed your client and, therefore, "know" his or her complete criminal record, there are many ways that these rules can and do come into play. One is when a judge asks you outright during the taking of the plea whether or not you know of any prior convictions. The second is when your client fails to disclose prior convictions to a probation officer who then relies on the client's statement to fashion a sentencing recommendation. In this second instance, the sentencing recommendation usually is in a report upon which the judge relies. If this happens and the probation officer fails to find the priors, the criminal history reported to the "tribunal" will be incomplete. And, thus, it can be entirely possible that the priors known to you will not be in the probation report relied upon by the judge for sentencing purposes.

In either of these situations, do you have an obligation to report your client's prior convictions to the court and, thereby, exposing your client to a harsher sentence? As you might expect, the answer is not crystal clear.

Because prior convictions are presumably a part of the "public record," it is important to point out that there may even be some controversy as to whether a prior offense is actually a secret or confidence. According to the rule, "confidence" refers to information protected by the attorney-client privilege under applicable law. "Secret" refers to other information gained in the professional relationship that the client requests be held inviolate or disclosure that would be embarrassing or likely to be detrimental to the client.

Model Code DR 41-101(a) distinguishes between "confidences" and "secrets." "Confidences" refer narrowly to information protected by the attorney-client privilege, i.e., information that cannot be used as evidence in a judicial proceeding. The elements of privilege vary somewhat from state to state, but basically they require that the information be in a communication between a client and a lawyer that is made in confidence for the purpose of obtaining or providing legal assistance. By this definition, it seems that the client's prior record, as known and related by the client, is a client confidence.

I think we can agree that, in the context of any criminal matter, and certainly in the context of a drunk driving case, the "disclosure" of an otherwise unknown prior conviction is likely to be detrimental to the client because it will almost certainly be used to enhance the sentence, thereby making it more punitive or onerous. So again, the question is whether or not you must reveal your client's prior convictions to the court, a likely detriment to your client.

Like so many other questions and issues in law, the answer is, "it depends." Michigan has essentially adopted the position of the American Bar Association:

> Where it is clear that the court is not relying on defense counsel to corroborate the judge's mistaken belief that the lawyer's client has no prior criminal record as a result of a clerical error omitting previous offenses in a certified copy of the client's driving record received from the state licensing bureau, defense counsel is not ethically obligated to disclose to the court the inaccuracy of the report.
>
> If a judge asks the lawyer if the client has a criminal record, or it is obvious the judge is relying on defense counsel to corroborate the judge's mistaken belief as to the true facts of the client's record, then the lawyer's duty of candor and fairness to the court requires the lawyer to inform the court not to rely on counsel's personal knowledge as to the client's record.

In Michigan, the committee has adopted ABA Formal Opinion 287. Accordingly, "where it is obvious that the judge is relying on informa-

tion received directly from the state or statements made by the prosecutor, we do not believe that DR 7-102 requires defense counsel to correct the prosecutor who mistakenly informs the judge that the client has no previous record or to comment upon the inaccuracy of the report received from the state. However, if the judge specifically asks the lawyer if the client has a criminal record or it is obvious the judge is relying in some way on defense counsel to corroborate the judge's mistaken belief as to the true facts of the client's record then in our opinion you cannot stand idly by. The lawyer's duty of candor and fairness to the court requires him or her to advise the judge not to rely on counsel's personal knowledge with respect to the client's record."

The state of Maryland has come to a nearly identical conclusion, finding that:

> Counsel has a number of ethical responsibilities that must be fulfilled at sentencing. These include a duty of candor to the court and a duty to maintain the attorney-client privilege. These two responsibilities can appear to conflict where the client discloses a prior conviction or probation before judgment that does not appear on the defendant's driving record or on the driving record proffered to the court by the State. Counsel is under no obligation to disclose information that is unfavorable to his client, but at the same time must take care to ensure that no remark of counsel or the client could be construed as misrepresenting the facts or misleading the court.

There is a separate, but related, issue regarding probation reports. If a judge asks a client about their criminal record and the client is untruthful, DR 7-102(B)(1) seems to require the lawyer to promptly direct his or her client to tell the truth, and if the client refuses to do so, the lawyer must reveal the lie to the judge. But as indicated in Professor Freeman's article, in looking at this question in 1953, the Committee recognized a conflict between the duty to preserve the client's confidences, and the duty to reveal perjury. In addition, the Committee acknowledged that the attorney is an "officer of the court." The Committee explained the question-begging nature of that phrase, however, in the following way:

> We yield to none in our insistence on the lawyer's loyalty to the court of which he is an officer. Such loyalty does not, however, consist merely in respect for the judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.

While Professor Freeman's article looks specifically at client perjury as in "testimony," the analysis relative to a client's self-reported criminal history is essentially the same. The narrow and specific question posited here is whether or not, in drunk driving cases, a defense attorney should have a duty to disclose prior alcohol-related convictions under any circumstances. If public policy favors treatment and sobriety for repeat drunk drivers, then the answer should resolutely be "no."

Often a lawyer is the first professional with whom the arrested driver consults. He or she is a gatekeeper for getting those who need treatment into treatment. Admittedly, this determination must be made not by the lawyer but by an appropriately qualified mental health professional; though a lawyer is often faced with the question or decision of whether or not to refer the client for a substance abuse evaluation.

In making an informed decision, a lawyer must know the client's complete prior history. This is true because one of the diagnostic criteria used in the mental health field for determining the type and extent of an alcohol problem is the number of prior drunk driving or alcohol-related offenses. As the number of priors increase, so does the probability of there being an alcohol abuse or dependence problem. It is important for a DUI accused to be forthright and honest regarding priors so that his or her attorney and treatment provider have complete information

relative to any possible alcohol issue.

Consequently, repeat drunk drivers should be at complete liberty to reveal priors to their lawyers without fearing that they will disclose this information to the court and used against them at sentencing. The rules of professional conduct should certainly not impede your earnest evaluation of your client's potential problem, governed in part by a review of your client's criminal history.

In fact, it seems to me that it would be better public policy if the model rules of professional conduct facilitated this effort. For these reasons, there should be a DUI exception to the rule of candor to the tribunal that seems to require disclosure of prior alcohol-related offenses. In this regard, at least, the Kansas rule that "[i]t is not defense counsel's place to admit to his or her client's prior offenses" should become the model rule.

If we agree that abstinence through treatment will better protect society from the dangers of drunk driving, and that this is good public policy, then a "don't ask don't tell" approach should be adopted by the court relative to a DUI defense lawyer's knowledge of a client's prior alcohol-related offenses. Such approach resolves the "trilemma" in a way that best serves and protects the client and the public.

Patrick T. Barone, editor of The DWI Journal: Law & Science, is an Adjunct Professor at the Thomas M. Cooley Law School where he teaches Drunk Driving Law and Practice. He is also the principal and founding member of the Barone Defense Firm, located in Birmingham, Michigan , and the co-author of two books on DWI-related issues, including Defending Drinking Drivers (James Publishing), a leading treatise in the field. He is also a sustaining member of National College of DUI Defense, and can be reached at (248) 594-4554.

Case Law & Litigation Tips

OHIO

911 calls that were made to avoid immediate danger are not testimonial and do not violate the Confrontation Clause when the declarant is not available to testify at trial and such calls may provide probable cause for a traffic stop.

State of Ohio v. Goslin, Douglas;
2009 Ohio 3487 (2009).

On April 21, 2007, Appellant was stopped and cited by Officer Finan of the Lancaster Police Department for impaired driving. The stop was based primarily on a 9-1-1 call made that evening by a concerned anonymous female citizen. The caller stated that the vehicle was a GMC Sonoma pickup truck, dark in color, and bearing a license plate number of DCX7710. She also provided a variety of specific details relative to her observations, including that the driver "was passing out and has no business driving." Also, that the driver was "having a lot of real bad problems [driving]," that he was "getting ready to go over a curb," and that he was "swerving all over the place." The caller also explained that she was calling because she had just lost an aunt to a drunk driver and didn't want to see anyone else get killed. The vehicle described by the 9-1-1 caller was quickly located and stopped and arrested and charged with impaired driving.

Appellant filed a Motion in Limine to limit the admissibility of the 9-1-1 call. Prior to the start of trial, counsel for both the prosecution and defense were given an opportunity to put their positions on the record regarding the motion. The parties agreed, with the trial court's consent, to continue the case so that the issue could be fully briefed. It was further agreed that Appellant would be granted leave to file a Motion to Suppress so that an appeal could be made immediately thereafter. A copy of the 9-1-1 call was admitted into evidence by stipulation of the parties.

The trial court denied Appellant's Motion to Suppress, finding that the 9-1-1 call was a present sense impression under Evid.R. 803(1) and

was admissible as an exception to the hearsay rule.

Upon review it was noted that the Ohio Supreme Court has ruled that recordings of 911 calls that were made to avoid immediate danger are not testimonial and do not violate the Confrontation Clause when the declarant is not available to testify at trial. *State v. Naugler*, 111 Ohio St.3d 130. Other Ohio courts have deemed similar 911 calls to be admissible as excited utterances and further holding that "under Evid.R. 803(2), the availability of the declarant is immaterial."

The court also found that the stop was supported by probable cause because it contained sufficient indicia of reliability. Factors considered "highly relevant in determining the value of [the informant's] report" are the informant's veracity, reliability, and basis of knowledge. *Id*. at 328. The ordinary citizen is on a different footing from a police informant who is himself implicated in criminal conduct; the credibility and reliability of the latter must be apparent before the information can be acted upon.

The court further reasoned that a police officer necessarily relies on information he receives over the police radio, and it is his duty to act when he receives that information. Here, Officer Finan responded to a 911 call from a citizen informant who personally observed Appellant's drunken behavior and gave a detailed description of Appellant's erratic driving, along with a description of his car and location to dispatch. The information relayed by the citizen constituted an eyewitness account of the crime. In addition, her call was motivated by concern for the personal safety of other motorists, not by dishonest or questionable motives. In fact, the citizen caller followed Appellant and stayed on the phone with dispatch for approximately five (5) minutes, all the time relaying and describing his movements.

GEORGIA

A law enforcement officer may attempt to persuade an accused to rescind her refusal to submit to chemical testing, as long as the procedure utilized by the officer in attempting to persuade a defendant to rescind his refusal is fair and reasonable.

State v. Rowell, 2009 Ga. App. LEXIS 855 (2009).

Laura Rowell was accused of driving under the influence of alcohol to the extent that it was less safe for her to drive and *per se* DUI. The trial court granted Rowell's motion to suppress the results of her state-administered breath test, ruling that the procedure used by the arresting officer to persuade her to rescind her refusal to take the test was not fair or reasonable. This suppression was appealed by the state and the trial court's suppression was affirmed.

The evidence from the suppression hearing showed that a Houston County deputy sheriff stopped Rowell when he observed her driving unsafely in heavy traffic. After he smelled alcohol emanating from Rowell, the deputy asked her to perform field sobriety tests. Rowell's performance indicated to the deputy that she was intoxicated, so he asked her to undergo an Alco-Sensor test. Rowell declined. The deputy then placed her under arrest and read her the implied consent warnings for a person over the age of 21 years. Rowell refused to submit to a state-administered chemical test.

The deputy testified that he took her to jail and placed her in the "Intox room." He read Rowell the implied consent warnings a second time. At the hearing, on cross-examination, the deputy testified that after he read Rowell the implied consent warnings a second time, she asked him some questions, including, "what happens if I blow and I'm under the limit? I said, then you'll be charged with what you're charged with, and you'll be gone." The deputy testified that he did not remember the exact words he said to her. Rowell testified that when the deputy took her into the Intox room, he read her her rights and asked her if she would take the test. Rowell testified, "I told him no, that I was under . . . legal advice not to. And he said, well, you know if you blow under the legal limit I can let you go home to your son, and everything will be fine. . . . So then I finally blew." Rowell testified that she felt coerced by the deputy's statement.

In its order, the trial court credited Rowell's testimony "that she was told that if she blew under .08 no charges . . . would be made and she

would be allowed to go home to her son." The trial court cited *State v. Highsmith*, which held that a suspect may revoke his implied consent, although "the court must evaluate the officer's actions to determine if the officer acted reasonably in the situation and whether the procedure was applied in a fair manner."

The trial court also relied upon *Howell v. State*, in which this Court recognized that a law enforcement officer may attempt to persuade an accused to rescind her refusal to submit to chemical testing, as long as "the procedure utilized by the officer in attempting to persuade a defendant to rescind his refusal [is] fair and reasonable."

Applying these precedents, the trial court concluded that the procedure utilized by the deputy to persuade Rowell to rescind her refusal -- telling her that she could go home to her son if she blew under the legal limit -- was not fair or reasonable, and the appeals court agreed.

FLORIDA

Revocation of a driver's license is a collateral consequence of a plea, and therefore, neither defense counsel nor the trial court is required to inform a defendant about such a consequence before the defendant enters his or her plea. However, wrongly advising about such a collateral consequence may constitute ineffective assistance of counsel.

State of Florida v. Sayles, Terry;
2009 Fla. App. LEXIS 9355 (2009).

Sayles entered a no contest plea to several charges in exchange for a sentence of thirty-six months' probation and eight months in jail. Two of the charges to which Sayles plead involved driving under the influence of alcohol and therefore implicated his driver's license. The plea form signed by Sayles stated that his sentences would "consist of . . . [a] 10 year DL revocation." At the plea and sentencing hearing, the trial court addressed the issue of the revocation of Sayles' driver's license by the Department of Motor Vehicles (DMV):

> DMV is going to do what it wants to do, and . . . they will do administratively with the driver's license what they do regardless of what I say, sir. So, I assume it will be 10-years revocation by DMV, not 20, but I can't make you any promises about what DMV will do. They're going to get this as two convictions, so I don't even want to begin to tell you or make you promises or assurances on your plea today with respect to your driver's license. I'm not going to do anything other than say it's a 10-year DL revocation.

At other times throughout the hearing, the prosecutor, the court, and defense counsel made references to a ten-year driver's license revocation.

Sayles subsequently filed a motion to withdraw his plea alleging that he was advised [by counsel] that because he was resolving both DUI's on the same day he would not have a lifetime revocation of his driver's license. The motion further alleged that subsequent to Sayles' plea, he received an order of permanent (lifetime) license revocation from the DMV. He claimed that his "plea was involuntary because he was advised his license would not be permanently revoked." The trial court orally denied the motion without any explanation. The trial court's written order of denial stated only that Sayles' "plea was freely and voluntarily entered."

On appeal, Sayles argued that in considering the motion to withdraw plea, the trial court incorrectly assumed that the revocation of his driver's license was a collateral consequence of his plea. Sayles contended instead that lifetime revocation is a direct consequence of his plea and that he therefore had a right to receive accurate advice about it. He also alleged that there is nothing in the record to refute the allegation made in his motion that he was misadvised by his attorney. Sayles asserted that the trial court should have held an evidentiary hearing on his motion.

The appeals court held that revocation of a driver's license is a collateral consequence of a plea, and therefore, that neither defense counsel nor the trial court was required to inform the

defendant about such a consequence. However, "[a]ffirmative misadvice about even a collateral consequence of a plea constitutes ineffective assistance of counsel and provides a basis on which to withdraw the plea." *Roberti v. State*, 782 So. 2d 919, 920 (2001). On this basis the court of appeals reversed the trial court and remanded the case for further proceedings.

ALABAMA

The statute in effect at the time a crime is committed governs the prosecution and eventual sentencing of that offense.

State v. Nelson, Jody;
2009 Ala. Crim. App. LEXIS 53 (2009).

On March 18, 2005, Officer Michael Merritt was notified by dispatch to be on the lookout for a reckless driver driving north on U.S. Highway 98 in Daphne. Officer Merritt subsequently identified a vehicle making constant lane changes without turn signals and initiated a traffic stop. The driver of the vehicle was identified as Nelson. Officer Merritt testified that he smelled alcohol coming from Nelson's person. After Nelson was unable to perform several field-sobriety tests, he was arrested for driving under the influence of alcohol.

The sole issue raised by Nelson on appeal was whether the circuit court was without jurisdiction to sentence him for the felony offense of DUI where the three prior DUI convictions used to elevate his fourth conviction to a felony DUI fell outside the five-year period provided for in Alabama law. Nelson, whose DUI arrest resulted from a traffic stop that occurred on March 19, 2005, was convicted on March 9, 2007, and sentenced on May 24, 2007. During the time between Nelson's arrest and his conviction, the Alabama Legislature amended the look back period; this amendment which became effective April 28, 2006, provides:

> "A prior conviction within a five-year period for driving under the influence of alcohol or drugs from this state, a municipality within this state, or another state or territory or a municipality of another state or territory shall be considered by a court for imposing a sentence pursuant to this section."

It was Nelson's contention that this newly enacted law is applicable in his case, thus mandating reversal of what he says is the circuit court's "illegal sentence." In considering this argument, the Alabama appeals court stated that the statute in effect at the time a crime is committed governs the prosecution of that offense. Likewise, a defendant's sentence is determined by the law in effect at the time of the commission of the offense.

Before the 2006 amendment became effective Alabama law contained no five-year-limitation period concerning convictions that could be used for the purposes of DUI sentencing enhancement. As previously established, Nelson's offense took place on March 19, 2005. Because the law controlling Nelson's prosecution contained no limiting five-year window, his DUI convictions that were more than five years old could be used for purposes of sentencing enhancement.

However, the court's review of the record indicated that one of the DUI convictions used to elevate Nelson's sentence to a felony DUI was in a municipal court. The record established that the State submitted certified copies of three Uniform Traffic Tickets and Complaints ("UTTCs") to the circuit court at the sentencing hearing -- 1993 and 1995 DUI convictions in the Baldwin County District Court and a 1999 DUI conviction in the Foley Municipal Court. The inclusion of Nelson's 1999 DUI conviction in the municipal court was not supported by an Alabama case that was decided after Nelson had been convicted of felony DUI. The Alabama Supreme Court held that prior in-state DUI convictions in municipal court do not count toward the total number of DUI convictions necessary to constitute a felony DUI offense under Alabama law.

Although Nelson's conviction for felony DUI cannot stand based on the fact that a municipal DUI conviction was used to enhance his sentence, the court noted that the law allowed for the remand of this case for the State to prove three DUI convictions, not including municipal DUI convictions, at a second sentencing hearing.

On this basis the case was reversed and remanded.

MICHIGAN

The inevitable discovery doctrine did not allow a warrantless search of a diabetic's blood.

People of the State of Michigan v Hyde, George William, ___ Mich App ___ (2009)(No. 282782)

In this case, it was undisputed that Hyde was improperly advised of his rights under Michigan's implied consent statute. Hyde was a diabetic, and this fact was known to the officer. Unbeknownst to the officer however was the fact that Michigan allow precludes a diabetic from giving consent to a blood draw.

Hyde was stopped while he was driving his motor home along I-75 southbound. The arresting officer testified at a suppression hearing that he noticed tire tracks on I-75 that were traveling from the extreme right to the extreme left hand side of the road. In an attempt to catch-up with the car making these tracks the officer followed them off I-75 at the Indian River exit and then continued to follow the tracks on M-68. The tracks came from a vehicle with dual rear wheels on each side. It also appeared that the vehicle made a U-turn at a parking lot and then continued westbound on M-68.

When the officer caught up with Hyde's vehicle he observed it to be halfway across the center of the roadway. Officer Williams testified that the roadway was snow covered, so the centerline was not clearly visible, but the vehicle was in the middle of the roadway. A video recording of the stop began when the camera for the police car was automatically activated along with the officer's emergency overhead lights. In the video the officer can be seen and heard to ask the driver, who was later identified as Hyde, to exit the vehicle. The officer noticed slow motor skills, poor balance and slurred speech.

Hyde admitted consuming five or six beers. No field tasks were administered due to the inclimet weather and because of a medical condition. Later during the stop, the arresting officer Williams and backup Officer Chamberlain entered Hyde's motor home after Hyde said he was cold. While inside the motor home Officer Williams observed a brown paper bag directly to the right of the driver's seat with a six-pack of Coors beer inside it. There were four empty bottles, while the fifth bottle was three quarters empty, and the sixth was unopened. There were also beer cans in the sink. Hyde claimed these were his daughter's from a previous night. Officers Williams and Chamberlain, who had both made over 100 drunk driving arrests in their careers, believed that Hyde was under the influence of alcohol.

The police arrested Hyde and, before leaving the scene, Officer Williams asked Hyde if he needed his insulin. Hyde stated he had already taken some. Hyde was advised of his rights and asked to complete a sobriety test at the Cheboygan County Jail, which was videotaped. A sample of Hyde's blood was taken at 3:30 a.m. The parties stipulated that the proper procedures were used in taking Hyde's blood.

Hyde filed a motion to suppress his blood sample and the blood test results, arguing that his Fourth Amendment rights were violated be-

cause his consent to the blood draw was the product of coercion when the police incorrectly told him that the implied consent statute still applied to him even though he had diabetes. The trial court denied Hyde's motion to suppress, concluding that although Hyde had been improperly informed about the consequences of his refusal to take a blood test because he was a diabetic, his alcohol content would have been inevitably discovered had the officer followed the correct procedure.

On appeal Hyde contended that the trial court erred by concluding that the evidence could be admitted under the inevitable discovery doctrine because the police could have obtained a warrant if not for their mistake in advising him of his rights under the informed consent statute. Hyde argued that this doctrine should not apply because it would create an exception that would obviate the need to obtain a warrant in any situation where there is probable cause. Moreover, Hyde contended that the inevitable discovery rationale is too speculative for the doctrine to apply.

In analyzing the issue the court indicated that there has never been a binding decision that the inevitable discovery doctrine may apply when there is probable cause but no warrant or warrant exception. The court found that there was a high level of probable cause but that it was obvious that the police were not in the process of obtaining a warrant when they secured Hyde's invalid consent. Officer Williams did not understand the implied consent statute exception for diabetics and did not attempt to correct his mistake once Hyde's blood sample was obtained.

Moreover, the court held that the reasoning that does not permit the doctrine to apply is particularly persuasive when placed in the context of Michigan's three concerns with applying the inevitable discovery doctrine—independent legal means, inevitability of use of the legal means and discovery of the evidence, and incentive for police misconduct or significant weakening of Fourth Amendment protections. To allow a warrantless search merely because probable cause exists would allow the inevitable discovery doctrine to act as a warrant exception that engulfs the warrant requirement. Even in the context of a good faith error, the Court rejected the notion that a *post-hoc* probable cause analysis can preclude the constitutional requirement that a neutral and detached magistrate issue the warrant.

Under the circumstances presented here, the Appeals Court concluded that the trial court's failure to suppress the blood sample evidence was not harmless because the verdict form did not distinguish between the common law and *per se* theories of guilt. Consequently, it was not possible for the court to determine if they had found Hyde guilty of drunk driving based on an alcohol level obtained from unlawfully seized blood. Therefore, the Court believed that the blood alcohol evidence clearly contributed to Hyde's conviction, and stated that it was not clear beyond a reasonable doubt that a rational jury would have found Hyde guilty of OWI absent the error in admission of the blood alcohol evidence. The Court therefore reversed and remanded for entry of an order vacating Hyde's OWI conviction under the theory that he operated a vehicle with a bodily alcohol content of 0.08% or more.

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