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D.C. DUI DISTURBIA: THE INTENDED POLICY AND ITS EXPLOSIVE EFFECTS

by *Monika Mastellone*



Many articles written on the topic of drunk driving often focus on the negative impact and consequences of drunk driving, and emphasize the need to crackdown on intoxicated drivers by implementing harsher laws and more severe punishments. In response to the public outcry over drunk driving, state law enforcements have been pushing forward efforts to enforce stricter laws that conform to the public's desire to catch intoxicated drivers and punish them for breaking the law.¹ In 2012, the District of Columbia amended its DUI Statute to include harsher penalties and stricter standards as a means to deter drinking and driving, while simultaneously broadening its definitions of impairment.² In effect, D.C. law enforcement is granted the authority to arrest and

prosecute persons for driving under the influence who have blood-alcohol content (BAC) levels well below the "legal limit" of 0.08 percent.³

As a result of this new policy, not only has law enforcement successfully broadened its ability to catch intoxicated drivers, but the D.C. criminal justice system has allowed for arrests, charges, and even convictions of drivers who were either driving within the legal limit, or who were not under any influence of alcohol (or drugs) at all.⁴ While no one contests the vital importance of thwarting the serious, harmful effects caused by drunk driving, a new issue has evolved that deserves some focus: the negative repercussions that result from over-zealous attempts to catch intoxicated drivers.

When these statutory changes were passed and enacted, the President of the Washington Regional Alcohol Program, Kurt Erikson, stated "[w]ith more than a quarter of the District's traffic deaths being caused by drunk drivers, these are necessary if not lifesaving new laws."⁵ The fact is, however, that the imple-

1 See, e.g., Journal Editorial Board, *Editorial: Habitual Drunk Drivers: State Senate Must Follow House in Crackdown*, WINSTON-SALEM JOURNAL (Oct. 20, 2013), http://www.journalnow.com/opinion/editorials/article_23147d6e-3824-11e3-bf11-001a4bcf6878.html (summarizing DUI crackdown efforts in North Carolina); T&D Staff Report, *State, Local Officials Plan DUI Crackdown*, THE TIMES AND DEMOCRAT (Aug. 17, 2013), http://thetandd.com/state-local-officials-plan-dui-crackdown/article_233c4a82-07ab-11e3-a719-001a4bcf887a.html (discussing DUI crack down efforts in South Carolina); Staff Report, *NJ Police Begin Drunk Driving Crackdown Effort*, NJ TODAY (Aug. 16, 2013), <http://njtoday.net/2013/08/16/nj-police-begin-drunk-driving-crackdown-effort/> (explaining the DUI crackdown initiative in New Jersey).

2 See generally, Comprehensive Impaired Driving and Alcohol Testing Program Emergency Amendment Act of 2012, available at <http://dcclims1.dccouncil.us/images/00001/20120712151430.pdf> (describing the changes in the new DUI law including an increase in mandatory-minimum sentences for certain DUI offenses).

3 See *id.*

4 Although convictions have been upheld where the defendant produced a breath score of 0.00 percent because evidence indicated that the defendant was under the influence of drugs rather than alcohol, see, e.g., *Derrick Carrington v. District of Columbia*, No. 11-CT-698 (D.C. Oct. 17, 2013), this article focuses solely on instances where the defendant contained a BAC level of 0.00 percent and where the police failed to indicate any suspicion of drugs.

5 Robert Thomson, *D.C. Toughens Drunk Driving Law, Restores Breath Test*, WASH. POST (July 31, 2012), <http://www.washingtonpost.com/blogs/dr-gridlock/post/dc->



mentation of these changes does not just save lives, but can ruin them as well. When a person is charged with and subsequently convicted of driving under the influence, certain consequences result: court dates; large fines; lawyers' fees as well as other costly fees; loss of license; probation requirements; potential jail time; and perhaps the most difficult hardship—the loss of one's job or the inability to pursue certain career endeavors due to a potentially erroneous DUI conviction. Particularly, D.C. police authorities⁶ have arbitrarily failed people during field sobriety tests,⁷ prosecutors are charging people under the DUI statute who have produced breath test scores of well below 0.08 percent (the 'alleged' legal limit)⁸ and worst of all, judges are convicting these individuals.⁹ Indeed, it appears that the District of Columbia has reached the point where completely sober people should fear driving in the District.

toughens-drunk-driving-law-restores-breath-test/2012/07/31/gJQAD0r7MX_blog.html (referring to the stricter standards and harsher penalties implemented through the 2012 amendments to the D.C. DUI Statute as the "new laws").

6 D.C. Police authorities include the Metropolitan Police Department (MPD), the United States Park Police (USPP), the United States Capitol Police (USCP), the Metro Transit Police, and the Secret Service—all vested with the authority to perform DUI stops and arrests. WASHINGTON PEACE CENTER, <http://www.washingtonpeacecenter.org/dccops> (last visited Dec. 18, 2013) (listing the numerous law enforcement agencies that have jurisdiction in Washington, D.C.).

7 D.C. DUI Attorney Bryan Brown, for example, tried a case in D.C. Superior Court a few years ago in which a police officer testified that the defendant had failed the Horizontal and Vertical Nystagmus tests in both eyes. This testimony proved to be fabricated during cross-examination when the defendant then popped out his glass eye in open court. Telephone Interview with Bryan Brown, Esquire, Law Office of Bryan Brown (Oct. 24, 2013) (notes on file with author).

8 See David J. Hanson, *DWI Arrests at Zero BAC in DC*, ALCOHOL PROBLEMS AND SOLUTIONS, available at http://www2.potsdam.edu/hansondj/Drivingissues/1133276608.html#_UrOAI PRD t8E (discussing officers' habit of arresting persons for DUI who have produced breath scores well below 0.08 percent, and focusing on one particular instance in which a woman was arrested for DUI after having one glass of chardonnay and producing a breath score of only 0.03 percent).

9 Telephone interview with Bryan Brown, *supra* note 7 (noting that in the summer of 2013, for instance, a D.C. Superior Court judge convicted a man of DUI who had produced a breath score of 0.02 percent).

Accordingly, this article sheds light on the issue of overreaching DUI laws that often result in unjust DUI prosecutions. This article also discusses the policy implications of the specific D.C. DUI Statute, issues with law enforcement training, problems that these efforts have caused, and suggestions for possible future resolution. While a complete fix of the problem may not be immediately foreseeable, the more awareness and knowledge that D.C. DUI attorneys possess on the issue, the greater chance that progress will be made toward achieving a solution.

I. D.C.'s DUI Dilemma

In 2010, there were seven deaths in the District of Columbia caused by drunk driving.¹⁰ In 2011, this number increased by one, resulting in a total of eight deaths caused by drunk driving throughout the District of Columbia.¹¹ The next year, in 2012, the D.C. legislature responded by introducing new legislation that included stricter standards and harsher penalties. Specifically, in July 2012, the D.C. City Council passed the Comprehensive Impaired Driving Act of 2012 ("Act"), signed into law by Mayor Vincent Gray.¹²

The Act cracks down on drunk driving by implementing greater maximum penalties for first-time offenders, while increasing the mandatory minimum sentences for repeat offenders. The maximum jail times for first-time offenders increased from 90 days to 180 days, and the maximum fine for first-time offenders increased from \$300 to \$1,000.¹³ Repeat offenders now face a mandatory minimum sentence of ten days in jail if their BAC is 0.20 percent or higher, and twenty days in jail if their BAC level reaches 0.30 percent.¹⁴ Moreover, should these mandatory minimum terms of incarceration apply in a particular case, the

10 MADD, *2011 Drunk Driving Fatalities by State*, <http://www.madd.org/blog/2012/december/2011-State-data.html> (last visited Nov. 4, 2013).

11 *Id.*

12 See Thomson, *supra* note 5.

13 D.C. CODE § 50-2206.13 (2013).

14 *Id.*



Act now precludes the possibility of serving incarceration terms on weekends or in a halfway house setting.¹⁵ Thus, all incarceration terms must be served consecutively and no part of the mandatory minimum sentence may be suspended.¹⁶

In addition, the Act “establishe[d] new oversight for the D.C. police department’s breath-testing programs and a certification program for officers using the equipment.”¹⁷ The purpose behind this provision was to allow officers to resume breath testing, so that convictions were no longer based merely on urinalysis¹⁸ and standardized field sobriety test¹⁹ (SFST) results.²⁰

15 See D.C. CODE § 50-2206.01(11) (2013) (defining “Mandatory minimum term of incarceration”); D.C. CODE §50-2206.57 (2013) (expanding on the meaning of “Mandatory minimum periods”); see also Michael Bruckheim, *District of Columbia’s New DUI Law Part 3: No More Weekends*, BRUCKLAW.COM (May 7, 2013), <http://www.brucklaw.com/part-3-no-more-weekends> (describing the “severe financial or occupational consequences” that individuals may face due to the fact that the weekend program is no longer available).

16 See § 50-2206.57(b).

17 See Thomson, *supra* note 5.

18 There is a current debate over the accuracy of urinalysis. Dr. Lucas Zarwell, the Chief Toxicologist for the District of Columbia, has testified to the D.C. Council that urine does not provide an accurate means for measuring a person’s level of intoxication because there is no scientific correlation between the concentration of alcohol in the urine sample and the person’s actual blood alcohol concentration. See *Zarwell Testimony on Urine*, YOUTUBE (Sept. 26, 2013, 00:44), http://www.youtube.com/watch?v=FUmhJ_jPF1E (“If you’re going to look at urine concentrations of alcohol and science, there is a very loose correlation.”).

19 SFSTs commonly include the Horizontal Gaze Nystagmus Test, the Walk and Turn test, and the One Leg Stand test, having accuracy rates of 77%, 68%, and 65%, respectively. See 2006 NHTSA SFST Manual (2006), available at <http://oag.dc.gov/sites/default/files/dc/sites/oag/publication/attachments/2006%20NHTSA%20SFST%20Manual.pdf>.

20 The Metropolitan Police Department had suspended breath testing the previous year after a consultant found that faulty testing equipment had inflated test results, resulting in nearly 400 convictions based on inaccurate results. See Mary Pat Flaherty, *400 DWIs in D.C. based on faulty data*, WASH. POST, June 10, 2010, at A1, A7, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/06/09/AR2010060906257.html> (“Nearly 400 people were convicted of driving while intoxicated in the District since fall 2008 based on inaccurate results from breath test machines, and

While the noble intentions of the D.C. legislature are recognized, the actual implications of this new legislation are unsettlingly astounding. Particularly, D.C. Police authorities are continuously pulling over motorists, concluding that these motorists have failed the SFSTs, and then once the motorist is arrested and taken to the police station for a breathalyzer test, these officers will cite the motorist for DUI even when the motorist produced a breath score below 0.08 percent.²¹ In effect, prosecutors charge these individuals with DUI, despite their low breath scores, resulting in many individuals receiving their first criminal conviction.

In one particularly noteworthy case, a D.C. Superior Court judge convicted a man of DUI who had produced a breath score of a mere 0.02 percent.²² Additionally, D.C. law enforcement has the ability to charge individuals with DUI who have produced a breath score of 0.00 even when there is neither any chemical evidence of alcohol nor any general suspicion of drugs being present in the motorist’s system.²³ Accordingly, the statute’s intended goal of catching intoxicated drivers is instead being perverted; the law is allowing innocent persons to be arrested, charged, and convicted of DUI.

The root of this problem stems from multiple factors. First, despite the fact that the statute prescribes new breath testing regulations, officers do not breath test on the scene.

half of them went to jail[.]”); Thomson, *supra* note 5. This sparked civil suits that resulted in the city paying out \$368,000 to select convicted DUI drivers who chose to pursue the civil suit; however, very few drivers were able to get rid of their criminal convictions. See Mike Debonis, *Three Years After Breathalyzer Scandal, D.C. Police Restart Alcohol Breath Testing*, WASH. POST (Jan. 9, 2013), <http://www.washingtonpost.com/blogs/mike-debonis/wp/2013/01/09/three-years-after-breathalyzer-scandal-d-c-police-restart-alcohol-breath-testing/> (stating that of the 50 drivers who challenged their DUI convictions, only two ultimately prevailed in getting their charges tossed).

21 See Hanson, *supra* note 8.

22 Telephone interview with David Akulian, Criminal Defense Attorney, Law Offices of David Akulian (Oct. 24, 2013) (noting that this case is presently pending appeal in front of D.C. Superior Court Judge Marisa DeMeo).

23 See Hanson, *supra* note 8.



Rather, they require motorists to perform a series of SFSTs and then proceed to arrest them based on the results of these field sobriety tests. After the arrest, the motorist is taken to the police station and given a breath test. Notably, many times this breath score is not admitted at trial because of either defective equipment or faulty procedure.

A reading of the National Highway Traffic Safety Administration manual, used for all D.C. police authorities' DUI detection and SFST training, uncovers where the problem begins to unfold.²⁴ In the course of their training, officers are first and foremost taught that a primary way to prevent people from driving under the influence is to instill the "fear" of being arrested into the public.²⁵ The manual explains that "unless there is a real risk of arrest, there will not be much fear of arrest."²⁶ This policy, alone, appears to encourage officers to arrest as many motorists as they can; the question that arises then is how far will officers go in meeting this goal?

As with any traffic-stop based arrest, to conduct a DUI arrest based on probable cause, officers first must pull over the vehicle. According to their manual, an officer's suspicion may be initially raised by witnessing either a traffic violation, or "behavior that is unusual, but not necessarily illegal."²⁷ This is referred to as "phase one."²⁸ Thus, according to the officers' training, unusual behavior in and of itself can raise suspicion that someone is intoxicated. Once an officer comes into initial contact with the motorist, "phase two" begins. In phase two, the officer can observe the driver by interacting with him face-to-face. During this phase, the officer will often ask interrupting or "unusual" questions in order to observe the driver's ability to react to such questioning.²⁹ Unlike with

SFSTs, the results of these tests merely provide the officer with clues as to the person's potential intoxication, but usually cannot themselves establish probable cause. Thus, officers facilitate phase two in order to collect enough reasonable suspicion to conduct the SFSTs.

In "phase three," officers will conduct the SFSTs.³⁰ Unlike in other jurisdictions, D.C. police authorities do not typically perform breath tests on the scene. In effect, if a completely sober person requests to be breathalized on the spot to show the officer his or her sobriety, he or she will likely be denied this request.³¹ Instead, he or she will be required to perform SFSTs, a series of tests that officers use to determine if a motorist is intoxicated, which is often required to obtain the probable cause necessary for the arrest.

The problem with SFSTs is that the results are unreliable.³² It is conceivably the case

30 See *id.* §§ VII-1 - VII-7 (SFSTs include the Horizontal Gaze Nystagmus test, the Vertical Gaze Nystagmus test, and Divided Attention tests such as the Walk and Turn test and the One Leg Stand test).

31 Telephone Interview with Bryan Brown, *supra* note 7 (explaining that officers likely prefer not to perform breath tests on the scene since they are not admissible in court as well as an added expense and inconvenient for the officers' zero-tolerance arrest prerogative).

32 See, e.g., Steven J. Rubenzer, *The Standardized Field Sobriety Tests: A review of Scientific and Legal Issues*, 32 LAW & HUM. BEHAV. 293, 293 (2008), available at <http://www.thecrimestoppers.com/mse2012/SFST%20additional%20materials/2008%20Rubenzer%20SFSTs%20-%20Scientific%20&%20Legal%20Issues.pdf> (concluding that "the research that supports their use is limited, important confounding variables have not been thoroughly studied, reliability is mediocre, and that their developers and prosecution-oriented publications have oversold the tests"); Patrick T. Barone & Jeffery S. Crampton, *Do "Standardized" Field Sobriety Tests Reliably Predict Intoxication?*, 84 MICH. BAR J., 23-26 (2005), available at <http://www.michbar.org/journal/pdf/pdf4article882.pdf> (describing the problems with SFST studies and emphasizing that the original SFST study conducted in 1977 produced an error rate of 47%, and another study later indicated that the HGN test is incorrectly performed by officers 95% of the time); *The Accuracy of the Standardized Field Sobriety Test*, STSF.US, <http://sfst.us/raw.html#top> (last visited Jan. 3, 2014) (providing raw data from an earlier study, indicating that SFSTs are extremely inaccurate predictors of BAC because almost everyone fails the SFSTs); Chad Maddox, *Standardized DUI Tests Are*

24 2006 NHTSA SFST Manual, *supra* note 19.

25 See *id.* § II-3 (describing the technique of "general deterrence" as instilling in the public a "fear of being arrested").

26 *Id.*

27 *Id.* § IV-1.

28 *Id.* §§ IV-2, IV-4.

29 *Id.* §§ IV-2, IV-4.



that any sober, medicated, or injured person could easily fail them. Moreover, these tests have error rates ranging from twenty-three to thirty-five percent.³³ Studies have shown that false positives are extremely common, which create an abundance of problems when D.C. police authorities are using this standard to arrest individuals.³⁴ Specifically, SFSTs are designed to provide an indication to officers that a person is intoxicated; for example, if a person hits four of the six clues on the horizontal gaze nystagmus (HGN) test, this is supposed to indicate to the officers that the person likely has a blood-alcohol concentrate of at least 0.10 percent.³⁵ In 2007, however, a study assessing the reliability of the HGN test found that persons with blood-alcohol levels below 0.05 percent produced false positives numerous times, in some cases displaying all six of the intoxication “clues.”³⁶

When a person fails the SFSTs, which many people often do, the officer will usually arrest the person for DUI and bring him or her to the police station either to conduct further SFSTs or to take a breath sample. This practice differs from other jurisdictions, many of which will usually perform a breath test at the scene to corroborate the SFST results prior to making an arrest. Despite the fact that the option for performing the breath test at the scene is provided in the officers’ manual, D.C. officers often skip this test, knowing that the results are not admissible in court.³⁷

Unreliable Indicators for Determining Driving Impairment, GOTOTRIAL.COM (Feb. 2012), <http://gototrial.com/standardized-dui-tests-are-unreliable-indicators-for-determining-driving-impairment/> (stating that “‘not a single study’ links SFSTs to driving impairment”).

33 See NHTSA SFST Manual, *supra* note 19, § VIII-1 (including statistics that that Horizontal Gaze Nystagmus (HGN) test is 77% accurate; the Walk and Turn test is 68% accurate; and the One Leg Stand test is 65% accurate).

34 See, e.g., Marcelline Burns, *The Robustness of the Horizontal Gaze Nystagmus Test*, NAT’L HIGHWAY AND TRAFFIC SAFETY ADMIN. (2007), at 18-22, http://sfst.us/KanePDF/The_Robustness_of_the_Horizontal_Gaze_Nystagmus_Test.pdf.

35 NHTSA SFST Manual, *supra* note 19, § VII-3.

36 See Burns, *supra* note 34, at 18 (“Table 13”).

37 See Koenig Pierre, *Is a Field Breathalyzer Test Administered During a Stop Admissible in Court?*,

II. Difficulties with the D.C. DUI Law

The core issue with the D.C. DUI law occurs when the arrestee provides a breath sample at the police station that results in a breath score reading below 0.08 percent. Notwithstanding the fact that there may have been no suspicion of drugs recorded or implied in the police report, prosecutors often go forward with bringing charges of DUI against these motorists. The first question raised is how can prosecutors charge people with DUI who have produced breath results below 0.08 when 0.08 is supposed to be the “legal limit?” The answer, albeit vague, is written in the statute. According to D.C.’s DUI Statute, “impairment” is defined by consumption of alcohol “in a way that can be perceived or noticed.”³⁸ In other words, despite the fact that a person may be completely sober or very close to it, e.g., having produced a breath score of 0.02 percent, a prosecutor may nevertheless press charges against the motorist based on the officer’s subjective testimony that he “perceived” or “noticed” drunken behavior. As such, this standard appears extremely subjective given that the basis for prosecuting a person for DUI can be based solely on an individual officer’s personal observations and opinions regarding the person’s behavior. While prosecutors argue that the standard is objective, this contention is highly contested by defense attorneys, who argue that the standard is too subjective, arbitrary, unconstitutional, and one that should not be tolerated by our legal system.

Furthermore, there is a clause in D.C.’s DUI Statute that stipulates that a person who produces a breath score below 0.05 percent (0.04 and below) is presumed not intoxicated.³⁹

PIERRELAWFIRM.COM (Feb. 4, 2013), <http://www.pierrelawfirm.com/2013/02/04/is-a-breathalyzer-test-taken-immediately-after-a-stop-admissible-in-court/> (explaining that roadside breathalyzer results are not admissible in court because the technology of a roadside breathalyzer is not as accurate as those kept at the station, which are calibrated and provide a more exact reading of a person’s BAC).

38 D.C. CODE § 50-2206.01(8) (2013).

39 See D.C. CODE § 50-2206.51(a)(1) (2013). While it is neither considered intoxicated per se nor presumed not



Overzealous law enforcement can overcome this ‘rebuttable presumption,’ however, by using their ‘experience’ and ‘training’ to “perceive” or “notice” impairment.⁴⁰ It is extremely troubling that the “legal limit” of 0.08 has been undermined by the discretionary decisions made by police, prosecutors, and even judges to arrest, charge, and convict persons based on this distorted interpretation of the law.⁴¹

Unfortunately, the subjective standards written into the statute do not stop at intoxication; the D.C. DUI Statute further states that a person is impaired when there is “evidence that a person is impaired by a drug.”⁴² Again, this standard is troubling because, as far as the law is concerned, “evidence” of drugs could essentially mean anything. This vague and unclear wording puts a motorist at risk of being considered under the influence of drugs by a mere subjective interpretation of the individual’s actions or behavior. Rather than this ambiguous subjective standard, the statute should

intoxicated, the “grey area” of breath scores between 0.05 and 0.07 percent can still survive a Motion of Judgment for Acquittal if not otherwise resulting in a conviction based on the subjective testimony of the officers.

40 Specifically, if an officer decides that a person is intoxicated based on his personal observations and perception that the person is acting in a way consistent with intoxication, the officer can arrest the person for DUI notwithstanding the fact that the person produced a breath score below 0.05 percent.

41 Currently, all fifty states have implemented a legal limit of 0.08 percent; no state has a legal limit that is either above or below 0.08. See DMV.org, <http://www.dmv.org/automotive-law/dui.php> (last visited Jan. 3, 2014). D.C., however, is not the only jurisdiction to prosecute DUI cases with blood-alcohol contents below 0.08 percent. See, e.g., George Fredrick Mueller, *Alcohol Level .07% or Less Yet Still Arrested in California for DUI/ DWI, How?*, <http://www.avvo.com/legal-guides/ugc/alcohol-level-07-or-less-yet-still-arrested-for-dui--drunk-driving--dwi--how-in-california> (last visited Jan. 3, 2014) (discussing how California citizens are routinely being prosecuted for DUI after having produced breath scores of 0.05 percent or higher). In fact, there has even been a national push to lower the legal limit to 0.05 percent, arguing that people can be impaired with BACs at this level. See Mike M. Ahlers, *Tougher Drunk-Driving Threshold Proposed to Reduce Traffic Deaths*, CNN.com, (May 15, 2013, 6:36 AM), <http://www.cnn.com/2013/05/14/us/ntsb-blood-alcohol/>.

42 D.C. CODE § 50-2206.51(b)(1) (2013).

require chemical testing to prove the presence of drugs in a person’s system.

Also noteworthy is the provision of the D.C. DUI Statute that has been found unconstitutional by judges presiding over repeat offender cases.⁴³ Specifically, the Act included a clause stating that a person with a prior DUI conviction who refuses to submit to chemical testing will be presumed to be intoxicated.⁴⁴ In other words, under this section of the Act, the potential repeat offender’s refusal results in per se guilt of DUI and requires the state to fulfill no further burden in proving its case.⁴⁵ Accordingly, this clause is essentially “burden shifting,” making it the defense’s responsibility to prove that the person was not intoxicated.⁴⁶

III. Disharmony Between D.C. DUI Law and Its Intended Policy

The policy driving the overbroad discretionary strictness of the D.C. DUI Statute is the “zero-tolerance” mindset of law enforcement.⁴⁷ Originally, the D.C. DUI Statute did not contain any language regarding the presumption of non-intoxication if a breath score below 0.05 percent was produced. In fact, D.C. police authorities proactively enforced their idea of a “zero-tolerance” DUI policy by arresting anyone with a blood-alcohol content of 0.01 percent and above.⁴⁸ Additionally, officers would even arrest motorists with BACs of 0.00 if they

43 See Bryan Brown, Esquire, Law Office of Bryan Brown, & Thomas Lester, Esquire, Law Office of Thomas Lester, *Handling DUI Cases in DC*, Continuing Legal Education class powerpoint presentation, at slide 15 (Sept. 10, 2013) (on file with author).

44 D.C. CODE § 50-1905(b) (2013) (“If a person under arrest refuses to submit to specimens for chemical testing as provided in §50-1904.02(a), and the person has had a conviction for a prior offense under §50-2206.11, §50-2206.12, or §50-2206.14, there shall be a rebuttable presumption that the person is under the influence of alcohol or a drug or any combination thereof.”).

45 See *id.*

46 See *id.*

47 See Hanson, *supra* note 8.

48 *Id.* (“If you get behind the wheel of a car with any measurable amount of alcohol, you will be dealt with in DC. We have zero tolerance . . . Anything above .01, we can arrest.”).



admitted to having a drink earlier in the evening.⁴⁹ In one famous instance, a forty-five year old lawyer was handcuffed, searched, arrested, put in a jail cell, and charged with DUI after she admitted to police officers that she had one glass of chardonnay wine with dinner producing a breath score of just 0.03.⁵⁰ Shortly after the case of the “chardonnay lady,” as some people familiar with her story have referred to her, the D.C. Council amended the D.C. DUI Statute to include a clause declaring that a person is presumed not intoxicated when he or she produces a breath score below 0.05 percent.⁵¹

Despite the intentions to relax the extremely stringent “zero-tolerance” policy, the actual practices of law enforcement have not seemed to change. Motorists with breath scores below 0.05 percent and well below the “legal limit” of 0.08 are being arrested and charged with DUI. DUI attorneys in the District are retaining clients who have been charged under the DUI statute after producing breath scores as low as 0.017 percent,⁵² and even 0.00.⁵³ Clearly, the “zero-tolerance” policy held by officers in the field remains strong, despite the Act’s attempt to create a more reasonable law. Additionally, the government continues to prosecute these cases, hinging its hope on the idea that judges will convict based on their biases against drunk drivers.

IV. Defenses for the DUI Disaster

DUI defense attorneys dealing with cases in which their clients have been charged with DUI after producing breath scores below

(and above) 0.08 have several defenses available to them.

A. Statutory Interpretation

First, defense attorneys can look to the very language used in the statute to define the standards that should be applied by the court. “Impaired,” for example, is defined as “a person’s ability to operate or be in physical control of a vehicle is affected, due to consumption of alcohol or a drug or a combination thereof, in a way that can be perceived or noticed.”⁵⁴ Defense attorneys can thus argue that the required standard of proof has changed; specifically, that a direct correlation must be shown between the person’s intoxication and his inability to operate a vehicle in order to prove that the motorist was ‘impaired.’ Essentially, the defense should ask for a new jury instruction that clarifies this standard of proof to the triers of fact when it is a jury trial case.

B. Knowing the Law Better than the Adversary

Next, defense attorneys will often find portions of the Act buried in the statute that law enforcement ignores, and then can use this knowledge against the government at trial. D.C. Code § 50-2206.52(b), for instance, states that “[a]ny person upon whom a breath specimen is collected shall be informed, in writing, of the provisions of §50-2206.52 and §50-2206.52(a) at the time that the person is charged.” However, this requirement is not always met. Another issue defense attorneys can stress is the new foundational requirements prescribed in §50-2206.52, allowing defense attorneys to expand the materials included in their *Rosser* requests.⁵⁵

49 *Id.* (“The DC’s Attorney General says that it’s legal for drivers to be arrested for DUI (driving under the influence of alcohol) with ‘no registered BAC.’ Indeed, DC police do arrest people with 0.00 BAC if they admit to having had a single drink with dinner.”).

50 *Id.*

51 See D.C. CODE § 50-2206.51(a)(1) (2013); Telephone interview with Bryan Brown, *supra* note 7 (discussing the details of this highly talked about case and noting its significance in the evolution of D.C. DUI law) (notes on file with author).

52 Case received by D.C. criminal defense attorney David Benowitz.

53 Case on file with author (confidential).

54 D.C. CODE § 50-2206.01(8) (2013).

55 Pursuant to *Rosser v. United States*, 281 A.2d 598 (D.C. 1977), defense attorneys memorialize their discovery requests in a letter, asking for more information from the government, including any evidence deemed exculpatory under *Maryland v. Brady*, 373 U.S. 73 (1963).



Moreover, §50-1904,⁵⁶ §5-1501.06(h)(3),⁵⁷ and §5-1501.07⁵⁸ allow defense attorneys access to extensive records. It is vital that defense attorneys proactively ask for these specific items and hold the government to its obligations under the Act.

With these items at their fingertips, defense attorneys can begin to build defenses based on faulty machinery, incorrectly administered tests—sometimes conducted by uncertified officers, or incorrectly calibrated breathalyzer machines.⁵⁹ If defense attorneys become knowledgeable enough on what the stringent requirements are and can point out faults, they will likely be successful in suppressing breath scores. One example is that the United States Park Police require a twenty-minute observation period prior to administering a breath test; without fulfilling this requirement, the breath scores are not valid.⁶⁰ The government would

56 D.C. CODE §50-1904 (2013) (“Full information concerning the chemical test results administered in this chapter, including records as provided in §5-1501.06(h)(3), shall be made available to the person from whom specimens were obtained pursuant to Rule 16 of the District of Columbia Superior Court Rules of Criminal Procedure.”).

57 D.C. CODE §5-1501.06(h)(3) (2011) entitles the defense to collect records of: lab notes and bench notes; worksheets, graphs, and charts; photographs; raw data; reports; statistical information used to calculate probabilities and uncertainty; any logs related to the equipment materials used in testing; any written communications or records of oral communications regarding a specific individual case between the department and any other agency or between the department and any person not employed by the department; proficiency test results for individual examiners involved in the analysis.

58 D.C. CODE §5-1501.07(b)(1)-(3) (2013) (“In addition to the requirements under subsection (a) of this section, the Department shall: (1) Develop a program for District law enforcement personnel to become trained and certified as a breath test instrument operator; (2) Develop policies and procedures for the operation and maintenance of all breath test instruments utilized by District law enforcement personnel; and (3) Develop policies and procedures for maintenance of records demonstrating that the breath test instruments utilized by District law enforcement personnel are in proper operating condition.”).

59 Defense attorneys should look for machine error, breathing pattern error, core body temperature error, hematocrit error, partition ratio error, mouth alcohol error, and extrapolation error.

60 See United States Park Police Traffic Safety Unit

then have to prove its case solely on SFST results and other observations mentioned by the testifying officers. In addition, if the prosecution fails to provide any of these requested documents, or fails to respond to a video preservation request, a defense attorney may move to dismiss the entire case.

C. Learn the NHTSA SFST Manual

Under the D.C. DUI Statute, defense attorneys are entitled to all of the manuals used by law enforcement. Accordingly, one of the most effective defenses becomes the defense attorney’s ability to learn the manual better than the officers, providing for an extremely thorough cross-examination that adversely affects officer credibility. In the manual, for instance, officers are taught word-for-word (literally in quotations) what they are to say while administering the SFSTs. What defense attorneys will often be able to successfully point out, however, is that the officers have not memorized these directions. The most effective way to display this lack of memorization in open court is to ask the officer to recite the directions as the manual prescribes. In doing so, defense attorneys will be able to point out the errors made during the officer’s administration of the SFSTs, thereby discounting the alleged results produced by the SFSTs when the tests were conducted.⁶¹ Even more compelling, once the officers have performed the SFST directions incorrectly in court, defense attorneys can then argue that the particular officer would not have passed his course, and is therefore unqualified to testify as an expert witness.

Further, even if the SFSTs were administered correctly, defense attorneys will want to

Intoximeter EC/IR II Operator Manual, at 11 (“To eliminate the possibility of mouth alcohol contaminating a breath sample, United States Park Police’s breath test procedures require the safeguard of a 20 minute observation period.”).

61 For example, prior to administering the SFSTs, officers should be asking whether the motorist has had any injuries, accidents, or inner ear issues. Additionally, defense attorneys will want to point out the positive information detailed in the officer’s reports, the errors documented in the paperwork, and the omitted details the officer is trained to document.



point out the lack of credibility of the tests, as well as alternative explanations for the results. For instance, the motorist may have been suffering from a pathological disorder, from dry-eyes, or from an injury hindering his ability to balance correctly. Moreover, external factors such as wind, traffic, light, and dust may play a role in the reliability of the SFST results.

Finally, in building a successful DUI defense especially for those cases in which the government relies heavily upon the officer's observational testimony pointing out the overbroad "indicators" in the officers' manual for DUI detection is very effective. For instance, according to the officers' manual, the most common and reliable initial indicators of DUI include almost all traffic offenses.⁶² As such, defense attorneys will want to point out that these traffic violations are extremely common and are committed by sober drivers on a daily basis. Then, defense attorneys will want to discount the government's contention that the defendant was unable to "divide his attention" by pointing out factors such as the motorist's ability to operate a manual vehicle, requiring divided attention to shift gears while operating a clutch.

V. Diminishing the D.C. DUI Debacle

Ultimately, the only way to solve the current overzealous prosecution problem is to create enough awareness to initiate change. D.C. Council members should work toward revising the D.C. DUI Statute and amending the Act to be less overbroad and vague. Clearer definitions and narrower standards for determining the point of impairment are necessary to shield innocent drivers from being prosecuted for DUI. Moreover, local law enforcement authorities should create better training programs for identifying intoxicated persons and relax their "zero-tolerance" policy, as was intended by the

⁶² Specifically, turning with a wide radius, weaving, turning abruptly or illegally, stopping inappropriately, accelerating/decelerating rapidly, swerving, following too closely, driving too fast, driving too slow, or braking erratically. See 2006 NHTSA SFST Manual, *supra* note 19, §§ V-4 - V-6 (listing the "visual cue descriptions" to look for when pulling a motorist over for a DUI potential stop).

Act. Motorists with blood-alcohol contents below 0.05 percent should not be prosecuted for DUI unless a suspicion of drugs exists, that is then proven with chemical testing. Additionally, a higher standard should be implemented when prosecuting motorists for DUI who have produced breath scores between 0.05 and 0.07 percent.

The bottom line is that changes must take place, and that further reform of the current D.C. DUI Statute must be initiated. If the current practices of DUI law continue, many will begin to fear driving, even while sober; if such fear has not already set in. In the meantime, the strongest defense against the problem is zealous representation provided by DUI defense attorneys who can use preparation and perseverance to defeat erroneous DUI charges against innocent motorists in the District.

About the AUTHOR



MONIKA MASTELLONE, a Senior Staffer on WCL's *Criminal Law Practitioner*, an Article's Editor for the *American University Business Law Review*, and a member of WCL's Criminal Law Society, has dedicated her law school experiences to the specific field of criminal law.

During her time in law school, she has interned for the Maryland Office of the Public Defender, the D.C. Public Defender Service, a Maryland Circuit Court Judge, and is presently working as a law clerk at a private criminal defense office in downtown D.C., where she has learned invaluable information regarding D.C. DUI law. Special thanks to her supervisors and mentors, Thomas A. Key and Bryan Brown. In the spring of 2014, Monika will work as a student defense attorney at the WCL Criminal Justice Clinic. Before law school, Monika graduated from The College of New Jersey with a B.S. in Business.