

# Drunk Driving: Beyond the Basics



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In every drunk driving (DUI) case, the prosecution and defense are concerned with five basic components of the case:

1. Can the prosecution establish the requisite reasonable suspicion to stop the suspect's vehicle;
2. Can the prosecution prove the suspect's operation of the vehicle;
3. Can the prosecution demonstrate the necessary probable cause to arrest the suspect;
4. Can the prosecution prove the suspect was under the influence of intoxicating liquor and/or drugs to a degree that rendered him/her incapable of safely operating the vehicle; and
5. Can the prosecution prove compliance with R.I. Gen. Laws 31-27-3 (the suspect's right to an independent physical examination by a physician of his/her own choosing)?<sup>1</sup>

As a result of extensive police officer training at the state and municipal level and the emphasis placed on the apprehension and prosecution of suspected drunk drivers, the successful defense of DUI cases needs to move beyond the basic case components. This article focuses on recent Rhode Island Superior Court cases prosecutors and defense attorneys should consider when handling a DUI case.

## **I. PBT Refusal Precludes Subsequent Chemical Tests**

In *State v. Cote*,<sup>2</sup> a suspected drunk driver was stopped by the Jamestown Police and refused the Officer's request that she submit to a preliminary breath test (PBT). However, at the Jamestown Police station, the suspect did submit to a breathalyzer test at the request of the Officer which resulted in readings of .127 and .125 blood alcohol content (BAC).

In granting the defendant's motion to suppress the breathalyzer test results, the Court, relying on *State v. DiStefano*,<sup>3</sup> held the following: Even if a law enforcement officer is armed with a search warrant, the *DiStefano* holding mandates that no test shall be given to any suspect refusing a chemical test. Upon such refusal, the "plain and unambiguous" language, "none shall be given... becomes

operative" and precludes further testing. *DiStefano*, 764 A.2d at 1163. Thus, Defendant Cote's refusal extinguished the right of the officer to request and/or administer any further tests. The officer did have the right to cite the Defendant's refusal and subject her to the penalties of § 31-4.1-4, but the officer did not opt to do this.

Accordingly, Defendant Kathryn Cote's Motion to Suppress the breathalyzer results is granted.<sup>4</sup>

So, in accordance with the *Cote* decision, if a suspected drunk driver refuses to submit to a preliminary breath test on the side of the road the arresting Officer may not request the suspect to submit to a breathalyzer test at the station or the results of that breathalyzer test will be suppressed.

## **II. Lack of Release**

In a DUI case, the prosecution has the burden of proving a suspected drunk driver was advised of his/her right to be examined at his/her own expense immediately after his/her arrest by a physician selected by the suspected drunk driver. This is why the Rights for Use at Scene card is read to the suspected drunk driver at the time of his/her arrest and why the Rights card is entered as a state's exhibit at trial.

Rhode Island General Law 31-27-3 states the following:

### **Right of person charged with operating under influence to physical examination.**

A person arrested and charged with operating a motor vehicle while under the influence of narcotic drugs or intoxicating liquor, whatever its alcoholic content, shall have the right to be examined at his or her own expense immediately after the person's arrest by a physician selected by the person, and the officer so arresting or so charging the person shall immediately inform the person of this right and afford the person a reasonable opportunity to exercise the right, and at the trial of the person the prosecution must prove that he or she was so informed and was afforded that opportunity.

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Constitution, R.I. Gen. Laws 12-13-1 and Rule 46(a) of the Superior and District Court Rules of Criminal Procedure state that a Defendant shall be admitted to bail before conviction in most cases. To facilitate a Defendant's timely release on bail, R.I. Gen. Laws 12-10-2(a)(1) states in pertinent part "[t]he chief judge of the district court shall from time to time appoint,... as many justices of the peace as he or she may deem necessary, who shall be authorized to set and take bail in all complaintsailable before a division of the district court..."<sup>5</sup>

In *State v. Lemieux*,<sup>6</sup> a suspected drunk driver was stopped and arrested by the Portsmouth Police at 11:47 p.m. At the station, the suspect indicated his desire to go home, but was informed by the Officer "that no call would be made to a justice of the peace unless and until \$200 cash was in '[the police department's] hands.'"<sup>7</sup> The *Lemieux* Court held, "[i]t can not be gainsaid that the purpose of G.L. § 12-10-2(d) is to provide an arrestee with the opportunity to be released on bail when taken into custody during times when court is not in session. Clearly, this Defendant was not afforded his statutory and constitutional right to have an opportunity to secure his release."<sup>8</sup> Furthermore, the Court held that "[a]bsent prompt and timely release, a Defendant's invocation of his right to a medical examination per G.L. § 31-27-3 is hollow 'because of the fleeting nature of the evidence that might be obtained as a result of the medical examination....' *Comm. v. King*, 429 Mass. 169, 176 (1999). The timeline of the events (and absence of events) in the instant case clearly establishes that the Defendant was deprived of his right under this statute as well."<sup>9</sup> In granting the defendant's motion to suppress, the Court held that as a result of the violation of the defendant's constitutional and statutory rights the proper remedy is the suppression of the breathalyzer test results.<sup>10</sup>

Although not addressed in *Lemieux*, the lack of a timely release of a suspected drunk driver, who has submitted to the breathalyzer test, also triggers the defendant's rights pursuant to R.I. Gen. Laws 31-27-2(c)(6) which states:

[t]he person arrested and charged with operating a motor vehicle while under the influence of intoxicating liquor,... was afforded the opportunity to have an additional chemical test. The officer arresting or so charging the person shall have informed the person of this

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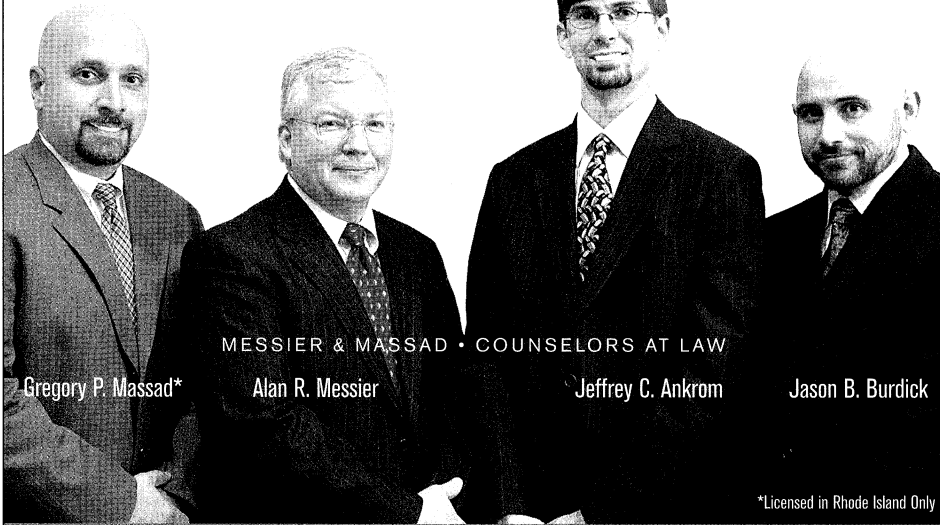
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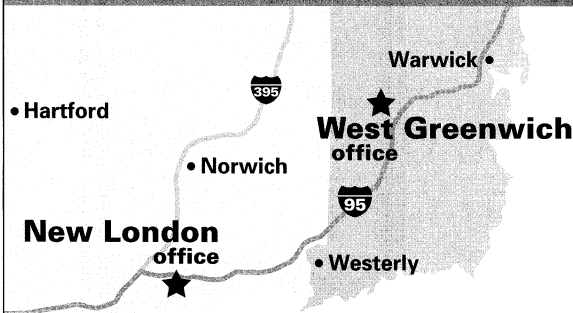
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right and afforded him or her a reasonable opportunity to exercise this right, and a notation to this effect is made in the official records of the case in the police department. Refusal to permit an additional chemical test shall render incompetent and inadmissible in evidence the original report.

Therefore, in any DUI case, it would benefit the state's case to ensure strict compliance with a suspected drunk driver's right to bail, right to an independent physical examination and right to an independent chemical test or the state's best evidence of intoxicated driving, the breathalyzer test results, may be suppressed.

### III. Standardized Field Sobriety Tests

The results of Standardized Field Sobriety Tests (SFST), in connection with other circumstantial evidence of intoxication such as a suspect's erratic driving and the indicia of alcohol, generally provide an arresting officer with sufficient probable cause to arrest a suspect for drunk driving. The National Highway Traffic Safety Administration (NHTSA) has developed SFSTs consisting of the Horizontal Gaze Nystagmus (HGN) test, the Walk and Turn test, and the One Leg Stand test. According to the NHTSA the validity of the SFST applies only when: "the tests are administered in the prescribed, standardized manner; the standardized clues are used to assess the suspect's performance; [and] the standardized criteria are employed to interpret that performance. If any one of the standardized field sobriety test elements is changed, the validity is compromised."<sup>11</sup>

In *State v. Scalisi*,<sup>12</sup> the Court held that "[t]he State bears the burden of establishing that the three above-described tests [HGN, Walk and Turn and One Leg Stand tests] were administered properly in order for them to be cloaked in reliability. The credible and unequivocal testimony at trial reveals a trio of deviations from the standardized test protocol which yielded unreliable results. The infirmities in the administration of the tests to the Defendant and the conclusions of the officer based upon the unsound results can not constitute any just or lawful evidentiary basis for a finding of guilt. As proof beyond a reasonable doubt is lacking, the Court enters a verdict of not guilty."<sup>13</sup>

The defendant in the *Scalisi* case had been involved in a motor vehicle accident with another vehicle in the town of

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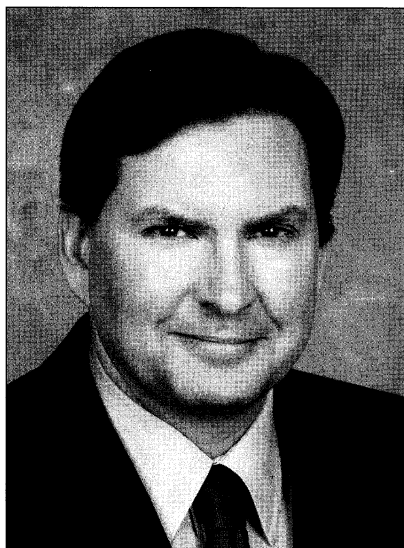
Middletown. The responding officer noticed certain indicia of alcohol including: an aroma of alcohol, slurred speech, and bloodshot eyes. The officer then administered the three standardized field sobriety tests. At trial, the officer "agreed that 'any deviation from NHTSA's instructions compromise the validity of the results of the test.'"<sup>14</sup> The Scalisi Court held that the deviations in the standardized testing protocols rendered the field sobriety tests results inadmissible and the absence of other sufficient evidence of intoxicated driving resulted in the dismissal of the DUI charge.

### Conclusion

The Superior Court's holdings in *Cote*, *Lemieux* and *Scalisi* are of great significance because these decisions address fundamental DUI case issues including: the admissibility of breathalyzer test results; the admissibility of standardized field sobriety test results; and a suspect's right to a release in a timely fashion to exercise his/her statutory and constitutional rights. Due to the significance of these decisions and their potential effect upon the prosecution and defense of all DUI cases within the state, it is likely these decisions will be appealed to the Rhode Island Supreme Court. Hopefully, this review of these three recent Superior Court decisions will assist practitioners involved in this ever-evolving area of the law.<sup>15</sup>

### ENDNOTES

- 1 See, *DEFENDING A DWI CASE, RHODE ISLAND BAR ASSOCIATION, Kenneth R. Tremblay, Esquire*, No.: 93-17 (1993).
- 2 *State v. Cote*, C.A. No.: N3/08-0120A (R.I. Super. 2009).
- 3 *State v. DiStefano*, 764 A.2d 1156 (R.I. 2000).
- 4 *Cote* at 2.
- 5 R.I. GEN. LAWS 12-10-2(a)(1).
- 6 *State v. Lemieux*, C.A. No.: N3/07-0126A (R.I. Super. 2008).
- 7 *Lemieux* at 1.
- 8 *Id.* at 3.
- 9 *Id.*
- 10 *Id.* at 4.
- 11 NHTSA, *DWI Detection and Standardized Field Sobriety Testing Student Manual* at VIII-3.
- 12 *State v. Scalisi*, C.A. No.: N3/07-0180A (R.I. Super. 2009).
- 13 *Scalisi* at 3. (citations omitted)
- 14 *Id.* at 2.
- 15 The author expresses his deep appreciation for the assistance of Kathleen Child and Jodi Van Sprang in the preparation of this article. ❖



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