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MUMBLING, FUMBLING, STUMBLING AND BUMBLING TO AN ACQUITTAL

By JOHN A. TARANTINO
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Once a defense attorney has tried more than a handful of drunk driving cases, he or she will notice something truly remarkable: the physical symptoms observed by the arresting officer follow specific and set patterns, and each of those patterns is designed for one purpose -- to point to guilt. Police departments not only condone these patterns of guilt, they actually encourage them through the use of pre-printed report forms which set out in checklist form the very symptoms – or the parade of horribles – that the officer is supposed (or at least expected) to observe. Query then: If the symptoms are so "common," then isn't the officer being conditioned to encounter them, because in simple terms he or she expects to observe them? After all, they are on the official form!

This is not the only problem: In other cases – and as I am certain many of you have experienced – some officers simply lie and include symptoms of alleged intoxication because without them, there would be little or no probable cause for an arrest.

The usual list of "bad" symptoms is certainly not exhaustive, but there are a number that appear with such frequency as to be almost laughable, were it not for the fact that our clients are charged with a criminal offense; and these otherwise laughable symptoms are often the basis for not only probable cause, but ultimately the officer's opinion on intoxication. They include:

- Thick and slurred speech, or alternatively incoherent speech, or mumbled speech;
- Fumbling for a license and/or registration;
- Stumbling and staggering when exiting the vehicle;
- Bloodshot, watery or glassy eyes;
- The odor of "alcohol" on the breath;
- A flushed or reddened face;
- Disheveled clothing and unkempt appearance; and
- Dilated pupils and/or slow pupil reaction to light.

Lack of Bladder Voiding as a Defense in DUI/DWI Cases

By Ronnie M. Cole, C. William Hinnant, Jr. MD, Karl Brandt and David Sweeney

Picture what appears to be a normal DUI/DWI stop. The arresting officer allegedly sees a vehicle weaving, and after following some distance, activates the blue lights at which time the Defendant pulls over. The Officer smells an odor of alcoholic beverage and asks the Defendant to perform a series of field sobriety tests, after which the Defendant is arrested and taken to the police station for a breath test and reads 0.17. The defense attorney prepares the case in the normal fashion giving notice of representation, filing of motions and his or her jurisdiction and requests a bench or jury trial.

The defense attorney has prepared an excellent defense and cross examination of the arresting officer and breath test operator, yet he or she still loses the case.

Is there any factor not relied upon by the defense attorney to negate the alcohol concentration reading of 0.17 on the breath test instrument?

Let's using the following scenario. Suppose the Defendant has left the lounge he was visiting at 10:30 p.m. and was stopped at 11:00 p.m. by the officer. After the investigation and sobriety tests given by the officer, the Defendant is placed under arrest at 11:20 p.m. and placed in the patrol car. At 11:55 p.m. a wrecker comes to the scene to tow the vehicle, and at 12:00 midnight, the arresting officer radios "I'm 10-67 one time." (which means in South Carolina that he is taking one subject to jail)

At 12:20 a.m. the arresting officer arrives at the police department and at 12:30 a.m. enters the breath test room to start the 20 minute observation period. At 12:55 a.m. the test is starting and at 1:00 a.m., the Defendant reads 0.17. That is two and a half hours (2.5 hrs) from the time the defendant left the lounge and two hours (2 hrs) from the time of his initial stop by the police officer.

In that time, the Defendant has never asked to use a restroom to urinate and has not voided on himself. (Something we have all seen happen in DUI cases)

Breath tests can emit false readings, but one cannot indefinitely control his or her bladder's ability to store urine in the absence of some physiological abnormality of urinary production or excretion.

Innovative defense attorneys have used lack of bladder elimination as a defense for some time, however, most attorneys fail to ever address this issue, much less formulate a defense by using it at trial. Physiologically, alcohol acts as a diuretic by suppressing the pituitary gland's secretion of antidiuretic hormone (ADH). The defendant's alleged alcohol consumption will also by necessity increase his body's free water content thus requiring filtration and excretion by is kidneys. These two factors attribute to the frequent trips to the restroom recognized by most individuals who consume any significant amount of alcohol.

The authors' study was designed using twelve (12) subjects, male and female, different body weights with some consuming food and some not consuming food prior to the testing. All subjects were alcohol free prior to the start of the test. They were given known quantities of alcohol at known times and tested at various times using three (3) BAC DataMasters®. All machines were calibrated prior to testing and diagnostic tests were performed prior to the start of taking the tests. A twenty (20) minute observation period was observed prior to each test. Subjects were asked not to void their bladder until it became unreasonably uncomfortable. Each subject was given a beaker that measured the quantity of urination.

As you can see in Table 1, the subjects' highest BA levels range from 0.06 to 0.22. It is important to notice the difference between subject #11 who had a BAC reading of 0.06 and subject #2 & #3 who read 0.22. The subjects with the higher BAC levels had more voids then those with the lower BAC lev-

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Table

SUBJECT	1	2	3	4	5	6	7	8	9	10	11	12
HIGHEST BAC READING	0.12	0.22	0.22	0.14	0.08	0.15	0.13	0.12	0.12	0.10	0.06	0.11
MIN. B/T VOID	50	50	45	45	55	50	58	57	100	55	61	75
	40	30	50	45	46	41	37	33	55	80	40	65
	35	35	55	40	52	49		50	60			
	70	60	75	35					40			
	50	35	40									
	25	45	40									
		40										
AVG. MIN	45	42.14	50.83	41.25	51	46.66	47.5	46.66	63.75	67.5	50.5	70
SUBJECT TOT. VOIDS	7	8	7	5	4	4	3	4	5	3	3	3

STUDY MIN.	2194
STUDY VOIDS	44*
AVERAGE MIN. B/T VOIDS	49.863

*Only 44 voids were taken into account because the first void was an initial void that established the reference point.

els. During the approximately six (6) hour study, subject #11 only voided three (3) times, whereas subject #2 voided eight (8) times. After the completion of the study, which involved drinking, breath testing and urinating, the average time between voids calculated from the initial void was 49.863 minutes. This result of 49.863 minutes is far shorter than the 2.5 hours in which our Defendant was not able to void in the scenario referred to above.

Table 2.

Table 2 shows a brief summary that takes the subjects' BAC range into account and averages the number of voids in each desired range as well as the average number of minutes between voids within that specific range group. According to our findings, an increase in the subject's BAC reading, increases the average number of voids and decreases the average number of minutes between each void. Table 2 data demonstrates that the average number of voids is inversely proportional to the average minutes between each void.

SUBJECT BAC RANGE	AVG. NUMBER OF VOIDS	AVG. NUMBER OF MIN B/T VOID
< 0.10	2.3	56
0.10-0.14	3.5	51
>0.15	5	46

How is the defense formulated? Everyone knows that consuming liquids requires urination. That is an undisputed medical fact. How then is it possible for a subject to read 0.17 and not void for 2.5 hours? Our research finds that it is not possible in our cohort of otherwise healthy individuals. A creative prosecutor might challenge a defendant's general kidney function, which might be affected by chronic illness such as diabetes, heart failure or hypertension. Another potential challenge to our defense would be a failure of the defendant's bladder to empty or store urine normally as seen in individuals with prostatic disease, pelvic malignancies, and neurological diseases of the bladder or women suffering from pelvic prolapse. These potential arguments can be rebutted by introduction of medical records or expert testimony.

If an otherwise healthy defendant has not voided in a period of 2.5 hours, how can he or she have a blood alcohol reading of 0.17? The argument to be made by the defense is that failure to void is conclusive proof that the breath test result may be erroneous. The machine may err, but the body in an otherwise healthy defendant cannot.

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Karl Brandt- *Mr. Brandt has over 44 years experience in analytical chemistry. He received his BS degree in Science from Clemson University in 1955, and then he received his MS in Science from the University of Tennessee at Knoxville in 1956. He taught short courses for the American chemical Society, the University of Wisconsin and Lafayette College. He received advanced training in infrared spectroscopy from Brooklyn Polytechnical Institute. He has attended numerous intensive training courses in BrAC measurement and field Sobriety tests culminating with the Indiana State University course headed by Dr. Bjorkenstein in May of 1996. Mr. Brandt has consulted for National Patent Analytical Systems on technical aspects of the Datamaster infrared breathanalyzer. He has done research and taught courses on the application of the Datamaster to the measure of blood/breath alcohol content.*

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