

I N S I D E T H E M I N D S

Navigating DUI Drug Cases

*Leading Lawyers on Understanding
Recent Trends in DUIs and Developing Effective
Defense Strategies*



ASPATORE

©2012 Thomson Reuters/Aspatore

All rights reserved. Printed in the United States of America.

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors nor the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

For customer service inquiries, please e-mail West.customer.service@thomson.com.

If you are interested in purchasing the book this chapter was originally included in, please visit www.west.thomson.com.

Knowledge Is Power:
Learn to Discern the
Difference Between Good and
Bad Science in DUID Cases

Rhidian D.W. Orr

Owner

The Orr Law Firm, L.L.C.



ASPATORE

Introduction

The trends in driving under the influence of drugs have come to the forefront of our nation's discussions over the past few years. It is important for every attorney who is representing someone charged with a drug-related driving case to gain as much knowledge and training as possible in drug recognition and the actual methods used in testing for the suspected substances. It is also vital to be aware of the pharmacological effect each suspected substance has on the human body. This chapter will scratch the surface of topics and issues dealing with the techniques used by the state and the evaluation process used on people accused of being impaired by drugs.

Drug DUI Cases: New Challenges for Defense Attorneys

The challenge lies in the fact that most lawyers and law enforcement officers are accustomed to alcohol-related DUI stops. Most officers have been trained to identify or recognize what they perceive as alcohol-related impairment clues or cues to determine whether the driver is under the influence. The clues are observed and identified through the performance of standardized field sobriety tests. Very few officers are trained as drug recognition evaluators (DRE). DREs are given different types of names such as "expert, evaluator, technician;" in this chapter, they will be referred to as evaluators. DREs are trained to identify the differences in clues between those impaired by drugs versus alcohol. DREs are supposed to eliminate alcohol as the cause of impairment and attempt to identify the type of drug(s) that may be causing the alleged impairment, however, there are no independent peer-reviewed studies that validate assumptions made within the DRE process or that validate the tests being administered. The tests used within the DRE process are nothing more than pseudo-science that have no factual scientific evidence to support the conclusion related to identifying drug impairment.

Legal Drugs and Impairment

There is no question that Schedule 1 and 2 narcotics, along with marijuana, in impairing levels are a major concern when a person is driving a car. The concern is when those drugs have been prescribed by medical professionals

and are being taken in the correct dosages and, as such, are not impairing a person's ability to operate a motor vehicle that we begin to question the process and the overwhelming number of false allegations and accusations. There are a significant number of Americans who take medications and prescriptions to assist them in sleeping, anxiety or depression, weight loss, mental illness, and hundreds of other valid medical reasons. The concern is that the presence of these drugs in their system could be interpreted as causing impairment and may give the officer false signs that the person is driving under the influence of drugs due to their outward manifestations and appearance. Medications are prescribed to make us feel "normal." We go to the doctor when we don't feel good, right, or normal. I would argue that driving when we don't feel well or normal causes one to be more impaired compared to when someone drives on prescription medications that make them feel as they should feel. Some people are able to drive better because they are "at a medicated level of certain drugs." In these cases, the medications have created a safer driver to the public, which should be encouraged not criminalized.

The Shortfalls of DRE Education

In my opinion, the DRE process is pseudo-science at best because the government has not run any scientific studies to prove the assertion of the DRE program and the tests being administered. In no other area would we accept something that has so little verifiable evidence to support its analysis and conclusions, yet we use these tests every day to convict people of driving under the influence. If you are trained in both alcohol and drug impairment studies, you know what officers presume to see. For example, if Officer Jones has been trained to look for the signs of impairment under DRE training, but is not applying it correctly, what he thinks that he sees may actually give him a false positive interpretation of a person's symptoms. One of the shortcomings in our enforcement of driving under the influence of drugs is that the officers have not been trained to differentiate between medicated or impaired people. Another major downfall of the DRE program is that we are asking police officers after a week of DRE training to make a medical diagnosis that most doctors would not feel comfortable giving without more information, more tests, and more research.

The simple fact is that no one in this country wants impaired or substantially incapable drivers on the road, whether their impairment is caused by drugs or alcohol. The problem is that it is no longer about safety, but rather money and political pressure. The state continues to arrest, charge, and convict innocent people because of the stigma behind drunk drivers, political pressures, poor training, and pseudo-science.

The focus for defense attorneys in DUID cases is to ascertain what evidence has been collected and what evidence has not been collected. With that information, the attorney can determine if the officer's observations, assumptions, and allegations are consistent with the facts and the alleged level of impairment. Make no mistake about it, DUID cases are on the rise, and the number of people being falsely accused continues to grow. Defense attorneys need to understand what signs of impairment should exist based on different types of medications, what levels of those medications actually cause impairment, and how to defend against the DRE, SFSTs, and positive blood tests.

Marijuana and DUI Drug Cases

In Colorado, and specifically in Denver, medical marijuana has become a centerpiece of drug-related DUI cases. The substance has the ability to do wonderful things for people in pain. Compared to other medical solutions to pain there are minimal side effects; people choose marijuana because it is natural and effective tool for pain management. Denver and Colorado state laws have changed, but the federal government has not changed; it has taken a blind-eye approach and has chosen to not enforce the law rather than change it. Colorado now allows you to see a medical doctor and get a medical marijuana license, if you qualify. While the use of the drug has become more open, I do not believe that there are more people smoking marijuana and driving under the influence due to the change in the law. The one thing that has changed is that officers are now looking for people under the influence of cannabis more often on traffic stops. When they pull a person over and smell marijuana (burnt or fresh) in the car, it is more likely than not that person is going to get arrested. Just because a person has smoked marijuana does not mean they are under the influence of the active components of the drug. There are active and inactive metabolites that result from smoking marijuana. The difference between Delta 9, Delta 9-

CO, and Delta 9-COOH, are very different. Inactive metabolites will not impair a person's ability to drive but will be found in a person's system for days if not weeks after introduction to the body. Consuming marijuana introduces the chemicals into your system, once in your system your body instantly starts to metabolize the drug. The human body starts to break down the THC and as this process occurs, the chemicals become inert in your system and the effect of the drug becomes less prevalent.

Metabolized THC and Challenges of Detection

A person may smoke marijuana with a legal prescription and ten hours later, have 100 nanograms of Delta 9 COOH in their system. If you do not understand how the substance is metabolized in a person's system, you may think that he is high or impaired by the drug simply based on the presence within the blood stream. In fact, the person should have only the inactive metabolite in their system. If the police use a urine or assay test and the individual tests positive for marijuana, the state has in the past proceeded with prosecuting that individual, even though the presence of the drug in the urine could only prove consumption, not impairment. What is in the urine has already passed through the body and is no longer in the blood stream, thus cannot be causing impairment. One of the more recent changes in Colorado is that the state's toxicologists have said that urine is a bad indicator of impairment for the reasons stated above. Urine is a historic view of what was in the human body and only indicates consumption. By the time everything gets into the bladder for excretion, it has passed through the blood and brain and cannot be causing any benefits, side effects, or impairment. A urine test shows that an individual has had THC in their system. In fact, you are getting the result from a reservoir of historical information. This is a useful testing tool for someone on probation who is not supposed to smoke or consume marijuana, but when you are being accused of a driving under the influence, it is impossible to discern whether the person was impaired at the time he was driving strictly by a urine test.

Currently, Colorado is attempting to create a per se limit for THC. The phrase "per se" is derived from Latin meaning "in itself," legally it is applied in this situation to say that if a person has a legal limit of a that is enough "in itself" to say they were impaired by the substance. The state then does

not need to prove that you are actually under the influence or impaired, but rather that you were “over the legal limit.” This would assume that any person over a specified limit of active THC is considered impaired by the mere presence of THC within their blood. There is no current per se limit for any drugs, marijuana included, and dozens of studies show that different scientists do not agree about where that limit should be set as there are too many variables that can determine impairment on an individual basis.

THC and Blood Testing

The current THC testing system that Colorado is using is the enzyme immunoassay (EIA). This test determines if the blood has the metabolites of the substance they suspect is causing impairment. If the presence of THC is then detected, the state moves forward with more testing. Depending on the type of chemical the state is seeking to qualify and quantify, they will use either gas chromatography mass spectrometry (GC-MS) or liquid chromatography mass spectrometry (LC-MS). This type of testing differs from the standard gas chromatography flame ionization detection (GC-FID) used in alcohol cases. In Colorado, we tend to see the (GC-MS) being used for cases involving allegations of impairment due to marijuana, but if other drugs are involved there can be a combination of (GC-MS, GC-FID, and LC-MS). The liquid chromatography is used to determine what molecules are present in the blood and, if there is Delta 9, how many ng/100ml is present. The state’s experts have been quoted as saying any presence of Delta 9 shows impairment, while others assert that five to seven nanograms indicates impairment. The simple fact is that we do not know how much of the substance impairs different individuals. How much you ingest, how long since you ingested, the quality of what is being ingested, all play roles into determining impairment. Six ng/100ml may impair you, but not even slightly impair the person who has been ingesting daily for five years. The state is leaning toward trying to put a five nanogram per se law into effect, which means if you have five nanograms of THC in your system, you will be presumed impaired. This is painting with a broad brush, because if someone is on chemotherapy treatment and needs to ingest marijuana twice a day for pain management, it would mean that the individual could be targeted for DUID even if they are not impaired, even to the slightest degree simply by the presence of THC in

their system. For example, I had a client who is a veteran whose service to our country created some very severe physical and mental issues. The pain he was dealing with was described as nearly unbearable; he did not want to take these medications or prescriptions, but it was his only way to get through the day. His medical team decided that marijuana was the least intrusive of the pain killers. He was authorized to carry a medical marijuana card, and his use of the medication enabled him to live a relatively normal life. His regular use of the drug has given him an increased tolerance to its effects. The same nanograms would not affect this client as it would someone who was a recreational user. An arbitrary per se law would cause this individual to make a choice: never drive again or stop taking his prescribed medicine and live the rest of his life in excruciating pain.

The Questionable Use of Non-Validated, Non-Scientific Detection

Law enforcement is trying to put together a program to determine if roadside maneuvers can determine impairment of driving under the influence of drugs. Law enforcement should take a scientific approach and have NHTSA put together a study, after which it takes the study to non-associated scientists for peer review. The issue with standardized field sobriety tests and the drug recognition evaluation programs is that they are not scientific. There is little to no empirical research. As a result, we are accusing people every day of being under the influence by the use of techniques and tests that are non-validated, non-scientific methods. Hundreds of thousands of Americans are being arrested based on these standardized field tests (SFSTs) and DRE “experts.” It would be appropriate to apply some of the funds acquired through DUI enforcement to develop a fund for non-associated, unbiased scientists to develop a scientific, accurate, and precise series of tests that are replicable, and that produce reliable data in determining if SFSTs can accurately determine impairment.

Green Tongues, Bad Tests, and Erroneous Results

Some of the tests used are bad science. For example, one of the clues taught in DRE training is that a green tongue may indicate impairment from marijuana. Because marijuana is legalized to a degree in Colorado, I

have asked a number of people who smoke marijuana if they have ever seen a green tongue. Many will reply, “Only when I have eaten a green Jolly Rancher candy.” Much of the DRE training is built on perceptions of what officers have seen. There is no scientific method or test for a green tongue. Another example is blistering of the tongue as an indication that people have smoked crack or marijuana. Blistering proves that heat was present, but it can be a cigar, cigarette, or regular pipe rather than an indicator of illegal drug use or impairment.

Science and Drug-Related DUI Cases

There is a lot of accurate science and pseudo-science in drug-related DUI cases. This area of defense requires attorneys to learn, train, and understand the effects of drugs and medication on the human body. For example, you can learn what causes a person’s pupils to dilate and what does not. Attorneys can learn what the true indicators of impairment are from specific types of substances. I get to talk to and work with some of the best experts in the country, and I believe that any attorney who is dealing with DREs and drug cases needs to surround themselves with the best scientific talent available. As lawyers, we are generally very good at what we do, and most of us strive to become better. Adding the talent of an expert can assist the attorney in gaining a higher level of understanding these scientific issues quicker and more concisely. A competent expert will explain a complex concept so the attorney can explain it to a jury, in common terms.

Unintended Effects: The Proliferation of Anti-Depressants and Other Legal Drugs

Our nation is becoming prolific users of anti-depressant drugs. Antidepressants have become a necessity for many people. Antidepressants are supposed to make us feel normal. The antidepressant labels warn that people should not mix medications or take more than is prescribed. Clients who are taking these medications need to talk to their doctors about how long they need to wait before operating a vehicle. We have seen an increase in people being arrested just after telling the officer they are on an antidepressant medication. In many cases, the levels of these drugs in their system prove not to be at a level that would cause impairment.

High Blood Pressure and Sleep Aids Issues

People who take antidepressants to get out of bed in the morning and drive to work may not realize that they are putting themselves in harm's way, nor do they realize that their actions and consumption of these medications expose themselves to investigation for DUID. In addition, many other daily medications can cause problems with DUID. High blood pressure medicine can cause signs of impairment that may not be true impairment. They may just be signs of high blood pressure!

Sleep aids are one of the most terrifying drugs we see in DUID cases. These drugs assist with heavy sleep, but there have been cases where these drugs have produced unintended tragic results. In Colorado, there have been cases where a person has a glass or two of wine at dinner, takes his sleep aid before bed, and at 5:30 a.m. is in handcuffs in a different jurisdiction or has wrapped his car around a tree. There are other cases where a person is arrested for weaving all over the road and has no recollection of driving or where they were going in the first place. We can all agree that someone who is driving erratically and then runs into a tree should not be on the road. We have had cases where a person took a legal sleep aid, went to sleep, got up, ate a meal, drank more wine, and went for a drive for no reason and has no memory of any of these actions. In one case, an individual got up and decided to go see a friend who had passed away years before. The experts will tell you that individuals have no idea what they are doing during the night when they are on these drugs. Some will get up in the middle of the night and make a full meal, clean it up, and go back to bed—in fact, one woman reported gaining thirty pounds after beginning to take a common sleep aid. On the other hand, how do you blame someone for driving when they do not even remember getting in the car—and the reason is not drunkenness, but a substance that alters their memory such that they cannot even control them or recall their actions?

We have noticed over the past few years an increase in involuntary intoxication cases. We have had a few people seeking representation after being out dancing and waking up in the morning in a detoxification center or jail. Their stories are always very similar. They had a drink, sometimes not even alcohol, and they leave it unattended when they go out on the dance floor. Things go black half an hour later and they end up in an accident or

with some sort of police contact. These cases are incredibly difficult to defend without a blood test that can be retest for substances, such as sedative, hypnotic, dissociative, Rohypnol, GHB, and/or other amnesiac.

The Paths to Arrest for Drug-Related DUIs

The most common path to arrest is when a person is pulled over by a law enforcement officer. The officer sees or smells something, or sees a bottle or container and starts asking questions. The stop may have started because the car had a license plate light out or a simple moving violation. Most DUI cases result from traffic stops that have nothing to do with bad driving. Once the officer stops the vehicle, the officer smells cannabis or asks the person if they have had any alcohol or taken any drugs tonight. The person admits to taking their medications or smoking a “bowl” earlier in the day and the officer starts to investigate for a DUID. If the officer sees a container of prescription pills, they have been known to jump to the conclusion that the individual is under the influence of a narcotic. Everything the officer does after that initial observation is viewed through that lens of suspicion and is used to support his pre-determined conclusion that you are impaired or under the influence of drugs.

DRE Evaluations of Impairment and Probable Substances

(The following list is a simplified outline of the DRE process)

DRE evaluation is based on a 12-step process:

1. Breath alcohol testing;
2. Interview by the arresting officer;
3. Preliminary examination;
4. Eye examination;
5. Divided attention tests;
6. Vital signs;
7. Dark room examination;
8. Muscle tone assessment;
9. Injection site assessment;
10. Interrogation of subject;
11. Opinion of the evaluator; and
12. Toxicology results.

The DRE also tests and evaluates the subject's pupil reaction to light, their pulse rate, blood pressure, body temperature, muscle tone, and a litany of other general indicators that again have no scientific basis to support driving impairment.

Horizontal gaze nystagmus (HGN) is best described as the involuntary jerking of the eyes when moving a stimulus across the line of sight at a specified distance without any other optical distractions. Vertical nystagmus (VGN) is the involuntary jerking of the eyes when moving a stimulus up and down in the line of sight at a specified distance without any other optical distractions. Lack of convergence of the eyes is determined when an object is drawn in toward the subject's nose and their eyes do not track inward. The suspect's pupil size is compared to a wheel chart (round disk that has different pupil sizes displayed). The officer is to determine which circle matches closest to the subject's pupil size. The pupil's reaction to light is determined by the officer depriving the subject of light and reintroducing light by turning on the lights or by flashlight. The officer is to subjectively determine whether the reaction was, slow, or normal. The officer is to take the subject's pulse and determine if it is down or up. Using a blood pressure cuff, the officer is supposed to take the subject's blood pressure and determine if it is up or down. Using a thermometer, the officer is to take the subject's body temperature and determine if temperature is normal, up, or down. The officer is to make an opinion if the subject's muscle tone is flaccid, rigid, or normal, regardless of the subject's age or physical conditioning.

Some of the major issues with the above testing is that the accused is under the stress and pressures of being arrested. The officer has no baseline to compare his current subjective observation, and after release, there is no secondary evaluation of these signs to determine accuracy. If you tested everyone in your office on the above, everyone would have different results because we are all unique and our bodies function differently. It would not determine if they impaired.

Weaknesses in the DRE Protocol

Two other problematic steps in the DRE protocol are the officers questioning about drug usage. The officer asks in Step 2 what drug the

individual is on, which is somewhat contradictory to the premise that DRE training enables an officer to discern what drugs are affecting a person. If the officer asks what drug the individual is on, it eliminates the non-biased scientific evaluation of the subject's impairment. If the person tells the officer that he is on a drug, regardless of how the rest of the conversation goes, the person will be viewed as someone on that type of drug. I am not being critical of the law enforcement officer, but it is simply human nature. If you tell someone to ignore the elephant in the room, the person will not be able to ignore the elephant. In Step 10, the officer then re-interrogates the subject to determine what drugs they are on for a second time just prior to Step 11. Step 11 is when the officer makes his determination of what drugs are impairing the accused.

Deficiencies in the State's Blood Testing Procedures

A blood test is the next stage on which the state relies to prove impairment. I have a client who is on a litany of medication prescribed by his doctors. They have determined he needs to be on these medications to bring him to a normal functioning state. The doctors who prescribe the medications have twenty to thirty years of education and training. The fact that the person has a certain level of a prescription medication in his blood stream does not mean that he is impaired when driving. One needs to know a full history of the person and the use of the medications. This would allow the evaluator insight into any tolerance to the medicine, what side effects the medicine has, if any, and whether the alleged indicia of impairment are due to the medications or some other medical reason.

Key Factors Affecting Case Strategy for Drug DUI

Marijuana is the most prevalent drug in Colorado, followed by antidepressants, sleep aids, and schedule 1 and 2 drugs such as cocaine. However, the specific drug has a material impact on how you structure your defense strategy.

If a drug shows up with which our firm is not familiar, we call all of the pharmacological experts we can to ask about the effects of that substance on the human body. We discuss symptoms, similarity, or differences to other drugs, masking characteristics of the substance, and physical

manifestations (pupil size) associated with use of the drug. The state's manual may contain general guidelines, but the experts in this field can provide a more accurate assessment of the real effects.

Knowledge is the Best Defense

We need as much information as possible, and our naïve hope is that the government agrees. Nobody wants to see an innocent person behind bars. Just because someone is taking a drug, it does not mean that they are guilty of driving under the influence. It is no different for alcohol. Mere consumption of a drink or a drug does not automatically cause impairment. Therefore, we need all of the physical information available. Defense attorneys need to understand the technology being used to test samples and reported results. They need to understand the inherent limitations of this equipment and how human error can cause the results to be falsely reported or manipulated. Some of the readings can provide a specific molecular amount of a chemical in the system. As a defense attorney, you must learn as much as you can about the drug by talking to experts. Over the years we have gathered a list of experts in most areas of pharmacology and medical testing. The best way to find an expert is to call fellow attorneys who can give you the most appropriate person to start interviewing. Our job as attorneys is to focus on being great at the law and defending our clients, and with so many new developments in the medical and scientific fields, it is difficult to keep up. This is why having active and strong relationships with scientists, pharmacologists, and medical professionals are important.

Issues Due to Lack of Safe Harbor Laws

Colorado has made it illegal to sleep in your car if you are impaired to the slightest degree if you have the ability to put that vehicle into motion. A client goes to the pharmacist and is told that they should not drive until they know how a new drug affects them. The client takes the narcotic. The narcotic reaches their stomach and sits there but it does not break down and enter the blood stream for a few hours. He starts to drive and goes to the grocery store, and as he is walking around and he suddenly feels like a Mack truck hit him. The client goes out to his car and puts his keys in the ignition, as he can't sit down or lay down to rest anywhere else. He is in the seat and listening to music, maybe with the heat or air conditioning on and

his intent is to wait it out or sleep it off until he feels better. An officer comes over to the car and informs him that someone saw him stagger out to his car and get in or that someone called because he appeared to be passed out in his car in the parking lot. He then is arrested for driving under the influence. Colorado does not have a Safe Harbor law that says that if you feel that you are impaired, you should not drive. Ohio has case law that allows a person to sleep it off in their car so long as the keys are not in the ignition. I believe that every state should adapt a Safe Harbor law to allow people to do the right thing, without fear of accusation or prosecution.

Lack of Full Disclosure of Impairment Levels

Colorado does publicize that its blood alcohol level for impairment is .05 instead of the .08 that is more common in other states. The tourist from out of state who comes to Colorado to go skiing and figures he can have three beers and be within the limit usually finds out the hard way that this is not true. The person is trying to stay within the law as he knows it, but he will still be prosecuted in Colorado for DWAI.

The state is trying to apply a per se limit on what constitutes impairment for marijuana. It does not matter whether you feel impaired or whether the state can even prove impairment. If your blood shows five nanograms of THC, you are presumed impaired. It has not been determined whether the proposed per se law will have a rebuttable presumption or not. As a result, innocent people face the potential loss of their job and their license due to ignorance and differing laws from state to state. These people suffer the stigma of a life-changing event because they were not aware of the law and we did not make an effort to let them know.

Learning the Science and Protocols Leads to Better Defense

Justin McShane and Josh Lee are two of the best DUI attorneys in the country and have put together training that enables defense attorneys and others to train at Axion Labs in Chicago under Dr. Polite and Dr. McNair on gas chromatography and how blood is tested. This enables the attorney to understand how blood is tested, the errors that can occur, how test results can be manipulated, and how to know if the state followed the

proper testing procedures in order to obtain a valid and reliable result. It would be nice to be able to rely on the fact that what the state is doing is accurate and correct in all cases, but the reality is that when dealing with our government, many issues arise in testing proficiencies. This can open the door to the use of some bad science to accuse a person of a crime. Often, corners are cut due to financial concerns and poor training. Therefore, it is the duty of the defense bar to become as knowledgeable about this information as possible.

If you asked me seven years ago what I knew about blood work, I would have told you that I knew a lot. Sadly, I actually knew very little. Regardless of your knowledge level or what you think you know, you have to surround yourself with colleagues, experts, and professionals who will help you understand the technology, pharmacology, and science behind the state's test. Understand that we are all working toward the same goal and the best attorneys I know are willing to admit they don't know everything and ask for help.

Disproving Drug Test Results

Recently, a young woman came in to my office accused of impairment from marijuana. She was facing loss of her college scholarship at a very prestigious school. Her scholarship had a clause that forbade any recipients from receiving a DUI as part of a morals clause. The state said it had a good case and that her blood sample was positive for marijuana. They even reported this to the school and school administrators. She did not have any active metabolites in her system. She might have been around people smoking marijuana and she might have smoked some days before, but she was not impaired when she was stopped. The steps we took to disprove the state's case saved her future because the levels in her blood were not sufficient to convict her. In fact, she had no active levels in her blood, but the officer and the DA still thought that was irrelevant and she must have been impaired. Only through our knowledge of DUID cases, the science behind the test, and what relevant scientific literature said regarding active and inactive THC, were we able to convince the district attorney to do the right thing and dismiss the case.

The Financial Imperative for DUI Charges

Nobody wants drunk drivers or impaired drivers on the roads with our wives, kids, and families, but in my opinion, DUI has become more of a money maker for the state than a safety issue. In Colorado, you will receive a letter from the Department of Revenue informing you that you are being charged with DUI and that your license is being revoked. The Department of Motor Vehicles is under the Department of Revenue in Colorado.

In Colorado, more than 30,000 people annually are accused of DUI. Obviously, some of those people are guilty and should be yanked off the road—some for a very long time. However, the state does not tell people what the legal limits are, and does not help people with practical prevention. A Florida-based company named duistopped.us is trying to put together a practical prevention system across the county. The site provides drivers and parents with practical ways to stop themselves and their children from drinking and driving, and to find safe ways to get home if they are impaired. I think that our state needs to find more ways to help with prevention of DUI rather than the punitive, revenue-generating side of enforcement, after the fact.

In our firm, if you are on your second or third offense, we work hard to get you into a treatment program that allows a person to re-evaluate their relationship with alcohol and drugs. If our society was more focused on prevention than on the punitive side, we would all be safer and better served.

Building a Successful Drug-Related DUI Defense Strategy

We start with the police report and the client's full written account of the event. We want to know what happened that night, where they were, how much sleep they had the night before, medical conditions, and other information about the client. If the client is a sixty-five year old Vietnam veteran with more medical problems than you can fit into a nine-inch thick chart, it is significant. Likewise, if your client is a sixteen-year-old girl who was hanging out with some friends, that is an important difference. It is important to get your clients to open up and share as much information as possible so that all avenues of defense can be explored. Make sure you understand your client, their habits, and the events surrounding the alleged offense.

Learn about Your Client and You May be Surprised

The Trial Lawyers College and the National College for DUI Defense suggest that you get to know your clients as though they are members of your family. Conduct an interview, sit down and talk to them, and you will find out things about who they are. The client may open up and tell you things that an individual would not normally tell his attorney. Getting on a personal level with a client enables you and your entire team to serve that client far better than an impersonal approach.

A client arrived in our office showing signs of drug impairment. She was not following our conversation, and I could not get her to focus. I thought that she had attention deficit issues or she was possibly “high.” After a long conversation and sitting down with our team, we decided that she was showing symptoms of Asperger’s syndrome. The officer who had contacted her must have assumed the signs he was seeing were due to her being high, rather than a medical condition. Generalities do not work in DUI or DUID cases, and our legal system requires proof beyond a reasonable doubt.

Acquiring Information to Explain Anomalies

The next step is getting all the information from the state. This is more than the district attorney’s office, and includes the Department of Health and Public Environment and any organization that may have information and physical evidence about your client. You must acquire the certifications of all of the officers’ trainings, including DUI, SFST, and DRE.

The defense bar has an obligation to educate those with whom we work in the legal system. We may have to explain gas chromatography to a judge, a district attorney, even a state’s expert, or call in an expert to ensure that everyone in the court has an appropriate and accurate understanding of the technology. In drug cases, experts are often necessary to explain anomalies. The officer on the side of the road only has to have reasonable suspicion to contact and probable cause to put an individual into the court system. However, we need to understand what it was that he saw that made him believe there was probable cause. We also need to avail ourselves of the training to make sure we can teach what we know to our jury members.

Finding experts and talking to colleagues is critically important. You will find that they are very open to collaborating and reviewing a case, or talking about a case. When you get into the scientific areas, you will find that the professionals there are very helpful. Members of the American Chemical Society are often willing to answer a quick question—but be prepared to spend some time because the individual will have to explain the answer to you. Regardless of the facts of your case, good science is good science, and procedures are either scientifically proven or they are not, there is no in between.

Client Re-Enactment Yields Ideas for Case Strategy

One of the most effective techniques for developing case strategy is to re-enact what happened the night of the arrest. The person is an individual, and may be a professional, and it is important to get to know them on that level. The more knowledge that you have about the person and their situation in a drug case, the better you are able to explain what the officer thinks he saw. We had a case in which the officer claimed that my client had six out of six clues for the HGN test, which matched everything that he put in the police report. However, I recalled that the client had told me he was going to the optometrist to get his glass eye checked. It is impossible for a glass eye to track the officer's finger, and yet the results of the HGN test and the police report said that it did. If you do not spend the time with the client and get to know them well, you will never uncover the little nuggets of truth that can result in acquittal.

Stay current on DUI defense strategy by reading books by experts and participating on listservs. There are strategies and tactics that you may not have tried, and the fact is that if you are not talking to your colleagues and peers, you are missing things that could help your client. It is amazing what you can glean from reading someone else's question. Another lawyer may interpret something in a different way that can be helpful to your client.

Sources of Information about the Incident

The information that you need to defend your client is available from the state, arresting agency, or via subpoena from the Colorado Department of Health and Environment. Unfortunately, what the state believes is enough

to prosecute is never truly enough to defend your client. For example, many people consider blood testing to be the most accurate testing in the world. In fact, the test has a litany of potential flaws. If the test is not administered or performed correctly, you can end up with bad science and inaccurate results. The more knowledgeable you are about the science behind the testing, the more apt you are to sense that something is not quite right with the state's case. You are doing a greater service to your client when you are well-trained and know the technical details. You may never be the top toxicologist in the country, but you will be comfortable asking scientists for their opinions and advice.

Countering the State's Case

Refuting Scientific Evidence

When you are attempting to counter scientific evidence, you must demonstrate that the state did not take due care to ensure that lab practices, test protocols, and other guidelines were followed carefully. You must also explain the ramifications of these shortcomings and how not following these rules creates bad science and compromises the validity of the results, thus rendering the result scientifically unreliable. The defense does not have to necessarily prove the test is wrong. The prosecution has to demonstrate that it was done in a scientifically valid manner with a scientifically valid result.

Countering the Officer's Account

Everyone looks at the incident through the lenses that they wear. Officers have been trained to get drunk or high drivers off the road. If they suspect that a person is high, then they will take them off the road. The best way to counter the officer's observations is to know your client. For some people, bloodshot and watery eyes, bags under the eyes, and having skin less rigid than normal can all be signs of impairment. For others, it can be explained as normal and common for them. For example, a friend of mine told me recently that if he does not have his cup of coffee on the way to work, he is driving impaired. That is funny, but it raises a question: if your body is used to having caffeine by 6 a.m., and on a particular morning, it does not, would

you act completely “normal?” Ultimately, a logical explanation to the jury will achieve the desired result.

Challenges for DUI Defense Clients and Lawyers

Millions of dollars are spent vilifying drinking and driving. I am not promoting impaired or substantially impaired driving under any circumstance, but we give away free samples of some sleep aids and free anti-anxiety medicines and promote people getting to a normal state. However, when you accuse someone of drug-induced DUI, he is vilified. In the public’s eye, they have done something akin to shooting a gun in a movie theater and hoping not to hit someone. Many people think that if someone has been drinking or doing drugs, then they are guilty. Just because someone has had a beer or two, or ingested marijuana earlier in the day, does not mean that they are under the influence when they are driving. There is a campaign that says, “Drink and Drive. Go to Jail.” I am waiting for the “Take Your Anti-anxiety Medication. Drive. Go to Jail” campaign. The first hurdle to clear is helping the public understand that a substance, whether it is acquired and consumed legally or not may show signs of impairment even if they are not impaired.

Another challenge in Colorado is that we do not get enough time to explain to a jury the science behind the SFSTs, DRE, and the testing procedures. How can we ask the jury to make a determination beyond a reasonable doubt on whether someone committed an offense if we don’t give them with the science and knowledge behind the evidence being used to convict this person? Good science does not pick sides. If the state were willing to use the most accurate scientific methods available, there would be far fewer problems with drug and alcohol DUI prosecutions.

Conclusion

I would like to believe that we use scientifically reliable evidence and procedures to accuse and convict people of DUI. Unfortunately, we will likely see prosecution continue in the least expensive manner possible and with a “close enough for me” mentality. DRE, which uses evaluators testifying to non-validated information, will result in people being accused of life-changing crimes. Many people will not deserve that fate because the

manner in which the state brings charges and presents evidence against them is fundamentally flawed. The state doesn't care about accuracy and reliability; it cares about getting the most convictions for the least amount of money.

The more information you can gather, the better off you are. Whether you acquire the knowledge through a CLE, The National College for DUI defense, colleagues, or experts, you should try to learn as much as you can. The scientific community is open to making things as scientifically valid as possible. Everyone is busy, but you will be surprised at how willing people are to help provide answers. However, when you get into the science of DUI, some of the "facts" that the state puts forward will simply not pass the "sniff test." You will be able to explain why certain observations made by the officer or the DRE are suspect or incorrect. Learning the science is not easy, and there is a lot of it, but once you have the knowledge you will open a whole new realm of law to your practice and new approaches to defending clients.

Key Takeaways

- Surround yourself with the best talent available. Adding an expert can increase your talent level quickly.
- Recognize your weaknesses and hire people whose strengths offset those weaknesses
- Cultivate relationships with other attorneys who can answer your questions about the scientific aspects of a case.
- Help clients change their lives. If they are repeat offenders, help them find an effective treatment program. Prevention through facing the problem works better over the long term than punitive actions.
- Take the time to get to know your client as if they are a member of your family. This in-depth understanding can yield details that will help with your defense.
- Do not accept generalities put forward by the officer, DRE, or prosecutor. They could mask a potential underlying condition that would lead the State to believe that your client was impaired.

Colorado lawyer Rhidian D.W. Orr is the owner of The Orr Law Firm, L.L.C. He is trained under the National Highway Safety Administration guidelines to administer the Standardized Field Sobriety Tests and is trained as an instructor on the tests. Mr. Orr is also trained as a drug recognition evaluator. He is trained on the operation of the Intoxilyzer 5000-EN, the machine used in every Colorado DUI/DWAI/UDD breath case. He is also trained in forensic chromatography, this training allows him to identify and attack issues with blood tests results used in DUI cases.

Mr. Orr is asked on a regular basis to assist other lawyers in finding ways to attack their cases. He has taught at the Sturm College of Law at the University of Denver and at the University of Colorado Law School on the subject of DUI defense. Mr. Orr is also a graduate of Gerry Spence's Trial Lawyers College and Terry MacCarthy's Cross Examination Seminar.

Mr. Orr has been chosen as a Rising Star by Super Lawyers in 2011 and 2012.

Acknowledgment: *I would like to thank my wife, family, and friends for all of their support. I would especially like to thank Nate Becker, Rick Hernandez, and my team at The Orr Law Firm, L.L.C. for their help and dedication in putting this chapter together.*



ASPATORE

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives and partners from the world's most respected companies and law firms. Each publication provides professionals of all levels with proven business and legal intelligence from industry insiders—direct and unfiltered insight from those who know it best. Aspatore Books is committed to publishing an innovative line of business and legal titles that lay forth principles and offer insights that can have a direct financial impact on the reader's business objectives.

Each chapter in the *Inside the Minds* series offers thought leadership and expert analysis on an industry, profession, or topic, providing a future-oriented perspective and proven strategies for success. Each author has been selected based on their experience and C-Level standing within the business and legal communities. *Inside the Minds* was conceived to give a first-hand look into the leading minds of top business executives and lawyers worldwide, presenting an unprecedented collection of views on various industries and professions.



ASPATORE