

Florida Criminal Law *Newsletter*

Florida DUI Breath Testing Under Fire

*Is the Intoxilyzer 5000 about to be
invalidated statewide?*

In a stunning setback for the State of Florida, a County Court Judge in Bay County granted a motion to suppress DUI breath test results on grounds that could have statewide application. On appeal to the Circuit Court, Judge Dee Dee Costello upheld County Court Judge O'Brien's decision holding that the Intoxilyzer 5000 was susceptible to manipulation during the breath test process. The 5000 gives a result within about six seconds, yet law enforcement can manipulate the machine to get higher BAC readings by lengthening the blow time.

For years, state experts have stated that the result is unaffected by the length of time a suspect blows into the machine.

This has been shown to be false.

Recently, at the Blood, Breath and Tears conference an expert demonstrated just how this manipulation occurs with an actual Intoxilyzer 5000. Persons with a known quantity of alcohol blew into the machine for different lengths of time and produced dramatically different readings.

The Intoxilyzer 5000 is also under attack for the many modifications it has undergone over the years. These modifications were not part of the administrative approval process two decades ago, thus the machines are no longer the breath testing instruments that were approved.

Hearings are scheduled in different circuits on these and other issues in Bay and Palm Beach counties.

Florida was supposed to purchase new breath testing instruments this year. However, budget shortfalls have resulted in a statewide system of ancient breath testing equipment that has been extensively modified.

Hearings are scheduled later this year in Palm Beach County and in Bay County on breath test issues.



General Criminal Defense Intake Form

Court Information

- Escambia
 - Santa Rosa
 - Okaloosa
 - Walton
 - Bay
 - Leon
 - Other _____
 - Arraignment Date: _____
-

Classification

- Felony
- Misdemeanor
- Traffic MM
- Traffic Felony
- Juvenile
- VOP/VOCC

Client Objectives

- Diversion program
 - Best Available Settlement
 - Avoid incarceration
 - Alternative to Incarceration
 - Lifestyle Change
 - Inpatient Treatment
 - Outpatient Treatment
 - Charge Reduction
 - Dismissal
 - Avoid Trial
 - Jury Trial NG Verdict
 - Driver's License
 - Avoid having a record
 - Other _____
-

Strategy

- Implied Consent Hearing
- Psychological Evaluation
- Partial Indigency Motion
- MTN to Set Bond
- MTN to Reduce Bond
- MTN to Change bond Conditions
- NC to NVC Statement
- Drop Charge Request Statement
- Walk in/Turn in on Warrant
- Diversion Program Letter (Defendant to supply info)
- Drug Court
- Mental Health Court
- Teen Court
- Obtain Medical Release
- Downward Departure
- Restitution up front
- Statement from Defendant's Witnesses
- Depositions anticipated
- Obtain photos of injury
- Obtain photos of scene
- Obtain photos of property damage
- Hire expert: _____

Miscellaneous

- Non-resident Defendant
- Military member
- Pre-existing Mental Illness
- Date of Arrest: _____
- Substance Abuse present
- DOMV Injunction
- Infractions

Directly Speaking

By Stephen G. Cobb
Editor, FCL Newsletter

The statewide motions being filed against the Intoxilyzer 5000 are an important public service by the criminal defense bar. I believe that the media will ultimately find our profession guilty of “protecting the criminals.’ Yet these motions aren’t for the protection of the guilty, they are for the protection of all of us. DUI, like Domestic Violence and many other crimes, are serious public concerns. Others, such as the prohibition against possessing marijuana for recreation drug use, should be abolished, but I digress.

The main point of directly speaking on the breath testing issue is to merely point out the obvious: The Florida Legislature has once again let the public down and failed to do their job. Their collective idiocy failed to provide adequate funds for election equipment before the divisive 2000 election, and in the DUI arena, they have failed to ensure the public that the breath testing instruments used are fair, accurate, and reliable.

A machine that can be manipulated by the operator is easily subject to the pressure politics of ensuring convictions in order to ensure re-election of certain public officials. Policies get implemented to make it costly,

burdensome and dangerous for wrongly accused people to defend themselves in a bias free court of law.

I saw the pressure politics of the pro-conviction mindset just last week. Again.

Someone came into my office with a BAC well under .08. Did the officer apologize and release the wrongly accused citizen? Of course not. They were carted off to jail without a drug or a blood test, and the State will try to crush a plea out of this individual – at least to a lesser charge – despite the fact this person is innocent. Pro-conviction pressure politics within the State Attorney’s Office will make it difficult for the Assistant handling the file to do the right thing: Dismiss the charges *and* ask the court for the law enforcement agency that made the arrest be ordered to pay restitution for impound fees, lost wages and any other related costs.

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Hot DUI Case

State v. Herring, 10 Fla. L. Weekly Supp. 480: Breath test failed to comply with rules and regulations where defendant was instructed to blow until tone stops, but tone continues until defendant is unable to blow further.

Classified Ads

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