

Chapter 8: Basics of DUI Defense

Note: At the outset of any DUI case carefully check the client's driving record to see how many prior DUI and DUI related charges and convictions are present and then be sure to investigate whether the prior conviction was legally valid. Check also for the presence of vehicular homicide and similar charges / convictions.

I. The Law

A. The Law of DUI in Montana

a. Title 61, Chapter 8, MCA

See also, MCA 61-8-408 (defendant can be charged with, and tried for, both DUI and driving with excessive blood alcohol level but can only be convicted of one or the other.)

B. Significant DUI law in Montana

1. *Hulse v. State of Montana*, 1998 MT 108 (SFST's are a search; particularized suspicion needed to conduct);
2. *State v. Schauf*, 2009 MT 281 (video at scene of arrest is relevant and probative of defendant's level of intoxication);
3. *State vs. Beanblossom*, 2002 MT 351 (defendant can be convicted of DUI on basis of evidence other than breath or blood testing);
4. *State vs. Strizich*, 286 Mont 1, 952 P. 2d 1365 (1997) (results from a PBT test are not substantive evidence of the amount of alcohol in a person's body);
5. *State vs. Damon*, 2005 MT 218, 328 Mont. 276, 119 P.3d 1194 (holding that the State met its burden in this case of establishing the accuracy and reliability of Damon's PBT result in showing that his BAC exceeded the then legal limit of 0.10 when Macquorn Forrester, responsible for research and design of the technology used by the Alco-Sensor III and chairman of the board of Intoximeters, Inc., the company that developed and manufactures the Alco-Sensor III, testified that the instrument's margin of error in the field falls in the ten percent range).

II. DUI Trial Practice

State with a Theme. A theme is nothing more than a sentence or two about why you are trying the case.

Jury Instructions. Build and maintain a library of each and every instruction that is relevant in DUI cases. When you receive the instructions offered by the prosecution in your case, review them carefully. There is a chance that they may offer repetitive instruction or incorrect instructions.

When it comes time to offer your own instructions, be creative!!

Motions in Limine and other pretrial actions. Limit any damaging and prejudicial evidence. Suppress any statements about prior crimes, convictions, and bad acts.

Think about whether your client should consider pleading to the non-moving violation offenses (e.g., no insurance, no license) in order to avoid undue prejudice at trial.

A. **Voir Dire**

1. Introduce yourself and your client.
2. Ask the jury about the various witnesses on both sides that will be testifying
3. Ask the jury if they know the prosecutor or the judge.
4. Ask the jury if any of them know each other.
5. Once you make introductions, it is time to get the jury into your case.
 - a. Remember, your questions should be designed to encourage a conversation about the juror's feelings – ask a few yes or no questions as possible (that's what the general questions are for). Use the juror questionnaire or general questions for the yes or no answers before you begin individual questioning. Most of the following questions will elicit information which will raise more questions. The goal is to educate the jury regarding the theme of your case and to learn about their real feelings on the hot-button issues raised by the evidence, your client and type of crime charged.
 - b. Start a discussion about the juror's feelings that doesn't make the juror feel uncomfortable. The answers will offer openings for talking about the important issue in your case along with reasonable doubt, burden of proof and the critical need to try your client's case on its facts without the influence of our natural concern over crime and the failings of the criminal justice system on the whole.
6. Then ask your Constitutional questions. These can really show bias.
 - a. Presumption of Innocence
 - b. Burden of Proof
 - c. Proof beyond a reasonable doubt
7. Exposing and Dealing with Bias
 - a. Talk about Drinking
 - b. Identify those who do not drink alcohol?
 - c. Discuss attitudes toward drinking and driving.
 - d. Find out if any jurors have ever gone to dinner, had a few drinks and then driven home.
 - e. Identify members of MADD, Maria's Challenge, etc.
 - f. Inquire whether jurors think drinking & driving is a "problem" in Montana.

- g. Who works as a server or bartender in a bar or bar/restaurant?
(Note: These are often good people to have on your jury.)
- 8. Connection to/Experience with Law Enforcement. This question needs to be asked.
- 9. Prior Jury Duty. This is an important question to follow up on.
 - a. Who has served on the jury panel before?
 - b. What kind of case was it?
 - i. Civil?
 - ii. Criminal?
 - iii. If it was a criminal case, ask questions what the charge was? then ask what the verdict was? How that prospective juror voted?
 - iv. If the prospective juror has served on many criminal jury panels, this could be problematic.
- 10. There are other questions, but these are the questions I always ask in DUI trials. You can do these in the order you feel comfortable with.
- 11. Voir dire in a DUI case can be limited to not more than 15 minutes per side. See: *State v. Michand*, 2008 MT 88.

B. Opening Statement. Some attorneys never give openings in DUI cases. Others reserve opening till the prosecution rests. Still others always take the opportunity to speak to the jury at the outset of the case. Reasons for policy vary. Openings can serve a strong instructive purpose. In an opening, you can ask the jury to look for certain things on DUI or surveillance videos. On the other hand, reserving opening allows you to study the prosecution's case and attack it harder once they rest.

For a considered discussion of the "pros" and "cons" of opening statements, please see the OPD Criminal Practice Manual, Part A7.

C. Note Regarding Questions: For every question you propose to ask:

1. Know why you are asking it;
2. Know the answer; and
3. Know the rule that allows you to ask it.

D. Preparing to Cross Examine the Officer in a DUI Case.

1. Prepare, prepare, prepare.
2. Remember "the only three rules of cross examination" as developed by master courtroom lawyers Pozner and Dodd:

- a. Ask only leading questions which suggest a simple yes or no answer ('Isn't it true', 'Wouldn't you agree').
 - b. Introduce only one fact at a time to your questioning sequence.
 - c. Advance the theme of your defense by building a set of chapters.
3. Keep control of the officer from the very beginning by asking easily understood questions and insisting on an answer to the question asked.
 4. Don't allow the officer to answer a yes or no question with a speech.
 5. Corral the officer with foundation questions which inevitably lead to the desired point – then keep him corralled (see sample questions below).
 6. Think ahead – unless he is firmly in the corral, don't ask him the \$64,000 question.
 7. Don't get greedy – when you have enough to argue the point in summation, stop! (That insignificant point can grow to reasonable doubt by the end of the case – if you are sensitive enough to leave it alone.)
 8. Always try to begin and end on a high note.

E. Goals of Cross Examination of the Cop.

In most cases, your goal in cross examining the officer in a DUI case is pretty straight forward:

1. To contrast his list of everything he claims the client did wrong, with your own list of everything the client did right;
2. To reveal inconsistencies in the police report; and
3. To offer reasons for the client's behavior other than that he was drunk

Never accuse the officer of lying . . . even if he is !!!

4. Your goal on cross is to find reasons for doubt even assuming the accuracy of the officer's testimony.

What follows is a "checklist" of sample questions designed to force the officer to concede points in your favor. It sets out a methodical challenge to the basis of the cop's opinion that lays the foundation, brick by brick, for arguing reasonable doubt.

F. DUI Cross Examination Checklist.

1. Deal with the **POLICE REPORT**

Purpose: To get the officer in the corral. You don't want him having miraculous on-the-spot recollections of harmful facts not in the report.

- a. You wrote up a report of the incident immediately afterward
- b. Purpose of the report is to make record of the details

- c. Included everything important
- d. Reviewed prior to trial
- e. Refer to it on direct
- f. Couldn't recall specific facts without it
- g. Don't now recall any significant facts not in the report
- h. Memory certainly better then than now
- i. Have ticketed many people before/since
- j. Have written many reports before/since
- k. Can't name person ticketed before the client
- l. In fact, have sometimes mixed up facts of one case with another

2. Deal with the officer's status as a **PROFESSIONAL WITNESS**

Purpose: To use the officer's experience and confidence against him. Is it fair to compare his polished performance with your nervous clients?

- a. You appear quite comfortable testifying
- b. Have done so many times before
- c. Trained how to testify persuasively at academy
- d. Told to look at jury
- e. How to hold hands, dress, etc.
- f. Lots of practice

3. Deal with the officer's **BIAS**

Purpose: To point out the officer's bias. To establish that his mind was made up from the beginning of the investigation that he is never wrong.

- a. Do you drink
- b. Ever drive after drinking
- c. Agree not inherently safe
- d. No quarrel/legal to drive after drinking
- e. In middle of night – you look for drunk drivers
- f. When first noticed client, thought might be a drunk driver
- g. People often drive [like client did] who have had zero to drink
- h. When smelled intoxicants = increased suspicion
- i. Started looking for signs/symptoms of intoxication
- j. No medical degree
- k. Based “opinion” on observations of that night only
- l. Never testified DUI defendant not under influence
- m. Never testified for a defendant in a DUI case
- n. Concluded that every person arrested for DUI was positively guilty

- o. Have never been wrong

4. Deal with DRIVING ISSUES

Purpose: To establish that the client's driving wasn't inherently dangerous (where applicable) and to list all of the things (s)he did properly.

- a. The officer's driving
 - i. Sped up to catch client
 - ii. How fast did you go
 - iii. No traffic had to swerve or brake
 - iv. Your speed not necessarily dangerous, [then neither was the client's]
- b. Client's driving actions:
 - i. Client's speed constant
 - ii. Lane travel correct
 - iii. Signaled lane changes/turns
 - iv. Responded properly to emergency lights
 - v. Parked safely
 - vi. No problem placing car in park, setting brake, opening window
 - vii. No problem with
 - 1. Understanding your questions
 - 2. Getting wallet out
 - 3. Getting license out
 - 4. Undoing seatbelt
 - 5. Putting wallet away
 - 6. Opening door
 - 7. Stepping out of car
 - 8. Closing door
 - 9. Walking to shoulder
 - viii. Didn't appear unsteady on feet
 - ix. Didn't hold onto the door or car for support
 - x. Did everything you asked /cooperated

5. SETTING FST SCENE

Purpose: to point out the inherent unfairness of field sobriety test and to create a mental image for the jury of true conditions.

- a. Cop's experience with FST's:
 - i. First performed at academy

- ii. Hundreds of times since
 - iii. First time in middle of day
 - iv. In well-lit room
 - v. When well rested
 - vi. Like a 'game'
 - vii. When relaxed – not stressed out
 - viii. No traffic whizzing by
 - ix. No police radio chatter
 - x. Comfortable temperature
 - xi. Comfortable clothing
 - xii. Didn't do as well first time as now
 - xiii. Did better with practice
 - xiv. Middle of your work day
 - xv. Well after defendant's normal bedtime
- b. Setting the scene of client's tests:
- i. Parked your car at an angle behind client's [for safety due to passing cars/trucks]
 - ii. Had client move to shoulder because traffic dangerous
 - iii. How wide was the shoulder
 - iv. Gravel/guard rail at shoulder's edge
 - v. Traffic continued to pass
 - vi. Left emergency lights on
 - vii. Left headlights on/brights
 - viii. Did client face toward or away from traffic (if toward: blinded by headlights – if away: no warning of approaching cars/trucks)
 - ix. Dark/erratic lighting
 - x. Numerous moving shadows [passing headlights]
 - xi. Cold/wind/rain/snow
 - xii. At least some slope [for runoff]
 - xiii. Gravel/debris collects on shoulder
 - xiv. Don't know how long since last swept
 - xv. Onlookers
 - xvi. Chatter from police radio
 - xvii. Distractions from other officers
 - xviii. Buffeting from passing cars/trucks/semis/motor homes
- c. What FST's actually measure:
- i. Intended to measure general balance, coordination, and ability to follow instructions
 - ii. Use same tests for everyone
 - iii. The tests do not vary depending on differences in

1. Age
 2. Physical conditions
 3. Illness
 4. Fatigue
 5. Suitability of the FST site
 6. Ability to handle stress
 7. Whether overweight
 8. Type of shoes
 9. Type of clothing
- d. Most people nervous when stopped
 - e. Normal for people to make physical and mental mistakes when nervous
 - f. Don't know what was going through client's mind during these tests
 - g. No objective way to measure level of nervousness of client
 - h. No way to measure client's ability to handle stress

6. Explain the **INDIVIDUAL TESTS**

Purpose: To point out conditions of FST's from client's point of view and despite unfair conditions, all he did properly.

- a. ABC's
 - i. Client cooperated throughout tests [the point of 'cooperation' is made several times during cross. It shows the client felt he had nothing to hide and respects the law]
 - ii. Didn't ask when client last performed
 - iii. Didn't give client chance to practice
 - iv. Familiar with WSP manual "DWI Enforcement" (page 30) ". . . if the suspect fouls the first try ask him to try again. If the second try is successful, the officer should minimize the value of any error made in the first".
 - v. Didn't give client second chance
 - vi. Did you take notes at the scene
 - vii. Where are those notes now [almost always destroyed]
- b. ONE-LEG STAND (BALANCE)
 - i. Looking for numerous symptoms of intoxication
 - ii. Ability to understand and follow each instruction
 - iii. Ability to maintain balance
 - iv. Client did:
 1. Put heel together

- 2. Hold arms at side
- 3. Tilt head back
- 4. Close eyes
- v. Did not tell client not to sway
- vi. Did not tell him to stop swaying
- vii. Afterward, did not tell him he swayed and let him try again
- viii. Not normal to keep arms at side while balancing, is it?

c. HEEL TO TOE

- i. Looking for numerous symptoms again
- ii. Ability to understand and follow each instruction
- iii. In fact, client [again, list all he did correctly]
- iv. Used “imaginary line”
- v. WSP academy “approved sobriety test” (page 10): “Walk and turn requires a hard, dry, level, non-slipping surface with sufficient room for the suspect to complete nine heel to toe steps. A straight line must be clearly visible on the surface”.
- vi. Some people have difficulty with balance even when they have had nothing to drink
- vii. “People more than 60 years of age, over 50 pounds overweight, or with physical impairments that affect their ability to balance should not be given this test”.
 - 1. What about age 55, but out of shape
 - 2. What about 35 pounds overweight with bad knees/ankles
- viii. Didn’t allow client to practice
- ix. Didn’t note the distance between heel to toe
- x. So to you, ½ “is same as 3”
- xi. Unnatural to do test without raising arms

7. Establish that there is NO BASIS FOR COMPARING CLIENT’S PERFORMANCE

Purpose: to point out that the only value of the test is in comparing the client’s performance with when he has had nothing to drink.

- a. Had never seen client before that night
- b. Had never
 - i. Heard him speak
 - ii. Walk
 - iii. Stand
 - iv. do balance tests

- c. no prior knowledge of client to judge nervousness
- d. no prior knowledge of what's "normal" for client
- e. agree alcohol affects people differently
- f. effect of alcohol can depend on:
 - i. amount of rest person had
 - ii. what person's had to eat
 - iii. individual metabolism
 - iv. tolerance
 - v. drinking habits
 - vi. what a person is drinking
 - vii. over what period of time
 - viii. physical conditioning
 - ix. whether healthy
 - x. whether fighting a cold
 - xi. even the person's "mood" or state of mind
- g. you don't know any of these things about my client
- h. odor doesn't tell how much a person's had to drink
- i. odor doesn't tell you whether a person is affected
- j. many other reasons for watery-bloodshot eyes, [contacts, fatigue, smoke, etc.]
- k. pupils are affected by intoxication: Normally slow to react to light
- l. didn't measure pupil reaction – the one test client would have absolutely no control over
- m. agree people who know client well have the advantage in judging the degree of impairment – at least in comparing the client's behavior when he has had zero to drink.

8. Clarify that there was NO PROBABLE CAUSE UNTIL AFTER TESTS COMPLETED

Purpose: to point out the officer himself had doubts throughout the test sequence.

- a. Must arrest when have "probable cause"
- b. PC means "reasonable grounds"
- c. Didn't arrest after [each field sobriety test]
- d. Didn't arrest 'til the very end'
- e. Still had doubts until very end

9. Discuss MIRANDA

Purpose: To show the client was in full possession of his mental faculties – after all he fully understood complicated legal concepts.

- a. Read Miranda rights to jury
- b. Satisfied client fully understood
- c. Didn't express any confusion
- d. Readily agreed to answer questions
- e. Readily agreed to take breath tests
- f. Fully cooperated/did not request attorney
- g. Client acted like nothing to hide

10. CONCLUDE ON A POSITIVE NOTE

Purpose: to complete the cross examination on a high note and re-emphasize the basis of reasonable doubt, i.e., that the officer's opinion is fallible.

- a. Client cooperative throughout
- b. Didn't note any "unusual actions"
- c. Didn't note any "unusual statements"
- d. Didn't ask client why he hit fog line, etc.
- e. Didn't do follow-up investigation per client's explanation/answers on AIR form
- f. Didn't talk to client's witnesses
- g. Didn't talk to bartender, host of party, doorman, etc.
- h. Based opinion solely on observations of client that night
- i. In fact, client told you that night, just as he has told the jury that he was not under the influence of intoxicants, didn't he?

G. Direct Exam of your Client in a DUI Case.

Ask yourself, do you really need to put your client on the witness stand? Is there anything he or she can say to help themselves out? If not, then don't call them and rest your case. Then argue how little evidence the prosecution has in their case.

Sometimes it is OK to put the client on the stand in a DUI case. It's an opportunity to humanize the client and to show the jurors that the client is a normal human being like they are.

III. Know the Consequences that Flow from a Conviction

- A. Immigration (can't get into Canada)
- B. Loss of commercial driver's license
- C. Escalating penalties associated with subsequent convictions

2011 DUI Revisions

HB 106: Creates a 24/7 Sobriety Project

- Effective October 1, 2011
- Amends 45-7-309, 46-18-201, and 61-5-208,
- Creates a 24/7 Sobriety Program for offenders convicted of a second or subsequent offense of 61-8-401 or 61-8-406.
- The program is not required, but counties can enforce it at their own discretion.
- Program participation may be a condition of bond or pretrial release, as well as a part of a sentence.
- Non-compliance with the program can be charged as contempt of court.

HB 12: Increase Penalties for 61-8-406 and 61-8-401

- Applies to all offenses committed on or after April 20, 2011.
- Amends 61-8-714 and 61-8-722
- Increases the potential jail time for a first offense BAC infraction (61-8-406) to 6 months (previously 10 days). For a second offense, the potential jail time is increased to 1 year (previously 30 days) and for a third offense, the time is also increased to 1 year (previously 6 months).

- Increases the potential jail time for a second offense DUI (61-8-406) to 1 year (previously 6 months)

HB 69: Revise Jail Penalties and Mandatory Minimums for DUI Court Participation

- Applies to all offenses committed on or after April 20, 2011.
- Amends 61-8-714 and 61-8-722
- Encourages DUI Court participation by allowing for the suspension of all jail time, except for the mandatory minimum, to be suspended with participation
- The mandatory minimum jail sentence for all crimes charged under 61-8-401 may not be suspended unless serving the minimum risks the physical or mental well-being of the offender. The mandatory minimum may also not be served on house arrest.
- For a second offense under 61-8-401, the potential jail time is increased to 1 year (this was also done under HB 12).

HB 102: Revise Probationary Driver's License for DUI Court Participation

- Applies to all offenses committed on or after April 8, 2011.
- Amends 61-2-302, 61-5-205, 61-5-208, and 61-8-734
- Participants in DUI Court may receive a probationary license at the court's discretion.
- A person with a second conviction of 61-8-401 or 61-8-406 may not receive a probationary license for the first 45 days of their suspension.
- A person with a third conviction of 61-8-401 or 61-8-406 may not receive a probationary license for the first 90 days of their suspension.
- Chemical dependency programs must be completed before the license is reinstated.

SB 15: Create Misdemeanor Crime of Aggravated DUI

- Applies to all offenses committed on or after April 28, 2011.
- Amends Title 61, Chapter 8,
- Applies if one of the following is true:
 - (1) The driver has a BAC of 0.16 or more,
 - (2) Is suspended or revoked for prior DUI/BAC,
 - (3) Is required to have an ignition device,
 - (4) Refuses testing and has previously refused testing in the past.
 - (5) Has a previous DUI-related conviction in the previous 3 years, or 2 in the previous 7 years.
- Penalty includes a maximum jail sentence of 1 year and a maximum fine of \$1,000.

SB 42: Authorize Warrants to Obtain Blood/Breath in DUI cases

- Applies to all offenses committed on or after April 28, 2011.
- Amends 46-5-224 and Title 61, Chapter 8

- If the arrested person has refused to provide a breath, blood, or urine sample under 61-8-409 or this section in a prior investigation in this state or under a substantially similar statute in another jurisdiction, the officer may apply for a search warrant to be issued to collect a person's blood for testing.
- If the arrested person has a previous conviction for a DUI-related offense, or a similar statute in another jurisdiction, the officer may apply for a search warrant to be issued to collect a person's blood for testing.
- Search warrant to be issued pursuant to 46-5-224.
- Proof of refusal is still admissible in court, even if a sample is obtained.

- A person with a second conviction of 61-8-401 or 61-8-406 may not receive a probationary license for the first 45 days of their suspension.
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