

UNDERMINING THE BREATH TEST: BUILDING THE DISCONNECT DEFENSE

I. Introduction

Many inexperienced DWI lawyers cringe when they see high Intoxilyzer results, for example 0.235, but, the experienced DWI lawyer embraces the high number because it might create a good defense. An exculpatory video performance by a client can create an indisputable conflict between an inculpatory breath test score and a juror's ingrained belief that they can trust their eyes and common sense, e.g. "a disconnect." A high breath alcohol concentration ("BAC") provides the skilled DWI lawyer a logical story to provide your jury with reasonable doubt to carry home and tell their family and friends about the inherent unreliability of the Intoxilyzer. This article is about how to tell the disconnect story from voir dire to closing.

II. Collecting The Corner Stones

The foundation of the Disconnect Defense ("DD") is sobriety evidence. In most cases where the DD is applicable, client's video is exculpatory for the client. An explainable bobble here and there or some erratic driving does not mean that you should throw in the towel where there is a legitimate, common sense explanation. The good lawyer will provide innocent explanations for signs mistakenly noted as indicators of intoxication. This is done by obtaining medical records of foot, leg, back, neck, or head injuries to explain away clues on the Standard Field Sobriety Tests ("SFSTs"). Further, elicit testimony that impeaches the officers comments concerning red eyes caused by intoxication where the evidence shows the client was in a smoked filled room, was a smoker, had allergies, was wearing contacts, or fatigued. Such evidence can be bolstered by receipts for the purchase of eye drops, allergy medication or cigarettes.

Additionally, the well read lawyer knows that drowsy driving is responsible for more accidents than drunk driving. Phone, text messaging, medical records or testimony of sleep deprivation can be used to explain erratic or sloppy driving. Time in the library can also be effective for the lawyer to collect scientific treatises to counter the State's attempt to discredit the DD with the excuse of tolerance.

III. Pouring the Foundation

As learned trial lawyers say: "the case is won or lost in voir dire." Look to juror professions to identify persons who can act as temporary witnesses during voir dire. Use these jurors to further your DD by having them share their own personal experiences which bolster your defense. Pay special attention to engineers, mechanics, machinists, and computer people because they can help you create the DD. As a personal preference, I generally do not like engineers or IT persons on the jury, however, they can be useful for short, powerful pieces of DD information during voir dire. To illustrate, they will admit machines/computers do not work perfectly all the time and that they do break down, freeze, malfunction, and act not as warranted. Remember, the Intoxilyzer is a government bought MACHINE and was probably the low bid device at the time of purchase.

You can highlight Intoxilyzer deficiencies by analogizing it to hypothetical or other measuring devices, i.e. thermometer, Taxalyzer 5000EN¹, Doppler 5000. Whatever machine you invent for jury use, use it to demonstrate the obvious error the machine made when contrasted with what you see, i.e. common sense. For example, the importance of embracing common sense by relating it to a dire consequence of being wrong, i.e. brain surgery if a thermometer reads 110°F, jail time for failing to pay taxes, or a natural disaster. Further, analogize each unreliability example in the breath test machine with your hypothetical machine: 20% acceptable range of error; self checking for accuracy; no warranty for merchantability or accuracy; recalled in multiple states; newer model available; citizen cannot purchase from manufacturer; manufacturer refuses to provide source code; not available for independent scientific testing; destroys the only direct evidence of sobriety/intoxication when the State had the ability to save that evidence; operator has no idea how the machine works; “scientist,” who does, rarely checks it in person; any inconsistencies or strange occurrences found in test records; etc... Begin with the first juror and the first unreliability example and ask how that makes the juror *feel* about the hypothetical machine? “Why would you trust this machine?” or “Why would you submit to this type of testing?” Go through the jurors and expose as many problems as possible as they relate to your machine. Your jury will remember, relate, and recognize the relation of deficiencies common to the hypothetical machine and the Intoxilyzer. Prepare yourself for the State’s improper commitment question objection and be prepared to argue that these examples are to be likened to witnesses who jurors can have pre-existing bias/prejudice, and they will aid you in the exercising of preemptory challenges and the proper framing of challenges for cause based on their answer.²

IV. Framing the Structure

The DD begins by establishing contradictions between the reported and actual reasonable suspicion and probable cause by effectively cross examining each police officer/witness. The State will attempt to establish the requisite loss of mental and/or physical faculties by eliciting testimony to establish that intoxication caused the poor driving and SFST results. Erratic driving can be neutralized through explanations using common driving errors or through the client’s or passenger’s testimony regarding specific reasons for the erratic driving or traffic violation.

Knowing the SFST manual better than the police officer provides the defense lawyer an immeasurable advantage. The skilled lawyer leads the officer and the jury to the conclusion that the validity of each SFST was compromised and/or that the video demonstrates no indication of intoxication. Remember, the State’s own science teaches us that impairment affects mental faculties before physical faculties.³ Build the disconnect stronger by emphasizing the client’s mental faculties, i.e. he was polite, cooperative and coherent through all the testing and contact with the officer. In the end, the accomplished lawyer may be able to lead the officer into admitting that he observed no loss of mental faculties. Henceforth,

¹ Thanks to Doug Murphy of Trichter & Murphy, P.C. for this example.

² See *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim. App. 2001).

³ See Texas Breath Alcohol Testing Program Operator Manual, pg. 44 (2001).

according to the science, any loss of physical faculties cannot be the result of intoxication and must be the result of something normal, i.e. fatigue, inexperience, injury, or nervousness.

Most importantly, establish with each witness that the client did not urinate on themselves and never asked to go to the bathroom. Later, in closing, contrast this testimony with the amount of drinks consumed required to support the Intoxilyzer result, e.g. 0.235 equals 12 beers equals 144 ounces of fluid in the system at the time of the breath test.

By neutralizing the State's evidence concerning loss of mental or physical faculties, the jury is then compelled to decide the intoxication element on the reliability of the Intoxilyzer result. Make the State's case rely solely on the number.

V. Roofing

The Breath Test Operator ("BTO") rarely has any significant exposure with the client; however, their testimony can easily destroy the State's case. Many large metropolitan BTOs usually operate the Intoxilyzer all night, running suspected DWI clients through the intox room like cattle. Some BTOs put personal notes on their reports. Here, remember that these notes are, in effect, small police reports and inadmissible hearsay as per Texas Rule of Evidence 803(8)(b).

The State will attempt to make the BTO look credible. However, enlighten the jury by examining his alcohol and Intoxilyzer experience. As per Texas Rule of Evidence 803(18) establish the *Texas Breath Alcohol Testing Program Operator Manual* is authoritative, so that you can cross examine the BTO with this learned treatise. Ask the BTO about the Intoxilyzer and his knowledge of the inner dynamics of the machine. Most will admit they know very little about Henry's Law, Infrared Spectroscopy, the simulator solution, or checking and maintaining the machine. Establish that the BTO only pushes buttons and the machine checks itself. Here, remember the "self check" function of the Intoxilyzer does not check all of the systems.

Through effective cross examination, the BTO may admit indisputable error regarding the simulator solution temperature and/or the fifteen minute presence period. This may be a ripe area for suppression of a breath test result if the BTO does not accurately remember the temperature requirement. Ask the BTO what the temperature was, what it is required to be, and what the government accepted deviation is of the simulator solution? All you need is one mistake! If you get one, the Technical Supervisor ("TS") must admit the results could be compromised, e.g. if the temperature was off or outside the allowable deviation.⁴

Another suppression area exists for failure to properly adhere to the fifteen minute presence period, e.g. the arresting officer brings the client to the BTO who immediately runs an Intoxilyzer test. Accordingly, be familiar with what the testifying TS considers is acceptable for compliance of "in the presence" requirement, i.e. line of sight, single or multiple officers for the duration, or within hearing range. Ask the BTO where the client was observed? Was there a video? Whose choice was it not to

⁴ See Texas Breath Alcohol Testing Program Operator Manual, pg. 35.

record the observation? Whether the client burped or belched during the period? How would they know if they did? Whether the client put anything in his mouth? And whether he thought it would have been useful for the jury to be able to see all this for themselves? Based on the TS's requirements, try establishing a conflict with the BTO's observation period. If truthful, the TS must admit that a violation in breath test procedure for failure to properly conduct the fifteen minute observation period compromises the validity of the result.⁵ Of course, the trial lawyer couples any violation with Article 38.23 of the Texas Code of Criminal Procedure, which is our statutory exclusionary rule.

VI. Putting Up the Walls

The TS is the State's bought and hired "expert" in the field of breath alcohol testing. Most likely the TS will be recognized by the court as an expert in breath testing, so be prepared to converse in science lay terms for the benefit of the jury. Only the skilled lawyer, with a firm working knowledge of breath testing science, the Intoxilyzer, and possession of multiple studies that are authoritative in the field of breath testing for 803(18) purposes, should cross examine a TS.

Most TSs will acknowledge the following breath testing authorities: Dr. Kurt M. Dubowski, Dr. A.W. Jones, and Professor Dr. E.M.P. Widmark. The prepared DWI defense lawyer will have articles by these noted authorities and be prepared to use them as learned treatises for cross examination. Texas Rules of Evidence 803(18).

With a good video performance or exculpatory testimony that demonstrates little or no loss of normal mental or physical faculties, Dr. Dubowski's table of the Stages of Acute Alcoholic Influence/Intoxication for a high BAC can be used to exemplify the disconnect between the client's faculties and the scientifically expected faculties. For example, Dubowski states a person's characteristics at a 0.235 are: disorientation, mental confusion, dizziness, impaired balance, muscular incoordination, staggering gait, etc.⁶ The TS may disagree and attempt to explain, but Dubowski is far more authoritative than the TS. Remember, being a TS does not automatically equate to being an expert in chemistry, toxicology, physiology, anatomy, pharmacology, etc... Prevent the TS from testifying about tolerance, drug or medication effects, or any medical conditions or injuries by challenging their qualifications using Rules 702 and 703.

Additionally, remember that an Intoxilyzer test administered during the absorption period (14 to 138 minutes) yields an erroneously high result.⁷

⁵ See Texas Breath Alcohol Testing Program Operator Manual, pg. 49 and Texas Administrative Code Section 19.3(a) and (c)(1).

⁶ See Dubowski, Kurt M., *Alcohol Determination if the Clinical Laboratory*, Am. J. Clin. Pathol. 74: 747, 749 (1980).

⁷ See Dubowski, Kurt M., *Absorption, Distribution, and Elimination of Alcohol: Highway Safety Aspects*, J. Stud. Alc. Suppl. No. 10: 98, 99 and 106 (1985); Widmark, E.M.P., *Principles and Applications of Medicolegal Alcohol Determination*, Biomedical Publications, pg 99, Davis, CA (1981).

Another ripe area is that the Intoxilyzer breath specimens are not saved; however, could be. Rather, the State destroys them by failing to preserve them and they are discharged out the back of the machine. There is a device called the “ToxTrap” that can be utilized with the Intoxilyzer to preserve breath specimens.⁸ The TS is the only witness that will know about the ToxTrap and destroying the breath specimen. Compare the destroyed breath specimen to a written statement by a Defendant that the police destroy because it is inconvenient/costly to keep it.

Remember that the jury was primed to distrust the hypothetical machine in voir dire based on certain unreliability issues. Establish each comparative issue with the breath test machine through the TS or the BTO, i.e. the breath test score must come within 0.02 of the first reading, which equals 20% acceptable range of error on either side of the Intoxilyzer score or a 40% swing of acceptable error. Furthermore, subpoena the TS to bring a copy of the Statement of Warranty for that particular machine. This document fails to state the Intoxilyzer is warranted for merchantability or fitness for a particular purpose. As a precaution, bring your copy provided in discovery as well. If the TS refuses to admit the issues, cross examine as a statement rather than a question regarding the other issues, thereby allowing the jury to judge the TS’s credibility.

The State will certainly attempt to explain the high BAC through the TS using tolerance. Object to this testimony. If sustained, you do not need to deal with the issue. Remember, being a TS does not equate to a tolerance expert. However, have a compilation of as many articles on tolerance as possible. Then, cross the TS on exactly which type of tolerance the State is relying upon and ask the difference between the other types of tolerance. Additionally, ask the TS the basis of his knowledge? Flip through the compilation of articles as you inquire, what’s the name of the article? The author? The country of origin? Why would a TS who knew they were testifying on a high BAC case not bring any authorities to support their position? A skilled attorney can use tolerance against the State by making the TS appear uncredible, unprepared and prejudiced.

Lastly, impeach the TS by showing he failed to even watch the video (they rarely do). “So, all of your testimony that my client is highly intoxicated is based solely on that Intoxilyzer score and not on any actual loss of mental or physical faculties?”

VII. Making it Pretty

If the client can afford it, you may consider hiring an expert. Make sure to investigate your expert for possible impeachment statements. Spend time reviewing anticipated testimony, to prevent any damaging testimony. Make sure your expert is familiar and knowledgeable with all the relied upon authority and has viewed all of the evidence, including the video. And lastly, prepare your client before they meet with the expert.

⁸ See Bergh, Arne, *Observations on ToxTrap Silica Gel Breath Capture Tubes for Alcohol Analysis*, J. of Forensic Sciences 30: 186-193 (1985).

VIII. Selling It

Your closing argument should consolidate the many disconnects into a defense and make logical deductions from the evidence. Depending on your personal style, choose a few effective demonstrations to illustrate the indisputable conflict between the tangible evidence (the client's video performance and mug shot) and the high BAC result.

The hypothetical machine discussed in voir dire should be revisited to remind jurors that the breath test machine contains the same unreliabilities. Empower the jury to acknowledge that they wouldn't trust the hypothetical machine and should likewise mistrust the breath test machine.

In closing argument, all demonstrative aids should stimulate attention and present the DD theory concisely and logically. Personally, I like to use a piece of green paper that says no loss of mental faculties, another green piece that says no loss of physical faculties, and a red piece that says "machine X". Remind the jurors that as exclusive judges, they decide which evidence to trust. Crumple up that red piece of paper and throw it in the trash. Additionally, I like to use pictures of ordinary people with written statements involving unrealistic numbers, i.e. skinny person who can bench press 500 pounds, heavy fellow that can run a 4.5 forty-yard dash, or a little cowboy that wears a men's size twelve boots. Similarly, the State is asking the jury to convict based on an outrageous number unsupported by common sense and the tangible, physical evidence: good video, good mug shot, never urinated, no loss of mental or physical faculties. And lastly, don't forget how many alcoholic drinks the TS testified that the client contained in their system at the time of testing. If you can, smuggle in that many beers to demonstrate and conclude the impossibility of actual consumption by the client without urinating. Either the machine is wrong, or the client's body defies the laws of science and common sense.

Each disconnect weaves the defense stronger. Remind the jury of the presumption of innocence and that any doubt in the evidence always reflects Not Guilty. Use the totality of the circumstances against the State by arguing the totality of sober circumstances. These indisputable conflicts create reasonable doubt. Now, the jurors have a constitutional duty to follow the law and find the client Not Guilty. The higher the test, the stronger your defense.⁹

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⁹ Additional thanks to J. Gary Trichter of Trichter & Murphy, P.C. for help in contributing and editing.