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Executive Director's Corner

By Rhea Kirk

What a great year Dean Barry Simons has had, ending with a fantastic Summer Session! Next up for the NCDD will be the NACDL/NCDD Vegas Seminar September 18-20, 2008, so make your plans to attend. We will be staying at Caesar's Palace again this year.

Victor Pellegrino has chosen Atlantis, Paradise Island, Bahamas for our 2009 Winter Session January 15 & 16 and it will be a sunny and warm respite from the cold winter winds! (Actually, I can't imagine being cold right now, but, still…!) Don't forget to get your passports ready and book your room and flight soon!!

On another note, the Board of Regents would like to thank the following people for their generous donation to our Scholarship Fund this year:

Andrew Mishlove, Morgan Hayes, Lloyd Golburgh, David Manilla, Gary Pirosko, Gary Bernstein, Pat Arara, Walter Fey, Justin McShane, Thomas Erker, Willard Hall, Scott Wonder, Hudson Bair, Andy Alpert, John Webb, Steven Horneffer, Joseph Koncilia, Bubba Head, Jerome Roselle

Looking forward to the next time I see you!

Regards,
Rhea

Message from the Dean

By Dean Barry T. Simons

The NCDD continues in its promise to provide the finest continuing legal education and training in DUI Defense to our ever-expanding membership. Our Las Vegas Seminar co-sponsored with NACDL was evaluated as one of the best ever. The Winter Session at the Royal Hawaiian on Waikiki Beach brought the Former Deans of the College (AKA Fellows) together in a special atmosphere to teach, inspire and share their collective wisdom. Masters of Scientific Evidence presented in collaboration with the Texas Criminal Defense Lawyers Association provided cutting edge approaches to the latest scientific issues confronting DUI Defense and a very entertaining and instructional Mock Trial. I am very excited about the upcoming Summer Session at Harvard that is dedicated to the "Art of Persuasion." The presentations and workshops will be interrelated and will stress the importance of "Framing" issues and how to precondition judges and juries to actually hear your defense.

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The true promise of NCDD as a College encompasses more than teaching and training. Colleges and Universities conduct important independent research. This year, the Amicus Committee has continued its public service function and has filed an Amicus Curiae Brief written by Lenny Stamm in support of Certiorari to the U.S. Supreme Court in *O'Maley v. New Hampshire* and is "On Brief" with NACDL as Amicus in *Massachusetts v. Melendez-Diaz* a Crawford confrontation case which is currently pending in the U.S. Supreme Court dealing with admissibility of lab reports.

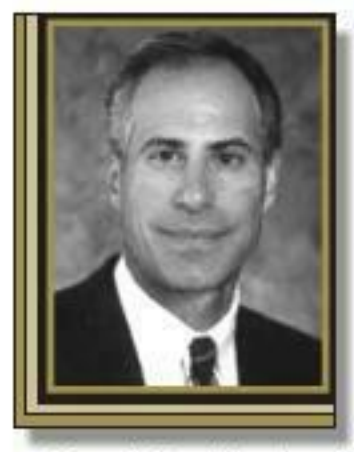
Colleges and Universities also have great Libraries. NCDD continues in its commitment to launch the "Virtual Forensic Library". Dr. Richard Jensen has donated his personal library of forensic articles to NCDD and those articles have been digitized and indexed through the efforts of Former Dean, Phil Price. The architecture for presenting this resource to our Membership has been established and will provide a platform to provide interactive practice tips on how to use these articles effectively. The Research Committee is reviewing transcripts, briefs and motions submitted by Members for inclusion in our "Members Only" portion of the Web Site. Please submit worthwhile materials to George Stein.

This is a very exciting time for NCDD! I urge each and every Member to reach out and be involved; join Committees; bring in new Members and participate in the List Serve. We learn from each other and give strength to each other It has been an honor to serve this past year.

Barry T. Simons
Dean

Certification Committee Report to Membership

by Steve Obernam



The Certification Committee is pleased to report that four NCDD members passed the 2008 examination administered in Honolulu. Congratulations go out to Troy Huser of Manhattan, KS; Jason Schatz of Salt Lake City, UT; Eric Sills of Albany, NY; and Tom Hudson of Sarasota, FL.

Anyone interested in becoming Board Certified in DUI Defense Law may review the procedures and rules by clicking the Board Certification link on the NCDD website (www.ncdd.com). As a reminder, the application deadline for the 2009 test is August 31, 2008. Be aware that the application is quite lengthy get started on it now! The test will be administered on January 14, 2009 at the Winter Seminar.

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Should you have any questions after reviewing the information posted on the website, please contact our Executive Director, Rhea Kirk or you may contact me directly at (865) 249-7200. I hope to be reviewing your application in the near future.

Steve Oberman,
Certification Committee Chairman

Case Law Update

by Flem K. Whited, III, Fellow

Breath test affidavit prepared by non-testifying breath test technician constituted testimonial hearsay for purposes of confrontation clause; Defendant did not have a prior opportunity to cross-examine technician so as to avoid confrontation clause violation

State v. Belvin,
2008 WL 1901674 (Fla.)

This case is before the Florida Supreme Court for review of the decision of the Fourth District Court of Appeal in *Belvin v. State,* 922 So.2d 1046 (Fla. 4th DCA 2006). In its decision the district court ruled upon the following question, which was certified to be of great public importance:

> DOES ADMISSION OF THOSE PORTIONS OF THE BREATH TEST AFFIDAVIT PERTAINING TO THE BREATH TEST OPERATOR'S PROCEDURES AND OBSERVATIONS IN ADMINISTERING THE BREATH TEST CONSTITUTE TESTIMONIAL EVIDENCE AND VIOLATE THE SIXTH AMENDMENT'S CONFRONTATION CLAUSE IN LIGHT OF THE UNITED STATES SUPREME COURT'S HOLDING IN *CRAWFORD V. WASHINGTON,* 541 U.S. 36 (2004)?

Bruce Belvin was arrested for driving under the influence (DUI). At a non-jury trial in county court, the breath test technician, Rebecca Smith, who administered the breath test and prepared the breath test affidavit, did not testify. The breath test affidavit was admitted over Belvin's objections that the technician should be present and subject to cross-examination. Belvin appealed his conviction and sentence to the circuit court arguing the failure to have the breath technician testify in person at trial violated his right to confrontation as espoused in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The circuit court affirmed the conviction and ruled that the breath test affidavit was not testimonial in nature and that *Crawford* did not preclude its admission.

> **"failure to have the breath technician testify in person at trial violated his right to confrontation"**

Belvin next sought certiorari review in the Fourth District Court of Appeal, which found admission of certain portions of the breath test affidavit during Belvin's criminal trial violated his constitutional right to confrontation under *Crawford.* The district court noted that breath test affidavits are usually prepared by law enforcement agencies for use in criminal trials or driver's license revocation proceedings. Thus, the court opined that such affidavits qualify as statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Id.* Thus, the Fourth District remanded the cause for a new trial and certified the question to the Florida Supreme Court for review.

In order to introduce breath test results as evidence in a DUI prosecution, the State must first present evidence that the test was performed substantially in accordance with approved methods, that is, by a person trained and qualified to conduct it, on an approved machine that has been tested and inspected. *See State v. Donaldson,* 579 So.2d 728 (Fla.1991).

Sections 316.1934(5) and 90.803(8), Florida Statutes (2007), provide for the introduction of affidavits containing the necessary evidentiary foundation as a public records exception to the hearsay rule. Such an affidavit is admissible without further authentication and is presumptive proof of the results of an authorized test to determine alcohol content of the blood or breath of a defendant. § 316.1934(5), Fla. Stat. The affidavit must contain the following:

(a) The type of test administered and the procedures followed;

(b) The time of the collection of the blood or breath sample analyzed;

(c) The numerical results of the test indicating the alcohol content of the blood or breath;

(d) The type and status of any permit issued by the Department of Law Enforcement which was held by the person who performed the test; and

(e) If the test was administered by means of a breath testing instrument, the date of performance of the most recent required maintenance on such instrument.

The first issue the court dealt with was whether the breath test affidavit contained testimonial statements. The Court held it did.

> Thus, we must initially determine whether the breath test affidavit at issue in the instant case contains testimonial statements. While *Crawford* did not establish a precise definition for the term "testimonial," the Supreme Court provided some guidance, holding that, at a minimum, statements are testimonial if the declarant made them at a "preliminary hearing, before a grand jury, or at a former trial; and [in] police interrogations." *Crawford,* 541 U.S. at 68, 124 S.Ct. 1354. Following *Crawford,* the Supreme Court established a general rule for determining whether statements are testimonial or nontestimonial:
>
> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the

circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. at 822, 126 S.Ct. 2266.

The distinction rests on the primary purpose of the statement.

Applying the rationales of *Davis* and *Crawford* to the instant case, we conclude that the breath test affidavit is testimonial. First, the affidavit was "acting as a witness" against the accused. *Davis,* 547 U.S. at 828, 126 S.Ct. 2266; *see Crawford,* 541 U.S. at 51, 124 S.Ct. 1354. The technician who created the breath test affidavit did so to prove a critical element in Belvin's DUI criminal prosecution. In other words, the breath test affidavit was created "to establish or prove past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822, 126 S.Ct. 2266; *see Thomas v. United States,* 914 A.2d 1, 12-13 (D.C.2006), *cert. denied,* U.S. , 128 S.Ct. 241, 169 L.Ed.2d 160 (2007). Second, the affidavit was not created during an ongoing emergency or contemporaneously with the crime. Instead, it was created "well after the criminal events had transpired." *Magruder v. Commonwealth,* 275 Va. 283, 657 S.E.2d 113, 129 (2008) (Keenan, J., dissenting); *see Davis,* 547 U.S. at 830, 832, 126 S.Ct. 2266. Third, the affidavit was created at the request of the police for Belvin's DUI prosecution. *See State v. Caulfield,* 722 N.W.2d 304, 309 (Minn.2006); *State v. March,* 216 S.W.3d 663, 666(Mo.), *cert. dismissed,* U.S. , 128 S.Ct. 1441, 169 L.Ed.2d 256 (2007). Finally, the affidavit falls squarely into the category of "formalized testimonial materials, *such as affidavits,*" which the Supreme Court listed in the various formulations of the core class of "testimonial" statements. *Crawford,* 541 U.S. at 52, 124 S.Ct. 1354 (emphasis added). A breath test affidavit is created under circumstances where the technician is expecting it will be used at a later trial. More precisely, the sole purpose of a breath test affidavit is to authenticate the results of the test for use at trial. *See* § 316.1934(5), Fla. Stat. (2007).

* * *

A breath test affidavit fits squarely within the definition of "testimonial" provided by the Supreme Court in *Davis v. Washington.* While *Davis* addressed the issue in the context of police interrogation, its principles are still applicable to this case. It is also conceivable that the breath test affidavit is, in fact, a type of interrogation. It is after all, a series of structured questions developed by state officials and answered by the breath technician who administers the breath test and records specific observations made at the time of testing the accused. "[T]he information recorded by the technician who administered the test is admitted to establish a critical element of the crime of driving under the influence." *Belvin,* 922 So.2d at 1051. Therefore, the type of statements contained in breath test affidavits are testimonial under *Davis* because "the circumstances objectively indicate that there is no ... ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822, 126 S.Ct. 2266.

In rejecting the State's argument that the affidavit was more akin to a "business record" or "public record" than an affidavit, the Court said

> While this Court and other courts have held that records kept in the ordinary course of business are generally admissible, this general rule is not applicable when the record is being prepared at the specific request of a law enforcement agency and is not simply a record that is normally generated by that business under circumstances that do not involve law enforcement.

The State next argued that even if the breath test affidavit is deemed testimonial in nature, there is no Crawford violation because technician Smith was unavailable to testify and Belvin waived his opportunity to cross-examine here prior to trial by failing to depose her under F.R.Cr.P. 3.220(h)(1)(D). The appellate courts were split on this issue.

> Because *Crawford's* unavailability prong has been satisfied, we next address whether Belvin had a prior opportunity for cross-examination. To support its position that the defendant had a prior opportunity to cross-examine the witness, the State cites to *Blanton v. State,* 880 So.2d 798, 801 (Fla. 5th DCA 2004), *approved,* 978 So.2d 149 (Fla.2008). In *Blanton* the Fifth District held that *Crawford's* goal of preventing the use of statements not previously tested through the adversary process can be satisfied by means of a discovery deposition. However, the First District in *Lopez v. State,* 888 So.2d 693, 701 (Fla. 1st DCA 2004), *approved,* 974 So.2d 340 (Fla.2008), rejected the conclusion reached in *Blanton.* The First District concluded that a discovery deposition does not qualify as a prior opportunity for cross-examination. In the decision now under review, the Fourth District relied on *Lopez* to conclude that "the taking of a discovery deposition cannot be treated as a proceeding that affords an opportunity for cross-examination." *Belvin,* 922 So.2d at 1053 (quoting *Lopez,* 888 So.2d at 701).
>
> In our review of *Blanton* and *Lopez,* we concluded that the exercise of the right to take a discovery deposition under rule 3.220 does not serve as the functional substitute of in-court confrontation of the witness. *See State v. Lopez,* 974 So.2d 340, 349-50 (Fla.2008); *Blanton v. State,* 978 So.2d 149, 155 (Fla.2008). As we explained in *Lopez,* there are a number of reasons why a discovery deposition does not satisfy the opportunity for cross-examination that is required under *Crawford. See Lopez,* 974 So.2d at 347-50. First, rule 3.220(h) was not designed as an opportunity to engage in adversarial testing of the evidence against the defendant, nor is the rule customarily used for the purpose of cross-examination. Instead, the rule is used to learn what the testimony will be and attempt to limit it or to

uncover other evidence and witnesses. A defendant cannot be "expected to conduct an adequate cross-examination as to matters of which he first gained knowledge at the taking of the deposition." *State v. Basiliere*, 353 So.2d 820, 824-25 (Fla.1977). This is especially true if the defendant is "unaware that this deposition would be the only opportunity he would have to examine and challenge the accuracy of the deponent's statements." *Id.* at 824. Second, a discovery deposition is not intended as an opportunity to perpetuate testimony for use at trial, is not admissible as substantive evidence at trial, and is only admissible for purposes of impeachment. Third, the defendant is not entitled to be present during a discovery deposition pursuant to rule 3.220(h). Based on this analysis, we cannot conclude that Belvin waived his opportunity to cross-examine technician Smith by failing to depose her under rule 3.220(h)(1)(D).

Furthermore, even though section 316.1934(5) gives a defendant the right to subpoena the breath test operator as an adverse witness at trial, the statutory provision does not adequately preserve the defendant's Sixth Amendment right to confrontation. Importantly, the burden of proof lies with the state, not the defendant. "Not only does a defendant have no burden to produce constitutionally necessary evidence of guilt, but he has the right to stand silent during the state's case in chief, all the while insisting that the state's proof satisfy constitutional requirements." *Contreras v. State,* 910 So.2d 901, 908 (Fla. 4th DCA 2005), *approved in part and quashed in part,* 33 Fla. L. Weekly S177, --- So.2d ----, 2008 WL 657867 (Fla. Mar. 13, 2008).

Because *Crawford's* requirement of a prior opportunity for cross-examination has not been satisfied, the admission of those portions of the breath test affidavit pertaining to the breath test technician's procedures and observations in administering the breath test violated Belvin's Sixth Amendment right of confrontation.

Appellate Court upholds finding of "no probable cause" to arrest

Smith v. Director of Revenue,
2008 WL 1944637 (Mo.App. W.D.)

Smith challenged the suspension of his license in the circuit court. The circuit court set aside the Director's suspension of Smith's driving privilege finding there was no probable cause for the arrest for DUI. The director appealed contending the circuit court's judgment was not supported by substantial evidence, is against the weight of the evidence and misapplied the law. The appellate court affirmed the circuit court.

Vehicle stop / initial observations / production of documents / exit from vehicle

The appellate court observed

> The evidence established that on the morning of July 15, 2006, at 7:56 A.M., University of Missouri Police Department Officer Sam Easley saw an Oldsmobile Alero, driven by Smith, make a "lane violation" on Rock Quarry Road in Columbia, Missouri. Easley began following the vehicle and noticed that the vehicle's registration had expired. Easley then stopped the Oldsmobile on the side of the road.
>
> When Easley approached the vehicle, he smelled a strong odor of intoxicants. Besides Smith, Drew Hill was also in the car. Easley testified at the trial that the odor of alcohol was coming from the vehicle and from Smith. On the Alcohol Influence Report, Easley marked the box which said that the odor of alcoholic beverage emanating from Smith's breath was strong, but, in his written narrative of the incident, Easley merely said that he noticed a strong odor of intoxicants coming from the vehicle. Easley also noticed that Smith's eyes were bloodshot and glassy and that his pupils were dilated. Easley asked Smith for his driving license, and Smith produced the license without difficulty.
>
> Easley returned to his patrol car and then approached the Oldsmobile for a second time. Easley asked Smith to get out of the car, and Smith had no difficulty exiting the vehicle. Easley then asked Smith how much he had been drinking. Smith told Easley that, the night before, he drank three drinks per hour over a four hour span but that he had been sleeping for five to six hours at a friend's house. Smith told Easley that he was driving that morning to pick up his car, which he had left in downtown Columbia.

The Field Sobriety Test

Easley then had Smith perform several field sobriety tests. First, Easley asked Smith to submit to the Horizontal Gaze Nystagmus (HGN) test. Before beginning the test, Easley turned Smith toward the direction of the sun. During the test, Smith complained about the sun shining into his eyes. Easley stopped the test, had Smith to turn and face away from the sun, and started the test again. From the test, Easley determined that Smith exhibited all six clues of intoxication. According to Easley, four or more clues on a HGN test indicate intoxication. Easley acknowledged, however, that there were "a lot" of types of non-alcohol nystagmus and that he could not determine whether the results of a HGN test are alcohol or non-alcohol induced. Smith testified

"Smith exhibited all six clues of intoxication. According to Easley, four or more clues on a HGN test indicate intoxication."

that he had slept with his contact lenses in, that his eyes were itchy, red, and uncomfortable, and that he had difficulty keeping his eyes open. He also said that, when Easley administered the HGN test, he could still see sunspots and that he could see sunspots for almost the entirety of the test.

Next, Easley asked Smith to perform the walk and turn test. During this test, Easley observed two clues of impairment. Smith raised his arms six inches from his sides, and he made an improper turn by not taking small steps with his right foot when he made his turn. Easley said that, although he was "not completely sure," he believed for the walk and turn test that four or more clues indicated possible impairment.

For the third field sobriety test, Easley asked Smith to perform the one leg stand test. During this test, Easley noticed two clues that indicated impairment. According to Easley, Smith swayed slightly to moderately from side to side, and Smith hopped two times on the count of 1003.

Easley then asked Smith to perform the alphabet test by reciting the alphabet from D through M. Smith performed this test correctly. Easley also asked Smith to perform the counting backward test by counting from 64 to 43. Smith also performed this test correctly.

For the sixth field sobriety test, Easley conducted a Preliminary Breath Test (PBT). Easley's dashboard video of the stop, which had partial audio and was introduced into evidence, shows that Easley contacted the dispatch to request that an older version of the PBT machine be brought to him. An officer arrived shortly thereafter with a PBT machine, but Easley noted that it was a new machine and that he had never used the new type of machine before. He then radioed the dispatch to ask for instructions. Easley attempted to administer the test to Smith, but then used his police radio to ask another officer to come to the scene and administer the test.

The PBT

At trial, Easley testified that the PBT indicated that Smith's blood alcohol content level was above .08 percent. After Easley testified about the results of the PBT, Smith asked Easley whether he administered the PBT to Smith. Easley said that he did not, and Smith objected to Easley's testifying about a test which someone else administered. The circuit court sustained Smith's objection.

The Law

We must affirm the circuit court's judgment unless it is not supported by substantial evidence, is against the weight of evidence, or erroneously declares or applies the law. *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976); *Verdoorn v. Dir. of Revenue,* 119 S.W.3d 543, 545 (Mo. banc 2003). "We accept as true all evidence and inferences in favor of the prevailing party and disregard contrary evidence." *White v. Dir. of Revenue,* 227 S.W.3d 532, 534 (Mo.App.2007). "If the facts of a case are contested, then this Court defers to the trial court's determinations regarding those facts." *Guhr v. Dir. of Revenue,* 228 S.W.3d 581, 585 n. 3 (Mo. banc 2007). If the facts are not contested then, as in any other civil case, "the issue is solely legal and there are no findings of fact for the appellate court to defer to." *Furne v. Dir. of Revenue,* 238 S.W.3d 177, 180 (Mo.App.2007); *Guhr,* 228 S.W.3d at 585 n. 3. ' "[T]he trier of facts," ' however, ' "has the right to disbelieve evidence, even when it is not contradicted." ' *Guhr,* 228 S.W.3d at 585 n. 3 (citation omitted).

To establish a prima facie case for driving while intoxicated, the Director's burden was to establish by a preponderance of the evidence that the arresting officer had probable cause to arrest Smith and that Smith's blood alcohol concentration was at least .08 percent by weight. § 302.505.1, RSMo Cum.Supp.2007; *Vanderpool v. Dir. of Revenue,* 226 S.W.3d 108, 109 (Mo. banc 2007). In regard to the probable cause necessary to suspend a driving license pursuant to section 302.505.1, the Missouri Supreme Court has said:

"The probable cause required for the suspension or revocation of a driver's license is the level of probable cause necessary to arrest a driver for an alcohol-related violation." "That level of probable cause will exist when a police officer observes an unusual or illegal operation of a motor vehicle and observes indicia of intoxication upon coming into contact with the motorist." "Probable cause, for the purposes of section 302.505, will exist when the surrounding facts and circumstances demonstrate to the senses of a reasonably prudent person that a particular offense has been or is being committed." "The level of proof necessary to show probable cause under section 302.505 is substantially less than that required to establish guilt beyond a reasonable doubt." "The trial court must assess the facts by viewing the situation as it would have appeared to a prudent, cautious, and trained police officer." *York v. Dir. of Revenue,* 186 S.W.3d 267, 270 (Mo. banc 2006) (citations and footnotes omitted).

* * *

In *Guhr,* the Missouri Supreme Court specifically said that where the facts of a case are contested, this court must defer to the circuit court's determination regarding those facts. *Guhr,* 228 S.W.3d at 585 n. 3; *see also Furne,* 238 S.W.3d at 180. Moreover, the Supreme Court reaffirmed the principle that " 'the trier of facts has the right to disbelieve evidence, even when it is not contradicted.' " *Guhr,* 228 S.W.3d at 585 n. 3 (citation omitted); *Furne,* 238 S.W.3d at 180. Therefore, as this court concluded in *Furne:*

As *Guhr* makes clear, the trial court is free to disbelieve even uncontradicted evidence and testimony, and it is only where the facts are uncontested, and not where the evidence is not contradicted, where no deference is due to the trial court. *Guhr,* 228 S.W.3d at 585 n. 3. Thus,

even where the evidence is not contradicted, unless the facts of the case are not contested in any way, this Court must give deference to the trial court's determination as to whether the evidence established reasonable cause to believe the individual whose license was revoked was driving while intoxicated. *Id.; York,* 186 S.W.3d at 272. *Furne,* 238 S.W.3d at 181.

In response to the Director's argument that the officer's testimony was sufficient to show probable cause the court said

> Smith, however, did not concede all of these facts. Indeed, he contested the Director's evidence by cross-examining Easley, by his own testimony offered during cross-examination, by presenting the testimony of his friend who was in the car with him when he was pulled over by Easley, and by offering Easley's dashboard video of the entire incident.
> On cross-examination, Easley acknowledged that he should never administer the HGN test with a person looking into the sun and acknowledged that the sun could affect a person's eyes. The dashboard video of the stop, however, shows Easley turning Smith directly into the sun to attempt to perform the first HGN test. Easley also acknowledged that there were "a lot" of types of non-alcohol nystagmus and that he could not determine whether the results of a HGN test were alcohol or non-alcohol induced. On the one leg test, Easley said that Smith hopped at the beginning of the test but then admitted that he went on from there for 30 seconds. Easley acknowledge that Smith passed the alphabet test and the counting backwards test. Although Easley noted two clues of impairment on the walk and turn test, he said that he would not consider two clues as passing or failing. On direct-examination Easley even said that, although he was "not completely sure," he believed for the walk and turn test that four or more clues indicated possible impairment. Moreover, the circuit court had an opportunity to observe the entirety of the stop and the administration of all the sobriety tests through Easley's dashboard video.
>
> Easley also testified that Smith's speech was clear and that he was cooperative with his commands. Although on the Alcohol Influence Report Easley marked the box indicating that a strong odor of alcoholic beverage emanated from Smith's breath, in his written narrative of the incident, Easley said that he noticed a strong odor of intoxicants coming from the vehicle and did not mention Smith's breath. Moreover, Smith's friend was also in the car, and the dashboard video of the stop shows that Easley would not allow Smith's friend to drive the car after Smith was arrested, presumably because he was also intoxicated. The smell of alcohol, therefore, could have emanated from Smith's friend.
>
> On cross-examination Smith testified that he wore contact lenses and that he was having problems with them because he was unable to take them out the night before. He said that on the morning of the incident it was difficult to keep his eyes open because his eyes were itchy and red from sleeping in his contacts. He also said that his eyes were uncomfortable. Smith also testified that, when Easley administered the HGN test the second time, he could see sunspots for almost the entirety of the test and that his eyes were itchy and uncomfortable.
>
> Smith's friend, Drew Hill, who was riding in the car with Smith when Smith was pulled over by Easley, testified that he absolutely did not see any signs of impairment from alcohol in Smith on the morning that Smith was arrested. Hill also said that he did not see Smith violate any traffic laws when he was driving and that Smith had no trouble navigating on the road.
>
> The circuit court in its judgment expressly found that, "based upon the credible evidence ... the arresting officer did not have probable cause to believe that [Smith] had committed an alcohol related traffic offense[.]" The circuit court, therefore, implicitly found that at least some of Easley's testimony was not credible. *See Furne,* 238 S.W.3d at 181. The circuit court "was entitled to accept or reject all, part, or none of that testimony, even if it is uncontradicted." *Id.*

Thus, the ruling of the circuit court was affirmed.

Driver cannot be convicted of driving on a suspended license where he has never been issued a driver's license

Sullivan v. State,
2008 WL 1990946 (Md.App.)

At approximately 7:15 p.m. on August 31, 2006, Montgomery County patrol officer Darrell Furdock stopped Sullivan while he was driving near the intersection of Fisher Avenue and Milford Mill Road. Furdock noted the odor of alcohol. Sgt. Furdock asked Sullivan, a Maryland resident, for his driver's license, but appellant could not produce a license. He ticketed Sullivan for, *inter alia,* driving on a revoked "license or privilege to drive" in violation of section 16-303.

At trial, Sullivan testified that he had never been issued a Maryland driver's license. Sullivan moved for acquittal on the ground that he could not be convicted of driving on a revoked license because he never had a license, much less had one revoked. In his view, the appropriate charge would have been driving without a license under section 16-101(a), which carries a lesser penalty. The court ruled:

> The trial court denied the motion, reasoning that one could have a privilege to drive even without having a license. The court said: "[T]he right to drive, it's a privilege to drive, it's not a card you carry in your pocket[.]" When defense counsel disagreed, the following colloquy occurred:
>
> The Court: Well, there's-how does one acquire a privilege to drive in the State of Maryland?
>
> [Defense Counsel]: Make an application.
>
> The Court: I know how you get a license, you make an application, but how do you get a privilege? There's a distinction between the two.

[Defense Counsel]: Sure, you make an application to get a license and they grant you the privilege by giving you that license.

The Court: See I think, in a lot of these statutes and in a lot of the cases they distinguish between the privilege to drive and the license to drive .... and it seems to me ..., because the way they deal with it is that the privilege is sort of an automatic thing, as opposed to a license which you have to apply for until such time that, that privilege gets taken away.

The trial court then observed that MVA records "show[ed] that based upon accumulation of points, the State of Maryland has revoked his privilege [.]" This record shows that, as of March 20, 2007, Sullivan had 15 "total current points," and lists Sullivan's "license status" as "revoked & suspended." It identifies Sullivan's "OLN" as S-415-115-108-830, and lists various offenses and administrative actions beginning March 30, 1997. An entry for September 13, 2003 reads: "DELETED FROM RECORD POINT SYSTEM REVOCATION." Other entries show that Sullivan's license was "revoked" on October 3, 2003 and "suspended" on July 8, 2005.

Rejecting Sullivan's argument that, having never acquired a license, he could not be convicted under section 16-303(d), the trial court found Sullivan "guilty of driving on revoked privilege."

The issue on appeal was framed by the court

At issue in this appeal is section 16-303(d), which provides that "[a] person may not drive a motor vehicle on any highway ... while the person's **license or privilege to drive** is revoked in this State." (emphasis added)

Although the term "license" has been defined by the General Assembly, the phrase **"privilege to drive"** has not. This language regularly appears in the disjunctive with the term "license," but there is neither regulation nor case law defining "privilege to drive" in the context of section 16-303(d), or otherwise explaining how a "privilege to drive" differs from a "license."

On appeal Sullivan renewed his arguments that he cannot be convicted of driving on a revoked license because he has never been issued a license, and that he cannot be convicted of driving on a revoked privilege to drive because he has never qualified to drive without a license. Sullivan interprets "privilege to drive" to mean only the permission granted to drivers under those exceptions to the licensing requirements set forth in section 16-102.

The court review out-of-state cases dealing with similar statutory schemes.

In *Kansas v. Bowie,* 268 Kan. 794, 999 P.2d 947 (2000), for example, the Supreme Court of Kansas interpreted a statutory scheme in which separate code provisions also required all drivers to have a license and prohibited driving on a canceled, suspended, or revoked license. After considering cases interpreting various statutory schemes, the Kansas court held that "a person who never had a driver's license cannot be charged with driving while suspended ... but can be charged with driving without a license [.]" *Id.* at 952. The court reasoned:

[D]riving a motor vehicle in Kansas is not a natural right but a privilege. That privilege is granted by the State and, pursuant to 8-235(a), the privilege to drive is granted only to those drivers with a valid license or those who are specifically exempt.... Exempt persons include nonresidents with a valid license issued elsewhere, or whose home state or country does not require a license to drive, and persons operating farm equipment.

The legislature used the phrase "valid driver's license" in 8-235(a) and, by doing so, intended to specify the tangible representation of a driving privilege. In 8-262(a), the legislature uses the term "privilege" rather than "license" and, by so doing, demonstrated the intent to include licensed drivers as well as drivers exempt under 8-236. No other drivers are granted a privilege to drive in Kansas. Further, the legislature limited the scope of the provision to persons whose privilege to drive is "canceled, suspended or revoked." In so doing, the legislature intended for only licensed persons to be covered by 8-262(a).

Id. at 951 (emphasis added and citations omitted).

* * *

In *City of Billings v. Gonzales,* 331 Mont. 71, 128 P.3d 1014, 1016 (2006), the Supreme Court of Montana reached a similar conclusion in interpreting its statutory scheme, which, like Maryland's, grants the privilege to drive only to those who have been issued a driver's license or otherwise qualify for a statutory exemption. A separate provision prohibits driving "when the person's privilege to do so is suspended or revoked[.]" Following the Kansas court's decision in *Bowie,* the Montana court agreed with five drivers that they could not be charged under this law, because they had never been licensed:

The distinction throughout Title 61 between "license" or "driving privilege" ... demonstrates that individuals lawfully can drive in Montana either by obtaining a driver's license pursuant to § 61-5-102, MCA, or by establishing that they have a privilege to drive without a license pursuant to § 61-5-104, MCA.

The plain language of § 61-5-212, MCA, requires that a person possess a privilege to drive before that privilege can be suspended or revoked. We have determined that the privilege to drive must be granted by law. Therefore, absent a license or privilege to drive without a license pursuant to § 61-5-104, MCA, the State cannot convict a person under § 61-5-212, MCA, with driving while license suspended or revoked. Adopting the State's position would require this Court to enlarge the phrase "suspended or revoked" of § 61-5-212, MCA, to include a driving privilege never granted. It is not the role of this Court to insert what has been omitted when applying statutes. *Id.* at 1016-17 (emphasis added).

In *New York v. Evans,* 79 Misc.2d 131, 359 N.Y.S.2d 449, 451 (Co.Ct.1974), a New York trial court, when reviewing a conviction for operating a vehicle while the driver's license was suspended or revoked, commented on the inequities of a comparable statutory scheme existing at that time:

> What all this means, of course, is that the defendant has found a convenient loophole in the Vehicle and Traffic Law.... [A]n individual who flagrantly violates the law by never applying for a license but driving nevertheless is in a better legal position than an individual whose driving record is blemished by a single offense and whose license was consequently revoked. The flagrant lawbreaker apparently can only be charged with a violation upon his arrest ... regardless of the number of convictions he has had for the same offense. However, the single offender subsequently arrested for operation while license is revoked is subject to prosecution for a misdemeanor. We urge the legislature to close the loophole and correct the obvious inequities in the law.

The court, nonetheless, reversed Evans's conviction. Other courts have reached similar decisions. *See, e.g., Francis v. Municipality of Anchorage,* 641 P.2d 226, 228 (Alaska Ct.App.1982)(15 year old who had never had a license could not be convicted of driving on a suspended license even though ordinance defined "license to operate a motor vehicle" to include the "privilege to drive" because there must be some kind of legal authorization to drive before a license or driving privilege can be suspended); *City of Aberdeen v. Cole,* 13 Wash.App. 617, 537 P.2d 1073, 1074 (1975)("The Department of Motor Vehicles could not suspend that which [defendant] did not have").

The Court then held:

> We conclude, based on our examination of Title 16 (Vehicle Laws-Drivers' License) of the Transportation Article, especially the section 16-101(a) prohibition against driving without a license or express exemption, that an unlicensed individual does not have a "privilege to drive" in Maryland unless the individual falls within the exemptions set forth in section 16-102. Because Sullivan does not qualify for any of these statutory exemptions, he did not have a "privilege to drive" that the MVA could "revoke," as section 16-303(d) contemplates.
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> The State charged Sullivan with driving while his license was revoked in violation of Trans. section 16-303. It could have, but apparently did not, charge him with driving without a license in violation of sections 16-101 and 16-102. Because Sullivan cannot be convicted of driving while his "license or privilege to drive" was revoked unless he once had a license or exemption, we must reverse the verdict of the trial court and vacate his conviction.

Special needs exception to the 4th Amendment cannot be used to allow introduction of blood alcohol evidence drawn pursuant to statute where no probable cause to believe driver under the influence of alcohol Statute that provides for implied consent for blood draw where probable cause to believe crash cannot be used to allow introduction of blood alcohol evidence in criminal proceeding

State v. Quinn,
178 P.3d 1190 (Ariz.App. Div. 1)

There is no dispute as to the underlying facts. On February 25, 2004, "several minutes before midnight," Quinn drove her vehicle east-bound in the west-bound lanes of Glendale Avenue at a high rate of speed and collided head-on with a vehicle traveling in the west-bound lanes. The collision resulted in serious physical injuries that required that Quinn and the other driver be hospitalized. Quinn was rendered unconscious and did not regain consciousness until after surgery.

As preparations were being made to take Quinn into surgery, a law enforcement officer instructed the hospital to draw a sample of Quinn's blood pursuant to A.R.S. § 28-673. Consequently, while Quinn was still unconscious, a nurse drew blood from her arm, and the officer took immediate possession of the entire sample. The blood tested positive for a variety of drugs, including methamphetamine, cocaine and morphine. Quinn subsequently was charged with aggravated assault pursuant to A.R.S. § 13-1204(A)(1) (2001). Prior to her trial on these charges, Quinn filed a motion to suppress the results of the blood draw.

Section 28-673, rather than requiring probable cause to believe that a person was driving under the influence before a driver's blood may be taken, requires probable cause to believe that the driver caused a motor vehicle accident that resulted in serious physical injury.

> Section 28-673(A) provides:[a] person who operates a motor vehicle within this state gives consent to a test or tests of the person's blood, breath, urine or other bodily substance for the purposes of determining alcohol concentration or drug content if the person is involved in a traffic accident resulting in death or serious physical injury as defined in § 13-105 and a law enforcement officer has probable cause to believe that the person caused the accident or the person is issued a citation for a violation of [various provisions of the title].

The State stipulated below that there was not probable cause to believe that Quinn was under the influence of alcohol or drugs. The State argued that even in the absence of probable cause, Quinn's blood evidence could be admitted in her criminal prosecution pursuant to the "special needs" doctrine by which some specialized searches are evaluated under the Fourth Amendment. Alternatively, it argues that Quinn gave her consent to the blood draw by virtue of A.R.S. § 28-673 and thus the evidence is admissible even if it would not be admissible pursuant to the special needs doctrine. The Court addressed and reject each of these arguments.