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Executive Director's Corner

By Rhea Kirk

Dean Pellegrino picked a wonderful respite from the cold, damp weather the rest of the world was having! Atlantis was fabulous with its wonderful weather, fantastic culture, and all of its beach activities.

MSE was terrific! New Orleans will never be the same! Great food and fellowship made for a smooth transition from Dallas. If you couldn't make it this year, we hope to see you at MSE 2010.

We are all looking forward to the Summer Session in Cambridge. The small group workshops are going to be better than ever and the knowledge you will gain is invaluable. Don't miss it!

It really amazes me that even in these trying times, we are all still in it… Together!

Looking forward to the next time I see you!

Regards,
Rhea

Is Crossing "the Fogline" a Basis for a Stop?

by Ed Fiandach, Fellow and Former Dean

In our experience, one of the more common reasons for stopping an automobile after midnight is when the motor vehicle is observed to be crossing a pavement marking, either the left hand lane marking or the white stripe that runs down the right hand portion of the pavement more commonly known as "the fog line." Recently, an interesting out of state case, State v. Philips, 2006 WL 3477003, came to our attention. In Phillips, the defendant was charged with failure to obey a traffic control device and operating a vehicle under the influence of alcohol Phillips pled not guilty to both charges and filed a motion to suppress any evidence relating to both violations, asserting that the state trooper did not have a reasonable suspicion to believe that he was operating his vehicle while under the influence of alcohol and that there was no probable cause to stop or arrest him for operating a vehicle under the influence of alcohol or for failure to obey a traffic control device. A hearing was held, at which time it emerged that the "failure to obey" charge came from crossing the white right hand marking known as the fogline. The trial court found no violation and suppressed any evidence retrieved as a result of the stop.

The state subsequently filed an appeal, asserting that the trooper lacked reasonable suspicion to stop Phillips' vehicle. Specifically, the State contended that the trooper's observation of Phillips' vehicle crossing the right white edge line three times in a distance of approximately one mile was sufficient to allow him to initiate a traffic stop. Further, the State maintained that the totality of the circumstances surrounding the stop of Phillips' vehicle created a reasonable suspicion that Phillips was driving while impaired.

In determining the issue at hand, the Ohio court noted that under their law, a vehicle may be stopped when there is probable cause to believe that a traffic violation has been committed or reasonable suspicion "to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."

The court commenced its analysis by observing that the trooper stopped and cited Phillips for failure to obey a traffic control device. In the regard, Ohio law provides:

(A) No pedestrian, driver of a vehicle, or operator of a streetcar or trackless trolley shall disobey the instructions of any **traffic control device** placed in accordance with this chapter, unless at the time otherwise directed by a police officer.
R.C. 4511.12.

The court then examined the statutory definition of a traffic control device. Ohio law defines a traffic control device as: all flaggers, signs, signals, markings, and devices placed or erected by authority of a public body or official having jurisdiction, for the purpose of regulating, warning, or guiding traffic * * *." (R.C. 4511.01[QQ]).

Were the case to end here, there would be no need for inclusion. It seems to say the obvious. However, the court went further. It noted that R.C. 4511.12 "prohibits any driver of a vehicle from disobeying the instructions of a traffic control device" (emphasis in original). Since the section does not define "instructions" the court turned to the dictionary. It found that the American Heritage Dictionary defines "instructions" as "[a]n authoritative direction to be obeyed; an order" (American Heritage Dictionary (3 Ed.1996) p. 936). It then turned to the purpose of the fogline:

We begin by noting that the Legislature has not enacted a statute which indicates that a right white edge line instructs an operator of a vehicle. However, the Legislature has had multiple opportunities to indicate that the right white edge line instructs vehicle operators to avoid crossing it; however, when enacting, for example, R.C. 4511.28, entitled "Permission to overtake and pass on the right", the Legislature failed to reference the right white edge line or any instructions the right white edge line provides. See, also, R.C. 4511.01(BB), (EE) (providing the definitions of "Street" or "Highway" and "Roadway" respectively without reference to the right white edge line); R.C. 4511.25(B) [providing that vehicles proceeding at less than the normal speed shall be driven either "in the right-hand lane then available for traffic, or as close as practicable to the right-hand

Continued top of page 2

curb or edge of the roadway" without reference to the right white edge line].

The court then found that the common use of the lines belied the fact that they were "instructions":
Additionally, there are many locations, especially near intersections, where one roadway joins another but does not continue thru an intersection, where the pavement has been widened to allow vehicles to pass to the right of a vehicle which is waiting to make a left turn. See R.C. 4511.28(A)(1). However, in these instances, the right white edge line continues in a straight line and passing to the right of the vehicle would require the passing vehicle to cross the right white edge line. Therefore, any interpretation that a right white edge line instructed operators of vehicles not to cross it would be inconsistent with the Legislature's specific provision allowing the crossing of the right white edge line provided under R.C. 4511.28. We also note that some roadways have wide areas to the right of the right white edge line for use by horse-drawn vehicles, which vehicles are also subject to any instructions of a traffic control device, and the State's suggested interpretation of R.C. 4511.12 would prohibit such driving.

Finally, the court observed that classification of the fogline as a "traffic control device" flew in the face of the Ohio regulation that establishes the same:
Markings on highways have important functions in providing guidance and information for the road user. Major marking types include pavement and curb markings, object markers, delineators, colored pavements, barricades, channelizing devices and islands. In some cases, markings are used to supplement other traffic control devices such as signs, signals and other markings. In other instances, markings are used alone to effectively convey regulations, guidance, or warnings in ways not obtainable by the use of other devices.

Therefore, the court, over a dissent, held as follows:
Accordingly, we find that the right white edge line provides guidance and information about the roadway and does not provide any instructions or orders to operators of a vehicle. Therefore, when a motorist crosses the right white edge line, he or she is not "disobeying the instructions" of a **traffic control device**, because the right white edge line does not provide any instructions.

Having found that the right white edge line is a **traffic control device**, but does not provide any instructions, we find that driving over the right white edge line, without more, does not and should not result in a violation of R.C. 4511.12(A). Accordingly, Phillips' alleged driving over the right white edge line does not constitute a traffic violation, and the legality of Phillips' traffic stop cannot be based on probable cause of a violation of R.C. 4511.12(A).

New York represents another jurisdiction where the Phillips rationale can easily be applied. Initially, in the Empire State a motorist may be charged with violating Vehicle and Traffic Law § 1128(a). As noted above, a violation of this section requires that the vehicle not be driven "as nearly as practicable within a single lane * * *." This forces an inquiry as to what, exactly does the fogline represent in New York?

Pavement markings are generally described, not in the Vehicle and Traffic Law, but in Official Compilation of Codes, Rules and Regulations of the State of New York or, as they are commonly known, NYCRR. In particular, 17 NYCRR 261.7 "Roadway Edge Lines," is long but is well worth reading. It sets out:
(a) Application.

(1) Edge lines may be used for any of the following purposes:

(i) To mark the right side of roadway where traffic is shunted to the left. This condition is frequently encountered where the highway ahead has fewer or narrower lanes. It also applies to the left side of one-way roadways where traffic is shunted to the right. The converging portion of the edge line should have a length determined by use of table 262-2 (see Part 262.2 of this Title). The edge line should be extended along the roadway edge a distance of at least one hundred feet from each end of the converging portion of the line.

(ii) To mark the edge of the roadway through substantial or abrupt changes in horizontal alignment. The edge line should be extended along the roadway edge a distance of at least one hundred feet from each end of the curve.

(iii) To define the edge of a roadway adjacent to the shoulder. This use has particular application where the shoulder area has characteristics and appearances similar to the highway pavement. It is essential, however, that the shoulder not have the appearance of a travel lane. Where an edge line is used to define the left edge of a roadway of a divided highway or other one-way roadway, it should also be used to define the right edge.

(iv) To discourage motorists from veering out of line because of bridge abutments or other fixed objects close to the pavement. In such instances, an edge line may be marked from a point at least one hundred feet in advance of the object to a point at least opposite the far end of the object. At a one-lane bridge where center line markings are discontinued in advance of the bridge, the edge line, if marked, shall begin at least at the point where the normal center line markings are discontinued.

(2) Edge lines should not be marked through intersections. They should not be discontinued at driveways, except at major commercial entrances and exits where suitably located edge line gaps of appropriate size would be beneficial in promoting orderly ingress and egress.

(3) Edge lines should not be used on any two-way roadway which does not have standard lane and/or center line markings, except at one-lane roadway sections (see section 233.6 of this Title).
(4) Application of edge lines on various types of highways is described in Part 262 of this Title.

Markings on highways have important functions in providing guidance and information for the road user.

(b) Design. Edge lines shall be four to twelve inches wide.

(c) Color.

(1) Edge lines on the left sides of one-way roadways, and at median islands which separate traffic flows in opposite directions, shall be yellow.

(2) Edge lines on two-way roadways, on the right sides of one-way roadways, and at channelizing islands which separate traffic flows in the same direction, shall be white.

In reviewing these provisions, certain portions may be dealt with summarily. Subdivision (a)(1)(i) does not apply in the situation we are reviewing since it is used to narrow pavement. Likewise, subdivision (a)(1)(ii) has no application since it is used to set out an abrupt change in the horizontal alignment of the pavement. Subdivision (iv) pertains to a line placed to outline a hazard such as a bridge abutment. Again, it has no applicability here. The balance of the provision deals with placement and color.

Of importance to this issue is subdivision (iii). Among other things, it provides that the purpose of the "edge line" is "[t]o define the edge of a roadway adjacent to the shoulder." Importantly, although nearly universal, the use of this particular marking is not mandatory. It is defined as having "particular application where the shoulder area has characteristics and appearances similar to the highway pavement."

Frequently, crossing this line will be viewed by the arresting officer as "failing to obey a traffic control device," a violation of Vehicle and Traffic Law § 1110(a). But is it? Vehicle and Traffic Law § 1110(a) sets forth that:
(a) Every person shall obey the instructions of any official traffic-control device applicable to him placed in accordance with the provisions of this chapter, unless otherwise directed by a traffic or police officer, subject to the exceptions granted the driver of an authorized emergency vehicle in this title.

This, of course, requires us to ask; is a fog line or "edge marking" a "traffic control device"? For that answer, we turn to Vehicle and Traffic Law § 599 entitled "definitions" describes a "traffic control device" as:
. . . all signs, signals, markings and devices not inconsistent with the vehicle and traffic law placed or erected by authority of a public body or official having jurisdiction for the purpose of regulating, warning or guiding traffic.

The question, therefore becomes this. Is an "edge marking", which has been placed "[t]o define the edge of a roadway adjacent to the shoulder" (17 NYCRR 261.7) a "traffic control device within the meaning of § 599?

Yes it is, inasmuch as it has been placed to "channelize" or warn traffic of the margins of the roadway, but again, our inquiry is not over for the New York statute is identical to its Ohio counterpart in that it requires deviation from instructions. As noted above, they exist to "[t]o mark the right side of roadway where traffic is shunted to the left," "[t]o mark the edge of the roadway through substantial or abrupt changes in horizontal alignment," "[t]o define the edge of a roadway adjacent to the shoulder," or "[t]o discourage motorists from veering out of line because of bridge abutments or other fixed objects close to the pavement." At no point to they exist as instructions. Hence, the Ohio rationale appears to apply without modification.

There is, however, another section that is utilized in this situation, Vehicle and Traffic Law §1128(a), failing to maintain lane. This section provides:
a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Recently, a New York appellate level court adopted the foregoing rationale. In People v. Davis, 870 N.Y.S.2d 602 (January 9, 2009), the defendant was stopped after a New York State Trooper observed the right front tire of a jeep travel 'partially' on the fog line 'three or four times.' The trooper initiated a traffic stop which led to the discovery of nine bags of hallucinogenic mushrooms and a bag of marihuana. The defendant was indicted for criminal possession of a controlled substance in the second degree, criminal possession of marihuana in the second degree. Finding the stop to be impermissible, the Appellate Division Third Department first examined a host of out-of-state cases that supported the contention that such stops were not authorized (State v. Ross, 37 Kan App 2d 126, 129, 149 P3d 876, 879 [2007]; State v. Tague, 676 NW2d 197, 204-205 [Iowa 2004]; State v. Livingston, 206 Ariz 145, 148, 75 P3d 1103, 1106 [2003]).

Case Law Update

by Flem K. Whited, III, Fellow

Texas Appellate court says that stopping across the top line at intersection that has a rosswalk is not a violation of law

Mumper v. State,
2009 WL 201142 (Tex.App.-Dallas)

The facts of Mumper are quite simple. On June 13, 2007, McKinney Police Officer Ursula Mayorga arrested appellant for misdemeanor driving while intoxicated after his vehicle stopped over the marked top line at a stop-sign-controlled intersection. The stop sign in question, which was at the intersection of Glen Oaks Drive and Lake Forest Drive in McKinney, Texas, has both a top line and a crosswalk. Mumper drove his Hyundai Elantra east on Glen Oaks in McKinney, Texas. There were no other cars on the road except for appellant and Officer Mayorga. Before appellant reached the intersection of Glen Oaks and Lake Forest, he signaled a right turn and stopped his car with his front tires just past the marked top line and the back tires behind the top line. Neither of appellant's car tires reached the marked line of the crosswalk during the stop.

He filed a motion to suppress and first supplemental motion to suppress, arguing that his initial detention was without reasonable suspicion or probable cause because he did not commit a traffic offense. The motions were heard and denied by the trial court after a hearing. No witnesses were called at the hearing. The parties agreed at the hearing that there was no basis for the stop other than the officer's belief that appellant failed to stop at the top line.

In his only issue, appellant argues that the trial court erred by denying his motion to suppress. Specifically, he claims the initial detention was without reasonable suspicion or probable cause because he did not commit a traffic offense under section 544.010 of the Texas Transportation Code, which governs stop signs and yield signs. Section 544.010(c) requires drivers approaching a stop sign to:

[S]top before entering the crosswalk on the near side of the intersection. In the absence of a crosswalk, the operator shall stop at a clearly marked stop line. In the absence of a stop line, the operator shall stop at the place nearest the intersecting roadway where the operator has a view of approaching traffic on the intersecting roadway.

TEX. TRANSP. CODE ANN. 544.010(c) (Vernon 1999).

In this case, the State concedes that appellant did not violate section 544.010(c) because the intersection in question has a crosswalk and appellant stopped before entering it. Although we are aware of no cases interpreting section 544.010(c) under circumstances such as these, the plain language of the statute requires a driver to stop at a marked top line only in the absence of a crosswalk. See TEX. TRANSP. CODE ANN. 544.010(c) (Vernon 1999); see also Ex parte Noyola, 215 S.W.3d 862, 866 (Tex.Crim.App.2007) (we give effect to the plain meaning of the statutory text unless application of a statute's plain language would lead to absurd consequences the Legislature could not possibly have intended). Therefore, since the undisputed facts show that appellant stopped with his front tires beyond the marked top line but before the crosswalk and there is no basis for the stop apart from the officer's belief that appellant failed to stop at the top line, the trial court should have granted appellant's motion to suppress. We sustain appellant's issue.

The Court of Appeal reversed the judgment and remanded and the State appealed to the California Supreme court.

California Supreme Court Says Stop Of Vehicle For Only Displaying A Temporary Tag Is Illegal

People v. Hernandez,
2008 WL 5171080 (Cal.)

In Hernandez, sheriff's deputy Anthony Paonessa saw defendant Hernandez driving a pickup truck with no license plates, but displaying a temporary operating permit in the rear window. Vehicle Code section 4156 provides:

[O]ther provisions of this code notwithstanding, the department in its discretion may issue a temporary permit to operate a vehicle when a payment of fees has been accepted in an amount to be determined by, and paid to the department, by the owner or other person in lawful possession of such vehicle. The permit shall be subject to such terms and conditions and shall be valid for such period of time as the department shall deem appropriate under the circumstances.

Nothing about defendant's permit appeared amiss and Deputy Paonessa saw no other violations. Nevertheless, Paonessa decided to effect a traffic stop. He discounted the presence of the apparently valid permit because, in his experience, such permits are very often forged or have been issued for a different vehicle, or the vehicle itself is stolen.

After Hernandez's motion to suppress evidence was denied, a jury convicted him of obstructing an officer in the performance of his duties, resisting arrest, being under the influence of methamphetamine, and driving under the influence of drugs.

The Court of Appeal reversed the judgment and remanded and the State appealed to the California Supreme court. They affirmed the judgment of the Court of Appeal. Here, both of defendant's truck's plates were missing. The Attorney General contends that Deputy Paonessa was entitled to rely on his experience that temporary permits are often invalid, and thus he was entitled to stop defendant, even though there was no objective indication that defendant was violating the law. To that argument, the court said:

To accept the Attorney General's argument would be to depart from settled California and federal precedent requiring particularized suspicion. This we decline to do. Courts from other jurisdictions also seem uniformly to have concluded that permitting officers to stop any car with temporary permits would be to countenance the exercise of the unbridled discretion condemned in Delaware v. Prouse, supra, 440 U.S. at page 663, 99 S.Ct. 1391. (See United States v. Wilson (4th Cir.2000) 205 F.3d 720; Bius v. State (2002) 254 Ga.App. 634, 563 S.E.2d 527; State v. Childs (1993) 242 Neb. 426, 495 N.W.2d 475; State v. Aguilar (Ct.App.2007) 141 N.M. 364, 155 P.3d 769; State v. Chatton (1984) 11 Ohio St.3d 59, 463 N.E.2d 1237; State v. Butler (Ct.App.2000) 343 S.C. 198, 539 S.E.2d 414; State v. Lord (2006) 297 Wis.2d 592, 723 N.W.2d 425; see also People v. Nabong (2004) 9 Cal.Rptr.3d 854, 115 Cal.App.4th Supp. 1.)

The Attorney General contended that it is significant that defendant's truck was an older model, which presumably would have had already been issued license plates.... He found fault with the Court of Appeal for having failed to address why an older vehicle lacking license plates, as distinguished from a new car, would not objectively contribute to an officer's reasonable belief that a violation of law has occurred, thus justifying a vehicle stop.

The short answer to the Attorney General's argument is that the age of defendant's truck was not mentioned at the suppression hearing, where Deputy Paonessa simply described defendant's vehicle as a brown pickup truck. Asked to describe it further, he said it was a brown Toyota pickup truck.

In a variant of this argument, the Attorney General contends that

a vehicle that has been issued license plates must display the plates even if a temporary operating permit has been issued. Again, this assumes that defendant's was an older model that had been issued plates, an assumption not supported by the record of the suppression hearing

Moreover, license plates once issued can be lost or damaged, requiring replacement (Saunders, supra, 38 Cal.4th at p. 1137, 45 Cal.Rptr.3d 66, 136 P.3d 859), and the Vehicle Code does provide that a vehicle may be driven without plates, if it displays a valid temporary permit Veh.Code, 5202). Therefore, the age of the vehicle, without additional particularized suspicion, would not have supported the stop.

The Court distinguished their recent decision in People v. Saunders (2006) 38 Cal.4th 1129, 1134, 45 Cal.Rptr.3d 66, 136 P.3d 859.

There an officer stopped a pickup because its front license plate was missing and the registration tabs on the rear license plate were expired. Even though an apparently current temporary permit was displayed in the rear window, we concluded that the investigative stop did not run afoul of the Fourth Amendment because the officer had no other ready means to verify the vehicle's compliance with the law. (Saunders, at p. 1131, 45 Cal.Rptr.3d 66, 136 P.3d 859.)

Saunders's truck had an expired registration tab and no front license plate. We pointed out that w]e have not yet decided whether an officer may stop a vehicle that has an expired registration tab but also displays a temporary operating permit. We noted that there were conflicting opinions in the Courts of Appeal. However, we did not resolve the conflict because Saunders's front license plate was missing, and the lack of a front license plate had long been recognized as a legitimate basis for a traffic stop. (Saunders, supra, 38 Cal.4th at pp 1135-1136, 45 Cal.Rptr.3d 66, 136 P.3d 859.)

Without a traffic stop the officer could not determine whether the temporary operating permit applied only to the expired registration or to the missing license plate as well. Moreover, the officer's suspicion that the vehicle was in violation of section 5200 was supported by the Department of Motor Vehicles procedures for replacing lost, stolen, or mutilated plates. Under those procedures, a registered owner must surrender or mail in he remaining plate(s). [Citation.] Yet, as both parties testified, the pickup still displayed its rear license plate, which supported the inference that the registered owner had not initiated the process of replacing the missing plate. (Saunders, supra, 38 Cal.4th at p. 1137, 45 Cal.Rptr.3d 66, 136 P.3d 859.) Thus, in Saunders the officer confronted an anomalous situation. The pickup had one license plate and a temporary permit. Under DMV regulations, those circumstances would appear to be mutually exclusive. As a result, the officer had ample justification to stop the truck to investigate. (Ibid.)

Prosecutor Reference To Defendant Telephone Call Asking For His Attorney In His Opening Statement Before Defendant Was To Submit To Breath Test Had Adverse Prejudicial Effect On Jury, Requiring Mistrial.

State v. Veatch,
2008 WL 4724420 (Or.App.)

Defendant was convicted of driving under the influence of intoxicants (DUII), ORS 813.010(1). Defendant was arrested on suspicion of DUII and placed in the back of a police car. While the arresting officer was talking to another officer who had arrived to transport defendant to the Washington County Jail, defendant took his cell phone from his pocket and attempted to make a call. Officer Berry took the phone from him and then drove him to the jail. At the jail, Berry asked defendant if he would agree to take an Intoxilyzer test to determine his blood alcohol content. Defendant stated that he wanted to contact his family's attorney first. Pursuant to jail policy, defendant's hands remained handcuffed behind his back, so Berry dialed the telephone number and then placed the receiver on defendant's shoulder so he could hold it between his shoulder and head. It was approximately 4:00 a.m., and the attorney did not answer his telephone. Defendant left two voice mail messages asking him to return his call at the jail. Defendant then called his mother, asking her to refer him to another attorney. Berry testified at the suppression hearing, t was my understanding that his mother was unaware of any other attorneys that the family used. erry offered to let defendant look for another attorney in the telephone book, but, Berry testified, defendant didn't desire to do that. After defendant left the messages for his attorney, Berry waited half an hour for the attorney to call back. When he did not return the call, Berry then told defendant that he needed a decision as to whether defendant would agree to proceed with the Intoxilyzer test. Defendant initially remained silent, which Berry took as a refusal to take the test. He printed a refusal card from the Intoxilyzer machine. Moments later, defendant stood up and walked over to the machine, so Berry decided to let him submit a sample. Defendant blew into the mouthpiece, but he did not blow hard enough for the machine to get a sample. Berry recorded his attempt as another refusal.

Before trial, defendant made a motion to suppress the evidence related to the Intoxilyzer test, arguing that he was denied the right to private consultation with counsel before deciding whether to consent to the test. The court denied the motion.

At defendant's trial, before the jury was selected, defense counsel, the prosecutor, and the trial court discussed pretrial rulings that a different judge had made earlier. Defense counsel stated that the judge had ruled that there should be o mention of [defendant's] telephone calls whatsoever because that's invocation of a right * * *. And the second prong was no mention of witness Gerry Chase, who's a lawyer, because the right to call a lawyer is also part of the counsel right * * *. The prosecutor stated that she had a different recollection of the pretrial ruling, acknowledging that e can't say he was a lawyer, but contending that the judge had ruled that evidence about calls could come in. The court ruled that there could be no mention of telephone calls unless the defense opened the door to such evidence and that, even then, w]e don't need to know who it was to * * *. In her opening statement to the jury, the prosecutor stated that defendant had attempted to use his cell phone in the back of the police car. Defense counsel interrupted, stating, our Honor, I have a matter for the court. he court responded, o, I know what it is and it's fine. fter opening statements had concluded, the jury was sent out of the courtroom. Defense counsel stated that, or the record, he was moving for a mistrial. The court interjected that it understood that the motion was based on the prosecutor's mention of the cell phone, adding, I]t's close, but I knew that's [what] you were going to do and I would overrule it. In its case-in-chief, the state called Berry to testify. After he testified about defendant's arrest and transport to the jail, his direct examination continued as follows:

Okay. Did you-first of all, are you trained to operate the Intoxilyzer?
Yes.
Okay. While at the station, did you read the defendant his rights and consequences?
Yes.
Did you ask him if he would take the test?
Yes, I did.
How did he respond?
He wanted to call his lawyer before making that decision.
[Defense counsel]: Objection. I have a matter for the court.
THE COURT: Sustained. And if I hear that word again-
[Prosecutor]: Yeah.
THE COURT:-you're going to start all over again.

The defendant renewed his challenge to the introduction of the evidence related to the Intoxilyzer test. He contended that Berry should have given him privacy both when he left the voice mail messages for his attorney and when he called his mother to ask her to refer him to another attorney. He relies on a passage in State v. Durbin, 335 Or. 183, 194, 63 P.3d 576 (2003), in which the Supreme Court stated that, to avoid violating the right to counsel, the police might find it preferable to inform the driver of their intent to administer the breath test and then, if the driver requests counsel, to allow the driver a reasonable time in which to seek legal advice, in private, before beginning the required observation period [that precedes the test]. Defendant relies in particular on the phrase or seek legal advice, arguing that the court held that confidentiality is required not only when an arrested driver is speaking with an attorney, but also while the driver is seeking counsel-that is, while the driver is attempting to locate and establish contact with an attorney.

The defendant renewed his challenge to the introduction of the evidence related to the Intoxilyzer test.

The defendant's right to counsel included the right to confer privately with counsel and that his invocation of the right to counsel was sufficient to request an opportunity to confer privately. he presence of the officer within earshot while [the] defendant consulted with his lawyer breached the confidentiality of the lawyer-client communication and violated [the] defendant's right to counsel under Article I, section 11. Durbin, citing, State v. Jancsek, 302 Or. 270, 274, 730 P.2d 14 (1986) concluding that the fact that the officer had already begun the 15-minute observation period did not justify the officer's continued presence while [the] defendant consulted with counsel the fact that the observation period would have to be terminated does not justify a violation of the defendant's ight to consult with his lawyer privately if a request for counsel is made after the observation period has begun, it is ordinarily not oo late to require that the consultation with counsel be confidential (emphasis added)). In short, the court held in Durbin that privacy must be afforded while an arrested driver confers with an attorney, not while the driver attempts to locate or establish contact with an attorney.

Defense counsel's statement- have a matter for the court immediately following Berry's testimony was sufficient to alert the trial court that he intended to move for a mistrial. The court's response shows that it understood counsel's intent: It immediately threatened to grant a mistrial, warning the prosecutor that she was going to start all over again if defendant's invocation of the right to counsel was mentioned again, and it instructed the jury to disregard the testimony. Furthermore, when defendant expressly made the motion after Berry finished testifying, the court stated, hat's denied still. In this case, when defense counsel asserted that he had matter for the court, the court understood what the matter was. Rather than giving defendant an immediate opportunity to make his mistrial motion outside the presence of the jury, the court here took the actions that it believed to be appropriate in response to the offending testimony: It warned the prosecutor of the possibility of a mistrial and gave the jury a curative instruction. Had defense counsel expressly moved for a mistrial at the outset, rather than signaling his intent by merely saying, have a matter for the court, there is no reason to believe that the court's response would have been any different. Under the circumstances, defendant should not be penalized on preservation grounds because the court chose to respond to the situation as it did. In short, the Court concluded that, with respect to Berry's testimony, defendant's mistrial motion does not run afoul of preservation requirements.

In short, if the court chooses to give a curative instruction rather than declare a mistrial, any error in denying a preserved mistrial motion remains preserved regardless of whether the defendant objected to the sufficiency of the instruction. The Court concluded that Berry's statement likely gave rise to an adverse inference of guilt. The jury was informed that defendant had invoked the right to counsel in response to being asked whether he would submit to a potentially incriminating breath test. Berry's statement was not incidental to some other point that the jury was more likely to be focusing on. As defendant argues, under the circumstances, a jury would likely infer that a person arrested for DUII would not ask for an attorney unless he or she was concerned about failing the breath test-in other words, a jury would likely see it as a tacit admission of guilt. Because nothing in the context diverted the jury's attention away from that inference, the Court could not say that it is unlikely that the jury drew it.

Seemingly Neutral Jury Instruction Concerning Refusal to Submit to Breath Test Still Over-Emphasized Defendant Refusal

Bartlett v. State,
2008 WL 5047703 (Tex.Crim.App.)

The appellant, Roy Bob Bartlett, was convicted of felony driving while intoxicated (DWI). Over the appellant's objection, the trial court instructed the jury at the conclusion of the guilt phase of trial that it was permitted to consider the fact that the appellant had refused to submit to a breath test. On appeal, the appellant asserted that this instruction constituted an impermissible comment on the weight of the evidence. The court of appeals rejected this argument, and affirmed the conviction. The criminal appeals court granted the appellant's petition for discretionary review to examine this holding and reversed the appellate court judgment.

The appellant was stopped for speeding by a state trooper

while driving on August 7, 2005, in Aransas County. Suspecting that the appellant was intoxicated, the trooper asked the appellant, inter alia, to submit to a breath test. The appellant refused to take a breath test without the presence of his counsel. He was arrested for the offense of driving while intoxicated. At trial, the evidence of his refusal to submit to a breath test was admitted into evidence under Texas Transportation Code Section 724.061 That provision reads:

A person's refusal of a request by an officer to submit to the taking of a specimen of breath or blood, whether the refusal was express or the result of an intentional failure to give the specimen, may be introduced into evidence at the person's trial.

The appellant was convicted by the jury and sentenced to five years' confinement suspended by probation for a period of two years.

The single issue on appeal was whether the following jury instruction constituted an impermissible comment on the weight of the evidence:

You are instructed that where a Defendant is accused of violating Chapter 49.04, Texas Penal Code, it is permissible for the prosecution to offer evidence that the defendant was offered and refused a breath test, providing that he has first been made aware of the nature of the test and its purpose. A Defendant under arrest for this offense shall be deemed to have given consent to a chemical test of his breath for the purpose of determining the alcoholic content of his blood.

The prosecution asks you to infer that the defendant's refusal to take the test is a circumstance tending to prove a consciousness of guilt. The defense asks you to reject the inference urged by the prosecution and to conclude that because of the circumstances existing at the time of the defendant's refusal to take such test, you should not infer a consciousness of guilt.

The fact that such test was refused is not sufficient standing alone, and by itself, to establish the guilt of the Defendant, but is a fact which, if proven, may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not the Defendant's refusal to take the test shows a consciousness of guilt, and the significance to be attached to his refusal, are matters for your determination.

There are three specific circumstances under which a trial court may single out a particular item of evidence in the jury instruction without signaling to the jury an impermissible view of the weight (or lack thereof) of that evidence. First, the trial court may specifically instruct the jury when the law directs it to attach certain degree of weight, or only a particular or limited significance, to a specific category or item of evidence Second, the Legislature has expressly required the trial court to call particular attention to specific evidence in the jury charge when the law specifically identifies it as a predicate fact from which a jury may presume the existence of an ultimate or elemental fact.

Third, the trial court may instruct the jury with respect to evidence that is admissible contingent upon certain predicate facts that it is up to the jury to decide.

First of all, although Section 724.061 of the Texas Transportation expressly allows the court to admit the evidence of a defendant's refusal to take a breath test, there is no statutory language that directs the jury to attach any special weight or significance to such evidence.

Nor does Texas law anywhere establish any presumption that arises in a DWI case from the defendant's refusal to take a breath test. Evidence of the appellant's refusal to submit to a breath test is relevant for precisely the reason that the trial court identified in the contested jury instruction, namely, that it tends to show a consciousness of guilt on his part. But Section 724.061 of the Transportation Code does not establish a legally recognized presumption of consciousness of guilt that follows from the fact of refusal. The Court was not aware of no other statutory language that expressly authorizes the jury to presume a consciousness of guilt from the refusal to take a breath test. In the absence of such a legal presumption, it is improper for the trial court to instruct the jury with respect to inferences that may or may not be drawn from evidentiary facts to ultimate or elemental facts. Because a presumption of consciousness of guilt from the refusal to submit to a breath test s not an explicit legal tool for the jury[,] HYPERLINK \l it was error for the trial court to have instructed the jury with respect to available inferences that may derive from that evidence.

Finally, the admission of the appellant's refusal to take the breath test was not contingent on any other fact which a jury is charged by law to decide. Indeed, the law typically assigns to the judge, not the jury, the role of determining the admissibility of evidence. It had the potential to obliquely or indirectly convey some [judicial] opinion on the weight of the evidence by singling out that evidence and inviting the jury to pay particular attention to it. The jury instruction did nothing to clarify the law. It served no function other than to improperly end to emphasize the evidence of the appellant's refusal to submit to a breath test y repetition or recapitulation. It had the potential to obliquely or indirectly convey some [judicial] opinion on the weight of the evidence by singling out that evidence and inviting the jury to pay particular attention to it.

Jury Instruction Referring to Defendant Remaining Silence, and Refusing to Submit to Breath Test as Evidence of Potential Consciousness of Guilt requires Reversal.

State v. Orians,
2008 WL 5053447 (Ohio App. 3 Dist.)

Defendant-Appellant, Kevin J. Orians, appeals the judgment of the Tiffin Municipal Court convicting him of operating a vehicle while under the influence of alcohol. On appeal, Orians contends that the trial court erred in its special instruction to the jury regarding his refusal to submit to a chemical test. Orians argues that the trial court's special instruction was not neutral and was slanted in favor of the prosecution. Based upon the following, we reverse the judgment of the trial court.

In March 2008, Orians was arrested and cited for one count of operating a vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(1)(a), a misdemeanor of the first degree, one count of traveling left of center in violation of R.C. 4511.25, a minor misdemeanor, and one count of refusing a breath alcohol test with a prior conviction of operating a vehicle while under the influence of alcohol in violation of R.C. 4511.19(A)(2). After his arrest, Orians was transported to the police station where he signed a refusal of a breath alcohol test.

Thereafter, Orians entered a plea of not guilty. Orians also filed a motion to suppress evidence obtained from the stop, arguing that the arresting officer did not have awful cause to detain him or to form an opinion that he was under the influence of alcohol, which the trial court denied.

In May 2008, the State filed proposed jury instructions, including the following instruction on refusal of a chemical test, derived from Westerville v. Cunningham (1968), 15 Ohio St.2d 121:
Although a person has the right under Ohio law to refuse to submit to a chemical test, such refusal is a fact which, if proven, may be considered by you as evidence that the defendant's refusal to submit to a chemical analysis was because he believed that he was under the influence of alcohol.
Where a defendant is accused of intoxication and is not intoxicated, the taking of a reasonably reliable chemical test for intoxication should establish that he is not intoxicated. On the other hand, if he is intoxicated, taking of such a test will probably establish that he is intoxicated. Thus, if he is not intoxicated, such a test will provide evidence for him; but if he is intoxicated, the test will provide evidence against him. Thus, it is reasonable to infer that a refusal to take such a test indicates the defendant's fear of the results of the test and his consciousness of guilt, especially where he is asked his reason for such refusal and he gives no reason which would indicate that his refusal had no relation to such consciousness of guilt. The weight to which such a circumstance is entitled and whether or not such conduct shows a consciousness of guilt are matters for your determination. (State's Proposed Jury Instructions, p. 3).

Orians objected to the State's proposed jury instructions regarding refusal of a chemical test on the basis that the instruction referred to intoxication, which was not an element of the charged offense, and on the basis that the instruction indicated to the jury that a defendant must give a reason for refusing to submit to a chemical test, and is not permitted to remain silent.

The case then proceeded to trial, at which Orians testified that he refused to take the chemical test because he wished to speak to his attorney first, but was unable to contact him despite several attempts; because he wanted to know what his options were, and no one at the police station would answer his questions; and, because he felt pressured to refuse the test because a police officer told him that he would be written up for DUI whether or not he took the test. After the close of testimony, Orians again objected to the State's proposed jury instruction on refusal of a chemical test. The trial court overruled the objection and submitted the State's instructions to the jury. (Trial Tr., p. 55). The jury found Orians guilty of operating a vehicle while under the influence of alcohol pursuant to R.C. 4511.19(A)(1)(a). The trial court accepted the jury's verdict of guilty, convicted Orians of the offense, sentenced him to serve a one hundred eighty day jail term, with one hundred seventy-five days suspended, imposed two years of community control, suspended his license for one year, and ordered him to pay a fine of $350.
Concerning jury instructions on refusal of a chemical test, the Supreme Court of Ohio has held that,
In a situation such as here, as well as a * * * Cunningham-type occurrence, an instruction by a trial judge to a jury, with regard to a defendant's refusal to submit to a chemical test, must not be one-sided. * * * [T]he trial judge should not invade the province of the jury. That is precisely what occurred in the instant case when the trial judge charged the jury that they could consider the fact that appellee refused to take the test because the defendant believed she was under the influence of alcohol. * *
*[C]ircumstances may exist where the refusal to submit to a chemical test by a person suspected of driving while under the influence of alcohol is not based on consciousness of guilt. Maumee v. Anistik (1994), 69 Ohio St.3d 339, 343-344(citations omitted).
The Supreme Court then expressed its approval of the instruction on refusal to submit to a chemical test contained in the Ohio Jury Instructions, reading:
Evidence has been introduced indicating the defendant was asked but refused to submit to a chemical test of his/her breath to determine the amount of alcohol in his/her system, for the purpose of suggesting that the defendant believed he/she was under the influence of alcohol. If you find the defendant refused to submit to said test, you may, but are not required to, consider this evidence along with all the other facts and circumstances in evidence in deciding whether the defendant was under the influence of alcohol.
4 Ohio Jury Instructions (2004) 899, Section 711.19.

The Supreme Court held that this instruction provided proper neutrality in a situation here a person has been arrested for driving while under the influence of alcohol and is requested by a police officer to submit to a chemical test of his or her breath but he or she refuses to take the test, and the reason given for the refusal is conditional, unequivocal, or a combination thereof. Anistik, 69 Ohio St.3d at 344.

In the case before the Court, however, the trial court chose to charge the jury with an instruction as set forth in Cunningham, 15 Ohio St.2d at 122, which included eight references to intoxication. The word intoxication is not an element of R.C. 4511.19(A)(1)(a), nor is it referred to anywhere in the statute. By using this word in an instruction concerning operating a vehicle while under the influence of alcohol, the trial court failed to correctly and clearly state the law applicable to the case. The Court found the connotation of the word intoxication to be suggestive and prejudicial. Additionally, the trial court's instruction charged the jury that it was reasonable to infer that a defendant's refusal of a chemical test evinced consciousness of guilt specially where he is asked his reason for such refusal and he gives no reason which would indicate that his refusal had no relation to such consciousness of guilt. Finally, in Anistik, supra, the Supreme Court of Ohio expressly approved of the jury instruction for refusal of a chemical test that is contained in the Ohio Jury Instructions, whether the refusal was conditional, unequivocal, or a combination thereof. The Supreme Court declared that this instruction provided appropriate neutrality and prevented the trial judge from invading the province of the jury by allowing the jury to weigh all of the facts and circumstances surrounding the refusal. As the Supreme Court has approved of this instruction, the trial court should have utilized it to ensure neutrality and avoid reversal on the issue.

Because the trial court here failed to correctly and clearly state the law of the case, failed to provide a neutral instruction, and ignored the Supreme Court's holding in Anistik, the Court found that the trial court abused its discretion.