August 2011 Vol. 21, No. 1

ILLINOIS STATE BAR ASSOCIATION

Traffic Laws & Courts

The newsletter of the Illinois State Bar Association's Section on Traffic Laws & Courts

Summary suspension after a motor vehicle accident

By Lisa L. Dunn

The Illinois legislature has granted the Secretary of State authority to suspend driver's licenses and driving privileges of individuals who are involved in motor vehicle accidents involving personal injuries. This article will discuss *Odom v. White*, 408 Ill. App. 3d 1113 (Ill. App. 5th Dist.) 2011, a recent decision from the Illinois Appellate Court, 5th District. The issue in *Odom* was whether the injuries suffered in two motor vehicle accidents met the statutory definition of a type A injury, which confers implied consent for a blood-alcohol test.

Section 6-206(a)(31) of the Illinois Vehicle Code gives the Secretary of State discretionary authority to suspend or revoke the driving privileges of any person upon sufficient evidence that the person has refused to submit to a blood-alcohol test as required by section 11-501.6 of the Illinois Vehicle Code (625 ILCS 5/11-501.6 (West 2008) or has submitted to a test resulting in an alcohol concentration of 0.08 or more. 625 ILCS 5/6-206(a)(31) (West 2008). Section 11-501.6(a) of the Code provides that any person who drives or is in actual control of a motor vehicle upon the public highways and who has been involved in an accident resulting in personal injury or death for which he has been arrested for a non-equipment violation, as evidenced by a traffic ticket, shall be deemed to have given consent for a blood-alcohol test. 625 ILCS 5/11-501.6(a) (West 2008). Pursuant to 625 ILCS 5/11-501.6(g), "…[a] personal injury shall include any type A injury as indicated on the traffic accident report completed by a law enforcement officer that requires immediate professional attention in either a doctor's office or a medical facility. A type A in-

Continued on page 2

People v. Geier

By David Franks, Lake in the Hills, IL

People v. Geier, 407 Ill.App.3d 553, 348 Ill.Dec. 552 (2nd Dist. 2011)

Initial probable cause did not dissipate merely because Arresting Officer continued to follow motorist for 2-4 miles, after observing traffic violation, before stopping motorist.

The State charged defendant with driving under the influence of alcohol. 625 ILCS 5/11-501(a)(2) (West 2008). The traffic citation described the road conditions as dry with clear visibility. Defendant was issued a notice of summary suspension of her driver's license for 12 months. 625 ILCS 5/11-501.1 (West 2008). Prior to trial, defendant moved to quash her arrest and suppress evidence obtained when a sheriff's deputy stopped her vehicle.

Defendant petitioned to rescind the statutory summary suspension, alleging that the Arresting Officer stopped her vehicle without reasonable grounds to believe that she was operating her vehicle while under the influence of alcohol. Following a hearing, the trial Court granted defendant's petition. The trial Court found that the Arresting Officer did not have sufficient cause to effect a traffic stop.

Defendant then moved to quash her arrest and suppress evidence, arguing that the Arrest-

Continued on page 3

INSIDE

***(Notice to librarians:** The following issues were published in Volume 20 of this newsletter during the fiscal year ending June 30, 2011: August, No. 1; November, No. 2; March, No. 3; May, No. 4).*

If you're getting this newsletter by postal mail and would prefer electronic delivery, just send an e-mail to Ann Boucher at aboucher@isba.org

Summary suspension after a motor vehicle accident

Continued from page 1

jury shall include severely bleeding wounds, distorted extremities, and injuries that require the injured party to be carried from the scene."

In *Ryan v. Fink*, 174 Ill. 2d 302, 310 (1996), the Illinois Supreme Court adopted the language of Section 5/11-501.6(g) and held that type A injuries are those listed in the following paragraph: "severely bleeding wounds, distorted extremities, or injuries that require the injured party to be carried from the scene." Only drivers involved in more serious accidents, in which the expectation of privacy is diminished and the administration of the blood-alcohol test is minimally intrusive are subject to testing. *Fink,* 174 Ill. 2d at 311. The statute does not require the law enforcement officer to have any suspicion or cause to believe that the driver is intoxicated or under the influence of alcohol prior to asking him or her to submit to testing. Therefore, the application is limited to motor vehicle accidents of a more serious nature. *Fink,* 174 Ill. 2d at 309-12.

Odom v. White consisted of two consolidated cases. The facts surrounding appellant Joshua A. Odom reveal that he was involved in a one car accident and could not get out of his vehicle because his car came to rest against an embankment. Appellant Odom repeatedly told the responding personnel that he was "fine and not injured." Odom's only injury was a minor head laceration. The traffic accident report indicates a type B injury. The only time Odom might have "moaned" or "groaned" was at the hospital when blood was drawn because of his aversion to that procedure. The facts surrounding appellant Jason H. Janes reveal that the passenger had a small cut above his right eye. The passenger was not given any choice whether to take the ambulance, but was forced to go, despite the passenger's objections to transport by ambulance. The traffic accident report did not indicate a type A injury or an incapacitating injury. Both Odom and Janes submitted to blood alcohol tests, which revealed blood alcohol concentrations of 0.08 or more. Both drivers' driving privileges were suspended and each driver contested the suspension before the Secretary of State. In each case, the Secretary of State upheld the suspension, which was then affirmed by the circuit court. The Appellate Court reversed the Secretary's decisions and found that merely carrying away a passenger from the scene by ambulance does not fulfill the statutory requirement of a type A injury. The Appellate Court held that the plain language of the statute requires not only that the injured party be carried from the scene, but that they have injuries that require they be carried from the scene. The Appellate Court stated that the implied consent statute was held constitutional in *Fink* because it was narrowly drawn to apply only to drivers involved in more serious accidents. It is those more serious accidents in which the expectation of privacy is diminished and the administration of a blood-alcohol test is minimally intrusive. Thus, the Fifth District of the Illinois Appellate Court held that suspension of driving privileges pursuant to Section 6-206(a)(31) of the Illinois Vehicle Code is limited to type A injuries, which must include "severely bleeding wounds, distorted extremities, and injuries that require the injured party to be carried from the scene." 625 ILCS 5/11-501.6(g).

In summary, the 5th District Appellate Court has now provided some guidance as to what a type A personal injury actually means. According to the 5th District Court, a type A injury includes "severely bleeding wounds, distorted extremities, and injuries that require the injured party to be carried from the scene." 625 ILCS 5/11-601.5(g) (West 2008). It does not mean merely removed from the scene by ambulance. ■

Lisa L. Dunn is an attorney with an office in Arlington Heights. She represents clients in criminal and traffic matters in Lake and Cook County. She is also a former Hearing Officer with the Secretary of State, Department of Administrative Hearings, and has extensive experience with DUI license reinstatement hearings, BAIID violations, and interpretation of the rules and regulations of the Secretary of State.

People v. Geier

Continued from page 1

ing Officer lacked probable cause to make the initial stop of her vehicle prior to her arrest. At hearing on Defendant's motion, the Arresting Officer testified that he was traveling south on Route 76 approaching Woodstock Road and observed defendant's silver Chevy Blazer a little more than a quarter-mile away on Woodstock Road. Defendant's vehicle was moving "a little fast" as it approached the intersection, and it abruptly stopped at the intersection. The intersection was controlled by a stop sign and located on a downhill curve.

After Defendant's vehicle stopped, it turned left onto southbound Route 76. The Arresting Officer then observed the vehicle cross over the white fog line on the right-hand side of the road. At one point, all four tires passed over the fog line. The vehicle next turned right onto Spring Creek Road. The Arresting Officer observed no problems with that turn. The vehicle then turned north onto Riverside Road. The vehicle continued to travel within its lane. However, after the vehicle passed Olson Road, the vehicle's left front wheel crossed over the center line. The Arresting Officer did not recall whether or not the tire completely crossed over the center line. The Arresting Officer then stopped Defendant's vehicle.

The Arresting Officer testified that the distance between Woodstock and Olson Roads is about two miles, but that it could be four to five miles. The Arresting Officer was unable to run his radar. When he paced Defendant's vehicle, it exceeded the speed limit. He had not caught up to Defendant's vehicle before he reached Spring Creek Road, but caught up to the vehicle by the time it reached Riverside Road.

The Arresting Officer did not issue defendant a ticket for crossing the center line, but he did issue her a ticket for driving over the fog line. 625 ILCS 5/11-709(a). Addressing why he did not pull over defendant between Spring Creek and Olson Roads, the Arresting Officer testified that since there were curves and hills, there was no safe place to stop a car in that area. He was concerned for both defendant's and his own safety. The Arresting Officer did not activate his take-down lights while there was a significant distance between himself and Defendant. The Arresting Officer testified that he preferred to have a short distance between his squad car and a motorist before activating his take-down lights because, if a car was too far ahead, the driver would not necessarily know that the officer is trying to effect a stop. The Arresting Officer acknowledged that the shoulder on southbound Route 76 is the width of a car.

Following arguments, the trial Court granted defendant's motion to quash and suppress. The court noted its familiarity with *People v. Leyendecker*, 337 Ill.App.3d 678, 787 N.E.2d 358, 272 Ill.Dec.543 (2nd Dist. 2003), which defendant's counsel had cited. The trial Court found that defendant crossed the fog line at Woodstock Road and Route 76 and, therefore, violated the Illinois Vehicle Code (625 ILCS 5/11-709(a). Addressing probable cause, the trial Court found, however, that there were between two and four miles from the point of the violation to where the Arresting Officer stopped defendant. The trial Court stated that the testimony showed that defendant's vehicle passed several intersections before the Arresting Officer stopped her. The trial Court found that the Arresting Officer was credible but did not have probable cause to stop defendant. The court stated that a "significant" factor in its ruling was that the Arresting Officer delayed in pulling over defendant.

The State filed a Motion to Reconsider, arguing that a peace officer is not required to effect a traffic stop immediately after witnessing a traffic violation and that there is no requirement that a peace officer issue a traffic ticket on the same day as the cited offense. The trial Court denied the State's motion, reiterating its prior findings and stating that the Arresting Officer waited too long to issue the ticket.

The State filed a certificate of impairment and appealed pursuant to Illinois Supreme Court Rule 604(a)(1).

On appeal, the State argued that the trial Court erred in granting defendant's motion to quash and suppress. The State challenged two aspects of the trial Court's ruling, arguing that the trial Court erred by (1) relying on *Leyendecker,* because that case was distinguishable and limited to its unique facts; and (2) not placing more weight on the Arresting Officer's assessment of the circumstances surrounding his delay in stopping Defendant. The Appellate Court agreed with the State's

Traffic Laws & Courts

Published at least four times per year.

Annual subscription rate for ISBA members: $20.

To subscribe, visit www.isba.org or call 217-525-1760

Office
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701
Phones: 217-525-1760 OR 800-252-8908
www.isba.org

Co-Editors
Sarah E. Toney
Dolorita May

Managing Editor/ Production
Katie Underwood
kunderwood@isba.org

argument that the trial Court erred in granting defendant's motion.

The Appellate Court reviewed *Leyendecker* and concluded that *Leyendecker* was distinguishable from the matter at bar. The Appellate Court noted that in the instant case, defendant's driving error—all four wheels of her vehicle crossed the fog line—was for more egregious than the error that occurred in *Leyendecker*—a momentary crossing, by a width of one foot, of the fog line while maneuvering in a 65-mile-per-hour zone into a curve. In the matter at bar, the Appellate Court maintained that there were no special conditions such as the poor visibility in *Leyendecker* that would have accounted for defendant's driving error. Although the Arresting Officer testified that the approach to the Woodstock Road and Route 76 intersection was a downhill curve, the Arresting Officer testified that defendant's vehicle crossed over the fog line after she stopped at the intersection, and the Arresting Officer wrote in the DUI citation that the road conditions were dry with clear visibility. Unlike *Leyendecker,* the Arresting Officer testified that defendant's vehicle crossed over at least one of the roadway's center lines.

The Appellate Court then addressed the State's second argument, that, although the trial Court expressed no concern as to the Arresting Officer's credibility, it nevertheless appeared to disregard the Arresting Officer's explanation as to why he did not stop defendant earlier.

The Appellate Court noted that the Arresting Officer testified that, after he observed a traffic violation, he followed defendant's vehicle for two to four miles before stopping Defendant because he did not feel there was a safe place to stop. The Appellate Court noted that the trial Court found there was no probable cause because the Arresting Officer waited too long to stop Defendant, and the Appellate Court also pointed out that the trial Court did not explain how the initial probable cause dissipated merely because the Arresting Officer continued to follow defendant for two to four miles after observing the traffic violation. Mere delay does not dissipate probable cause to arrest. *People v. Shepherd,* 242 Ill.App.3d 24, 29-30, 610 N.E.2d 163, 182 Ill.Dec. 739 (4th Dist. 1993).

In addition to relying on *Shepherd,* the Appellate Court cited Section 107-2(1)(c) of the Code of Civil Procedure of 1963 which states, in part, that a "peace officer *may* arrest a person when" the officer "has reasonable grounds to believe that the person is committing or has committed an offense". (Emphasis added). 725 ILCS 5/107-2(1)(c). The Appellate Court concluded that this statute has been construed to mean that an officer has discretion to arrest a person "immediately, later, or perhaps never." *Shepherd,* 242 Ill.App.3d at 29.

The Appellate Court ruled that the trial Court erred in granting defendant's motion to quash and suppress. The Appellate Court reversed the judgment of the Circuit Court and remanded the cause for further proceedings. ■

Don't be intimidated by DUIs with blood evidence

By Erica Nichols

For most people, when they hear DUI, they assume there was a breathalyzer. But, the state can also attempt to prove your client is over the legal limit through a blood or urine test. A blood test is no reason to be intimidated and below I will explain why. First you should review your discovery and speak with your client to determine which type of blood draw and test was done. There are two statutes that allow the state to introduce a blood alcohol test result into evidence in a DUI prosecution. First, there is a consent blood draw under 725 ILCS 5/11-501.2. A consent blood draw will also be referred to as a DUI Kit. The second type is an emergency blood draw under 725 ILCS 5/11-501.4. This is most common when there has been an accident with injuries and your client was transported to the hospital and blood was drawn at the hospital. Each type of blood draw has its own legal requirements for admission into evidence at trial. It is these requirements that provide the opportunity to defeat the blood evidence.

Consent Blood Draw/DUI Kit

First, a consent draw or DUI Kit under 725 ILCS 5/11-501.2 is the most similar to evidence of a breathalyzer. It requires the consent of the client and warnings to the motorist should be read before the blood is drawn. The hospital usually has the DUI kit in a secure location within the emergency room and officers should use kits provided by the department and/or hospital. The police officer must obtain consent from the defendant and then request the hospital personnel to obtain the kit. A consent draw blood kit will not be done by the hospital without the police officer's request for it. The consent draw must be obtained pursuant to Illinois State Police regulations found in the Administrative Code.[1] A kit contains two vials for blood with industry standard anti-coagulant and preservative indicated by a gray vacuum top.[2] A kit will also contain vials for the collection of urine. Urine is the preferred evidence for testing for drugs, not alcohol.[3] The Illinois State Police regulation requires that the blood be collected by a licensed physician, registered nurse, trained phlebotomist, or certified paramedic.[4] The identity of the person collecting the blood may appear in the officer's Alcohol Drug Influence Report or at the least in the medical records from the hospital. A law enforcement officer shall be present when the sample is drawn to authenticate the sample.[5] The medical records may indicate which officer requested the DUI kit and which one was present for the draw.

The tubes of blood must be labeled with the name of the patient and date of withdrawal and treated as biohazard evidence.[6] The kit is subject to chain of custody requirements.[7] The kit should be sealed in front of the officer and both the hospital personnel and officer should initial the tape on the box. The officer then takes custody of the kit and submits it to the Illinois State Police laboratory for analysis as soon as practicable.[8] A forensic scientist with the Illinois State Police will photograph the kit in its box and each vial prior to analysis. Through discovery, you may request or receive photocopies of the seals and chain of custody documents from the Illinois State Police Laboratory. Consider your trial strategy before subpoenaing these items, you may want to argue a lack of chain of custody and the state may not tender the entire laboratory file.

It is not necessary for every person involved the chain of custody to testify at trial.[9] *People v. Bishop* states that the evidence may be admitted with a missing link if there is testimony sufficiently describing the condition of the evidence when collected and delivered that matches the description of the evidence when examined.[10] At trial, this means that the officer who was present for the draw and took custody of the DUI Kit must describe the kit, the seals, the initials and that description must match the one given by the forensic scientist who examined it at the Illinois State Police Laboratory. If the witnesses cannot sufficiently describe the evidence or the state fails to elicit sufficient descriptions, then there is an argument that the chain of custody is compromised and that the state has failed to meet its burden to show that reasonable measures were used to protect the evidence from being altered.[11]

The DUI kit containing the blood should be kept in a cool environment because it is biohazard evidence and improper handling could destroy the sample. The forensic scientist will describe a cooler at the lab and you can cross on its security and appropriate regulation. It is important to question the officer about the transportation of the DUI Kit. Ask if he placed it in the trunk of his squad car and for how long and then to whom and when it was transferred. Blood evidence can be damaged by mishandling.[12] If there is lack of testimony regarding the safekeeping of the blood evidence, you have an argument that it was damaged and thus the results are not reliable. The state must show that reasonable measures were employed to protect the evidence.[13] You should also note that the arresting officer is probably not the officer who transports the evidence to the ISP lab and the forensic scientist witness is probably not the person at the lab who receives the evidence. Watch for dates and names on the discovery from the ISP laboratory to build your chain of custody argument.

The ISP laboratory will conduct an analysis using headspace gas chromatography and return a result in whole blood.[14] This is important because a whole blood result is required by statute and it is the state's burden to present whole blood result.[15] There will not be a conversion of this result. You can cross the forensic scientist on the testing procedures and lab certifications. The forensic scientist may run fifteen samples or more at one time.[16] If you are arguing chain of custody, be sure to ask the forensic scientist about how blood decomposes and whether it could be detected by the human eye.[17]

The consent blood draw/DUI Kit requires at least three witnesses. The state must present the officer, the person who drew the blood, and the scientist who analyzed the blood. You can create doubt about the chain of custody and the reliability of the sample.

Emergency Treatment Blood Draw

The second type of blood draw is the emergency room draw exception under 725 ILCS 5/11-501.4. This statute states that a blood alcohol test conducted as part of emergency medical treatment is admissible in a DUI prosecution.[18] The state will generally request the court to sign a Qualified Protective Order for use with a subpoena for your client's medical records. Upon receipt of the medical records by the court, an *in camera* inspection will be done by the court prior

to releasing the records to the parties. When you review the medical records, look for the injuries and diagnosis to determine what treatment was being rendered and to see if it qualifies as necessary emergency medical treatment. The lab report and relevant medical records can be admitted under the business record exception to the hearsay rule.[19] Most often, the state will call the person who collected the blood and qualify them as the custodian of records. To meet the business record exception, the witness must testify to the business record and additionally foundation found in the statute.[20] The witness must testify that the sample was tested by the lab the hospital routinely uses and there must be some testimony that test was ordered in the regular course of treatment.[21] It is not necessary that the witness testify to a chain of custody.[22] The lab technician who received and tested the blood is not required to testify, nor is subject to cross-examination. An objection can be made that this violates Defendant's right to confront witnesses.[23]

The issue with the hospital blood draw is that hospitals generally will conduct a serum blood test.[24] They spin out the water in the blood and then test it for the presence of ethanol. So the alcohol test result will be higher than a whole blood test result.[25] A serum result can be anywhere from 12 percent to 20 percent higher than a whole blood result because alcohol is attracted to water in the body and the serum has a higher relative percentage of water which results in the higher concentration of alcohol.[26] The state must then convert the serum test result into a whole blood test result.[27] The administrative code has provided a regulation and conversion factor specifically for this situation. The administrative code requires the serum result to be divided by 1.18.[28]

The state may utilize a forensic toxicologist with the Illinois State Police to perform this calculation and present a conversion report. This expert can be cross-examined regarding how the conversion factor is determined, the studies done to determine the average conversion factor, and what medical conditions may affect an individual's specific conversion factor. The state may ask the court to take judicial notice of the conversion rate and not present this expert with his report.[29] However, you should object and argue that judicial notice is proper for the conversion factor, but not for the result. A court is limited to the exhibits offered and admitted; it should not be completing its own math equations to determine if the defendant's whole blood alcohol concentration was over .08 beyond a reasonable doubt.[30] The court has held that the conversion factor is not a mandatory presumption, but a permissive one. The court does not have to accept the conversion factor and resulting math.[31]

Over the years, there have been many challenges to blood evidence. Most of these issues—whether medication was given to the defendant, or whether alcohol was used to swab the arm, or the effect of an IV on the blood test—have been found to be unconvincing and not a bar to admissibility of the blood result. Overall, the appellate court has held that there must be evidence that the medication, IV, or alcohol swab affected the test results to make it unreliable.[32]

There is still plenty of room for argument in a DUI with blood evidence and opportunities for success. ■

---

1. 20 Ill. Admin. Code ' 1286.320 (2011).
2. 20 Ill. Admin. Code ' 1266.320(d).
3. 20 Ill. Admin. Code '1286.330.
4. 20 Ill. Admin. Code ' 1286.320(b).
5. 20 Ill. Admin. Code ' 1286.320(a).
6. 20 Ill. Admin. Code ' 1286.320(e).
7. *People v. Bishop*, 354 Ill. App. 3d 549, 559 (1st Dist. 2004).
8. 20 Ill. Admin. Code ' 1286.320(f).
9. Bishop, 354 Ill. App. 3d at 560.
10. Bishop, 354 Ill. App. 3d at 560.
11. See *People v. Harris*, 352 Ill. App. 3d 63, 69 (1st Dist. 2004) (citing *People. v. Irpino*, 122 Ill. App. 3d 767, 775 (2nd Dist. 1984)).
12. Don Ramsell, Illinois Practice Series, Vol 25: IL DUI Practice & Guidebook, Appendix A (West 2010).
13. *People v. Bynum*, 257 Ill. App. 3d 502, 510 (1st Dist. 1994).
14. For a detained explanation, please see Don Ramsell, Illinois Practice Series, Vol. 25: IL DUI Practice & Guidebook '4:71.
15. See 726 ILCS 5/11-501 (2011); *People v. Thoma*n, 329 Ill. App. 3d 1216 (5th Dist. 2002).
16. Don Ramsell, Illinois Practice Series, Vol. 25: IL DUI Practice & Guidebook ' 4:71.
17.Id.
18. 725 ILCS 5/11-501.4 (2011).
19. 725 ILCS 5/11-501.4.
20. *People v. Massie*, 713 N.E.2d 110 (1st Dist. 1999); 725 ILCS 5/11-501.4.
21. 725 ILCS 5/11-501.4
22. *People v. Lach*, 302 Ill. App. 3d 587 (1st Dist. 1998), appeal denied, 184 Ill. 2d 566 (1999).
23. See *Crawford v. Washington,* 541 U.S. 36, 54 (2004); *Melendez-Diaz v. Massachussets,* 129 S. Ct. 2527 (2009); *Bullcoming v. New Mexico,* 11 S. Ct. 2705 (2011).
24. Ramsell, supra note 16.
25. See *People v. Menssen*, 263 Ill. App. 3d 946, 953 (5th Dist. 1994).
26. *People v. Green*, 294 Ill. App. 3d 139 (1st Dist. 1997).
27. *People v. Thoman*, 329 Ill. App. 3d 1216, 1219 (5th Dist. 2002).
28. 20 Ill. Admin. Code ' 1286.40 (2011).
29. *People v. Thoman*, 329 Ill. App. 3d 1216, 1219 (5th Dist. 2002).
30. See *State v. Rivers,* 410 Ill. 410 (1951); *Murdy v. Edgar,* 103 Ill.2d 384, 394 (1984).
31. See *People v. Olsen*, 388 Ill. App. 3d 704, 716 (2nd Dist. 2009).
32. See *People v. Miller*, 166 Ill. App. 3d 155 (3rd Dist. 1988); *People v. Rushton*, 254 Ill. App. 3d 56 (2nd Dist. 1993); *People v. Hirsch*, 355 Ill App. 3d 611 (2nd Dist. 2005).

Bullish for *Bullcoming*

By Niyati Thakur

Besides having a curious name, *Bullcoming v. New Mexico* is a notable, if cautious, extension of the Confrontation Clause cases *Crawford* and *Melendez-Diaz*. *Crawford v. Washington*, 541 U.S. 36 (2004), *Melendez-Diaz v. Massachusetts*, 129 S. Ct 2527 (2009). Donald Bullcoming was arrested for a DUI. A lab report certifying his blood alcohol concentration, prepared by a forensic scientist—Caylor— was tendered in discovery and presented at trial. The State, however, did not produce Caylor at trial, and another forensic scientist, Razatos was allowed to testify, to validate and lay the foundation for the lab report. The Defense objected, stating that the admission of the lab report without the testimony of the forensic scientist who created it violated the Confrontation Clause. The trial court overruled the objection, and admitted the lab report as a business record. Bullcoming was convicted of the DUI. He appealed, and in the interim, the Supreme Court decided *Melendez-Diaz v. Massachusetts*. The New Mexico Supreme Court, while acknowledging the *Bullcoming* lab report to be testimonial evidence, held that the report did not violate the Confrontation Clause because (1) Caylor was "a mere scrivener" recording results from a machine and (2) Razatos, who was qualified by the trial court as a expert on the procedures of operating the machine, was available for cross-examination. *Bullcoming v. New Mexico*, 180 L. Ed. 2d 610,619 (2011). The Supreme Court roundly rejected this logic and held, "…[T]he Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination." *Id.* at 622.

How does this impact DUI litigation in Illinois? Thus far in my practice, the State has not tried to introduce the testimony of one forensic scientist to admit the lab report of another. If it did, *Bullcoming* is clearly right on point. In a DUI with a breath test, however, *Bullcoming* must be used in a more oblique way, by focusing on the Supreme Court's evolving definition of testimonial evidence. The *Crawford* court, after a painstaking historical exegesis, describes testimonial evidence as "made for the purpose of establishing or proving some fact" and "that declarants would reasonably expect to be used prosecutorially." *Crawford* 541 U.S. at 51-2. *Melendez-Diaz*, applying this principle, held that a forensic lab report-though painted by the State as the 'result of neutral, scientific testing'- is testimonial for purposes of the Confrontation Clause. "To be sure, the Clause's ultimate goal is to ensure the reliability of evidence… It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Melendez-Diaz*, 129 S. Ct at 2536. *Bullcoming* builds on this definition of testimonial evidence: "To rank as 'testimonial,' a statement must have a 'primary purpose' of establish[ing] or prov[ing] past events potentially relevant to later criminal prosecutions." *Bullcoming*, 180 L. Ed. 2d at 620 citing *Davis v. Washington*, 547 U.S. 813,822 (2006).

What is testimonial for the purposes of the Confrontation Clause? In other words, as defense attorneys, what do we have a Sixth Amendment right to cross-examine on? This is the crux of the *Bullcoming* argument as it relates to DUIs. In a DUI with a breath test, 625 ILCS 11-501 a(1), the state tries to get the result of the breath test in by introducing it into evidence as a business record. Before they can do so, they need to lay a foundation, establishing that, among other things, the machine used was certified accurate within the required 62 days. In the past, the state had tendered breath logs which were filled in by hand- by the officers administering the breath test and also the officers who performed the accuracy checks. Though the officer who did the accuracy check didn't necessarily need to appear, the testifying officer could be vigorously cross examined on errors in the breath logs— wrong dates and times, blank spaces, discrepancies between the logs and the Alcohol & Drug Influence Report (ADIR) and all of the many human errors that are a part of the breath test process. We rarely get these handwritten logs anymore. The state now tenders computer printouts of the machine's internal accuracy checks with a notarized 'Certification' document from the Illinois State Police that is signed by their 'Keeper of Records.' A few months ago, we received printouts that showed all of the accuracy checks for the relevant time period as well as the breath tests in between. These un-redacted printouts contained the officer's names and similar information as the handwritten logs. More recently, however, the computer printouts of the accuracy checks have been truncated. In discovery, the state will often provide one sheet of paper— a printout of the breath machine's internal accuracy checks— along with the ISP 'Certification' document. Together, these two sheets of paper are introduced as evidence to establish the fact that the breath machine was working correctly on the relevant date. What this means for the defense is that there can be no meaningful cross examination regarding the accuracy checks. The state doesn't produce the ISP Keeper of Records; it's the officer giving the breath test that testifies to their validity. This is despite the fact that the officer did not print them, did not perform them, and really has no understanding of how the internal accuracy checks work.

It's clear that the breath log accuracy checks are not the "ultimate issue" so to speak, like the wife's statement in *Crawford* or the alleged cocaine in *Melendez-Diaz*. The accuracy checks are, however, an critical foundational requirement. Without them, the breath test result stays out. This is often the difference between a conviction and a Not Guilty. The systematic watering down of what is being tendered in discovery is troubling. The trial judges' acceptance of almost anything, admissible or not, that validating the reliability of the breath test machine, is likewise problematic. The case law in Illinois regarding this issue follows a similar systematic watering down of the foundational requirements. As it now stands, breath logs and accuracy checks are not considered testimonial. This does not mean that they are not. With the added impetus of *Bullcoming*, we must argue that they are.

Getting down to the nuts and bolts, when the State tries to have the accuracy checks admitted as a business record, object. The accuracy checks themselves may be performed in the "course of a regularly conducted business activity," but the printout is not. Ill. R. Evid. 803(6). The printout was clearly made in anticipation of litigation, and is a response to the State's subpoena. The judge will most

likely let it in, but you've made your record. The main takeaway from *Bullcoming* is to argue effectively that the breath logs and accuracy checks are testimonial evidence. Why are the breath logs and accuracy checks testimonial evidence? (1)They are being introduced for 'proving some fact' in a criminal proceeding, namely that the breath machine was working correctly. (2) They were created solely for an evidentiary purpose made in aid of a police investigation, that purpose being to lay a foundation to get the breath test in. (3) The accuracy results are sworn to by the ISP Keeper of Records and notarized, underlining the formalized testimonial nature of the records (Though not mentioned before, this issue is in *Bullcoming* at 623.) (4) Just as the court held in *Bullcoming*—that the results of the lab report were not just a machine- generated number, nor are the accuracy checks just a machine generated number. They represent myriad details that are susceptible to human error- that the blanks used to certify the machine were inserted properly, that the person certifying the machine used the proper protocol, that the computer performing the internal checks was operating correctly. "These representations, relating to past events and human actions not revealed in raw, machine-produced data, are meet for cross-examination." *Bullcoming*, 180 L. Ed. 2d at 622. If all else fails, quote the inimitable Justice Scalia, "Dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." *Melendez-Diaz*, 129 S. Ct. at 2536. quoting *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004)(italics added). ■

TRAFFIC LAWS & COURTS
ILLINOIS BAR CENTER
SPRINGFIELD, ILLINOIS 62701-1779
AUGUST 2011
VOL. 21 NO. 1

Non-Profit Org.
U.S. POSTAGE
PAID
Springfield, Ill.
Permit No. 820