

D.W.I. – PROSECUTION PERSPECTIVES

Presented by

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Biographical Information

1993-present

Employed as an Assistant District Attorney with the Harris County District Attorney's Office Police Integrity Division.

Has personally handled around 100 jury trial cases including capital murder, murder, aggravated robbery, intoxication manslaughter, driving while intoxicated, and sexual assault.

Obtained the longest sentence in Harris County history for a first offender intoxication manslaughter defendant, is the first prosecutor in the State of Texas to convict a person for "Felony Murder" arising out of a Third DWI offense, and the only prosecutor in the state to successfully prosecute a police officer for conduct during a police chase. Has prosecuted several high profile defendants including professional athletes, a city council member, business C.E.O.s, etc.

Training

Assists in training of the Houston Police Department DWI units, Harris County Sheriff's Department (Accident Division and Academy), Constable Precinct Four, Department of Public Safety, Fort Bend County DAO, etc. on DWI law enforcement / prosecution issues.

Past-member of the Texas District and County Attorney's Association (TDCAA) Training Committee assisting in planning of continuing legal education programs for prosecutors from the State of Texas.

Member of the Harris County District Attorney's Office Training Committee assisting in planning of continuing legal education programs for the above office. Member of the Harris County District Attorney's Office Hiring Committee.

Activities

Speaker on DWI prosecution issues at Texas Prosecutor's Trial Skills Courses (2000-present), TDCAA Intoxication Manslaughter School, Texas Department of Public Safety DWI Prosecution School, Texas Alcohol Traffic Safety Education Association, State Bar of Texas, and Texas Department of Criminal Justice Crime Victim's Conference.

Guest speaker for North Harris County E.D.C. on DWI prosecution, Teen Court / Hedwig Village, and several public schools around the Houston area.

Mother's Against Drunk Driving award for contribution to DWI law enforcement. Member on MADD Board of Directors / Gulf Area Chapter, member of "Texas Impaired Driving Advisory Board (Texas A&M/TEEX)."

The Video!!!



The Test!!!



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STEPS IN THE PROSECUTION OF A DWI

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2. Upcoming Changes in DWI Law
3. Police Investigation
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I. INTRODUCTION

The crime of DWI and related violations of the Texas statutes have become one of the most litigated cases in Texas criminal courts. The numbers of people affected as victims of this crime is staggering. This has meant the passage of numerous laws to combat the problem. As a result of these new laws, there is a potential minefield of areas for both prosecutors and defense lawyers to navigate in this field of the law. This article and accompanying power point presentation is an attempt to cover some of the newest and most contested areas of these laws and the issues faced by prosecutors.

II. RELEVANT DWI STATUTES

1.07 T.P.C. (26): Individual

Individual means a human being who is alive, including an unborn child at every stage of gestation from fertilization until birth.

49.031 T.P.C.: Possession of an Alcoholic Beverage in a Motor Vehicle

A person commits a violation if the person knowingly possesses an open container of an alcoholic beverage in the passenger area of a motor vehicle that is located on a public highway, regardless of whether the vehicle is being operated, is parked, or stopped. This is a class C misdemeanor that is not an arrestable offense if the person promises to appear. Note the difference between this offense and an open container under 49.04 T.P.C. that does not limit the violation to a public highway. An open container violation under 49.04 T.P.C. creates a mandatory minimum amount of 6 days jail on any DWI #1.

49.04 T.P.C.: Driving While Intoxicated

A person commits a violation if the person is intoxicated while operating a motor vehicle in a public place. A violation is a Class B Misdemeanor.

49.045 T.P.C.: Driving While Intoxicated With Child Passenger

A person commits a violation if the person is intoxicated while operating a motor vehicle in a public place and the vehicle has a passenger in it who is 14 years of age or younger. A violation is a State Jail Felony. Beware of a Deadly Weapon allegation that could make this offense a 42.12 3g C.C.P. violation. Additionally, a jury may not probate a state jail felony conviction.

49.07 T.P.C.: Intoxication Assault

A person commits a violation if the person by accident or mistake, while operating a motor vehicle in a public place while intoxicated and by reason of that intoxication causes serious bodily injury to another.

49.08 T.P.C.: Intoxication Manslaughter

A person commits a violation if the person, while operating a motor vehicle in a public place while intoxicated and by reason of that intoxication causes the death of another by accident or mistake.

49.09 T.P.C.: Enhanced Offenses and Penalties

An offense under 49.04, 49.05, 49.06, or 49.065 is a Class A Misdemeanor with a minimum term of confinement of 30 days if the person has one prior conviction under these or similar statutes.

An offense under 49.04, 49.05, 49.06, or 49.065 is a Third Degree Felony if it is shown at trial that the person has at least one conviction for Intoxication Manslaughter or two or more convictions involving the operation of a motor vehicle (or boat, airplane, or amusement park ride) while intoxicated.

An enhancement under Chapter 49 may only be used if it is a final conviction under this section and the conviction was committed within ten years of the new offense from the latest date after conviction or release from probation or parole. The “ten-year rule” does not apply to Intoxication Manslaughter convictions. The prosecutor may not use the same conviction to enhance a case under Chapter 12 T.P.C. and Chapter 49 T.P.C.

49.10 T.P.C.: No Defense

The fact that the person was entitled to use the intoxicating substance is not a defense (includes prescribed or over-the-counter drugs).

49.11 T.P.C.: Proof of Mental State Unnecessary

Proof of a culpable mental state is not required. See Felony Murder Statute?

708.102 T.T.C.: Surcharge for Conviction of Certain Intoxicated Drivers

Each year, the Department of Public Safety shall assess a surcharge on the license of each person who during the preceding 36-month period has been finally convicted of an offense relating to the operation of a motor vehicle while intoxicated.

The amount of the surcharge under this section is \$1,000 per year (\$1,500 per year for 2 or more convictions during that period or \$2,000 if the alcohol concentration is above 0.15 at the time of test).

524 & 724.031 T.T.C.: Administrative License Revocation

Chapter 524 covers license suspensions for those suspects who fail a breath/blood alcohol test. Chapters 724.031 etc. cover those suspects who refuse to provide a specimen when lawfully requested.

106.04 T.A.B.C.: Under 21 DWI

No person under 21 years of age may operate a motor vehicle with any detectable amount of alcohol in their system.

III. UPCOMING D.W.I. CHANGES

House Bill 51: makes ignition interlock devices mandatory as a condition of bond if the test score is 0.15 or more (time of analysis, not driving), makes ignition interlock devices mandatory as a condition of probation if the test score is 0.15 or more (time of analysis, not driving), adds DWI with child to the list of DWI enhanceable offenses, and deletes the confusing ten-year rule for DWI enhancements.

House Bill 157: requires 72 continuous hours of confinement as a condition of DWI probation.

House Bill 160: requires a court order for police to download a vehicle's "black box." An officer must show the court that retrieval of the information is necessary to protect the public or that the information is evidence of an offense.

House Bill 904: allows a judge to stack "Intoxication Assault" convictions arising out of the same transaction.

House Bill 1357: requires suspension of a driver's license (or denial of an application) for furnishing alcohol to a minor.

House Bill 1646: broadens the definition of motor vehicles to include more types of all-terrain vehicles.

House Bill 1759: allows a jury to probate a state jail sentence unless the sentence occurs automatically under CCP 42.12 section 15(a) and increases the maximum possible amount of time served as a condition of probation from 90 to 180 days.

House Bill 2275: allows for seizure of a habitual drunk driver's car (must have at least 3 prior convictions) as contraband.

IV. POLICE INVESTIGATION

Among other things, a prosecutor should evaluate driving facts before making a trial decision. Facts that are good for the prosecution include substantial weaving, excessive speeding, committing traffic violations between 2 and 4 AM, driving the wrong way on a one way street, collisions with fixed objects, unusually slow to respond to police lights / siren, and improper activity at stop lights (sitting through green lights, etc.). Facts that are not necessarily helpful to a prosecutor include speeding less than 15 miles per hour over the limit, running a red light, fail to signal, non-moving violations. In accident cases, statements, photos, diagrams, and accident reports need to be reconciled. Often, these good driving facts can be mitigated by improper recordation of the facts at the scene.

After noting the driving facts involved a prosecutor should next be concerned about the contact between the offender and the officer or witnesses. A prosecutor should evaluate the condition of defendant that potentially leads up to the beginning of a DWI investigation. Some factors are obviously helpful to the prosecution, such as expelled bodily fluids. However, other factors may not be so important such as fumbling for a driver's license or brief stumbles upon exit from the vehicle as long as the defendant has a justifiable excuse for such conduct.

In the grand scheme of things, a prosecutor will try to present all facts under a "totality of the circumstances" test. A defendant who exhibits an odor of an alcoholic beverage about his breath, red-bloodshot eyes, etc. may appear to be impaired to the average person. Yet again, with a justifiable excuse for these symptoms of intoxication, a prosecutor should be aware of the impact this testimony may have on the jury. It may not be as significant as he or she thinks.

The next fertile area that prosecutors should focus on is the field sobriety testing aspect of the investigation. Field sobriety tests are generally not much more than routines officers use to observe signs of intoxication. An officer who performs these tests generally has no scientific expertise and the tests should properly be used for observation purposes. An exception to this is the Horizontal Gaze Nystagmus test, which does require a certain amount of expertise. A prosecutor should focus on the officer's adherence to the N.H.T.S.A. guidelines as many defense lawyers will attack the officer's methods and then attack his or her abilities in other areas. Should a prosecutor notice errors in the admission of these tests by a peace officer, that fact should enter into the prosecutor's decision on whether or not to proceed. Obviously, the officer's

errors may be explained by factors outside of their control or may not have an impact due to other strong evidence.

V. FILING OF CHARGES

Although generally not an area focused upon by prosecutors or defense lawyers, this area should not be overlooked. On cases involving an accident where hospital blood tests are pending, the defense lawyer should try to maintain contact with the investigating agency in an attempt provide any assistance to the officer. While “lawyering up” may be the appropriate advice, it may often get the defendant a DWI charge that could have been avoided. Most accident investigators will be influenced by information provided by the lawyers on the case.

The charging process can be important. In some cases, pleading a case as a DWI third may have benefits over an intoxication manslaughter case. Conversely, a defense lawyer should remain properly advised on the charging process in order to inform the potential client and to potentially avoid some charges.

On other cases, both parties often overlook pleading errors. Considering the state of the law, noticing an error during trial can be disadvantageous to both parties. For the defense, these errors can be waived and for the prosecutor, helpful pleadings may alleviate proof concerns.

VI. NON-ISSUE SETTINGS

During the pendency of the case, many issues may arise that could affect the outcome of the case. For the prosecutor, the biggest issue is the Administrative License Revocation hearing. This hearing is an opportunity for the defense to obtain discovery of the State’s case and assess the credibility of the officer. Peace officers will often not thoroughly prepare for this hearing and may result in errors that they would not ordinarily make. Nonetheless, this simple moment of being unprepared will haunt the prosecutor at trial. For above reasons, it may behoove the defense lawyer to bring this information to the attention of the prosecutor in an effort to work out a favorable resolution to the case.

VII. PRE-TRIAL ISSUES

Once a case is on track for trial, both parties should already be well into the preparatory stage. Unfortunately, time constraints for both the prosecutor and the defense lawyer usually mean that this is not true. This is an overlooked area that results in many cases being set for trial without both sides having been fully informed of the issues.

A prosecutor should discuss the cases with the arresting officer to verify the facts contained in the report. Additionally, the officer may have excluded certain information from the offense report such as

witnesses in the defendant’s car, those in the officer’s car, wrecker drivers, EMT personnel, etc. These additional witnesses may have extremely relevant information that could induce a dismissal from a prosecutor or a plea from a defendant. Neither party should ignore these potential witnesses.

Additionally the attorneys would be remiss in not talking to the friends or co-workers of the defendant. They may provide helpful information to the parties that could force a resolution of the case. It would be helpful to show the defendant’s videos to them for opinions on the defendant’s behavior. Along the same lines, if there is a medical reason for the defendant’s performance at the station or the scene, it would be helpful to the parties to obtain that information from credible sources such as the defendant’s medical records or his or her doctor. Doctors at the jail facilities will often classify the defendant’s mental status as normal upon entry into the jail; yet, this information is always never sought by the defense.

There are many other items of evidence that the parties may find important, such as scene photos or measurements that may not have been taken by the officers. If these are obtained, it is important to ensure that the photos match the scene as described in the offense report. When all of this information is compiled properly, it may force a beneficial resolution to the case. This is especially true when combined with other circumstances mentioned in the previous areas.

VIII. VOIR DIRE & TRIAL ISSUES

The problem for the prosecutor is the juror perspective that “It could have been me?” This benefits the defendant in that the jury in this sort of a trial will be less likely to convict a person who may be the next-door neighbor. The goal for the prosecutor in a DWI type case is to convince the jury of a theme such as the dangers of drinking and driving or to take responsibility for your actions. Additionally, the prosecutor should attempt to educate the jury on exactly how high the standard of sobriety is regarding any loss of normal use of mental or physical faculties.

To convince a jury of the high standard, the prosecutor should explain that the verdict does not have to be unanimous as to which theory of intoxication the defendant is guilty of and that intoxicated does not mean drunk. In addition, the prosecutor should focus upon the fact that, in many instances, DWI is an opinion crime resting upon the opinion of one person, namely a peace officer. Failure to do this in today’s post Rodney King climate can be fatal. Many jurors will not accept the opinion testimony of one peace officer to convict and will require some sort of verifiable scientific evidence.

As stated earlier, the video is often the jury’s key piece of evidence. Failure to address the video at voir dire by either party will have serious consequences. A

prosecutor failing to discuss a video where the defendant shows slight signs of impairment is asking for an unfavorable verdict. Conversely, a defense lawyer failing to address a strong State's video is similarly asking for trouble. I suggest showing the video to others for their lay opinions on the defendant's appearance. Along those same lines, a close breath test needs to be discussed by both sides, especially in light of recent cases covering extrapolation issues. Lastly, in refusal cases, juror's feelings on implied consent should be obtained. Jurors that think that the "machine" never works and should always be refused will not be favorable to the State and those who believe that the only reason for a refusal is fear of incriminating results will not be good for the defense. It would be improper for either party to avoid these issues.

IX. EXPERT WITNESSES

Expert witnesses are becoming quite common in our courts as witnesses du jour! It is understandable that this is occurring as jurors become more discriminating and defense lawyers feel the need to rebut the claims of trained officers and technical supervisors. However, many experts for the defense have such extensive histories in trial that it is very easy to obtain transcripts for impeachment purposes assuming that the prosecutor has filed the proper request for notice of experts. Experts who may be particularized for the defendant such as doctors may be more helpful than general DWI experts. One thing is certain and that is that any expert who has testified around the state will have a transcript out there for the opposing side to use.

X. CONCLUSION

The ramifications of a DWI charge are too great to be taken lightly. The financial and human tolls caused by impaired drivers usually justify these ramifications. However, that does not mean that a particular defendant should not have proper representation. Simply being arrested for DWI can have serious consequences to a particular defendant. The consequences become much more severe when a person is convicted of such an offense. The chances of conviction once arrested and the consequences that flow from that conviction mean that no attorney should take these sorts of cases lightly. It is imperative that a thorough investigation be completed and that both sides attempt to work towards an amicable resolution of the matter to protect the interests of the defendant and those of society.