FINDING THE LINE BETWEEN DWAI AND DWI

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Aside from a weak case of operation, strong evidence of a stop without probable cause to suspect a Vehicle and Traffic violation (or reasonable suspicion of a crime), or meager proof of alcohol consumption, attorneys who defend Driving While Intoxicated (DWI) cases are usually content with a verdict that finds the defendant guilty of the lesser-included, non-criminal offense of Driving While Ability Impaired (DWAI).

Most DWI cases in the local criminal courts (and many in Superior Court) are tried to the judge rather than to a jury. Therefore, it is incumbent upon counsel, especially in cases where there is no chemical test evidence of the defendant's blood alcohol content (BAC), to know, not only the legal distinction between DWI and DWAI, but to have a good idea (whether based on past experience, word of mouth or clues gleaned in a pre-trial conference), where the judge is likely to draw the line between them.

This is especially so because while there is an objective component to the analysis (i.e whether the defendant was incapable, by reason of voluntary consumption of alcohol, to operate his/her vehicle as a REASONABLE AND PRUDENT DRIVER [or was just impaired to whatever degree]), exactly where a defendant crosses the line from one to the other is very much in the eye of the individual fact-finder.

In the oft-cited case of People v Cruz 48 NY 419 (1979), the Court of Appeals rejected the trial court's determination that VTL 1192-3 violated Due Process for failing to sufficiently define and distinguish DWAI from DWI so as to: inform motorists in clear terms of what conduct is proscribed, prevent indiscriminate enforcement of the law by police and abuse of discretion by the courts. The Court held that while there is some element of subjectivity at play, intoxication is a concept that is sufficiently well known to the courts and to every-day people such that further elaboration is not required for the statute to satisfy the constitutional standard.

As the Court observed: " A statute which employs terms having an accepted meaning long recognized in law and in life cannot be said to be so vague or indefinite as to afford a defendant insufficient notice of what is prohibited or inadequate guidelines for adjudication even though there may be an element of degree in the definition as to which estimates might differ." (Citing Connolly v General Construction Co. 269 US 385[1926]).

The Cruz court deemed it sufficient to say (as reflected in the Criminal Jury Instructions [CJI]), that for DWAI, the question is whether, by voluntary consumption of alcohol, the defendant has actually impaired TO ANY EXTENT, the physical and mental abilities which he/she is expected to possess in order to operate a motor vehicle as a reasonable and prudent driver. Intoxication, by extension, represents a GREATER DEGREE OF IMPAIRMENT that is reached when the defendant has voluntarily consumed alcohol to the extent that he/she is INCAPABLE, (to a SUBSTANTIAL EXTENT), of employing the physical and mental abilities that he/she is expected to possess in order to operate a motor vehicle as a reasonable and prudent driver.

Some of the factors that the fact-finder is supposed to consider in making the determination include: the defendant's physical condition/appearance at the time of the stop, his/her balance/coordination, manner of operation, any opinion offered with respect to intoxication (need not be from an expert), and, if applicable, any chemical test evidence of BAC. (Per 1195[2][A], a BAC of .05 of 1% or less is prima facie [PF] evidence of non-intoxication and non-impairment; BAC over .05 but less than .07 is PF evidence of non-intoxication and relevant [but not PF] evidence of impairment [subd. 2B]; BAC .07 is PF evidence of impairment (subd. 2[C]); and .08 is the statutory threshold for DWI per se [1192-2]).

It should be noted that while chemical test evidence (e.g. BAC .26 of 1/%) can (indeed, is necessary to) sustain a charge of VTL 1192-2, it can also provide relevant (but not independently conclusive) evidence of common law DWI (See Johnson v Plotkin 172 AD2d 88 [3d dep't 1991). There must be additional proof (e.g. manner of operation, defendant's demeanor, appearance and lack of coordination), to sustain a charge of DWI under VTL 1192-3. (People v Brosnan 62 Misc3d 21 [App. Term 2d dep't, 9th/10th Jud. Dept's 2018]).

Just how much and what kind of evidence will transport the defendant from the low-threshold lane of impairment, across the center-line into the danger zone of intoxication can be the subject of disagreement even among judges of the same court. In People v Grennon 36 Misc 3d 33 (2d dep't App. Term 8th/9th Jud. Dists. 2011), the majority of the court held that the proof

was legally insufficient to support the defendant's DWI conviction (VTL 1192[3]), where the trooper testified that the defendant: drove 95 mph on a 60 mph highway, but committed no other V&T violations once the trooper flashed his lights and followed him for some distance before pulling him over. The defendant admitted drinking some beer at a Yankee's game, exhibited glassy eyes and gave off an odor of alcohol. No evidence of field tests was offered.

Although the defendant allegedly registered a BAC .19 on the breathalyzer, the jury acquitted him of Aggravated DWI (VTL 1192-2[A]) and DWI per se (VTL 1192[2]). The court held that while speeding might show a diminution of the abilities required to drive as a reasonable and prudent motorist, it is too equivocal, in and of itself, to carry too much weight on the issue of intoxication. Nor did the trooper's other observations, in the courts view, establish beyond a reasonable doubt that the defendant was driving while intoxicated.

The dissenting justice (who concurred in the affirmance of the speeding conviction), took the view that driving 30 mph over the speed limit (and then slowing down suddenly) after consuming alcohol coupled with the other symptoms noted, should have been enough to sustain the conviction under VTL 1192-3.

In contrast, see, People v Barger, 78 AD3d 1191(2d dep't 2011), a refusal case, where the court upheld the DWI conviction upon proof that the defendant was speeding, crossed over the center line and crashed into a parked car. The defendant admitted drinking alcohol, his car smelled of it and there were open beer bottles inside. (See also People v Pell 2019 NY Slip Op. 51092[U][2d dep't App. Term 9th/10th Jud. Dists): Evidence was sufficient to support DWI conviction where defendant drove through a stop sign, admitted drinking beer, had glassy eyes, odor of alcohol and failed all field sobriety tests).

In light of the fluid nature of DWI evidence and the variability of judicial thresholds in determining when impairment becomes intoxication, counsel must, in preparing for trial, in particular, cross examination of the arresting officer, have some understanding of the abilities expected of a reasonable and prudent driver, how alcohol consumption affects them, and be able to elicit facts about your client that are consistent with sobriety (or at least impairment rather than intoxication).

Counsel also must be able, whenever possible, to blunt the effect of damaging testimony. (e.g. You would agree officer, wouldn't you, that many people who speed are completely sober when they do so?"; "In fact, in your career, you have arrested many drivers for speeding who were not intoxicated, isn't that right?" "And some of them were driving significantly above the speed limit, weren't they?"; "Incidentally officer, you would agree, wouldn't you, that it takes more skill, control and coordination to control a car at high speeds than at lower speeds, true?; And the only V&T violation that you observed my client commit was speeding, isn't that right?; " He wasn't veering out of his lane?...He wasn't weaving within his lane?...Didn't disobey and traffic control devices?...He didn't cause any other vehicle to slow down or get out of his way?"

According to the National Highway Traffic Association (NHTA), alcohol, which is a central nervous system depressant, adversely affects any number of motor and mental functions including a person's: judgment/ability to make sound decisions ("whaddya talking about 'call an UBER?' I'm perfectly fine."); concentration (including the ability to focus on multiple stimuli at the same time), attention span, comprehension, depth/distance perception, color differentiation, peripheral vision, reaction time, coordination (brain, eyes, hands and feet), balance, and communication skills.

Judges, like most people, are acutely aware of the hazards of drunk driving (according to the NHTSA, 40% of vehicular fatalities involve drunk drivers), and, as elected officials, they are mindful of public perception and aware that their judgments are subject to scrutiny and public comment by high-profile advocacy groups as well as the media. So, if counsel hopes to persuade the court to find in favor of the lesser-included offense, he/she must, through effective advocacy, give judges as many hooks as possible to hang their hats on.

Besides visiting the scene (from first observation to the stop), reviewing the accusatory instrument/supporting deposition/DWI Bill of Particulars for impeachment material if the officer adds details at trial not previously documented, (or testifies inconsistently), counsel, must, as noted above, highlight the good facts and neutralize the bad ones on cross examination. The following is one possible approach (assume a garden variety case with speeding, some fumbling with license/registration, admission to drinking, coming from a bar, going home, odor of alcohol, slurred speech, bloodshot/watery eyes, unsteady on feet , passed some tests, failed others, refused breathalyzer test (after calling counsel).

Q. Officer Dibble, you've been a police officer for 18 years, is that right?

A. Yes

Q. And you've made hundreds of DWI arrests in that time?

A. Yes.

Q. Now, as an experienced officer, every time you pull someone over whom you suspect may have been drinking, you know that there are certain things you look for in deciding what charges to bring, true?

A. Yes, there are many things that I take into consideration.

Q. Of course, but I can only go one at a time, so please bear with me. The first thing you notice is how the person was driving his/her vehicle?

A. Usually yes.

Q. For example, if you see someone weaving all over the road or crossing the double yellow lines or repeatedly going onto the shoulder, those kinds of things would get your attention wouldn't they?

A. They well might.

Q. Might or would?

A. Would.

Q. And in those types of situations, you undoubtedly would be concerned, based on those observations, that the driver may be intoxicated, true?

A. That would cross my mind, yes.

Q. In this case, it's fair to say that the only thing that drew your attention to my client's vehicle and what caused you to follow him was the fact that your perceived him to be speeding, true?

A. Yes

Q. He wasn't weaving in or out of his lane?

A. Not that I observed.

Q. Well, if you had observed that, you would have testified to it, true?

A. Yes.

Q. And you would have written it down or checked it off in your report, right?

A. Yes

Q. But you didn't write down anything like that in your report, did you?

A. No.

Q. Now from the time you first decided that my client was speeding to the time that you put on your lights and siren, you allowed my client to continue driving for a quarter of a mile, isn't that right?

A. Give or take, yes.

Q. Well, you testified that my client had just passed Ted's hotdog stand when you first noticed him speeding and you put your lights on when he was driving by Paula's donuts. Didn't you tell us that on direct exam?

A. Yes.

Q. And you've driven that stretch of road hundreds of times in your career, correct?

A. Many times, yes.

Q. And you know, don't you, that the distance between Ted's Hot Dogs and Paula's Donuts is exactly one-quarter mile, don't you? (Counsel knows this because he/she measured the distance).

A. That's right.

Q. And, as a police officer, you've undoubtedly frequented both establishments, haven't you?

A. I beg your pardon?

Q. I'll move on...Isn't true that you could have pulled my client over before he got as far as Paula's true?

A. I could have.

Q. But you let him continue on for a quarter of a mile before signaling your intention to pull him over, isn't that right?

A. Yes.

Q. And it's fair to say that if you felt my client posed a danger to any other motorists when you first saw him, you would have pulled him over as quickly as you could, true?

A. Of course.

Q. Officer Dibble, isn't it true that you waited to pull my client over because you wanted to see whether he would do any of those things we talked about earlier, you know, weaving, cross the center lane, driving on the shoulder?

A. I wanted to observe his driving.

Q. And what you observed was speeding and nothing else, true?

A. As I stated, counsellor, yes.

Q. When you turned your lights on, my client pulled over safely to the shoulder of the road, did he not?

A. He pulled over without incident.

Q. And he did so in a reasonable period of time, true?

A. Yes.

Q. So, as far you could determine, my client took notice of your lights and responded in a manner that was appropriate to your directions, true?

A. I guess you could say that.

Q. Does that mean you agree with me, then.

A. Yes.

....

Q. Now when you approached the driver side of my client's car, you saw that he was wearing a seatbelt?

A. Yes.

Q. And use of seatbelts is not only required by law but it usually suggests that the driver has exercised good judgment for his own safety and well-being in case of an accident, true?

A. It could.

Q. And there certainly was no accident in this case, was there?

A. No.

Q. Just speeding.

A. As you keep reminding me.

Q. You asked my client for his license and registration?

A. I did.

Q. He produced both documents, did he not?

A. Eventually yes, but he fumbled in the glove compartment and in his wallet before producing them.

Q. Well, it's true, isn't it, that you've encountered perfectly sober drivers who fumbled around the glove compartment before finding their registration?

A. Yes.

Q. It could have been that the glove box was disheveled?

A. Yes...

Q. Or they were nervous?

A. Yes...

Q. Or both?

A. Perhaps.

Q. In your experience, you have found that sometimes people get nervous when a police officer pulls them over, true?

A. It happens.

Q. My client didn't drop the registration?

A. No.

Q. And he removed his license from his wallet and handed it over, didn't he?

A. Yes.

Q He was complaint and cooperative?

A For the most part, yes.

Q. Polite and respectful too, wasn't he?

A. I had no problems with him.

Q. If you did, you would have said so, would you not?

A. Yes.

Q. And in your years of experience, I imagine that you have encountered some real obnoxious and belligerent people, haven't you?

A. Most definitely.

Q. But my client was nothing like that, was he?

A. No.

Q. By the way, my client told he was heading home when you pulled him over, didn't he?

A. Yes.

Q. And based on what you learned from his driver's license, he was actually heading in the direction of his home, true?

A. Yes.

NOTE: IF the officer did not testify that the defendant admitted to drinking ALCOHOL or a specific alcoholic beverage, DON'T ask about it on cross. The defendant's admission is of negligible probative value if it doesn't confirm the consumption of alcohol.

...

Q. Officer, regarding my client's breath, you could not tell from what you claim you could smell what my client may have consumed or when, could you?

A. Not really no.

Q. You testified about my client's speech, correct? (Note non-repetition of officer's specific testimony about speech being slurred).

A. I did.

Q. It's fair to say, isn't it, that you had no frame of reference or base line of comparison?

A. I'm not sure I follow.

Q. My point is that you hadn't met him or spoken to him before this night, had you?

A. No.

Q. And you haven't heard him speak since, have you?

A. No I haven't.

Q. So, you're in no position to say that what you heard was normal or out-of-the-ordinary for him, can you?

A. All I can say is what I noticed that night.

...

Q. And turning to the field sobriety tests, those are divided attention tests, true?

A. Yes.

Q. In other words, the person has to listen to your instructions, process them in his head and follow your instructions whether it's to touch his finger to his nose while tilting his head back, walking and turning heel-to-toe on an imaginary line on the side of the road at night, or counting back and forth on his fingers, correct?

A. Pretty much, yes.

Q Fair to say, if you felt my client was too far gone to attempt these tests, you wouldn't have asked him to do them, correct?

A. Correct.

Q. So you were confident in his ability to hear you, understand you and at least attempt what you were asking him to do, true?

A. Yes.

Q. And you would agree that what you asked him to do is not something that people ordinarily do, true?

A. I suppose not.

Q. I mean, people normally don't walk heel-to-toe, or try to touch their nose while tilting their head or stand like the Karate Kid on one leg, do they?

A.I imagine not.

Q. Anyway, you were looking to assess my client's ability to follow instructions and carry out the physical tasks you required of him, true?

A. Yes.

Q. And you were confident based on my client's responses to your directions, that he understood what you were requiring him to do, correct?

A. He appeared to understand me.

Q. Well, he never said that he didn't understand or that he needed any instruction to be repeated, did he?

A. He did not.

Q. And he responded appropriately to every question or comment you had?

A. Yes.

Q. And regarding the finger-to-nose test, my client touched the tip of his nose, just as you instructed, didn't he?

A. Yes he did.

Q. And when he walked heel-to-toe, he swayed only slightly?

A. Yes.

Q. Didn't stumble or fall, did he?

A. Not that I saw.

NOTE: If the defendant does poorly on a particular field test, stay away from it on cross exam unless it there is an alternative explanation (e.g. uneven walking surface, dark out, windy, snowy, cars breezing by, some other physical condition or injury).

....

Q. Officer, at different points during your encounter with my client, you advised him of his Miranda and DWI refusal rights, did you not?

A. Yes.

Q. My client told you he understood all those rights?

A. Yes.

Q. And based on your observations of my client's appearance, demeanor and responses to your instructions, you were confident that he understood everything you told him, true?

A. I had no reason to believe otherwise.

Q. And, in fact, my client exercised his right to refuse the breathalyzer test, true?

A. Yes, that's true.

Q. But that was only after he consulted with counsel over the phone, isn't that right?

A. Yes.

Q. You saw him make he call, didn't you?

A. From a distance, yes.

Q. He didn't fumble with the phone or appear to be confused about who or what number to call, did he?

A. Not that I observed.

.....

Q. Finally, officer, you know from your years of experience, that there are different degrees of impairment from alcohol consumption ranging from slightly impaired to "falling-down, soil-yourself or passed-out drunk", isn't that right?

A. You could say that.

Q. And I imagine that you have arrested people at both ends of the spectrum and everything in between.

A. You bet I have.

Q. So you know that there is a difference between driving while impaired and driving while intoxicated, correct?

A. Yes.

Q. Of all the people that you have arrested over the years for driving under the influence of alcohol, it's fair to say that you have never charged a single one with Driving While Impaired, have you?

A. I have not.

NOTE: DO NOT ASK THE LAST QUESTION UNLESS YOU KNOW THAT TO BE TRUE. In fact, no question should be asked for which the answer is not already known to counsel.

Every case, like every fact-finder, will be different to one degree or another, and counsel will have to tailor his/her approach to the situation at hand. If the issue is operation, then that is where counsel will fight the battle. Or, if the proof puts the defendant behind the wheel and the manner of operation is not particularly offensive and/or the defendant is not especially sozzled, the battle can be waged on that front and counsel can shoot for the Impaired rather than take in a verdict of Driving While Intoxicated. Understanding the legal and factual differences between the two offenses and accurately assessing the place where the judge is likely to draw the line between them is critical to achieving a successful outcome.