RECENT DEVELOPMENTS IN DWI AND OTHER SERIOUS TRAFFIC OFFENSES AS WELL AS GENERAL DISTRICT COURT TRIAL TACTICS

I. **Changes of Note In The Code**:

18.2-266.1 – Baby DWI - .02 Blood Alcohol Concentration (BAC) or higher for individuals under the age of 18. Although this still not counted as a Driving While Under the Influence (DWI) for subsequent offense, the punishment is harsher than that of a DWI 1st.

18.2-270 – Surprisingly not amended as to punishment and continues to call for minimum mandatory sentences for certain DWI's when the legislature has eliminated a huge number of minimum mandatory sentences.

18.2-368.3 – Allows one to obtain a restricted driver's license 30 days after conviction of a Refusal to Take a Blood or Breath Test. A first offense is still civil. Can Commonwealth appeal to circuit court if you win? 18.2-268.4 continues to call for civil trial to be conducted as if a misdemeanor.

18.2-270.1, 18.2-270.2, and 271.1 – Installation of an Ignition Interlock system, which meets criterion of statutes, after conviction of DWI 1st, if installed for one (1) year and, is the only restriction placed on the drivers' license. The driver must only operate vehicles with system in vehicle and attend and complete VASAP.

4.1-1107 – It is unlawful for driver or passenger to use or consume marijuana in a vehicle which is being operated on a public highway. The statute sets out, in paragraph C., certain evidence which raises permissive

inference of guilt. Punishment is a Class 4 misdemeanor (fine only).

4.1-1110 – "Any person who possesses or consumes marijuana or marijuana products while operating a school bus and transporting children is guilty of a Class 1 misdemeanor." Surprised by the low punishment; however, it does not exclude a DUID charge, or felony child abuse charge.

4.1-1302 - Search without warrant; odor of marijuana.
"A. No law-enforcement officer, as defined in § 9.1-101, may lawfully stop, search, or seize any person, place, or thing and no search warrant may be issued solely on the basis of the odor of marijuana and no evidence discovered or obtained pursuant to a violation of this subsection, including evidence discovered or obtained with the person's consent, shall be admissible in any trial, hearing, or other proceeding.
"B. The provisions of subsection A shall not apply in any airport as defined in § 5.1-1 or if the violation occurs in a commercial motor vehicle as defined in § 46.2-341.4."

II Recent cases:

DWI's

Lynch v. Commonwealth, 2022 Va. App. Lexis 212 (unpublished)(2022) – Officer dispatched to Krispy Kreme based on a 911 call that a person was sitting in a vehicle behind the wheel in middle of roadway. The officer found defendant asleep behind the wheel and only person in vehicle. Lynch first stated that he was not supposed to be behind wheel and, then, stated that he did not know why he was behind the wheel. The car was in drive and leaped forward when Lynch took foot off brake. Lynch could barely stand and was in continuous motion. He could not perform any field tests. Methamphetamine was found in plain view in an open container. An opened bottle of black cherry malt liquor was on center console. Other drug paraphernalia was found in front seat plus little baggies. Several charges were placed. Defendant challenged only his conviction on driving under the influence. Defendant stated that if he

was under the influence of the powerful stimulant, he would not have been sleeping. He was sleeping or unconscious at the scene and at the hospital. There was no blood or breath test administered. Lynch asserted that the Commonwealth failed "to exclude the reasonable hypothesis that a medical condition caused his 'odd behavior.'"

The court found that the circumstantial evidence as a whole together with the fact that the Defendant did not appeal his Drinking While Driving conviction, which became the "law of the case." There was, therefore, ample evidence of the defendant's driving under the influence.

Ibanez v. Commonwealth, 2022 Va. App. Lexis 7 (unpublished)(2022) -

"Adrian Edgar Ibanez appeals his driving-while-intoxicated conviction, arguing that the Commonwealth failed to prove that he was operating the motor vehicle in question when it rolled over. Ibanez claims that, without such proof, the trial court erred both in admitting the certificate of analysis showing his excessive blood-alcohol level and in convicting him of driving while intoxicated. Because the Commonwealth presented sufficient evidence that Ibanez operated the vehicle, we reject both challenges and affirm the conviction."

"After midnight on March 6, 2019, Virginia State Police Trooper Mark Dalton was dispatched to respond to an accident that had "just happened" on Sunburst Road in Campbell County. Trooper Dalton arrived at the scene about nine minutes later. He saw a Chevrolet pickup truck with damage on all sides and the roof, leading him to conclude that the truck had left the road and "rolled." The only people at the scene were Ibanez, who was in the back of an ambulance; fire department and emergency personnel; and one other witness (whose name and sex is not disclosed in the record). The witness was in a separate car. Ibanez was the only one present who was injured. He had blood on his face, bloodshot eyes, and slurred speech. He smelled strongly of alcohol. When Trooper Dalton asked what happened, Ibanez said he didn't remember. Ibanez at first said that 'he was on his way home from a friend's house,' but then said that 'he had just left Buffalo Wild Wings.' Asked if he had been drinking, Ibanez replied that he had consumed "two or three beers." Trooper Dalton discovered that the truck was registered to a female whom he believed shared the same address as Ibanez. She was not at the scene, however, and there was no sign that she had been there. Ibanez voluntarily submitted to a preliminary breath test. Based on the results, Trooper Dalton arrested Ibanez for driving under the influence. The arrest occurred at 2:00 a.m., roughly an

hour and a half after the crash. After being arrested, Ibanez consented to give a blood sample. A nurse drew his blood using a kit approved by the Department of Forensic Science, and Trooper Dalton properly maintained custody of the sample and submitted it for lab analysis. The resulting certificate of analysis showed that Ibanez's blood-alcohol level was 0.214%by weight by volume. Ibanez was charged with driving while intoxicated in violation of Code §18.2-266. At his bench trial, Ibanez argued that the certificate of analysis should be excluded for lack of proof that he operated the truck. The judge overruled the objection and admitted the certificate into evidence. At the close of the Commonwealth's case, the defense moved to strike the Commonwealth's evidence…"

The appellate Court held that there was sufficient evidence of Ibanez was operating the vehicle (probable cause) such that the Certificate was properly admitted and, in fact, the evidence was sufficient, then, for the conviction.

Jason Park v. Commonwealth, 74 Va. App 635 (2022) – "Jason Park appeals his conviction for refusal of a breath test, second offense. He argues that the trial court erred by denying his motion to suppress the evidence, challenges the information he received about the consequences of refusing a breath test, and contends that the evidence was insufficient to support his conviction."

"Here, the evidence, viewed objectively and in the light most favorable to the Commonwealth, amply establishes probable cause to arrest.3 Officer Ciarrocchi found the appellant's car wrecked on the side of the road. The appellant was hiding in some bushes nearby while waiting for a rideshare service. When questioned, he admitted that he was involved in the accident a short time earlier but denied drinking any alcohol. As they talked, Officer Ciarrocchi noticed that the appellant's speech was slurred, his eyes were bloodshot and glassy, and his breath smelled like alcohol. The appellant did not know the street he was on and could not find his driver's license. Further, he refused to participate in field sobriety tests."

The court found that there was probable cause to make the arrest and implied consent kicked in. The fact that the appellant was not offered was of no consequence.

"… [W]e conclude that Code § 18.2-267 obliged Officer Ciarrocchi to specifically tell the appellant that he was entitled to a preliminary breath test

and offer him one, even though the appellant declined "field sobriety tests." As for the second question, regarding whether the proper remedy is suppression of the evidence, this Court has already answered it in the negative. Code § 18.2-267(F), requiring that an investigating officer inform a suspect of the right to take a preliminary breath test, does not provide that a violation is remedied by excluding the resulting evidence. Compare Code § 18.2-267(F) (containing no remedy), with Code § 19.2-56(B) (providing that 'evidence obtained from a search warrant executed in violation of this subsection shall not be admitted into evidence'). '[U]nless the statute expressly provides for an evidentiary exclusion remedy,' a violation of a statute does not require suppression of "the offending evidence.'" *Seaton v. Commonwealth*, 42 Va. App. 739, 757 n.7 (2004)"

Lundmark v. Commonwealth, 74 Va. App 411 (2022) – Defendant was prosecuted by the Commonwealth for violation of the county's DWI ordinance. Defendant appealed noting the Commonwealth as Appellee. The Court of Appeals stated that the County was a necessary party to the appeal and were not named. They dismissed the appeal. Appellant filed for a rehearing *en banc*. *Lundmark v. Commonwealth*, 74 Va. App 569 (2022), the Court agreed to hear the matter *en banc* and vacated the above opinion.

Green v. Commonwealth, 299 Va 593 (2021) – "The trial court convicted William Chad Green of refusing to take a breath or blood test in violation of Code § 29.1-738.2 after he had been arrested for operating a boat while under the influence of alcohol. At trial, Green objected to the lawfulness of his arrest and sought to introduce evidence that it had not been supported by probable cause. Agreeing with the Commonwealth, the trial court held that Green's objection to his arrest had to be 'raised by motion or objection . . . in writing, before trial,' Code § 19.2-266.2(A)-(B). On appeal, Green argues that the trial court erred in so ruling." The Court agreed with Green, and reversed and remanded the case.

Sarafin v. Commonwealth, 288 Va. 320 (2014) - In this case, an officer answered a noise complaint and found Sarafin asleep in the driver's seat of his Mercedes. He was parked in his driveway with the radio on. The officer awoke him and Sarafin turned the key from accessories to the off position.

Sarafin had a strong odor of alcohol beverage, and blood shot and glassy eyes. He admitted to drinking and, then, driving home. He was asked to perform field tests which he was unable to complete successfully. He was charged with DWI. He asserted that "operation" of a vehicle could only occur on a highway, as defined in Title 46.2 of the Virginia Code.

The Court concluded, "In this case, **Sarafin,** was in actual physical control of his vehicle. He was seated behind the steering wheel, and the key was in the ignition switch." Here the key was in the "accessory" position, the engine was not on.

The Court, further, decided, that 18.2-266 applied on private property because, among other things, the statute is a criminal statute, not in the traffic code, and the term "Highway" only applies to the implied consent portion of the statute.

Contrast this case with *Stevenson v. Falls Church*, 243 Va. 434 (1992), where the Defendant was asleep behind the wheel of his vehicle with the key in the ignition (but unknown whether it was in the on position) parked in a convenience store parking lot. None of the systems of the vehicle were being "operated." Defendant was intoxicated. The Virginia Supreme Court found no operation because there was no evidence of manipulation of any of the motive power, electrical system or the like (that includes turning on the lights or radio).

The DWI statute may apply to operating a riding lawnmower in your front yard. Remember, if you are arrested on your lawn mower in your front yard, you should consider not taking any test. Do not drive it in the road.

Lambert v. Commonwealth, 298 Va. 510 (2019) (Published) - In order to prove an accused guilty under the applicable portion of Virginia Code Section 18.2-266, the Commonwealth must prove, beyond a reasonable doubt, that the drug, or combination of drugs, which impaired the driver's ability to drive safely, were self-administered. *Jackson v Commonwealth*, 274 Va. 630, 634,635 (2007), 652 S.E.2d 111, 113,114 (2007). That the drug or drugs were "self administered" is an element of the offense.

In the *Jackson* case, John Allen Jackson was in pain and voluntarily went to an emergency room where he voluntarily allowed a nurse to administer a shot of Dilautid for his pain. Dilautid is a narcotic and central nervous system depressant, as is the Methadone in this case. Jackson was told not to drive. Ignoring the advice, he did drive, which resulted in his being involved in an accident and being charged with Driving While Intoxicated, pursuant to Virginia Code Section 18.2-266. Jackson went to the hospital on his own accord. He received treatment by injection, which he sought by seeking treatment and which he voluntarily accepted. *Jackson*, 274 Va. 632, 633, 652 SE2d 112. The Supreme Court of Virginia, reversing the Virginia Court of Appeals, found that the drug was not "self administered" and dismissed the case, even though Jackson was intoxicated. The case was dismissed, not remanded to the trial court to apply the proper law to the facts. *Jackson*, 274 Va. 634, 652 SE2d 113 (2007).

In *Lambert*, the Supreme Court opined that the *Jackson* case "did not address the issue in this case, what constitutes 'self administration' of a drug." The fact that Jackson was dismissed under the circumstances in the case was dicta and the only part of the opinion which was not *dicta* was that self administration of the drug was an element of the offense and had to be proved by the Commonwealth beyond a reasonable doubt. A defendant who allows someone else to administer the drug becomes self administration. Even a doctor or nurse, during health care treatment, gives an individual a shot with his or her permission that conduct is "self administration," under the statute.

In your cases, pay attention to whether the Commonwealth proves self administration. Lay low until your motion to strike. Do not ask the officer any question which may show self administration. "I took," in a defendant's statement to police, will seal the deal for the Commonwealth.

MELENDEZ-DIAZ

Hicks v. Commonwealth, 2017 Va. App. Lexis 221 (2017) (unpublished). The Appellant raised two grounds for the suppression of a certificate. On the first ground for suppression of the certificate, the Court opined that the

trial court did not commit error. On the second of the two grounds which the appellant raised, the Court of Appeals decided not to address the purported error, which was that the person who received the sample was not present to testify. That person stated on the certificate that the vial was received and was sealed. That is testimonial and subject to cross-examination and had to testify at trial. The Court never addressed that error; instead the Court found that even were the alleged error correct, it was harmless beyond a reasonable doubt. That finding was made without addressing the specific error assigned. Why would the Court have addressed the first argument, when it did not have to and, then, not address the second argument? The harmless error conclusion would have applied to both Assignments of Error raised.

Logan v. Commonwealth, 72 Va. App. 309 (2020) – Logan was charged with attempting to purchase a firearm while subject to a protective order. The Commonwealth must show that Logan had notice that he was subject to a protective order. Logan had been served with the order. He attempted to suppress from evidence the return on the order as testimonial and took the position that the officer who served him had to be present because the use of the service he noted on back of the order had become testimonial.

"If the primary purpose of the statement on the return of service was *not* for use in an investigation or prosecution of a crime, then the Confrontation Clause plays no role in its admissibility. See id. at 244, 135 S.Ct. at 2180. Therefore, we must determine the primary purpose of a return of service on a protective order entered pursuant to Code § 19.2-152.9.

"Generally, where the primary purpose of preparing and maintaining a document is for government administrative purposes, rather than prosecutorial purposes, the document is not testimonial. See *Adjei v. Commonwealth*, 63 Va. App. 727, 746-47, 763 S.E.2d 225 (2014) (holding that certain documents prepared by the United States Citizen and Immigration Services were not testimonial because the preparation and maintenance of those documents were necessary to the agency's administrative and adjudicatory functions)" The document was admissible.

DRIVING REVOKED:

Commonwealth v. Murphy, 2021 Va. App. Lexis 191 (unpublished)(2021). "On November 24, 2020, a Nelson County grand jury indicted James Daniel Murphy ("Murphy") for two violations of Code § 46.2-357-driving while declared a habitual offender and driving that endangers another person while declared a habitual offender-and also two violations of Code § 46.2-391-driving while revoked in a manner that endangered another person and driving while intoxicated ("DWI") while his license was revoked. Pursuant to Code § 19.2-266.2, Murphy moved, pretrial, to dismiss the indictments alleging violations of Code § 46.2-391 on double jeopardy grounds arguing that he could not be punished under both Code § 46.2-391 and Code § 46.2-357. The Circuit Court for Nelson County ("circuit court") granted Murphy's motion and dismissed the two Code § 46.2-391 indictments." The Commonwealth appealed"

"The Double Jeopardy Clause of the United States Constitution provides that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' U.S. Const. amend. V. The Virginia Constitution has a similar clause that encompasses the same protections afforded by the Fifth Amendment's Double Jeopardy Clause. Va. Const. art. 1, § 8; *Green v. Commonwealth*, 65 Va.App. 524, 532 (2015). The Double Jeopardy Clause provides 'protection against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense.' *Commonwealth v. Gregg*, 295 Va. 293, 298 (2018) (quoting *Payne v. Commonwealth*, 257 Va. 216, 227 (1999)). When an accused is tried for multiple offenses in the same trial, only the third prohibition is at issue. *Turner v. Commonwealth*, 221 Va. 513, 529-30 (1980)."

"Because the statutory language and legislative history do not plainly prohibit multiple punishments for violations of Code § 46.2-357 and Code § 46.2-391, the application of the *Blockburger* test provides 'a clear indication of contrary legislative intent.' *Gregg*, 295 Va. at 298 (quoting *Whalen v. United States*, 445 U.S. 684, 692 (1980)). As we have already noted, Code § 46.2-357 and Code § 46.2-391 are not the same offense under *Blockburger*; therefore, we find that the General Assembly clearly did not intend to forbid multiple punishments."

Villareal v. Commonwealth, 2013 Va. App. LEXIS, 150, unpublished. - In this case Villareal was arrested for driving after revocation for multiple convictions of DWI, pursuant to Virginia Code Section 46.2-391(0)(3), a class 6 felony carrying a minimum mandatory 12 months to serve. An off duty police officer was providing security for a restaurant in a strip mall, including the parking lot. The parking lot had signs of "no loitering," "no alcohol" and "no trespassing." The parking lot was bordered by two public highways and had a "stop" sign regulating traffic leaving the parking lot. Villareal left the restaurant and backed her vehicle out of a parking space into the off duty officer's marked police vehicle. She was charged with DWI 4th, refusal and the driving revoked. Villareal plead guilty to DWI, was found not guilty of the refusal and was tried and convicted of the driving suspended. Only the driving suspended was appealed.

The first question was whether the statute required that the driving occurred on a highway. The statute does not include the language "on a highway." However, in line with *Prillaman v. Commonwealth,* l99 Va. 401 (1957) and the context of the statute, the Court of Appeals determined that the words "on a highway" be read into the statute as an element of the offense.

As an aside, remember that this statute is in the Motor Vehicle Code (Title 46.2) which regulates driver's licenses, among other things, unlike DWI which is included in the Criminal Code (Title 18.2). Contrast *Sarafin,* **Supra.**

The Court, then, determined whether the parking lot was a "highway" within the Code's definition in Section 46.2-100. See partial statute in Appendix 1.

The Court found that the record did not support a finding that the parking lot was specifically designated as a "highway" by ordinance for law enforcement purposes.

The Court stated:

" The Supreme [*7] Court has held that "the test for determining whether a way is a 'highway' depends upon the degree to which the way is open to public use for vehicular traffic." *Furman v. Call, 234 Va. 437, 439, 362 S.E.2d 709,*

710, 4 Va. Law Rep. 1278 (1987) (citing *Kay Management v. Creason, 220 Va. 820, 831-32, 263 S.E.2d 394, 401 (1980)).* Roadways through otherwise private areas open to unrestricted public vehicular traffic have been determined to be "highways" within the meaning of *Code§ 46.2-100.* See *Kay Management, 220 Va. at 832, 263 S.E.2d at 402* (apartment complex streets were "highways" because of free and unrestricted vehicular use by the public); *Seaborn v. Commonwealth, 54 Va. App. 408, 679 S.E.2d 565 (2009)* (apartment complex streets where speed bumps were installed throughout was a 'highway' because of free and unrestricted vehicular use by the public); *Mitchell v. Commonwealth, 26 Va. App. 27, 34, 492 S.E.2d 839, 842 (1997)* (roads running through a mobile home complex were "highways" as those roads were "open to the unrestricted use of the public" and with no signage restricting use).
"Here, the evidence presented at trial proved that appellant's act of driving occurred entirely within the parking area of the strip mall parking lot where the restaurant was located. Appellant's limited act of driving occurred while she was backing out of a marked parking space in the strip mall parking lot. We conclude that the act of backing out of a marked parking space did not constitute driving on a 'highway' within the meaning of *Code § 46.2-100*, but rather occurred in a 'private road or driveway' as defined in the same code section. See *Caplan v. Bogard*, 264 Va. 219, 563 S.E.2d 719 (2003)*"*

Villareal's conviction was reversed.

RECKLESS DRIVING:

Labarge v. Commonwealth, 22 Va. App. Lexis 43 (unpublished)(2022) – "'Determining 'the degree of the hazard posed' by [a] defendant's driving . . . heavily 'depends upon the circumstances in each case.' Id. (quoting *Mayo v. Commonwealth*, 218 Va. 644, 648 (1977)). '[T]he cumulative effect of a series of connected, or independent negligent acts causing a death may be considered in determining if a defendant has exhibited a reckless disregard for human life.' *Cheung v. Commonwealth*, 63 Va. App. 1, 9 (2014) (quoting Stover v. - 11 - Commonwealth, 31 Va. App. 225, 231 (1999)). "Generally, negligence . . . [is a] factual finding[]," and thus an issue for a trier of fact to resolve; it only becomes a question of law "'when reasonable minds could not differ.' *Levenson v. Commonwealth*, 68 Va. App. 255, 258 (2017) (quoting *Hawkins v. Commonwealth*, 64 Va. App. 650, 655 (2015)). Such

factual findings 'are not to be disturbed unless they are plainly wrong or are without evidence to support them." Id. at 259 (quoting *Wilkins v. Commonwealth*, 292 Va. 2, 7 (2016)).

*"*We hold, contrary to appellant's argument, that sufficient evidence supports the finding that appellant operated his tractor-trailer with a reckless or indifferent disregard of the rights of others under circumstances which made it not improbable that others would be injured. The evidence established that weather conditions along 295 South on the night of October 11, 2018 were bad. A flash flood warning was in effect around Exit 38-B after several inches of rain had fallen, and a high wind warning was also in effect with winds of twenty-five to thirty-five miles per hour and gusts over forty miles per hour blowing from the left side of the highway. Emergency responders from the Virginia State Police, Engine 6, Medic 6, and Rescue 10 testified that they experienced very bad weather conditions that evening. Appellant himself acknowledged how bad the weather was, telling police that there had been heavy rain and wind on 295 South and testifying to the same at trial." Conviction affirmed.

Commonwealth v. Cady, 300 Va 325 (2021)"In this case, the Commonwealth appeals a split decision by a panel of the Court of Appeals, Cady v. Commonwealth, 72 Va. App. 393 (2020). The decision reversed a misdemeanor conviction based upon a jury verdict finding Mark Spencer Cady guilty of reckless driving in violation of Code § 46.2-852. The Commonwealth alleged that Cady, while driving along a two-lane road, wholly abandoned his duty to keep a proper lookout for a substantial period of time and recklessly struck and killed a motorcyclist who had stopped to make a left turn. The Commonwealth contends that the Court of Appeals erroneously held as a matter of law that no rational jury could have found Cady guilty of reckless driving."

"Viewed in the light most favorable to the Commonwealth, the evidence supports the jury's verdict. Cady "had music playing," J.A. at 43, 356;see id. at 360, prior to the collision and did not "remember seeing or striking" the motorcycle, id. at 43. He bewilderedly asked, "What happened?" immediately after the collision. Id. at 314. No evidence suggested that Cady's view of the motorcyclist was obstructed by environmental conditions or that Cady was experiencing a medical emergency. The large burgundy motorcycle was

stopped directly in front of Cady in his lane and within his full, unobstructed view, and the motorcyclist had his left turn signal on while waiting to make a left turn. The collision occurred on a straight stretch of road on a clear, sunny day."

The Court of Appeals was reversed and conviction reinstated.

HIT AND RUN:

Owens v. Commonwealth, 2022 Va. App. Lexis125 (unpublished) (2022) –

"Owen challenges the sufficiency of the evidence to support his felony conviction of leaving the scene of an accident in violation of Code § 46.2-894."When reviewing the sufficiency of the evidence, '[t]he judgment of the trial court is presumed correct and will not be disturbed unless it is plainly wrong or without evidence to support it.'" *Smith v. Commonwealth*, 296 Va. 450, 460 (2018)."

"Adam Hatcher ("Hatcher"), who was driving the Ford side-swiped by Owen, testified that after Owen dislodged the Silverado from his Ford, he moved the Ford completely off the road and called the police to report the accident. Owen never stopped to give Hatcher his insurance information or ask if Hatcher was injured as a result of the accident. Hatcher further testified that the damage to his truck cost$6,631 to repair and agreed that Owen went into his house after the accident and stayed there until the police arrived."

"Owen contends that he did not leave the scene of the accident. After the accident, he proceeded to his driveway, which was nearby and within sight of the scene of the accident. Owen claimed that he moved his vehicle so that he could contact police from his home. When police arrived, he provided full details concerning his involvement. Because Owen remained in sight of the accident scene, he argues that the phrase "the scene of the accident" in Code §46.2-894 should be read as co-extensive with "the scene of the accident" in Code §19.2-81."

"Here, the trial court found that Owen drove 200-300feetfrom the scene of the accident and parked his vehicle in his driveway. Owen did not check on the

driver of the other vehicle nor exchange information with him. Additionally, Owen did not call 9-1-1 dispatch until thirty minutes after he arrived home. By that time, Trooper Lacks was already in route because Hatcher had pulled off the road and reported the accident. Nothing in the record suggests that stopping in his own driveway was an immediate stop or that his driveway was the first safe place to park the truck. The evidence in the record is sufficient to support the trial court's finding that Owen failed to immediately stop at the scene of the accident."

The conviction was affirmed.

TRY THAT DWI 1ST IN GENERAL DISTRICT COURT

For the actual trial of a DWI 1st offense, **most** of our General District Courts (GDCt) in SW VA will not impose a greater punishment than offered by the CWA as a plea or as would be imposed by the judge on a plea of guilty to a first offense DWI.

In addition, the accused also has the safety valve of an appeal to circuit court which wipes out the judgment of the GDCt and gives the accused a *de novo* hearing in Circuit Court.

I have observed, in the GDCt, however, many lawyers, fail to try those cases in General district Court even though they will have the same outcome if convicted**,** and may have won at trial. They plead them for that same standard outcome.

Our firm tries almost all 1st offense DUI's in GDCt, if we cannot work out a deal with the CWA**.**

Frankly, we win about a third to one-half of the cases which we think we will lose. The prosecutor makes a mistake or something unexpected comes up. During the trial, the lawyer has to listen closely to the evidence and to know how to apply the law to the fact presented by the Prosecutor.

Most cases are won or lost on the prosecution's evidence.

Often, a lawyer has to do what comes very hard for lawyers, do not cross-examine their witness, usually an officer. That usually cuts off their case.

Most, if not all, lawyers, including myself, believe they have to ask questions. The witness can always call the witness back to the witness stand, as an adverse witness.

By the very hard process of not cross examine, you force the prosecutor's case to end.

Counsel for the accused must also know the of Prosecution's Problems arising out of the Supreme Court Cases of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). and their progeny.

The CW now has a system in place to allow the Defendant to object once notice of intent to present is filed by a prosecutor to introduce the certificate without bringing the analyst to court. The accused has 14 days to object. Object whether you carry through at trial. The lab is always losing employees who may no longer be able to testify.

A blood test certificate of analysis must conform with two (2) statutes. The certificate must comply with Virginia Code Section 19.2-187, dealing with the introduction of certificates in general, from certain labs, into which evidence. The certificate must also comply with Virginia Code Section 18.2-268.7 requires the certificate be executed and include "the time and by whom the blood sample was received and examined; a statement that the seal on the vial had not been broken; ... and that the vial was one to which the completed withdrawal certificate was attached;..." The Court of Appeals, in *Basfield v. Commonwealth*, 11 Va. App. 122 (1990).

My position is that, if the statute requires that a statement of a witness as to the truthfulness of a matter, such as the date of receipt of the sample, the fact that the vial was received unbroken and the seal was intact that the individual who placed that statement on the certificate is subject to Cross-Examination, pursuant to the Confrontation Clause.

If counsel for the accused keeps the certificate out of evidence, the prosecution must prove intoxication, as well as the agent causing the intoxication while in operation of the vehicle. *Clemmer V. Commonwealth*, 208 Va. 661 (1968) (1968).

Sometimes, even if the Commonwealth can't get the certificate, in pursuant to the implied consent statute. However, the prosecution may be otherwise able to introduce the certificate, for instance, based on the actual consent of the accused.

In *Charles v. Commonwealth*, 23 Va. App. 161 (2014), the Court of Appeals opined rebuttable presumptions arise in favor of the Commonwealth when the testing is done pursuant to Implied Consent.

For instance, the Blood Alcohol Concentration (BAC) from the analysis of the blood or breath test is the presumed to be the same as it was when the person was operating the vehicle.

There are, also, other presumptions are those which arise out of the level of the BAC, and the enhanced convictions. Those are not available to the prosecutor

if the BAC is not the result of an Implied Consent withdrawal.

An accused can be convicted for having a .08 BAC while operating a vehicle, if the test is conducted pursuant to implied consent. If not an implied consent test, the .08 cannot be used for a *per se* conviction. It is not a test "taken pursuant to this chapter".

Implied consent also requires that an accused is operating the motor vehicle on a highway, as defined by the Virginia Code.

If the result arises out of actual consent and not pursuant to the Implied Consent statutes, the court cannot make any presumptions. The trial court is left with the BAC and can do nothing with it, except to know there is alcohol in the defendant's blood.

Even if an expert testifies, there are still no rebuttable presumptions which arise from the certificate and the accused cannot be convicted of the *per se* .08 portion of the statute.

Look to *Villareal v. Commonwealth*, cited earlier for the definition of highway.

For instance, an accused, backing out of a parking space in the parking lot for the Street Law Firm or the Walmart, in Grundy, and is stopped for some reason by an officer who later arrests him or her for a DWI. The accused does not have to take the test.

Again, if the prosecutor gets the certificate in based on consent, the certificate has no meaning to the Court without an expert and raises no presumption, even with an expert and no presumption that the BAC is the same as when the accused was backing out of the space.

The accused must be arrested within 3 hours of operation. In an accident situation, the officer must prove that the arrest occurred within 3 hours of the accident.

The call from the dispatcher is hearsay as to time of accident.

Again, the certificate has no real meaning at trial, if taken by consent of the accused.

The Court in *Rosenborough v. Commonwealth*, 55 Va. App. 653 (2010), holds that the test inadmissible where the OFFICER read Implied Consent to the accused, when it did not apply, private property. It would cause, they held, the accused to incorrectly believe that he had to take the test or face the risk of incurring another charge

That keeps the certificate out.

In *Beckham v. Commonwealth*, 67 Va. App. 654 (2017) the Court held that in order to convict an accused of a subsequent offense DWI, using an out of state conviction, the Commonwealth bears the burden of proving that the statutes are substantially similar.

Counsel for the accused must look to the out of state statute for the time of the accused's previous conviction, not to the current statute. For instance, Tennessee's statutes, through 2010, involving convictions for driving under the influence of drugs, are not substantially similar to Virginia's. Its current statute, however, is substantially similar on some matters but not others (such as allowing an intoxicated driver drive your car). If the charging instrument does not state which portion of the statute the charge was under, the prosecutor has not shown substantially similar beyond a reasonable doubt.

Our office tried a DWI 3rd felony case in which the prosecutor introduced the then current Tennessee statute in 2017. We introduced the 2010 statute. The Judge reduced and stuck the charge from a felony to a misdemeanor second offense, during a jury trial.

I recently tried a second offense DWI in another jurisdiction. The prosecutor introduced the current Tennessee statute for my client's 2015 Tennessee conviction. It was her burden to prove substantial similarity of the Tennessee statute, at the time of my clients conviction, was substantially similar to our statute upon which he was then being tried.

In a bench conference I just asked prosecutor what the Tennessee statute said in 2015. She said she did not know. I pointed out to the judge that, if she did not know, he could not know, for purposes of the trial. The subsequent offense language was stricken.

Another important fact which the Commonwealth must prove is that the operation occurred while the accused was intoxicated.

In *Bland v. City of Richmond*, the accused had accident, after the accident, the accused left scene and came back. The Commonwealth introduced no evidence that his drinking before the accident, here, the last operation of the vehicle.

The case was dismissed on appeal.

Our office recently had a case where my client's last drink was in Bristol. She had an accident in the Claypoole Hill area of Tazewell County. Her statement to the Police Officer, once Mirandized, was that her last drink was just before she left Bristol.

The Commonwealth forgot to introduce her statement.

This is the exact case where you do not cross and give the officer the chance to get it in. No cross. The prosecution rested and the evidence was stricken.

In order to prove an accused guilty of driving under the influence of drugs, under the applicable portion of Virginia Code Section 18.2-266, the Commonwealth must prove, beyond a reasonable doubt, that the drug, or combination of drugs, which impaired the driver's ability to drive safely, was self-administered. See *Lambert*, above

The Virginia Code Section 19.2-187.02 now allows the Commonwealth to

introduce the results of blood tests performed by a medical facility, in the normal course of business, as a business record.

Counsel for the accused must remember, that there is no presumption from that blood draw.

Defense Counsel should also object to field tests given to an accused who is obese, has a balance problem, a medical problem affecting his or her legs or is age 70 or older. NHTSA (the National Highway Transportation Administration) does not approve the field testing of those people and says that the tests are not accurate.

Another truly new aspect of trying DWI's is body cam and cruiser cam footage. I have already had cases where the video contradicted the officer's testimony. That was bad prep by the officer and prosecutor.

In Virginia, attorneys may now check online for the administrative regulations for the Department of Forensic Science for the administration of Breath Test administration and equipment. Title 6, Agency 40, Chapter 20. http://lis.Virginia.gov/cgi-bin/legp604.exe?000+reg+6VAC40-20 as well as:

A. The complete history of breath testing machines and licensed operators. It allows the attorney to also look at the accused's specific test, 10 days after it was administered. https://breath.dfs.Virginia.gov

B. Breath test training manuals and other manuals pertaining to the machines.

https://www.dfs.virginia.gov/documentation-publications/manuals/

If you want to know how the prosecutors are going to prosecute, the DWI Manual as well as the advanced DWI Prosecution Manual for CWA's are published by the Commonwealth's Attorney's Services Council, an agency of the Commonwealth of Virginia. It is subject to FOIA. Get the manuals.

Consider making the office as an expert. You are on cross examination. Qualify the officer as an expert in BAC calculation, based on training to run a breath test. The preliminary breath test may not be introduced during the prosecution of the case. As defense counsel, you may introduce it. The officer states that he arrived about 45 minutes after the accident occurred and, then, administered the preliminary breath test (PBT) 30 minutes later. The result was .08. The BAC on the breath test at the jail is .12 one hour after the PBT was administered. Based on the officers training in absorption of alcohol, he or she will testify that the BAC was going up and based on absorption rates, the actual BAC at the time of the accident (last operation of the vehicle) was below a .08 and probably a .06 BAC.

For the reasons set out above and more, attorneys should try these cases in GDCt and not be worry about losing. There is no loss if you would get the same sentence on a plea of guilty. Winning these cases builds confidence; however, you

learn from your mistakes in a loss and are less likely to make that same mistake again.

From facts to procedure in the trial of these cases the attorney for the accused has to stay aware of what is happening in the case and apply the statutory and case law.

Word of Mouth is more important, in this area, than advertising for most potential clients. Trying cases in GDCt helps build that reputation whether you win or lose in GDCt.

I hope that was of some use to you. Try that DWI 1st unless your offer from the prosecutor is for a Reckless or the like.