HOW TO HANDLE DWIs & DUIDs FROM START TO FINISH IN A SIMPLER WAY IN THE GENERAL DISTRICT COURT

The purpose of this CLE is to discuss the trying of DWIs and DUIDs in the General District Courts in the counties and/or cities of Wythe, Bland and Tazewell as well as courts west of those counties.

Based on my experience in those General District Courts I find that the Commonwealth will generally offer what the judge will do upon a plea of guilty. I have also found, except in extreme cases, that the judges will generally impose the same sentence after conviction at trial as the defendant would receive on a plea of guilty.

If you are trying a DWI or DUID, without additional charges or enhancements which the prosecutor offers to drop, then you and your client have nothing to lose by trying the case.

If you lose, appeal to circuit court. That wipes out the judgment until the appeal can be tried. Sometime officers leave and are no longer available to testify or, in DUID cases, the person who conducted the analysis may have left the lab. If not, you can always drop the appeal by notice to the Court and Commonwealth's Attorney, no later than the commencement of trial. Remember, you can still withdraw the appeal if you have made pretrial motions which the circuit court has overruled before the trial date.

Under these circumstances what could you or your client lose by taking the case to trial in the general district court, other than your time.

These trials (win or lose) also help hone your trial skills because of the complexities of DWI/DUID trials.

RECENT DEVELOPMENTS FROM THE COURTS.

Sarafin v. Commonwealth, 288 Va. 320 (2014). Not new but important. Defendant was in his private driveway in driver's seat at night, intoxicated and with the radio on in the vehicle. The defendant's conviction of operating a motor vehicle under the influence is affirmed. (offense is in criminal code not motor vehicle code)

Commonwealth v. Lopez, 98 Va. Cir. 413 (2015). The only case I can find regarding possession of a key fob which could operate the systems of the car. If the defendant is in the car, is intoxicated and is holding the key fob in his or her hand, he or she is "operating" the motor vehicle under the influence.

Commonwealth v. Belcher, 98 Va. Cir. 281 (2018) from Judge Kilgore in Wise County. Coercion and Duress may be a defense to DWI or DUID case. This is an interesting case to read. Anthony Collins represented the defendant with this novel defense.

Lambert v. Commonwealth, 598 Va. 510 (2020) – The Commonwealth must, in a DUID case, prove that the drugs were self administered. However, even allowing a medical provider to administer the drug is self administration.

Lynch v. Commonwealth, 22 Va. App. LEXIS 212, (2023)(unpublished), proof of drugs (even Methamphetamine) or a combination of drugs, when a person shows all of the signs of intoxication, is insufficient for a conviction absent evidence that those specific drugs, or a combination, caused the affect on the defendant, the evidence is insufficient to obtain a conviction.

Yemel'Yanov v. Commonwealth, 76 Va. App 347 (2023). A DWI 2nd Conviction, on appeal from the circuit court may be used as a predicate offense to prove a DWI 3rd offense felony

Forness v. Commonwealth, 302 Va. 1 (2023). Where the Petitioner was charged with DWI 3rd or subsequent offense, a felony, and the Commonwealth amends the charge to a 2nd offense misdemeanor. The reduction of the charge merely charged a different offense; and, the Petitioner was not acquitted of the felony merely conviction of what otherwise would be a lesser included offense, under those circumstances. The circuit court acted properly in refusing to expunge the felony DWI.

Smith v. Commonwealth, 78 Va. App. 371 (2023). Stopping a vehicle with no light on the rear license tag, was reasonable suspicion to stop the vehicle even though by statute that fact could not be used for such purpose at the time of trial. However, the statute cannot be used retroactively to the time of the offense when it had not yet become the law.

Fitzgerald v. Commonwealth, 2024 Va. App. LEXIS 3 (unpublished). A driver could be convicted of DWI without a blood or breath test when proved by circumstantial evidence as a whole. Here the driver caused a multi-vehicle accident when making a left turn, had glassy eyes and evidence of the smell of alcohol emanating from him.

INITIAL CLIENT INTERVIEW

Get a copy of the warrant and complaint in support of the warrant before or during interview.

Ask client where the stop occurred.

Did the officer say why he pulled him/her over.

Did he/she use the turn signal to pull over.

Did accused have any problem getting the driver's license and/or or registration to the officer.

What field tests were given.

Does accused have any physical limitations which would cause him/her to be unable to complete any of the tests and was the officer informed.

Is accused obese or 70 years old, or older.

How did he/she perform the field tests.

Go over Complaint in support of warrant and how it differs from client's perception of what occurred.

If breath test was given, then go online to the Virginia Department Forensic Breath Testing web site at https://breath.dfs.virginia.gov/, to check the history and condition of the breath testing device as well as the operator's licensing to to perform the test.

Were there any special circumstances surrounding why the accused was driving (emergency/coercion/duress).

If an accident case, how long after the time of the accident was he/she was arrested. It must be within three (3) hours from the time of operation. Did the Accused tell the officer when the accident occurred.

If an accident case, was there any evidence that the accused did not consume alcoholic beverage ("My last drink was in Abingdon," and the accident is in Russell county) after the accident or take the medication after the accident in a DUID case.

This list is not exhaustive.

BEFORE TRIAL

Make sure that you have and have reviewed the DWI Manual for Prosecutors and the Advanced Manual. It is published by the Commonwealth's Attorney's Services Council, an agency of the Commonwealth of Virginia. You will have to pay some cost. Request it pursuant to FOIA:

Commonwealth's Attorney's Services Council
William & Mary Law School, Room 220
613 South Henry Street
Williamsburg, Virginia 23187

If the Commonwealth intends to introduce a certificate in evidence for the BAC or Drugs in the accused's blood, the person who conducted the test must be present. See: *Grant v. Commonwealth,* (based on *Melendez-DiazI),* 54 Va. App. 714, 724 (2009).

However, Virginia statutes for the introduction of such certificates were amended. Now, in compliance with Section 19.2-187.1, if the Commonwealth

intends to introduce the certificate without live testimony of the person who performed the test, they must submit a notice of his or her intent at least 28 days before the hearing and with a copy of the certificate attached. If you object, you must do so, in writing, no later than 14 days after the prosecutor's notice. I use a modified form to include anyone who must make a certification. For that form, see **Appendix 1.** In the objection, which we use, we include the people who make any certifications, on the document.

There is a matter which has not yet been decided by the appeals courts. The person who receives the vial at the lab states on the certificate that he/she received it and that seal was intact. That is required to be on the certificate. It is a statement for the truth of the matter asserted. Do you not have the Constitutional right to cross-examine that person? Object if that person is not present to testify.

THE TRIAL (And This Is Not Exhaustive)

I will not repeat here, matters discussed above:

The stop:

Was the stop valid? The prosecutor must show that there was a reasonable suspicion of criminal conduct to make the initial stop.

In the case of *Commonwealth v. Gilbert*, Record No. 0963-98-3, 1998 Va. App. LEXIS 474 (Ct. App. Sep. 8, 1998). The officer stopped the accused, in part for defective "daytime running lights" or Side lights." Even though the lights were defective they were not required equipment and were not required to be inspected by statue of the Commonwealth. The stop was therefore Unconstitutional and evidence after the stop was suppressed.

Many of reasons for which a police officer could stop a motor vehicle do not, alone, allow the stop under new statutes. For instance a stop may not be justified by only no lighting over rear license, dangling object, expired registration, expired inspection sticker. Again, this list is not exhaustive.

In addition, the officer may stop a vehicle for a perceived violation of a valid code section; however, under the specific circumstances that law may not apply. For instance, your client at two o'clock a.m. is operating a motor vehicle on a highway with two or more lanes for each direction of travel (like the "four lane") and there is no traffic around his/her vehicle. He/she changes lanes or makes a turn without using a turn signal and is stopped for that reason, alone. The use of a turn signal to change lanes or make a turn is governed by Virginia Code Sections 46.2-848 which states:

"Every driver who intends to back, stop, turn, or partly turn from a direct line shall first see that such movement can be made safely and, whenever **the operation of**

any other vehicle may be affected by such movement, shall give the signals required in this article, plainly visible to the driver of such other vehicle, of his intention to make such movement." Emphasis Added.

If the accused's turn does not affect the operation of another vehicle, it is legal to make the lane change or turn without the use of the turn signal. The stop is Unconstitutional and everything following the stop is suppressed from use as evidence in the trial.

If you win at this point, it is over.

If an accident case, there are two other prerequisites which the Commonwealth must prove, and each for different reasons.

The Commonwealth bears the burden of proving that the accused did not ingest the intoxicant after the accident and operation. See: *Bland v. City of Richmond*, 190 Va. 42 (1949). Absent such proof (usually proved by your client's statement) the Commonwealth has not proved that the operation occurred while the accused was operating the vehicle.

I had a case where the client was intoxicated and had an accident in an industrial park of a southwest Virginia county. Upon questioning the client, the officer obtained her statement that she had been drinking alcoholic beverages at a party in the city of Bristol, Virginia and then headed home. That is the proof he needed. In that case, the Commonwealth forgot to introduce the statement to the officer. **At that point you have to do the hardest thing for a defense attorney to**

do. I told the judge that I had no cross-examination for the officer. The Commonwealth knew they had a problem but could not figure out what it was. They rested and lost on a motion to strike.

That was a case which should have been lost. However, prosecutors sometimes make mistakes. Sometimes you win cases, which you should not win, because of those mistakes. You will not know unless you take the case to trial.

If you are going to win a DWI/DUID case in the General District Court, you will generally have to do so based on the Commonwealth's case.

The second thing that the Commonwealth must prove in an accident case is that the accident occurred on a highway, as opposed to private property, and that the arrest was made within three (3) hours of the operation of the vehicle. Otherwise, the test does not come into evidence as an implied consent certificate.. See Virginia Code sections 18.2-280, *et seq*. The operation has to be on a public highway for implied consent to apply. That is important because the uses and presumptions arising out of blood or breath test only apply if the testing was done in accordance with the Virginia Implied consent statute. The presumption arises from the certificate. If the officer only testifies as to the BAC and the certificate is not introduced, no presumption arises and the judge cannot, without expert testimony give any real consideration to the result.

The type of presumptions which arise from a proper "implied consent test" are that: (1) The BAC or drug content in the blood as shown in the test are presumed to be that at the time of operation of a vehicle, (2) a .08 is all the Commonwealth needs for a conviction, (3) a .15 raises the presumption that the punishment should enhance and (4) a .21, or higher, an even greater enhancement of the punishment. Again, see Virginia Code Section 18.2-280 *et seq* (the implied consent statutes). Taking away those presumptions, even an expert may not be enough to convict.

If your client is charged under a town or city code, make sure it was properly adopted. It has to comply with the Virginia statute to be enforceable. If the municipality's code section is invalid, the charge must be dismissed. See *Amin v. Henrico,* 63 Va. App. 203 (2014) where the Court found that the enabling statute, Section 46.2-1313 of the Virginia Code, did not contain language allowing the incorporation by reference of this specific section of Title 18.2. The Court also found that the warrant charged, and the Defendant was found guilty of, "Henrico County Ordinance 22-2 incorporating *Virginia Code Section* 18.2-308," not the State statute prohibiting such conduct. The conviction was void *ab initio.*

A good case to help understand what is or is not considered to be a public highway, is *Villareal v. Commonwealth,* 2013 Va. App. LEXIS, 150,

unpublished. It cites all of the case history of matters such as when is a parking lot is or is not considered a “highway,+ not private property.

Rosenborough v. Commonwealth, 55 Va. App. 653 (2010), controls what a police officer may not do in order to have a driver on private property take a blood or breath test. The test is inadmissible where person is read Implied Consent and he/she is operating on a street, way, real property, or the like, which is not a "Highway."

If you try a DUID case, remember, that two additional elements apply: (1) the Commonwealth must show that the drug was self administered. If the case is devoid of any evidence on that point (unfortunately it will usually be from your client’s statement to police that “I took…”) If the case is devoid of such evidence, the court has to strike the case. (2) The Commonwealth must prove that the drug, or combination of drugs, impaired the driver's ability to drive safely. *Jackson v Commonwealth,* 274 Va. 630, 634,635 (2007), 652 S.E.2d 111, 113,114 (2007). Also see the express language of 18.2-266.

Finally, you can get a copy of the Breath Testing training manuals from the Virginia Department of forensic science. You may be able to qualify the officer who gave the test as an expert for purposes of overcoming certain presumptions by showing that the accused’s BAC was rising at the time of the operation so that the

breath test does not show the BAC at the time of operation. The Commonwealth cannot introduce the preliminary breath test into evidence but the defendant can. If the breath test is higher on the final breath test than in the preliminary, the officer can testify as an expert as to what he learned about alcohol absorption in the blood and that the BAC may have been even lower than what the preliminary breath test showed if it was taken a half hour or more after the operation and the taking of the preliminary breath test.

You may also challenge the preliminary field sobriety test given by the officer. The National Highway Transportation Safety Administration (NHTSA) approves three Standardized Field Sobriety Tests (SFST), which have been scientifically validated. The walk heel to toe and turn is one of those test, but should not be used on individuals who have back, or leg problems or are age 65 or older. The one leg stand is another of those test, but should not be used on individuals who have back, or leg problems or are age 65 or older or more than 50 pounds overweight. The final tests are the Horizontal and Vertical Nystagmous Gaze Test (HGN).

Other approved tests which have not been scientifically validated are: the four (4) finger count, nose touch test, and tracing. For all three, the officer is testing

the Defendant's ability to follow directions and can perform the test as directed. See the NHTSA SFST Training Manual Section 8 pages 45-49.

For a good 404 page read, read the NHTSA SFST TRAINING MANUAL. You will learn more about DWI/DUID detection than you ever want to know. The instructor's manual from 2023 (revised from 2019) may be found on line at https://www.nhtsa.gov/document/dwi-detection-and-standardized-field-sobriety-test-sfst-instructor-gui

SUBSEQUENT OFFENSES

Subsequent offenses may be a problem, as well, for the Commonwealth. *Beckham v. Commonwealth,* 67 Va. App. 654 (2017). In order to convict a defendant of a subsequent offense DWI, using an out of state conviction, the Commonwealth bears the burden of proving (beyond a reasonable doubt) that the statute of the other state is substantially similar to that of the Commonwealth. Here the Court found that Florida's statute was substantially similar to the Virginia.

But remember, the substantially similar statute of the other state must be that which was in effect at the time of the offense in the Commonwealth. That burden is on the Commonwealth. Should the offense have been committed at a time before the current statute of the other State, the Commonwealth has not met its burden because the court has no idea what the out of state statute was at the time of the offense in

Virginia.

Also see *Richardson v. Commonwealth,* 2002 Va. Cir. Lexis 63 (2002). The Court held that, pursuant to Virginia Code Section 46.2-390, if an accused is merely convicted of a DWI which is a second offense, in the trial court, and not convicted as a "second offender," the Commissioner may only suspend the driver's license for a period of one **(1)** year, not three (3). That is not the case for a third offense because the statute merely calls for three (3) convictions within ten (10) year not that the person be convicted as a "third offender." This is only a circuit court decision; however, the Commissioner seems to be following it.

Traffic and DWI Check Point stop. There is too much to cover here but you can get the entire history as well as what the police must do to conduct a proper check point in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990),

Finally, as stated earlier, these defenses are not exhaustive. However, these are simple ways to try the case at the General District Court level. I have been to CLE's where they teach you the complicated big city defenses where your client has unlimited funds and the ability to hire experts. To me they seem exotic in our local practices.

APPENDIX 1

VIRGINIA: IN THE GENERAL DISTRICT/CIRCUIT COURT FOR _____ COUNTY

COMMONWEALTH OF VIRGINIA, PLAINTIFF,

v. **CASE NUMBER: _____**

DEFENDANT.
_____,

OBJECTION PURSUANT TO VIRGINIA CODE SECTIONS 19.2-187 and 19.2-187.1

TO THE HONORABLE JUDGE OF THE AFORESAID COURT:

Now comes the Defendant and in answer to the NOTICE filed upon the Defendant by the Commonwealth of Virginia, pursuant to Virginia Code Sections 19.2-187 and 19.2-187.1 of the Code of Virginia (1950), as amended, and states the Defendant's objection to the notice and to having the certificate(s) admitted into evidence without the person or people who performed the **analysis, and/or made any observation or observations which are required to be on the certificate** being present and testifying.

The Defendant demands that if the results set forth in the certificate(s) are introduced, by the Commonwealth, into evidence, that the aforementioned individuals be present at the cost of, and upon subpoena issued by, the Commonwealth and that he or she be required to testify under direct examination

by the Commonwealth in its case in chief and be subject to confrontation and cross-examination by the Defendant.

_____

By:_____
Of Counsel

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CERTIFICATE OF SERVICE

I, Robert M. Galumbeck, hereby certify that a true and correct copy of the foregoing document was sent by facsimile transmission and was mailed by first class mail on this the ___ day _____, 202__, to the office of the Commonwealth's Attorney for _____ County, Virginia, at its address of record and in accordance with the Rules of Supreme Court of Virginia.

_____