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**Commitment
Matters**



Just Because They Say So Doesn't Make It So...



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Recently, I defended an individual who might be considered the holy grail of DUI cases, the truly innocent individual. Usually, in the DUI defense field, we represent people who have had a drink (or several) and then are stopped while driving. While the issue of when an individual is "under the influence of alcoholic beverages ... when affected to the extent that the person's normal faculties are impaired" [see F.S. 316.193 (1)(a)] is a murky one that requires precise and creative lawyering, we can all agree that when a person has had nothing to drink, and they are also not under the influence of a chemical or controlled substance as defined by F.S. 877.111 or Ch. 893, they are not a DUI.

But sometimes, we are called to defend just such a case. In my case, Mr. Innocent (his name has been changed to protect the moron who arrested

him) had the misfortune to be driving behind an undercover police officer who was driving in an unmarked police car. When the officer suddenly jammed on his brakes to avoid hitting a panhandler who suddenly stepped into the roadway, Innocent was unable to avoid hitting the back of the officer's car.

Some might say, "But Bobby, he ran into the back of the police car. Isn't he responsible for failure to use due care or failing to stop in time?" Not according to the officer who jammed on his brakes. After, yelling at the panhandler and ordering him to remain on the scene, the officer can be heard on his body-worn camera video explaining to Innocent "Hey, it was not your fault! There was nothing you could have done to avoid hitting me when I hit my brakes to avoid hitting [the panhandler]!" No citation for any improper driving was issued to Innocent.

The accident was not without physical cost to Innocent. While his front airbag was deployed, he struck his head on the steering wheel before it could open, and a gaping wound to his forehead caused extensive bleeding that was clearly visible on the officer's video. The undercover officer called for fire rescue, who quickly responded and transported Innocent to the hospital to be stitched up.

So, how did we get a DUI out of this? No odor had been detected by the

initial officer. No indicia of impairment were observed by any of the officers who responded to this "officer-involved" accident, aside from the fact that Innocent seemed concerned or confused about what had just happened. Oh, and his eyes were a bit bloodshot and glossy, most likely from the airbag deploying. But what caused a DUI Task Force officer to be asked to respond to the hospital was the finding of an EMPTY decorative cognac bottle in the rear of Innocent's car when it was inventoried by the police before it was towed from the scene.

At about this time, you may be thinking, "But how do you know that Innocent had nothing to drink that night? Just because a client says it does not make it true." Well, none of the officers on the scene (or fire rescue or hospital personnel) smelled any odor of alcohol about his breath or person. And Innocent had a passenger in the car, a friend that he was visiting. Mr. Friend, when interviewed, said very clearly, "We had nothing to drink. We were not doing drugs. We just went out to pick up some snacks for my kids when the accident occurred."

Here is where the lesson of this story is learned. The DUI Task Force officer who went to the hospital to interview Innocent was a five-year officer with yearly MADD Century Awards for DUI arrests. Of course, the "Century"

award is given to any officer who makes at least 100 DUI arrests in a calendar year even if they were not good arrests. The officer does not maintain an HGN log or a log of his arrests of any kind, and his department has made no effort to confirm the accuracy of his work.

Just before a hearing on the 29-page motion to suppress I had filed due to the lack of cause to request sobriety exercises at the hospital as Innocent reclined on a hospital gurney, or to subsequently arrest him after he allegedly failed those exercises, the prosecution declared “but the officer’s an expert!” “He has been accepted as an expert in two prior cases, so he should be permitted to testify as to the results of the HGN exercises administered at the hospital.”

I requested the names of these cases that he had allegedly been qualified as an expert in, as well as his DRE logs. What did I find?

In the first case, a DUI Manslaughter, the officer testified at a pretrial detention hearing that the defendant should be detained without bond because it was his opinion that the driver was impaired by some of the “cocaine and/or fentanyl” that were found in an inventory search of his car before towing. [Sound familiar?]

Thankfully, the judge who accepted him as an expert still granted that defendant a bond. And the DUI Manslaughter charge? It was subsequently “No Informationed” by the prosecutor’s office because the blood tests confirmed that no alcohol or drugs were in the defendant’s blood. The so-called DUI Task Force officer “expert” was dead wrong!

In the second case in which the officer was accepted as an expert by a county court judge (in a misdemeanor DUI case), the officer made similar mistakes. The charges against that individual were later dropped.

Prior to his being proffered as an expert in Mr. Innocent’s case, I was granted a deposition in the case. I

asked the officer about the modified sobriety exercises that he administered to Innocent. And it became very clear that this DUI Task Force officer had no idea what he was doing!

The horizontal gaze nystagmus exercise? The officer held the stimulus 6-8 inches from Innocent’s eyes (and he still did not smell an odor of alcohol from Innocent while at that proximity to him). How could he be holding the stimulus at the wrong distance from Innocent’s eyes? NHTSA guidelines clearly require the stimulus to be held 12-15 inches from a person’s nose! See NHTSA 2018 ADVANCED SOBRIETY TESTING METHODS MANUAL, SESSION 2, at p. 18. That is HGN 101! How could the officer get this basic requirement wrong?!

“And how long did it take you to administer the HGN exercise to Mr. Innocent?” “Maybe thirty seconds.” Yet, the exercise clearly requires at least 82-seconds to be properly administered! See THE DEFENDER-DUI NOTES COLUMN-THE ENTIRE GRIT EATING WORLD-SPRING 2022. And see 2023 SFST PARTICIPANT MANUAL, SESSON 8, pages 24, 27, 32 & 37.

The last straw?

Q: “Officer, you are aware of the fact that there are many kinds of nystagmus?”

A: “I am.”

Q: Can you distinguish between the different types of nystagmus that exist?

A: No, I cannot”

Q: “And nystagmus can be caused by many things unrelated to the consumption of alcoholic beverages?”

A: “It can be.”

Q: “One of the things that can cause nystagmus is if the person has suffered a head injury?”

A: “That is correct.”

Q: “Weren’t you in the hospital because Mr. Innocent has suffered a head injury from ramming his head into the steering wheel?”

A: “I was.”

Q: “Did it ever occur to you that the alleged nystagmus you observed from Innocent was due to the fact that

he had sustained a head injury?”

A: “No.”

Unbelievable! I guess that when you are a [DUI Task Force] hammer, everything you see is a nail (a guilty person)!

The officer also pointed out the fact that for the Romberg balance test, even though Innocent was laying on a gurney, and his actual balance wasn’t being tested, his Apple stopwatch timed him estimating 30-seconds in 25.06 seconds. “That is also why I believed that he was DUI.” “But officer, doesn’t the NHTSA guidelines for the time aspect of the Romberg Balance exercise state that it is acceptable to have an estimation +/- 5 seconds?” The officer answered, “No. There is no acceptable range of estimation.” He was wrong again! See NHTSA 2018 ADVANCED SOBRIETY TESTING METHODS MANUAL, SESSION 5, at p. 18 (“Research has indicated that a non-impaired subject’s time estimation will typically be within +/- 5 seconds of 30 seconds”).

The moral of this story? NEVER accept an officer’s word that they are properly trained in handling DUI cases or in administering field sobriety exercises! NEVER accept an officer’s word that they properly administered the field sobriety exercises to your client! Simply put, do not assume that they know what they are doing, even if they are assigned to some fancy unit like a DUI Task Force! And see Garcia v. State, 27 FLW Supp. 791 (Fla. 11th Jud. Cir. 2019) (improper to bolster or “festoon[] with the ornaments of science and scientific expertise” an officer’s credentials). And you need to know what you are doing when questioning the officers, and what they should be doing, and be prepared to challenge their observations and conclusions.

By the way, the judge granted the motion to suppress. Whether the prosecution will appeal the judge’s ruling or drop the case has not yet been decided. Stay tuned!