Cleveland State Law Review

Volume 11
Issue 1 *Symposium on Intoxication*

Article 9

1962

Police View of the Intoxicant

Leo R. Collins

Police View of the Intoxicant

*Leo R. Collins**

A LAW ENFORCEMENT OFFICER'S INITIAL CONTACT with a possibly intoxicated individual may occur as a result of a complaint or from a casual observation. His primary concern is to determine if the party is intoxicated, and if he is, to temporarily remove him from society in order that others will be protected and in fact to protect him from himself. The incarceration of an intoxicated subject is recognized as a reasonable measure because intoxication, although technically a misdemeanor, is immediately important as a breach of the peace.

Many law enforcement officers have found, on being subjected to cross-examination, that in their efforts to arrest an intoxicant they had failed to gather enough competent evidence illustrating the intoxicant's condition at the time of arrest. As a result of many "not guilty" verdicts, modern law enforcement agencies have progressed from the time when an officer would merely ask the subject to repeat a rhyme that the subject would find difficult to say if he were drunk, to modern methods where intoximeter or other machine tests, movies, and tape recordings are used to supplement the officer's report.

The initial police phase in an intoxication case concerns the criteria used in order to determine the physical condition of the subject at the time of his arrest.

In the case of a motor vehicle wandering along the highway in such a manner as to make the observer believe that its operator is suffering from the influence of alcohol, many law enforcement agencies have found that movies of the vehicle in question are an excellent form of evidence. From the moment the officer first observes the vehicle to the time when he stops it, notice should be taken (and recorded) of everything done by the vehicle which does not conform to recommended operating procedures.

After having stopped the vehicle, the officer should have the operator rise to his feet, taking notice of the efforts exerted and the degree of difficulty experienced by the subject in his attempts to maintain some degree of balance. Again, during

* B.S., B.A., John Carroll University; Former Patrolman, City of Willoughby, Ohio, Police Dept.; Former Deputy Sheriff, Lake County, Ohio, Sheriff Dept.; Senior at Cleveland-Marshall Law School.

this time, the movie camera proves its worth. While initially interviewing the subject, the officer should determine if the operator is either tired, sick, or under the influence of drugs or alcohol; and if the latter is the case, whether or not the influence is great enough to interfere with his operation of a motor vehicle. For these purposes, observations of the subject's clothing, face, eyes, and balance are important. The odor of the breath, the demeanor, and the manner of speech of the person are also valuable considerations. Frequently, physical tests, like the picking up of coins, are used during this first meeting.

For illustrative purposes, take the case of the car operator who the officer decides should be incarcerated in order to have him answer the charge of operating a motor vehicle while under the influence of alcohol.

After transporting the operator to headquarters, most police officers give him the opportunity to take an intoximeter test, or one of other similar machine tests. The intoximeter is a machine which measures the percentage of alcohol in the subject's blood by taking a sample of the breath. The subject may refuse to take the test; however if he takes the test, the results may be used for or against him. It is to be noted that an officer on the witness stand should not hold himself out as an expert concerning the intoximeter; it is sufficient that he know how to operate such a machine. Nor is it error for the court to permit the police chemist to testify as to the purpose of such tests and the manner in which they are performed.[1] But where it appears that a law enforcement officer has had sufficient experience with intoxicants, and where he has had the opportunity to observe a particular defendant, it is not error for the court to permit such officer to express his opinion as to whether or not the defendant was under the influence of intoxicating liquor.[2]

The amount of alcoholic consumption necessary to place a person in violation varies from state to state.[3] In Ohio, .15 of 1 percent is sufficient to obtain a conviction for operating a motor

---

[1] City of Columbus v. Waters, 69 Ohio L. Abs. 261, 124 N. E. 2d 841 (C. P. 1954).

[2] State v. Moore, 74 Ohio L. Abs. 116, 139 N. E. 2d 381 (C. P. 1956).

[3] Smith and Lucas, Breath Tests for Alcohol, 1 Crim. Law Q. 25 (1958); Note, Breath Tests for Alcohol, 5 J. For. Sci. 395 (1960); Annot., 5 Ohio Jur. 2d, Arrest, Sec. 30 (1954); Note, Opinion Evidence of Intoxication, 77 L. Q. Rev. 166 (1960).

vehicle while under the influence of alcohol; while .13 of 1 percent is sufficient to convict a person of intoxication.[4]

After the operator has been taken to the "station house" and prior to the time he is "locked up," many law enforcement agencies will take movies of the subject as he is put through various movements, or asked to exhibit his handwriting. In connection with these movies, simultaneous tape recordings may be used.

Intoxication statutes vary from state to state, and in any given state the court decisions may seem to vary somewhat from the provisions of the statute. The Ohio Revised Code, Section 4511.19, relating to operating a motor vehicle while intoxicated, states:

> No person who is under the influence of intoxicating liquor, narcotic drugs, or opiates shall operate any vehicle, streetcar, or trackless trolley within this state.

The first impression from the above statute would suggest that *any* amount of alcoholic consumption would lead to a violation. However, the courts generally feel that the influence must be of such a degree that the operation of the vehicle necessarily would be seriously affected. They hold that .15 of 1 percent of alcohol in the blood is the point at which any person would be in violation.[5] It is to be noted that a person with less than .15 of 1 percent in fact may well be under the influence to such a degree that he could not safely operate a motor vehicle.[6]

A consideration of the Ohio statute on operation of a motor vehicle while under the influence reveals that this section does not state that the operation shall take place upon "a public highway, street, or thoroughfare." However, all other Ohio statutes relating to motor vehicle offenses contain the prerequisite of operation on a public highway. Apparently, a person could be convicted for operating a motor vehicle while under the influence of alcohol regardless of whether or not the operation took place upon a public highway. However, no reported decisions on this point in Ohio were found.

In a prosecution for operating a motor vehicle while under the influence of alcohol, a general charge by the judge to the

---

[4] State v. Titak, 75 Ohio L. Abs. 430, 144 N. E. 2d 255 (App. 1955); Smith, Drinking and Driving, 3 Crim. Law Q. 1 (1960); Sullivan, Driving While Under the Influence of Intoxicating Liquor, 1958 Wis. L. Rev. 195.

[5] State v. Titak, *Ibid.*

[6] *Id.*

jury that a party with less than .05 of 1 percent of alcohol in his bloodstream is not under the influence, and that a party between .05 of 1 percent and .15 of 1 percent may be under the influence, and that a party with more than .15 of 1 percent is definitely under the influence, is not prejudicially erroneous as to the defendant.[7]

Testimony that the person charged with either intoxication or with operating a motor vehicle while under the influence of alcohol, refused an alcometer test, blood test, or urinalysis is admissible. The failure of the defendant to take the test is a proper subject of comment by the state.[8]

A person operating a motor vehicle under the influence of panta barbital, which is a sleep-producing drug or pill, comes within the Ohio statute for operation of the vehicle while intoxicated; that is, operating a motor vehicle while under the influence of narcotics. However, such a person does not come within the provisions of the Code as to operating a motor vehicle while under the influence of alcohol.[9]

Evidence was produced by the arresting officers in *State v. Neff*[10] that the defendant's eyes were glassy and bloodshot, that there was an odor of some intoxicant on his breath, his speech was slurred, his eyes did not seem to focus, and that he walked with an unsteady gait. The defendant told the officers that he had had "a couple of beers" and was not ill. Such evidence was held to be sufficient to support the trial court's finding that the defendant was "under the influence" of intoxicating liquor.

It has been held that persons are immune from conviction under Ohio Revised Code Section 4511.19 when their driving ability has been affected by consumption of a beverage with an alcoholic content of less than 3.2 per cent by weight, regardless of the extent of such effect.[11] The court in this case held that the definition of intoxicating liquor under the section dealing with the Liquor Control Act[12] extended to the Revised Code.

---

[7] *Id.*

[8] State v. Galton, 60 Ohio App. 192, 20 N. E. 2d 255 (1938).

[9] State v. Walter, 12 Ohio Op. 148 (C. P. 1938).

[10] 104 Ohio App. 289, 148 N. E. 2d 236 (1957).

[11] Ohio v. Mikola, 12 Ohio Op. 2d 25, 82 Ohio L. Abs. 517, 163 N. E. 2d 82 (Lucas County Ct. 1959).

[12] Ohio Rev. Code § 4301.01 (1953). " 'Intoxicating Liquor' and 'liquor' shall include all liquids and compounds containing more than three and two-tenths per cent of alcohol by weight which are fit to use for beverage purposes. . . ."

In consideration of the problem of the intoxicated driver, and recalling that many surveys have revealed that such operators cause over 57 percent of the fatal accidents, law enforcement agencies, legislatures, and other interested parties have advanced various proposals. The core of the problem, for law enforcement officers is how to determine, as quickly as possible, the amount of alcohol that a suspect has taken. John O. Grimm, an Akron attorney, has proposed that:

> Legislation could be provided which would state that a person, in applying for his operator's license, must consent to the taking of all alcometer tests, as a condition of the operator's right to the use of the highways.[13]

Such legislation would eliminate all constitutional prohibitions and limitations. Unfortunately, all attempts to pass such legislation in Ohio have failed. In New York, however, such an "implied consent law" was passed in 1953.[14] This law provides that the suspect has the choice of either submitting to a test or submitting to revocation of his operator's license.

Many cases have had as their main issue whether or not the defendant was "driving" or "operating" the motor vehicle. The important point to consider is how much control the defendant had over the vehicle. In some states it is sufficient if the defendant exerted some control over the vehicle such as starting the engine, moving the gearshift, or releasing the brake.[15] Other cases have held that the mere position of the defendant behind the steering wheel is sufficient, particularly those jurisdictions having a "physical control statute.[16] In England a defendant was convicted as a result of having been found sleeping in a motor vehicle, while he was intoxicated, and it was admitted that he was waiting for a friend to drive him home. However, in this case the court said that the penalty allowed by the statute, of suspending the defendant's operator's license, would not apply.[17]

It is a good point for officers to remember that, in an attempt to convict a person found at the scene of a wreck, there must

---

[13] Grimm, The Drunken Driver, 43 Ohio Op. 61 (1951).

[14] Anderson v. Macduff, 208 Misc. 271, 143 N. Y. S. 2d 257 (1955); Garden City v. Miller, 181 Kan. 360, 311 P. 2d 306 (1952).

[15] Annot., 47 A. L. R. 2d 570 (1956).

[16] Austin v. State, 47 Ga. App. 191, 170 S. E. 86 (1933); Hester v. State, 196 Tenn. 680, 270 S. W. 2d 321 (1954).

[17] Jowett-Shooter v. Franklin, 2 All E. R. 730 (Div. Ct. 1949).

be strong evidence to indicate that such a person was actually driving the vehicle.[18]

It is generally held that the privilege against self-incrimination is not violated by reception of evidence of blood tests or other physical tests for convictions of intoxication, since the privilege against self-incrimination only relates to "testimonial" compulsion, and not to real or objective evidence.[19]

In cases where the defendant consents to a physical examination, there is a waiver of any constitutional rights and privileges which would, possibly, exclude evidence of blood tests, alcometer tests, or other physical tests.[20]

Sound recordings are generally held to be admissible, once a proper foundation has been laid for their admission.[21] If the prosecution should offer a tape recording of the defendant's voice, taken at the time when he was arrested for being under the influence of alcohol, most courts would hold that the defendant would have to show the inaccuracy of the recording in order that the evidence be rejected. Tape recordings, conducted at the same time as movies, would be more difficult to prove not admissible. Undoubtedly, the use of a tape recording taken while the defendant was intoxicated would be allowed for impeachment purposes on cross examination.[22]

Motion pictures are admissible in court when they have been authenticated by extrinsic evidence.[23] Motion pictures of the defendant, taken prior to incarceration for intoxication, are admissible. The objection that they were taken while he was under arrest, which is in effect compelling him to give evidence against himself, is not well founded. Such motion pictures fall within the category of reasoning that holds "that an accused foot may be placed in a footprint in an endeavor to show similarity between the print and the shoe."[24] Evidence on film can

---

[18] DeHart v. Gray, 245 S. W. 2d 434 (Ky. 1952).

[19] Annot., 25 A. L. R. 2d 1407 (1952); State v. Galton, *supra,* note 8.

[20] City of Columbus v. Glenn, 60 Ohio L. Abs. 449, 102 N. E. 2d 279 (App. 1950); State v. Titak, *supra,* note 4 at 260; City of Columbus v. Thompson, 55 Ohio L. Abs. 302, 89 N. E. 2d 604 (App. 1949).

[21] Epstein v. Epstein, 285 App. Div. 1128, 141 N. Y. S. 2d 819 (1955).

[22] Annot., 58 A. L. R. 2d 1024 (1958).

[23] Annot., 62 A. L. R. 686 (1928).

[24] Housewright v. State, 154 Tex. Crim. 101, 225 S. W. 2d 417 (1950); McCormick on Evidence, Sec. 181 (1954).

be one of the important techniques of the investigation of D. W. I. cases.[25]

Today the motorist who is charged with operating a car while under the influence usually will use every means available to escape conviction. This is because a conviction usually will cause his operator's license to be suspended. Thus the burden placed on law enforcement officers is a heavy and important one. The crucial problem is whether or not sufficient evidence will be available at the trial. The average motorist fears the loss of his operator's license more than he fears a fine or a few days in jail. Also, a person charged with operating a car while under the influence may find that his automobile insurance will rise in cost, if he is convicted. The most discouraging fact of all, however, is that few seem to realize that their chances of being killed, or of killing others, are greatly increased when they drink and drive.

[25] Traffic Digest and Review of Northwestern University, p. 5 (April, 1960); and see Alcohol Intoxication and Influence, A Treatise of the Law-Medicine Center of Western Reserve University (1958).