

A Monthly OVI Report

OnTap

CHEATING ON PERMIT EXAMS ...ONLY THE TIP OF THE ICEBERG

By: Jon Saia

The State of Ohio, Office of Inspector General, recently issued a press release stating that it has found evidence of cheating during the annual testing of law enforcement officers seeking permits to conduct instrument checks (to make sure the instrument is in proper working order) and breath tests on individuals arrested for OVI.

Cheating on exams is only one of the many problems with breath alcohol testing in Ohio.

Despite the fact that the machines used in Ohio have the ability to collect and store data of all test results, Ohio opts not to include that software in any machine purchased for use in Ohio. The failure to collect and store data becomes relevant when a machine malfunctions. Evidence of the malfunction can simply be discarded and no record of the malfunction will exist.

Although cross-examination of law enforcement on this issue appears to be the only means of discovering the misconduct, defense attorneys find themselves in a "Catch 22." Some courts require attorneys to have knowledge of the misconduct before being allowed to question law enforcement about the misconduct. Gaining knowledge of the misconduct can be difficult when the only evidence of the misconduct has been discarded.

This rationalization may seem a bit unusual and unfair, but is utilized quite often in Ohio in OVI cases. For example, although a videotape recording of an OVI stop may have been destroyed, Ohio law requires defense counsel to prove that, if the tape still existed, there would have been evidence on the tape favorable to their client.

Many permit holders in Ohio currently have permits (authorizing the administration of instrument checks and breath alcohol tests) which indicate issuance by the Director of the Department of Health. The problem is that the individual that signed the permit was not the Director at the time of the issuance of the permit. Despite this fact, many individuals are convicted of OVI based upon a breath alcohol test result which was conducted by an individual that may not have had the authority to conduct the test.

Another issue involves proficiency testing. Law enforcement officers seeking permits to conduct breath testing must demonstrate their ability to perform instrument checks and to demonstrate knowledge of the operation of the breath alcohol testing instrument. Rather than spending the required 30 minutes on proficiency testing, most records indicate that no more than four to six minutes is spent on proficiency testing. Despite this fact, permits are routinely issued.

Currently, new regulations are being circulated by the Ohio Department of Health, which will greatly improve the breath testing process in Ohio. Improvements include dry gas simulation checks (currently wet bath) being performed before and after every test (currently every 192 hours), two tests within two to 10 minutes of one another to confirm the accuracy of the test (currently only one test is administered), approval of new instruments with state-of-the-art technology and components (currently using technology and components dating back 20 plus years), advanced software programs which include data collection and storage (currently not used in Ohio instruments). Despite all of this new technology and assurances for accuracy, many of which have already been implemented in other states, Ohio still readily accepts the results of breath alcohol tests from instruments that have been around since the 1980's.

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Tap Into This...

From Gazebo, 1986.

DRINKING'S FUNNY. When I look back on it, all of our important decisions have been figured out when we were drinking. Even when we talked about having to cut back on our drinking, we'd be sitting at the kitchen table or out at the picnic table with a six-pack or whiskey.

For the Bar... OVI Case Law Update

Law enforcement's failure to comply with Administrative Regulations that require a simulation check to be completed with a new bottle of testing solution after a failed instrument check requires the results of a breath test to be suppressed. Further, reliance upon testimony given in another case concerning the facts surrounding law enforcement's failure to follow the Regulations supported the suppression of the breath test result. *State v. Bequeath*, 2008-Ohio-647.



CHEATING ON PERMIT EXAMS ...ONLY THE TIP OF THE ICEBERG Continued from other side.

Cheating on exams is only the tip of the iceberg concerning Ohio's problems with breath alcohol testing.

Also see us at: www.888oviohio.com

Who's On Tap...

Known for the persistent manner with which he defends his clients, Mr. Piatt has successfully defended hundreds of clients charged with OVI. With a string of "Not Guilty" verdicts, Mr. Piatt has gained a reputation as one of the most successful OVI trial attorneys in the State of Ohio.

Mr. Piatt is also known among the defense bar for raising new and unique defenses in OVI cases that set trends around the State for use by other defense lawyers. His previous prosecution experience in various municipalities throughout Central Ohio has given him special insight to prosecution philosophies that assist him in defending OVI cases.



Richard A.L. Piatt

Mr. Piatt is often called upon by colleagues to speak at seminars relating to OVI defense and has made many appearances in the national and local media regarding issues relating to OVI defense.

Ohio's Scarlet Letters...

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