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policing with perspective

MPTC IN-SERVICE: UPDATE 6¹

Failure to properly perform the breathalyzer test

Once a defendant agrees to take the breathalyzer, police may testify about his refusal to perform the test properly. *Commonwealth v. Curley*, 78 Mass. App. Ct. 163 (2010):

Facts. Police Officer Craig Perry saw the defendant make an illegal right turn through a red light on Main Street in Hudson. When Officer Perry turned on his blue lights, the defendant accelerated and drove away; he stopped a short time later in a parking lot. The defendant told the officer that he was coming from a local bar, but he initially denied having anything to drink. Perry observed the defendant with red and glassy eyes; he could smell an odor of alcohol, and the defendant's speech was slurred. The officer called for assistance, and he asked the defendant to perform certain field sobriety tests. The defendant was arrested.

At the police station, the defendant was given an opportunity to take a breathalyzer test. The defendant asked Sergeant Christopher Shea, the patrol supervisor, about the effects of alcohol, whether they depended on a person's body weight and when he had eaten, and the "timing of first and last drinks." Sergeant Shea did not answer these questions; he offered the defendant a consent form for the test, and the defendant continued to question him. Eventually, the defendant said that he wanted to take the test, but he wanted a drink of water first. Shea explained that the procedure did not permit him to take anything by mouth before the test. The defendant then agreed to take it and signed the form.

Officer Donovan instructed the defendant "to blow into the mouthpiece with a deep breath with his lips sealed around . . . the edge of . . . the mouthpiece so that the sample could go into the machine." The defendant kept blowing with his mouth open so the air would not go into the machine. Donovan and Shea observed the defendant go through this process four times, each time blowing in the same way, and never producing a reading.

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After the test process, the defendant began to complain that he was "going into a diabetic shock." The arresting officer, Perry, who had been trained as a fire fighter and an EMT, did not see any symptoms. Nevertheless, an ambulance was called; paramedics arrived, and the defendant told them that his complaint was "dehydration." He was transported to a local hospital. Officer Perry accompanied him because he was still in custody.

At the hospital, the defendant reiterated that he had low blood sugar; however, it was the opinion of the paramedics that "his blood sugar was fine." The hospital staff then did a test for dehydration, and gave him one bag of intravenous fluid. During the hour that the defendant was at the hospital, he made a telephone call to his brother. Officer Perry overheard the defendant's side of the conversation: "I'm in the hospital, I got nervous . . . I got pulled over by the police, and I was nervous to take the test so I pulled a fast one." He then laughed.

When the defendant was returned to the station, he demanded to take the breathalyzer. Shea told him that the time for the test was over but he re-advised him of his rights under G. L. c. 263, § 5A. In response, the defendant became argumentative and threatened "to drive drunk again."

When the case went to trial, the defendant testified that he had gone to see his dentist in the afternoon. He then went for lunch by himself at a Chinese restaurant and had a "Mai Tai." After lunch, he drove to meet his brother at "a bar called Yours and Mine." He had a drink called a "Sea Breeze" and left after ten minutes. Officer Perry stopped him soon afterwards, and he acknowledged making an illegal right turn on a red light.

The defendant testified that he was nervous during the field sobriety tests but he believed that he performed them well. At the police station, he told the police officers that his lips were cracked and dry and he would need "a drink of water or at least some Chapstick . . . if they wanted me to blow on that thing." He denied making any complaint about his blood sugar. His request for water was refused and, eventually, he was transported to a hospital and given intravenous fluids.

He admitted speaking to his brother from the hospital and telling him that he had pulled "a fast one," an expression he testified referred to his illegal right turn. He did not disagree with the officer's description of him as laughing, saying, "I did not feel in any way that I was impaired to a point where I was going to, what happened happened, so I . . . probably wasn't taking it as serious as I should have. I was in a good mood, . . . like I say, I had a coupla drinks in me, uh, I wasn't worried, I just wasn't worried, you know." Other than saying that he was dehydrated and his lips were chapped, the defendant never specifically described what happened when he tried to take the test.

He was convicted of his third OUI.

Analysis. It is well settled that evidence of a defendant's refusal to take a breath test offered by a police officer is not admissible against him in a trial for operating under the influence.

The underlying rationale is that a defendant's refusal is the equivalent of his statement, "I have had so much to drink that I know or at least suspect that I am unable to pass the test." Such a statement is compelled, the court reasoned, because the accused is placed in a "Catch-22" situation: take the test and perhaps produce potentially incriminating real evidence; refuse and have adverse testimonial evidence used against him at trial.

In this case, however, the defendant did *not* refuse to take the breathalyzer test; had he done so, evidence of that refusal would have been inadmissible.

Here, he signed a form indicating that he *consented* to the test. What followed -- a series of physical actions -- was properly the subject of the observing officer's testimony. This was not a "Catch 22" situation -- one in which a criminal defendant has no choice but to provide incriminating evidence against himself. This defendant had a choice that would not have incriminated him -- that is, he could have refused to take the breathalyzer. Instead, he chose to sign the consent form. The jury could have inferred from his actions that he was trying to avoid giving a sample while appearing to try to take the test.

This evidence was properly admitted.