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Traffic Laws & Courts

The newsletter of the Illinois State Bar Association's Section on Traffic Laws & Courts

Back to the basics: Challenging the accuracy of field sobriety tests

By Rachel J. Hess

Scenario: Police officer observes Defendant's vehicle speeding and initiates a traffic stop on the vehicle. Based on observations made after the stop the officer conducts a DUI investigation. Defendant submits to standardized field sobriety tests including the Horizontal Gaze Nystagmus test ["HGN"]. Defendant is arrested and charged with various offenses of the Illinois Vehicle Code including but not limited to Driving Under the Influence of Alcohol in violation of 625 ILCS 5/11-501(a)(1), (2). Defendant files a motion to quash arrest and suppress evidence. At the hearing, the officer testifies that he administered the tests according to how he was trained but admits that he was not trained in accordance with the standardized field training manual used by the National Highway Traffic Safety Administration ("NHTSA Testing Manual").[1] The issue raised in this scenario is not whether the test results are admissible, but rather, whether or not they are *reliable* based upon the officer's admission that he does not administer the tests according to NHTSA standards.

Argument

Generally, in order for a "test" to be considered valid, it must be supported by a reasonable degree of validity in accordance with *Frye v. United*

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The Illinois Supreme Court rules on the constitutionality of suspension of driving privileges if a person receives court supervision for unlawful consumption of alcohol under 21 years of age

By Lisa L. Dunn

On June 24, 2010, the Illinois Supreme Court filed an opinion declaring that section 6-206(a)(43) of the Illinois Vehicle Code is constitutional. *People v. Boeckmann*, Docket Nos. 108289, 108290 cons. Section 6-206(a)(43) of the Illinois Vehicle Code requires suspension of driving privileges if a person receives court supervision for unlawful consumption of alcohol under 21 years of age.

Facts

This was a consolidated appeal from the circuit court of Clinton County where two defendants were each charged with unlawful consumption of alcohol by a person under 21 years of age (235 ILCS 5/6-20(e)). The Defendants pled guilty to unlawful consumption of alcohol as charged. The Defendants alleged in the trial court that sections 6-206(a)(38) and (a)(43) of the Illinois Vehicle Code, as applied, violated their constitutional rights to due process and equal protection of the law of the United States and

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Back to the basics: Challenging the accuracy of field sobriety tests

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States, 293 F.2d 1013 (D.C. Cir 1923). In 1977, the National Highway Traffic Safety Administration commissioned the Southern California Research Institute to determine the best method for detecting drunk drivers through the use of field sobriety tests and that study revealed that the HGN test, when used with the walk-and-turn and one-leg stand tests, is the most accurate and effective method of detecting alcohol impairment. *People v. Robinson*, 349 Ill. App. 3d 622, 812 N.E.2d 448, 456 (1st Dist., 2004).[2] In fact, a subsequent study revealed that of the three field sobriety tests, the HGN test was the most powerful. *Id*.[3] Furthermore, according to the United States Department of Transportation Test Manual, as devised for use by law enforcement agencies, the HGN test is "the single most accurate field test used in determining whether a person is alcohol impaired." United States Department of Transportation, National Highway Safety Administration, Improved Sobriety Testing 4 (1984), as cited in *State v. Bresson*, 51 Ohio St.3d 123, 125, 554 N.E.2d 1330, 1332 (1990); *See also*, *Robinson*. The results of an HGN test are not conclusive, however, and can only be considered along with other evidence of intoxication. *Id* at 546.

In Illinois, the HGN test was found to meet the *Frye* standard in *People v. Buening,* 229 Ill. App.3d 538, 592 N.E.2d 1222 (1992). That decision, in turn, was followed by the appellate court in *People v. Wiebler,* 266 Ill.App.3d 336, 339, 640 N.E.2d 24 (1994).

In the wake of *Buening* and *Wiebler,* HGN test results have been routinely admitted in prosecutions for driving under the influence…. Although the State is no longer required to show that the HGN test satisfies the *Frye* standard before it may introduce the results of an HGN test into evidence, the validity of HGN tests and test results is not beyond challenge. If a defendant has evidence showing that HGN tests are unsound, then he may interpose the appropriate objection to the HGN test results and present his supporting evidence to the trial court. If the trial court is persuaded by the defendant's evidence, then the court has the right to bar its admission. Note, however, that it is the defendant's obligation to show that the test results are infirm. It is not the responsibility of the State to show that the tests and results are scientifically valid. Absent proof by the defense that the HGN test is unsound, *the State need only show that the officer who gave the test was trained in the procedure and that the test was properly administered*.

People v. Basler, 193 Ill. 2d 545, 740 N.E. 2d 1, 4 (Ill., 2000) (emphasis added). Thus, for HGN test results to be admissible, a proper foundation requires testimony concerning the officer's education and experience in administering the test and a demonstration or explanation that the procedure was properly administered. *People v. Buening,* 229 Ill. App.3d at 546, 592 N.E.2d 1222 (1992). Once a proper foundation has been laid, the results of that test may be admitted as evidence of consumption of alcohol but may NOT be used to establish that the defendant's blood alcohol concentration was at or above a certain level. *See People v. Dakuras*, 172 Ill. App. 3d 865, 527 N.E.2d 163 (2d. Dist. 1988) (holding that the HGN test was inadmissible to prove a blood alcohol concentration due to Section 11-501.2 of the Illinois Motor Vehicle Code, which restricts proof of blood alcohol concentrations to specific analyses of blood, breath or urine only). For example, the police officer's testimony regarding the results of a defendant's failed HGN test tends to show that he or she consumed alcohol prior to being tested. Similarly, testimony that a defendant did not display any sign of HGN is relevant evidence that tends to show that he or she had not consumed alcohol. The result of the test, therefore, makes it either more or less likely that a defendant was impaired due to [consumption of] alcohol." *People v. McKown*, Docket No. 102372, pg. 20 (Ill. 2/19/2010) (Ill., 2010).

Illinois recognized and adopted the NHTSA protocol for field sobriety testing in *People v. McKown*, Docket No. 102372 (Ill. 2/19/2010) (Ill., 2010). In that case, the Illinois Supreme Court affirmed *Basler* with regard to the admissibility of HGN testing holding that "HGN testing is generally accepted in the relevant scientific fields as evidence of alcohol consumption and possible impairment" and adopted "the trial court's five conclusions of law regarding the admission of HGN evidence and its use at trial."[4] *Id*. pg. 28. The Court further held that "evidence of HGN field-sobriety testing, *when performed according to the NHTSA protocol by a properly trained officer*, is admissible under the *Frye* test for the purpose of showing whether the subject has likely consumed alcohol and may be impaired. As for the qualifications of the individual witness, the trial court concluded that a proper foundation must be laid, including a showing that the witness is *properly trained and that he performed the test in accordance with proper procedures*." *Id*. pg. 21.

The proper method for conducting HGN testing in the field, and the qualifications of the witness, requires that the HGN testing was performed according to the NHTSA standard testing protocol as developed and taught by NHTSA. *McKown*, Docket No. 102372, pg. 21. Thus, the Court limited *Frye* admissibility to only those HGN test results that followed the NHTSA standard testing protocol. The Court further noted that "the use of HGN evidence should be *limited to proof of alcohol consumption* and the *possibility* of resulting impairment. Limitation may take the form of sustaining an objection to certain questions or arguments made by the prosecutor, giving a limiting instruction at the time the testimony is given, or giving a written jury instruction at the conclusion of the case." *Id*. pg. 20.

With regard to the admissibility of a defendant's performance of physical field sobriety tests, including the Walk-and-Turn Test and One-Legged Stand Test, and the admissibility of testimony interpreting the results of those tests, Illinois courts have been reluctant to require the same quantum of training as with the HGN. This distinction was addressed in *People v. Sides*, where the Court explained that the 'finger-to-nose test', the 'walk-and-turn test,' and the 'one-leg stand test' (sic) "were not so abstruse as to require a foundation *other than the experience of the officer administering them*." 199 Ill. App. 3d 203, 556 N.E. 2d 778, 779 (4th Dist. 1990) *citing People v. Vega*, 145 Ill.App.3d 996, 1000-01, 496 N.E.2d 501 (1986) (emphasis added). Similarly, in *People v. Bostelman*, 325 Ill.App.3d 22, 756 N.E.2d 953, 961 (2d Dist. 2001), the Court concluded that an officer is not required to establish that he has any previous experience or formal training in the administration of field sobriety tests in order to testify about the defendant's performance on field sobriety tests.

In light of the decision in *McKown*, however, defendants should renew their arguments

to extend the principles and guidelines set forth by the U.S. Department of Transportation, as well as the recent Illinois Supreme Court decisions of *Basler* and *McKown*, to other field sobriety tests. Indeed, it would be inconsistent for courts to disregard the clear directive of the Supreme Court in finding that the NHTSA guidelines should be strictly followed with regard to HGN testing and not extend those same principles to other field sobriety testing—especially where those tests have a lower accuracy rate than the HGN.[5] Failure to follow the NHTSA testing guidelines also contradicts everything that the officers are taught and arguably renders the NHTSA Testing Manual irrelevant. As if to emphasize how important it is to follow the guidelines without deviation, the NHTSA Testing Manual unambiguously states that, "if any one of the standardized field sobriety test elements is changed, the validity is comprised." NHTSA Testing Manual at VIII-19 (emphasis in the original). Similarly, the Illinois Local Governmental Law Enforcement Officers Training Board and the Illinois Department of Transportation, in conjunction with the Illinois State Police, have produced a Field Sobriety Training Manual, which is based upon the NHTSA standards. Page 9 of that manual states "If the standardized administration and scoring procedures presented in this manual are not followed, then the decision-making guidelines are no longer accurate." The Illinois State Police Breath Analysis Unit also has a Field Sobriety Manual, which adopts the NHTSA standards. Page 12 of that manual states that "If the standardized administration and scoring procedures presented in this manual are not followed, then the decision-making guidelines are no longer accurate." Clearly, these guidelines were intended to be followed.

Other jurisdictions have held that standard field sobriety tests conducted in a manner that departs from the methods established by the National Highway Traffic Safety Administration "NHTSA" are inherently unreliable. *See State v. Homan*, 89 Ohio St. 3d 421, 732 N.E.2d 952, (Ohio, 2000).[6] In *Homan*, the Ohio Supreme Court opined that, in administering field sobriety tests, the police must strictly comply with established standardized procedures. *Homan*, 89 Ohio St.3d at 427. In that case, the Trooper testified on cross-examination that "at times he deviated from established testing procedures." *Id*. The court held that when administering field sobriety tests there must be strict compliance with the standardized testing procedures set forth in the National Highway Traffic Safety Administration (NHTSA) Student Manual, *Id*. at 425. Therefore, even though field sobriety tests may be valid and admissible when strictly administered and scored, any deviation from the approved/standardized administration procedure rendered the results unreliable and therefore subject to bar.

While field sobriety tests must be administered in strict compliance with standardized procedures, probable cause to arrest does not necessarily have to be based, in whole or in part, upon a suspect's poor performance on one or more of these tests. The totality of the facts and circumstances can still support a finding of probable cause to arrest even where no field sobriety tests were administered or where the test results must be excluded for lack of strict compliance. That is where the officer's note taking skills[7] become critically important.[8]

Conclusion

The admissibility of standardized field-sobriety testing, including HGN evidence, in an individual case will depend on the State's ability to lay a proper foundation and to demonstrate the qualifications of its witness, subject to the balancing of probative value with the risk of unfair prejudice. The small margins of error that characterize field sobriety tests make strict compliance with standard testing protocol critical. For example, in *Homan*, the arresting officer's failure to use the full four seconds when checking for the onset of nystagmus, while seemingly trivial, rendered the results of that test unreliable.

In this scenario, Defendant should argue that the field sobriety test results, particularly that of the HGN test, should be excluded because the officer was not properly trained in accordance with the standardized field training manual used by the National Highway Traffic Safety Administration (NHTSA) and, therefore, the validity of the results are compromised. For the reasons stated above, Defendant may move to quash arrest and suppress evidence of any field sobriety testing unless such test results have been established as reliable by proof that there was strict compliance with the standardized procedures for administering the tests. Finally, Defendant should move in limine to limit the testimony of police officers to actual observations only, and prohibit such terms as

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pass, fail, etc., because such terms are prejudicial, misleading and invade the province of the trier of fact. *See Sides.* ■

1. U.S. Department of Transportation HS 178 R2/06, DWI Detection and Standardized Field Sobriety Testing, Student Manual (2006).

2. *Citing* National Highway Traffic Safety Administration, U.S. Department of Transportation, Psychophysical Tests for DWI Arrests, No. DOT-HS-802-424 at 39 (June 1977).

3. *Citing* National Highway Traffic Safety Administration, U.S. Department of Transportation, Field Evaluation of a Behavioral Test Battery for DWI, No. DOT-HS-806,475 at 4 (September 1983).

4. 1. HGN testing satisfies the *Frye* standard in Illinois. 2. HGN testing is but one facet of field sobriety testing and is admissible as a factor to be considered by the trier-of-fact on the issue of alcohol or drug impairment. 3. A proper foundation must include that the witness has been adequately trained, has conducted testing and assessment in accordance with the training, and that he administered the particular test in accordance with his training and proper procedures. 4. Testimony regarding HGN testing results should be limited to the conclusion that a "failed" test suggests that the subject may have consumed alcohol and may [have] be[en] under the influence. There should be no attempt to correlate the test results with any particular blood-alcohol level or range or level of intoxication. 5. In conjunction with other evidence, HGN may be used as a part of the police officer's opinion that the subject [was] under the influence and impaired.

5. NHTSA analyzed the Laboratory and field-testing test data of sobriety tests and determined that:

a) the HGN by itself was 77% accurate
b) the Walk-and-Turn by itself was 68% accurate
c) the One-Legged Stand by itself was 65% accurate

6. The National Traffic Law Center (NTLC) has a list of every state's Appellate Court/Supreme Court cases addressing HGN and SFST issues. The materials are available to law enforcement at <http://www.ndaa.org/ntlc_home.html> or by phone (703) 549-4253.

7. "The evidence gathered during the detection process must establish the elements of the violation and must be documented to support successful prosecution of the violator." NHTSA Testing Manual, pg. IV-7.

8. Field notes may be subpoenaed as evidence in court.

The Illinois Supreme Court rules on the constitutionality of suspension of driving privileges if a person receives court supervision for unlawful consumption of alcohol under 21 years of age

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Illinois Constitutions as well as the proportionate penalties clause of the Illinois Constitution. The Secretary of State (Secretary) was granted leave to file an appearance. The trial court found section 6-206(a)(43) unconstitutional on due process grounds as applied to the defendants. The trial court rejected the defendants other constitutional challenges based on the equal protection and proportionate penalties clauses. This appeal to the Illinois Supreme Court followed.

Analysis

Under section 6-206(a)(43) of the Illinois Vehicle Code, the Secretary is required to suspend for three months the driving privileges of any person receiving court supervision for a violation of section 6-20 of the Liquor Control Act (235 ILCS 5/6-20). The Secretary argued that the suspension of the defendants' driving privileges for unlawful consumption of alcohol bears a rational relationship to legitimate governmental interest in highway safety. The prevention of young people who consume alcohol from driving is a reasonable means of furthering the interest in highway safety, argued the Secretary. Finally, the Secretary argued that the suspension of defendants' driving privileges is a reasonable means of promoting the legitimate public interest in deterring underage consumption of alcohol.

The defendants' relied on *People v. Lindner,* 127 Ill.2d. 124 (1989) and argued that suspending their driving privileges does not bear a rational relationship to the public interest in the safe operation of motor vehicles because no vehicle was involved in the commission of their offenses. And, they argued, the suspension of driving privileges in all cases of underage consumption of alcohol is not a reasonable means of promoting the public interest in highway safety.

First, the Supreme Court pointed out that all statues are presumed to be constitutional. Second, the court has held that a driver's license is a non-fundamental property interest. *Lindner,* 127 Ill.2d at 179. Third, the applicable standard of review is the rational basis test. When applying the rational basis test, the Court must identify the public interest the statute intended to protect, determine whether the statute bears a rational relationship to that interest, and examine whether the method chosen to protect or further that interest is reasonable. *Lindner,* 127 Ill.2d at 180.

The court found that the public interest that the statute is intended to protect is "the safe and legal operation and ownership of motor vehicles." *Lindner,* 127 Ill.2d at 182. The court found that since it is reasonable to believe that a young person who disobeys the law by engaging in the underage consumption of alcohol may also lack the judgment to decline to drive after drinking and therefore the statute in question bears a rational relationship to the interest of the state in promoting the safe and legal operation of motor vehicles. The court explained that the rationale in *Lindner* is whether the revocation of driving privileges bears a rational relationship to the public interest in the safe operation of motor vehicles. Since the underage consumption of alcohol will impact one's ability to drive a motor vehicle safely, there is a connection between the offense and ability to drive. Finally, the court concluded that the suspension of the defendants' license for underage consumption of alcohol is a reasonable method of promoting the public interest despite the absence of a motor vehicle or plans to drive.

The court next examined cases in other jurisdictions that upheld similar statutes when there were substantive due process challenges. The court declined to overrule *Lindner* as wrongly decided because it defined the public purpose of the statute too narrowly. Since the parties did not ask the court to overrule *Lindner* herein, the Supreme Court did not consider that but in dicta stated in a future case, parties can ask for *Lindner* to be overruled.

The Defendants also asked the court to find 6-206(a)(43) unconstitutionally arbitrary as applied because the Secretary does not exercise discretion in determining whether to suspend a person's driving privileges

for underage consumption of alcohol. The Court found that section 6-206(a)(43) provides for a mandatory suspension. Finally, the court found that the proportionate penalties clause does not apply because the suspension of driving privileges under section 6-206(a)(43) is not penal in nature because the purpose is to provide for safe highways and protect the public, and not to punish licensees.

Justice Garman, joined by Justice Thomas, specially concurred and indicated they believe that *People v. Lindner,* was wrongly decided. Justice Garman believes that *Lindner* too narrowly defined the public purpose of section 6-205 of the Vehicle Code and that there might be different public purposes that might be served by different statutory provisions that mandate or permit the revocation or suspension of a driver's license, whether contained in section 6-205, 6-206, or elsewhere in the Vehicle Code. However, they find that section 6-206(a)(43) of the Vehicle Code bears a rational relationship to the legitimate purpose of encouraging compliance with section 6-20 of the Liquor Control Act and of protecting young drivers and the public from potentially deadly consequences that may occur if a person whose judgment is impaired by alcohol drives a vehicle.

Justice Freeman dissented and argued that the circuit court correctly followed *People v. Lindner,* 127 Ill.2d 174(1989) and since neither party asked for *Lindner* to be overruled, he cannot express an opinion on whether it should be overruled. ■

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Defending "unlicensed" drivers in the State of Illinois and creation of an Illinois Special Driver's License Certification Program

By Neal Connors, Attorney at Law

Introduction

One of the popular collateral areas of practice for attorneys concentrating in immigration law is traffic and misdemeanor. The outcome of relatively minor traffic and misdemeanor matters for undocumented persons is extremely important since the outcome, to a non-citizen, may be life-changing. For example, a routine traffic stop might result in an individual's extended detention and possible removal from the U.S. by immigration authorities. Currently, methods differ by jurisdiction in Illinois in the handling and treatment of "unlicensed" motorists--a significant and pressing issue for both judicial circuits and the undocumented.

I began handling cases for immigration clients who received one or more tickets for being unlicensed, uninsured, or both, about seven or eight years ago. I attribute this, in part, to the increased influx of undocumented persons into many different parts of the state over the past 10 years. Recently, I encountered a case involving an undocumented individual charged with being "unlicensed" and informed of the possibility that he might receive a 30-day jail sentence after making his first court appearance *pro se*. That brought him to my office where I learned that he possessed a valid foreign driver's license (Mexico) as well as the ever-popular "international driver's license"—a common identity document possessed by undocumented persons obtained either here in the U.S. or in Mexico. While I had previously been able to resolve these types of cases with some general plea negotiation and good-faith bargaining efforts, now it appeared that the bar had been raised enough that a careful re-examination of the Illinois driver's licensing statute would be required. What I discovered in the law surrounding this special class of undocumented and "unlicensed" drivers may surprise you.

The Statute

The first provision that defense lawyers and states' attorneys might already be familiar with is the general provisions under the Illinois Vehicle Code respecting foreign "licensed" drivers. 625 ILCS 5/6-101 (b) states that "No drivers license shall be issued to any person who holds a valid Foreign State license, identification card, or permit unless such person first surrenders to the Secretary of State any such valid Foreign State license, identification card, or permit." 101(c) further states that "any person licensed as a driver hereunder shall not be required by any city, village, incorporated town or other municipal corporation to obtain any other license to exercise the privilege thereby granted."

Under this provision, a German engineer who arrives in the U.S. should be able to rent a vehicle at the airport and lawfully operate it during his stay. Clearly this individual is ineligible to obtain an Illinois driver's license, particularly since he or she likely does not likely hold a social security number, an essential prerequisite for establishing identity and for obtaining a valid Illinois driver's license. The simplest explanation for the reason why a foreign person or an individual temporarily visiting the state does not have to obtain a driver's license to enjoy the benefit of driving in Illinois is *comity*, defined as recognition of the law in other jurisdictions where the public policy behind such law is similar enough to our own public policy requisites. Constitutionally speaking, the foregoing principle is squarely set forth within the "full faith and credit clause," Art. IV, section 1 of the United States Constitution, which provides for recognition of other states' laws and court orders under many circumstances.

Under 6-101, foreign drivers are currently *per se* ineligible from obtaining an Illinois driver's license and no municipality or jurisdiction can contravene this measure outlining the class of persons eligible for a traditional state driver's license. In apparent restatement of the basic rule regarding prohibiting foreign driver's licensing, section 5/6-102 sets forth the class of individuals whom are not required to have an Illinois driver's license, as follows:

1. Any employee of the United States Government or any member of the

> Armed Forces of the United States, while operating a motor vehicle owned by or leased to the United States Government and being operated on official business need not be licensed;
>
> 2. A nonresident who has in his immediate possession a valid license issued to him in his home state or country may operate a motor vehicle for which he is licensed for the period during which he is in this State;

This section appears to exempt foreign visitors from the requirement of having to obtain a valid state driver's license provided they already possess a valid foreign license. To be sure, most undocumented persons lack such a document, yet there are exceptions, and courts ought to recognize and understand where these exist. The more common scenario and method applied by circuits in dealing with unlicensed, undocumented motorists is accommodation rather than retribution: most circuits are inclined to recognize the practical dilemma of undocumented motorists in their communities and dismiss or reduce the unlicensed citation with imposition of a substantial fine, ranging from $100 to $500 in different southern Illinois circuits. Oftentimes the result is dependent on the overall circumstances of the police stop and whether the individual has complied with other requirements of motor vehicle law, such as obtaining proper liability insurance and valid vehicle registration.

Currently, an undocumented person has no trouble purchasing an automobile, registering it with the Secretary of State, even insuring it with a reputable insurance company, and hitting the streets. Many of these drivers actually have driver's training in their own country, reflected in their possession of a lawful driver's license in their home country. But the overwhelming majority of undocumented persons are unlicensed with little prospect for alleviating their dilemma.

During a recent visit to another circuit court in Illinois, I calculated approximately $12,000 in fines assessed during a single session of the traffic court lasting no more than an hour and a half and in which unlicensed motorists were routinely assessed a $400 fine by the traffic court. Ironically, the majority of the people who appeared that day likely returned to their automobiles leaving the courthouse. This is why I have turned my focus to addressing some of the myths regarding "unlicensed" offenses in light of the actual language and interpretation of the statute and to asking some fundamental questions about the application of motor vehicle statutes to undocumented persons.

The statutory provision most often cited to suggest that undocumented persons are liable for obtaining a valid state driver's license after a period of residence here is the following:

> A *nonresident* who becomes a resident of this State, may for a period of the first 90 days of residence in Illinois operate any motor vehicle which he was qualified or licensed to drive by his home state or country so long as he has in his possession, a valid and current license issued to him by his home state or country. Upon expiration of such 90-day period, such new *resident* must comply with the provisions of this Act and apply for an Illinois license or permit.

So, what standards of proof are relied upon by the courts to verify residency of "nonresident" persons? Are undocumented persons considered "residents" for purposes of the Motor Vehicle Code after ninety (90) days notwithstanding the legal fact that they are not lawful residents of the U.S.? Considering the fact that it is difficult to ascertain with any precision how long someone has been in the U.S., it seems unlikely that prosecutors will wish to establish and prove residency of an undocumented illegal immigrant in a misdemeanor traffic matter. Presumably, the 90-day provision concerning residency is intended to cover the class of citizens and inhabitants who "become resident" in the conventional sense either through relocation within the State of Illinois or legal migration to the U.S.. If undocumented individuals do not demonstrate any other indicia of acquiring lawful residency here, how can they be considered residents for purposes of the Motor Vehicle Act exclusively?

The final section of this article addresses the fact that in no uncertain terms, notwithstanding the foregoing, many undocumented persons do *not* possess a valid Illinois' driver's license at this time and it is time to reform this deficiency and current legal fiction. Creation of a special driver's license certification program by the Secretary of State in Illinois would provide a sound regulatory fix to the problem of large numbers of unlicensed motorists on Illinois roadways. For those who are ineligible to obtain a driver's license currently because of their undocumented legal immigration status and lack of a valid social security number, issuance of a special driver's license certification would require a financial payment or bond. A payment of not less than $1,500 for a term of not less than (3) years is envisaged.

The Proposal

Undocumented, unlicensed motorists represent an abundant percentage of the cases burdening our state circuit courts on a regular basis. Unlicensed motorists are many times more likely to be involved in a fatal accident. By providing these persons with a special driver's license certification, greater control and accountability will be exerted over those already driving. The revenue expected to be immediately generated upon implementing such a program takes into account some very specific realities affecting unlicensed motorists throughout the State of Illinois. The first time one of these drivers is stopped by the police for any infraction, i.e., speeding, illegal turn, tinted windows, or the like, it is typically discovered that the driver is "unlicensed." 625 ILCS 5/6 governs Illinois Driver Licensing Law.

It appears that Illinois would be a leader if a state special driver's license certification program were introduced here. Other states, including California, have attempted to introduce legislation allowing undocumented persons to obtain a "regular" driver's license without any special provisions or fees, thereby dooming it to failure. Illinois' certification program would have specific requirements for participation and generate substantial state revenue additionally. The State of Illinois historically has been a leader of sound economic and progressive social legislation in this arena. The need for sound education programs benefiting our greatest resource at this time, educated youth in Illinois, prompted passage of House Bill 60 in 2003, part of the so-called "Dream Act" which allows undocumented immigrants who lived with their parents and attended high-school in the State of Illinois to apply for college financial aid.

Certifying eligible and qualified unlicensed drivers in Illinois remediates the shortcomings of exacting a fine on unlicensed motorists without any corresponding ability to prevent a recurrence of the same infraction. Promoting issuance of a

special driver's license certification program in the State of Illinois creates greater driver accountability on state roads and highways, increases state revenues, and promotes safer driving as previously unlicensed drivers aim to preserve their new-found driving *privileges*.

The eligibility requirements for obtaining a special driver's license certification would be based on existence of an existing foreign driver's license; however, a conditional ninety-day certification permit would be afforded to an individual in order to enroll in a certified course of driving instruction. Only persons ordinarily resident in the State of Illinois would be eligible. Identity documents such as a consular visa, passport, or other credible identity documentation would be required to establish verifiable evidence of applicants.

Conclusion

Establishing a special driver's license certification program which is legally verifiable, fee-based, and state-administered, ensures that tens of thousands of unlicensed drivers in Illinois obtain driving privileges subject to regulations established to protect the citizens of the State of Illinois.

Addendum

Since the writing of this article last spring, a number of recent court experiences and arrests have revealed the new emphasis of law enforcement on immigration in traffic matters. Despite all the attention that the State of Arizona enjoys over illegal immigration, many municipalities and counties are pursuing unlicensed illegal immigrants with vigor with or without an attention-grabbing statute. The number of calls I receive concerning police stops and arrests for unlicensed motorists have increased, and the probable cause underlying such stops have become less than reputable at times, and in fact, increasingly comical. Some of my personal "probable cause" stop favorites which have revealed an unlicensed motorist include: defective windshield, failure to signal when required, no valid safety test sticker, "obstructed driver's view," and the mother of all heinous traffic offenses: "failure to have functioning wipers activated when required."

The above motorist is likely to have been arrested, booked, and an ICE (Immigration and Customs Enforcement) detainer placed against him or her. One such motorist contacted me, through his next of kin, inquiring why he was being held for more than ten days without ICE-Immigration picking him up and transporting him back to Mexico. After further inquiry revealed that ICE had no intention of picking him up after such a length of time in the county jail, it became apparent that the rules concerning immigration detainers of suspected undocumented persons were not always being observed.

Frequently, an undocumented person arrested on even a minor traffic violation may be placed in detention while law enforcement contacts the local immigration office to report a possible illegal immigrant in their custody for a "criminal" offense, such as unlicensed driving, brought about by failure to signal or to use wipers. Counsel needs to know that pursuant to 8 C.F.R. §287.7, any authorized immigration officer may issue an Immigration Detainer-Notice of Action to any federal, state, or local law enforcement agency on behalf of an individual in custody. However, pursuant to subsection (d) of this federal regulation, "such agency shall maintain custody of the alien for a period not to exceed 48 hours, excluding Saturdays, Sundays, and holidays in order to permit assumption of custody by the Department." The required notice to initiate such a "hold" on any person is brought about by issuance of an Immigration Form I-247 to the detaining official or agency. Without the I-247 being issued to the local jailer, further detention on behalf of immigration is illegal. Furthermore, 42 U.S.C. §1983 provides an appropriate vehicle for recovering monetary damages for persons unlawfully held in violation of the federal regulation, as well as payment of attorney fees.

In my practice, catching flies with honey oftentimes seems a more practicable solution, and so informing officials of the foregoing information is usually sufficient and educates everyone in the process. ■

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The appellate court affirms grand jury's subpoena power to issue subpoenas in DUI cases

By J. Brick Van Der Snick

In a recent 5th District Appellate Court opinion, *People v. Bauer*, 2010 W.L. 2780426 (July 9, 2010), the appellate court affirmed the Effingham County grand jury subpoena power to obtain defendant's medical information after an accident, from a hospital.

Facts

The defendant, Christopher Bauer, filed a Motion to Suppress Evidence wherein he alleged that the State had obtained his medical records by misusing the grand jury's subpoena power. Following a hearing, the circuit court denied defendant's motion, and after a stipulated bench trial, the defendant was convicted of misdemeanor DUI of which he has been charged by information after the indictment had been issued. Originally, the defendant had been indicted on two counts of felony Aggravated Driving under the Influence of Alcohol.

On March 18, 2007 the defendant was involved in a motor vehicle collision in which he and the driver of one of the other vehicles was seriously injured and transported by helicopter to Carle Foundation Hospital (Carle) in Urbana, Illinois. In the course of his medical treatment at Carle, a specimen of the defendant's blood was drawn and tested for serum-alcohol level by hospital personnel. Between March 18, 2007, the date of the accident, and January 15, 2008, the date the bill of indictment was issued, the grand jury issued a subpoena duces tecum on two occasions.

Although both subpoenas issued requested the production of documents to the Effingham County grand jury at its address, both of Carle's responses to said subpoenas were returned *directly to the State's Attorney's Office* who opened and inspected them and thereafter delivered them to the grand jury and requested that they be turned over to the State's Attorney's Office.

The first subpoena duces tecum was requested by, the State's Attorney's Office On April 17, 2007 asked the Effingham grand jury to issue a subpoena duces tecum, directing Carle to produce to the Effingham County grand jury, *records of any and all blood and/or urine tests pertaining to the defendant* for treatment received on or about March 18, 2007 for purposes of determining blood alcohol concentration of the defendant. Carle response to said subpoena was sent directly to the State's Attorney's office and did not include results of a blood test.

Accordingly, on August 16, 2007, the State's Attorney requested the grand jury to issue a second subpoena duces tecum to Carle to this time asking for copies of *general hospital records* regarding the defendant based on a State's Attorney's investigator's testimony during the August 16, 2007 proceedings, that the defendant may have been administered a preliminary breath test at Carle. The response to the second subpoena was sent directly to the State's Attorney's office and also did not include a record of blood-alcohol testing.

The State's Attorney's office thereafter contacted the hospital and, on October 23, 2007, the hospital personnel disclosed to the State's Attorney that the lab blood serum-alcohol-concentration test of defendant's blood indicated a result of 0.104.

At the grand jury proceedings held on January 15, 2008, a special prosecutor with the Appellate Prosecutor's Office presented evidence seeking an indictment against the defendant. The Special Prosecutor requested the grand jury to issue a bill of indictment charging the defendant with two counts of Aggravated DUI. On January 15, 2008 the defendant was indicated on two counts of Aggravated DUI.

On September 16, 2008, the defendant moved to suppress the chemical test evidence, which he alleged the State had obtained by misusing the grand jury's subpoena power. In his Motion to Suppress, the defendant alleged that the State had improperly acquired confidential medical information, including the result of the defendant's chemical analysis, by directing Carle to deliver the materials to the State through the use of the subpoena power of the grand jury.

The trial court denied defendant's Motion to exclude the chemical test evidence. In its order, the circuit court concluded the defendant had failed to present sufficient evidence to establish an abuse of the grand jury's subpoena power by the Effingham County State's Attorney. The court concluded that the blood alcohol test results were obtained pursuant to a subpoena duly issued by the grand jury pursuant to its statutory powers, pursuant to a proper request by the State's Attorney. Finally, the circuit court concluded that no evidence was presented to demonstrate that the State's Attorney had acted in bad faith or had intentionally caused Carle to return the documents to the State's Attorney's Office rather than the grand jury.

In its order, the circuit court further held that, unlike the grand jury subpoena challenged in *People v. DeLaire*, 240 Ill. App. 3d 1012 (1993), the grand jury subpoenas were issued pre-indictment, in an effort to determine whether there was sufficient evidence to charge the defendant with felony DUI. The circuit court also held that, unlike *People v. Wilson*, 164 Ill. 2d 436 (1994) and *People v. Feldmeier*, 286 Ill. App. 3d 602 (1997), the State's Attorney did not attempt to circumvent the Effingham County grand jury but repeatedly appeared before it to keep it informed and to seek permission to act under its authority.

On February 17, 2009, the parties proceeded to a stipulated bench trial on a charge of misdemeanor DUI, with which the State, by information, had charged the defendant on February 12, 2009. After the stipulated bench trial, the circuit court found the defendant guilty of DUI a Class A Misdemeanor. On March 13, 2009, the defendant filed a motion for a new trial.

On May 15, 2009, the circuit court entered a judgment and sentenced the defendant. On June 12, 2009, the defendant filed a notice of appeal.

Analysis

The defendant contends that the State's Attorney's misuse of the grand jury's subpoena power facilitated the State's Attorney's unauthorized access to the defendant's confidential medical information, including the lab report of the .104-serum –alcohol-concentration test result. The defendant argued that, as a result, the chemical evidence was

inadmissible at the trial.

The appellate court, in a very extensive and exhaustive analysis, reviewed the grand jury's power to subpoena documents, grand jury's proceedings under 725 ILCS 5/112, and reviewed several cases applicable to same, including *Wilson*, supra, and *January 1996 Term Grand Jury*, 283 Ill. App. 3d 883 (1996), and concluded that in the present case, the case for a misuse of the grand jury process was not persuasive because the grand jury subpoenas were issued by the grand jury pre-indictment, the documents were returnable to the grand jury, and that the State's Attorney did not attempt to circumvent the grand jury but repeatedly appeared before it to keep it informed and to seek permission to act under its authority.

The appellate court went on further to state, "However, if we were to conclude that the State's Attorney misused the grand jury process in acquiring the subpoenas, as in *Wilson*, the defendant here was not prejudiced by the process used to obtain his medical records" because as the court further added "If the allegedly improper procedures had not occurred, the State's Attorney could still have received the documents from the grand jury." See *People v. Popeck*, 385 Ill. App. 3d 806 (2008).

The appellate court also addressed and dismissed defendants contentions that the grand jury subpoena had been insufficient pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (45 C.F.R. § 164.512(f)(l)(ii)(B) (2005) and that the State's conduct violated HIPAA.

Conclusion

The appellate court dismissed defendant's claims of misuse of the grand jury subpoena by the State's Attorney's Office. Further, there were no HIPAA violations. The appellate court affirmed the circuit court's denial of defendant's motion to suppress defendant's serum alcohol concentration test result. Conviction affirmed. ■

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