

## THE AMAZING INVENTED ONE LEG STAND TEST

I represented a man who was charged with driving while impaired and also charged with refusing to take the breath test. Normally if you refuse to take the intoximeter test the officer will take you to the hospital and force you to provide a blood sample which result may be admitted into evidence. For that reason it is no longer a good idea to refute the breath test. Because if you do, you get the penalties for refusing and your blood alcohol level comes in as evidence anyway. In this case the trooper did not take my client to the hospital to get a blood test (I am not sure why). When he got my client to the breath test room my client tried to blow but the officer had his own special procedure. The first hearing on his refusal was held at the Department of Motor Vehicles in front of a hearing officer to determine if my client willfully refused. I argued that he didn't and the hearing officer accepted that argument in part because of the trooper's rather bizarre and unique procedure for giving an intoximeter test. The trooper testified that he gave defendants only two opportunities to blow regardless of the circumstance. He gave the defendant one opportunity to blow and if the intoximeter timed out then he gave the defendant only one more opportunity. If the machine timed out again he found that the defendant had willfully refused no matter what the circumstances were. I asked what he would do if the defendant threw up after the first test but during the second test (which would require him to start the procedure over) and he said, "I would consider that a refusal." I don't think the hearing officer believed that throwing up was a voluntarily action. I also asked the trooper of the people that were trying to give a breath sample (not people who just say "I'm not going to give you a sample" or "I'm not going to blow"), since we have had the new machine (the Intoximeter EC-IR II) how many had he charged with refusing? He explained that he had found 50% of the people who were trying to give him a breath sample to have willfully refused because they did not comply within the very short period of time he allowed them.

Up until 2008 or so North Carolina used the intoximeter 5000 breath testing device. It is based on infrared technology in which a light shines through your breath sample and detected at the other end of the sample chamber. The theory is that the more alcohol that is in the breath sample chamber the less light will be received at the other end at the frequencies which are blocked by alcohol. That technology is well studied and well understood, and the amount of pressure and volume of breath that you provide to that particular machine is not very critical. Around 2008 North Carolina began replacing the intoximeter 5000 with the intoximeter EC-IR II which tests your breath with an electro chemical fuel cell, a completely different process. What is inarguably true of the intoximeter EC-IR II is that it is much more complicated and difficult to provide the breath sample it requires than the intoxilyzer or some other machines require. For that reason it takes police officers a bit longer to get a valid sample and requires patience which some officers don't possess. I was able to get the officer to testify that the DMV find that my client had refused. It was critical that I get the Judge to hear that the DMV found for us. I do a lot of DMV hearings and I am successful at the DMV sometimes, which can work wonders in court.

Since there was no intoximeter test to rely on, the State was forced to rely on his driving, coordination and performance on field sobriety tests. I had spoken to the officer prior to court and of course gone over the circumstances carefully with my client very shortly after the incident I had also looked at the officer's notes. In neither of the interviews nor in the officer's notes was the one leg stand mentioned. One leg stand is a standardized field sobriety test in which the officer asks you to put your hands at your side, lift one leg six inches off the ground and stand while you count to thirty like this; one thousand one, one thousand two, all the way to thirty.

What the officer is looking for is your ability to stand on one leg for thirty seconds, your ability to count correctly. Surprisingly, the officer will not explain what he is looking for on field sobriety tests and so people are often tricked into thinking that if they make it to 35 instead of 30 they will get extra credit. The officer will find that if you do anything not exactly in his instructions or exactly as he expected you to perform the test, (even though he will not tell you what he expects), then you are not following instructions and that is an indication of impairment. My client's recollection was that he had not done the one leg stand, and when I interviewed the officer, he did not mention that test, nor was there anything in his notes about it. Amazingly when he testified he started explaining that the defendant did the one leg stand. My client grabbed my coat and wanted to tell me that he had not done that test, but I said "Stop and wait and let's see what he says" and the officer said "he did the one leg stand perfectly". Though my client had not done the one leg stand that testimony was the turning point in the case. Most people can't stand on one leg for thirty seconds even when they are completely sober and the fact he made it to thirty without raising his hands, missing a count or any of the other things the officer is looking for gave the Judge a very good reason to believe that he was not impaired. The lesson here is to prepare very well but be careful about objecting to testimony until you have heard whether it is damaging or helpful to you. Based on these arguments, my client was found by the DMV to have not refused to take the breath test, and was found not guilty of driving while impaired by the Court.