

## The Mysteriously Appearing Field Sobriety Test, and the problem with Sports Watches

I represented a man who was charged with driving while impaired and exceeding a safe speed in an accident case. When he came in he told me that he had a very recent prior DWI and that he had a bad knee. He had nine beers from the early afternoon until about 10:00 pm. As he was driving down the road some deer came towards the road and he went to the right, over corrected and flipped the Toyota Tundra he was driving that was not his. When the police arrived about 30 minutes after the accident lots of people were standing along the side of the road. Since the defendant was badly shaken up by the accident and he told the trooper that he had a bad knee the trooper did not perform any field sobriety tests. He did blow into a portable breath test machine on the side of the road and was arrested. When he was taken down to the station, the trooper asked him to blow into the Intoximeter EC-IR II. North Carolina only within the last year adopted the EC-IR II disposing of over 1000 Intoxilyzers valued at \$8000 each that seemed to be working as they should. The EC-IR II has had problems, and one that I've seen is that many people can't provide the steady 10 second breath sample it requires to register a number. The second trooper that gave the breath test testified that he gave people only 2 opportunities. They got one opportunity until the machine timed out (about 3-5 minutes) and then he gave them 1 ½ minutes (he used the stopwatch and alarm function on his fancy sports watch). At the end of 1 ½ minutes regardless of what happened he said the defendant had willfully refused.

I argued the refusal first at the DMV. I argued that the defendant did not willfully refuse. To the contrary, he was blowing and trying as hard as he could. When the trooper who gave him the breath test told him he was finding that he refused my client got very upset and began to argue with the trooper (not generally a good idea). The trooper then told the DMV officer about his interesting 1 ½ minute stopwatch procedure. I believe that if he hadn't had such a fancy watch he would have just let the test time out twice which probably would have satisfied the hearing officer. I asked him where he had been trained on this 1 ½ minutes procedure and he testified that he had made it up himself out of whole cloth. I asked him where the 1 ½ minutes came from and he said that just seemed a reasonable time to him. I then asked him out of all the people that been trying to give him a sample on the intoximeter since it had come to NC (at that point about a year ago) how many had he refused. He answered to my astonishment that 50 percent of the people that were trying to blow were found to have refused by him after his fancy wrist watch timer trick. The hearing officer found this to be an unfair and needlessly mechanical process to determine if someone has refused, and so he ruled that my client did not willfully refuse.

Thereafter we had a hearing in court and I argued that the trooper did not have sufficient corroborating evidence to prove that my client was the driver of the car outside of my client's confession. Since my client had told the troopers that he was the driver, they did not bother to interview any of the other people at the scene or get their names because they were sure they had their man. In fact it turned out that my client was not the owner of the vehicle that was wrecked and I successfully argued to the court that there was not enough evidence that he was the driver outside of his confession to prove beyond a reasonable doubt that he was driving. I also successfully argued to the Court that there was very little evidence that he was impaired since the DMV had found that his refusal was not a willful refusal (I got that in despite that the fact that it's not clearly admissible in district court), and the officer testified that my client did the one leg stand. My client was certain that he did no field sobriety tests and told me he couldn't do the one leg stand ever because of his bad knee, but the officer interestingly enough said that he did it without any problems. One of my toughest jobs was getting my client to quiet down when the officer made up that field sobriety test and wait until we saw what the officer would say about his performance before we argued that it was pure fiction. When the trooper said he did very well I did not ask any other questions about that part. When the Judge announced the not guilty verdict, I wasn't and still am not clear on whether the Judge found that my client wasn't proven to be appreciably impaired or wasn't proven to be the driver. We were all was just

happy that he didn't have to spend as much as a year in prison and lose his license for 4 years. That's what happens when you have an experienced and effective lawyer who isn't afraid to try your case!