

ALBUQUERQUE CRIMINAL LAWYER BLOG

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Right to Independent DWI/DUI Chemical Testing, Really?

New Mexico law allows a DWI/DUI suspect to request independent chemical testing. In fact, NMSA 66-8-109(B) requires that the officer inform the suspect of this right. The question arises what happens if the officer fails to offer the independent chemical test?

The law dictates that the breath alcohol score must be suppressed for failure to inform the DWI/DUI suspect of the right to independent chemical testing. The problem is in proving the failure of the officer to comply with the law.

As is often the case in DWI/DUI cases in New Mexico, the issue boils down to issues of credibility. Who is the court or jury to believe, the cop or the suspect? It is often a coin toss with the jury. As for the Court, it is clear that the presumptions are with the cop. This is so in the impaired to slightest degree, under the .08 limits DWI/DUI cases, where you are impaired if the cop says you are impaired. It is equally so in the advice of rights for independent chemical testing.

This presumption was made clear in the 2007 case of *State v. Duarte*. In that case, the officer videotaped the field sobriety tests. Presumably this same video would have carried evidence of the reading of the implied consent and the advice of rights for independent chemical testing. The cop lost the video. The Court made some interesting rulings allowing in testimony regarding the field sobriety tests despite the loss of the only real evidence of the suspect's performance.

Further, the suspect said that he was not informed of that right. The cop did not say he did inform him of that right. Instead, he said it was his general practice to read the advice of rights. Despite the loss of the video, again the only true evidence of the reading of those rights, and the officer's lack of recollection of the reading other than his general practice, the Court ruled in favor of the State and refused to exclude the breath alcohol results.

This case, like the under the limits DWI/DUI arrests on the impaired to the slightest degree standard, points to the real presumptions in DWI/DUI cases in New Mexico. Is there really a presumption of innocence when an officer need only opine that the suspect was impaired for a DWI/DUI conviction? Is there really any due process protection at all

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when as in this case the only tangible evidence of the officer's compliance with the law has been lost, and yet the officer is allowed to testify to what would have been on the video based general procedure?

The great majority of law enforcement officers are honest, competent and professional. Due process protects society against those that are not. New Mexico's DWI/DUI laws present a sliding scale of justice which is dependent upon the luck of the draw on the cop, the prosecutor and the judge. Fairness, justice and due process are situational. Is DWI/DUI such a threat to our society that it justifies the rebalancing of our system of justice?

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