

# ALBUQUERQUE CRIMINAL LAWYER BLOG

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## **Refusal of Breath Alcohol Test Carries Big Risks and Little Reward in New Mexico DWI Cases**

Many mistakenly believe it is in their best interests to refuse the breath alcohol test (breathalyzer) on a New Mexico DWI stop. The fact is that refusal has some pretty serious consequences with little possible trial benefits.

Refusal to take the breathalyzer results in some rather harsh consequences. First, a refusal results in an automatic one year drivers license revocation for a first time DWI under the New Mexico Implied Consent Act. Second, a refusal results in a charge for aggravated DWI which carries mandatory jail time for conviction. The mandatory jail time varies with the number of prior DWI convictions. For a first time DWI offender, an aggravated DWI carries 48 hours mandatory jail. It gets increasingly more severe for subsequent convictions.

So why the misconception about the refusal's benefits at trial? A .08 breath alcohol score results in a presumption of driving while intoxicated which is hard to overcome. A .16 or above is aggravated. Some believe that if there is no breath score, then it is harder to prove driving while intoxicated. This would make much more sense if the standard in New Mexico was not "impaired to the slightest degree." In other words, the true standard for the prosecutor to meet is whether or not alcohol impaired the driver's ability even to the slightest degree. This provision was in fact inserted in the statutes to address those drivers that refuse the breathalyzer. Unfortunately, its use has been significantly broadened and is used now routinely on drivers below .08.

So now the driver who has refused has suffered much more serious consequences. In addition, the standard is impaired to the slightest degree which is a very low standard if any standard at all. The jury is presented with testimony that the driver was in fact drinking which is typically not too hard to prove. The jury is also presented with a defendant driver who refused the breath alcohol test. Jurors who often assume guilt from the outset of trial expecting the defendant to prove his or her innocence now have a fairly easy logical conclusion on which to hang their prejudice. They might and do ask, if he wasn't drunk then why did he refuse the test?

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Don't forget that the State still has the field sobriety tests on which to base their arguments. Police officers now often video the field sobriety tests, and this video is crucial evidence in the case. Even without the video, the officers will document each and every misstep on the field sobriety tests. Make no mistake, these tests are a challenge under the best of circumstances. The circumstances are hardly ideal in most DWI stops.

In conclusion, refusing the breathalyzer carries substantial risks with questionable value. Despite the myths, there is no fool proof strategy to beat a DWI charge except to avoid drinking and driving in the first place.

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