

ALBUQUERQUE CRIMINAL LAWYER BLOG

PUBLISHED BY
COLLINS & COLLINS, P.C.
ATTORNEYS AT LAW

September 3, 2010

Burden on State to Fully Establish Foundation for Admission of Breath Alcohol Test Results

In *State v. Toms*, the New Mexico Court of Appeals addressed the foundational requirements for admission of breath alcohol score results in a DWI trial. The Court in *Toms* reiterated the ruling in the 2007 New Mexico Supreme Court case of *State v. Martinez*. In addition, the Court expanded on *Martinez* in addressing the proper procedural grounds by which a defendant may attack the foundation of the breath alcohol results.

The Court first stated that calibration of the machine by the officer was not enough. Though calibration of the machine is a measure to insure the accuracy of the breath alcohol score, it is insufficient to establish the foundation for admission of the score into evidence at trial. In addition, as stated in *Martinez*, the State must prove by a preponderance of the evidence that the machine has been properly certified and the certification is current at the time of the test. The State in short must show that the machine has been properly certified, the certification is current, and the machine was certified by the Scientific Laboratory Division of the Department of Health (SLD).

Failure to fully establish the foundation for admission of the breath alcohol score will render the evidence inadmissible. These foundational requirements are meant to insure the accuracy of the breath alcohol scores and to protect defendants against unreliable or inaccurate tests results. The State argued that the defendant must raise the issue prior to trial. Effectively, the State argued that the defendant was obligated to alert the State to weaknesses in its case prior to trial in essence providing the State with the opportunity to cure the defect.

Fortunately, the Court disagreed. This foundation is the State's responsibility, not the defendant's. The Court expressly expanded on *Martinez* to address the State's argument. The Court stated that the defendant has no obligation to raise the deficiency in the State's case via pre-trial motion as the trial court and the State had suggested. The Court stated that the state has the burden of laying the foundation for the breath alcohol test results and that the Court would not "require the defense to file a pretrial motion simply to advise the prosecution that it may have a defect in its proof or some problem in establishing the appropriate evidentiary foundation."

DWI is enforced very vigorously in New Mexico for good reason. DWI is a threat to the safety of all of us and our families who drive New Mexico roads. However, on occasion, DWI is perhaps enforced a little too vigorously as was the recently invalidate practice of arresting drivers who were sleeping in their cars, and the continuing practice of

Main Office:
400 Gold Ave. SW
Suite 500
Albuquerque, NM 87102
(505) 242-5958

<http://www.albuquerquecriminallawyerblog.com/>

arresting and prosecuting drivers at breath alcohol levels below .08. Fortunately, the Court in *State v. Tom* has not shifted the burden of prosecution to the defendant him or herself by placing the responsibility of foundational elements to the defendant. After all, the defendant should not carry the burden of prosecuting him or herself despite the efficiencies that would come from such a requirement.

**Main Office:
400 Gold Ave. SW
Suite 500
Albuquerque, NM 87102
(505) 242-5958**

<http://www.albuquerquecriminallawyerblog.com/>