

WINNING THE CIVIL SUSPENSION CASE - A CHECKLIST

1) Notice of Intent to Suspend.

• During initial phone call, request client to immediately mail white copy of notice by certified mail (remind them to fill it out!) requesting a hearing - must be mailed or delivered within 7 days or else automatic suspension 11 days after notice given to operator, 23 V.S.A. § 1205(e)(1); see also § 1205(e)(2) (if second violation of § 1201, suspension automatic even if hearing requested).

• Did Officer mail or give Notice of Intent to Suspend within 3 business days of receiving test results? See § 1205(c).

• Did arresting officer enter correct dates for giving the notice to the operator, and due date for return by mail? If not, and notice returned late, or if client suspended, move to request a hearing out of time pursuant to V.R.C.P. 80.5(d) (requires showing of good cause).

• Was client's breath test result at least .08%, as required by § 1205(b)(5)? If not, Court should dismiss Civil at Preliminary Hearing. State v. Anderson 2005 Vt. 80, ¶ 18, 16 Vt. L.W. 161, 163 (2005).

2) Datamaster Evidence Ticket.

• Correct times for stop and test listed?

• Second test given which falls below .08%? Second result can prove that first result inaccurate. § 1205(h)(4) and rebuts § 1205(h) presumption. State v. Lowe 169 Vt. 575 (1999) (mem.).

• Second test given? Greater than 10% difference between the two tests?

• Error prompt message or other indication of failure or malfunction?

• Simulator Solution Temperature unusually high or low?

3) **D.W.I. Affidavit.**

- **Page 1:** ¶ 2 - Time and date of offense agree with Datamaster Ticket?

- **Page 1:** ¶ 3 - Cop's story make sense? Is there a narrative affidavit attached? Is it notarized? Is notarization date the same date the officer signed the affidavit? See State v. Lanoue 9 Vt.Tr.Ct.Rptr. 181, 182 (2005) (striking D.W.I. affidavit which was notarized one day after it was signed).

- **Page 1:** ¶ 4 - Do "Observations of Defendant" support officer's reasonable belief that person is under the influence so as to justify request for preliminary breath sample under 23 V.S.A. § 1203(f)? See State v. Palmer 4 Vt.Tr.Ct.Rptr. 273 (2000); see also "D.U.I. Detection and Standardized Field Sobriety Testing Manual" (hereinafter "F.S.T. Manual") Sept. 2000 Ed. at 67 (Preliminary Breath Test result by itself "should never be the sole basis for a D.U.I. arrest").

- Do the "observations of Defendant" square with how the driver performed on the videotape?

- **Page 2:** Does "Time observation of Defendant started" square with time given on Implied Consent Form? How does it compare to time test was given, either on the Datamaster ticket or Implied Consent Form? If significantly less than 15 minutes between the start of the observations period and the test, may be able to show test results inaccurate for failure to comply with Vermont Department of Health requirements for breath testing. See State v. Gray 7 Vt.Tr.Ct.Rptr. 321 (2003). You must get an affidavit from Carl Tremmel or other defense chemist to establish this.

- **Page 2:** ¶ 5 - Miranda warnings - each box checked as read? If client agreed to talk to officer, was there a valid waiver, i.e. was the waiver language paragraph read, signed (or waiver verified by video tape) and witnessed? Remember that "heavy" burden is on State to prove a valid and knowing

waiver, which will not be presumed from ambiguous conduct. State v. Hohman 136 Vt. 341, 351 (1978).

- Was client advised of right to counsel at State expense regardless of ability to pay, as required by § 1202(c) and State v. Madonna 169 Vt. 98, 102 (1999)? Failure to provide such information, regardless of whether client had prior D.W.I. convictions, is grounds for suppressing the test results. State v. Stockwell 9 Vt.Tr.Ct.Rptr. 96 (2004) (Also holding that prejudice resulted from defendant having had two prior driving offenses where he had used services of a private attorney).

4) **Implied Consent Form.**

- Did officer record the client agreed to give a breath sample but was then later charged with a refusal?

- Was the 15 minute observation period followed?

- Was the officer actually in the client's presence during that time?

- If the State cannot account for the entire 15 minute waiting period it may not be able to prove the accuracy of the test result at the Civil hearing. State v. Gray 7 Vt.Tr.Ct. Rptr. 321 (2003). (Failure to wait full 15 minutes before providing breath sample renders test results inaccurate).

- If the client burped, belched or vomited during the observation period did the officer restart the 15 minute waiting period? Failure to do this may compromise accuracy of the test result for failure to comply with V.D.H. Guidelines. State v. Vanderminde Docket No. 1853-12-99Bncr and 99-12-99Bncs. Requesting breath sample only 8 minutes after a burp destroys 23 V.S.A. § 1205(n) presumption; State v. Kerwynn Docket No. 63-7-99Bncs (after multiple burps, failure to observe suspect for 15 minutes renders the test results inaccurate).

- **Paragraph 8:** ¶ A - Did client request blood test? If so, how long was he held before his release? Section 1203a(a) may be argued to support suppression of the breath test if the officer "prevented

or denied” the operator’s ability to obtain an additional “test or tests”.

- Was the client “detained in custody” after providing a test “*and* upon completion of processing”, i.e. was the client shackled, placed in a holding cell, or otherwise prevented by the officer from leaving the station after the processing was completed? If so, if the client requested an additional or independent test, and the officer did not make arrangements, the evidentiary test may be suppressed for failure to comply with Section 1203a(b). See State v. Karmen 150 Vt. 547, 549 (1988).

Page 4: ¶ 9 - Are the “officer’s observations” backed up by the video tape?

- Are there additional offenses?
- Was the client video taped (always request a copy even if the processing form indicates otherwise)?
- Is the record of prior convictions accurate?
- Often officers get confused if client has out-of-State D.W.A.1 or D.W.I. convictions - check with DMV, as your client may only be facing a true 1st offense in Vermont.

5) Preliminary Hearing

- State obligated to provide copies of all documents, including statements, processing forms, police notes, identity of witnesses, etc. § 1205(l). Sanctions can include, in the court’s discretion, exclusion of any witness or evidence not timely disclosed, see V.R.C.P. 80.5(e). **(End of Quotation)**

- If this is client’s second offense or higher, *do not* agree that the hearing may be held more than 42 days after the date of the offense. According to § 1205(h), failure to hold the final Civil hearing within 42 days of the date of the offense, requires dismissal, unless good cause shown by the State or of Defendant consents. State v. Tongue 170 Vt. 409 (2000); State v. Singer 170 Vt. 346 (2000). This rule only applies in cases involving a second offense or higher. 23 V.S.A. § 1205(t).

6) **If Blood Test:**

- Request Independent Analysis requested through Alcohol Analysis Laboratories, Inc., P.O. Box 3386, Concord, New Hampshire 03302-3386. Include a \$100.00 fee.
- Is independent sample result within 10% of State's result? If not, i.e. deviation of greater than 10%, get chemist's affidavit from Carl Tremmel establishing that unexplained disparity between the two test results renders the evidentiary test inaccurate under § 1205(h)(4). See State v. Morgen 7 Vt. Tr.Ct. Rptr. 194 (2003).
- Do times given on blood sample analysis request form match times given on D.W.I. affidavit?
- Was breath testing equipment not reasonably available as required by 1202(a)(2)? This depends not only upon the proximity of the nearest DataMaster, but in cases where the client was injured, and receiving medical treatment, what did the officer know about the driver's condition, including the extent and duration of treatment, at the time he ordered a blood sample. The State's failure to show that breath testing not reasonably available should result in judgment in favor of the operator for noncompliance with § 1202, under 23 V.S.A. § 1205(h)(5). See State v. Most 7 Vt.Tr.Ct.Rptr. 347 (2003); State v. Remesch 7 Vt.Tr.Ct.Rptr.320 (2003); State v. Carleton No. 153-12-98Rdcr (1999); State v. Blainey No. 153-11-04Gicr (Bench Order at 27-36). (Per Kurt Hughes) (arresting officer's failure to consult with medical personnel concerning impact of transporting hospitalized driver short distance to barracks for breath testing, and not inquiring how long before treatment would be given, justified suppression).
- Officer cannot order blood sample simply because DataMaster inoperable or malfunctioned. State v. Coffey 8 Vt.Tr.Ct.Rptr. 287 (2004) (orthodontic device caused malfunction;

defense expert provided testimony) - but failure to remove bite plates - dental bridge work - dentures have not been found by the Courts to warrant suppression of breath test results, even though there exists literature substantiating that dentures can trap mouth alcohol which can significantly impact test results. See 17 POF 2d. (1978); I. Erwin Defense of Drunk Driving Cases § 18.03 (3d. Ed.) (1982).

- My experience in recent case with dentures - Harvey Cohen, after reviewing Defendant's processing and dental records, could not opine that there was mouth alcohol trapped in dentures which could affect accuracy of test result. However, if client used denture adhesive, result could be different (per Cohen).

7) **Preparing for the Civil Suspension Hearing:**

- **Attitude** - they're winnable.
 - relaxed standards of proof can help you as well as the State.
 - small claims procedure - Under V.R.C.P. 80.5 and 23 V.S.A. § 1205(j) can

use affidavits by experts, chemists and lay witnesses.

expert affidavit

chemists affidavit

Lay W. affidavit? Prob. Nat

- **Remember** - 5 day rule for prior delivery of affidavit by hearing - § 1205(j).
 - chemist can testify by phone.
 - Notice of Contested Issues and Notice of Affirmative Defense, i.e. lack of

physical control, § 1201(f), must be delivered to State and to Court 7 days before Final Hearing, § 1205(h).

8) **Final Preparation:**

-Use Chemist (Tremmel, Cohen).

-Talk to lay witnesses who can rebut operation/lack of physical control/unreasonableness of officer's belief driver under influence.

-Videotape - watch at least 2 times because you will always miss something on the 1st viewing.

9) **Using Discovery From Criminal Case**

• ALWAYS REQUEST OR INSPECT DATAMASTER MAINTENANCE RECORDS AND READ THEM CAREFULLY.

- Pay special attention to error message code printouts and simulator solution change worksheets. If Data simulator solution had expired by the time of the test, argue that test results are inaccurate by getting the Officer - preferably the Datamaster Supervising Officer responsible for maintenance of the machine, to agree that the expired solution may affect accuracy of the test. At least one judge has agreed - see State v. Belber Docket No. 257-3-03Bncr and 25-3-03 Bncs.

- History of Recent DataMaster malfunctioning can result in finding that testing methods used were neither valid or reliable, State v. Clark Docket No. 74-4-93Rcs; State v. Lawson 6 Vt.Tr.Ct.Rptr. 371 (Repeated "simulator out of range" messages recorded at the time of the breath test, as well as two weeks earlier, rendered test results inaccurate).