PROVING INTERFERENCE WITH COUNSEL CLAIMS AFTER STATE V. POWERS

Bradley D. Myerson, Esquire
5261 Main Street
P.O. Box 915
Manchester Center, Vermont 05255
E-mail: cmylwyr@sover.net
Website: www.mylwyr.com

One of the first questions to ask a prospective D.W.I. client is whether they were aware of video cameras at any point of the processing. The State Police and certain Sheriffs and local Police Departments video tape both the roadside and the in-station processing. If the client remembers that there were video cameras present, was he aware that they were being used? If he was being video taped by the side of the road, this could suggest to the client he was also being tape recorded or monitored once inside the station. The client should also be asked 1) where the cameras were positioned in the room, 2) when and how he first became aware of them during the processing and 3) whether he was told or had reason to believe that he was being electronically monitored or video taped - including whether the officer mentioned that the video would be shut off during the conversation with counsel.

Positive answers to these questions can then lead to a discussion of whether the client was inhibited in any way by the presence of the cameras. It is good practice to request a copy of any video, (don't forget the cost is now $20.00), even if the D.W.I. processing form doesn't indicate that the client was video taped. However, it is wiser to first establish the client's awareness of the video cameras, and his belief that he was being monitored or recorded, before determining whether either of those activities impacted upon his conversation with counsel. It is assumed, of course, that the

suspect did exercise his right to counsel; if he did not, even if his exercise of that right was deterred by his belief that he was being video taped, a resulting motion to suppress the breath test results or refusal will likely be unsuccessful.

It is well settled that any demonstrated police actions which "cloud" the informed, voluntary nature of a D.W.I. suspect's decision whether or not to give a breath sample must result in suppression of the test results. State v. Carmody 140 Vt. 631, 636 (1982); State v. Fredette 167 Vt. 586, 587 (1997) (mem.) (The "...court will not tolerate deliberate efforts by law enforcement personnel to thwart an arrestee's meaningful opportunity to consult with counsel.").

A D.W.I. suspect's right of confidential consultation with his attorney initially springs from 23 V.S.A. § 1202(c), which affords him the right to speak with an attorney before deciding whether to give a sample of his breath. State v. Lombard, 146 Vt. 411, 415 (1985). That decision is, of course, a crucial one, and it must be entirely voluntary in nature. State v. Baldwin 140 Vt. 501, 513 (1981); see, also, State v. Duff, 136 Vt. 537, 539 (1978). Otherwise a "flaw" may result from any unauthorized police conduct impinging upon the decision making process, which can require suppression of the test results. State v. Carmody, supra at 636; State v. Lombard, supra.

The right to counsel "concerns an arrestee's opportunity to consult freely with counsel..." State v. Fredette 167 Vt. 586, 587-88 (1997) (mem.)

The Vermont Supreme Court has held that there must be prejudice shown by a defendant who, as here, is claiming interference with the statutory right of counsel where the decision whether or not to take the breath test is concerned. State v. Roya 174 Vt. 451 (2002) (mem.) (No grounds to suppress breath test results where defendant could not show prejudice arising from being furnished insufficient notice of right to counsel); State v. Sherwood 174 Vt. 27 (2002) (Where police

video taped defendant's conversation with his attorney, without the defendant's knowledge, suppression was not warranted as defendant could not show either that the taping deprived him of a meaningful consultation with counsel or that he was otherwise prejudiced). However where a defendant did not prove a security risk, and testified that the close proximity of the policeman during his consultation with counsel prevented him from asking certain questions of his attorney, suppression of the breath test results was ordered. State v. Wright 7 Vt. Tr. Ct. Rptr. 230, 231 (2003) attached as an "Appendix" (construing Roya and Sherwood).

Even the most recent line of Supreme Court cases requiring a finding of prejudice where a claim is made with interference with counsel, do not modify the over arching rule that in order for consultation with counsel to be meaningful it must be private and unconstrained.

> ...a defendant's statutory right to counsel is violated where the police unjustifiably monitor a defendant's legal consultation and the monitoring inhibits, coerces or otherwise restricts the defendant's ability to meaningfully engage with his attorney...". State v. Sherwood, supra at 82 (citations omitted).

State v. Lombard, supra, at 415, looked to 3 main criteria as indicating whether a violation of the right to counsel provided under 23 V.S.A. § 1202(c) occurred. First, did the defendant present a "legitimate security risk" which clearly justified the Officer's continued presence during the telephone consultation? Next, was there any evidence suggesting that defendant "felt inhibited, coerced or restricted" in conferring with counsel in the presence of the video camera? Finally, did any part of the attorney-client consultation assist the prosecution in any way? See also State v. West 151 Vt. 140, 145 (1988) (Construing Lombard in applying a "totality of the circumstances" test to determine whether reasonable efforts made to allow private consultation with counsel).

State v. Powers 2004 Vt. 39, 176 Vt. 444 (2004) clarifies the standards to be followed in

proving that police monitoring of a D.U.I. arrestee's conversation with his attorney interfered with the § 1202(c) right to have a meaningful and open consultation before deciding whether to provide a breath test. In Powers, a D.W.I. arrestee *asked* and was told that his interview in the station was being recorded on both audio and video tape. When Mr. Powers requested an attorney, he was not told that the officer would turn off the recording. He testified that he could not ask his on-call attorney about the impact of his prior D.W.I. arrests because, "I didn't feel comfortable discussing my situation because I wasn't sure if there was something I would say that could be held against me". Id. 2004 Vt. 39 ¶ 3, 176 Vt. at 447. Accordingly, he refused to provide a breath sample. A portion of Mr. Powers' conversation with his attorney was tape recorded and actually admitted into evidence at the separate Civil Suspension and suppression hearings.

Restating the "totality of the circumstances" test set down in State v. West, supra, the Powers court held:

> In summary, when faced with a challenge under § 1202, where defendant does not present a security risk, a court must determine if the police justifiably monitored the consultation and whether that monitoring caused defendant to feel inhibited during the conversation. This inhibition is judged using an objective standard. The standard asks the following question: looking at the totality of the circumstances, given the nature of the setting, how would a reasonable person in the defendant's position have understood his situation? Id. at ¶ 8, 176 Vt. at 449-50 following State v. West, supra. 151 Vt. at 145.

In reversing both the trial court's denial of the Motion to Suppress, and judgment in favor of the State on the Civil Suspension case, the Powers court found that police interfered with the defendant's right to a private and meaningful consultation with his lawyer, even though the officer turned off the *audio recording* of the processing..."because the defendant was told that the processing was being recorded, he reasonably believed that his conversation with his attorney was

also being recorded" id. 176 Vt. at 450 (emphasis added). From these facts the Powers court found that the State had violated Mr. Powers' "right to a reasonably private consultation with (his) attorney". Id. comparing State v. Sherwood, supra.

The Powers court next reviewed the record for any evidence that "defendant felt inhibited in his consultation with his attorney", in order to decide whether that consultation was meaningful. Id. The defendant's testimony that he didn't "feel comfortable discussing my situation", based upon his belief he was being recorded, was evidence of such inhibition. Id. Interestingly, no mention was made of whether the defendant changed his behavior in order to gain more privacy in shielding himself from the video camera than speaking with counsel. Even though the police weren't recording his conversation, Mr. Powers' reasonable belief that he was being taped was pivotal to the Court's finding that the police violated the statutory right to counsel.

Again relying upon State v. Sherwood, the Powers court raised one final bar to be cleared in order to justify suppression: was there a "causal nexus...between the alleged illegality and the evidence of defendant seeks to (suppress)" Id. 176 Vt. at 450-51 quoting State v. Sherwood, supra, 174 Vt. at 33. Again Mr. Powers' testimony about "feeling inhibited about what he could reveal to the attorney about his prior record" was objective proof which furnished the "sufficient causal nexus between the police violation of defendant's right to a meaningful consultation with an attorney and his refusal to submit to the evidentiary breath test" to justify suppression. Id. at 451. This finding of prejudice rested upon the fact that "Defendant could not ask the questions necessary to get the information he needed to make an informed opinion". Id.

Lessons To Be Learned From State v. Powers

Where the D.W.I. arrestee did not present a security risk, and will testify that either police were present during his conversation with his attorney, or he believed he was being subjected to video monitoring, the following questions should be asked in order to prove a motion to suppress, or for judgment in the Civil License Suspension case for failure to comply with 23 V.S.A. § 1202, see 23 V.S.A. § 1205(h)(5):

• did police actually monitor the conversation?

• was the client handcuffed to a wall or bench?

• where was it positioned in the processing room?

• if there was a video camera was it activated?

• did the client ask or was told that the camera would be shut off, or the sound deadened during conversation with counsel?

• where were the police during the video monitoring?

• did defendant know where they were?

• as in Powers, did the defendant believe that his conversation with counsel was being recorded either because either (1) police did not tell him that the camera would be shut off, or 2) the defendant knew that the entire processing was being video taped (be sure to ask if the client was aware that he was being video taped inside the police cruiser, which would reinforce his belief that he was being taped during his conversation with counsel)?

• did the defendant change his behavior to gain more privacy and shield himself from the cameras, by *lowering his voice, projecting his voice toward the floor, turning away from the camera, bending his head (and speaking into his chest) or cupping his hand over the receiver*?

• how brief was the conversation with the attorney?

• how much of the conversation time recorded on the D.U.I. processing form was spent actually receiving advice from the attorney as opposed to the officer speaking with counsel (obviously the shorter the conversation the stronger the argument that the client felt inhibited because he could not get all of the information necessary to make an informed decision)?

• was the client a repeat offender, and/or did he actually refuse the test? Such facts would underscore the need for a more detailed consultation which, if only several minutes long, coupled with testimony about the inability to ask more questions because the suspect believed he was being monitored, could establish the prejudice necessary to justify suppression.

• can defendant show prejudice by demonstrating how the monitoring interfered with his ability to get all the necessary information from his attorney in order to decide whether to take the test? This is a cause and effect relationship where the defendant only has to satisfy a minimal burden of production on showing that the interference with counsel influenced in some way either his refusal or a decision to take the breath test, which choice would have been different had full access to counsel been given. See State v. Roya, supra 174 Vt. at 453.

• were there questions he wanted to ask counsel but could not because he was afraid of being overheard? Under Powers this is an objective test which must be satisfied by testimony from the client himself. However, the Powers court cautioned "against revealing the contents of privileged attorney client communications in an attempt to demonstrate that the defendant suffered no prejudice". Id. 176 Vt. at 447 ftn. 2.

SETTING AND COLLECTING YOUR FEE

Bradley D. Myerson, Esquire
5261 Main Street
P.O. Box 915
Manchester Center, Vermont 05255
E-Mail: cmylwyr@sover.net
Website: www.mylwyr.com

The practice of law is as much a business as it is a profession. We have the right to charge a reasonable fee for the service we provide to the client, subject to the constraints of Vermont Rule of Professional Conduct 1.5(a) which requires us to weigh, inter alia, what other attorneys in the area customarily charge for defense of D.W.I. cases, the amount of the fee and the results obtained, the time limits imposed in defending a D.W.I. case, i.e. court scheduling orders and motion deadlines, and the "experience, reputation and ability of the lawyer...performing the services". Prof. Cond. R. 1.5(a)(3),(5),(7). So how do you set a fair fee? How do you collect it?

When a prospective D.W.I. client calls, give them roughly 10 minutes of time in order to get the facts of their case and have them feel comfortable with you before discussing fees. Most clients want more answers to their questions than can be provided over the telephone in a 10 minute conversation. I always suggest to prospective clients that an office consultation, either in person or by telephone, would allow for a more detailed analysis of their case, the interplay between the D.W.I. and Civil Suspension cases, and how the D.W.I. and Civil Suspension matters would be defended. The client is told that they would be charged my standard hourly rate of $160.00 per hour for this consultation, which normally lasts for 2 hours, and is payable by the time we meet. I also

decide

whether the client is simply looking for free advice, or is actually able to pay for the defense of their cases, and will act accordingly.

At the end of the office consultation and upon review of any processing materials I tell the client what kind of case they have, the chances for success of any motions , the likelihood of a reduced charge, and other possible outcomes. The client must be reminded that they are facing two separate charges, the criminal D.W.I. charge as well as the Civil Suspension case. Much care should be given to the difference between the Civil and Criminal matters. I charge a separate fee for each, with the Civil Suspension fee being all inclusive and the D.W.I. defense fee taking the case through to Calendar Call, after pre-trial motions have been decided. A suggested fee retainer is attached. Any non-D.W.I. offenses, such as drug possession, should be handled by a separate retainer charging a separate fee.

If the client decides to hire me, I consider the consultation fee included in the fee retainer, and will refund the consultation fee back to the client. I do not charge for out-of-pocket expenses (telephone, mileage, video tape, etc.) except for experts, demonstrative evidence, etc. If I have to travel outside of Bennington County I will slightly adjust the fee to account for additional travel time spent.

I also include language in the retainer agreement calling for a reduced fee if the D.U.I. and Civil cases settle at arraignment, with the unearned balance of the underlying fee retainer being immediately returned to the client. My fee retainer agreement also provides that the fees charged for pre-defense of the D.W.I. and Civil suspension cases are flat fees which are non-refundable if there is no settlement within one week of arraignment. This is intended to cure any dispute over the

fee where the client rejects an offer made at arraignment, but after the case is worked up and

litigated, elects to accept that same initial offer.

Consider the time spent on the following tasks typical for defense of a 1st offense D.U.I. and Civil Suspension case, in setting your fee:

1) Initial Interview (including initial phone intake)	= 2 - 3 hours
2) Arraignment (<u>not</u> including travel time)	= 1 - 2 hours
3) Research and preparation of all pretrial motions, pleadings and contested issues, including interviewing witnesses, working with the chemist, reviewing video tape and Data Master Discovery.	= 5 - 6 hours
4) Preparation for and attendance at (joint) contested Civil Suspension and Pre-trial Motions hearing (not including travel time).	= 3 - 5 hours
5) Post-hearing Calendar Call and plea negotiations (not including travel).	= 1 - 2 hours
6) Client contacts not included in above, including case wrap up.	<u>= 1 hour</u>
	= 13 - 19 hours

If the typical first offense D.U.I. and Civil Suspension case consumes 19 - 20 hours of your time, not including travel, ask yourself whether your fee adequately covers this amount of time, as well as accounting for your level of experience, success in handling D.U.I. and Civil Suspension cases, your reputation in your area, and the time constraints imposed by the court. The Rules of Professional Conduct do allow for charging a fixed fee greater than the lawyer's hourly rate multiplied by the number of hours spent in defense of a criminal case.

Be wary of the client who is lawyer shopping and claims that attorney x's fees are lower than

yours. I also never accept scheduled payments in D.U.I. cases or criminal cases generally, unless

the matter is heading for trial. If the client wants to hire you, and he realizes that D.U.I. and Civil Suspension are very serious and complicated charges, then he will pay the fee by the date of arraignment. Accept scheduled payments at your peril. If the prospect client is lawyer shopping, tell

him that there are certainly less expensive attorneys out there, and perhaps counsel who charge more than you do. You must be sufficiently confident in your ability to defend the client, and in your track record in handling these cases, in order to impress upon the client that the fee being charged him is being justified.

The fee retainer should also specify that if the D.W.I. charge is not resolved by Calendar Call, the client will have to agree to a new retainer agreement covering trial defense. I customarily charge by the hour for criminal trial defense, and require a trial fee retainer to cover at least the first 40 hours of preparation time, with any unearned balance to be refunded to the client.

It is more difficult to set an adequate fee where the case is a D.U.I. 2nd offense or greater, a felony, i.e. serious injury to another or where a blood test is involved. Invariably I find myself under estimating flat fees charged for these cases. I would generally add at least $1,000.00 to my quoted fee for defending against a D.U.I. 2nd offense. Felonies, particularly involving blood sampling issues, take up so much time and effort that I have decided to simply charge by the hour for these cases, with an average retainer of $5,000.00 to cover the equivalent amount of time per hour. Any companion charges, including vehicle forfeiture or immobilization defense, may be governed by a separate retainer agreement as they will require additional preparation time.