



The Trial of a New York DWI Case - Jury Selection

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THE TRIAL OF A DWI CASE

JURY SELECTION

The defense of a DWI case has become increasingly more difficult over the past decade. Harsher laws, increased law enforcement, and public sensitivity to this subject have all contributed to this result.

The process of jury selection is an opportunity to help level the playing field in the defense of a DWI case and educate the jury so as to try to give your clients a better chance of successfully defending themselves against a DWI charge.

The defense of any type of DWI case is very difficult given the public's dislike for the crime of Driving While Intoxicated. In order to help your chance of successfully defending the charge, the jury has to be educated that Driving While Intoxicated is the only crime that a person can be convicted of based upon another individual's opinion as opposed to actual fact. Put another way, when a jury returns a guilty verdict at least as to common law Driving While Intoxicated, they are accepting, beyond a reasonable doubt, the police officer's opinion as to a defendant's condition. Although the opinion is to be supported by facts observed by the officer, it is necessary to focus the jury's attention on the ultimate fact that in order to be found guilty your client must be convicted based upon a person's opinion.

Along this theme, jury selection provides a wonderful opportunity to use examples of when all of us in our own individual experiences have formed an opinion about something that turned out to be wrong. When it is ultimately time to give your summation to the jury, jurors can be reminded of these issues raised during jury selection. The difference between fact and opinion allows you to argue to the jury that by returning a not guilty verdict it does not mean that the jurors found that the officer was lying but rather that his opinion was wrong or mistaken. That is,

the officer misinterpreted what he or she believed.

DEALING WITH TESTIMONY
&
EDUCATING THE JURY ABOUT THE DIFFERENCE BETWEEN
SUBJECTIVE AND OBJECTIVE OPINIONS

It is extremely important to highlight to the jury the difference between an individual's objective opinion and subjective opinion. Often times when I am litigating a DWI case, I will inquire of several members of the jury what their interests are. Once I learn what an individual juror's interest is, I will begin to question that juror about his or her understanding of the difference between a subjective fact and an objective fact which people utilize every day in order to form opinions about a given set of circumstances. For example, if a prospective juror indicates that he or she is a baseball fan, I almost always pose questions about baseball players. I will make a statement that Willie Mays is the greatest center fielder in the history of major league baseball. I will then follow that up with a question of whether anybody disagrees with the opinion. Thereafter, I begin to explain my reasons for why I believe Willie Mays was the greatest center fielder of all time. Given that example, I get the jury to understand that my statement about Willie Mays is not a fact but is rather my subjective opinion. I then turn to the jury and advise them that other people may disagree with me and some people may believe Mickey Mantle or others may believe Joe Dimaggio was the greatest center fielder in the history of major league baseball. This type of questioning leaves powerful visual images to which you can refer during summation in order to help you argue for your client by simply arguing to the jury that the officer's opinion is his own subjective opinion. The jury must then be reminded they must view those facts in an objective fashion so that they are convinced beyond a reasonable doubt that in fact your client was intoxicated.

Other examples of distinguishing between a subjective opinion and objective fact is by holding up different color pens, one red and one black. I will ask an individual juror or the jury panel as a whole, while holding the black pen, whether the statement “this pen is black” is a fact or opinion. Unanimously the jury will all indicate that it is a fact that the pen is black. I will then make a subjective statement that the tie that I am wearing is the nicest tie ever made. I will then ask an individual juror or the jury as a whole if that statement is an opinion or fact. Unanimously they will all agree that it is merely my own subjective opinion. These types of examples are virtually limitless but their impact can have tremendous value in defending an individual charged with DWI.

CONSTITUTIONAL SAFEGUARDS

Jury selection also provides a wonderful opportunity to reinforce all of the constitutionally guaranteed principles enjoyed by every criminal defendant. It is extremely important to emphasize to the jury that the defense has no burden of proof. Moreover, along with the burden of proof, a defendant in a criminal case has no obligation to testify. I will often explain to the jury that I could sit down next to my client right at that moment and not be heard from again and the jury cannot draw any type of negative inference from that. I explain to them that although it is not required, they will hear from me many more times before the end of the trial because the job of the defense attorney is to challenge, question, and probe the prosecution’s evidence.

We often learn as young children that there are always two sides to every story. I remind the jury that a criminal trial is not the same as our common life experiences. I explain this to the jury because a jury does not get to hear the defendant’s side of the story unless the defendant elects to testify on his or her own behalf. Again, this reinforces your client’s right to remain

silent. I will also advise the jury that if my client decides to testify, that does not change the burden of proof. That is, my client does not need to persuade you that he is telling the truth.

NATURE OF THE DWI CHARGE

Upon selecting a jury on a DWI charge, counsel must be aware of the sensitive nature of DWI cases. No one condones Driving While Intoxicated. That being the case, it is essential to enlighten the jury that while it is understandable that everyone is against operating a motor vehicle while under the influence of alcohol, it is not a crime to consume alcoholic beverages and then operate a motor vehicle. Rather, the Vehicle and Traffic Law only penalizes individuals who operate a motor vehicle while they are under the influence of alcohol as that is defined by the Vehicle and Traffic Law. I question the prospective panel as to the issue of whether anyone believes that a person should not operate a motor vehicle after having had anything of an alcoholic nature to drink. If any of the jurors raise their hand in agreement with that statement (and usually this will be the case), I have the potential to challenge that juror for cause. If that occurs, you must question that juror regarding his or her willingness to follow the Judge's instructions. If he or she still believes that anyone who consumes any amount of an alcoholic beverage should not operate a motor vehicle, you are in a position to successfully argue to the Court that the juror has an unwillingness to follow the Court's instruction and therefore should be challenged for cause.

A POLICE OFFICER'S TESTIMONY

A DWI case will always rely on the testimony of police witnesses. In order to effectively select a jury, you must get the jury to agree that a police officer's testimony is to be given no more weight than any other witness' testimony including that of the defendant. An easy way to support this issue is by pointing out to the jury that the police officer can be mistaken as opposed

to lying about facts. This is a very effective technique in the defense of any case but in particular a DWI case. One effective way that this idea can be brought out during jury selection is to ask prospective jurors to raise their hands if they have ever been given a speeding ticket. Often times several members of the panel will indicate that they have been given a ticket. I then follow up by asking whether anyone who has received a speeding ticket believed that he or she was given the ticket unjustly, that is, was anyone given a ticket for speeding who believed that he or she in fact was not speeding. Once again, very frequently, one or more individuals will raise their hand. This concept flows nicely when those individuals who were given tickets were claimed to have been clocked by some type of radar device. By questioning the jurors in this regard, you can expose to the entire panel that individuals on the jury panel have taken issue with the results of a radar speeding ticket which can show the inaccuracy or unreliability of machines. This builds a logical bridge to attack the chemical breath test result as being unreliable just as the radar device was.

FIELD SOBRIETY TESTING

In DWI cases there will typically be sobriety test evidence submitted by the prosecution. The fact of the matter is, many jurors have no experience with field sobriety testing. A simple way in which to attack field sobriety tests is to inquire of the jurors whether they have ever had difficulty doing any type of tests that require coordination. Many times there are people who are simply non-athletic and will readily admit to having difficulty performing simple coordination tasks. I like to utilize the example of a trained Olympic athlete, perhaps a gymnast or an ice skater who has trained and competed tens of thousands of hours in preparation for the Olympics. Ultimately I give the example as to whether they have ever seen such Olympian make a simple mistake whether it's a gymnast on the balance beam or a skater on the ice. I like to use the

analogy that people can react differently under a stressful or nervous type setting. My experience is that every juror will concede that being pulled over by the police and being investigated for a Driving While Intoxicated charge would certainly be a stressful experience. By using this type of example, you can loop that together with your summation to give the jurors an explanation of why your client did poorly on the sobriety tests.

Also, it can be very effective to ask jurors whether they had any difficulty with a sport when first learning the sport. For example, if there are any golfers on the panel, you can ask them whether they had difficulty hitting a golf ball the first time they played golf. You can then ask them if they improved with practice. Almost always, people do. Remind the jurors that your client did not get the chance to practice the field sobriety tests.

BREATH TEST MACHINES

If your case involves a breath test, I like to briefly voir dire the jury panel as to their understanding of breath test devices and whether they have heard anything about them which led them to form opinions about them. Inherent with any type of chemical breath test device is a built in margin of error plus or minus .01 of one percent. That is, if a chemical test result is a .10, most officers will readily admit that assuming everything is working perfectly and that the test was administered in proper fashion, the most the officer can tell you is that the subject's blood alcohol was either .10, .11, or .09. There is a twenty percent difference between those three results. You can then use every day experiences to question the jurors as to whether they believe a potential twenty percent swing is something that they feel comfortable with. For example, you can ask jurors if their doctor prescribed a certain medication for them or their children and advised that the medication may result in serious side effects such as paralysis or kidney failure or stroke in twenty percent of the patients who use that medication, whether anybody on that

panel would be willing to take that medication or administer it to their children.

Another way to emphasize the point is to ask the jury if they would accept all expense paid plane tickets to Hawaii if they knew the airplane had a twenty percent chance of having engine failure in mid air. By looping these themes into the reliability of the breath test result, you will be able to condition the jury, and then you go back before the jury during your summation, you can attack the breath test result so as to establish reasonable doubt.

These types of questions can be very effective in the DWI case where you have a low chemical test result or even where you have a high chemical test result and the prosecution's common law evidence is weak.

RE CASES

Selecting a jury in a refusal case is a challenging job. Clients who refuse to take a chemical test often receive a devastating jury instruction. It is incumbent on defense counsel to enlighten the jury of reasons (other than fear of the test result) why a person may refuse a chemical test.

Initially, we like to begin by educating a jury that a person has the right to refuse a chemical test. In addition, it is quite common for people to have heard that breath test devices are not reliable, and thus because they have heard this, they opt to refuse. Sometimes people refuse because they use medications which are made of alcohol and are afraid the medications will register as though they had been drinking alcohol. Ultimately, during summation you will have to address why your client refused and that process must start during jury selection.

The above thoughts are merely guidelines and are not intended in any way to be exhaustive of the areas which the practitioner should cover during jury selection. Some courts impose time restrictions during jury selection so you must target the specific areas you feel are

most important to cover. Once again, due to the unique nature of Driving While Intoxicated, it is also important to flush out through the prospective jurors their personal opinions as to alcohol consumption as well as whether any individuals are members of MADD or SADD or any other anti-drunk driving groups. In addition, it is vital to inquire whether they or anyone they know had ever been a victim of a drunk driving related accident.

