

OUI Dos and Don'ts

By Brian J. Buckley, Esq.

"Use a little wine for thy stomach's sake and thine own infirmities." – St. Paul

This is written for those who, on occasion, enjoy a beverage away from home and must return there via a motor vehicle. Getting stopped by the police can happen to anyone. A cautionary tale comes to mind. I recall sitting by a window at the Firehouse Café in Worcester years ago with two friends, one a veteran state police trooper and the other a long-standing member of the "drink-and-drive society" who had never been stopped on suspicion of driving under the influence. As we watched some near accidents during rush hour at Exchange and Commercial streets (this was back when it was a four-way intersection and the convention center was little more than a dream), the trooper offered a warning: "Let's say that after you leave here today, you stopped at the stop sign completely, looked both ways, and proceeded into the intersection, and you were hit by another car that ignored completely the stop sign. The focus of the police would be on you because of the smell of alcohol." What follows are 10 items of advice in case you are unlucky.

1. Know where your license and registration are kept.

Police are very watchful for their own safety, and whenever they get a whiff of alcohol emanating from a motorist, the investigation begins. In an OUI investigation, the first moments of interaction may be crucial. The police receive training in the form of a U.S. Department of Transportation manual entitled *DWI Detection and Standardized Field Sobriety Testing*. The manual instructs trainees about pre-exit interview techniques that "apply the concept of divided attention" and include "asking for two things simultaneously" such as the driver's license and vehicle registration. The situation becomes even more complicated for the driver if, while he or she is looking for the requested documents, the police officer engages in the second technique of "asking interrupting or distracting questions" or the third technique of "asking unusual questions." If the driver knows where the right documents are, smoothly finds them without hesitation, and is able to hand them to the police officer, a potential crisis may be averted.

2. Be polite and respectful to police and other first responders.

They have a job to do and don't need to listen to a lot of nonsense. The more attitude you project, the greater the likelihood you may not be going home anytime soon.

3. Say as little as possible while being polite and respectful.

The inquiry is entirely subjective and guided by the police officer's sense of fairness. Slurred speech, admissions of drinking, or inconsistent responses are among the indications police are watching for as well as nonresponses to questions asked while a license and registration are sought. The police may ask you to recite the alphabet from E to R or count backwards from 65 to 47; one takes those tests at their peril.

4. If you're questioned while seated in the car or after being asked to step from it, state that you would like a lawyer present before answering any questions.

The police are not obligated to warn of Miranda rights until you are in custody. Although you may be detained while the investigation proceeds, the police are free to ask questions that usually result in incriminating replies. By asking for a lawyer and invoking your right to silence, you eliminate a potentially powerful and harmful source of evidence.

5. If you're asked to step from the motor vehicle, do so carefully.

You must step from the motor vehicle and walk where directed. If you have health issues making such an event difficult for you and can state them succinctly, do so. The police are now actively searching for evidence of OUI. This is known in the manual as "the exit sequence," as in, "How the driver steps and walks from the vehicle and actions or behavior during the exit sequence may provide important evidence of impairment."

6. Refuse politely to perform any field sobriety tests.

Field sobriety tests are the heart of any OUI prosecution. Although the horizontal gaze nystagmus test is always given, the result is inadmissible without expert testimony. I have never heard of a suspect closing his or her eyes and politely refusing to participate. To do so, however, would eliminate a test police always use to support probable cause to arrest. These tests are subjective, both in the officer's choice of tests to be performed and in his or her grading of your performance. The police are looking for "clues" that suggest you are under the influence. Most police reports focus on clues that are observed and neglect to mention the clues that did not occur. The police also tend not to tell the suspect shortly after each test is performed whether he or

she has passed or failed the test. One case tried years ago demonstrates these tests' importance to the prosecution: A young man led the police on a not-so-merry chase from Route 190 onto Route 290 before he was pulled over at Brosnihan Square. The trooper, enraged, seized the motorist, pulled him out of the car, and arrested him for OUI. A breathalyzer test was refused. The jury found him not guilty because of the absence of evidence.

7. Refuse politely to explain your decisions.

You will never talk your way out of an OUI arrest. The less you talk, the less evidence you provide to the police.

8. Do not take any breath test at the scene.

It cannot be offered into evidence and helps the police officer's quest for probable cause to make the arrest.

9. Do not take a breathalyzer.

The only exceptions are that you know you can pass it or that your license requires it. As for passing it, do not be guided by how you feel or by barroom bathroom charts that feature estimates as to weight, number of drinks consumed, and time period of consumption necessary for a result lower than .08 test result. There are too many other physiological factors that will have greater bearing on results. People who have a commercial driver's license must take the breathalyzer test or face a year's loss of that particular license.

10. Realize that you may be videotaped or audiotaped at the scene, in the cruiser, in the station, while using a telephone to make your statutory call, and in your cell.

Surveillance cameras are becoming a fact of life. There have been cases where suspects are videotaped at the scene, in the cruiser, at the station, and in a cell. More likely, the videotaping will occur during booking at the station. Booking questions must be answered. The camera is trained on you; speak clearly, stand straight and still, and be polite. The better you look and sound, the less you sway and mumble, the better the evidence will be at trial.

These are some thoughts from a trial lawyer who has spent over three decades before the bar prosecuting and defending persons charged with OUI.

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