

# D.W.I. LINK

A newsletter by Taheri & Todoro, P.C., devoted to Driving While Intoxicated law in New York State

Taheri & Todoro, PC, 388 Evans Street, Williamsville, NY 14221, Telephone: (716) 633-0374

Volume Eighteen

February 2004

## Admission of the Breath Test Score: Basic Foundational Elements

The most powerful piece of evidence in many DWI cases is the defendant's breath test score. Because no statutory provision exists under New York State law setting forth the underlying basis necessary for admission of a breath test score as evidence, the facts that must be presented by the prosecution when seeking admittance of the defendant's score has been developed through case law addressing this topic.

The foundational requirements for admission of the breath test has been developed over several years from a series of cases issued by various courts. For example, the proper foundation for admission of a breath test score was addressed by the Appellate Division of the Fourth Department in *People v. Donaldson*, 36 AD2d 37, (4th Dept. 1971), where the Court held:

The evidence as to the operation of the Breathalyzer was adequate. The officer who administered the test was qualified in that respect by his training received at the State Police School given by personnel of the New York State Police Laboratory... Additionally, there was ample proof that the instrument was properly calibrated and that the chemicals used in the test were of the proper kind, and mixed in the proper proportion. There also was adequate proof that the entire test had been administered in accordance with the rules and regulations of the State Police Department. Accordingly, it was not error to have admitted in evidence the results of the breath test. *Donaldson* at pp. 40-41.

Building upon the definition set forth in *Donaldson*, *supra*, the Court of Appeals, addressed this topic in *People v. Freeland*, 68 NY2d 699 (1986), where it noted:

We are presented in this case with a record devoid of any evidence to support the conclusion that the testing device was capable of producing an

accurate result. Proof that the test operator was certified by the Health Department to conduct breathalyzer tests, while permitting the inference that the test was properly given (*Vehicle and Traffic Law* § 1194 [9]; see, *People v. Mertz*, 68 NY2d 136) is not probative of the distinct foundational requirement concerning the accuracy of the machine....

Thus, in the absence of any evidence from which the trier of fact could reasonably conclude that the test results were derived from a properly functioning machine using properly constituted chemicals, it was error to admit the test results and a new trial is required. We note that, on the state of this record, we have no occasion to determine what nature, quantity and quality of proof is required to establish these foundational requirements, because there was no such proof in this case. *Freeland* at pp. 700-701.

While *Freeland* and other cases have provided some guidelines for the foundational requirements, no court or statute has ever specifically set forth the "nature, quantity and quality of proof" required for admission of the test. This has resulted in the development, over time, of a series of documents that New York State prosecutors will present in court when seeking admission of the breath test score. In most cases, these documents consist of the following:

1. A **Breath Test Instrument Record of Inspection/Maintenance/Calibration** submitted under CPLR § 4518(c) (the business records exception to the hearsay rule) to establish that the instrument was working properly at the time of the defendant's breath test. Following the ruling of the Court of Appeals ruling in *People v. Todd*, 38 NY2d 755 (1975), breath test instruments are usually calibrated every six months, and the prosecutor will usually present a certificate establishing that the machine was calibrated within six months prior to the defendant's test;

2. A **Record of Analysis — Simulator Solution**, also submitted under CPLR § 4518(c), to establish that the alcohol content of the simulator solution used to test the breath test device was within the accepted levels set forth in 10 NYCRR § 59.5(d) (greater than 0.08 percent alcohol measurable within the limits of plus or minus 0.01 percent weight per volume);

3. A copy of the test operator's **Breath Analyzer Operator Permit** issued by the New York State Department of Health. The prosecution will then rely on the presumption set forth in VTL § 1194[4](c) to establish that the test was properly administered. The presumption in VTL § 1194[4](c) is merely "permissive" and not mandatory. See *People v. Mertz*, 68 NY2d 136 (1986).

Many courts also require the prosecution to provide the log maintained by the arresting law enforcement agency indicating that the breath test device was passing weekly simulator tests at the time of the defendant's test. Other courts will admit the breath test without this document.

For older, and now rarely used, wet chemical breath test devices, an additional document establishing the tested value of the ampoule of chemical used in the test also will be presented to the court.

While there is no specific law stating that these documents are sufficient to establish a proper foundation, courts will usually find that a sufficient foundation has been established for the admission of the breath test if these three documents are in order.

This newsletter does not offer specific legal advice. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. If you have any questions or would like a specific topic covered in the newsletter, please contact Michael S. Taheri, Esq., or Peter J. Todoro, Esq., at Taheri & Todoro, PC, 388 Evans Street, Williamsville, NY 14221, telephone no. (716) 633-0374, e-mail: taheri@localnet.com.

Edited by James F. Orr

Newsletter available by e-mail if you contact us with your address.