

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

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Tongue Jewelry Voids Breath Test Results

The Indiana Court of Appeals has suppressed a breath test result because the defendant had a metal stud through her tongue at the time of her test. Like New York State, Indiana requires an observation period prior to administration of the breath test. The officer administering the test noted the metal stud prior to beginning the observation period, but did not ask the defendant to remove it. The application of the ruling as it relates to New York State law is set forth below.

Guy v. Indiana, 805 NE2d 835 (4th Dist. 2004)

The case of *Guy v. Indiana*, 805 NE2d 835 (4th Dist. 2004), was an appeal brought before the Court of Appeals of Indiana, Fourth District, regarding the failure of the trial court to suppress the breath test result because a "foreign substance" (a metal tongue stud) was in the defendant's mouth. 260 Indiana Administrative Code 1.1-4-8(1) states:

[t]he person to be tested must have had nothing to eat or drink, must not have *put* any *foreign substance* in his or her mouth or respiratory tract, and must not smoke within twenty (20) minutes prior to the time a breath sample is taken" (emphasis added).

The Indiana Court of Appeals found that the metal tongue stud was a "foreign substance" and that the word "put" should be interpreted to mean that no foreign substance should be "present" in the mouth *during* the twenty minutes prior to the test. Whether or not the substance was actually put in the mouth more than twenty minutes ago was irrelevant.

How does NY State law compare?

New York has an administrative statute similar to 260 IAC 1.1-4-8(1). 10 NYCRR § 59.5 (b) states:

Continuous observation of the subject shall be maintained for at least 15 minutes prior to the collection of the breath sample during which period the subject must not have ingested alcoholic beverages or other fluids, regurgitated, vomited, eaten, or smoked or be allowed to place anything in his/her mouth; if the subject should regurgitate, vomit, smoke or place anything in his/her mouth, an additional 15 minute waiting period shall be required.

The New York State and Indiana laws are very similar. With regards to the specific language at issue in *Guy v. Indiana*, *supra*, there is some minor variation. The New York State law does not contain the term "foreign substance," rather it uses the general term "anything." Also, Indiana law uses the term "put" while New York State law uses the term "place."

Foreign Substance / Anything

In the Indiana case, the defendant argued that the metal stud was a foreign substance while the prosecution argued that the metal stud was more akin to dental appliances, which other states had ruled were not required to be removed prior to a breath test. Indiana law does not define foreign substances, but, based in part on the *Black's Law Dictionary* (7th ed. 1999) definition of a foreign substance as "[a] substance found in a body, organism, or thing where it is not supposed to be found," the Indiana Court of Appeals found that a metal stud was indeed a foreign substance.

New York State law does not use the term "foreign substance." Instead, it uses the term "anything" to define what cannot be placed in the defendant's mouth prior to the breath test. There is no ruling in New York State as to whether a metal stud through the defendant's tongue would fall under the definition of "anything" as it is meant to be applied to 10 NYCRR § 59.5 (b).

Put / Place

Indiana law states that a defendant shall not "put" a foreign substance in the mouth. New York State law states that a defendant shall not "place" anything in the mouth. Despite this minor difference in terminology, the term "place" may be subject to the same interpretation as the Indiana law, i.e., that it actually means no foreign substance should be *present* during the period preceding the test.

Application in New York State

As with Indiana law, the law in New York State relates to the foundation that must be laid for the breath test to be admitted at trial. As a result, on its face it appears that a similar successful argument made in New York State would result in the breath test score being suppressed. In practice, however, the result may be different. In *People v. Terrance*, 120 AD2d 805 (3d Dept. 1986), the Appellate Division, Third Department held that "[f]ailure of the police officer conducting the test to ensure that defendant had nothing in his mouth for 20 minutes before the test was carried out goes only to weight to be afforded the test result, not its admissibility," *Terrance, supra, at p. 807*.

While the decision in *Terrance, supra*, does not address the admissibility of a test result when it can be established that the defendant *definitely* had something in his or her mouth immediately prior to the test (as opposed to mere failure to observe), this case still could be used to support an argument that the presence of an object in the defendant's mouth goes to the weight, not the admissibility, of the breath test in New York State.

The authors of this article would like to thank Drew Whiting, a senior at Clarence High School, for his assistance in organizing and drafting this article.

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

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