

A newsletter by **Taheri & Todoro, P.C.**, devoted to *Driving While Intoxicated* law in New York State
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New York State Police Vehicles Now Equipped with Video Cameras

The New York State Police have recently equipped some patrol cars in Erie County with video cameras. Recordings from these cameras may provide instrumental evidence in DWI cases in that they will usually record the defendant's driving, performance on roadside field tests, and the arrest of the defendant. Because these cameras are limited to recording events that occur in the vicinity of patrol cars, they do *not* record anything surrounding the administration of the breath test at the New York State Police barracks.

While, at first blush, the use of this new technology would be assumed to favor the prosecution in most cases, the defense often may turn these recordings to the defendant's advantage. Defense counsel should craft of discovery demand under Criminal Procedure Law section 240.20 that makes a specific request for any video taken of the defendant in the course of the investigation and arrest. A few methods that may be explored by defense counsel to turn these recordings to the defendant's advantage are set forth below.

The defense should request the entire videotape taken that evening, not just that portion of the videotape recording the defendant's stop. If defense counsel can obtain the entire tape, he or she would have access to recordings of other stops made by the arresting officer that may be used to impeach that officer during cross-examination. This material may be useful if, for example, the arresting officer testifies that he or she "always" has drivers perform the field tests in a certain way when the videotape of other arrests shows that this is not

the case. Under the proper circumstances, such evidence may show that both the officer's decision to stop a driver and his or her determinations regarding performance on field tests are much more arbitrary than the officer's testimony indicates.

Even if defense counsel is unable to obtain the entire video tape, he or she should retain all video tapes of arrests obtained in other cases. If defense counsel is then faced with the same arresting officer in a later case, he or she will have a record of a specific case that may be useful to impeach the arresting officer's testimony that he or she "always" conducts DWI arrests in a certain way.

If the prosecution fails to produce the videotape, defense counsel may be able to turn this failure to the defendant's advantage. In *People v. Karns*, 130 Misc2d 247 (Roch. City Ct. 1985), a videotape was made at the police station of the booking process and "motor tests" performed by the defendant. After the prosecution failed to offer this tape into evidence or give any explanation of its whereabouts, the defendant moved to dismiss the charges based, in part, on the theory that the videotape, if introduced, would have exculpated the defendant. The prosecutor stated that she had never requested the videotape from the police, nor had she reviewed it.

The court ruled that "a prosecutor has an affirmative duty to view the videotape and, if it is exculpatory, make it available to the defendant, even absent of a request for it," *Karns, supra*, at p. 250. While the court did not dismiss the charges outright as requested by the defense, the court ruled that the appropriate sanction was "to charge the fact finder 'that they may draw the strongest inference

that the videotape would not support the People's proof of intoxication,'" *Karns, supra*, at p. 250. In other words, while the arresting officer had testified that the defendant stumbled and was "wobbly and staggering" during the administration of the "motor tests," the fact finder would be permitted to assume that the defendant was steady on his feet throughout the testing.

Similarly, in *People v. Marr*, 177 AD2d 964 (4th Dept. 1991), a videotape was made the defendant's breath test. The defendant apparently stated that he would take the test, but then failed to successfully complete it after several attempts. The prosecution characterized this as a refusal. The videotape was erased by law enforcement because he mistakenly believed it had no evidentiary value. The trial court ruled that, because the prosecution was responsible for the loss of the tape, the People would be precluded from "introducing any evidence of defendant's alleged refusal to submit to the breathalyzer test," *Marr* at p. 964. The Appellate Division of the Fourth Department upheld this determination.

Defense counsel could make a similar argument if the prosecution fails to produce a patrol car videotape that allegedly documents the defendant's "bad driving" and "failure" on field tests. Absent the production of the tape, the defense should request that the court preclude the prosecution from introducing any evidence regarding these two issues.

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.

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