Criminal Law

Defending the practicalities of DUI in Virginia

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This is an analysis of the pre-arrest and arrest stages of a Driving Under the Influence of alcohol (DUI) charge in the Commonwealth of Virginia. From inserting the keys into the ignition, to deciding whether to submit to a blood or breath test, this article focuses on what a potential defendant does or fails to do, and how that is used to establish the requisite elements for a DUI conviction. While no one condones driving under the influence of alcohol, it happens, and every practitioner should understand the law and how it is applied in these situations.

1. The Stop (Reasonable Suspicion)

The Fourth Amendment of the U.S. Constitution restricts police officers from stopping and detaining citizens without reasonable suspicion of criminal activity or other justifiable reasons. A traffic stop is considered a detention or seizure under the Fourth Amendment.[1] Reasonable suspicion is a relatively low evidentiary standard that requires the police officer to have a specific, articulable, and individualized suspicion that crime is afoot which reasonably warrants a brief intrusion into the driver's privacy.[2] Thus, in order for a police officer to stop a driver, he must have reasonable suspicion, based upon the totality of the circumstances available to him at the time of the traffic stop, that a crime is in progress or about to be committed (usually a traffic or equipment violation).[3] This cannot be a mere hunch. The police officer must be able to articulate with specificity, a reasonable basis for his suspicions.[4] Whether a traffic stop is justified depends upon "whether the facts available to the officer [would] warrant a man of reasonable caution in the belief that the (traffic stop) was appropriate."[5] If a police officer does not have reasonable suspicion for pulling a vehicle over, the traffic stop is illegal. In accordance with the "fruit of the poisonous tree" doctrine, "evidence seized as a result of an illegal stop is inadmissible against a defendant at trial."[6]

However, a traffic stop can still be valid even if the police officer is mistaken as to the *fact(s)* that he uses to establish his reasonable suspicion. For instance, a police officer can pull a driver over if he thinks the vehicle's taillight is broken, even if in fact it is working properly. From that point he could begin to establish probable cause to arrest the driver for DUI. A mistake as to the fact(s), which provide the basis for the reasonable articulable suspicion, does not negate the legitimacy of the traffic stop as long as the police officer reasonably believed, in good faith, that his conduct was lawful.[7]

The traffic stop *is* illegal if the police officer is mistaken as to the *law* that he suspects is being broken in order to establish his reasonable suspicion. For instance, a police officer cannot pull a driver over for having a cracked passenger-side mirror. Even if it is cracked, it is not illegal to drive in Virginia with a cracked passenger-side mirror. Thus, if the police officer makes a mistake as to the law in order to form his reasonable suspicion, even if objectively reasonable and in good faith, the traffic stop is illegal and all of the evidence obtained thereafter should be inadmissible at trial.[8]

In addition to an officer's "mistake of law," mere unusual activity, in itself, is not enough to warrant a traffic stop. If there is no reasonable and articulable suspicion as to criminal activity, the stop is invalid, and any evidence gathered as a result should be inadmissible. For instance, after being followed by a police officer, the driver of a vehicle pulled over and switched seats with the passenger. The Virginia Supreme Court found that this behavior, while unusual, was insufficient to create a reasonable suspicion in the police officer's mind.[9] "Lawful conduct that the officer may subjectively view as unusual is insufficient to generate a reasonable suspicion that the individual is involved in criminal activity."[10] Furthermore, a police officer stopping to assist a vehicle that was driving partially in a yard and partially on the shoulder of the road was deemed an illegal detention by the Vir-

ginia Supreme Court and the subsequent DUI was dismissed.[11] Even though the police officer believed the vehicle was malfunctioning and needed police assistance, the court decided this "did not give rise to reasonable suspicion, based on objective facts, that he needed police assistance" or that criminal activity was underway.[12]

Violating, or appearing to violate, any Virginia or local criminal or traffic law is the most common basis for reasonable suspicion to stop a driver.[13] However, if the police officer pulls a driver over for any reason not associated with DUI, he has not yet established any evidence towards probable cause to arrest for DUI. The driver's chances of avoiding an arrest are significantly higher when the traffic stop is based on one of these reasons.

Certain driving activities, however, give a police officer reasonable suspicion to pull a driver over for DUI because they are considered characteristic of intoxicated driving. Alcohol is a central nervous depressant that causes a user's eyes to fixate for periods longer than a sober person resulting in a "gazing" effect. When combined with other negative side effects of alcohol, such as delayed reactions and impaired decision-making capabilities, an intoxicated driver tends to exhibit "cues" of impaired driving, visible to a trained police officer.[14]

Being pulled over for reasonable suspicion of DUI *and* of breaking another substantive law is probably the worst situation to be in for a driver stopped on suspicion of DUI. It is difficult to argue successfully at trial that the traffic stop was illegal, since the driver was breaking a law. Additionally, the police officer has already established a significant amount of evidence to show probable cause to make a DUI arrest. Common examples of this include: failure to maintain lane position during a turn or curve, following too closely, driving on the wrong side of the road or an area other than the roadway, failure to activate headlights (only illegal between sunset and sunrise, and during periods of reduced visibility), failure to dim headlights (only illegal when within 500 feet of oncoming traffic), literally drinking alcohol while driving, stopping on the roadway for no apparent reason (only illegal if other traffic present), and failure to use a turn signal (only illegal if affects other traffic).[15] The most common driving activity that breaks the law *and* indicates DUI, and is often the most difficult with which to deal, is weaving across or straddling lane lines or center divider lines. Research suggests that when paired with *any* other "cue," weaving across lane lines generates a 65 percent probability of DUI with a BAC at or above 0.10 percent.[16]

Some driving actions are questionable as to whether they create a reasonable suspicion for the police officer to pull a driver over for DUI or if they merely create a hunch. This entails driving in a fashion that does not break any specific law, but does exhibit common DUI cues. In isolation, exhibiting one of these signals is usually not enough to warrant a traffic stop. There is no set number of how many cues it takes, but according to a review of notable Virginia appellate cases it appears that two cues would generally suffice for reasonable suspicion purposes. Common examples of legal activities that may suggest DUI include: driving significantly lower than the posted speed limit, accelerating and/or decelerating for no apparent reason, poor shifting or stalling of a manual transmission, delayed response to traffic signs or signals, abrupt or jerky turning maneuvers, and almost striking another vehicle.[17] The best and most damaging example of an unusual or erratic driving cue that suggests DUI, but does not actually break any law, is swerving or weaving within your own road lane. The Virginia Court of Appeals has held that this activity alone can create reasonable suspicion.[18] However, at least one Circuit Court since then has decided that weaving within a lane is insufficient to establish reasonable suspicion.[19] Whether this cue by itself warrants a valid traffic stop probably depends on the frequency of weaving. Plainly put, over a distance of 0.5 miles, weaving between five and ten times was found sufficient for reasonable suspicion, while weaving three times, over the same distance, *with the vehicle's wheels touching the lane lines and the center divider line* was found insufficient.[20]

At a roadblock, a driver is detained, just like a traffic stop, but *without any reasonable suspicion of criminal activity*, to determine whether the driver has been drinking. The U.S. and Virginia Supreme Courts have decided, however, that checkpoints are constitutionally valid. Nonetheless, there are specific factors a court must weigh to determine a checkpoint's validity: It must be carried out pursuant to an explicit advance plan, contain neutral criteria, and limit the conduct of the officers undertaking the roadblock.[21] Furthermore, the court also evaluates other aspects of the checkpoint to determine whether it amounts to an invasion on a driver's personal liberty: the length of the stop, the nature of the questioning, whether a search is conducted, whether there was adequate warning of the official nature and purpose of the stop, whether motorists are being stopped in a systematic, nonrandom fashion, whether the officers received adequate training and the presence of on-site supervision.[22]

Some drivers make the hasty decision to avoid the roadblock. This typically occurs in three ways: turning onto another public road or parking lot, turning onto a private road or driveway, or executing a U-turn. Most police checkpoints have a designated "chase car" to pursue the evading vehicle although the officer must be able to articulate reasonable suspicion of illegal activity in order to pull the driver over. Merely *appearing* to evade a checkpoint is not necessarily illegal. "A driver's undertaking a lawful driving maneuver which has

the effect of avoiding a checkpoint does not, standing alone, furnish reasonable suspicion of possible criminal activity."[23] The key is whether any abrupt or irregular driving activity occurred when performing the turn or U-turn.

A driver approaching a roadblock who makes a legal, normal turn onto a public road or into a public place should not trigger a police officer's reasonable suspicion. The key aspects to analyzing this maneuver are whether the driver avoided sudden braking, properly used his or her turn signals, maintained proper speed and lane position through the turn, and abstained from other blatantly suspicious activity. "A legal turn into an existing roadway prior to reaching a checkpoint, standing alone, does not warrant reasonable suspicion that the operator is involved in criminal activity."[24] Additionally, a lawful turn into a public parking lot before reaching a roadblock does not constitute reasonable suspicion.[25]

Making a lawful turn onto private property not open to the public, such as a person's driveway, is a trickier technique for avoiding a checkpoint. By itself, it probably falls short of giving the police officer valid reasonable suspicion to conduct a traffic stop, although it does create an element of suspicion.[26] With additional suspicious factors, Virginia courts have validated these stops. If the turn onto private property is done in plain sight of the police officer(s), the detail to consider in the analysis is whether the driver avoids actions such as sudden stopping, hesitant driving, and prolonged eye contact with police, which independently raise suspicion of criminal activity.[27] Specific particularized suspicious actions, when paired with a lawful turn onto a private road, are sufficient to establish reasonable suspicion. However, the police officer "must be able to point to specific suspicious facts, other than the lawful maneuver and his [general] suspicion," to justify a traffic stop.[28]

Finally, a U-turn is the easiest way to avoid a roadblock but also draws the most attention. The U-turn must, of course, be legal and done in a normal lawful manner.[29] No matter how perfectly the U-turn is executed, however, Virginia courts have held that a U-turn, by itself, could be considered sufficient reasonable suspicion to justify a traffic stop.[30] The key factor in the U-turn analysis appears to hinge on the distance it is done before the checkpoint. A lawful U-turn executed 100-150 feet in front of the checkpoint, in itself, satisfied reasonable suspicion requirements.[31] However, a lawful U-turn 300-400 yards before a checkpoint was found insufficient to justify a traffic stop.[32]

2. The Arrested (Probable Cause)

After the police officer initiates a traffic stop based on his reasonable suspicion that criminal activity is underway, he approaches the vehicle in order to validate this suspicion. If his interaction with the driver of the vehicle dispels his suspicion, he must release the driver immediately. However, if his interaction with the driver confirms his suspicion or reveals that further investigation is necessary to determine whether criminal activity is present, the police officer may further detain the driver to conduct a brief investigation. At this point, the police officer is attempting to obtain enough evidence to establish probable cause to arrest the driver.

The Fourth Amendment of the U.S. Constitution prohibits police officers from arresting citizens without probable cause. Probable cause is an evidentiary standard higher than "reasonable suspicion," which exists when "the facts and circumstances within the officer's knowledge, and of which he has reasonably trustworthy information, alone are sufficient to warrant a person of reasonable caution to believe that an offense has been or is being committed."[33] Probable cause does not require an actual showing of criminal behavior, or that the police officer's belief that a crime has occurred be more likely true than not.[34] Rather, "only a probability or substantial chance of criminal activity" need be shown to satisfy the burden of probable cause and justify an arrest.[35] An arrest without probable cause is invalid and all evidence gathered as a result should be inadmissible at trial.

In order for a police officer to arrest a driver for DUI, he must have probable cause that the driver was in fact (a) driving or operating a motor vehicle, *and* (b) under the influence of alcohol at the time he was driving or operating the vehicle.

(a) Driving or Operating a Motor Vehicle

In accordance with Virginia's DUI statute, "driving a motor vehicle" is exactly what it purports to be, putting the vehicle in motion. However, there is no bright-line rule as to what it means to "operate a motor vehicle" in Virginia. In its loosest sense, "operating a motor vehicle" means activating, manipulating or exerting control over any electrical or mechanical function of a motor vehicle. Whether the key is in the ignition, and whether the ignition is in the "on" or "off" position, are distinctions that have been argued both successfully and unsuccessfully to establish or refute the element of operation of a motor vehicle.[36] In light of a recent Virginia Court of Appeals case, however, it appears that the ignition must at least be in the "on" position.[37] Nevertheless, merely turning the ignition to the "off" position is not necessarily enough to avoid a DUI charge. Circumstantial evidence, by itself, can be sufficient to establish that a person was in fact the driver or operator of a vehicle.[38]

Additionally, the driver or operator does not have to be on a public road or highway to be charged with DUI.[39] "Public ownership of the property upon which the vehicle is driven or operated is not an element the commonwealth must prove in a prosecution for (DUI)."[40] However, and as will be noted later, a driver arrested on private property is not required to consent to breath or blood testing.

(b) Under the Influence of Alcohol at the Time of Driving or Operating the Motor Vehicle

Along with determining that the defendant was the operator of a motor vehicle, a police officer needs to establish that her blood alcohol content (BAC) was at or above 0.08 percent, or that she was under the influence of alcohol at the time of driving or operating the motor vehicle.[41] Thus, the police officer must collect evidence such as a blood or breath sample to test if the driver's BAC is at or above 0.08 percent. The officer can also obtain other evidence that the driver has "drunk enough alcoholic beverages to so affect (her) manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation."[42]

There are various ways a police officer obtains evidence towards probable cause. First, if the traffic stop is for driving behavior generally associated with DUI, the officer can already be well on his way to establishing enough probable cause for an arrest. Next, after activation of emergency lights and/or sirens, the driver's timely response and how she stops her vehicle will be closely observed by the officer. Finally, *almost everything* that occurs during the traffic stop can be used to establish probable cause for a DUI arrest. There is no specific level of how much evidence the police officer needs to satisfy the burden of probable cause. Probable cause, like reasonable suspicion, is based upon the "totality of the facts and circumstances presented and what those facts and circumstances reasonably (mean) to a trained police officer."[43]

(i) Under the Influence of Alcohol

The officer continues to collect evidence when he approaches a vehicle and interacts with the driver. Some initial indicators often present at this time in the traffic stop which are used to establish probable cause for DUI are: difficulty with vehicle controls, fumbling with driver's license and/or registration, bloodshot eyes, slurred speech, slow response to the police officer's communications, making the officer repeat himself, making irrational or confused statements, and providing incorrect or inconsistent information to the officer.[44] Every word the driver says has the potential and likelihood of adding additional evidence towards the officer's probable cause.

If the police officer suspects the driver of drinking, usually he will ask her to exit the vehicle and take a field sobriety test (FST). If the driver agrees to do this, she most likely will furnish the officer with additional evidence for probable cause. Examples of this include: difficulty exiting the vehicle, swaying, demonstrating unsteady balance, leaning on the vehicle or other object, and, of course, failing the FST.

A driver has the right to refuse to take the FST.[45] The Virginia Supreme Court has ruled that refusing to take a FST is not evidence of "consciousness of guilt," and by itself, is insufficient to establish probable cause for DUI. However, that same court also noted that refusing to take a FST "may have some relevance in a police officer's assessment of probable cause" of DUI when that refusal is "accompanied by evidence of the driver's alcohol consumption and its discernable effect on the driver's mental or physical state."[46] If the driver refuses to exit the vehicle and/or take the FST, the officer would either have to place her under arrest based on the evidence he has already collected, or release the driver.

Throughout the traffic stop, the police officer should also be aware of evidence to determine that it is alcohol, and not some other reason such as fatigue or physical disorder, that is the cause of the driver's seemingly impaired behavior. In order to convict a defendant for DUI, the Commonwealth must prove the presence of alcohol in the driver's system.[47] An officer can target alcohol as the source of impairment to validate a DUI arrest in a number of ways: an open alcohol container or other visible alcohol containers in the vehicle, the odor of alcohol, the driver admitting to drinking alcohol, or a preliminary breath test (PBT) showing any amount of alcohol in the body.[48]

Mere stumbling and/or slurred speech without signs of alcohol consumption should be insufficient evidence for a DUI conviction. For example, drowsiness or a mental or physical disorder could be responsible for the driver's odd behavior. Without an admission of drinking, positive PBT test, visible signs of alcohol or at least an odor associated with an alcoholic beverage, there can be no probable cause for DUI.[49] However, just one indicator of the presence of alcohol, such as the odor of beer, paired with drunken behavior can be sufficient to prove the intoxicant and its influence on the driver, and consequently the DUI.[50]

While the odor of alcohol can be sufficient for determining the presence of alcohol, the police officer's best method is normally the PBT. Taking a PBT seems almost always ill-advised. In accordance with Virginia statute, the driver has the right to refuse a PBT.[51] In accordance with the very same statute, if a driver chooses to take the PBT and the machine indicates that *any* "alcohol is present in the person's blood, the officer may charge the person with a violation of (DUI)."[52] So by agreeing to take the PBT the driver practically guarantees the police officer probable cause for an arrest. The result of the PBT, or the driver's refusal to take it, is not admissible at trial.[53] Furthermore, the officer cannot use the driver's refusal to take the PBT to establish probable cause during the traffic stop.[54]

(ii) Post-Arrest Breath and Blood Tests

After the arrest, the police officer will continue to gather evidence against the driver concerning the DUI prosecution. This includes the defendant's statements, the manner in which she behaves, and most importantly, her breath or blood test results. In order to obtain a conviction for DUI,

the Commonwealth *must* be able to prove beyond a reasonable doubt that alcohol in the defendant's system at the time of the alleged offense caused impairment. The government's strongest tool for determining the presence of alcohol intoxication of a driver is by conducting breath or blood tests after the arrest. If the test indicates that a driver's BAC is 0.08% or greater, there is an inference that she is in violation of Virginia's DUI statute. For any certificate of analysis to be admissible, the driver needs to be arrested for DUI within three hours of the alleged offense.

Anyone who drives or operates a vehicle on a Virginia public highway consents to submit blood or breath samples to determine the alcoholic content of his or her blood.[55] In contrast to the elements of DUI, a driver consents to these tests only when driving on a public road. Even though a driver may still be charged with DUI, she is not obligated to submit to a breath or blood test if the alleged offense occurred on private property.[56]

Virginia law dictates permissive inferences to accompany different levels of BAC tested in breath or blood samples. If the results of the test indicate a BAC of 0.05 percent or less, there is an inference that the driver is sober.[57] If the blood or breath results show a BAC between (but not at) 0.05 percent and 0.08 percent, there is no inference either way.[58] Finally, if the results display a BAC of 0.08 percent or greater, there is an inference that the driver is under the influence of alcohol.[59] Furthermore, by taking the breath or blood tests the possibility of mandatory jail time becomes an issue. For a first offense, a BAC at or above 0.15 percent requires five days in jail and a BAC above 0.20 percent mandates 10 days.[60]

If the driver agrees to take the breath test, she is subject to the permissive inferences associated with the results. If the driver refuses, her level of intoxication must be determined from other evidence gathered at the time of the alleged offense. Moreover, neither a driver's refusal to take the test nor the fact that she was offered one, should be used as evidence, or even mentioned by the Commonwealth, to prove a DUI at trial.[61]

However, if a driver refuses to take a post-arrest breath or blood test, she will be charged with unreasonable refusal, which is a civil charge punishable by driver's license suspension for one year.[62] An unreasonable refusal can be as clear-cut as a verbal rejection ("I will not blow into the machine.") or as subjective and vague as failing to blow into the breath machine sufficiently to give a result.[63] Once charged with an unreasonable refusal, the burden is on the defendant to prove that her refusal was reasonable and thus legal, such as a valid and corroborated medical explanation for not being able to blow properly.[64] Rationalizations for refusing a breath test that have been deemed unreasonable are: a driver's belief that she was sober; being, in fact, sober; a driver's belief that she was being framed; on advice of counsel, and inability to consult counsel first.[65] Valid grounds for reasonably refusing a breath test (but not blood test) have been unconsciousness, total incoherence and uncontrollable or incessant burping.[66]

Virginia law no longer gives the defendant the choice between either a breath or blood test to determine BAC. Only when a breath test is unavailable or the defendant is unable to take one for a valid reason, must the police administer a blood test.[67] As per the "implied consent" statute, a defendant is required to take a blood test in the same regard as a breath test, and the results of the blood test carry the same inferences as the breath test. Furthermore, refusal of the blood test carries the same penalty as refusing the breath test. The Virginia Supreme Court has held that there must be some reasonable factual basis for refusal to take the blood test, such as endangerment of the health of the accused by the withdrawal of blood.[68]

Where a driver elects to refuse breath and/or blood tests, some jurisdictions are instructing their police officers to obtain immediate post-refusal blood test warrants from a magistrate or "on-call" judge. Virginia has not adopted these stringent measures as a whole, although some counties reportedly have been utilizing these techniques for the collection of evidence. The U.S. Department of Transportation National Highway Traffic Safety Administration (NHTSA) and Mothers Against Drunk Driving (MADD) are leading this "No Refusal" movement throughout the U.S.[69] Members of these organizations are upset because they believe some drivers throughout the country are able to skirt DUI convictions by refusing post-arrest breath or blood tests.[70] In support of this initiative, chief NHTSA spokesman, U.S. Secretary of Transportation Ray LaHood, asserts, "prosecuting suspected drunk drivers is much more difficult when the offender refuses a breath test," and "states that have adopted "No Refusal" programs report more guilty pleas, fewer trials and more convictions."[71]

The "No Refusal" initiative appears to conflict with Virginia case law, and at the very least renders Virginia's "implied consent" statute irrelevant. In two Virginia Supreme Court cases, the court has declared that the defendant "*has the power to refuse to submit to the test* but not the right to refuse it," and that the defendant was "not compelled under (the "implied consent" statute) to submit to the blood test."[72] The Virginia Supreme Court has also stated that if a "person declares the refusal in writing on a prescribed form, or refuses to so declare, then *no samples shall be taken*."[73]

Virginia law permits police officers in rare instances, known as "exigent circumstances," to encroach upon a defendant without a warrant in order to prevent the concealment or destruction of relevant evidence. As recent as 2006, the Virginia

Supreme Court ruled that "the need to take the test before the percentage of alcohol in the blood diminished" does not constitute an "exigent circumstance."[74] Furthermore, that same court pointed out the incompatibility of such an idea. "The "exigent circumstances" exception advocated by the Commonwealth *would undermine completely the implied consent provisions of Code §18.2-268.2*."[75] The court's reasoning that this would "render irrelevant the issue of a driver's consent" should be applied to the "No refusal" initiative's position on post-refusal blood testing *with a warrant*.[76] What is the point of the "implied consent" statute if, in reality, a driver has no option to refuse?

Conclusion

As the case law reveals, the details of what a driver did, or did not do, during the stop and arrest process can have a significant impact on the disposition of the case. This analysis of the DUI statutes and case law hopefully helped clarify some of the issues that arise before and during the arrest process and will assist the practitioner in defending a client charged with DUI.

Endnotes

1. *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *Jackson v. Commonwealth*, 267 Va. 666, 672 (2004).
2. *Terry v. Ohio*, 392 U.S. 1, 21 (1968); *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *McGee v. Commonwealth*, 25 Va. App. 193, 202 (1997).
3. *McCain v. Commonwealth*, 275 Va. 546, 553 (2008).
4. *Alston v. Commonwealth*, 40 Va. App. 728, 738 (2003) (*quoting Hatcher v. Commonwealth*, 14 Va. App. 487, 490 (1992)).
5. *Wallace v. Commonwealth*, 32 Va. App. 497, 504 (2000).
6. *Harris v. Commonwealth*, 276 Va. 689, 694 (2008) (*quoting Jackson*, 267 Va. at 672).
7. *Craig v. Commonwealth*, 2009 Va. App. LEXIS 199, 2 (2009) (*citing Barnette v. Commonwealth*, 23 Va App. 581, 584 (1996)).
8. *Commonwealth v. Snyder*, 2007 Va. App. LEXIS 307, 9 (2007).
9. *Zimmerman v. Commonwealth*, 234 Va. 609 (1988).
10. *Harris v. Commonwealth*, 276 Va. 689, 697 (2008) (*citing Harris v. Commonwealth*, 262 Va. 407, 416 (2001)).
11. *Barrett v. Commonwealth*, 250 Va. 243 (1995).
12. *Id*.; The court chose to avoid deciding whether the stop, and the evidence gathered therein, would have been valid under the "community care-taking functions" doctrine if there was evidence sufficient to show the driver, in fact, required police assistance.
13. *Craig v. Commonwealth*, 2009 Va. App. LEXIS 199 (2009) (driving with what appeared to be an inadequately illuminated rear license plate sufficient reasonable suspicion to warrant a traffic stop which led to DUI conviction, even though license plate was, in fact, sufficiently illuminated).
14. Stuster, Jack, Anacapa Sciences, Inc., submitted to U.S. Department of Transportation National Highway Traffic Safety Administration, "DUI Detection at BACs Below 0.10" (1997).
15. *Id*.
16. *Id*.
17. *Id*.; An anonymous tip also factors into reasonable suspicion but since that is entirely outside of the driver's control it has been excluded from this paper.
18. *Neal v. Commonwealth*, 27 Va. App. 233 (1998).
19. *Commonwealth v. Webb*, 56 Va. Cir. 419 (Danville 2001).
20. *Id*.; *Neal* 27 Va. App. 233.
21. *Simmons v. Commonwealth*, 238 Va. 200, 203 (1989).
22. *Id*.; *Crandol v. City of Newport News*, 238 Va. 697, 701 (1989) (*citing Lowe v. Commonwealth*, 230 Va. 346, 352 (1985)).
23. *Lovelace v. Commonwealth*, 37 Va. App. 120, 126 (2001).
24. *Murphy v. Commonwealth*, 9 Va. App. 139, 145 (1989).
25. *Bass v. Commonwealth*, 259 Va. 470, 477 (2000).
26. *Lovelace*, 37 Va. App. 120 at 126.
27. *Bailey v. Commonwealth*, 28 Va. App. 724 (1999).
28. *Lovelace*, 37 Va. App. 120 at 127.
29. *Commonwealth v. Eaves*, 13 Va. App. 162 (1991) (U-turn along with sudden deceleration and late application of turn signal enough to justify traffic stop).
30. *Stroud v. Commonwealth*, 6 Va. App. 633 (1988).
31. *Id*.
32. *Commonwealth v. Wells*, 2007 Va. App. LEXIS 9 (2007) (other factors such as reduced visibility were present in this case).
33. *Saunders v. Commonwealth*, 218 Va. 294, 300 (1977).
34. *Purdie v. Commonwealth*, 36 Va. App. 178, 185 (2001).
35. *Illinois v. Gates*, 462 U.S. 213, 243 (1983); *Quigley v. Commonwealth*, 14 Va. App. 28, 34 (1992); *Purdie*, 36 Va. App. 178 at 185.
36. *Compare Propst v. Commonwealth*, 24 Va. App. 791, 794 (1997) with *Stevenson v. City of Falls Church*, 243 Va. 434, 438 (1992).
37. *Nelson v. Commonwealth*, 2010 Va. App. LEXIS 42 (2010) (this probably includes the "accessory" option on most ignitions as well since the determining factor for "operation" is that the electrical system has been manipulated or activated).
38. *Lyons v. City of Petersburg*, 221 Va. 10 (1980).
39. Somehow, a moped is the only vehicle that requires the DUI infraction to be on a public highway ("(T)he term "motor vehicle" includes mopeds, while operated on the public highways of this Commonwealth." (Va. Code §18.2-266 (2010))).
40. *Mitchell v. Commonwealth*, 26 Va. App. 27 (1997).
41. Va. Code §18.2-266.
42. *Commonwealth v. Elliot*, 2003 Va. App. LEXIS 467, 13 (2003); *Hill v. Lee*, 209 Va. 569, 571 (1969).
43. *Buhrman v. Commonwealth*, 275 Va. 501, 505 (2008).
44. "DUI Detection"
45. *Jones v. Commonwealth*, 279 Va. 52, 58 (2010) "There are numerous innocent reasons why a person may refuse to engage in tests that are not required by law [such as FST], including that a person may be tired, may lack physical dexterity, may have a limited ability to speak the English language, or simply may be

reluctant to submit to subjective assessments by a police officer."

46. *Id*., 279 Va. 52 at 59.
47. The presence of drugs would also be sufficient for a DUI arrest, however that is beyond the scope of this paper.
48. Va. Code §18.2-267 (2010).
49. *Miller v. Commonwealth*, 214 Va. 689 (1974) (At the very least there can be no conviction for DUI without "evidence that tended to establish the agency responsible."); *Clemmer v. Commonwealth*, 208 Va. 661 (1968).
50. *Williams v. City of Petersburg*, 216 Va. 297 (1975).
51. Va. Code §18.2-267.
52. *Id*.
53. *Id*. (but the PBT result can be admissible at a probable cause hearing or motion to suppress (*Stacy v. Commonwealth*, 22 Va. App. 417 (1996)).
54. LexisNexis, 1-21 *Virginia Criminal Law and Procedure*, (Supp. to §21.6) (2010). The Virginia Supreme Court has decided that "the automobile incidents are isolated and unequivocal events, whereas the alcohol test refusals could stem from a larger number of motivations not related to the alcohol issue and many of those instances are innocent human behavior. Hence no adverse inference is to be drawn from a refusal to be tested."
55. Va. Code §18.2-268 (2010).
56. *Id*.; *Commonwealth v. Wood*, 73 Va. Cir. 333 (Charlottesville, 2007); *Edwards v. Oberndorf*, 309 F. Supp. 2d 780, 786 (E.D. Va. 2003).
57 Va. Code §18.2-269 (2010).
58. Va. Code §18.2-269.
59. *Id*.; Va. Code §18.2-266.
60. Va. Code §18.2-270 (2010).
61. Va. Code §18.2-268.10 (2010); *Cash v. Commonwealth*, 251 Va. 46, 49 (1996). However, this evidence may be used by the Commonwealth "in rebuttal or ... for the sole purpose of explaining the absence at trial of a chemical test of such sample." (Va. Code §18.2-268.10).
62. Va. Code §18.2-268.3 (2010) (Subsequent refusal charges are misdemeanors with harsher penalties).
63. *Hudson v. Commonwealth*, 266 Va. 371 (2003) (burden on defendant to support his claim of having a lung problem which made it impossible for him to blow into the breath machine).
64. *Id*.
65. *Cash v. Commonwealth*, 251 Va. 46 at 50.
66. *Pearson v. Commonwealth*, 43 Va. App. 317 (2004) (person must not have ingested fluids, regurgitated, vomited, eaten, or smoked 20 minutes prior to the breath test).
67. Va. Code §18.2-268.2 (2010); *Hudson*, 266 Va. 371; *Lamay v. Commonwealth*, 29 Va. App. 461 (1999).
68. *Bailey v. Commonwealth*, 215 Va. 130, 131 (1974).
69. NHTSA, *U.S. Transportation Secretary Ray LaHood Announces Holiday Drunk Driving Crackdown*, (Dec. 13, 2010) <http://www.nhtsa.gov/PR/DOT-209-10>.
70. *Holiday Drunk Driving Crackdown*
71. *Id*.; LaHood, Ray, *No Refusal*, Fastlane: The Official Blog of the U.S. Secretary of Transportation (Dec. 13, 2010) <http://fastlane.dot.gov/2010/12/no-refusal.html#more>.
72. *Caldwell v. Commonwealth*, 205 Va. 277, 281 (1964); *Walton v. City of Roanoke*, 204 Va. 678 (1963).
73. *Cash v. Commonwealth*, 251 Va. 46 at 49 (emphasis added).
74. *Bristol v. Commonwealth*, 272 Va. 568, 575 (2006).
75. *Id*. (emphasis added)
76. *Id*.

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W. Edward Riley IV assisted Mr. Weiland on this article. Mr. Riley's full biographical information appears on page 27 of this Journal.