

# DWI Defenses- Fighting Against the “Presumptions”; and Fighting Against the BAC

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# I. What are the Presumptions, Exactly?

## A. THEY ARE NOT PRESUMPTIONS

a. Permissive Inference vs. Presumption- NOT  
tomato vs. tomato

b. Feel free to remind everyone of this!

c. What exactly is a "permissible inference?"

## B. Statutory Scheme

DWI- 18.2-266--- There are 5 ways to be convicted, if the person is operating:

- a. BAC .08 or higher (per 210 liters of breath)
- b. Under the influence of alcohol
- c. Under the influence of narcotic drug or any combination of drug which impairs his ability to operate a motor vehicle
- d. Under the combined influence of alcohol and drugs which impairs his ability to operate a motor vehicle
- e. Blood Content of .02 mg of cocaine, .1 mg methamphetamine, .01 mg of phencyclidine or .1 mg methlenedioxymethamphetamine (per liter of blood).

## C. Yap v. Commonwealth

49 Va.App. 622 (2007).

2. Yap was an attack on the presumptions, based on the SCOTUS case of Francis v. Franklin, which held that evidentiary presumptions against the defense violate due process.

3. Yap concluded that our presumptions are merely "Permissible Inferences", noting that our SCOVA had already adopted the fiction:

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I find that due process requires that [Code] § 18.2-269 be treated as creating a permissible inference, rather than as a mandatory rebuttable presumption, as that term is defined in *Francis*. I further find that such an interpretation of the statute is consistent with how the Supreme Court of Virginia has directed that rebuttable presumptions should be viewed. So construed, the statute is constitutional, both facially and as applied.

## II. Where are the "Permissible Inferences", Exactly?

Two sets of inferences :

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The "Presumptions" at Virginia Code Sec. 18.2-269(A)(3):

If there was at that time 0.08 percent or more by weight by volume of alcohol in the accused's blood or 0.08 grams or more per 210 liters of the accused's breath, it shall be presumed that the accused was under the influence of alcohol intoxicants at the time of the alleged offense.

Again, Yap tells us that the word "Presumption" when used against a criminal defendant, certainly, necessarily, means "Permissible Inference".

- b. The other "presumption" is that the blood alcohol concentration while driving may be inferred to be the same as indicated by the results of the breath or blood test, typically taken 60-90 minutes AFTER driving.

- c. This "lookback" presumption comes from the Davis case. Don't sleep on the Davis case! It contains a thorough discussion of both types of presumptions discussed here today, as well as the requirement that section 266(i) clearly applies only to the BAC at the time driving-- "Driving or Operating **While** .08 or higher ... ".

*Davis v. Commonwealth*, 8 Va. App. 291 (1989)

### III. REBUTTING THE PRESUMPTIONS

(oops!--They are "Permissible Inferences"!)

Negotiation- when a prosecutor justifies a non-offer with “he’s a .11, and I’ve got the presumption.”

2. Compartmentalize a case in terms of analyzing winnable RAS or PC motions, but switch gears and look at the strength of the case as a whole when you are trying to rebut the inference.

3. I.e., call upon the fact-finder to ask this question: *"If there were no BAC, would there be enough evidence here, including the video, etc., to convict?"* If not, argue that they should not convict on the BAC alone because these machines are simply not perfect. They are machines, run by computers, with lots of parts.
4. I point to the clock on the back wall of the Courtroom. (These clocks are right most of the time, but not always. When they are not working at all, they are still right twice a day). Likewise, bathroom scales. If you don't like the result, you can always try again-- and that is what the EC-IR II does, too!

5. Point to the fact that these machines don't even give the same number twice in a row-- whether for human breath or for ethanol standards-- they are always given a certain tolerance between consecutive or duplicate tests.
6. Point back to the statutes at Virginia Code § 18.2-268.10:

D. The court or jury trying the case involving a violation of clause (ii), (iii) or (iv) of § 18.2-266 or § 18.2-266.1, or a similar ordinance **shall determine the innocence or guilt of the defendant from all the evidence** concerning his condition at the time of the alleged offense.

## IV. TIME OF DRIVING ISSUES:

1. Rising BAC- “3 shots and I’m out” defense.
  - a. Practically, you need facts. This had to have actually happened- often, client made statements to officers that he had left the bar/friend’s house/ party very recently and only drank alcohol immediately before he left (and very quickly).
  - b. Most common with bartender/server types. Just got off work right before closing time, or waiting for ride? Beer and a shot. Lather, rinse, repeat. Pulled over 10 minutes later. Breath test 90 minutes after that.

# Timing of Driving

- c. So, what's the BAC at the time of driving? That is the ultimate question.
- d. Do you need an expert? Not always. Fact pattern above makes it "almost obvious" for some judges. See also, Kehl v. Commonwealth-- "the poor man's expert witness".

- e. Kehl case discusses two different experts, one from each side, but both describe the phenomenon of the absorption period, where the BAC rises for a period of time after the drinking is done:

[B]ecause the accepted knowledge of blood alcohol absorption and elimination rates makes it clear that the timing of the chemical test is critical in terms of the accuracy of the test to reflect the prior blood alcohol concentration at the time of driving, the test results cannot be conclusive. . . .

# Time of Drinking/Driving

... As such, the accused may challenge the test results by competent evidence, such as, for example, that he had not consumed enough alcohol in the relevant time to reach the level indicated by the chemical test results. Unless rebutted, however, the test results are sufficient to establish the blood alcohol concentration at the time of driving.

*Kehl v. Commonwealth*, 15 Va. App. 602, 605, (1993)

# Time of Drinking

Mr. Kehl was convicted and affirmed, because

Assuming arguendo that the *Davis* presumption had been rebutted, the testimony of the Commonwealth's expert provided a sufficient basis from which the trier of fact could, nevertheless, have concluded that appellant's BAC at the time of driving was at least 0.10 percent.

*Kehl v. Commonwealth*, 15 Va. App. 602, 606 (1993) ;

- f. A discussion of the Absorption period is also mentioned in the EC/IR II Operator's Manual, included as a part of their training! (Ask for Judicial Notice!). This is found at page 36 of the manual:

### **RATE OF ABSORPTION**

Absorption rates vary somewhat from person to person. Individual absorption rates can also vary depending on the condition of the body. Alcohol begins to pass into the bloodstream within one to two minutes after it is consumed. Nearly all of the ingested alcohol is absorbed within 45 minutes. During normal social drinking conditions, alcohol is often absorbed in less than 30 minutes.

g. What other evidence do you need for the "Rising BAC" defense to work?  
Oh, yeah, you need evidence!

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- i. FST's? These are very close to the time of driving, so, in a Rising BAC case, they can't be bad or the defense will lose. It is "ok" if they support PC, because they weren't designed to convict anybody BARD anyway.
- ii. PBT? Not necessarily, but it might help to dispute PC and let in PBT if it fits the "mouth alcohol" theory and the "rising BAC" theory.
- iii. Receipt from Bar? Bar-tender testimony? Drinking companions? Nice, but not always available, and not conclusive.

iv. Most likely, you will need your client's testimony, so "preparation, preparation, and preparation"!

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v. Finally, the Rising BAC defense requires an understanding of the interaction of the absorption period and the BAC on the Breath Sheet.

vi. We are actually expecting the drinking timeline to begin with a low number at the stop, estimated by our expert, and then the expert's opinion should also be able to match up the final result on the BAC with the drinking evidence and timeline.

# Time of Driving?

## 2. Accidents-- the 3 Hour Rule:

- a. Car is off or client is out of the car when police arrive.
- b. Permissive inference principle- that BAC during test is the same as it was while driving- built into 18.2-268.2(A):  
Requirement that a person be arrested within 3 hours of the offense.

- c. Three ways for Commonwealth to establish time T]of accident:
  - i. Client's statements.
  - ii. Witness observing the accident
  - iii. Police officer who claims to have driven by that area shortly before and remembers no accident.
- d. Remind Judges why this 3 hour requirement exists and why there must be NO reasonable doubt about the time

# Time of Drinking:

- e. The Drinking AFTER Driving Defense:  
FOWLKES; 194 Va. 676
  - iii. Burden is not on defendant to show that he drank after the accident, it's the CW's burden to show that he didn't drink alcohol after the accident.
  - iv. As a practical matter, plan to present some evidence of drinking.

## V. PARKING LOTS/PRIVATE PROPERTY ISSUES.

1. Implied Consent law is only triggered by driving/operating on a "Public Highway". Unfortunately, the definition will include some types of private property if they are open for public travel.
2. Start with 46.2-100 Definition, specifically referenced in 18.2-268.2 (Implied Consent Law).  
Note: Don't let anybody argue that the definition of Public Highway doesn't apply because it is in Title 46.2.

# Parking Lots

3. What type of parking lots triggers implied consent?

- a. Case 1-- Prillaman, and it's progeny. Drove 50 feet on a gas station's premises. Not a highway. Still good law, cited many times:

We conclude that the service station premises of Setliff were not “open to the use of the public for purposes of vehicular travel” and were, therefore, not a “highway” as defined in § 46-1(8), Code 1950

*Prillaman v. Commonwealth*, 199 Va. 401, 408, 100 S.E.2d 4, \_\_\_ (1957).

# Parking Lots

- b. Contrast Prillaman with Kay Management and progeny. Apartment complex with several buildings and parking lots between them which were all private property, but the Court found that they were open to public use:

The trial court ruled that the streets in the apartment complex were highways within the statutory definition. Kay, relying upon *Prillaman v. Commonwealth*, 199 Va. 401, 100 S.E.2d 4 (1957).

*Kay Management v. Creason*, 220 Va. 820, 831, 263 S.E. 2d 394, \_\_\_\_ (1980)

# Parking Lots:

- c. More recently, the Roberts case held that a simple parking lot at a 7-11 store is not a public highway.

The 7-Eleven parking lot was privately owned property. The owner of the lot, Southland Corporation, issued an invitation to do business to the public. Access by the public to the property was restricted to this invitation

*Roberts v. Commonwealth*, 28 Va. App. 401, 406, 504 S.E.2d 890, \_\_\_\_ (1998)

# Parking Lots

4. Can the Commonwealth still introduce evidence of BAC even if implied consent doesn't apply? How? They will try. See *Roseborough*, a case which is partially mooted by statutory amendment:

For those reasons, the admissibility of certificates of analysis must be carefully limited to situations in which the implied consent law, with all of its attendant protections, is applicable.

*Roseborough v. Commonwealth*, 281 Va. 233, 238, 704 S.E.2d 414, \_\_\_\_ (2011)

