

THIS IS A TRANSCRIPT OF AN ACTUAL DWI TRIAL IN THE FAIRFAX COUNTY CIRCUIT COURT. THE NAME OF THE DEFENDANT, who blew a .11 BAC, HAS BEEN CHANGED TO “PROTECT THE INNOCENT”. This trial included argument of a motion to suppress the arrest. The videotape is not transcribed here, but it is discussed in the argument of counsel and the Court’s ruling, leading to a surprise ending.

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Commonwealth of Virginia

vs.

JOHN DOE,

Defendant.

April 17, 2008

Fairfax, Virginia

The above-entitled matter came on to be heard before the Honorable Bruce D. White, Judge of the Circuit Court of Fairfax County, Virginia on April 17, 2008. The witnesses and court reporter were duly sworn and the following appearances were made on behalf of the respective parties:

On Behalf of the Commonwealth:

David Gardy, Esquire

On Behalf of the Defendant

Paul Liam McGlone Esquire

I N D E X

	Direct	Cross
Joseph N. Matzke	6	13
Commonwealth’s Exhibits		

P R O C E E D I N G S

(Court Reporter was duly sworn.)

THE COURT: Are you ready to proceed in the matter of Commonwealth versus John Doe?

MR. McGLONE: Yes, Your Honor.

THE COURT: Go ahead.

MR. McGLONE: Paul McGlone on behalf of Mr. Doe, the defendant. I want to offer the Court a little bit of an opening statement and I understand the Commonwealth goes first.

There is a pretrial motion, which is our motion to suppress. And I want to explain a little bit to the Court about the posture that we're in. I had originally filed a motion, the Commonwealth objected on notice; and gets it continued two weeks, and we were told to file specific factual assertions. There was a briefing schedule; I filed mine last Monday; they were supposed to file a response on Thursday or Friday.

I have not received a response. I don't know if anything has been filed in the Court file. Is there anything out there?

THE COURT: Not an answer. I just picked this one up and don't know what was --

MR. McGLONE: Your Honor, my objection raised originally was that the defense ought not be required to proffer facts in the case where the Commonwealth has the burden of proof.

There are no facts as I raised my objection and put them on notice that I'll be objecting to certain fourth amendment issues. I can anticipate, in fact, I tried the case downstairs and I can anticipate, particularly, I can anticipate that there's a video tape. And so I made that allegation. But, there's been no other factual allegations made in response to my allegations. So, the only facts before the Court on this motion are the facts set forth in that. I would ask that with regard to the motion, it be limited to the video tape because there has been no reply as originally ordered by the Court; as requested by the Commonwealth and ordered by the Court.

If I may, Your Honor, it just, it puts me in a position of sort of like saying okay, here we have to show your hand first, tell us what your objections are and kind of spell out what you anticipate the evidence to be; and the Commonwealth does have the burden of proof under *Simmons v. Commonwealth*, which was a DWI roadblock case.

The Commonwealth has the burden of proof, you know, every step on these fourth amendment suppression issues. And, as far as the video, Your Honor, we would suggest that maybe 10 or 15 minutes total, but we would suggest that the Court only needs to watch it once with respect to if we're going to watch it for a pretrial motion if the same facts would be before the Court as we proceed to trial.

THE COURT: There's no response in the file. Your memorandum is in here and there's also, I don't see anything that reflects a briefing schedule, but I certainly accept counsel's representations as to that and I assume the Commonwealth does as well.

THE COMMONWEALTH: Yes, Sir.

THE COURT: Do you have any problem with us proceeding in the fashioned outline?

THE COMMONWEALTH: No, Your Honor. If I can just get Mr. McGlone to clarify like what the specific outline is as far as his proposal. I have no problem with watching it, I believe, watching the video first. Is that the proposal?

MR. McGLONE: Well, the video, my suggestion would be if the video is going to be the only evidence with respect to this motion to suppress, it's the only thing I've offered in my statement of fact. Nobody else has offered anything else. So, we watch the video --

THE COURT: Well, tell me this, I don't know who you were in front of before, but the Judge indicated that he would hear the motion to suppress prior to trial?

MR. McGLONE: Yes, Your Honor. And the Court will hear the trial today also.

THE COMMONWEALTH: Your Honor, the pretrial aspect of it, Your Honor, is something that preserves the Commonwealth's right of appeal, if the motion is granted favorable to the defendant, so that it's not combined with the trial. That was understood from the previous hearing.

THE COURT: Your suggestion is that the Commonwealth is not allowed to put on any other evidence in support of the motion in opposition to your motion to suppress because they're the one video taping?

MR. McGLONE: I'm objecting to them offering any other evidence because they're the ones that asked for this schedule and haven't given me notice that they have any other evidence.

THE COURT: Well, I'm having a little tough time going through procedurally how you are proposing that we proceed. It sounds like you're proposing that you decide that the Commonwealth can show a video tape and that that then precludes the Commonwealth's evidence on the issue that's going to be subject to your motion.

MR. McGLONE: Slightly different, but the same idea, I would offer the video tape. I would say "it is what it is". And because I'm the only one that's offered evidence, so the Commonwealth -- I'm not telling the Commonwealth to offer the video tape, but yes, I'm bringing a motion, I'm offering this evidence that you see a car disappear from sight, then you see an officer catch up, you see a couple of other cars, and then he pulled over, this defendant's car.

I'm going to go over a little bit of the facts, Your Honor, if I may, then the car is followed for a little while, then as they pull over, they pull into I believe it's either an inactive bank or church parking lot. They park. There is nothing particularly aggravated about the driving behavior other than the allegation of speed, which is further back down the road.

And again, our suggestion would be that it seems that on camera anyway they've lost sight of the subject vehicle and then caught up again with a few vehicles, and pulled over the second vehicle that they came to.

And then he gets out of the car and starts conducting the sobriety test, Your Honor. We're going to get to an issue, I'm going to skip ahead a little bit. But, he conducts the sobriety test and the sobriety tests are not in any way showing that he's falling down drunk. They're not really showing that he's clearly intoxicated. There are some suggestions that maybe things weren't perfect.

But, there are some very good signs of sobriety. And I want to call the Court's attention to that, particularly when we get to the subject, which is going to be another issue the Commonwealth will want to address.

But, on the probable cause objection the Stacy case says that under certain circumstances and the guidance of the Court they can offer evidence of a preliminary breath test; the alc osensor is the brand name of the device they use, they carry it in the car and they offer that as a preliminary breath test.

The statute, 18.2-267, says not, I don't know to what extent I need to go into this, but the statute says "not admissible in the prosecution under 18.2-266", so it's another statute, we're here on 266. And, then it says that "the officer shall advise the person of all their rights under this statute."

So, we'll get into a little bit of a debate about that, about whether the Court should hear that evidence. If the Court hears evidence that he blew a number on a breath test and the Court wants to take that into account for determining probable cause, well that may go a long way towards establishing the Commonwealth's case. I would ask to stop the tape before, I'm not sure if the officer reads that number out loud or if he just says I'm going to place you under arrest now. But, we do get to that point on the tape.

We would be arguing, Your Honor, that that is probably not a, not a proper foundation, and then there's some other issues which we may in fact want to preserve for appeal. But, that wasn't addressed in the Stacy case and that they may have been addressed here and there in other cases.

So, our primary focus of this is going to be ten minutes into this, when all the testing is done and we get to the alc osensor test, there's a conversation back and forth between the officer and my client where you'll hear my client's voice and you'll hear him talking clearly and coherently and asking questions in response to what the officer has advised him.

And, there are questions that -- I hear the questions, and I'm thinking, "oh gee, this guy sounds like he's educated, this guy sounds like he has" -- the point being that he's clear and coherent. There's not any sign of intoxication there. It's entirely consistent with sobriety and inconsistent with intoxication. We're asking the Court to view the tape as a whole and to see if we've got somebody here who has failed sobriety tests and ought to be arrested because he has some alcohol on his breath or if we've got somebody who has passed a sobriety test and ought not be arrested for lack of probable cause.

THE COURT: Why wouldn't we just do the suppression, since it's a bench trial, in the course of the DWI trial?

MR. McGLONE: Well, once jeopardy attaches the Commonwealth would lose their right of appeal. I'm anticipating, that's why we set it up this way. And that's what the Stacy case sets up. The Stacy case -
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THE COURT: Well doing that, then wouldn't we ordinarily not have the suppression motion and then immediately after it have the trial because of the PBT stuff?

MR. McGLONE: Well, that's a bench trial. We certainly wouldn't in front of a jury. We're going to show the thing once, if the Court admits the PBT. I think the understanding has been entrusted as officers of the Court, is that that PBT is not going to be taken into account for purposes of guilty or not guilty.

Going ahead, Your Honor, just finishing with my opening, there ultimately will be a breath test and if there's a valid arrest, there's probably a valid breath test. The stop in this case was shortly before 10:00 at night and the breath test was given I believe at 11:27 over here at the jail. And, as is often the case, there's an hour and a half between the driving and the breath test. So, he blew a .11 at the breath test.

We don't have a whole lot of evidence of anything else. I don't think we're going to see any evidence of anything else after the video tape shuts off -- so, all we've got is the breath test. The .08 or higher is not a presumption any more. It says that in the code, but it's a permissible inference. We've got a statute that says that it has to be taken into account with all other evidence and I'm talking about evidence of sobriety and evidence, lack of any intoxicated driving type behavior.

When we have speeding, we don't really have any authority to say that speeding is evidence of intoxication. Speeding happens all day long and probably a small percentage might have had something to drink. But, the type of driving that we usually associate with alcohol and intoxication, sometimes even slow driving, erratic driving, lane shifting, things like that.

In those cases, like if we've got a car going squarely down the center of his lane, signals, find a safe place, but does all the right things I think that we'd expect a driver to do, he's getting a speeding ticket and then it goes into, there is an odor of alcohol and they're outside for a while. I think, you know, to a great extent the video speaks for itself.

THE COURT: Okay, well we're going to break at 1:00 if we're not done by then. So, we need to get going.

THE COMMONWEALTH: Your Honor, my preference would be just, as Your Honor said, just to do the trial and as issues arise with regard to reasonable suspicion for the stop and the probable cause for the arrest, we address those perhaps as we go along.

I do want to say that the defense evidence of the video tape will go into those issues and perhaps we can just revisit --

THE COURT: I understand that the reason the Commonwealth, the defendant had suggested doing it in the motion to suppress first was to preserve the Commonwealth's right to appeal. If you're not interested in that, then there's no reason to do it in that order.

THE COMMONWEALTH: I really don't know, other than what Mr. --

MR. McGLONE: Here in Fairfax, Your Honor, they don't, in Arlington they do. So, it was laid out that way two weeks ago, but I have no problem going straight ahead through the trial. If the Commonwealth wants to waive that issue, then we'll go ahead and just do a regular DWI trial and we'll take the suppression motion up as it comes.

THE COMMONWEALTH: Yes, Sir, Your Honor. And if I may just add, because certain judges do and don't allow the PBT in for, if probable cause for the arrest is challenged --

THE COURT: That's generally, probable cause is allowed, but not for guilt.

THE COMMONWEALTH: Okay. So, it will be admissible.

MR. McGLONE: Your Honor, I'm going to ask you not to make a ruling on that --

THE COURT: I'm not.

MR. McGLONE: I'm going to argue based on foundation and case law.

THE COURT: I agree. Okay, ready?

THE COMMONWEALTH: Yes, Sir, Your Honor. Officer Matzke. He is our sole witness, Your Honor.

OFFICER JOSEPH MATZKE,

a witness, was called for examination by counsel, and having been first duly sworn by the Court, was examined and testified as follows;

DIRECT EXAMINATION

BY THE COMMONWEALTH:

Q Could you state your name for the Court, Sir?

A Joseph Matzke.

Q Officer, could you state your employment, please?

A Yes, Sir. I'm a police officer with the Fairfax County Police Department.

Q Okay.

And, Officer Matzke, on September 21, 2007, were you so employed, in uniform and displaying your badge of authority?

A Yes, Sir, I was.

Q Okay.

On that occasion, did you have occasion to come up into contact with the defendant seated to my right at counsel table on a public highway in Fairfax County?

A Yes, Sir, I did.

Q And, what public highway was that?

A It was Algonquin Parkway.

Q About what time do you remember seeing the defendant?

A At approximately 10:00.

Q And what were you doing at that time?

A I was running stationary lidar.

Q Okay. And what is lidar?

A Lidar is basically like a radar system except it uses laser instead of radar.

Q To catch speeding?

A Yes.

Q And, when you were running lidar, what if anything first brought your attention to the defendant's vehicle?

A I observed the vehicle traveling at a high rate of speed --

MR. McGLONE: Your Honor, I am going to object to the speed if he's going to offer speed without a foundation. I don't know if there's a calibration for the lidar, but that would be my foundation objection that.

THE COURT: Objection to the high rate of speed sustained.

BY THE COMMONWEALTH:

Q Was your lidar unit calibrated?

A Yes.

Q And when was it calibrated?

A The 9th day of May 2007.

MR. McGLONE: I'm going to waive any objection to the speed bit, Your Honor, at this time.

THE COURT: Commonwealth One will be received.

(The document previously described was marked as exhibit number 1 and entered into evidence as such.)

BY THE COMMONWEALTH:

Q And, was the defendant's vehicle the one that passed through the beam at that time?

A Yes, Sir.

Q And what was the speed number?

A It showed 65 in a posted 45 mile per hour zone.

Q And what did you do after you noticed that?

A I then observed the vehicle pass me. I had the vehicle coming towards me. I then had to do a u-turn and catch up to the vehicle. I caught up to the vehicle at Algonquin Parkway at the intersection of route 7 and conducted a traffic stop at that point.

Q And do you remember what time the traffic stop was?

A I believe it was pretty close to the 10:00 p.m. time.

Q And, what offense did you actually stop the defendant for violating?

A Speeding.

Q Okay.

And, did you approach the car?

A Yes, Sir.

Q And what if anything did you notice about his person?

A I could smell the odor of alcohol about his person.

Q And anything else about his person?

A No, Sir.

Q And, did the defendant say anything to you at that time?

A Yes, Sir.

I had asked him, because of the odor of alcohol, if he had anything to drink. He stated to me that

he had one drink an hour prior.

Q Okay.

And, was there anybody else in the car?

A No, Sir.

Q At that point, did you ask for his license and registration?

A Yes, Sir. I did.

Q Was it given?

A Yes, Sir.

Q Okay.

And what did you do then?

A I then asked if he would be willing to do a field sobriety test, which he agreed to do.

Q Okay.

And, where were these tests conducted?

A Outside the vehicle. Where he had stopped was the intersection of Dranesvilles Road and Route 7 at an old bank parking lot.

Q Okay.

And, what part of the parking lot, was it paved?

A It was a paved parking lot, yes, Sir.

Q Okay.

Was it a flat surface or was it --

A A flat surface, yes, Sir.

Q And, did you ask the defendant if he had any physical illnesses --

A Yes.

Q Or anything like that that would affect his performance?

A Yes, Sir. I asked him if he had any physical or medical issues that would hinder him in doing any of the tests. He said no.

Q And, what was the first test that you instructed him to perform?

A The first test was the one legged stand.

Q Okay.

And what did you instruct him to do to perform that test?

A I told him to start with feet together, hands down to his side, pick up either foot he wanted to off the ground with his toe pointed up, look down at his foot and count out loud.

I asked him then if he understood the instructions. He stated that he did.

Q And how long was the test supposed to last?

A I did not give a specific time.

Q Okay. All right.

And, could you describe what you saw when the defendant performed that test?

A Yes, Sir.

He dropped, he lifted his left foot. He dropped his left foot four times. He also did not keep his hands down to his side. His hands were approximately, I'd say about a foot away from his body, both his left and right hand.

He also used his left hand to push against his vehicle to keep himself steady.

Q Okay.

And, do you remember how long he counted for?

A I believe it was roughly 16 seconds, or he counted to 16.

Q And, do you remember when his foot went down?

A In those 16 seconds I did not recall specifically, no, Sir.

Q And when you say it went down, did it go part of the way down to the ground or did it go all the way down?

A By going down, touching the ground with his foot.

Q And did he perform that test one time or more than one?

A One time.

Q Okay.

And, what was the second test that you asked him to perform?

A The second test was the walk and turn.

Q Okay.

And, could you describe how you instructed him to perform that one?

A Yes, Sir.

I instructed him to start the same way as he started the previous test, with his hands down to his side and feet together. I instructed him to look down at his feet and take nine heel to toe steps making sure that his heel and toe made contact with every step, take nine steps up, slowly turn around and take nine heel to toe steps back.

Q Okay.

A He said that he understood.

QO Okay.

And, could you describe the performance on that test?

A Yes, Sir.

Approximately 12 out of the 18 steps that he took were not heel to toe. They were approximately three inches or more apart. He also seemed unsteady on his feet.

Q Okay.

Did he perform that more than once or just the once?

A Just one time.

Q Okay.

Were there any other tests?

A Yes, Sir.

I gave him the ABC test.

Q Okay.

And what is the ABC test?

A Basically I asked him if he knew his ABCs and he said he did. I instructed him just to go from letter a to letter z.

Q Okay.

And, what did you observe when he performed that one?

A As he got to letters e f and g he stopped and then started again back at e and continued on through.

Q Okay.

And, did he just perform that one the one time?

A Yes, Sir.

Q Were there any other tests performed, field sobriety tests performed?

A No, Sir.

Q Okay.

And, did he, during the course of the field sobriety test, did he make any other statements to you?

A Not that I can recall, no, Sir.

Q And, after you had him perform the field sobriety tests and he completed the last one, what did, did you offer him a preliminary breath test?

A Yes, Sir I did.

Q And what if anything did you say to him before?

A I just stated that I would offer him a preliminary breath test, instructed him basically all he had to is blow through a tube. It would give a preliminary reading of his breath test. He did not have to take it if he didn't want to. He did eventually agree to take the test.

Q Okay.

And did you make any comments about the results of that?

A No.

Q And, what was the result of that --

MR. McGLONE: Objection, Your Honor.

THE COURT: Okay.

MR. McGLONE: Your Honor, I'm going to argue, and I think after you see the tape, the statute 18.2-267 spells out certain criteria, certain specific things that are supposed to be done, how it's done and how he's supposed to tell him that it can't be used against him in the prosecution. And, I think we have to hear the exact

conversation.

The officer said that he advised him and offered him a test. We don't dispute that he agreed to take it ultimately, but this is a conversation that they had back and forth.

And then we're going to get into --

THE COURT: And this conversation is on tape?

MR. McGLONE: It is on tape, Your Honor. And I --

THE COURT: So, you want me to withhold ruling on that until we view the tape?

MR. McGLONE: I do, Your Honor. And then I'm going to have some argument at that point.

THE COURT: I think that's a reasonable way to proceed.

MR. McGLONE: Just to speed things up, we would stipulate to the venue and the county line. We would stipulate to the venue and the identification of the defendant. And I think that, as I said, if there's a valid arrest, then there's a certificate that's going to flow from this, we see the certificate and the time on the certificate and we'd have no objection to the Court when the time comes, that's, when the Court gets to that point, when that certificate is also part of the case, I don't know what foundation he's going to spend time building.

THE COMMONWEALTH: I appreciate it.

MR. McGLONE: The arrest was within three hours of the, those things we'll stipulate to.

THE COURT: Okay.

THE COMMONWEALTH: Do I understand the Court's preference to advance beyond the PBT results at this time?

THE COURT: Correct.

THE COMMONWEALTH: Okay.

BY THE COMMONWEALTH:

Q Okay.

After the PBT was given, what did you do next?

A I then placed the defendant under arrest for driving while intoxicated.

Q Okay.

And, what did you do after you placed him under arrest?

A I then transported him to the Fairfax County Adult Detention Center and had him do a breath test at the ADC.

Q And did you read the Miranda rights?

A Applied consent, yes, Sir.

Q Okay.

Or, did you read Miranda to him?

A No, Sir, I did not read Miranda to him.

Q Okay.

But, you did read implied consent. Where was that read?

A At the ADC prior to the breath test.

Q And what did you advise him of? Did you read, did you read him something containing the implied consent?

A Yes, the implied consent in its entirety that they have at the ADC.

Q Okay.

And did the defendant agree to have his breath tested?

A Yes, Sir, he did.

Q Okay.

Where was that test administered?

A At the ADC.

Q Did you observe the preparation to that test?

A Yes, Sir, I did.

Q Did you watch him for at least 20 minutes before the test?

A Yes, Sir.

Q Okay.

During this time, during the 20 minutes, did he eat, drink, smoke, belch or regurgitate?

A No, Sir.

Q And did you actually watch him blow into the machine?

A Yes, Sir, I did.

THE COMMONWEALTH: If I may retrieve the certificate of analysis, Your Honor, from the file.

May I approach the witness?

THE COURT: Uh huh.

BY THE COMMONWEALTH:

Q Officer, do you recognize that document?

A Yes, Sir, I do.

Q Okay.

What is that?

A This is the printout of the final printout --

Q Okay.

And, how do you recognize that document as what you're saying?

A My initials and my employee identification number are correct.

THE COMMONWEALTH: I move the certificate into evidence.

MR. McGLONE: Objection, Your Honor, we still have a pending motion to suppress.

THE COURT: I'll withhold dealing with the admissibility of that.

THE COMMONWEALTH: I believe I have no further questions at this time.

THE COURT: Okay.

CROSS EXAMINATION

BY MR. McGLONE:

Q Before we watch the video, officer, I just want to ask you a couple of things. Where were you originally parked running lidar?

A I was in a median just south of Potomac Avenue on Algonquian Parkway.

Q Algonquian Parkway, Fairfax County Parkway turns into Algonquian Parkway?

A Correct, around 7100 block, correct.

Q And so you were facing back, you were facing towards Great Falls?

A North, correct.

Q And he came on by you, you're looking at him, so you had to make a u-turn after he passed and you measured his speed?

A Correct.

Q After he went on by?

A Correct.

Q Okay.

And then, you caught up with him at route 7, how far is that from where you were parked?

A I would say a little under half a mile, I'm not sure of the exact distance.

Q Okay.

And so when you went to make the u-turn to come out of the median, did you make a u-turn to your left?

A Yes, Sir.

Q Your left?

A Yes, Sir.

Q And when you hit your blue lights, did that video tape recorder automatically come on?

A Yes, Sir, it does.

Q Okay.

So, as you get down the parkway, you would then make a right onto route 7 and then you're heading towards Sterling?

A Correct.

Q But you're still in the county of Fairfax, I understand that --

A Correct.

Q But, you're heading west on 7, the right hand -- and there's other traffic, if anybody came north from Fairfax, from Fairfax County Parkway they could make a left onto the same set of ramps that you had to go down?

A Correct, they would.

Q They make a left hand turn, it's not a full cloverleaf thing?

A Correct.

Q Okay.

Did you see other traffic coming from that direction making a left?

A Yes, Sir.

Q And then you -- this car and he went on down, now was there any problem with him pulling over? He did not accelerate or anything?

A No, Sir.

Q He slowed down, did he put on his flashers, his turn signal?

A I do not recall if he used his turn signal or his flashers.

Q Anything else about his driving? Did he hold his lane and then pull off the road when he found a parking lot to pull into? Is that what he did?

A Yes, Sir.

Q Now, you say that you asked him if he had any physical problems that would prevent him from doing sobriety tests, you asked him that before you told him what the tests would be. Is that correct?

A Correct.

Q Okay.

Now, on the tests themselves, what I've heard is, I've heard a one legged stand, a walk and turn and then an ABC test. Are you trained in the NHTSA standard test, the National Highway Traffic Safety Administration test?

A Yes, Sir.

Q Can you tell the Court which tests are the NHTSA tests?

A The walk and turn test, the one legged stand test.

Q So, those two are the NHTSA test, which also uses an HGN test, which we don't use much in Fairfax?

A Correct.

Q Okay.

And, so with the NHTSA tests, for the one legged stand, are you trying to present this test and use it as a standardized test like the way NHTSA designed the test?

A NHTSA specifies at least 30 seconds. I did not instruct a time.

Q Okay.

Because, isn't it true that the standardized tests would only be valid if you presented them in a standardized manner?

A For the baseline, my experience, administering the test and observing the test.

Q And, so the same would apply I guess on the walk and turn. Is yours, does yours vary from the NHTSA or is it pretty much the same?

A The same.

Q It's pretty much the standard test, okay.

A Yes.

Q So, in conducting the walk and turn test, your testimony is that he went out nine steps and came back nine, are those the right number of steps?

A Correct.

Q Okay.

So, he did a total of 18 steps?

A Correct.

Q And he turned around and came back, turned around okay?

A Yes, Sir.

Q And, as instructed, this would be walking heel to toe, one foot in front of the other, as if almost as if on a balance beam. Is that correct?

A Correct.

Q Okay.

So, if somebody were to step off the line, then that would be like falling off a balance beam?

A Correct.

Q Okay.

And this test, wouldn't you say that an intoxicated person would not effectively be able to walk up and down a balance beam?

A I guess, but an intoxicated person may be able to walk up and down a balance beam.

Q Okay.

Now, he walked one foot in front of the other, but your testimony was on 12 of the 18 steps he did not touch heel to toe?

A Correct.

Q Is that correct?

A Yes.

Q Okay.

So, he did effectively, using that analogy, stay on the balance beam?

A Yes, Sir.

Q Okay.

And, you say his arms were out, we'll see that on the video, his arms were out approximately a foot was your testimony?

A Right.

Q And, if you recall from your NHSTA training, do you recall what they're saying is that these tests originally were designed to show whether or not a person would be suspected of being over .10 with a 62 to 65 percent accuracy, is that what they taught you?

A I can't recall the specific percentage.

Q Okay.

But, the tests themselves are designed to help you make a probable cause determination?

A Correct.

Q And not that any one of these tests would be designed to prove anybody guilty beyond a reasonable doubt?

A They're just a tool to let us know whether or not someone would be intoxicated, yes, Sir.

Q Okay.

You testified when you got out of the car, when you first approached him you smelled an odor of alcohol. I haven't heard you testify that he had slurred speech or any other behavioral clues that you're usually looking for with DWI, was there any problem with his speech?

A No, Sir, not that I recognized.

Q Did you notice a stutter at any point during the night?

A No, Sir, not that I can recall.

Q Okay.

Except with the alphabet he got to the letter g and went back to e?

A Correct.

Q Kind of like a stutter, e f, g, e, f, g, --

A I don't guess you call it a stutter.

Q And other than that he did the rest of the alphabet okay?

A Yes, Sir.

Q He stopped at z?

A Yes, Sir.

Q And you understood everything that he was saying to you that evening?

A Yes, Sir.

MR. McGLONE: Okay. Your Honor, at this point, I understand it's still the Commonwealth's case, but I'd like to go back to the issue on the suppression motion and go ahead and show the video tape.

THE COURT: Any objection?

THE COMMONWEALTH: No, Sir, Your Honor.

MR. McGLONE: I don't know if this thing is cued up or if it's ready, if you want to help us with that, officer.

THE WITNESS: It should be ready to go.

MR. McGLONE: Okay.

(Video tape was played -- approximately 11 minutes)

MR. McGLONE: That's long enough to let the Court know the officer had just as much trouble getting that tube into the device.

At this point, Your Honor, I think we are where we said we would be as far as the Court has seen, and I am proceeding with my motion to suppress, first of all. The defense would submit that there really is no doubt, looking at this video, that the cruiser went very fast to get on down the road and get to that intersection and there were no cars in sight, and from a couple of different angles as we approach. And we see a blinker on the right, we think that's a car -- and he gets to the intersection -- there's no car. There's another car coming from the other direction as was described in the testimony.

And then he goes around that car and gets to the first next car, which really was over to the left. We never saw that car coming down the right or left ramp really. But, as everybody approaches 7 they've got to be on one lane anyway.

So, he pulls over that next car. Now, the defense theory of innocence would be that perhaps he's pulled over the car that he measured, perhaps he's pulled over the next car, perhaps a car that came on by and came by him, or perhaps a car that came from another direction.

But, there's no identification of the car by the tag number and this is all bush, bang, boom, pull over the next car, and he's confident, he just doesn't know that he's got the right car. We're looking at the video. And, based on the stop of this vehicle itself, it's not how we usually write speeding tickets. We usually see the car, stay with the car and pull the car over and write the ticket. We don't radio on down the road and have somebody else pull over the car by tag number.

Generally the only witness in the case to the speeding is the officer, the officer sees the driver, identifies the driver and they don't lose sight of the driver.

The case where we have a really high speed case and the police come upon another car and it looks the same and the defendant finally takes the stand and says well, right before he pulled me over cars did go whipping by. And, you know, there's a defense theory of innocence. Now, that's with respect to the stop, Your Honor.

I'm going to go ahead and get to the next issue.

A couple of things that happened with these tests, Your Honor. The officer demonstrated the test and verbally, this part was cut off, I didn't -- if I may just step in front, Your Honor. These tests are always demonstrated. He said, well point your toe up and raise your foot six inches. And the point I want to make, Your Honor, is that when I, if I fall over, somebody catch me, but, if I point my toe up or even keep it at a 90 degree angle with my leg and I go like this, some part of my foot is going to be six inches off the ground and some part isn't.

So, if the heel is four and toe is 12, if that's good enough, fine. But, if I'm really required to get the heel six inches off the ground, it makes the test a lot harder and we lose the benefit of having a standardized test.

So, the instructions that are given, it's not clear what you're raising six inches off the ground because you necessarily have the toe and the heel, my foot maybe a foot long, you know, even at that angle one is six inches higher than the other. So, the toe is necessarily much more than six inches. If all I had to do was get the toe six inches off the ground, it's a much easier test. What is the standard?

The testimony was that he touched the car. He's the one that put him standing right there. He's

right next to the car. So, if he's swaying a little bit and the car is there, I didn't show him that, I wasn't really watching for it. So, if the Court saw it, you know, there it is. But, there's a car there, he was told to stand right there. He did walk away and threw his keys or something and you know, came back to the same spot.

And he came back to the same spot like somebody that's following instructions. And, I want to emphasize, Your Honor, and I know the Court heard it because I asked you to listen carefully, the conversation and the, the coherent conversation and the voice inflection of a person who is trying to be a little bit persuasive, trying to get an answer to a question, trying to understand.

And, it necessarily, and all of that is there throughout, but especially as we get to the end there with, well, what will happen. And, there's kind of a raised voice and the exact opposite of what we expect to see from an intoxicated person. I've said, you know, an educated person, but a person who's coherent and capable of a sophisticated back and forth conversation.

But, the officer's advice on this has been, first of all, it's not admissible in Court. And, that's the first problem that we get into. And counsel will argue the Stacy case that says even though the statute says, 267 says, and I can just go down the line here on this, Your Honor, 267 says that the results shall not be admitted into evidence in any prosecution under 266. Has that been waived, Your Honor? Because we're proceeding to trial. You know, this was part of what we were trying to keep out. But, I'm arguing it's not admissible, Your Honor.

But, I think it's also not admissible because the officer has advised him that it's not admissible. He hasn't said, and I'm not saying he consciously tricked him by saying it's not admissible in a prosecution, it won't be admitted to Court. That's what he said, it's not admitted in Court.

And we have the case of the town of -- Thomas v. the Town of Marion, 1983, this is the one that stands for the proposition that where a person submits to a breath test and gives his actual consent to a breath test after being misadvised by the police, the test is suppressed.

That consent was given subject to bad advice. That's Thomas v. the Town of Marion and it's discussed again in the Overbee case, which is some issue of whether he drank after driving and whether the test was, I think most of those might have to do with whether the test was given within the two hour rule. Again, those cases have to do with the final breath test and not an alcosensor test.

But, then we have the question of the Stacy case says well, we'll let it in if the defense opens the door by raising the issue of probable cause. Well the defense is raising the issue of probable cause, Your Honor, because we're saying that he walked on a balance beam effectively. You know, would have not fallen off a balance beam, turned around and came back.

The Court can judge for itself how close the feet were together. We're dealing with a black and white, well, I think it's color really, but it's, you know, a grainy tape. And we're happy to have it if it tends to show what actually happened, what actually was said, to the extent that there's variance slightly between what the officer said and what we actually saw.

I'm not suggesting there was any misrepresentation there, it's just it's nice to see what the tape says and what actually happened. At the end of the count of 15 or 16, I think he got to 15 and the officer testified it

was 16. I'm not sure if we could see him going down. The officer doesn't say when he went down or when he touched down, but there was some, sort of some, I would say a little kicking back and forth, a little shimmy back and forth. I don't think he touched down then, if he did, he was moving. But, he kept it up for a while.

At the end of it the officer says, and we heard it on tape, okay, that's good. That can be characterized either way. I like to characterize it as "that's good", I saw the test, I thought it was pretty good. That's what the officer said to him at the time.

Then, the walk and turn test was pretty good. Again, as if on a balance beam, he successfully counted to nine, he counted the numbers out loud, just like he did the alphabet pretty well. He's counting okay, he can be heard. All of these things, we've got the admission that he had something to drink.

In testimony the officer said he detected an odor of alcohol. In the field we heard the officer say well, I detect a slight odor or alcohol. So, it's there, a slight odor or alcohol. Usually we hear a strong odor, we hear moderate odor. Very rarely do we hear a slight odor of alcohol when somebody is alone in the car. A slight odor of alcohol is at the low end of all this. And, that's really what all of this is--- is this a situation where the person has to be arrested?

Now, there's one other case, Your Honor. And I don't know if the Court is familiar with it, it's a civil case and it talks about, specifically about this type of alcosensor case. This was a case where Dick McGarry, who is our local expert on toxicology, was called in to testify in a civil case, Santen v. Tutthill and Winchester Family Billiards. I brought copies. I don't know if the Court wants to hear about it or look at it.

But, the Court, they had proffered the results of the alcosensor and the Court at trial ruled that, the Court of Appeals said, according to the proffer, the type of machine used to administer the test was accurate and thus also the results, assuming the machine was regularly calibrated.

So, the test -- and then it says but there was no evidence by way of proffer otherwise that the machine used to give the preliminary test had been regularly calibrated. We see calibrations all the time and we see them in the code for the breathalyzer machine, the certificate has been offered into evidence, we see it all the time. We saw it for lidar today.

So, we've seen two statutorily regulated calibration standards. There is no set standard, but if they have a standard in the regs, but we have no evidence today, non proffered yet that this device has been calibrated.

So, I submit per the Santen v Tutthill case, that that should be a necessary part of the foundation. It's an issue that was not raised in the Stacy case when the Court of Appeals said we can admit these things for purpose of probable cause.

So there was two or three issues there, Your Honor, how he was advised, whether he fell on things and then we look at the statute itself, a b, c, d, e, f, g, I'm not going to read the whole thing, Your Honor, f says, police officers or members of the staff, upon stopping a person suspected shall advise a person of his rights under the provisions of this section. So, we've got these different rights.

It talks about the method to be used, they used that method -- alcosensor -- it says -- one of the

things it says is that he may be arrested if there's presence of alcohol and then finally it says, it shall not be admitted to evidence for any prosecution under 266 or 266.1.

The purpose of this section being to permit a preliminary analysis of the alcohol content of the blood of a person suspected of having violated the provisions of 266 or 266.1.

That purpose statement there, Your Honor, confirms what paragraph a says, which is that the suspect shall be entitled, this is a defense statute, that's the purpose of it, they reiterate that down at the bottom, is to give somebody the ability to get on home safely without being arrested if an officer is mistaken. It's not meant to be a prosecution statute. They have their statute, they have their breath test after he's been arrested.

This is written in to be a preliminary screen and they talk about it as an entitlement, take it or leave it, it won't be used against you. And that's what it is.

Now, we've come to the point where some judges will view this, and I'm going to proffer this, Your Honor, you can take it or leave it, it's not a Court of Appeals type of thing, but, some judges will draw the line and say if the officer says to him it can't be used at trial, it won't be used to prove you guilty, but it can be used against you if probable cause is an issue, if they use that magic language, well that seems to track the case law as reconciled with this statute.

That wasn't given here. What was given was more of a misleading thing, that it won't be used against you and then based on that he took the test.

THE COURT: All right.

THE COMMONWEALTH: I think the first issue I need to address is the stop.

THE COURT: You don't have to worry about the stop.

THE COMMONWEALTH: Okay, Your Honor.

At this point, I will argue just what we saw on the tape and what the officer's testimony was and, you know, at the end of that, wait for Your Honor's ruling as to the results of the PBT, whether they're going to come in.

But, what we heard from the officer was that he detected an odor of alcohol once he approached the vehicle, I think from the driver. That was what he said on the tape as well. He said slight odor on the tape.

And, when the officer asked if he had been drinking, he did admit to drinking, he said he had one. So, at this point when we're examining the officer, the officer is observing for purposes of whether or not there's probability this person had been drinking and it may be influencing his driving.

We have an odor of alcohol that he immediately detects and an admission to drinking. He asks him to get out of the car and perform three field sobriety tests. Those tests were not, certainly not the tests performed by someone falling down drunk, but that's not what the statute requires. But, they were, there were cues that the defendant didn't perform the tests very well, Your Honor.

On the one legged stand, the video showed, we couldn't see the foot go down. The car was actually blocking where we would see the foot go down, but the officer testified that in the 16 seconds the foot went down four times.

That there was also some bit of wobbling, Your Honor, with regard to the defendant's balance. But, the officer at that point stopped the test after the four steps went down in 16 seconds. But, we couldn't quite see from the video exactly where in those 16 seconds the foot went down.

On the walk and turn, certainly from the officer's vantage point, and he testified as to that, it was a better vantage point to see exactly how far apart the steps were. It was a better vantage point from his testimony and his position than we had watching the tape. He said I believe it was 12 of the steps were not heel to toe. He was instructed at least -- so, at this point, Your Honor, the two tests that the defendant performed -- certainly not perfectly.

And, in the officer's case, he had seen two tests and they were not performed as instructed. The third test, the abcs, which were, should be, people in a normal state should be able to do ABCs. The officer noticed and the tape showed as well that there were problems in the first half there, as Your Honor saw, that wasn't a perfect test, as you saw on the tape, he did go a through z, but there were some problems in there.

At that point, if I may just, the video did show that at one point there was some discussion, well, can't I just leave my car here, can't you just write me for 60 and can't I just leave my car here and go home. There was never a moment that I heard when he said, you know, I haven't been drinking, I'm not intoxicated and I'm fine to drive. He said, well, can't I just leave the car and get some other way home. And that's suggestive of perhaps some knowledge by the defendant that he might be a little bit over the limit, Your Honor.

And, at that point, we're dealing with everything the officer has seen, and at that point, even without I would suggest, the PBT results coming in, we have the PBT given and everything we have so far, would give the officer probable cause to arrest for the DWI or the DUI now.

If the results were -- I'll just await Your Honor's ruling as to the results. But, as far as the case law is concerned, defense counsel, from what I've heard, is saying and agreeing with me that the Stacy case does, did say, and I do have a Fairfax county case that says the same thing, that for probable cause purposes, even where the officer says is not -- won't be used against you in Court, it can come in for probable cause purposes, I believe the officer's exact statement here was that it was not admissible. I think that not admissible, won't be used against you in Court are, for purposes of, a difference without necessarily an effect as far as whether or not that would be, that would take it out of Stacy, the Commonwealth and the case could show Your Honor if Your Honor would like to see the Fairfax County case.

THE COURT: I'm happy to see anything you want me to see.

THE COMMONWEALTH: Okay.

THE COMMONWEALTH: Now, looking at the ruling in that case, Judge Wooldridge said, I think the ruling there was that before hearing potential evidence, probable cause was lacking and therefore -- and I think that's kind of a threshold issue for the Court to look at it, and say well, I've got probable cause anyway, we don't even have to go into all this alcosensor stuff. But, in that case they do use the language can't be used against you, they don't use exactly the same language they used here, which is it will not be -- sorry, I wrote it down when I heard it, it will not be, not admissible in Court, the language used today.

THE COURT: I don't find that Judge Wooldridge's case is on point.

The problem I've got is that the wording was that this test is not admissible in Court. And a clear inference and the context when viewing the video tape indeed was that it really can't be used against you. And I know, I think the officer quoted the code section accurately.

But, in the context of someone stopped on the road that doesn't know what's in that code section, to simply say it's not admissible in evidence, when in fact in principally every DWI it is used against the person who takes it if it's over the limit, I think is not the entire story.

I suspect that the officer in giving the PBT was hoping that it would be at an okay level because the test results from all the other things were so marginal. The inference from the other questioning was that he was going to be arrested if he didn't take the PBT test. And that coupled with it can't be used against you is such that, I think it is, I don't guess I would call it a misadvisement, but it certainly to me is not a full advisement. So, I suppress the PBT test.

So far as the probable cause, I don't find any driving conduct visible on the tape that gives rise to probable cause either, or to guilt of DWI. We do have the speed. Speed in and of itself, I find not to be sufficient to get probable cause for DWI nor is it sufficient when coupled with observation of slight odor of alcohol.

And, the results of the tests that I view on the video tape, which I viewed him largely to complete successfully.

So, based upon all of things, it appears to me that this case is dismissed. Thank you.

MR. McGLONE: Thank you, Your Honor.

THE COMMONWEALTH: Yes, Sir.

(Whereupon, the taking of the matter in the above-entitled cause was concluded.)

CERTIFICATE OF COURT REPORTER/NOTARY PUBLIC

I, Peggy A. Lyons, Notary Public/Court Reporter, do hereby certify that the proceedings were taken by me at the time, place, date and for the purposes set forth in the caption herein.

Further that the foregoing transcript is a true and accurate record of the proceedings to the best of my knowledge and ability.

Given under my hand this 28th day of June 2008.

Peggy A. Lyons

Notary Registration #162703

My Commission Expires: 9/30/2011