



TRAFFIC SAFETY NEWS

September 2016

The PBT Result: To Report or Not to Report?

By Susan Glass, Traffic Safety Resource Prosecutor

In almost every impaired driving case, law enforcement officers administer a PBT, or preliminary breath test, to the suspect prior to his or her arrest. For some time now, officers have been instructed not to include the numerical result of this test in their reports. Rather, they have been told to indicate that the test was “positive for alcohol” or that the result “was above .08.” Some agencies even have policies and procedures which prohibit their officers from documenting the numerical result. The basis for this practice is Section 577.021 which provides that the numerical result is inadmissible to prove a person’s blood alcohol content. Is this the correct practice or should the actual result should be reported? This article will attempt to convince law enforcement officers and their agencies that the numerical result should, in fact, be documented.

The first and most basic reason why the numerical result should be reported is that the PBT actually produces a numerical result. The instruments do not read positive for alcohol or indicate only that the result is over a certain level. There is no other circumstance in which officers are told not to accurately document the facts of a case. I think there is a fear that if the actual number is included in reports, officers will inadvertently testify to this number . Our officers are, however, well

Funding for this newsletter was provided by the
Missouri Division of Traffic and Highway Safety

PBT Results (con't)

trained and competent. We can certainly trust them not to testify to the number in the same way we trust them not to testify regarding any other inadmissible evidence. So long as prosecutors adequately prepare their officers for testimony, the risk of this number being blurted out will be small.

There is also some concern that having the number could be detrimental to a case in certain circumstances, primarily where the PBT result is dramatically different than the ultimate evidential result. This is another concern that I believe to be overblown. In most cases, the results will not be all that different. Or, the difference will be able to be explained. Moreover, if an officer has a PBT that regularly reports a result very different than the evidential test, that officer should have that PBT checked and calibrated. The cases where the result will be helpful will outweigh the few cases where the result will prove detrimental. In the end, officers and prosecutors seek to ensure that justice is served. If a PBT result is detrimental to a case, we should deal with that like we deal with any other bad fact.

Another reason that the result should be reported is because there are several instances where the actual numerical result of the PBT would be admissible and useful information to have. By statute, the number is admissible to establish probable cause for the arrest, at a preliminary hearing for instance. The number would also be useful at bond hearings. If a person on probation is arrested for an impaired driving offense, the number would be useful at a probation violation hearing.

The Missouri Association of Prosecuting Attorneys recently adopted a best practices recommendation that prosecutors should encourage officers to include the numerical result of the PBT in their reports. They should also include the time the test is administered and the make and model of the PBT used. This recommendation is not binding, but it is a strong indication that prosecutors generally prefer to have this information than not.

If you are an officer that does not routinely record the actual result of PBTs administered or if you are an administrator of an agency that tells officers not to record this result, consider whether this is the best practice or if you should change this practice and accurately report the results of the investigation.

Case Law Update

Southern District

State v. Gilmore, No. SD33813 (September 16, 2016)

Defendant was convicted of felony driving while intoxicated. He does not challenge the sufficiency of the evidence to support his conviction. Rather, he challenges the sufficiency of the evidence supporting the enhancement of the offense from a misdemeanor to a felony because he had not been convicted of four prior felonies.

Defendant has five previous misdemeanor convictions. He claims these convictions were insufficient to support enhancement to a felony, arguing that the provision in section 302.321 referencing enhancement if a person has four convictions for “any other offense” refers only to felony offenses.

Courts are to construe statute according to the plain and ordinary meaning of the terms used. An offense is defined as any violation, even a minor one. Nothing in section 302.321 limits the meaning of “any other offense” to felony or serious crimes. As such, the defendant’s prior misdemeanor convictions were sufficient to support the enhancement.

Beasley v. Director of Revenue, No. SD33925 (September 16, 2016)

Driver’s license was revoked for failing to submit to a chemical test. He challenges the revocation arguing that there was not sufficient evidence to support finding probable cause of intoxication.

The facts presented at trial established that an officer responded to the scene of a one-vehicle crash. When he arrived, he noted that several highway signs had been run over. A Jeep was turned on its side, and beer cans were strewn about. The driver had been transported to the hospital, but a passenger indicated that the driver had been drinking. Another officer responded to the hospital where Driver was transported. He interviewed the paramedics who had worked on Driver. They both indicated that he was intoxicated. Driver’s medical records also indicated that he suffered from acute alcohol intoxication. This was sufficient to establish probable cause of intoxication.

Western District

State v. Larsen, No. WD78695 (August 16, 2016)

Defendant was charged with the class D felony of DWI after he had previously pled guilty to a municipal offense arising out of the same incident. The state appealed the dismissal of the charge based on double jeopardy grounds.

Case Law Update

Defendant was arrested for DWI in Greenwood and was subsequently charged with violating a municipal ordinance in the City of Greenwood Municipal Court. He pled guilty to that charge. He was later charged with felony DWI in Jackson County based on the same arrest. He filed a motion to dismiss based on double jeopardy. This motion was granted, and the state appealed.

The state argued that the city of Greenwood lacked subject matter jurisdiction to hear the case based on section 479.170 which provides that a DWI case is not cognizable in municipal court if the defendant has two or more prior convictions for intoxication related traffic offenses.

The subject matter jurisdiction of Missouri courts is dictated by the Missouri constitution. A municipal court has subject matter jurisdiction to hear and determine violations of municipal ordinances. This subject matter jurisdiction cannot be limited by statute. In this case, the city court had both subject matter and personal jurisdiction over the case and the defendant. Therefore, charging him with another offense in state court based on the same incident violated double jeopardy.'

NOTE: This case basically holds that cases can be heard in municipal court regardless of the number of prior offenses and despite Section 479.170. To ensure that repeat offenders are prosecuted in the appropriate court, officers and prosecutors should carefully review the criminal history of defendants prior to referring cases to municipal court.

State v. Baker, No. WD78391 (August 16, 2016)

Driver was convicted of DWI. He appealed arguing that the evidence was insufficient to show that he drove his vehicle while intoxicated.

The evidence at trial established that an officer responded to an intersection where a 911 caller had reported a possible intoxicated driver stopped in a vehicle. When he arrived, the officer found the car with the headlights and rear lights on. The key was in the ignition and in the operating position. Two mostly empty bottles of whiskey were in the car. Defendant was found staggering, approximately twenty feet from the car. There was an overpowering odor of alcohol on his breath, and his eyes were bloodshot and watery. He refused to perform field sobriety tests or submit to a breath test. The officer also interviewed the 911 caller who indicated that he saw Defendant sitting in the driver's side of the car and no one else was in the car. The car was registered to Defendant.

The defendant claims that because the engine was not running when the officer

Case Law Update

arrived on the scene the state was required to present significant additional evidence that he drove while intoxicated which it failed to do. The evidence here showed that Defendant was sitting in the driver's seat of a vehicle stopped in a busy intersection and blocking a lane of traffic. The officer arrived on scene only five minutes after receiving the 911 call. The intersection was so busy that it would be unreasonable to conclude that the car had been stopped long before someone called it in. This combined with the additional evidence described was significant additional evidence sufficient for a trier of fact to find beyond a reasonable doubt that Defendant drove his vehicle while intoxicated.

State v. Clark III, No. 78732 (August 16, 2016)

Defendant was convicted of DWI as an aggravated offender. He does not challenge the sufficiency of the evidence to establish his guilt of DWI. Rather, he challenges the admission of his prior convictions to establish his repeat offender status.

Defendant had three prior municipal convictions. He challenged the court's reliance on two of these convictions arguing that the officers' statements in the reports regarding these offenses were hearsay and reliance on them violated his right to confront witnesses. The court did not need to decide these issues, however, as Defendant's own non-hearsay admissions in the police reports were sufficient to establish that he had operated a motor vehicle while intoxicated in both challenged cases. As such, the evidence was sufficient to prove all three of Defendant's prior convictions.

State Traffic Fatality Totals Year to Date

2016—624

2015—595

**This represents an increase of approximately 5%.
59% of the people killed were not wearing their seat belts.**

*Based on figures provided by the Missouri Division of Traffic and Highway Safety.
Figures are current as of September 19, 2016.*