DUI DEFENSE IN TENNESSEE

Straight Answers About Your Rights and What to Expect Next

BARNES & FERSTEN
109 S. Northshore Drive, Suite 310
Knoxville, TN 37919
(865) 234-0410
www.knoxcrimdefense.com
questions@knoxcrimdefense.com

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Can you answer YES to these 4 questions? If so, we may be able to help

(1) **Have you been arrested in east Tennessee?**

(2) **Are you willing to let us fight your case and not immediately plead guilty?**

(3) **Would having a DUI on your record seriously affect your education, career, family, or other important areas of your life?**

(4) **Can you afford to pay a reasonable attorney fee with a down payment and a payment plan?**

If you answered YES to all of these questions then give us a call to discuss how we can help you avoid the worst consequences of a DUI arrest.

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FOREWARD

THE WAY WE APPROACH DUI CASES MAKES THE DIFFERENCE

Just about every lawyer who practices criminal law, even part of the time, will take your DUI case. What happens after the lawyer takes your case will make a huge difference in your stress level, how your case is handled, how good a result you get, and ultimately how this arrest affects your life.

To give each client and their case the attention they deserve, we have chosen not to mass advertise and take in hundreds of cases for very low fees. Instead, every client will get personal attention, each client will be able to reach and speak with an attorney, have their calls returned promptly, and know that every defense, whether legal or factual, has been fully investigated.

Most of all, a lower case load helps us to do battle in the courtroom when negotiated resolutions fail, rather than settling for a plea and moving on to the next dozen cases.

We hope this short book will answer some of your questions about what we think are the best ways to defend a DUI case and what you can expect during yours. If you would like to speak with us about your specific case just give us a call or text message to (865) 805-5703, or email us at questions@knoxcrimdefense.com.

CHAPTER 1

DUI MYTHS YOU MAY HAVE HEARD

- **If I refused a test I automatically lose my license, there is nothing I can do.**

  - False. That is not the law, but police officers, the general public, and even many lawyers believe this myth. We'll address it in more detail later. In short, you are entitled to a preliminary hearing on the implied consent charge that will determine whether you lose your license. The implied consent charge can be dismissed in General Sessions Court or, if it is not dismissed in General Sessions, it can be appealed to Circuit Court. Implied consent charges can be dismissed for a multitude of reasons that will likely be determined based on the testimony of the arresting police officer at your preliminary hearing in General Sessions Court.

- **If my blood or breath test is over the legal limit, I am automatically guilty.**

  - False. Similar to the refusal myth, many people cannot imagine how they might not be found guilty if their BAC is over the legal limit. If this myth were true, we would just sit back and wait for the blood test to come back and there would not be any need for fighting in court. You would just plead guilty and receive the maximum 11 months and 29 days in jail. That is not how we do things. Don't believe this myth. We can help you regardless of whether your blood or breath test came back over the legal limit.

- **The more the lawyer charges the better he must be.**

o There is a relationship between a lawyer's fee and his expertise, but it is not direct. A fee is influenced by supply and demand, level of expertise and years of experience, and also by factors that make no difference to your case such as how much a lawyer spends on offices, staff, and advertising. At the end of the day, you should choose the attorney that makes you feel the most comfortable and confident in fighting for you.

- **The court system treats everyone equally and every case is decided based solely on its merits.**

o This is ideal but unfortunately it is not reality. Like every other system in the world, the justice system consists of people who are not 100% perfect. Case outcomes depend on many factors and factual guilt or innocence is just one of those.

- **I really am innocent, so I do not need a lawyer.**

o False. Innocent people get charged with crimes more often than we would like to think. Many are understandably upset at the expense, embarrassment, and inconvenience of being charged with a crime they did not commit. Unfortunately, rarely would these people be able to win their cases without professional representation. A lawyer has the ability to discuss your case with the assistant district attorney assigned to your case to advocate your innocence effectively in a way that will generally be more effective than you speaking to the assistant district attorney directly.

- **I have never been arrested before, so this will not be that difficult.**

o Most people charged with DUI have no prior record. It is an unusual crime in that respect. Having no prior record is a good thing and can aid an attorney in negotiating your case, but it will not get you very far in winning your case alone.

- **The court will give me a lawyer, so I do not need to hire one.**

o You have a right to an attorney. The court will give you a lawyer if you qualify as indigent. Whether you qualify is up to the judge who would have to find you "indigent" based on your sworn financial statement. There are many good lawyers working as public defenders, but even the best public defenders will have a much larger case load to focus on than private attorneys. Generally speaking, a private attorney will likely have more time to give you personalized attention and be able to take the time to explain the process to you in more depth.

- **I was only using prescribed medication, not illegal drugs or alcohol, so I am not guilty.**

▪ Prescription medication DUIs are becoming extremely common. There are many reasons for this, including doctors writing more narcotic and scheduled prescriptions and police officers being taught to be on the lookout for drivers

using prescription drugs. There are often very good defenses to these cases. However, the law makes no distinction for illegal versus prescribed drugs and having a prescription, by itself, is not a defense to DUI by prescription drugs. The ultimate question in prescription

drugs cases is whether your driving behavior, interactions with the police and any field sobriety tests that you may have conducted proves beyond a reasonable doubt that those prescription drugs resulted in you driving a vehicle while impaired.

- **I was not even driving the vehicle, how can I be guilty of DUI?**

o Driving is not actually a requirement for someone to be charged and convicted with driving under the influence, despite the name of the offense. Many people have been arrested hours after having had anything to drink, while sleeping in a car in a private parking lot, or even while walking in a parking lot outside of the car. While these situations do present many possible legal and factual defenses, those situations can result in you being charged with a DUI. For example, one reported case in Tennessee involved a man who was convicted of DUI while he walking towards his motorcycle in a Walmart parking lot with a replacement part in his hand to fix his motorcycle before the driver was even able to drive away.

Tennessee law makes it illegal to be in physical control of a motor vehicle under the influence. This leads to a complicated question that a DUI lawyer can answer, what does it mean to be in physical control of a motor vehicle. The Tennessee Supreme Court attempted to answer that question in its decision in *State v. Lawrence*. In the case before the Tennessee Supreme Court, Mr. Lawrence was found asleep behind the wheel of his truck, leaning towards the passenger side. The engine was off and the keys were in his pocket. He was alone. He was found guilty of DUI from being in physical control of the truck and the Tennessee Supreme Court upheld his conviction.

In short, the court determined that if the car could have been immediately placed into motion or could have been placed into motion without much effort such as getting a tank of gas from a nearby gas station, then the driver is in physical control of the vehicle. However, these types of cases are very fact specific, and a skilled DUI attorney can help explain your case towards a successful disposition of the charges against you.

CHAPTER 2

WHAT ATTORNEY SHOULD I CONTACT TO DISCUSS MY DUI?

Nearly every lawyer with even a tiny bit of criminal defense experience accepts DUI cases. Many believe, as misdemeanor cases, they could not be much different than other cases they handle, but the reality is that DUI cases are difficult and hard fought.

DUI cases present complex issues that do not often arise in other contexts. For instance, blood tests are accomplished by a method called chromatography. Having an in depth understanding of what chromatography is, how it works, and when and how it can fail, is vital knowledge for a DUI lawyer. However, my educated guess is that less than 5% of lawyers in east Tennessee who take DUI cases, could explain to you the scientific process of how your blood is tested.

So, what does that mean to you? Look for a lawyer who focuses a large portion of his or her practice on DUI defense. Good signs include training from the National College for DUI Defense and the American Chemical Society. Check out the lawyer on avvo.com to read what former clients have said and to see what DUI specific credentials are listed. Finally, speak to the lawyer on the phone before scheduling an appointment. You can often tell how comfortable a lawyer is in discussing specific DUI issues without even going into the office. You can also gauge how your experience might be by how quickly you get a call back, how you are treated by the staff, and how willing the lawyer is to speak with you about your case and the issues you want addressed.

You are the client and thus, every important decision is ultimately your decision, including the initial decision of which lawyer you decide to hire. Make sure that you hire a lawyer that listens to your concerns and is able to provide you with answers regarding important aspects of your case. You should feel that you are your lawyer's primary concern.

CHAPTER 3

YOU HAVE A MEETING WITH AN ACCOMPLISHED DUI LAWYER, WHAT WILL IT BE LIKE?

New clients are often nervous about their first meeting with a lawyer, especially when they have never needed a lawyer before. If you are coming to meet with an attorney at Barnes & Fersten there is no need to be nervous. You will be treated and spoken to with respect. You will find a relaxed but professional atmosphere that is designed, not to intimidate or impress you, but to make the process as easy as possible for you. At the end of the day, you are the client and we want to make sure that we relieve some of the stress that you have been having over your recent DUI charges.

Like a job interview, both you and the attorneys at Barnes & Fersten are considering whether a professional relationship would be beneficial to you. At the end of the day, we want to do everything that we can to help you because you, the client, is the one facing charges that could have a substantial impact on your life. As such, we want to help guide you towards a successful disposition of your case that will help you move forwards with as little consequences, if any, as possible.

During that first meeting, we will spend anywhere from 30 minutes to an hour together. You will be given an opportunity, at the very beginning of each meeting, to get your questions answered and all of your concerns addressed.

After that the attorneys at Barnes & Fersten will need to get as many details as possible about any prior arrests or convictions, the day leading up to your arrest, you're driving before the police turned on their blue lights, your interactions with the police, your field sobriety tests, your blood or breath tests, your medical history, and other details that might relate specifically to your case.

By this point, we will have a good idea what some of our defenses and strategy will be and I will share them with you. Some lawyers will not discuss these potential defenses and strategies with you for fear that you will take his strategy and hire a cheaper lawyer to implement it.

However, the lawyers at Barnes & Fersten are skilled advocates that have the oral, research and writing skills to convey your legal defenses to the prosecutor and to the court in a way that not many lawyers can successfully.

In every meeting, we are asked some version of the question, "what are my odds of winning my case." We cannot and will not make you any guarantees. If a lawyer does that, do not walk out, run. It is an empty promise that no lawyer should make or is even allowed to ethically make to you. But the lawyers at Barnes & Fersten will give you their best professional opinion on the possible outcomes of your case. If we do not believe that you have real defenses or if we do not believe that we can help you, we will not accept your case. We have declined cases in the past and will continue to decline cases where we believe that we cannot accomplish the goals that someone wants and expects us to accomplish.

We, unlike many firms, do allow you to pay your case fee on a payment plan. A down payment is required to start work. The

amount varies but is usually between one-third and one-half of the fee. We will work together on a payment plan that you can afford that will get your fee paid off before the case is concluded.

There is one exception to the above paragraph. Few DUI cases end up requiring a jury trial. For that reason, I charge separately for that service, since it usually consumes many, many hours of attorney preparation and court time. If your case ends up one of the few that requires a trial, you will know that well ahead of time and we will decide together on what trial fee makes sense, given what has already happened in your case.

CHAPTER 4

DOES EVERYONE CHARGED WITH DUI HAVE TO HIRE A LAWYER?

The answer is yes and no. Not everyone charged with DUI strictly has to have a lawyer. You do have the option to speak directly with the district attorney or even defend the case yourself. I would not recommend it though. While you could probably learn the steps to perform your own appendectomy on YouTube, that does not make doing so a good idea. The same is true of defending your own DUI case.

In the most basic, straightforward cases, almost any lawyer who has practiced criminal law can get you a plea to DUI and walk you through the penalties. This might not be true if there was an accident, injuries, or other aggravating factors. However, if you have no criminal history, have a BAC less than .20%, had no children in the car, and did not have an accident or injure anyone, a minimally experienced lawyer can walk you through the plea process and get you set up for jail, any community service, DUI school, and tell you how much you owe in fines and where to pay them.

Only a lawyer who defends DUI cases regularly will likely be able to recognize what defenses might be available in your case, how the district attorney and the judge are likely to respond to those defenses and will be able to implement a strategy to use them effectively on your behalf. For that reason, it makes the most sense when dealing with a DUI to hire counsel who defends these cases for a living.

CHAPTER 5

BAIL: PAYING FOR YOUR FREEDOM DURING THE PENDENCY OF YOUR CASE AND REQUESTING A BAIL REDUCTION

To start, statutory law in Tennessee starts with the presumption that a defendant should be released on his or her recognizance, meaning that the defendant should not have to pay bail.

If you are not released on your own recognizance, every defendant that is accused of DUI is entitled as a matter of both constitutional and statutory right to be released on bail, no exception. In short, you are entitled to be released from jail because one of your most fundamental rights as a citizen of the United States is the presumption of innocence and thus, keeping you in jail undermines the idea that you are to be presumed innocent. Additionally, the United State Supreme Court also acknowledged that you can help your lawyer defend your case better if you are out of jail.

Why is my bail for DUI greater than my friend's bail for a previous DUI?

That is a great question that frustrates many defendants. Bail has two primary purposes: (1) ensuring the defendant appears in court; and (2) ensuring the safety of the public. As such, if someone is viewed as a larger threat to the public, their bond will be higher than someone who is less of a threat. Similarly, someone who has previously been charged with a failure to appear in court will likely have a higher bail.

Additionally, the court may place you on special pre-trial conditions of bail in addition to your bail amount, or your lawyer can request the addition of pre-trial conditions in an endeavor to request for a lower bail amount. If you have one or more prior convictions for DUI, the court has no choice but to consider special conditions of bail, which includes the use of an ignition interlock device or an electronic monitoring device with random drug or alcohol testing.

I cannot afford bond or cannot wear an electronic alcohol monitoring device on my leg, will the court lower my bond amount or reduce the conditions of my release?

First, your lawyer should always attempt to get you released on your own recognizance, as that is the presumption as discussed previously.

If the court refuses to release you on your own recognizance, the court is constitutionally required to set bail at an amount that is no higher than an amount that will fulfill the two purposes set forth above. Of course, the dollar amount may be arbitrary.

If you believe that your bond amount is far too high then your lawyer should file a motion to reduce bond. A motion to reduce bond should cover the two purposes of bail set forth above. For example, to prove that you will appear in court, your lawyer should explain your ties to the community to prove that you are not a flight risk and unlikely to miss court.

Additionally, if the court makes one of the special conditions of bond one of your bond conditions, you can request the court to reduce those conditions. For example, some people's jobs may cause them to be unable to wear an electronic alcohol monitoring device. In such a

scenario, your lawyer can make a motion to reduce your bond conditions.

I violated a bond condition, will my bond be revoked?

Maybe. It is true that your right to bail may be revoked or taken away from you if you violate a condition of your release, commit another criminal offense while out on bond or obstruct the progress of your case. It is also true that a violation of a condition of your release may result in a motion by the state to increase your bond amount, just as you have the right to oppose the motion or move for a reduction.

However, your lawyer will discuss the specific violations of your release with the district attorney and potentially the judge to help avoid your bond being revoked.

CHAPTER 6

DUI CASE ROADMAP: I HAVE BEEN ARRESTED AND HAVE A COURT DATE, WHAT HAPPENS NOW?

YOUR FIRST TIME IN COURT

Your first court date will not decide your case. Generally, the first court date will consist of: making sure you understand what you are charged with, the court finding out whether you have or will hire a lawyer, or whether you are applying for a public defender, and finally, setting a new court date for either negotiations or a hearing.

Do you need a lawyer for the first court date? Not strictly, but it is a good idea because even at the first court date there are things that can happen that could harm your case. In some circumstances, your lawyer may be able to request a change in your bond conditions on that very first day. In multiple offense cases, or cases where you are on another bond or probation, you definitely should not show up to court alone on your first court date. Even if none of those things apply to you, having a lawyer retained will make the process go much more smoothly and often you will not have to even show up to court at all because your lawyer can handle resetting the case for you and you will already know what statute(s) you are charged with violating.

"STATUS" OR NEGOTIATION DATES

Your second, and sometimes more, court dates will be a time for your lawyer to discuss the case with the district attorney who is prosecuting your case.

By the second court date your lawyer should have most or all of the materials, reports, videos, medical records, etc..., necessary to investigate and defend your case. The district attorney may or may not have also reviewed your case and any video evidence. In some instances, your lawyer may feel confident that the district attorney will eventually offer a better deal which may also result in your case taking additional court dates.

Most people are surprised to find out that their blood alcohol results can take 8-10 weeks to come back and as many as 6 months to come back in a drug DUI case with no alcohol involved. So, at your second court date, you may or may not know your BAC. If it is not back, you should not resolve your case on that second court date, even if you expect your BAC to be very high, because your BAC may surprise you and be beneficial to your case. Even if your BAC is ready, most of the time it takes more than one of these negotiation dates, to resolve a case successfully.

Many cases will be resolved at one of these negotiation dates, either by a negotiated plea that you are happy with or with a dismissal of charges.

PRELIMINARY HEARING

If no agreement can be reached, your case will be set for a "preliminary" hearing. I put preliminary in quotation marks because it can often take six months or more to get to this stage.

At the preliminary hearing court date, the officer who arrested you will receive a subpoena to appear in court. In most cases, he will show up. This is not like a traffic ticket where you can hope that the officer will not show up and the case will get dismissed. That does occasionally happen, but do not bank on it. Even if the officer does not show up on that first court date, the judge will allow the district attorney an additional court date for the officer to show up. If the officer fails to show up multiple times, then it is more likely that the court may dismiss your case for a failure to prosecute.

More negotiations will likely occur on this date, and if no resolution can be reached, your lawyer and the district attorney will conduct a hearing on your case in front of the judge. You will not testify. You technically can, but for many reasons that we can discuss in person, it would be the extraordinarily rare case, in which a client would testify at this stage.

The preliminary hearing is extremely important to your defense. Many lawyers "waive," or choose not to have this hearing. Do not let this happen to you unless there is a very good reason to waive this hearing. There sometimes is, but rarely.

The hearing is an opportunity to get the officer under oath, and to have your lawyer cross-examine him about many topics that can be used in your favor and in some cases to get the case dismissed outright.

Even if your case is not dismissed at this stage, the officer's sworn testimony can be used against him in criminal court. For this reason, a good lawyer will understand what he or she must get the officer to admit during the preliminary hearing to set up certain motions to file in criminal court, which will be discussed in more detail in Chapter 11.

At the end of your hearing the judge will decide whether there is "probable cause" to continue your case on to the next stage of court. Probable cause is not a particularly high level of proof, and it is far lower than beyond a reasonable doubt, so many times the judge will find at least some proof of DUI and send the case on to the trial court. However, the judge can also decide legal issues, like whether a stop or arrest was constitutionally made. If he decides these issues in our favor, he can and will dismiss your case.

The process described here often takes 4-8 months and several court dates. It occurs in "general sessions" court, rather than in "criminal court." We can discuss the differences in person, but in general, jury trials happen in criminal court. Preliminary hearings and negotiated pleas happen in general sessions court.

Most DUI cases are resolved during this general sessions court process. If yours is a case that may end up in criminal court, we will discuss that in detail before we get to the preliminary hearing court date.

CHAPTER 7

ELEMENTS OF A DUI: WHAT DOES THE STATE HAVE TO PROVE FOR A JURY TO FIND ME GUILTY OF DUI?

A DUI is a criminal offense in Tennessee and thus, you will not be found guilty of DUI unless the State proves every element of DUI beyond a reasonable doubt, or you plead guilty to the offense. The elements of DUI requires that the person accused of DUI must have been: (1) driving or in physical control; (2) of an automobile or other motor driven vehicle; (3) on a public road, highway, on the premises of a shopping center, trailer park, apartment complex, or any other location generally frequented by the public; (4) while under the influence of an intoxicant, or some other listed substance, that impairs the driver's ability to safely operate a motor vehicle by "depriving the driver of the clearness of mind and control of himself which he would otherwise possess" or with a blood alcohol level of .08% or more.

Sometimes, a simple reading of the elements can provide you with a defense. For example, in some states, you can be convicted of DUI while riding a bicycle. However, by reading the elements of the crime that we have outlined above, you clearly cannot be found guilty of DUI for riding a bicycle in Tennessee because the State must prove driving or physical control **of an automobile or other motor driven vehicle**. Thus, unlike some other states, in Tennessee you cannot be convicted of DUI for riding a bicycle, but you can be convicted for being on a lawnmower, for example.

Another important thing to keep in mind in a DUI case is that only the state has to prove anything. In order for a person to be found guilty of DUI, the state must prove each of the four elements of DUI beyond a reasonable doubt. Reasonable doubt is the highest level of proof in America's system of justice. In a car wreck case, the plaintiff need only prove by a preponderance of the evidence, and a dependency case, where the state takes a child away from a parent, the state only needs to prove its case by clear and convincing evidence. However, in a criminal case, including cases for DUIs, a higher burden of proof is required, beyond a reasonable doubt.

Conversely, the individual that was charged with DUI cannot be forced to prove anything. A defendant does not need to prove that they were not impaired and does not have to even put on any proof at all. Instead, the defendant is presumed innocent, presumed that he or she was not impaired, presumed that he or she was not driving or in physical control of a motor vehicle and presumed that he or she was not on a public roadway. Each and every one of those elements must be proven beyond a reasonable doubt by the state and the defendant will be presumed innocent of each element of the offense unless the jury finds that the State proved each specific element and thus, the specific crime charged, beyond a reasonable doubt. Both the presumption of innocence and the State's burden of proof are perhaps two of the strongest rights that someone charged with DUI has protecting them, which lays the foundation of nearly every defense that may be applicable to you in your case.

CHAPTER 8

WHAT ARE THE DIFFERENT TYPES OF DUI IN TENNESSEE? PER SE, IMPAIRMENT, AND BY CONSENT

There are two different ways that the state can seek to prove the crime of DUI in Tennessee, either: (1) per se; or (2) by impairment.

The first way that the state will attempt to prove a DUI is through proving that the defendant's blood or breath alcohol concentration in their blood at the time of driving was more than .08%. Unlike in some other states, the blood alcohol level is on its own crime, rather than simply being a way to prove impairment by alcohol. This means that even someone who is not "impaired," but does have a .08% blood-alcohol concentration, is guilty of DUI. The state usually seeks to prove a .08% blood-alcohol concentration either by a forensic breath test or forensic blood test. How those tests work and the defenses to them are covered in the next chapter.

The second way that the state often seeks to prove DUI, especially when no breath or blood test was administered, is by showing that the defendant was impaired to such a degree that they were not able to safely operate a motor vehicle. Whether the person was impaired is ultimately a question for the jury, but the state often seeks to prove impairment through a combination of a police officers' observations, defendants' words and admissions, the defendants' actions and demeanor, performance on field sobriety test, and other physical and mental indicators of impairment such as slurred speech, bloodshot, red, and watery eyes, unsteadiness on one's feet, and the inability to concentrate and/or carry-on a conversation.

Lastly, a rare case, but one that may occur nonetheless, that many people do not know about is that you can be prosecuted for the crime of DUI if the state can prove that you aided and abetted another in the commission of a DUI. This type of charge is often called DUI by consent or DUI by proxy. Under DUI by consent, the state can prosecute someone for DUI if they can prove that they aided and abetted, or should be held criminally responsible for the conduct of another. For example, the passenger of the vehicle who is also the owner of the vehicle that allowed an impaired person to drive their car may be charged with DUI. In this circumstance, the state would need to prove additionally that the person charged with DUI by consent had actual knowledge that the driver was too impaired to drive the vehicle but that the defendant allowed the individual to drive anyways.

CHAPTER 9

I GAVE A BLOOD OR BREATH TEST AND IT CAME BACK POSITIVE. AM I AUTOMATICALLY GUILTY?

No. A blood or breath test with a result over .08% does not automatically make you guilty. In fact, most blood tests are returned with a BAC above .08% when there is an alcohol related DUI arrest. Even so, many of those cases do not result in a DUI conviction.

The law prohibits driving or being in physical control of a vehicle with a blood alcohol concentration of .08% or more. That means that the State has to prove beyond a reasonable doubt that the results of their BAC test are accurate and that the BAC was above .08% at a time when the defendant was driving or controlling a vehicle. This is often more difficult than it seems.

First, no machine ever invented operates perfectly all the time. For example, if you have ever spent a lot of money on a nice computer and used it for any length of time, you know that even good machines do not always function the way that they should. Second, even if the chromatographs the State uses to test blood are working perfectly, there are many sources of human error that can cause a test to be wrong, including at the time of the blood draw, in its storage and transportation, and at the time a sample is prepared for testing.

Additionally, there are cases where proving a BAC *at the time of driving* is difficult because of a delay of several hours between driving and the blood draw or because alcohol was consumed after driving. For example, a driver's vehicle may be totaled in a car accident then

the driver may drink after the accident when his or her vehicle is incapable of being driven.

A good DUI lawyer will know what issues to look for and what questions to ask of you to determine if any of these issues are present in your case. Your attorney should also know how to present these issues in a persuasive way to a prosecutor, judge, and ultimately a jury. At Barnes & Fersten, our attorneys understand the law in such a manner that they can explain the facts of your case in a persuasive manner to whichever audience your case requires.

CHAPTER 10

IMPLIED CONSENT LAW: WILL YOU LOSE YOUR LICENSE FOR REFUSING A BLOOD OR BREATH TEST?

It's a common misconception that if you refuse to take a blood or breath test that your license will automatically be revoked for one year.

It is true that if you are found guilty of violating the Implied Consent Law, which requires you to give a chemical sample under some circumstances, that you will lose your license. However, just like DUIs, there are defenses to a charge of violation of implied consent.

What is the Implied Consent Law?

The implied consent law states that any individual driving in the state of Tennessee is presumed to have given consent to a chemical test of their breath or blood under certain circumstances. The presumption only applies to a law-enforcement officer who has reasonable grounds to believe that a driver is violating the DUI law. That means that if you are pulled over for speeding, without any other indicators of impairment, an officer cannot legally ask for a sample of your blood. On the other hand, if you are pulled over on suspicion of DUI, and the officer has enough information to arrest you for DUI, he can then legally ask you for a chemical sample. If the driver agrees to give a chemical sample, then there is no violation of the implied consent law. However, if the individual refuses, then they will be charged with violating the implied consent law.

Many people believe, and I have even heard officers tell defendants,

that violating the implied consent law will automatically result in the loss of your driver's license.

Can a police officer force me to give them a blood sample?

Ordinarily, if the driver refuses to give consent today breath or blood sample then no test will be given. Instead, the driver will be charged with a violation of the implied consent law.

However, there are exceptions to this general rule. For example, there are currently statutes that require a mandatory blood draw, even when a driver refuses to give consent, when there is an accident with death or injury, when the driver has previously been convicted of DUI, or when there is a child in the car under age 16. In the case of a mandatory blood draw, the law allows a police officer to physically force the suspected DUI driver to submit to a chemical test, including allowing an officer to strap a defendant down during the blood draw. Unless one of the rare exceptions exists, the officer cannot coerce you to give consent or mislead you about what the Implied Consent Law requires.

Will a jury decide if I lose my license?

No. A jury will not decide if you lose your license.

Instead, the general sessions judge, rather than a jury, will make a determination of whether the officer had probable cause to find you guilty of the implied consent law.

During your preliminary hearing for your DUI charge in general sessions court, the State will not only have to prove probable cause for your DUI but also for your Implied Consent charge. It is important that your lawyer pays close attention to the proof

presented by the district attorney during your preliminary hearing to persuasively argue to the judge that the State lacks probable cause to find you guilty of Implied Consent.

Significantly, unlike your DUI charge, the Implied Consent charge is a civil citation that will be conclusively determined on the date of your preliminary hearing, unless you appeal the court's decision.

Can I appeal the court's decision finding a violation of the implied consent law?

If the general sessions judge finds probable cause for implied consent during your preliminary hearing, it is important that you are aware that you may file a notice of appeal that very same day to maintain your license and appeal the court's decision to the circuit court.

Until your case is decided, including the appeal, assuming your license was valid prior to your arrest, usually no action will be taken against your privilege to drive.

CHAPTER 11

DUI PENALTIES: What are the penalties and WILL I DEFINITELY HAVE TO SERVE THEM?

The penalties for DUI depend on the circumstances and they get exponentially greater in a situation where someone has been previously convicted of DUI. There are also increased penalties for having a very high BAC, a BAC over .20, and for having children in the car.

A first offense DUI, if convicted, carries a mandatory minimum penalty of: 48 hours in jail, a $350 fine, a 12-hour DUI school, and a one-year loss of your driver's license. You will also have to have an ignition interlock device installed on your car to get your driving privileges back. That is the minimum if convicted, though the jail time can be up to 11 months and 29 days and the fine can be up to $1,500. There are other penalties that can be imposed, including attendance at a Victim Impact Panel and community service or litter pick up.

Briefly, the mandatory minimum penalties for multiple offenses are, in addition to those for first offense:

- Second offense: 45 days minimum jail service and a $600 fine.
- Third offense: 120 days minimum jail service, and a $1,100 fine.
- Fourth offense and greater: Class E Felony, 150 days minimum jail service and 1-6 year sentence, 8 year license revocation, and a $3,000 fine.

- Sixth or greater offense: Class C Felony, 150 days minimum jail service, 3-15 year sentence, and at least $3,000 fine.

However, just because someone has previously been convicted of DUI, does not necessarily mean they can be validly charged with a second, third, or fourth offense. There are time periods, beyond which prior offenses do not count. These time periods are affected by the offense dates of previous convictions, and it is important that your lawyer get the original documents to determine whether someone has been validly charged with a multiple offense DUI because the penalties are so heavily increased.

Despite how serious these penalties are, they only apply if you are actually convicted of DUI or multiple offense DUI. There are many defenses, as you've read already to DUI. Also, a strong defense and a refusal to plead guilty can and does often lead to a negotiated plea deal to reduced charges, including reckless driving, traffic tickets, dismissals, and in the circumstance of multiple offenses, to a less serious DUI penalty range.

CHAPTER 12

Standardized field sobriety tests: Walk the line, stand on one leg... What these tests really mean

When an officer investigates a suspected DUI, he will often have the person he is investigating perform certain tasks. Some of these tasks or tests are standardized and are used in many DUI stops and some are completely made up by individual departments or even individual officers.

have heard of officers dropping coined change on the ground and asking a suspect to pick it up, as well as the infamous "say your ABCs backward" test. There are other non-standardized tests that are more prevalent including the finger-count test, the Rhomberg balance test, the finger to nose test, and the lack of convergence test. None of these tests are "standardized" and none have ever been conclusively shown to be able to predict impairment by the National Highway Traffic Safety Administration (NHTSA), the body that studied and standardized the 3 most often used field sobriety tests. It is important that your attorney challenges the validity of these non-standardized tests because the State will likely try to use them to prove that you were under the influence and because there is little evidence to support that claim for many of the non-standardized tests.

There are three "standardized" tests, for which the NHTSA has prescribed very specific training and administration. These tests are the Horizontal Gaze Nystagmus Test, the Nine Step Walk and Turn Tests, and the One Leg Stand Test. One thing to keep in mind for all of these tests, and that is the only all caps and all bold language in

the entire NHTSA training manual is that "**IF ANY ONE OF THE FIELD SOBRIETY TEST ELEMENTS IS CHANGED, THE VALIDITY IS COMPROMISED."** That statement is vitally important and true. The tests were designed to be given in a particular way to people who qualify to take the tests. If someone is more than 65 years old, more than 50 pounds overweight, or has particular back, leg, knee, or inner ear problems, the tests should not even be given because they are unlikely to yield accurate results. There are a multitude of other factors that can affect the outcome of the tests that your lawyer will explore with you.

Horizontal Gaze Nystagmus Test

Many people tell me that they passed this test without actually knowing what the officer is looking for. The objective is not to see if someone can follow a light or pen with their eyes, but instead to determine whether "nystagmus" is present. Nystagmus is a rapid jerking of the eyes and can indicate alcohol intoxication. There are three clues in each eye an officer looks for: (1) "a lack of smooth pursuit" (jerking during eye movement; (2) "distinct and sustained nystagmus at maximum deviation," (jerking when the eye is looking to the extreme left or right; and (3) "onset of nystagmus prior to 45 degrees."

While alcohol intoxication can cause nystagmus, so can dozens of other conditions. Additionally, this is a very difficult test to correctly administer and score and should be performed by someone with a scientific or medical background. Our Tennessee appellate courts have held that the HGN test is a scientific test, and for that reason, it is almost never used in evidence at a DUI trial because it is a very rare

officer who can qualify as a scientific expert on nystagmus. As such, if the State cannot provide an expert witness to discuss the HGN test in detail, the test will be inadmissible at trial and thus, the State is only left with 2 other field sobriety tests to use against you at trial.

Nine Step Walk-and-Turn

The walk and turn test requires the subject to walk in a straight line, touching heel to toe, without stepping off the line, missing heel to toe, raising arms for balance, walking nine steps, making a turn with a series of small steps and returning nine steps in the same fashion.

There are 8 possible clues that an officer is looking for and according to the original NHTSA study, 2 or more clues indicates a blood alcohol level over .10%. There are dozens of opportunities to exhibit a single clue on this test. For instance, missing heel to toe on just 1 out of the 18 steps equals one clue, the same is true for stepping off the line just once.

Even though this is a difficult test to pass, there are specific things that your attorney should look for. For instance, did the officer correctly instruct and demonstrate the test? If not, it would not be fair to count the test against you. Also, was the test performed on a flat, non-slippery surface and were heels or boots allowed to be removed? If not, the test may be invalid. Finally, was the person tested even a good candidate to take the test or would he or she fail whether intoxicated or not due to some medical condition. However, even when the test is instructed by the officer perfectly, this test is still not conclusive evidence of DUI.

The One Leg Stand

The one leg stand requires the person being tested to stand on either leg with their other leg extended out approximately six inches off the ground, with hands down by the person's sides and with their toe pointed out.

There are four clues that officers are looking for on this test, including swaying, hoping, putting a foot down, and raising arms for balance. Any two of these clues, if present even once, indicates a blood alcohol concentration of .10% or greater according to the original NHTSA study.

Like the other tests, the one leg stand must be administered, instructed, scored, and demonstrated properly in order to be valid. Also, like the other tests, there are many circumstances that would make a person a poor candidate to take the one leg stand or that would cause them to demonstrate clues for reasons other than impairment. A good DUI lawyer will know what questions to ask and what to look for on the video of your tests to challenge the officer's determination that the test indicated that someone was impaired by drugs or alcohol. Once again, this test is not conclusive evidence of DUI because many individuals that are not impaired cannot "pass" this test because of various conditions outlined above.

CHAPTER 13

How much is all of this going to cost me?

You may have heard the public service advertisements estimating the cost of a single DUI at $10,000 or more. It's true that there are many costs that will result even from an arrest for DUI.

First, there are indirect costs that many people suffer, including higher insurance premiums for years, the loss of a job or being skipped over for a promotion or not hired for a new job due to a criminal record. Unfortunately, if it comes down to hiring one of the two best candidates for a job and one has a DUI conviction and the other doesn't, the person with the record will often lose out. A conviction can also affect professional licenses and close out highly profitable opportunities in some fields.

Next, the direct costs of a DUI, if convicted include, fines and court costs usually totaling more than $1,000, DUI School at approximately $175, the ignition interlock device required for a restricted license will be more than $1,000 for the year, under some circumstances an alcohol monitor will be required while the case is pending costing about $300 per month, which can easily exceed $2,000, insurance can increase dramatically for 3 to 5 years, and the Department of Safety may require an alcohol and drug assessment, and treatment if recommended, before charging a reinstatement fee before you can get your license back. Even going to jail isn't free, as you will be charged a daily rate of approximately $35.

Lawyers' fees vary greatly from lawyer to lawyer and also based on the facts of each case. A third offense, because of the greater risk, will usually be more expensive to defend than a first offense. Most lawyers, including those at the Barnes & Fersten, charge "flat rate" fees for DUI cases. That means that you will know the entire cost of the representation at the first meeting, whether the case takes 3 months or 2 years to resolve. The one exception to that is if a case goes to trial, we do not charge a fee for trial up front since we know that most cases will be resolved before trial and it does not make sense to charge a fee to cover many hours of trial preparation and a day or two of trial if we do not yet know if that will be necessary. With just a little information about your case we can usually quote you a fee, even over the phone, which many lawyers will not do. Many lawyers require you to come in to find out the cost, with the goal of selling you on their services once you are there.

We will never be the most expensive DUI lawyers in our area, but we will not be the cheapest either. We know that legal fees are unexpected and can cause a hardship. Even so, a good representation requires time, expense, and expertise, and therefore will not be cheap.

Unlike many firms, we do offer payment plans that allow a client to make payments on the fee. These payment plans require a down payment, usually between 1/3 and 1/2 of the total fee, and the remaining balance can be paid in monthly, bi-weekly, or weekly payments, depending on what works best for each particular client.

While not everyone can afford to have us represent them, we do try to keep fees low enough so that the majority of our east Tennesseans can afford a high quality DUI defense when they need it.

CHAPTER 14

Defending Against a DUI: Suppressing Warrantless Searches

Suppressing a warrantless search

A police officer cannot search your vehicle just because you were pulled over and suspected of DUI. Generally speaking, an officer must have a warrant to search your vehicle because you have an expectation of privacy in your private property.

As such, Tennessee courts begin with the presumption that a warrantless search of your vehicle was illegal. Consistent with that notion, just like the burden of proving you guilty beyond a reasonable doubt is on the State, the burden of proving that a warrantless search of your vehicle fits into one of the numerous exceptions of the warrant requirement is on the State as well.

Although there are many exceptions to the requirement for a police officer to have a warrant before searching your vehicle, there are four primary exceptions that apply to DUI cases. Your lawyer should strictly scrutinize any warrantless search that resulted in evidence of DUI, or any other crime such as simple possession, being used against you.

Common exceptions in DUI cases:

(1) Inventory Search

The first and probably most widely used exception to the warrant requirement in a DUI case is the inventory search exception. This

exception applies to allow a police officer to search your vehicle without a warrant whenever the officer has probable cause to arrest you for suspicion of DUI.

In short, whenever a police officer arrests you for suspicion of DUI, the officer will not leave your vehicle on the side of the road. Instead, the officer will call a tow truck company to tow your vehicle for you. Before the tow truck company tows your vehicle, an officer will search your vehicle to "inventory" the vehicle, or make a list of all of your personal belongings within the vehicle, in an endeavor to protect your personal belongings.

In the eyes of the courts, an inventory search is justified because it is for your, the defendant's, protection to insure that your belongings are not stolen, as well as to protect the police department from claims that they are responsible for your personal belongings being stolen.

Defense

Although an officer may inventory search your vehicle before towing it, the burden is on the State to prove that there was not a reasonable alternative to the officer seizing and towing your vehicle. It is important that your lawyer evaluates every aspect and every justification provided for an inventory search.

For example, a police officer is required to ask you, the individual being arrested for suspicion of DUI, whether you can call someone to pick up your vehicle in a reasonable period of time. If you can have a loved one or a friend, or call a towing company yourself, you should be provided that opportunity, even if you do not have a passenger present that can safely operate your vehicle for you.

Additionally, other defenses may exist that your lawyer should discuss with you to determine if they can suppress any illegal evidence found during an inventory search.

(2) Search Incident to Arrest

Another widely used exception is the search incident to arrest exception. This exception may only be used to find evidence against you in limited circumstances including: (1) you, the arrestee, being within reaching distance of the passenger compartment at the time of the search; or (2) it is reasonable for the officer to believe that your vehicle contains evidence of the offense of your arrest.

The first circumstance is justified by courts based on the belief that you can reach in the compartment to obtain a firearm, making you a threat to the officer, or you can hide the evidence of the offense.

The second circumstance is justified by courts only in limited ways. This is extremely fact specific which your lawyer must strictly evaluate as well. For example, if your vehicle, rather than your body and breath, smells like alcohol or marijuana, the officer may search your vehicle under this exception because it is reasonable for the officer to believe that there is an open container or marijuana within your vehicle.

Defense

Once again, the burden is on the State to prove that this exception is applicable to justify the officer's warrantless search of your vehicle. The officer's suspicion that there is evidence of the crime within your vehicle must be based on specific reasonable inferences, rather than simply a hunch.

Just for being arrested for DUI, an officer cannot claim that he or she was searching your vehicle to find evidence of the crime of DUI. The officer must have specific suspicion based on the circumstances of your individual case. An officer cannot simply speculate that there is illegal evidence in the vehicle.

Moreover, the officer cannot search your entire vehicle based on this exception. Instead, the officer may only search areas that the officer can reasonably believe may contain evidence of the crime. For example, if an officer smells beer and is looking for an open container in the vehicle, the officer cannot open your trunk to find the open container, unless he or she has specific information that makes the officer believe that there is evidence within the trunk.

(3) Automobile Exception

This exception is very similar to the search incident to arrest exception, only that it is slightly more broad in that the officer may search your entire vehicle, including your trunk.

For this exception to be applicable, it is even more strict than the search incident to arrest exception because the officer must have probable cause, rather than just reasonable suspicion, that evidence of the crime may be found inside of your vehicle.

Defense

Similar defenses apply to prohibit the use of this exception as the search incident to arrest exception. Of course, because probable cause requires more proof than reasonable suspicion, if the officer did not have reasonable suspicion to justify the use of the search incident to

arrest exception, the officer definitely did not have probable cause to use the exception to the warrant requirement.

(4) Plain View Exception

Lastly, an officer may search your vehicle if evidence of a crime is in plain view. This means that if the officer observes beer, or any other illegal contraband, the officer may then search your vehicle.

Additionally, even if you are pulled over for a traffic violation, a police officer may ask you to step out of your vehicle. When you step outside of your vehicle, if illegal contraband falls out of your vehicle or is in plain view when you open your door, the officer may also rely on this exception.

Defense

Although this exception is usually upheld more broadly by courts than the other exceptions, there are still defenses from the plain view exception. For example, if the officer did not have reasonable suspicion to pull you over in the first place then the officer would have never saw the illegal contraband in plain view. Thus, the evidence would be subject to suppression.

Overall, whenever an officer searches your vehicle and finds evidence of the crime of DUI, or any other crime, it is important to question the officer on which exception he or she relied on to conduct a warrantless search. It is also important to question the officer to determine if a defense is applicable to suppress the evidence.

If any defenses to an illegal search is applicable in your case, it is important that your lawyer discusses the defenses with you. Your lawyer should question the officer vigorously on the search either at a preliminary hearing or at a motion to suppress hearing to argue that the facts of your case made the exception inapplicable. And remember, the burden of proving that the search was valid is on the State, not you and your lawyer to prove that it was invalid.

CHAPTER 15

Defending Against a DUI: Suppressing a Confession or a Statement

Just like with a motion to suppress a search, the burden is on the State to prove by a preponderance of the evidence that you waived your rights. Your waiver of your Miranda rights must be made voluntarily after being made fully aware of the nature of the right being abandoned and the consequences of the decision to abandon that right. Thus, this is why when an officer reads you your Miranda rights the officer must inform you that anything you say may be used against you in court.

When must Miranda rights be given?

An officer does not need to mirandize you after pulling you over for suspicion of DUI or when you are conducting field sobriety tests. In fact, field sobriety tests are considered by the courts to be non-testimonial, which is not subject to suppression for a failure to mirandize.

There are two requirements to proving that you were entitled to be advised of your Miranda rights: (1) that you were in custody; and (2) that you were being interrogated. If both conditions are met, the officer's failure to mirandize you makes any statements you made subject to suppression.

(1) Custody requirement

Your lawyer should focus on the facts specific to your case to prove that you were in custody any time that you made any statements against your interest or any admissions.

You are "in custody" when, under the totality of the circumstances, a reasonable person in your position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest. For example, if the police officer retains your driver's license during the traffic stop then for Miranda purposes you are considered in custody because no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return your license and because driving without your license is an additional traffic violation.

(2) Interrogation requirement

This requirement does not mean that you were in a room alone with the officer for hours being interrogated. Instead, you are the subject of an "interrogation" whenever a police officer asks questions that is reasonably likely to elicit incriminating information while you are also in custody.

If you make any admissions to the officer during the investigation your lawyer should evaluate whether a Miranda issue exists. Your lawyer should understand Miranda and the ways to skillfully and persuasively argue that you were entitled to Miranda rights before your incriminating statement was made by you.

Did I properly invoke my Miranda rights?

I told the officer that I was invoking my right to remain silent then later on I made incriminating statements, they cannot use those statements against me, right?

(1) Right to remain silent

This is a situation that is extremely fact specific. Generally, once you invoke your right to remain silent, you cannot be asked questions that are likely to elicit an incriminating response for the full time that you are in custody plus an additional 14 hours. However, there are some exceptions to this rule. For example, if you invoke your right to remain silent but then later begin speaking to the officer on your own, without being interrogated, then the statements may or may not be subject to suppression.

(2) Right to a lawyer

Similarly, if you invoke your right to a lawyer, you cannot be questioned about the specific crime that you were arrested for committing without your lawyer present, after you are advised of your Miranda rights. However, exceptions to this rule exist as well. For example, an officer may question you about another crime separate from the crime that caused you to be in custody without there being a violation. In these instances, it is important that your lawyer analyzes the facts to determine whether a breach that entitles you to suppression exists.

I asked for a lawyer but the officer continued to interrogate me, they cannot use my statements against me right?

Once you state **unequivocally** that you want a lawyer, all questioning must stop. An issue exists where you make statements such as "I think I need a lawyer now." You must clearly and unequivocally state "I want a lawyer" for questioning to stop.

Overall, you may be entitled to a suppression of statements that you made even before you were mirandized. As such, your lawyer must always be weary of the circumstances under which you made your admission or statement against interest.

CONCLUSION

We hope that this short book has given you some answer to your questions. We also hope that with the additional information you are feeling at least a little better about the DUI charge you are facing. Much of the fear in this situation comes from the unknown.

Finally, we'd like to speak with you about your case and what we can do to help. Please give us a call to discuss your case. You can also text or email. Our number is (865) 805-5703.