

### **1. Driving under the influence- BAC via Implied Consent**

Virginia law states that anyone operating a motor vehicle on a public highway implicitly consents to submit to a breath or blood test to determine his BAC if a law enforcement officer possesses probable cause to believe he is operating a motor vehicle while under the influence of alcohol or drugs. If the officer has probable cause, and arrests that individual within three hours of the time that person operated a motor vehicle, that person must submit to testing and the results of that test are admissible at trial if administered correctly.

This rule provides four avenues to contest the admissibility of the BAC test results: whether 1) the accused was “operating” a motor vehicle, 2) if he was “operating”, whether it was on a public highway, 3) whether the officer possessed probable cause to arrest the accused and 4) whether the arrest occurred within three hours of operating a motor vehicle while under the influence.

Under Virginia law, “operating” is a broad term that encompasses activity beyond actually driving the car. The Commonwealth can prove operation even if the accused was asleep behind the wheel if certain requirements are met, such as to what extent the car was “on”. There are numerous cases on the subject, and the determinations frequently turn on very specific facts.

Similarly, “public highway” is broader than the common meaning of the term. A public highway is not just a main roadway, but also includes places many would consider “private.” These include roadways within a privately owned apartment complex, travel lanes in a shopping center and even parking lots. Courts consider whether the roadway is open to the public, including whether there are “No Trespassing” signs, whether there are traffic control devices, and the presence of lane markings. The classic example of a non-public roadway is a parking lot existing solely for a lone convenience store. It is worth noting that one may still be convicted of DUI on a non-public roadway, but the government will not be able to rely on testing pursuant to the implied consent law, thus complicating the prosecution.

Determining whether the officer had probable cause to arrest the accused for DUI is a fact-specific inquiry. Courts will consider many factors, including whether the accused’s driving indicates impairment, whether the accused smelled of alcohol, whether the accused admitted using alcohol or drugs, the degree of impairment, if any, indicated during the field sobriety tests, and the results of the preliminary breath test. Under the implied consent statutes, the officer must offer the accused a preliminary breath test, which the accused is free to decline. Due to reliability concerns, the results are not admissible to demonstrate guilt, but they are admissible if the defense challenges probable cause for the DUI arrest.

The rule mandating that implied consent applies only when arrest occurs within three hours of the offending operation generally becomes an issue only in accident cases. In those cases, police most likely were not present to witness the accident, so the prosecution must present witnesses that can establish the time of the accident. This becomes particularly problematic when it is a single vehicle accident involving only the defendant. The prosecution often will rely on the accused’s own estimate of the accident time, but that opens the prosecution to the question of how intoxicated the accused really was: if the accused was impaired, his estimate of the time of the accident should not be reliable. Sometimes, an officer can testify that he was patrolling the area and had passed the location of the accident within the three hours preceding arrest and had not observed an accident. If the prosecution can meet the implied consent requirements, the results of the BAC testing are admissible.

### **2. DUI Refusal Cases**

When an accused refuses to submit to testing, the lack of test results deprives the government of crucial evidence. However, if the police followed the procedures the implied consent statutes dictate, “unreasonable” refusal to submit to testing is a separate crime, and can lead to loss of driving privileges and possibly jail time if the accused has a prior conviction for refusal or DUI. In these cases, the same analysis required for determining probable cause becomes the focus of the case. The main difference is that the Commonwealth will have to establish intoxication at the much higher level of “beyond a reasonable doubt” rather than mere probable cause.

### **3. DUI- Government obtained BAC evidence outside the implied consent statutes**

Even if the Commonwealth proceeds outside of the implied consent context, it still may establish the accused’s BAC. This may be done if the accused actually (in contrast to the statutory implicit consent) consents to testing. More frequently, the Commonwealth will have secured evidence of the BAC through a search warrant for the accused’s blood or through hospital records if the accused was transported to the hospital following a traffic accident.

In this situation, the Commonwealth must utilize a toxicologist as an expert witness to demonstrate that the BAC of the accused was sufficient to impair one's ability to operate a motor vehicle. The defense may attempt to rebut the toxicologist's testimony with its own expert.

#### **4. Driving under the influence of drugs**

Driving under the influence of drugs presents the same issues as the more common cases involving alcohol. The important legal difference is that regardless of whether the evidence of drug use enters via implied consent or some other method, the Commonwealth often must use a toxicologist. The important practical difference is that many prosecutions for driving under the influence of drugs involve the use of prescription drugs that the accused took according to a valid prescription. While technically illegal, and just as dangerous if taken in the wrong dosages, courts often will view the user of valid prescription drugs in a better light than a drunk driver.

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