

IMPLIED CONSENT LAW UPDATE

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What Will Be Covered

- Statutory Changes
- Constitutional Caselaw Developments
- Uncertainty of Measurement in Breath Tests
- 171.19 Petitions
- Time for Questions



Statutory Changes

What happened?

- On July 1, 2017, statutory changes to IC and DWI laws went into effect
 - Important note: Most changes apply to “acts committed on or after” July 1, 2017
 - Someone with a DWI on June 30, 2017, is still subject to old laws
- Worth taking a look at the session law:
 - <https://www.revisor.leg.state.mn.us/laws/?id=83&year=2017&type=0#laws.2.9.0>

Ignition Interlock

- Commissioner cannot require interlock devices to use or enable location tracking capabilities without a court order
 - Minn. Stat. § 171.306, subd. 2
- If interlock device is capable of location tracking, manufacturer must notify interlock participant of capabilities
 - Minn. Stat. § 171.306, subd. 3

Breath Tests

Minn. Stat. §
169A.51,
subd. 2

- There is now a breath test advisory, rather than an implied consent advisory
- Essentially the same information as old advisory, except no mention of controlled substances



DRIVER AND VEHICLE SERVICES
DRIVER EVALUATION UNIT
445 MINNESOTA STREET, SUITE 170
ST. PAUL, MINNESOTA 55101
PHONE:(651)282-2025 FAX:(651)282-2463
Internet: www.dps.state.mn.us/dvs

LE Case#/ICR: [REDACTED]

Breath Test Advisory

Time Started: [REDACTED] Location Read: [REDACTED]

[REDACTED], I believe you have been driving, operating or controlling a motor vehicle in violation of Minnesota's D.W.I. laws and you have been placed under arrest for this offense.

1. Minnesota law requires you to take a test to determine:

1a. if you are under the influence of alcohol,

Times Read: 1 Notes:

2. Refusal to take a test is a crime.

Times Read: 1 Notes:

3. Before making your decision about testing, you have the right to consult with an attorney. If you wish to do so, a telephone and directories will be made available to you. If you are unable to contact an attorney, you must make the decision on your own. You must make your decision within a reasonable period of time.

Times Read: 1 Notes:

4. If the test is unreasonably delayed or if you refuse to make a decision, you will be considered to have refused the test.

Times Read: 1 Notes:

Do you understand what I have just explained?

Yes No

Times Read: 1 Notes:

Do you wish to consult with an attorney?

Yes No

Times Read: 1 Notes:

Time telephone made available: Start: 2:47 AM Stopped: 3:05 AM

Will you take the Breath test?

Yes No

Times Read: 1 Notes:

(If refused) What is your reason for refusing?

Times Read: _____ Notes:

Signature of Peace Officer Electronically Signed by: [REDACTED]		Enforcement Agency
Badge Identifier [REDACTED]	[REDACTED]	
Business Telephone Number [REDACTED]	Date/Time Signed [REDACTED]	Time Completed [REDACTED]

Updated Advisory Form

What about blood & urine tests?

- A search warrant is now required for fluid tests
 - Minn. Stat. § 169A.51, subd. 3(a)
- Warrant requirement also satisfied if an exception to the warrant requirement applies
 - Such as exigent circumstances
 - Minn. Stat. § 169A.51, subd. 3(b)

Fluid Tests & License Revocations

- New statutory section for revocations based on fluid test results or refusals:
 - Minn. Stat. § 171.177
- In order to trigger license revocation under this statute, driver must be told “refusal to submit to a blood or urine test is a crime.”
 - Minn. Stat. § 171.177, subd. 1
 - No advisory form- just have to be told
 - Refusal crime defined under Minn. Stat. § 169A.20, subd. 2(2)

- There is no statutory right to contact an attorney when the officer gets a warrant for blood/urine testing
 - Only have to be told refusal is a crime
- If driver “objects” to first fluid test offered, officer has to offer alternative (blood or urine) before “action can be taken” against the driver
 - Can only revoke license or charge with refusal if both tests were offered and refused
 - Minn. Stat. § 171.177, subd. 2

- If a person refuses fluid testing, then a test must not be given.
 - Unless officer has probable cause for CVH or CVO
- A refusal under § 171.177 also does not constitute obstruction of legal process unless refusal was “accompanied by force or violence or the threat of force or violence.”
 - Minn. Stat. § 171.177, subd. 13

- Officer will certify to Commissioner whether person refused testing pursuant to the search warrant or if the test results indicate illegal alcohol concentration or Schedule I or II controlled substance
- Commissioner will then revoke license accordingly
 - Minn. Stat. § 171.177, subds. 3-5

Procedural Changes

- Now there are two statutes under which a petition for judicial review can be filed:
 - Minn. Stat. § 169A.53 for breath tests
 - Minn. Stat. § 171.177 for fluid tests pursuant to search warrant
- Under *both* provisions, driver now has **60 days** to serve and file petition (used to be 30)

- Legislature added prescription drug affirmative defense that can be raised as an issue in either a 169A.53 or 171.177 hearing:
- “It is an affirmative defense to the **presence of a Schedule I or II controlled substance** that the person used the controlled substance **according to the terms of a prescription** issued for the person according to sections 153.11 and 152.12, unless the court finds by a **preponderance of the evidence that the use of the controlled substance impaired the person’s ability to operate a motor vehicle.**”

- Certain issues unique to 171.177 hearings
 - Did a licensed peace officer apply for a search warrant in accordance with requirements set forth in sections 626.04 to 626.18?
 - Did a neutral magistrate review the application for a search warrant and find PC?
 - Was the search warrant and the process by which it was obtained valid?
 - Minn. Stat. § 171.177, subd. 12(b)(4)-(6)



Ongoing Constitutional Cases

Where We've Been...

- *Birchfield v. North Dakota*,
579 U.S. ___, 136 S. Ct. 2160 (2016)
 - Breath tests are searches incident to arrest, so no warrant needed and refusal can be a crime
 - Blood tests are too intrusive to be searches incident to arrest, so you do need a warrant for refusal to be a crime

- *State v. Trahan*, 886 N.W.2d 216 (Minn. 2016)
 - State cannot prosecute defendant for refusing a warrantless blood test without exigent circumstances
 - Test refusal statute unconstitutional as applied to defendant
- *State v. Thompson*, 886 N.W.2d 224 (Minn. 2016)
 - State cannot prosecute defendant for refusing warrantless urine test
 - Test refusal statute unconstitutional as applied to defendant

What's left?

- “Gap cases” with incidents that occurred before *Birchfield, Trahan, Thompson* but were tried after the caselaw changed
- *State v. Phillips*, 2016 WL 4497355
 - Blood consent case from October 24, 2014
 - Court of Appeals found that Advisory was legally accurate at the time it was read
 - Remanded to determine consent and application of good-faith exception to the exclusionary rule
 - MNSC granted cert, case was briefed and argued, then defendant passed away and case dismissed

- After *Phillips* dismissed, MNSC granted cert on two other cases
- *Morehouse v. Comm'r of Pub. Safety*,
2016 WL 4497470
 - Same procedural posture and result as *Phillips*
 - Blood consent case from August 30, 2015
 - Court of Appeals remanded to determine consent/good faith
 - Currently being briefed at MNSC

- *Johnson v. Comm'r of Pub. Safety, 887 N.W.2d 281 (Minn. Ct. App. 2016)*
 - Driver arrested for DWI on November 9, 2015
 - Read the Advisory – told refusal of a urine test is a crime
 - Refused urine and blood testing
 - Court of Appeals held that Advisory was inaccurate when given and violated driver's due process rights
 - Currently being briefed at MNSC

- Many cases stayed at COA and MNSC pending Morehouse and Johnson
- These cases not likely to have huge effect given new statutory changes



DMT Tests & Uncertainty of Measurement

Some brief background...

- BCA is an accredited calibration lab by ASCLD
 - Have been calculating calibration uncertainty for fleet of DMTs
- This accreditation does not require them to report uncertainty for individual tests
 - Not many states that do this
- In July 2016, BCA completed calculations for test uncertainty
 - BCA can now supply a “confidence interval” for the average of a driver’s two breath samples

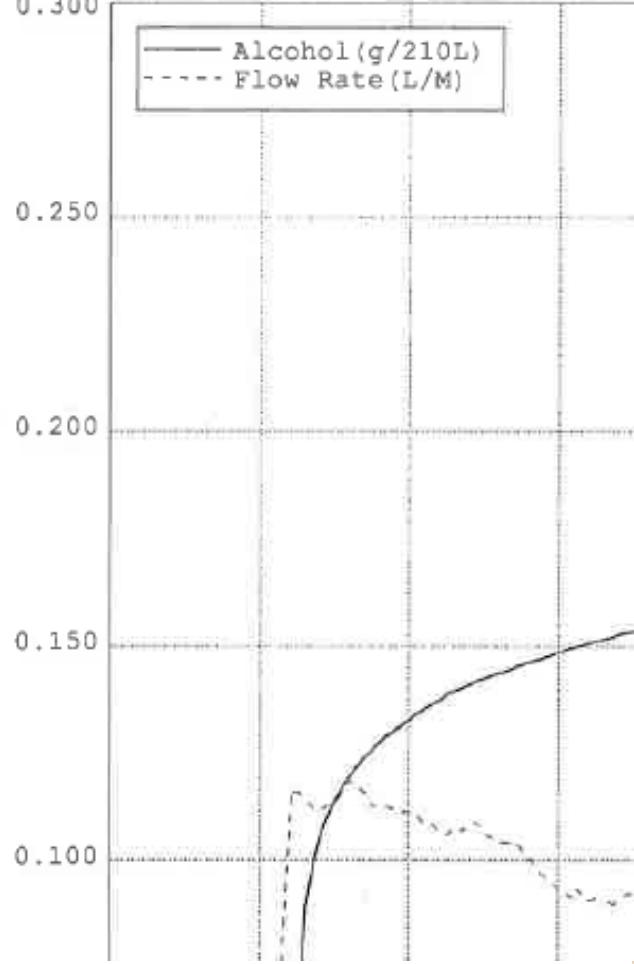
DIAGNOSTIC CHECK PASSED 02:42
AIR BLANK 0.000 02:44
SUBJECT SAMPLE Vol=4.76 02:45
IR = 0.161
AIR BLANK 0.000 02:46
CONTROL SAMPLE 02:46
IR = 0.076
AIR BLANK 0.000 02:48
SUBJECT SAMPLE Vol=4.51 02:49
IR = 0.162
AIR BLANK 0.000 02:50

REPORTED VALUE IN g/210L 0.16 02:45

For DMT test uncertainty of measurement information, email the BCA Calibration Laboratory at bca.breathtest@state.mn.us

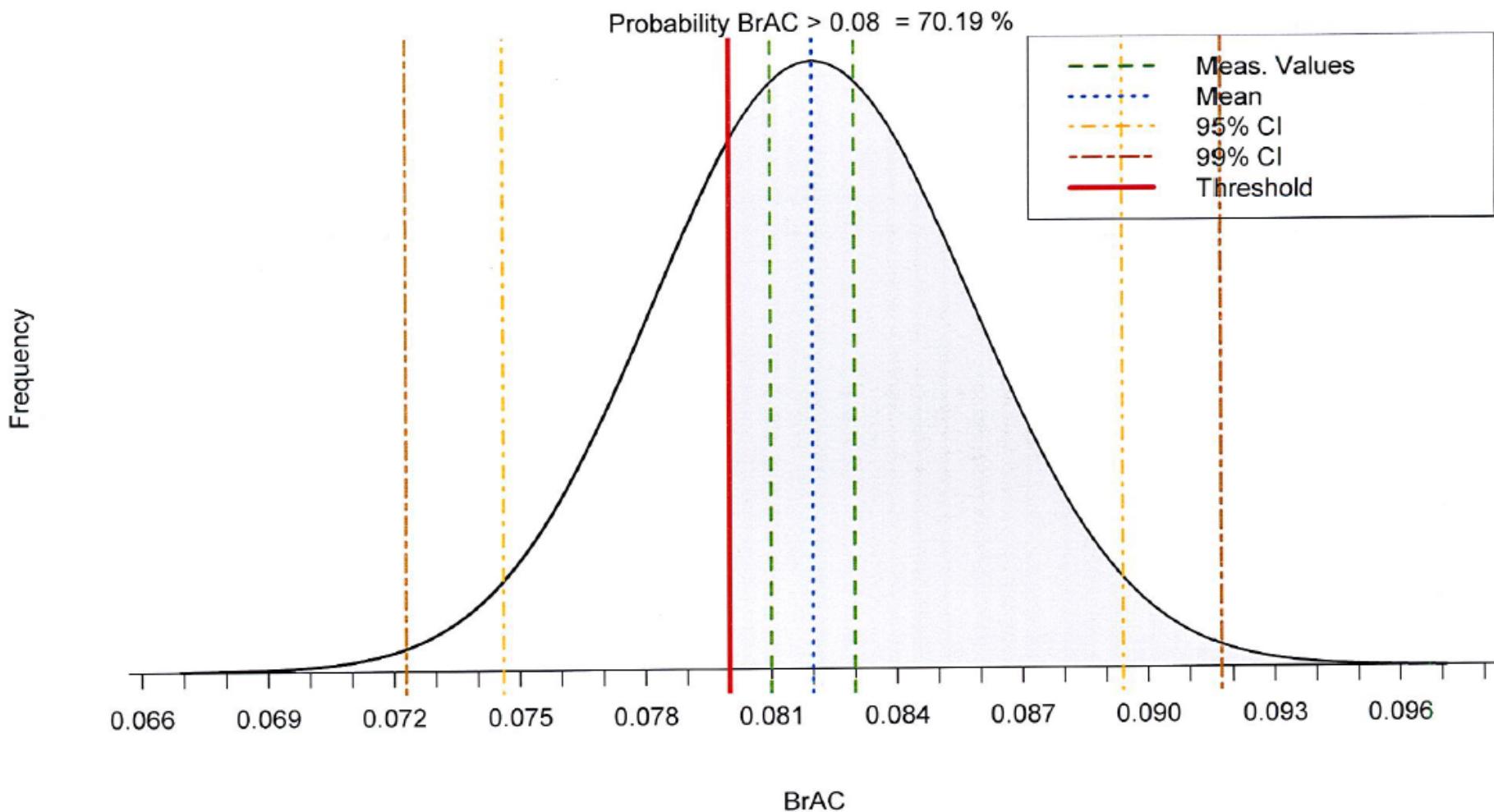
REMARKS:

Checked mouth vis and verbally. No BBV, RFI
Both samples long, hard, steady, cooperative



Fall 2016 – textbox added on DMT results

100500-100 : 2017 Normal Distribution at 0.082 with Combined Standard Uncertainty = 4.6 %



Uncertainty & IC Hearings

- In the past, courts had rejected “margin of error” arguments in IC context
 - Are uncertainty and margin of error the same?
- DMT tests are admissible by statute (Minn. Stat. § 634.16)
 - Challenges being made to their reliability
 - More difficult to challenge tests that aren’t “on the line,” i.e. 0.08 or 0.16
- Lower burden of proof in IC hearings

- Not much appellate caselaw on this issue yet
 - *State v. Mahoney*, 2017 WL 3013256
 - Released July 17, 2017
 - Affirmed district court's decision to admit DMT test result based on 634.16 even though district court found the test result was not foundationally reliable because there was no calculated test uncertainty
- Cases to watch for:
 - *McIntyre v. Comm'r*: Argued June 21, 2017
 - District court sustained revocation over uncertainty challenge
 - *State v. Brazil*: Awaiting oral argument
 - Court trial where judge convicted defendant of DWI with aggravating factor of .16 or more despite uncertainty challenge

Questions? Talk to the experts!

- **bca.breathtest@state.mn.us**
- **(651) 793-2777**



Minn. Stat. § 171.19 Petitions

What are they for?

- Any person whose driver's license has been refused, revoked, suspended, canceled, or disqualified
 - EXCEPT under § 169A.52 (implied consent) or § 171.186 (child support)
- File within 180 days of effective date or before expiration of withdrawal period
- Examples: ignition interlock, B-card violations, out-of-state violations, CVO

Keep In Mind

- Court determines whether Petitioner is entitled to reinstatement
 - Petitioner bears the burden of proof (*Pallas v. Comm'r of Public Safety*, 781 N.W.2d 163, 166 (Minn. Ct. App. 2010))
- Per the statute, Petitioner must be present and available for cross-examination
- Commissioner can present evidence by affidavit
 - Usually a reply will be filed before the hearing

DVS Contacts

- General Driver Evaluation
 - (651) 297-3298
- Ignition Interlock
 - dvs.ii@state.mn.us
 - (651) 296-2948
- Records
 - (651) 296-2940
- License Status Check:
 - www.mndriveinfo.org

Thank you for coming!

- Any questions?
- corybeth.monnens@ag.state.mn.us