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SJC limits OUI opinion testimony

Officers may offer an opinion in court about the defendant's level of intoxication, but they may not offer an opinion that the defendant's intoxication impaired his ability to drive. Comm. v. Canty, --- Mass. --- (2013): Officer Frank Bulman saw Joseph Canty's vehicle come within four inches of striking the curb. He followed the vehicle and observed it cross over the white fog line and then drift back over the double yellow line.

Bulman activated his lights, but Canty did not stop for twenty seconds. When he did, he did not put the vehicle "in park" despite Bulman's request. Canty explained that it was not his car.

Canty had difficulty retrieving his license from his wallet. Bulman could smell alcohol on Canty's breath and his eyes were bloodshot. Canty said he had consumed four beers in four hours, but his time frame only covered two hours!

Canty tripped over his own feet as he got out of the car. When asked to perform the "walk and turn test," Canty walked at a 45 degree angle. During the "one leg stand" test, Canty put his foot down three times and raised his arms to balance.

Bulman arrested Canty for OUI. A half empty bottle of brandy was found on the front passenger side of the car.

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Testimony at trial. At trial, Officer Bulman testified:

Prosecutor: "And at that point [after the field sobriety tests], had you formed any opinion as to his sobriety, officer, based on your observations?"

Officer Bulman: "Yes, I did."

Prosecutor: "And what was that opinion?"

Officer Bulman: "I believed that his ability to drive was diminished."

Prosecutor: "Did you have any opinion as to what may have caused that diminished capacity?"

Officer Bulman: "I believe it was alcohol consumption."

Analysis. A police officer may give an opinion in court regarding a defendant's sobriety, but cannot testify to his guilt or innocence. The problem: Testifying that a defendant's ability to drive was compromised by alcohol is, in reality, saying the defendant is guilty.

Faced with this dilemma, the SJC decided that an officer may give an opinion that the defendant is intoxicated, but may not give an opinion that the defendant's intoxication impaired his ability to operate the vehicle.

Here, Bulman was properly allowed to testify that Canty was "probably impaired." However, he should not have been allowed to testify that Canty's "ability to drive was diminished" by his alcohol consumption.

What should I do in the future . . .

DON'T testify: "Based on my training and experience, I believed the defendant had a diminished ability to operate safely because of alcohol consumption."

DO testify: "My opinion is that Johnny Defendant was intoxicated because I smelled a strong odor of alcohol on his breath; heard his slurred speech; saw his glassy eyes; watched him trip when he got out of his car; and observed his inability to perform basic field sobriety tests."

[Whatever facts you have, just organize them in this way. It's powerful.]

Hope this helps you on the street,

John Sofis Scheft