

TSRP Talk: Back to Basics

By: Joshua K. Saucier, Assistant TSRP

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This TSRP Talk is going to be a bit different than normal, and that's because there are two diverse items that I want to address. The first is getting back to basics in OUIs, and particularly in fatal crash investigations. The second is a new Law Court case addressing challenges to Intoxilyzer 8000 results. Let's get to it.

I. BACK TO BASICS: THE LIMITS OF BLOOD TEST RESULTS

Sometimes we have to step back to basics and with a few anecdotal cases that attempt to rely on blood evidence to prove operating under the influence ("OUI"), now is one of those times. Such attempts at reliance on blood has appeared true – or is at least most publicized – in fatal crash investigations. Will just blood evidence work to prove a manslaughter charge in Maine? The short answer is "maybe sometimes, but not always." I know, I know: that's a lawyer answer. But let's see why it's true.

In Maine, OUI, proof of which can sustain a manslaughter charge, can be proven in one of two ways: (1) by showing that someone has an elevated blood or breath alcohol contentⁱ, or (2) that someone was "under the influence of intoxicants."ⁱⁱ "Under the influence of intoxicants" of course, means that a person's "mental or physical faculties were impaired however slightly, or to any extent, by alcohol, drugs, or other intoxicants . . ."ⁱⁱⁱ

Can successful, admissible blood testing prove one of those two items for us? Well, blood testing shows the presence and amount of alcohol, the presence of some drugs, and the presence and amount of some drugs.^{iv} A blood test will not tell you the amount of all drugs or even the presence of every possible drug.

What does this all mean? It means if the suspect was over the legal limit for alcohol, then you could have a case based on the blood alone.^v A blood test, will not, by itself, prove an OUI other than one based upon elevated blood alcohol content. It cannot prove a case where someone was impaired by alcohol but was under .08; it cannot prove a case where someone was impaired by drugs; and it cannot prove a case where someone was impaired by a combination of alcohol and drugs.

You only need to look to New Hampshire to see the consequences of trying to rely too heavily on blood evidence in charging impairment related crimes. In the *Zhukovskyy* trial, in which the defendant was alleged to have killed seven different individuals, eight of twenty-three charge hinged on whether the defendant was impaired or, in our language, OUI.^{vi} To prove those

charges, prosecutors attempted to rely on blood evidence and admissions showing the consumption of heroin, fentanyl, and cocaine; the testimony of a laboratory; and statements of the defendant that the effects of the cocaine were still present: that he “still felt awake, and alert, and fine” because of the drug.^{vii} This was despite officers noting no signs of impairment.^{viii} Those eight charges did not even make it to the jury; the judge decided that there was little to no evidence of impairment and that no jury could find impairment based upon the evidence presented.^{ix}

How, then, will the state prove that a person was impaired? That can only be done through your observations and investigation. Do not shy away from that investigation and do not shrink from your duties. Remember, in a fatal crash with an alive driver, you are investigating a potential homicide: one human being may have killed another. Leave no stone unturned and, please, if you can, have a drug recognition expert present to talk to any alive drivers. Remember also that blood tests are used to support and confirm your observations, not to replace or supplant them.^x

II. *STATE V. BEELER*^{xi}: A SOLUTION FOR SOLUTION

If you’ve been to court on an OUI recently, you’ve probably heard arguments that the intoxilyzer test was not admissible because “there was no proof that the solution was approved by DHHS.” Well, I mention *Beeler* here in case you hear that argument again.

In *Beeler*, the Law Court reminds us that the ultimate test for admissibility of scientific evidence is its reliability. Reliability can be proven in multiple ways, and, for an intoxilyzer test, one of those ways could be through the sole testimony of a chemist.^{xii}

Prosecutors, if an intoxilyzer test is challenged, please talk to the lab, ask about the tests reliability, and consider making a *Beeler*-type argument. Officers and particularly site coordinators, if you see such a challenge, please make sure you prosecutors know about *Beeler*.

Thank you for reading. Stay safe.

ⁱ That elevated content is equal to or over 0.08 grams per 100 milliliters of blood or equal to or over .08 grams per 210 liters of breath. See [29-A M.R.S. § 2411\(1-A\)\(A\)\(2\)](#).

ⁱⁱ [29-A. M.R.S. § 2411](#).

ⁱⁱⁱ [State v. Soucy, 2012 ME 16](#), ¶ 11, 36 A.3d 910.

^{iv} MAINE CENTER FOR DISEASE CONTROL AND PREVENTION, PE BLOOD ALCOHOL ANALYSIS PROCEDURES 2 (July 29, 2021) (“Forensic alcohol analysis is defined as the practical application of specialized devices, instruments and methods by trained laboratory personnel to measure the concentration of ethyl alcohol in samples of blood from persons involved in traffic accidents or traffic violations.”); see e.g., MAINE HEALTH AND ENVIRONMENTAL TESTING LABORATORY, QUALITATIVE BLOOD DRUG EXTRACTION AND ANALYSIS 3 (October 16, 2019) (“This method describes the procedures for the qualitative detection of drugs in whole blood.”); MAINE HEALTH AND ENVIRONMENTAL TESTING LABORATORY, DETERMINATION OF NARCOTICS IN BLOOD BY LIQUID-LIQUID EXTRACTION AND LC-MS/MS ANALYSIS 3 (“This method describes the procedures for the quantitative determination of Narcotics and metabolites in whole blood.”); MAINE HEALTH AND ENVIRONMENTAL TESTING LABORATORY, DETERMINATION OF CANNABINOIDS IN BLOOD BY LIQUID-LIQUID EXTRACTION AND LC-MS/MS

ANALYSIS 2 (“This method describes the procedures for the quantitative determination of Δ^9 THC, OH-THC and THCCOOH in whole blood.”)

^v Combined, of course, with proof of operation.

^{vi} *Volodymyr Zhukovskyy trial video: Judge makes decision to dismiss some charges*, WMUR9 ABC, 11:20-12:12, <https://www.wmur.com/article/volodymyr-zhukovskyy-trial-video-judge-makes-decision-dismiss-some-charges/40800373> (August 3, 2022) (hereinafter “Video at ____.”).

^{vii} Video at 12:12-26:32.

^{viii} *Id.*

^{ix} Video at 11:20-12:12, 25:20-26:32.

^x Note also that blood tests are used to prove the presence of an intoxicant, which is required for an OUI related charge.

^{xi} 2022 ME 47, __ A.3d. __.

^{xii} *Id.* ¶ 14 (“In making the initial reliability determination, the court can rely solely on the testimony of the State’s chemist that the result was reliable[.]”).