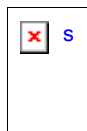


## Ohio's Greatest Home Newspaper



## Beating the system

In DUI cases, not taking breath test can benefit drivers

*Friday, September 1, 2000*

**Michael Hawthorne**  
*Dispatch Staff Reporter*

Judges know not to blow. So do politicians, police officers and lawyers.

Other Ohioans are figuring out what people who make and enforce the laws already understand: Refusing to take a breath, blood or urine test makes it more difficult for prosecutors to win a drunken-driving conviction.

In many cases, a Dispatch computer analysis shows, motorists who refuse the tests benefit from reduced charges. They escape jail time, hefty fines and higher insurance costs -- penalties imposed under laws intended to discourage driving under the influence of alcohol.

"People are finding out they can beat the system," said Joyce Spaulding, state victim advocate for Mothers Against Drunk Driving. "What good are all these laws if they don't work?"

With local judges, lawyers and politicians leading by example in DUI cases, Franklin County outpaces Ohio's 87 other counties in the number of test refusals. Forty percent of the 3,596 motorists who refused the tests in 1998 and



**James D. DeCamp / Dispatch**

**State Highway Patrol Trooper Darius Roberts administers a field sobriety test to a driver recently involved in a three-car crash on I-270.**

### Franklin County stands out

Franklin County ranks first in the state in breath-test refusals. Nearly 3,600 motorists in the county refused to take the tests in 1998 and '99. Forty percent of them escaped DUI convictions.

Officials who have refused the test after DUI arrests in Franklin County:

Former Mayor Dana "Buck"

'99 escaped a DUI conviction, according to the newspaper's analysis of refusals and driving records from the Ohio Department of Public Safety.

Rinehart

- Former Ohio Senate President Stanley Aronoff

Statewide, motorists arrested on suspicion of DUI were convicted of reckless operation or other reduced charges in a third of the 35,259 cases involving test refusals during the same period, the analysis shows.

- U.S. District Judge John Holschuh

- Municipal Judge Bruce Jenkins

Test refusals are so widespread that the Ohio Criminal Sentencing Commission, headed by Chief Justice Thomas J. Moyer of the state Supreme Court, urged lawmakers last year to close the loophole.

- Common Pleas Judge John Connor

- Juvenile Judge George Twyford

Despite tough talk about cracking down on DUI, legislators quietly rejected a recommendation from the 28-member commission that would have presumed motorists who refuse the tests legally drunk.

- Mike Colley, chairman of the Franklin County Republican Party
- 

"We're sending the wrong message now," one commission member, Judge H.J. Bressler of Butler County Common Pleas Court, said last week. "The reason for that test is to get drunken drivers off the road. We should make it clear there will be severe penalties if they refuse to take the test."

#### A decline in deaths

Tougher laws, safer cars, changing attitudes about drinking and driving, and sobriety checkpoints during high-travel weekends such as Labor Day have helped dramatically reduce the number of deaths from alcohol-related accidents.

Ohio had 374 DUI fatalities in 1998, the latest year for which figures are available, compared with 818 in 1984.

Although Ohio boasts a "zero-tolerance" policy toward DUI, stories about prominent officials arrested on suspicion of drunken driving invariably include a brief mention that the person "refused to take an alcohol-breath test."

Officials who refused the tests after DUI arrests in Franklin County include former Columbus Mayor Dana "Buck" Rinehart, former Ohio Senate President Stanley Aronoff, U.S. District Judge John Holschuh, Municipal Judge Bruce Jenkins, Common Pleas Judge John Connor, Juvenile Judge George Twyford and Mike Colley, chairman of the Franklin County Republican Party.

Several police officers stopped on suspicion of DUI also refused the tests -- including Roy F. Scott Jr., an off-duty Columbus patrolman arrested Aug. 20 after

he crashed into a van stopped at a red light.

While those officials might have an insider's view of the system, defense lawyers say refusing to take the test is wise for anyone. Ohio Supreme Court rulings make it difficult to challenge the machine, they say.

"I might be inclined to have more clients take the test if we could challenge the machine," said Cleve Johnson, a Columbus defense lawyer. "They (police) want the test to be God."

Refusing to take a test after a DUI arrest still carries a penalty.

To encourage more tests, lawmakers in 1993 approved a law that automatically suspends a motorist's driver's license for one year -- or longer if the person has a record of prior refusals.

"You're robbing yourself of an excellent defense if you don't blow and you aren't drunk," said Circleville Municipal Judge John R. Adkins.

Yet judges, prosecutors and defense lawyers agree that a suspension means little to chronic DUI offenders, many of whom drive without licenses.

Moreover, nearly 40 percent of the motorists who refused tests during the past two years obtained permits allowing them to drive to and from work, state records show.

Sanctions can be worse under state laws that promise harsh penalties for repeat DUI offenders.

Many criminal-justice experts think the number of test refusals will skyrocket as a result of the state's new "super-drunk" law that took effect in May. The measure doubles the penalties for motorists whose blood-alcohol level is 0.17 or higher.

Under current law, a driver is considered legally drunk at 0.10.

When lawmakers return to the Statehouse this month, they will be asked again to discourage test refusals.

Sentencing commission members want the state to deny work-related driving permits for drivers who refuse to blow and double the minimum three days in jail for those later convicted of DUI.

"Once the word gets out about that (super-drunk) law, nobody is going to take the test," said Capt. J.P. Allen, legislative liaison for the State Highway Patrol. "Certainly no attorney worth his salt is going to recommend it."

A lesson learned

Like Colley and Aronoff and most others charged more than once with DUI, Ryan

Hayes learned about the loophole the hard way: He blew into the machine.

The next time, he knew better.

After the 23-year-old Columbus resident was pulled over for running a stop sign at 1:32 a.m. on April 3, 1998, he complied with a request by Columbus police Officer Steven Wolfangel to take a breath test. It registered his blood-alcohol level at 0.14.

Hayes was found guilty of DUI less than a month later, sentenced to three days in an alcohol-treatment program, fined \$300 and placed on probation for a year, court records show.

But he soon was back on the road.

When Hayes was pulled over for speeding at 4:20 a.m. last Halloween, Trooper M.J. Bruce of the State Highway Patrol found him with vomit in his lap. The trooper put him through a series of field sobriety tests, which Hayes failed.

Later at the police station, Hayes refused a breath test.

Without a test result in the second case, his public defender negotiated a plea bargain to a lesser charge -- reckless operation of a motor vehicle. That added two points to his driver's license, not six for a DUI conviction. (A driver with 12 points loses his or her license.)

He also was sentenced to a one-year probation instead of mandatory jail time for a second conviction.

Hayes' case isn't unusual.

Nearly 90 percent of the motorists who refused to take a blood-alcohol test statewide during the past two years had at least one prior DUI conviction, according to state records.

"The word on the street is to refuse if you're stopped," Franklin County Municipal Judge Anne Taylor said. "I've really seen a trend toward this in recent years. The savvy defendants will force you to do more work."

Prosecutors point out that they don't need breath-test results to secure DUI convictions. They rely instead on the arresting officer's description of the motorist's condition and the results of field sobriety tests.

Chris Carpenter knew the drill after he was pulled over July 18, 1998, for running a red light and making an illegal U-turn on Polaris Parkway at I-71. But refusing to take a breath test didn't help him.

Based on the Grove City resident's previous offenses -- he has 14 prior DUI convictions, according to court records -- Carpenter's latest case was moved to

Common Pleas Court, where Judge David Cain found Carpenter guilty. Carpenter is serving an 18-month sentence at the Pickaway Correctional Institution.

### Tough in Medina County

In all but seven of Ohio's 88 counties during the past two years, state records show, more than half of the cases involving test refusals ended in DUI convictions.

Medina County ranked the toughest, with 86 percent of the cases involving test refusals ending in convictions. But at least half of the motorists who refuse to blow escaped drunken-driving convictions in Hardin, Ross, Fayette, Richland, Preble, Harrison and Gallia counties.

"The lack of a test makes our job more difficult and gives the defense something to work with in court," Columbus City Prosecutor Steve McIntosh said. "I think most people would rather take the risk and not take the test. You see that a lot with people who work within the system."

When Stanley Aronoff rammed his Cadillac into a pillar in the Statehouse parking garage in August 1999, state troopers on duty reported that the former Senate president smelled of alcohol and failed three sobriety tests.

The troopers arrested him on suspicion of DUI. But Aronoff, a Cincinnati Republican and influential lobbyist, refused to take a breath test after placing a phone call to Columbus lawyer Charles "Rocky" Saxbe.

Seven months later, Aronoff's attorneys brokered a deal that allowed him to plead guilty to a pair of misdemeanors: failing to control his vehicle and impaired alertness.

Aronoff paid a \$100 fine and \$118 in court costs, but he escaped the automatic one-year license suspension for refusing to take the breath test. The troopers hadn't asked him to take the test within two hours of the stop, as required under the law.

"We had bar tabs, witnesses who were with him and people in the Statehouse garage," said William Meeks, one of Aronoff's attorneys. "All said the same thing: He was not impaired by alcohol."

The DUI arrest was Aronoff's second in Columbus. He pleaded guilty to a lesser charge of reckless operation in 1982, despite a test that showed his blood-alcohol level at 0.12 after police pulled him over for running a red light near the Statehouse.

The stakes were higher for Mike Colley, a trial lawyer and former member of the Ohio State University Board of Trustees.

Colley was convicted of DUI in 1994 after scuffling with two Columbus police

officers who stopped his 1986 Jaguar on Hague Avenue near I-70. A breath test registered his blood-alcohol level at 0.22, more than double the legal limit, according to court records.

A second conviction after his Nov. 19, 1997, DUI arrest would have resulted in mandatory jail time.

While he performed poorly on a field sobriety test, reaching only the letter "g" when asked to recite the alphabet, Colley refused to take a breath test after the second arrest. He ended up pleading guilty to an offense called "physical control of a motor vehicle while under the influence of alcohol," a minor misdemeanor.

Other prominent officials were less fortunate.

Rinehart, Holschuh, Jenkins, Connor and Twyford all were convicted of drunken driving.

The lack of a driver's license forced Jenkins to ride the bus to work at the Franklin County Municipal Court, where he presides over DUI cases. Connor sometimes rode his bike to work at Common Pleas Court.

In a more recent example of a public official refusing the test, Lorain Law Director Mark Provenza told officers that he didn't trust the machine after Parma Heights police arrested him for drunken driving at 2:54 a.m. June 13.

During the ensuing furor over his refusal, Provenza was picked up in Lakewood after veering off a road and running over a fire hydrant. He took the test the second time, and it registered a blood-alcohol level of 0.15.

#### Implied consent

Members of the sentencing commission note that under state law, Provenza and all other Ohio motorists give implied consent to be tested by signing a driver's license.

Judges also are encouraged to tell juries that they can consider the refusal of a breath test as evidence against a motorist. The commission wanted to go a step further and force those who refuse to blow to prove in court they weren't drunk.

Defense lawyers and civil libertarians contended that the idea would run counter to the notion of "innocent until proven proved guilty," but it wasn't as radical as another proposal that would have created criminal penalties for refusing the test.

Nebraska, Alaska, Rhode Island, Minnesota and the District of Columbia have criminalized refusals.

"We shouldn't penalize people who aren't drunk just because they refuse to take a test," said Becky Herner, assistant state public defender.

An alternative recommended Aug. 24 by the commission would deny driving privileges to motorists who refuse to blow, with no exceptions for getting to and from work.

For those later convicted of DUI, the penalties would be the same as if they had submitted to the test and it registered a blood-alcohol level of 0.17 or higher.

A need for further study

Sen. Scott Oelslager, a Canton Republican who heads the Senate Highways and Transportation Committee, said legislative leaders need time to study the latest proposal.

"We need to address this issue," Oelslager said. "The question is, how do we make it constitutional?"

Defense lawyers already are on the attack. They say the idea gives prosecutors an unfair advantage as long as DUI defendants can't challenge the breath tests.

Meanwhile, motorists such as Angie Craft will continue to gamble by refusing to blow.

Westerville police stopped the 33-year-old Columbus woman for running a red light at 3:07 a.m. last Labor Day. Officer S. Dollison reported that Craft admitted drinking much of the previous day and failed a field sobriety test.

She had no prior record, though, and there was no test result to indicate whether she was legally intoxicated.

Three months later, prosecutors accepted a plea bargain to one count of reckless operation. Judge Taylor sentenced Craft to three days in an alcohol-education program and placed her on probation for a year.

"I know the situation didn't look good, but I don't believe I was guilty of driving under the influence," Craft said in a brief telephone interview last week.

"We live in a world where it's man vs. machine. I didn't want my fate to be determined by a machine."

---

[HOME](#) | [SPONSORED EVENTS](#) | [CLASSIFIEDS](#) | [ONLINE YELLOW PAGES](#) | [SUBSCRIBE](#) | [CONTACT US](#)

Copyright © 2000, The Columbus Dispatch