

The Columbus Dispatch

TEST RESULTS HARD TO ARGUE WITH

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Illustration: Photo, Graphic

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Defense lawyers hate the machine -- and it's easy to see why.

The State Highway Patrol boasts an 80 percent conviction rate in drunken-driving cases, most of which include evidence collected by a Breathalyzer, the trade name for a machine that measures the level of alcohol in a person's body.

Rulings by the Ohio Supreme Court have deflected a series of challenges to the machine _ in use in Ohio since 1968 _ even though defense lawyers and the experts they subpoena often argue that the results can be unreliable.

A motorist can be so nervous that he or she belches up stomach contents that produce inaccurate readings, attorneys say. Or radio frequencies can interfere with the calculations.

But unless they can prove that the machine wasn't calibrated correctly, lawyers are stuck with it. So they do the next best thing: They advise their clients not to blow into it.

"Most competent lawyers are not going to allow their clients to take a test that they can't challenge later in court," said William Meeks, a Columbus defense attorney who has fought the machine for years. "To do so is practically malpractice."

"Very few people can afford to hire the experts needed to challenge the test," said Cleve Johnson, another local defense lawyer. "As a result, the poor man's defense is to not take it."

State lawmakers are being asked to discourage test refusals by increasing criminal penalties and denying work-related driving privileges for motorists who refuse the tests. Defense lawyers are lobbying for more tools of their own: Dual tests or video cameras in police cruisers to record traffic stops.

"That would put us out of business," said lawyer Brad *Koffel*, who represents many DUI defendants.

A panel formed by the Ohio Department of Health in the early 1990s recommended that motorists be allowed to take a second alcohol-breath test if they don't like the results of the first.

The National Safety Council has recommended the dual procedure, and about half of the states require it.

In Ohio, the idea has caught on only in Upper Arlington and Circleville.

In those two cities, if the difference between the two tests is less than 0.02 grams per 210 liters of breath, the lower amount is used as evidence. Additional testing is required when a greater discrepancy is recorded.

"I want people to feel the test is fair," said Judge John R. Adkins of Circleville Municipal Court.

Said Upper Arlington Police Lt. Michael Brining: "Offering the second test helps us build a better case. It makes a lot of defense attorneys go away."

If the test is done correctly, the last bit of air to escape as a person exhales is a reliable indicator of their blood-alcohol level, said Alfred Staubus, an associate professor of pharmaceutical chemistry and a forensic-toxicology expert at Ohio State University.

The lungs have thin capillaries that allow oxygen to be transferred into the blood and carbon dioxide to be expelled back. In the process, Staubus said, small molecules such as alcohol also pass through the membrane.

"It's not the machine that's wrong," said Staubus, who has acted an expert witness for defendants and prosecutors in DUI cases. "But the first test can produce an artificially high blood-alcohol level if a person has stomach reflux."

Law-enforcement officials contend that the current system accurately indicates blood-alcohol level and a motorist's ability to drive.

"We have no reason to doubt the validity or accuracy of the first test," said Sgt. Gary Lewis, a patrol spokesman.

When motorists refuse the tests, prosecutors usually fall back on an officer's description of their condition and the results of field sobriety tests.

Juries likely will believe motorists are drunk, the thinking goes, when they've failed to walk a straight line, stand on one leg or follow a small object with their eyes.

Established procedures must have been followed, though.

Last month, the Ohio Supreme Court ordered a new trial for an Erie County woman because a trooper conducted a field test on "a gravel-covered, uneven surface of road when a flat surface is required."

Two Wayne County municipal judges in northeastern Ohio have a novel approach to dealing with motorists who refuse breath tests: They encourage police to fax them a request for a search warrant to obtain blood samples from the suspect.

Defense lawyers generally agree that blood tests are the most accurate method of determining blood-alcohol levels.

"We've got fax machines at home and will grant an officer's request at any time, as long as they are drawn up properly," Judge D. William Evans said.

His colleague, Judge Stuart Miller, said using blood tests and denying driving privileges are two effective ways to get drunken drivers off the road.

"Unless the prosecution has a damn good reason, I'm not going to allow people to use test refusals to circumvent the law," Miller said. "It just destroys the whole purpose behind the statutes."

Caption: (1) James D. DeCamp / Dispatch
State Highway Patrol Trooper Todd Heck readies the Breathalyzer machine at the Perry Township Police Department.

(2) Graphic

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