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Present

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MOTIONS IN LIMINE FOR DUI CASES

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2017 Advanced DUI Conference

Motions in Limine Presentation

MOTIONS IN LIMINE - Improve your DUI case

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Motions in Limine

Why File?

It strengthens your case!

Helps admissibility of your evidence

Excludes inadmissible defense evidence

- Knowing your evidence ahead of time assists with determining your trial strategy
- Nudges the defense to where you want the trial to go
- Gives you a chance to create alternate plans if evidence not admitted.

Motions in Limine-Other reasons

- Winning your Motions in Limine helps you to settle your cases ahead of trial.
- It allows you to file appellate actions as necessary
- Helps fill your Trial Notebook.

Motions in Limine

- From Latin, meaning "on the threshold"

Motion in Limine

- Motion in Limine - "A written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements."

Black's Law Dictionary

Motions in Limine- AZ case law

- In criminal cases, "[a]pretrial motion in limine is merely a convenient substitute for evidentiary objections at trial."
- State may wish to object to defendants proposed evidence at trial- and is not required to submit a written motion in advance of trial.
- *State v. Alverez* 228 Ariz. 579 (App. 2012)

Motions in Limine- AZ Case law

- Preserves issues for appeal or special action!
  - "Where a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial."
  - See State v. Leyvas, 221 Ariz. 181 (App. 2009)
  - Bad- State v. Reyes, 238 Ariz. 304, 307 (App. 2015)
  - But see Rules of Evid. 103!

Motions in Limine- AZ Rules

- AZ Rules of Evidence Rule 103 (2) (b) –

  Do not need to renew an objection or Offer of Proof.

  Once the court rules definitively on the record-either before or after trial- a party need not renew an objection or offer of proof to preserve the claim of error for appeal.

  (So make sure the court rules definitively.)

Motion in Limine or blatent disguised Motion to Suppress?

- OBJECT! - Move to strike them
- Must comply with the Rules of Criminal Procedure:
  - Rule 35.1- Must be in writing! Is it a memorandum and does it state the specific factual grounds AND the precise legal points, statutes and authorities?
  - Rule 16.1 (B) Must be timely! Was it filed at least 20 days prior to trial?
  - See State v. Aguilar, 171 Ariz. 444 (App. 1992)

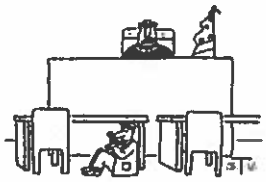
DUI Motions in Limine- Common Filings

- 1) Motions in Limine by the defense regarding the chemical test (blood or breath)
- 2) Motions in Limine by the defense regarding the officers testimony on observations and the Field Sobriety tests
- 3) Defense Motions against virtually everything else
- 4) Defense motion to admit evidence
- 4) States Motions against defense evidence and self-serving hearsay
- 5) States Motions to admit evidence

Motions in Limine - Focus on Two types

- 1) Objections to Defense Evidence
- 2) Requests to admit our evidence

Motion in Limine



Counselor, it's just an expression.
You can't literally "ambush the defense."

Motions in Limine – Defense evidence

Motions in Limine

- Where to start?
- AZ Rules of Evidence Rule 402 General Admissibility – "Irrelevant evidence is not admissible". If you lose:
- AZ Rules of Evidence Rule 403 The court may exclude relevant evidence if its probative value is substantially outweighed by the danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time or needlessly presenting cumulative evidence.

Motions in Limine-defense

- Rules of Evidence –Rule 702- KEEP OUT JUNK SCIENCE!
  - Rule 702 - Testimony by Experts
    - A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if :

      A) The experts specialized knowledge *will help the trier of fact to understand the evidence or to determine a fact in issue.*
      - B) The testimony is based on *sufficient facts or data.*
      - *C)* The testimony is the product *of reliable principles and methods,* and
      - *D)* The Expert has *reliably applied the principles and methods to the facts of the case.*
        - *(The defense has to show all of the above!)*

Motion in Limine - Micro clots

- EXAMPLE – Claim by defense is going to be micro-clots
- There are microscopic clots in the States blood sample reducing the actual volume of blood, thus artificially increasing the alcohol concentration in the sample.

Motion in Limine-defense

- Assuming you argue it is irrelevant (Rule 402) as there is no showing of proof for this defendant and still lose, go next to Rules of Evidence Rule 403 .
- The court should exclude this testimony because its probative value (the defendants blood sample might be wrong) is substantially outweighed by the danger of unfair prejudice to the state (no actual showing) , misleading the jury that something might have happened, and wasting time (it is mere speculation).

Motion in Limine- defense evidence

- USE ALL PARTS OF RULE 702
  - Are there any studies that support this (not just mention a micro clot)?Ask for proof of who has reliably studied micro clots and their effect on blood and alcohol?
  - So-
    - The testimony is NOT the product of reliable principles and methods (Rule 702 (c).
    - The testimony is NOT "based on sufficient facts or data" (Rule 702 (b)).
    - It will not help the trier of fact to understand the issue or determine a fact in issue (Rule 702 (a). (Relevance)
    - The defense cannot have reliably applied the evidence to the facts of this case (Rule 702 (d) if they didn't test the blood.
    - What is the "good faith basis" for raising the issue?

Motion in Limine- defense evidence

- Micro clots- in the end it is just a defense experts random guess, with no supporting evidence of reliability, and no showing that it actually occurred in our case, which is highly prejudicial to the State.
- Make your record!

Motions in Limine - Defense Hanging Drop

- Defense claim – "The Hanging Drop"
- A drop of blood on the pipette tip contained ethanol and added to much blood to the headspace vial. More blood equals more alcohol.

Motion in Limine- defense evidence

- Hanging Drop
  - No evidence it occurred-pure speculation and not relevant (can't meet Evid. Rule 403 (a) or (b)
  - No studies support it- It is not based on reliable principles and methods (Rule 702)
  - The expert does not reliably apply the principles and methods to the facts of this case
  - There are not sufficient facts or data, and it does nothing to help the jury with this case.

Motion in Limine - PBT's

Defense admitting result of PBT as "under .08"

- Motion in Limine to prevent defense admitting actual PBT number
- They cannot meet the requirements of ARS 28-1323(A)
  - Observation period and second sample or 15 minute deprivation with duplicate test?
  - What calibrations were performed on the PBT?
  - Is that specific instrument approved by DPS?
  - Does it also meet the Rules of Evidence Rule 702?
  - See also *State ex rel McDougall v. Johnson* 181 Ariz. 404 (App. 1995)

Motions in Limine- defense evidence

- Statistical stacking-reliably applied?
- Exclude any expert testimony outside their area of expertise (slant on the roadway means unreliable OLS and WAT FST's?)
- Admitting test results with no expert

States Motions in Limine

- We can do this too!

In a completely unscientific survey (does not comply with rule 702) estimation at a local magistrate court, The ratio of defense motions in limine to States motions in limine runs around ten to one.

States Motions in Limine -PBT refusal

- State moves in limine to admit a PBT refusal!
- No constitutional right to refuse
- Refusal is not testimonial evidence so no 5th amendment issue (See *State v. Superior Court (Ahrens, RPI)*, 154 Ariz. 574 (1987)
- A DUI suspect has the power, but not the right, to refuse to submit to testing. See *State ex rel Verberg v. Jones (Phipps, RPI)*, 211 Ariz 413 (App. 2005)

States Motion in Limine - PBT refusal

- It does not matter the test would have been inadmissible
- It is relevant to demonstrate consciousness of guilt
- There is no legal authority that excludes it
- Can admit and comment, just like an FST refusal and/or blood/breath test refusal.
- Should get a jury instruction on it at least

States Motion in limine to admit PBT for "presence of alcohol"

- Merely use for presence of alcohol
- PBT results are not admissible as they do not meet the requirements of ARS 28-1323 (A)
  - Foundation to admit "for the purpose of determining a person's alcohol concentration. (the statutory language).
  - We are not doing that. No alcohol concentration

States Motion to admit PBT for presence

- Neither statutes or the case law suggest any foundation is needed for mere presence of alcohol
- It is relevant!
- Where is the authority to suppress?
- Statutory foundation ensures accuracy of results, for mere presence not necessary and not in the statute
- (NOTE-You will need a witness who will testify a PBT is capable of detecting the presence of alcohol)

Motions in Limine

Remember-Proceed with Caution!

Just in case of mistrial request…

- What is the Legal Objection?
- Evaluate what was said (PBT or preliminary breath test?)
- Did the number come in and is there any harm? Didn't officer also testify they smelled the presence of alcohol?
- Again, only reason results not admissible is the requirements of ARS 28-1323 (A) (Statute states- "for the purpose of determining a persons alcohol concentration")
- Mistrials are supposed to be the rare exception

States Motions in Limine- Second Samples

Motion in limine- commenting on second sample

- If the defendant :
  - 1) Requests and obtains a sample for his/her own use, AND
  - 2) Attacks the validity of the States test

The State may:

1) Cross examine them (if they take the stand) about receiving a second sample and
2) Comment on defendants failure to produce evidence of the second sample results at trial (reasonable inference against him/her).

See *State ex rel McDougall v. Corcoran (KEEN, RPI)*, 153 Ariz. 357 (1987)

(If they test the blood and notice an expert just file a motion for disclosure)

Motion in Limine- *Keen* allows it

- Challenge the defendant and court for any legal authority that holds we cannot discuss the second sample and argue the reasonable inferences flowing from it.
- Make sure there is enough blood left for testing before making this argument!

Motions in limine- partition ratios (both parties)

Motion in Limine- Partition ratios
(Cooperman/Guthrie)

- PARTITION RATIOS (Also called 2100 to 1 or blood to breath ratio)
  - 1) Defendant might have an abnormally low partition ratio causing an elevated breath alcohol concentration (BrAC)
  - 2) Defendant may have had a fever that caused an elevated BrAC (But everyone's temperature rises/changes throughout the day)

Defense Motion in Limine

- Testimony as to fever- says who?
- If the defendant, self-serving hearsay
- If the expert- Cite Evidence rules Rule 402, 403 and 702.

Motions in Limine - States Motions (PRE)

- *Cooperman* held that partition ratio evidence (PRE) is <u>not</u> relevant to the DUI (A) (2) charge
- Partition ratio is only relevant to the (A) (1) impairment charge
- PRE is admissible without evidence of defendants individual physiology (decision is missing the Rule 702 analysis) however;
- This is subject to Rule 403 weighing test
- Either party can invoke the DUI presumptions
  - *State v. Cooperman*, 232 Ariz. 347 (2013)

Motion in Limine- States Motion

- So Partition Ratio Evidence is not admissible for the Per Se charges!
  - *Cooperman* says so directly.
    - Move to prevent any arguments by the defense on the .08
    - Settle the jury instructions that the jury may not consider the 2100 to 1 partition ratio evidence for the per se (A) (3)charges.
    - (A) (1) still subject to Rule 403 weighing
    - You need to bring up Rule 702 as a difference from *Cooperman* as Court did not consider it for (A) (1) and should be denied.

Motion in Limine- States Motions

- If partition ratio allowed for (a) (1) charge
  - Point out during motion that this benefits the defendant without any scientific proof it actually applied to this defendant. (unfair prejudice/reliably applied?)Assuming an average ratio the breath test will be 10% low compared to the blood test.
  - At least court should submit a limiting instruction for the jury and make it clear to the jury that it does not apply to the per se charges.

Motions in limine- State motions

- These same arguments also apply to:
  - Breathing patterns (who cares?)
  - Breath temperatures
  - Radio Frequency interference
  - Any other defense flavor of the month

MOTIONS IN LIMINE - DUI drugs

WHAT NOT TO DO IN A MARIJUANA DUI!

- Do NOT file a Motion in Limine to preclude admission of an AMMA card.
- See *Ishak v. McClennan*, 241 Ariz. 364 (2017)
- Even the well written dissent agreed they could present their card as part of their affirmative defense.
- DO File a motion in limine about there must be testimony presented showing amount in blood insufficient to prove impairment. Argue the cases of *Dobson v. McClennan*, 238 Ariz. 389 (2015) and *Ishak*.

Motions in Limine- State arguments

- Prescriptions

Motions in Limine- State (DUI drugs)

- Prescription drug defense
  - Just what the doctor ordered...and ONLY what the doctor ordered
  - ARS 28-1381 (D) Defendant must prove he took the prescription as prescribed .
  - State v. Bayardi (Fannin, RPI) 230 Ariz. 195 (App. 2013)

Motions in Limine- State

- Preclude any mention of a prescription! Why?
  - They need a Doctor- if not there, the prescription information is hearsay
  - Pre-August 18th- is it a valid doctor? (Homeopath, neuropath, non- US)
  - Use to settle jury instructions

Motion in Limine- State

- Very Common and useful State motion- Preclude self-serving hearsay!
  - "I only had two beers" or "I only smoked this morning"
  - See *State v. Barger*- 167 Ariz. 563 (App. 1990) – The defendants attempts to admit his statement through the arresting officer was properly precluded as self-serving hearsay. Also see *State v. Wooten*, 193 Ariz. 357 (App. 1998)

Motions in Limine

- Barger was an assault. The police spoke to him the day afterward, and he told the police he felt threatened by one victim's gesture and another showed a machete, so he pulled a gun and threatened them.
- The Court says the statements to police were not against his interest, so doesn't qualify for a hearsay exemption, and given they were the day after and defendant had time to think about things they were not reliable and trustworthy.
- Wooten is a murder case where the defendant gave self serving statements to witnesses again the day after the event. For us- statements before or after FST's?

Motions in Limine-State

- File a motion in limine on Suppressed evidence (statements)
- *Harris v. New York*, 91 S.Ct. 643 (1971); *U.S. v. Havens*, 100 S. Ct. 1912 (1980); *State v. Menard*, 135 Ariz. 385 (App. 1983)
- Suppressed evidence can be used to impeach! The defendant cannot "use the Constitution as a shield and a sword".

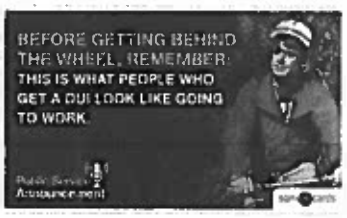
State's motion in limine

- Others to use on for DUI's:
- 9-1-1 and dispatch recordings
- Showing body camera video either in entirety, or only relevant part
- Breath test with calibrations greater than 30 days apart

Motions in Limine

- Please, have office standard motions in limine and use them. Argue Rule 402,403 and 702. We have to stop the "junk science" and this is a great way to educate and help us turn the tide.

In conclusion



Thank You!

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