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Present

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DUI Mistrials: How to Avoid Them and What to do if One is Requested

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DUI Mistrials:
How to Avoid Them
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What is a Mistrial?

- A trial of an action which cannot stand in law due to disregard of some fundamental requisite before or during trial.
- A judge may declare a mistrial because of some extraordinary event, **for prejudicial error that cannot be corrected at trial**, or because of a deadlocked jury

Black's Law Dictionary

Why Don't We Ask For Mistrials?

- If there is no manifest necessity, jeopardy attaches and we are done

How to Avoid Them

- Instruct Witnesses:
  - Not to talk about suppressed evidence
  - Regarding judge's orders
  - To avoid common pitfalls – *Fuenning*, PBTs, *Miranda*, right to counsel, etc.
- Tell them in front of the judge/make record
- Make sure evidence has been disclosed
  - Discovery sanctions *Crim. Proc. Rule* 15.7(a)(3)

How to Avoid

- Use Motions *in Limine*/House Keeping Matters
  - PBT refusals
  - Comment on second samples/independent tests
  - *Fuenning* language
- Know the Law
- Build & Protect Your Reputation
- Know Your Judge

Don't Step Over the Line

- **ER 3.8. Special Responsibilities of a Prosecutor**
- **ER 3.3. Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law or fail to correct a false statement of fact or law previously made to the court;

(2) fail to disclose Arizona legal authority known be directly adverse to one's position & not disclosed by opposing counsel;

Don't Step Over the Line

- **ER 3.4. Fairness to Opposing Party and Counsel**
- A lawyer shall not:

  (c) knowingly disobey an obligation under the rules of a court except for an open refusal based on an assertion that no valid obligation exists;

  (e) in trial, allude to any non-relevant matter or one that will not be supported by admissible evidence. . .

How to Respond to Motions for Mistrial

How to Respond to Motions for Mistrial

- Evaluate Whether Anything Improper Occurred
- Do NOT Simply Concede
  - PBTs, *Fuenning*, etc.
  - Educate the judge
- Know & Argue the Legal Standard
- Cite to & Show the Court Case Law

Keep Cites to Cases With Legal Standards in Your Trial Notebook

Legal standard

"Declaring a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that it is the only remedy to ensure justice is done."

State v. Maximo, 170 Ariz. 94, 98-99 (App. 1991).

Legal Standard

- Granting a mistrial is a drastic remedy and should only be ordered if it appears justice will otherwise be thwarted. *State v. Marshall*, 197 Ariz. 496 (App. 2000).
- Motions for mistrial are disfavored at law and to be granted only with great caution. *State v. Serna*, 167 Ariz. 373 (1991); *State v. Clifton*, 134 Ariz. 345 (App. 1982).

How to Respond to Motions for Mistrial (cont.)

- If There Was Error:
  - Move to strike
  - Suggest a curative instruction/limiting instruction

Striking Comments & Curative Instructions

- Jurors are presumed to follow the instructions of the court. *Elliott v. Landon*, 89 Ariz. 3255 (1961).
- Even statements that go to fundamental error can be cured by the trial court's instructions. *State v. White*, 115 Ariz. 199 (1977).

How to Respond to Motions for Mistrial (cont.)

- Try to get the defense to ask for the mistrial
  - Waives error
- Get the judge to find manifest necessity

Example
nothing improper occurred

- Your honor, nothing improper occurred. The officer is allowed to _____.
- Provide legal argument with case law, rules, etc.

Example
If there was error or if it is clear the judge believes there is a problem:

- This evidence is admissible and should be allowed (if applicable) however, even if you find it should not this does not warrant a mistrial.
- If applicable – defense isn't even asking for one. Both parties agree this should not be a mistrial.

Example

- As case law such as *Serna* and *Clifton* clearly recognize, mistrials are disfavored at law due to their drastic nature.

Example

- "Declaring a mistrial is the most dramatic remedy for trial error and should be granted only when it appears that it is the only remedy to ensure justice is done." *State v. Maximo*, 170 Ariz. 94, 98-99 (App. 1991).
- They are only appropriate if justice will be thwarted. *State v. Marshall*, 197 Ariz. 496 (App. 2000).

Example

- That simply is not the case here. This was merely a few words in a 2 – 3 day trial. (Depending on alleged error may want to point out overwhelming evidence of impairment, etc.)
- At the very most, this court should strike the statement and issue a curative instruction.

Example

- As this court is certainly aware, it is black-letter law that jurors are presumed to follow the instructions of the court. Recognized throughout case law such as *Elliott v. Landon*.
- Even statements that go to fundamental error can be cured by the trial court's instructions. *State v. White*, 115 Ariz. 199 (1977).

Example

- This court would have to find manifest necessity and that justice cannot be accomplished with out this drastic remedy.
- This is not even close. [Add more argument and ask the court to deny.]

Common Issues

Fuenning

Typical *Fuenning* Situation

- Witness says defendant was drunk, seemed impaired, or merely mentions the word drunk
- Defense asks for a mistrial based on *Fuenning* claiming this goes to the ultimate issue.

Testimony

- Q: Are you familiar with the symptoms of intoxication?
- A: Yes
- Q: Did the defendant display them?
- A: Yes. The defendant's conduct seemed influenced by alcohol.

Fuenning v. Superior Court, 139 Ariz. 590, 605 (1983).

What did *Fuenning* say?

- When in a DWI prosecution, the officer is asked whether the defendant was driving while intoxicated, the witness is actually being asked his opinion of whether the defendant was guilty.
- In our view, such questions are not in the spirit of the rules . . . Ordinarily, more prejudice than benefit is to be expected from this type of questioning.

Keep Highlighted Relevant Case Law in Your Trial Notebook

- Officer testified the defendant was "under the influence"
- Not per se inadmissible or reversible error
- *Fuenning's* ultimate opinion testimony was *dicta*
- It did not overrule existing law holing such evidence admissible
- *Fuenning* requires to trial court to consider whether the probative value outweighs its prejudicial impact

State v. Bojorquez, 145 Ariz. 501 (1985)

State v. Askren, 147 Ariz. 436 (App. 1985).

Q: Is there something you hope to learn from the whole battery (of FSTs) . . . ?

A: Yes, on the basis of his performance on the test and my observations of his physical appearance and the odor of his breath, it's an attempt to determine whether he is, in fact, intoxicated and was intoxicated while he was driving the car.

See also, State v. Bedoni, 161 Ariz. 480 (App. 1989)

Violations Rarely (if ever) Require new trial

- On a scale of 1 to 10 the officer rated defendant a "ten plus" for intoxication is an expression of opinion on the ultimate issue
- But was not prejudicial and did not require reversal based on other evidence (not stricken here)

State v. Lummus, 190 Ariz. 569 (App. 1998).

State v. White, 155 Ariz. 452 (App. 1987)

- Cited *Bojorquez* with approval.
- Testimony - officer had the impression defendant was definitely under the influence.

State v. White, 155 Ariz. 452 (App. 1987)

- We agree with defendant's argument that the officer's statements were impermissible. *Fuenning*
- However, *Fuenning* also said that it would be proper to ask whether defendant displayed symptoms of intoxication or whether defendant's conduct seemed influenced by alcohol. *Id.* We must determine whether the officers' statements were prejudicial.

State v. White, 155 Ariz. 452 (App. 1987)

- Here, no officer was asked whether defendant was driving while intoxicated.
- As to Lair's testimony, the question was about symptoms, and the nonresponsive answer was that the defendant was "under the influence."
- Upheld trial judge who sustained the objection without granting a motion for mistrial.

Searched but did not find **ANY** case that ordered a new trial on appeal for a so-called *Fuenning* error.

Civilian Witnesses

Lay witnesses that have observed a person at a time in question may give their opinions of intoxication or sobriety.

Esquivel v. Nancarrow, 104 Ariz. 209 (1969); *State ex rel Hamilton v. City Court of Mesa (Lopresti*, RPI) 165 Ariz. 514, 518, n.3 (1990); *M. Udall, Arizona Law of Evidence* § 22 at 39 (1960); *Morales v. Bencic* 12 Ariz.App. 40 (App. 1970).

PBTs

Typical PBT Situation

- Prosecutor asks: What happened next?
- Officer responds: "I gave the defendant a PBT test.
- Defense demands a mistrial, citing no law, but insisting this is absolutely improper.

The Easy One – **PBT Refusal**

- No Constitutional right to refuse.
- Refusal is not testimonial evidence. So no 5th Amendment issue. *State v. Superior Court (Ahrens, RPI)*, 154 Ariz. 574 (1987).
- A DUI suspect has merely the power, but not the right, to refuse to submit to testing. *State ex rel. Verburg v. Jones, (Phipps, RPI)*, 211 Ariz. 413, ¶ 9, (App. 2005).

PBT Refusal

- It does not matter that the test would not have been admissible
- It is relevant to demonstrate consciousness of guilt
- Can admit & comment – just like FST refusals and blood test refusals
- Should even get a jury instruction
- Suggest you move *in limine*

PBTs

- What is the objection? (Did the number come in?)
- Only reason PBT results are not admissible is do not meet requirements of 28-1323(A)
  - Foundation to admit "for the purpose of determining a person's alcohol concentration" (statute's language)
  - The officer did not do that, he just said he gave a PBT

- Should be able to admit and use for presence of alcohol
- PBTs have been found admissible for certain purposes – *Valenzuala v. Cowen*, 179 Ariz. 286 (App. 1994)(PBT acceptable for PC).

Admit PBT for Presence of ETOH

- Neither statute nor case law suggest foundation needed for mere presence of alcohol
  - Where is the authority to suppress? Or mistrial?
- Statutory foundation ensures accuracy of the result – for presence we don't care
- It's relevant
- Need witness who will testify PBT is capable of detecting the presence of alcohol

PBTs

- Evaluate what was said
  - Did officer say "PBT" or "preliminary breath test?"
  - Was the number mentioned?

Prevent Defense From Admitting the Actual Number

- Cannot meet requirements of ARS 28-1323(A)
  - Observation period & second sample or 15 min. deprivation with duplicate tests
  - Calibrations
  - Specific instrument may not be DPS approved
- Cannot meet the requirements of Rule 702
  - Not scientifically reliable without the above

Defense Must Meet the Same Standards of Foundation

- Independent samples
- Second samples
- And PBTs

State ex rel. McDougall v. Johnson (*Foster*, RPI), 181 Ariz. 404 (App. 1994); *Deason*.

Comment on Second Sample/Independent Test

Typical Situation

- Witness testifies to: the fact that 2 tubes of blood were drawn, the purpose of the 2nd tube, that defendant was advised of his right to an independent test, pros. argues inferences, etc.
- Defense asks for a mistrial claiming burden shifting, relevance, etc.

Second Sample – *Keen* allows it

If defendant :

1) requests & obtains a sample for his/her own use &/**OR**
2) attacks validity of State's test

State may:

* cross-examination about receiving 2nd sample, &
* **comment on defendant's failure to produce evidence of second sample results at trial (reasonable inference against him/her).**

State ex rel. McDougall v. Corcoran (*Keen*, RPI), 153 Ariz. 157 (1987).

Second Sample – *Keen* allows it

Challenge Defendant and Court for **ANY** authority that holds we cannot discuss the second sample and argue reasonable inferences

Keen

- Make sure there is enough blood left for testing before making this argument
- May want to bring that fact out in trial
- May want to move in limine

Officer's HGN Accuracy

Officer's HGN Accuracy Typical Situation

- Prosecutor asks officer what his accuracy is when using the HGN.
- Witness answers
- Defense asks for a mistrial claiming it is improper, we can't do it, vouching, etc.

Officer's Accuracy on HGN

- What is the objection? (must be specific)
- No case, rule, or statute prohibits
- *State* v. *Cook*, 172 Ariz. 122, (App. 1992) allows it
  - Refusal case with no reading to corroborate, Ct. ruled was consistent with *Lopresti*
  - Even though officer <u>correlated results to test results,</u> defendant opened the door to correlation by claiming his 97% accuracy rating was only from self-reporting.

Officer's Accuracy on HGN

- Goes to credibility & weight of the evidence
- Is part of Rule 702 foundation
  - c) The testimony is the product of reliable principles and methods
  - d) The expert has reliably applied the principles and methods to the facts of the case
- If the defense challenges HGN in any way, they put the officer's accuracy at issue

VGN

VGN - Typical Situation

- Prosecutor asks officer what he did next – officer testifies to VGN test
- Defense asks for a mistrial claiming VGN testimony is not admissible

VGN

- What is the specific objection?
- Challenge the defense for a legal basis
- **No AZ case** says does not meet Rule 702 or is not admissible

VGN

- HGN Manuals – not in original research but field use has proven VGN reliable indicator of high dose Etoh & DID drugs for that individual
- Studies - Citek 2003 & 2011
- Use officer's experience

What if a Mistrial is Granted?

- Motion for Reconsideration?
- Get the Judge to make a finding of manifest necessity

Re-trial Deadline Rule 8.2(c)

c. New Trial. A trial ordered after a mistrial or upon a motion for a new trial shall commence within 60 days of the entry of the order of the court.

Includes hung juries

Thank You!

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