

Random Observations from a Very Jaded Mind



by
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Forty years is a long time to focus on anything, especially a particular area of the law. Yet, from my first assignment as a young prosecutor in Janet Reno's Miami State Attorney's Office, I decided that if I was going to be prosecuting people for a particular offense, I was going to learn that area of law better than everyone else. And even though I left the DUI division for the felony division after my first year in the office, this area of law always followed closely behind. DUI Manslaughter case? Let's give it to Bobby!¹

I provide this story because for 40+ years now, I have been defending or prosecuting, lecturing, or writing about this area of the law. And the absurdities of how the police gather evidence and prosecutors prosecute these cases has led me to the observations below. So, you might ask me, "but Bobby, how will these absurdities help me win my DUI cases?" Well, just as you might think that what the police do is dumb, so too will your jurors. I leave it to you to adapt each area of discussion to the facts of your cases.

FIELD SOBRIETY TESTS

As I wrote in *The Florida Defender*,

Summer 2021 ("The Best of the Worst"), field sobriety tests were initially created by police officers on the road. The officer would think, "Hey, how should I test this guy to see if he is drunk? Let me throw some coins on the ground and have him pick them up! Let me have him walk on a line with one hand and juggle three balls while singing the Catalina Magdalena Hoopensteiner song to see if he is impaired."²



A list of almost 100 different tests that were being used by officers across the country was compiled. Stop and think about that for a moment. Almost 100 different tests were being used! And there was no standardization of how to administer (or how the poor subject stopped was to perform) the exercises. What could go wrong?!

It was only when Marcelline Burns was writing her Ph. D thesis on psychology in the 1970s that this list was reduced to the few we see today, which leads to the following questions:

- Why weren't medical doctors consulted when Dr. Burns was attempting to address the issue?
- Wouldn't a medical doctor be a better place to start?
- Don't neurologists use some of these tests when they test for neurological concerns?
- Wouldn't it make sense to understand how a neurologist administers such tests in their office before having police officers use them on the road?
- Wouldn't it make sense to understand

how they score/evaluate the results?

- Wouldn't it make sense to understand what those results potentially show and why they show that?
- Wouldn't it make sense to understand the limitations of each test?

As one individual so succinctly stated, "These aren't sobriety tests, they are agility tests, and I am just not that goddamn agile!"

BREATH TESTS

Prosecutors love to tell juries about how reliable breath test results are. Which leads me to the following observations:

If blood tests are more accurate than breath tests, why are we giving people breath tests and not blood tests?

ANSWER: Because breath tests are easier and cheaper to administer.

But shouldn't we, for something so important that it can lead to a criminal record and, potentially, jail time, try to do what is more accurate than what is easiest or cheaper?

Meaning: good enough for government work really isn't...

Intoxilyzers are scientific instruments?

ANSWER: Intoxilyzer 8000s were purchased by the state of Florida for \$6,000 each. See www.fdle.state.fl.us/Alcohol-Testing-Program/Intoxilyzer-8000-Records/Correspondence-and-Miscellaneous/Documents/Quotes-1.aspx.



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How many scientific instruments cost that little?

ANSWER: Many Intoxilyzers that are currently being used in the state of Florida were purchased in or around 2002 (I suggest you check the FDLE website for the actual purchase and registration information for your machine, see www.fdle.state.fl.us/Alcohol-Testing-Program/Intoxilyzer-8000-Records/Instrument-Files-and-Registrations/Registrations.aspx). How many scientific instruments that people use in their everyday lives are more than 20 years old?

Do any jurors still use their Motorola flip phones?

Do any of the jurors still use their Apple Macintosh's for their computing?

How old is the software on your computer programs before you update them?

Don't you replace your cellphone, car, laptop, toaster, etc. every few years?

Why do you change those devices every few years? [Answer: because science changes, technology changes, things wear out, they don't work in the manner intended. Outdated technology is just that; outdated.]

The more advanced (well, sort of) Intoxilyzers 9000s were released by their manufacturer [CMI] in 2009 and are used in many states.

Why is Florida still using the old machines?

ANSWER: Because it is all about the money!

So, because the state is too cheap to purchase the newer, better, equipment, we are left for something less accurate?!!

Do you go to a hospital to get operated on using old (from 2001) operating equipment, or do you go to the newer facility?

Statement of Warranty

New Product Warranty

CMI Inc. warrants that each new product will be free from defects in material and workmanship, under normal use and service, for a period of one year from the date of invoice to the initial purchaser. CMI's obligation is limited to repairing or replacing, as CMI may elect, any part or parts of such product, which CMI determines to be defective in material or workmanship. Warranty repairs will be performed at the factory or at a factory authorized service center.

The product, or part of the product, considered to be covered by the conditions of this warranty shall be returned, freight prepaid, in its original shipping container or similar protective container, to the factory, only after receipt of a Returned Material Authorization number from CMI. The repaired or replacement part or product will be returned from CMI or the authorized service center, freight prepaid.

Warranty coverage extends only to the original purchaser and does not include abuse, misuse, cables, switches or use of the product for other than its intended purpose. This warranty also does not apply if the product is adversely affected by attaching any feature or device to it, or is in any way tampered with or modified, without expressed written permission from CMI, Inc.

Repaired Product Warranty

Out of warranty product repairs are warranted for 90 days from the date of repair. This includes labor and those parts, which are replaced. If additional repair is required within the 90-day period, there will be a charge for any parts that were not originally replaced. Repairs made during this 90-day period that are unrelated to the original repair are not covered under the warranty.

There are no warranties expressed or implied, including but not limited to, other than those contained in this warranty. In no event shall CMI be liable for any loss of profits or any indirect or consequential damages arising out of any such defect in material or workmanship.

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The police officers who administer the breath tests have no scientific training. A 16-hour course is all that is used to train the officers in the use of the Intoxilyzer. See www.fdle.state.fl.us/Alcohol-Testing-Program/Breath-Testing-Home/Links/2015-Curricula-851-BTO-Course.aspx.

The individuals who have the important job of maintaining the machines to ensure their accuracy take a slightly longer course (all of 24 hours!) to teach them how to do that. See www.fdle.state.fl.us/Alcohol-Testing-Program/Breath-Testing-Home/Links/2015-Curricula-850-AI.aspx.

So, who wants me to remove their

appendix after I take this 24-hour course? Any takers? Bueller? Bueller?³

The Intoxilyzer 8000 came with a long-expired one-year very limited warranty!

The one-year limited warranty (see above) doesn't sound like it shows much faith by CMI, the manufacturer, in the machine they are selling. And this is their revised warranty! On their original warranties, which you can find with many of the machines still in use, they stated, in all caps and bold, "SELLER HEREBY EXPRESSLY DISCLAIMS ANY IMPLIED STATUTORY WARRANTY OF MERCHANT-

A SIDE NOTE: In a previous column, I wrote about the prosecution's attempt in a case in Broward County to charge my client, who was charged with DUI Manslaughter, with additional counts for DUI with property damage and reckless driving with property damage because he damaged his own vehicle! The prosecutor had claimed that because my client had an outstanding (but fully insured) loan on that car and that the bank was a lienholder on the car made it "the property of another." The trial judge agreed with me that these charges were absurd, and he dismissed them. The state attorney who filed the charges, and who stated that he did so routinely (but that no one had ever objected before!), filed a notice of appeal. I am happy to report that the Attorney General's Office reviewed the case and they quickly chose to dismiss the appeal.

ABILITY OR FITNESS FOR PARTICULAR PURPOSE.” Kind of strange that they would not warrant their machine for fitness for a particular purpose.

At some point we must ask ourselves, when are the “Good Enough for Government Work” methods no longer acceptable? Shouldn’t we draw that line when it comes to something that can lead to a criminal record, a driver’s license suspension, or jail?

Then again, I could be wrong; just ask my wife. 🏠

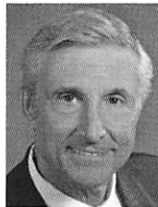
¹Much like the Life Cereal commercial in which Little Mikey was given the cereal to test it out, I was the person at the Miami SAO left to try out the cereal. “He likes it!!!” www.google.com/search?q=give+it+to+mikey+commercial&rlz=1C1ONGR_enUS1012US1012&coq=give+it+to+mikey&aqs=chrome.1.69i57j0i512l6j0i390i650l2.8012j0j15&sourceid=chrome&ie=UTF-8#kpv albx=_BWTimZO6ZKMUWwt0P26armAE_31.

²For a funny example of this, look at actor Steve Martin attempt the officer’s sobriety tests in *The Man With Two Brains*. www.youtube.com/watch?v=XRbZiCTzMg8. “As Steve Martin stated, “Goddamn, your drunk tests are hard!”

³See *Ferris Bueller’s Day Off* (1986).

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CONSENT SEARCHES: “Do you mind?”



by
Denis M.
deVlaming

“Do you mind if I look around?” the police officer asks the homeowner who replies “sure” and then steps aside. The officer conducts a search, finds contraband, and arrests the homeowner. Sound legal? It isn’t. Lawyers make their living with words. And words have meaning. Appellate courts look to the literal meaning of words. In the above scenario, a motion to suppress will be granted.

The following two cases make sense if taken literally. Often times, however, we make assumptions that although are based on common sense, do not comport with the literal meaning of words. In *State v. Cassidy*, 495 So.2d 907 (Fla. 3rd DCA 1986) a police officer wanted to search a defendant. In doing so he asked, “do you mind if I pat you down?” The defendant replied “sure.” The officer did and found drugs. The case ended up in the appellate court that ruled the defendant’s response by saying “sure” literally meant “sure, I mind” (drugs suppressed). And in *J.W.E. v. State*, 58 So.3d 376 (Fla. 2nd DCA 2011) and *V.H. v. State*, 903 So. 2nd

321 (Fla. 2nd DCA 2005) the Second DCA held that an officer who asks, “Do you mind if I search you?” and the defendant replies, “Yes,” does not obtain lawful consent (drugs found in search suppressed). It is not what the officer believes nor even what the defendant subliminally believes that determines if consent is present. It is the words themselves that the court looks to (See also *Robinson v. State*, 388 So. 2nd 286 (Fla. 1st DCA 1980).

Police officers often couch their request to search in a way of obtaining consent by asking, “Do you mind?” or “Do you have a problem?” (“If I search your car, if I search your house, if I search you, if I come in, if I pat you down” etc.). Somehow, they believe that the individual is more likely to cooperate if they couch their question that way. Unfortunately for them, the person may actually be disagreeing (to the search) by responding in a positive way (yes, sure, absolutely, etc.). When that is the case, a valid consent will not be found and the search will be ruled illegal.

So, when you are debriefing your client on a case that may turn on an illegal search and seizure, ask him or her the exact words used by the officer and their exact response. With a little bit of luck, both the officer and the client may have unwittingly fell within this scenario. 🏠

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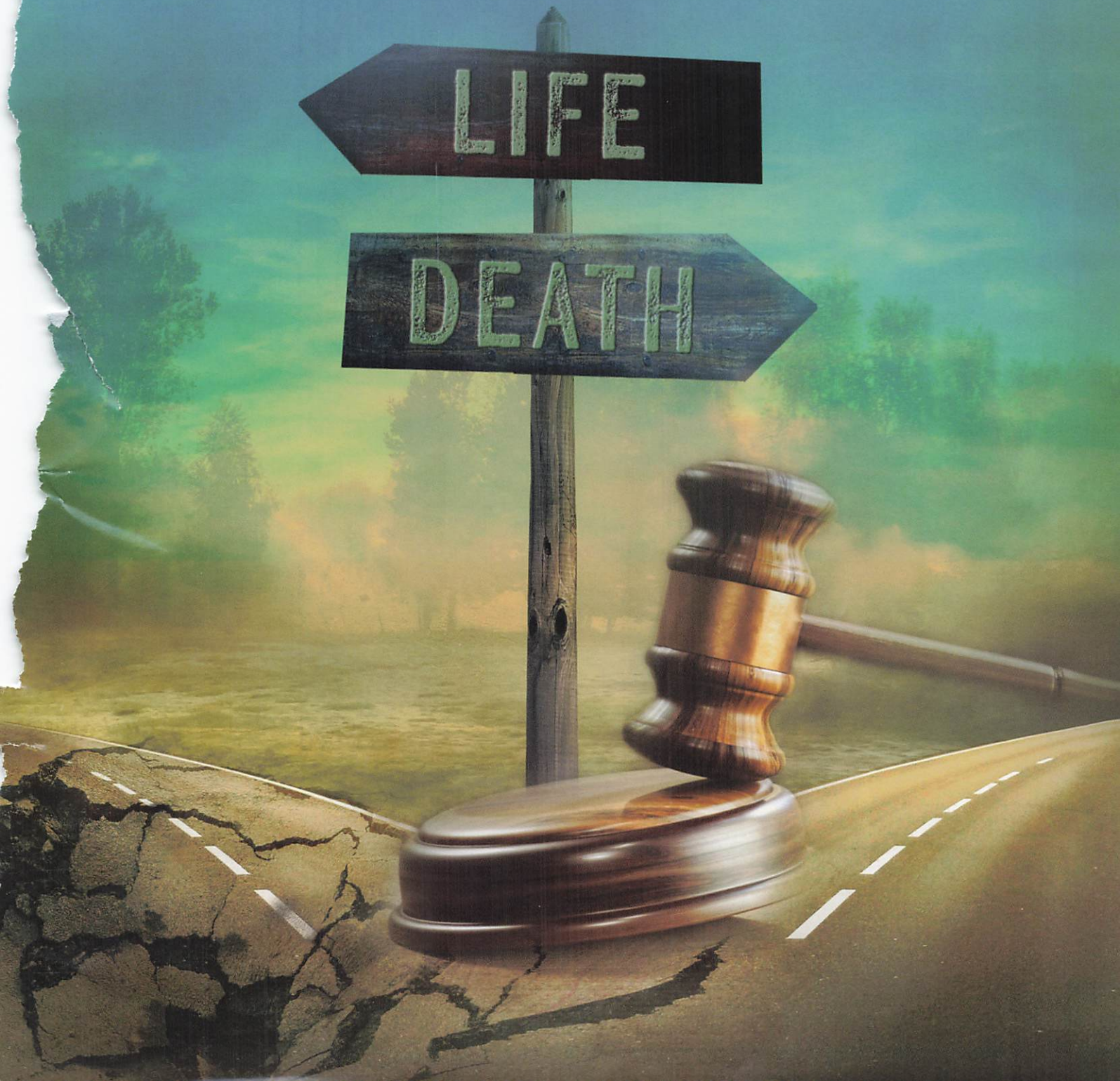
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