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# Driving Under the Influence in Illinois

Robert G. Johnston and Thomas P. Higgins\*

## I. INTRODUCTION

In Illinois, automobile operators who are caught while driving under the influence (DUI) of alcohol or other drugs face both civil and criminal proceedings. Some similarities exist between these two categories of proceedings. For example, each type of proceeding is initiated with a stop and arrest by a law enforcement officer. Further, each proceeding addresses whether the driver is entitled to retain a driver's license. The criminal proceeding, however, addresses the additional issues of whether the driver should be subject to one or more of the generally accepted criminal sanctions, such as a fine, or alternative sanctions specifically designed for the DUI offense, such as attending a substance abuse program.

## II. THE STOP AND ARREST

Among the issues that defendants often raise in both civil and criminal DUI proceedings are those related to a lawful stop and arrest. More specifically, a defendant may raise issues that concern the validity of an articulable suspicion to stop and probable cause to arrest.<sup>1</sup> Frequently, however, the language of judicial opinions

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1. *People v. Waddell*, 190 Ill. App. 3d 914, 922-23, 546 N.E.2d 1068, 1073-74 (4th Dist. 1989). An example of how a routine traffic stop may properly escalate into a DUI arrest is illustrated by the case of *People v. Houlihan*, 167 Ill. App. 3d 638, 521 N.E.2d 277 (2d Dist. 1988). In *Houlihan*, a police officer made an investigatory stop of a vehicle in a residential neighborhood at 3:00 a.m. when he heard a loud noise emanating from the vehicle and observed something under the front of the vehicle as it passed him in the opposite direction. *Id.* at 642, 521 N.E.2d at 280. The *Houlihan* court held that an officer may make a valid investigatory stop absent probable cause to arrest, provided that the officer's decision is based on specific articulable facts and reasonable inferences therefrom that warrant the investigative intrusion. *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). The court pointed out that an objective standard is used: whether the facts available to the officer would warrant a person of reasonable caution to believe that the action taken by the officer was appropriate. *Id.* A mere suspicion or hunch, the court stressed, is insufficient. *Id.* Thus, the court held that an officer may stop a vehicle if the officer reasonably infers from the circumstances that an occupant has committed an of-

does not clearly delineate these two distinct steps of stop and arrest.<sup>2</sup> Both the sufficiency of the facts to support an articulable suspicion to stop a motorist and probable cause for a subsequent arrest may be raised by a defendant at a rescission hearing.

### A. *An Articulable Suspicion to Stop*

To stop an automobile, a police officer must have an articulable, reasonable suspicion that the motorist is unlicensed, the automobile is not registered, or the vehicle or occupant is otherwise subject to seizure for violation of a law.<sup>3</sup> Further, if the officer believes, on the basis of articulable facts, that there is a substantial possibility that the driver has committed, is in the process of committing, or is about to commit a crime, the officer is permitted to stop the vehicle.<sup>4</sup> Since there is no uniform rule to determine when a reasonable suspicion exists, each case must be decided on its own facts.<sup>5</sup>

In determining the reasonableness of a police officer's conduct in stopping a motorist, the facts must be considered not from the perspective of hindsight, but rather, as they would have been viewed by a reasonable police officer confronting the same facts under the same circumstances.<sup>6</sup> An objective standard is employed to determine whether the facts available to the officer warrant a person of reasonable caution to believe that the officer's actions were appropriate.<sup>7</sup> For example, erratic driving, such as weaving across a roadway or even weaving within a lane, may provide a sufficient basis for an investigative stop of a motor vehicle.<sup>8</sup> Likewise, a traffic violation generally provides a sufficient basis for a vehicle stop,

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fense. *Id.* The court further noted that an officer need not actually witness a violation in order to establish reasonable grounds to investigate. *Id.* at 644, 521 N.E.2d at 281-82.

2. See, e.g., *People v. Peak*, 29 Ill. 2d 343, 194 N.E.2d 322 (1963).

3. *People v. Decker*, 181 Ill. App. 3d 427, 430, 537 N.E.2d 386, 387 (3d Dist. 1989) (citing *Delaware v. Prouse*, 440 U.S. 648, 656 (1979)); see also *People v. Hubbard*, 170 Ill. App. 3d 572, 577, 524 N.E.2d 1263, 1266 (2d Dist. 1988).

4. *People v. Lupton*, 178 Ill. App. 3d 1, 4, 532 N.E.2d 872, 874 (5th Dist. 1988) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)); see also *Houlihan*, 167 Ill. App. 3d at 642, 521 N.E.2d at 280.

5. *Houlihan*, 167 Ill. App. 3d at 642, 521 N.E.2d at 280.

6. *People v. Smithers*, 83 Ill. 2d 430, 439, 415 N.E.2d 327, 332 (1980); see also *Hubbard*, 170 Ill. App. 3d at 577, 524 N.E.2d at 1266.

7. *Houlihan*, 167 Ill. App. 3d at 642, 521 N.E.2d at 280. Although the *Houlihan* court found a mere suspicion or hunch insufficient, it should be emphasized that an officer may make a valid investigatory stop absent probable cause to arrest, provided the officer's decision is based on specific and articulable facts and reasonable inferences therefrom which warrant the investigatory intrusion. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

8. *Decker*, 181 Ill. App. 3d at 430, 537 N.E.2d at 388; see also *People v. Loucks*, 135 Ill. App. 3d 530, 533, 481 N.E.2d 1086, 1087-88 (5th Dist. 1985).

as does an equipment violation.<sup>9</sup>

After making a stop, a police officer may choose to warn or reprimand a driver without issuing a citation. An officer is not required to charge a minor violation when he discovers a serious one, such as a DUI, after a stop.<sup>10</sup> However, an improper stop may lead a court to find a lack of probable cause to arrest a defendant.<sup>11</sup>

### B. Probable Cause to Arrest

Once the issue of reasonable grounds to stop has been raised, the question of probable cause to arrest often will follow. Probable cause for arrest is based upon the facts and circumstances known to the arresting officer at the time of arrest.<sup>12</sup> Whether probable cause exists in a particular case does not depend upon the application of technical legal rules. Instead, probable cause is based upon the totality of the circumstances and facts known to the officer at the time the arrest is made.<sup>13</sup> Therefore, a court may place itself in the position of the arresting officer and, in light of the objective evidence, substitute its judgment on the issue of probable cause for the officer's judgment.<sup>14</sup> A trial court's determination that probable cause did or did not exist will only be reversed when it is con-

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9. *People v. Dillon*, 102 Ill. 2d 522, 524-26, 468 N.E.2d 964, 965-66 (1984); *People v. Assenato*, 186 Ill. App. 3d 331, 337, 542 N.E.2d 457, 460 (2d Dist. 1989); *Houlihan*, 167 Ill. App. 3d at 642-43, 521 N.E.2d at 281. In *Assenato*, the court found that the police were justified in stopping defendant's vehicle. Testimony showed that the stop was made at night, the defendant's vehicle was not displaying a license plate, and the police were unable to observe defendant's license-applied-for sticker. *Assenato*, 186 Ill. App. 3d at 337-38, 542 N.E.2d at 460-61.

10. *See People v. Roos*, 181 Ill. App. 3d 682, 683-85, 537 N.E.2d 424, 424-25 (5th Dist. 1989) (defendant stopped for failing to dim headlights and driving with non-functioning brake lights).

11. *See People v. Collins*, 154 Ill. App. 3d 149, 506 N.E.2d 963 (3d Dist. 1987). In *Collins*, the court concluded that the officer lacked an articulable, reasonable suspicion to stop the defendant, even though the officer had observed the defendant's vehicle crossing the center line. *Id.* at 151, 506 N.E.2d at 965. More specifically, the officer "could not deny that the defendant was avoiding a parked car." *Id.* Further, the evidence was insufficient to show that the defendant had created any hazard by crossing the center line. *Id.* The appellate court found that "[a]lthough the breathalyzer test administered subsequent to the stop and arrest clearly demonstrated that the defendant was, in fact, intoxicated, nevertheless, this evidence was tainted by the constitutionally improper stop. . . . Absent the fruits of the improper stop, there was no probable cause to arrest the defendant." *Id.* The court also found significant the defendant's "unrefuted, reasonable explanation" of his safe usage of the oncoming lane. *Id.*

12. *People v. Alcorn*, 183 Ill. App. 3d 431, 437, 539 N.E.2d 813, 817 (2d Dist. 1989).

13. *People v. Tisler*, 103 Ill. 2d 226, 230-31, 469 N.E.2d 147, 152 (1984); *People v. Wolff*, 182 Ill. App. 3d 583, 586, 538 N.E.2d 610, 612 (3d Dist. 1989).

14. *Wolff*, 182 Ill. App. 3d at 586, 538 N.E.2d at 612.

trary to the manifest weight of the evidence.<sup>15</sup>

Probable cause exists to make an arrest when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed and that the person arrested has committed the offense.<sup>16</sup> Circumstances observed after the act of driving, such as the actions of a driver after an accident, can offer reasonable grounds upon which to conclude that a defendant was DUI.<sup>17</sup>

This flexible approach to probable cause allows police officers to arrest both offenders who are approached in their vehicles and those who were previously DUI and have since taken refuge away from the automobile.<sup>18</sup> Regardless of the location of the stop, such factors as blood-shot eyes, slurred speech, disheveled clothes, the odor of alcohol, and poor performance on field sobriety tests may afford probable cause for a DUI arrest.<sup>19</sup>

### C. Adequacy of Warnings

An officer who arrests a driver from whom he requests a breath, blood, or urine test must warn the driver of the consequences of both agreeing and refusing to comply with the request. The arresting officer or the officer administering the test should inform the driver of the consequences of a completed test if the results reveal a

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15. *People v. Pelc*, 177 Ill. App. 3d 737, 742, 532 N.E.2d 552, 555 (4th Dist. 1988).

16. *People v. Preston*, 205 Ill. App. 3d 35, 38, 563 N.E.2d 80, 83 (3d Dist. 1990) (citing *People v. Goodman*, 173 Ill. App. 3d 559, 562, 527 N.E.2d 1055, 1057 (3d Dist. 1988)). In *Preston*, the court found that probable cause for an arrest existed after an officer came upon a serious traffic accident in the early morning hours. The officer was told by the defendant that another vehicle crossed the center line and hit his vehicle, contrary to the objective evidence. *Id.* at 37, 563 N.E.2d at 83. Additionally, the odor of alcohol on the defendant's breath was noticed by the officer and other emergency personnel. *Id.*

17. *People v. Sanders*, 176 Ill. App. 3d 467, 469-70, 508 N.E.2d 497, 499 (4th Dist. 1988) (defendant arrested at hospital after automobile accident).

18. See *Wolff*, 182 Ill. App. 3d at 585-86, 538 N.E.2d at 612 (defendant arrested at county jail after initially being approached at home); *Pelc*, 177 Ill. App. 3d at 740, 532 N.E.2d at 554 (defendant arrested in dormitory room after accident).

19. See *Pelc*, 177 Ill. App. 3d at 742, 532 N.E.2d at 555. Although the horizontal gaze nystagmus (HGN) test is not admissible at trial to prove intoxication, it may be admissible to prove probable cause. See *People v. Dakuras*, 172 Ill. App. 3d 865, 870, 527 N.E.2d 163, 167 (2d Dist. 1988); *People v. Furness*, 172 Ill. App. 3d 845, 849, 526 N.E.2d 947, 949 (5th Dist. 1988) ("we believe that the test, when combined with other factors, is acceptable to establish probable cause for arrest").

The HGN test is conducted with the use of a pencil or other object that is moved horizontally in front of the eyes of the suspect to check his ability visually to follow the movement of the object. For a detailed description of this test, see *People v. Vega*, 145 Ill. App. 3d 996, 1000-01, 496 N.E.2d 501, 504-05 (4th Dist. 1986).

blood alcohol concentration of 0.10 or more.<sup>20</sup>

When warnings are required, the police officer must read them to the driver. The statute does not require that an arrestee receive these warnings in writing. It requires only that the driver "shall be warned."<sup>21</sup>

A driver may be shown the "Warning to Motorist" form. This form sets out the warnings that a law enforcement officer must give the driver, as well as the penalties for refusal or noncompliance with the request for a blood, urine, or breath test. The form provides lines for the officer's signature, the name of the motorist, and other identifying information. This form is filled out by the arresting officer and filed with the court.<sup>22</sup> Courts have consistently found for the defendant when these warnings were misstated or the defendant was unable to understand the warnings.<sup>23</sup>

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20. ILL. REV. STAT. ch. 95 1/2, para. 11-501.1(c) (1989), provides in relevant part:

A person requested to submit to a test . . . *shall be warned* by the law enforcement officer requesting the test that a refusal to submit to the test will result in the statutory suspension of such person's privilege to operate a motor vehicle as provided in Section 6-208.1 of this Code. The person *shall also be warned* by the law enforcement officer that if the person submits to the test or tests . . . and the alcohol concentration in such person's blood is 0.10 or greater . . . , a statutory summary suspension of such person's privilege to operate a motor vehicle, as provided in Sections 2-608.1 and 11-501.1 of this Code, will be imposed.

*Id.* (emphasis added). The word "shall" in the statute indicates that the warnings are mandatory. See *Andrews v. Foxworthy*, 71 Ill. 2d 13, 373 N.E.2d 1332 (1978).

21. See *supra* note 20; see also *In re Rakers*, 187 Ill. App. 3d 27, 32, 542 N.E.2d 1311, 1314 (5th Dist. 1989).

22. See *Rakers*, 187 Ill. App. 3d at 32, 542 N.E.2d at 1314; *In re Trainor*, 156 Ill. App. 3d 918, 925, 510 N.E.2d 614, 619 (4th Dist. 1987).

23. In *People v. McCollum*, 210 Ill. App. 3d 11, 568 N.E.2d 493 (4th Dist. 1991), the court found that a driver was inadequately warned. Specifically, the officer informed the driver that refusal to submit to an alcohol test would result in summary suspension of his license for a period of six months. In fact, defendant's license was subject to suspension for a period of two years on the basis of his status as a repeat offender. Under these circumstances, the court concluded that the defendant was inadequately informed of the consequences of refusal to submit to a test. Accordingly, defendant's license was suspended for a six-month period, rather than for two years. *Id.* at 15, 568 N.E.2d at 496; see also *People v. Wegielnik*, 205 Ill. App. 3d 191, 197-98, 563 N.E.2d 84, 87-89 (1st Dist. 1990) (loss of driving privileges of non-English-speaking motorist rescinded despite driver's refusal to submit to test).

In *People v. Monckton*, 191 Ill. App. 3d 106, 547 N.E.2d 673 (3rd Dist. 1989), the arrestee was advised by the arresting officer that if he took a breathalyzer test, he could get a judicial driving permit, but that if he refused, he would lose his license for 12 months. In fact, refusal would have resulted in a license suspension of just six months. *Id.* at 109, 547 N.E.2d at 674. The arrestee submitted to the test, which resulted in a blood alcohol content reading of 0.17 and subsequent prosecution. *Id.* at 108, 547, N.E.2d at 674. On review, the appellate court reversed the DUI conviction because the defendant had been misled as to the possible length of license suspension. *Id.*

#### D. Refusal to Take Tests

Refusal to submit to any single test following an arrest constitutes a statutory refusal as to all three possible tests: breath, blood, and urine.<sup>24</sup> A finding of refusal will result in a summary suspension of one's driver's license.<sup>25</sup> A motorist is considered to have refused to submit to or complete a blood alcohol concentration test when, after a clear warning of the ramifications of such a refusal, the officer explicitly asks the motorist whether he will take the test, and the motorist, by word, act, or omission, clearly refuses.<sup>26</sup>

If the defendant's attempt to comply with the requirements of a breath test are inconclusive and found by the officer to constitute a refusal to take the test, the burden is on the defendant to show that the testing equipment malfunctioned or was operated incorrectly.<sup>27</sup> As long as the machine is in proper working condition and the defendant is capable of taking the test, his failure to provide a breathalyzer machine with an adequate air sample will be treated as a refusal to be tested.<sup>28</sup>

If one test result produces inconclusive findings, another test may be required. Failure to submit to a second test after taking a first test that has produced inconclusive results constitutes refusal.<sup>29</sup> Likewise, once an initial refusal to take one type of test is

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24. *People v. Bentley*, 179 Ill. App. 3d 347, 352, 534 N.E.2d 654, 657 (1st Dist. 1989).

25. ILL. REV. STAT. ch. 95 1/2, para. 11-501.1 (1989) (defining statutory summary suspension). Note that a lawful arrest must precede any request for a blood test under the implied consent law. See *Wegielnik*, 205 Ill.App.3d at 194-95, 563 N.E.2d at 84.

26. *People v. Kern*, 182 Ill. App. 3d 414, 416, 538 N.E.2d 184, 186 (3d Dist. 1989).

27. *People v. Hedeem*, 181 Ill. App. 3d 664, 537 N.E.2d 346 (5th Dist. 1989). In *Hedeem*, the defendant was found to have provided insufficient air samples for the breathalyzer machine. The police officer who administered the test believed that the defendant was placing his tongue over the hole in the mouthpiece in an attempt to evade the test. *Id.* at 667, 537 N.E.2d at 348. The officer believed that Hedeem's failure to provide a sufficient air sample constituted a refusal. *Id.* The appellate court agreed, concluding that it is not necessary to find that the defendant deliberately attempted to frustrate the test; mere failure to complete the test constitutes a constructive refusal. *Id.* at 664, 537 N.E.2d at 349. To conclude otherwise, the court reasoned, would circumvent the purpose of the statute, "to protect the citizens of Illinois by removing drunk drivers from the highways." *Id.*; see also *People v. Carlyle*, 130 Ill. App. 3d 205, 210, 474 N.E.2d 9, 13 (2d Dist. 1985).

28. *People v. Vinson*, 184 Ill. App. 3d 33, 35-36, 540 N.E.2d 8, 10 (4th Dist. 1989).

29. In *People v. Klyczek*, 162 Ill. App. 3d 557, 516 N.E.2d 783 (2d Dist. 1987), the defendant's breathalyzer test indicated that he was not under the influence of alcohol, and a subsequent request for submission to a either a blood or urine test was refused. The appellate court found that the request for a second type of test was reasonable based on the law enforcement officer's observations of the defendant's inability to perform field sobriety tests. *Id.* at 561-62, 516 N.E.2d 786-87. Therefore, an arrested driver's submission to an administered breathalyzer test does not preclude a summary suspension of his

established, the defendant is not entitled to another type of test to determine his blood alcohol level.<sup>30</sup>

Although the DUI testing procedure does not afford an individual the right to confer with an attorney, a request to speak to an attorney does not necessarily constitute a refusal. In *People v. Kern*,<sup>31</sup> the police allowed the defendant to call an attorney. The attorney who was contacted, however, was unable to advise the defendant because he was an out-of-state lawyer. The defendant requested and was refused permission to place a second telephone call to talk to an Illinois attorney. The defendant later renewed his request, and the police permitted him to consult with an Illinois attorney by telephone. After consultation, the defendant offered to take the test, but the police treated the second request to speak with an attorney as a refusal.

The appellate court, reversing the trial court, found that while a defendant's conditioning his taking of a blood alcohol test on his ability to consult legal counsel may constitute a refusal, no such condition existed in *Kern*. The court reasoned that since the police had established a policy of allowing defendants to consult with an attorney prior to testing, the officers could not consider the defendant's actions to be a refusal merely because he was persistent in his request to consult an Illinois attorney.<sup>32</sup>

### III. CIVIL DUI PROCEEDINGS

#### A. Summary Suspension

A summary suspension hearing is a civil proceeding separate from the criminal process associated with DUI.<sup>33</sup> Under section 11-501.1 of the Illinois Vehicle Code, the Illinois Secretary of State may summarily suspend a driver's license upon receipt of a law enforcement officer's sworn report certifying that the motorist: (a) was arrested for DUI and (b) either refused to submit to a test or submitted to testing which disclosed a blood alcohol concentration

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license if he refuses to consent to a subsequent blood or urine test. *Cf. People v. Rhoades*, 179 Ill. App. 3d 901, 903, 534 N.E.2d 1346, 1348 (4th Dist. 1989) (driver who refused to take blood test when breathalyzer results proved inconclusive was deemed to have refused to comply).

30. *People v. Bentley*, 179 Ill. App. 3d 347, 352, 534 N.E.2d 654, 657 (1st Dist. 1989).

31. 182 Ill. App. 3d 414, 538 N.E.2d 184 (3d Dist. 1989).

32. *Id.* at 416, 538 N.E.2d at 185-86.

33. *People v. Teller*, 207 Ill. App. 3d 346, 349, 565 N.E.2d 1046, 1047 (2nd Dist. 1991) (citing *People v. Moore*, 138 Ill. 2d 162, 169, 561 N.E.2d 648, 651 (1990) and *Koss v. Slater*, 116 Ill. 2d 389, 395, 507 N.E.2d 826, 828-29 (1987)).



of 0.10 or more.<sup>34</sup> Code section 2-118.1(b) provides that the officer's sworn report may constitute the sole evidence on which the summary suspension is based.<sup>35</sup>

The summary suspension process is an administrative function of the Illinois Secretary of State independent of the criminal charge of DUI.<sup>36</sup> Recently, section 6-208.1 of the Vehicle Code was amended to increase the period of suspension from one year to two years for any person, other than a first-time offender, who refuses to submit to a blood alcohol concentration test or who fails to complete such a test. The non-first-time offender who submits to a test that discloses a blood alcohol level of 0.10 or more will continue to face a one-year suspension.<sup>37</sup> Statutory summary suspension requires that the driver receive notice of the suspension. The suspension itself commences on the forty-sixth day following the driver's receipt of such notice.<sup>38</sup>

A driver whose license is summarily suspended may ask for a rescission hearing before a court, within thirty days after having received notice, to determine the validity of the suspension.<sup>39</sup> In addition, a driver may ask for a judicial permit allowing the motorist to drive to and from work to mitigate undue hardship caused by the license suspension.<sup>40</sup>

### B. Notice of Suspension

Sections 2-118.1(a) and 11-501.1(f)(1) of the Illinois Vehicle Code require that a defendant be given immediate notice of the statutory summary suspension and the right to a hearing.<sup>41</sup> The statute further provides that the suspension will not be effective until the defendant receives such written notice.<sup>42</sup> Section 11-501.1(g) provides that a suspension cannot take effect until forty-

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34. ILL. REV. STAT. ch. 95 1/2, para. 11-501.1 (1989).

35. *Id.* para. 2-118.1(b).

36. *See* *People v. Schuld*, 175 Ill. App. 3d 272, 284, 579 N.E.2d 800, 805 (2d Dist. 1988).

37. ILL. REV. STAT. ch. 95 1/2, para. 6-208.1 (1989).

38. *Id.* para. 11-501.1(g); *see also* *People v. Sargeant*, 165 Ill. App. 3d 10, 13-14, 518 N.E.2d 708, 710-11 (4th Dist. 1987).

39. *See infra* text accompanying notes 89-92.

40. *See infra* text accompanying notes 93-102.

41. ILL. REV. STAT. ch. 95 1/2, paras. 2-118.1(a), 11-501.1(f)(1) (1989).

42. *People v. Osborn*, 184 Ill. App. 3d 728, 540 N.E.2d 1109 (2d Dist. 1989); *People v. Gerke*, 156 Ill. App. 3d 43, 508 N.E.2d 1223 (2d Dist. 1987). In *Osborn*, the defendant's driver's license was summarily suspended without notice having been served upon the defendant. *Osborn*, 184 Ill. App. 3d at 729, 540 N.E.2d at 1110. Based on the arresting officer's sworn report, the Secretary of State issued a confirmation of summary suspension to the defendant. Defendant then filed his petition to rescind under section 2-

six days after notice is given to the defendant.<sup>43</sup> This requirement is reiterated in section 2-118(a) of the Code.<sup>44</sup>

Notice, as required by the statute, is also mandated by due process.<sup>45</sup> Therefore, until a defendant is served with notice, there can be no suspension. Immediate notice, as referred to in section 11-501.1(f), requires that notice be given with due and reasonable diligence in view of the circumstances of the case, and without unnecessary or unreasonable delay.<sup>46</sup>

In *People v. Marley*, the defendant did not receive notice of suspension at the time of his arrest. The appellate court characterized this failure as "an unintentional, administrative error."<sup>47</sup> Following Marley's release, which occurred on a Friday evening, efforts were made to contact him through his parents and inform him of the suspension. These efforts, along with other attempts to reach him over the following weekend at his parents' house and elsewhere, failed. On the following Monday, however, the police finally were able to contact Marley and serve him with notice of suspension. The court found that "once they discovered their mistake, the police acted diligently to correct it." While affirming the trial court's denial of rescission of the summary suspension, the court noted that the defendant had failed to show how the delay in notification could possibly be regarded as unnecessary or unreasonable.<sup>48</sup>

### C. *The Rescission Hearing*

#### 1. An Overview of the Issues

Section 2-118.1 of the Illinois Vehicle Code sets forth the limited

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118.1 on the ground that requisite notice had not been served. The trial court agreed and entered a judgment for rescission. *Id.*

On appeal, the State argued that since the defendant availed himself of his right to a hearing, he was not prejudiced by the lack of statutory notice. As this argument was not raised in the proceeding below, however, the court found it to be waived for the purposes of the appeal. Moreover, "[e]ven if the argument were properly before" the court, it would have been "unpersuasive" because proper notice was never served. *Id.* at 729, 540 N.E.2d at 1110-11. "[U]ntil defendant was served with notice of summary suspension there could be no suspension either to be confirmed or otherwise." *Id.* at 729-30, 540 N.E.2d at 1111.

43. ILL. REV. STAT. ch. 95 1/2, para. 11-501.1(g) (1989).

44. *Id.* para. 2-118(a).

45. *People v. Orth*, 124 Ill. 2d 326, 332-35, 530 N.E.2d 210, 213-15 (1988).

46. *People v. Marley*, 176 Ill. App. 3d 401, 405, 531 N.E.2d 108, 109 (5th Dist. 1988).

47. *Id.*

48. *Id.* at 405-06, 531 N.E.2d at 109-10.

issues that may be addressed at a rescission hearing.<sup>49</sup> Courts have held that examination of a law enforcement officer's report, including whether such a report is correctly sworn, is the proper focus of inquiry at a rescission hearing, as the sworn report serves a function analogous to a complaint in an ordinary civil proceeding.<sup>50</sup>

The rescission hearing may proceed on the officer's report alone or may include testimony and other evidence.<sup>51</sup> Section 118.1(b) of the Code specifically provides that the hearing may be conducted upon a review of the law enforcement officer's own official reports.<sup>52</sup> This provision assumes that the officer, if subpoenaed, would be present in court and subject to examination on the report.<sup>53</sup>

At the rescission hearing, the weight to be given to the evidence is determined by the trier of fact, whose findings will not be overturned unless they are against the manifest weight of the evidence.<sup>54</sup> Section 2-118.1(b) provides that the failure of an officer to answer a subpoena must be given the same effect as the failure of a complaining witness to appear in a criminal proceeding.<sup>55</sup> However, section 2-118.1(b) makes it clear that in the absence of the arresting officer, the State is permitted to use the arresting officer's sworn report to support the summary suspension of a defendant's

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49. Those issues are:

1. Whether the person was placed under arrest for an offense as defined in Section 11-501, or a similar provision of a local ordinance, as evidenced by the issuance of a Uniform Traffic Ticket; and

2. Whether the arresting officer had reasonable grounds to believe that such person was driving or in actual physical control of a motor vehicle upon a highway while under the influence of alcohol, other drug, or combination thereof; and

3. Whether such person, after being advised by the arresting officer that the privilege to operate a motor vehicle would be suspended if the person refused to submit to and complete the test or tests, did refuse to submit to or complete such test or tests to determine the person's alcohol or drug concentration; or

4. Whether the person, after being advised by the arresting officer that the privilege to operate a motor vehicle would be suspended if the person submits to a chemical test, or tests, and such test discloses an alcohol concentration of 0.10 or more, and such person did submit to and complete such test or tests which determined an alcohol concentration of 0.10 or more.

ILL. REV. STAT. ch. 95 1/2, para. 2-118.1 (1989).

50. *People v. McClain*, 128 Ill. 2d 500, 507, 539 N.E.2d 1247, 1250-51 (1989).

51. *People v. Wolff*, 182 Ill. App. 3d 583, 586-87, 538 N.E.2d 610, 612-13 (3d Dist. 1989).

52. ILL. REV. STAT. ch. 95 1/2, para. 2-118.1(b) (1989).

53. *See In re Vaughn*, 164 Ill. App. 3d 49, 52-53, 517 N.E.2d 699, 701 (4th Dist. 1987).

54. *People v. Decker*, 181 Ill. App. 3d 427, 430, 537 N.E.2d 386, 388 (3d Dist. 1989); *Vaughn*, 164 Ill. App. 3d at 52, 517 N.E.2d at 701.

55. ILL. REV. STAT. ch. 95 1/2, para. 2-118.1(b) (1989).

license, provided that the arresting officer is not under subpoena to appear.<sup>56</sup>

In *People v. Johnson*,<sup>57</sup> the trial court, upon a police officer's failure to appear at the rescission hearing, rescinded the defendant's summary suspension pursuant to a local rule of the Eighteenth Judicial Circuit.<sup>58</sup> The police officer had not been issued a subpoena.

The appellate court reversed, finding that local court rules cannot be inconsistent with Illinois Supreme Court rules and Illinois statutes, nor may oral court rules modify or limit the substantive law of the State.<sup>59</sup> The court further held that circuit courts lack the power to change the substantive burdens of the litigants before them.<sup>60</sup>

Additionally, section 2-118.1(b) prohibits the stay or delay of a statutory summary suspension.<sup>61</sup> In *In re Trainor*,<sup>62</sup> the court held that this no-stay provision is constitutional. The court found that no conflict exists between section 2-118.1 of the Code and Illinois Supreme Court Rule 305. The court interpreted the no-stay provision as applying only to the original implied consent hearing, as courts cannot stay a suspension prior to ruling on the section 2-118.1 hearing.<sup>63</sup> The court further noted that section 2-118.1(b) is not applicable to the circuit court's power to stay a pending appeal from a 2-118.1 hearing order.<sup>64</sup>

Section 2-1203(b) of the Illinois Code of Civil Procedure, which provides that a motion filed within a reasonable time after judgment in a non-jury case stays enforcement of the judgment, is not applicable in this context.<sup>65</sup> This section is not applicable because it does not provide for a stay of an administrative suspension.<sup>66</sup> A

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56. *People v. Johnson*, 186 Ill. App. 3d 951, 954, 542 N.E.2d 1226, 1227-28 (2d Dist. 1989).

57. 186 Ill. App. 3d 951, 542 N.E.2d 1226 (2d Dist. 1989).

58. The local rule stated that "[f]ailure of the officer to appear pursuant to this Rule shall be considered by the Court to be the same as the failure of the complaining witness to appear in any criminal proceeding." *Id.* at 953, 542 N.E.2d at 1227 (quoting Ill. 18th Cir. Ct. R. 34.05(c)).

59. *Id.* at 953-54, 542 N.E.2d at 1227 (citing *Arnold v. Northern Trust Co.*, 116 Ill. 2d 157, 506 N.E.2d 1279 (1987)).

60. *Id.* at 954, 542 N.E.2d at 1228 (citing *People ex rel. Brazen v. Finley*, 119 Ill. 2d 485, 519 N.E.2d 898 (1988)).

61. See Ill. Rev. Stat. ch. 95 1/2, para. 2-118.1(b) (1989) ("[t]his judicial hearing, request or process shall not stay or delay the statutory summary suspension").

62. 156 Ill. App. 3d 918, 510 N.E.2d 614 (4th Dist. 1987).

63. *Id.* at 924-25, 510 N.E.2d at 619.

64. *Id.*; see also *People v. Jennings*, 189 Ill. App. 3d 185, 190, 544 N.E.2d 1202, 1205-06 (4th Dist. 1989).

65. ILL. REV. STAT. ch. 110, para. 2-1203(b) (1989).

66. *Id.*

summary suspension in a DUI case is imposed by the Secretary of State, an administrative agency, and not by the circuit court.<sup>67</sup> Therefore, Illinois Vehicle Code section 2-118.1 is not in conflict with section 2-1203(b) of the Illinois Code of Civil Procedure.

## 2. Procedure

Section 2-118.1 of the Illinois Vehicle Code provides that a rescission hearing is to proceed in the same manner as other civil proceedings.<sup>68</sup> The hearing is intended to be an expedient procedure to get those charged with drunk driving off the road. Such a hearing is *sui generis*, even though the rules of civil procedure generally apply.<sup>69</sup>

The trial judge, at the start of the rescission hearing, may question the attorneys as to the issues in the case. Such issues may include the timeliness of the hearing, the legality of the stop and arrest, the adequacy of warnings, and any refusal to comply with a request to take tests.<sup>70</sup>

Like standard civil proceedings, section 11-501.2(a)(4) of the Illinois Vehicle Code allows a form of discovery prior to a rescission hearing.<sup>71</sup> This section affords the defendant a pre-hearing opportunity to review the evidence that may be offered against him and allows the defendant to be forewarned of any additional information that the State may raise concerning chemical test evidence. Additionally, section 11-501.2(a)(3) provides the defendant with an opportunity to rebut the State's evidence by having additional tests performed.<sup>72</sup>

As previously stated, the law enforcement officer's report plays an important role in a rescission hearing. Like a complaint in a

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67. *In re Rakers*, 187 Ill. App. 3d 27, 34, 542 N.E.2d 1311, 1316 (5th Dist. 1989).

68. *People v. Baboud*, 122 Ill. 2d 50, 54, 521 N.E.2d 884, 886 (1988); *People v. Cooper*, 174 Ill. App. 3d 500, 502, 528 N.E.2d 1011, 1012 (2d Dist. 1988).

69. *Cooper*, 174 Ill. App. 3d at 502, 528 N.E.2d at 1012.

70. *See supra* note 49.

71. "Upon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to the person or such person's attorney." ILL. REV. STAT. ch. 95 1/2, para. 11-501.2(a)(4) (1989).

72. Section 11-501.2(a)(3) provides:

The person tested may have a physician, or a qualified chemist, registered nurse, or other qualified person of their own choosing administer a chemical test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person shall not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

*Id.* para. 11-501.2(a)(3).

civil case, the officer's report is the jurisdictional step that starts the proceeding.<sup>73</sup> If such a report is inaccurate or defective in some way, the State should be given an opportunity to obtain verified amendments to the report by the arresting officer before holding a new hearing.<sup>74</sup> After an amendment is properly made, the circuit court hears evidence on the propriety of the suspension.<sup>75</sup> If a defective report cannot be amended, the circuit court must decide the case in favor of the defendant.<sup>76</sup> A report that fails to include the time and place of a test is not fatally defective. Rather, the time and place at which the test was administered are evidentiary issues that may be considered in determining the weight to be given to the test results.<sup>77</sup>

### 3. Burden of Proof

Because a summary suspension hearing is a civil, not a criminal, proceeding,<sup>78</sup> the motorist who requests judicial rescission of the suspension bears the burden of proof.<sup>79</sup> To rescind the summary suspension of a defendant's driver's license, the trial court must find that the defendant has satisfied his burden of proof by a preponderance of the evidence.<sup>80</sup> Whether a defendant has met this burden is a question of fact for the trial judge, whose determination will not be overturned on review unless it is palpably against the

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73. *Cooper*, 174 Ill. App. 3d at 502, 528 N.E.2d at 1012; *People v. Martin*, 161 Ill. App. 3d 472, 474, 514 N.E.2d 815, 816 (2d Dist. 1987).

74. *People v. Baboud*, 122 Ill. 2d 50, 59, 521 N.E.2d 884, 888 (1988); *see also* *People v. Zilio*, 191 Ill. App. 3d 1078, 1082-83, 548 N.E.2d 558, 560-61 (1st Dist. 1989) (amendments should be liberally allowed as in civil cases).

75. *People v. Fint*, 183 Ill. App. 3d 284, 285-87, 538 N.E.2d 1348, 1349-50 (4th Dist. 1989).

76. *Id.*

77. *People v. McClain*, 128 Ill. 2d 500, 509, 539 N.E.2d 1247, 1251-52 (1989); *see also* *Zilio*, 191 Ill. App. 3d at 1082, 548 N.E.2d at 560.

78. *People v. Gerke*, 123 Ill. 2d 85, 94, 525 N.E.2d 68, 73 (1988).

79. *People v. Orth*, 124 Ill. 2d 326, 338, 530 N.E.2d 210, 215 (1988); *see also* *People v. Vinson*, 184 Ill. App. 3d 33, 36, 540 N.E.2d 8, 10 (4th Dist. 1989); *People v. Kurtz*, 171 Ill. App. 3d 1068, 1071, 526 N.E.2d 540, 541 (2d Dist. 1988). In *Orth*, the Illinois Supreme Court held that placing the burden of proof upon the suspended motorist does not violate the due process clause of either the Federal or State Constitution. In reaching this conclusion, the court noted: "The summary suspension can only be rescinded if the motorist takes the positive step of making a 'written request for a judicial hearing in the circuit court of venue.'" *Orth*, 124 Ill. 2d at 337, 530 N.E.2d at 215 (quoting ILL. REV. STAT. ch. 95 1/2, para. 2-118.1(b)). In the usual civil proceeding, the party requesting judicial relief bears the burden of proof. *Id.*

80. *Kurtz*, 171 Ill. App. 3d at 1070, 526 N.E.2d at 541; *People v. Torres*, 160 Ill. App. 3d 643, 646, 513 N.E.2d 1142, 1144 (2d Dist. 1987); *People v. Sanders*, 155 Ill. App. 3d 759, 763, 508 N.E.2d 497, 499 (2d Dist. 1987).

manifest weight of the evidence.<sup>81</sup>

The defendant's initial burden is to establish a prima facie case for rescission of a summary suspension.<sup>82</sup> Prima facie evidence means evidence sufficient to establish a fact that will remain sufficient if un rebutted.<sup>83</sup> Elements of a prima facie case for rescission of a summary suspension include whether the blood alcohol concentration test was properly administered and whether the results obtained were accurate.<sup>84</sup> Evidence on these matters is indispensable for the defendant to meet his or her burden of establishing a prima facie case for rescission.<sup>85</sup>

If the defendant presents a prima facie case, the burden of upholding the license suspension then shifts to the State. The Supreme Court of Illinois has held that once a motorist has established a prima facie case that the breath test result obtained by the police did not disclose a blood alcohol concentration warranting suspension, the State can avoid rescission only by rebutting the defendant's evidence.<sup>86</sup> This may be done by moving for the admission of the test into evidence and providing the required foundation.<sup>87</sup> If the defendant fails to produce sufficient evidence

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81. See *People v. Decker*, 181 Ill. App. 3d 427, 430, 537 N.E.2d 386, 388 (3d Dist. 1989); *Kurtz*, 171 Ill. App. 3d at 1071, 506 N.E.2d at 541; *Torres*, 160 Ill. App. 3d at 646, 513 N.E.2d at 1144; *Sanders*, 155 Ill. App. 3d at 763, 508 N.E.2d at 499.

82. See *People v. Gryczkowski*, 183 Ill. App. 3d 1064, 1070, 539 N.E.2d 1360, 1364 (2d Dist. 1989); *People v. Knoblett*, 179 Ill. App. 3d 1015, 1016, 535 N.E.2d 77, 78 (4th Dist. 1989) (citing *Orth*, 124 Ill. 2d at 338, 530 N.E.2d at 215).

83. *Knoblett*, 179 Ill. App. 3d at 1016, 535 N.E.2d at 78; *Sanders*, 155 Ill. App. 3d at 764, 508 N.E.2d at 500.

84. See *Gryczkowski*, 183 Ill. App. 3d at 1070, 539 N.E.2d at 1364; *People v. Davis*, 180 Ill. App. 3d 749, 752, 536 N.E.2d 172, 174 (2d Dist. 1989) (citing *Orth*).

85. *Orth*, 124 Ill. 2d at 341, 530 N.E.2d at 217; *Davis*, 180 Ill. App. 3d 752, 536 N.E.2d at 174. For example, in *Orth*, the evidence sought to be introduced as a prima facie basis for rescission was the result of the breath test. The Supreme Court of Illinois found:

Where the motorist argues for rescission on the basis that the test results were unreliable, such evidence may consist of any circumstance which tends to cast doubt on the test's accuracy, including, but not limited to, credible testimony by the motorist that he was not in fact under the influence of alcohol. We emphasize that this is not an invitation to commit perjury.

*Orth*, 124 Ill. 2d at 341, 530 N.E.2d at 217.

It would appear that there are three logical reasons why a breath test cannot be properly completed: (1) a malfunctioning machine, (2) operator error, or (3) the defendant's inability or unwillingness to complete the test. See *People v. Hedeon*, 181 Ill. App. 3d 664, 670, 537 N.E.2d 346, 350 (5th Dist. 1989).

86. *Orth*, 124 Ill. 2d at 340, 530 N.E.2d at 216.

87. *Id.*; see also *People v. Marley*, 176 Ill. App. 3d 401, 405, 531 N.E.2d 107, 109 (5th Dist. 1988). The required foundation includes: (1) evidence that the tests were performed according to the uniform standard adopted by the Illinois Department of Public Health; (2) evidence that the operator administering the tests was certified by the Department of

to establish a prima facie case, the State has no responsibility to produce witnesses or evidence to rebut the defendant's unsubstantiated challenges to the accuracy of the blood alcohol concentration tests, nor is the State obligated to establish a foundation for admission of those test results.<sup>88</sup>

#### D. Timeliness of Rescission Hearing

A judge's authority regarding when a rescission hearing may be conducted is limited. Courts have interpreted section 2-118.1(b) of the Code to mean that the rescission hearing must take place either within thirty days of the defendant's request to the court or on the first appearance date shown on the uniform traffic ticket.<sup>89</sup> If the thirty-day period lapses before the first appearance date on a DUI offense, section 2-118.1(b) does not require the court to conduct a hearing within thirty days of the request for a rescission hearing. Rather, the court has limited discretion to choose the time at which to conduct a rescission hearing.<sup>90</sup> If the defendant is responsible for causing the thirty-day period to pass without an appearance, rescission may not be required.<sup>91</sup> The thirty-day period does not begin to run until the defendant brings a request for such a

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Public Health; (3) evidence that the machine used was a model approved by the Department of Public Health, was tested regularly for accuracy, and was working properly; (4) evidence that the motorist was observed for the requisite 20 minutes prior to the test and, during this period, the motorist did not smoke, regurgitate, or drink; and (5) evidence that the results appearing on the "printout" sheet can be identified as the tests given to the motorist. *Orth*, 124 Ill. 2d at 340, 530 N.E.2d at 216-17; see also *People v. Hester*, 88 Ill. App. 3d 391, 395, 410 N.E.2d 638, 641 (2d Dist. 1980) (in lieu of decal or certificate from Department of Public Health, page from instrument log book is admissible to satisfy the foundation requirement that breathalyzer was properly tested for accuracy and in proper working condition).

88. See *Orth*, 124 Ill. 2d at 338, 530 N.E.2d, at 215-16; *Gryczkowski*, 183 Ill. App. 3d at 1071, 539 N.E.2d at 1365; *Hedeen*, 181 Ill. App. 3d at 669-71, 537 N.E.2d at 350; *Marley*, 176 Ill. App. 3d at 405, 531 N.E.2d at 110.

89. See *People v. Gerke*, 123 Ill. 2d 85, 91, 525 N.E.2d 68, 71 (1988); *People v. Grange*, 181 Ill. App. 3d 981, 984-85, 537 N.E.2d 1153, 1155 (2d Dist. 1989). Section 2-118.1(b) of the Illinois Vehicle Code provides in pertinent part:

Upon the notice of statutory summary suspension served under section 11-501.1, the person may make a written request for judicial hearing in the circuit court of venue. . . . Within 30 days after receipt of the written request or the first appearance date on the Uniform Traffic Ticket issued pursuant to a violation of Section 11-501, or a similar provision of a local ordinance, the hearings shall be conducted by the circuit court having jurisdiction.

ILL. REV. STAT. ch. 95 1/2, para. 2-118.1(b) (1989) (emphasis added).

90. *Grange*, 181 Ill. App. 3d at 984-85, 537 N.E.2d at 1155-56; *In re Trainor*, 156 Ill. App. 3d 918, 924-25, 510 N.E.2d 614, 618-19 (2d Dist. 1987).

91. See *Trainor*, 156 Ill. App. 3d at 923, 510 N.E.2d at 618.



hearing to the attention of the court.<sup>92</sup>

### E. Judicial Driving Permits

In order to avoid undue hardship, section 2-206.1 of the Code enables a court to issue a judicial driving permit to a person whose license has been suspended.<sup>93</sup> Only first time offenders are eligible for such a permit.<sup>94</sup> The judicial driving permit, which is subject to conditions imposed by the court, allows the offender to drive to and from work during certain times, or to drive for the purpose of receiving medical care or substance abuse treatment.<sup>95</sup> Traveling for "educational pursuits" has been added to the purposes for which a court may issue a permit.<sup>96</sup> After the court enters an order authorizing a judicial driving permit, the order is submitted to the Secretary of State. A special form provided to the courts by the Secretary of State is used for this purpose.<sup>97</sup>

Any judicial driving permit order submitted to the Secretary of State that contains insufficient data or fails to comply with the Vehicle Code may not be used to issue a judicial driving permit.<sup>98</sup> Such an unacceptable order must be returned to the court by the

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92. *Grange*, 181 Ill. App. 3d at 987, 537 N.E.2d at 1157.

93. ILL. REV. STAT. ch. 95 1/2, para. 6-206.1 (1989).

94. A "first offender" is defined by statute as:

any person who has not had a previous conviction or court assigned supervision for violating Section 11-501, or a similar provision of a local ordinance, or a conviction in any other state for a violation of driving while under the influence or a similar offense where the cause of action is the same or substantially similar to this Code, or any person who has not had a driver's license suspension for Section 11-501.1 within 5 years prior to the date of the current offense, except in cases where the driver submitted to chemical testing resulting in an alcohol concentration of 0.10 or more and was subsequently found not guilty of violating Section 11-501, or a similar provision of a local ordinance.

ILL. ANN. STAT. ch. 95 1/2, para. 11-500 (Smith-Hurd Supp. 1991). This section was amended in 1989. The amendment narrowed the definition of the five-year period to read "prior to the date of the current offense." *Id.* The former version of this section defined the period as simply "within the last 5 years." *See id.* para. 11-500 (1987) (amended 1989).

Drivers who are not first-time offenders under the current definition may proceed in an administrative hearing before the Secretary of State in order to seek a hardship license. *Id.* para. 6-206.1(a) (1989). However, the court in *People v. Helton*, 203 Ill. App. 3d 324, 561 N.E.2d 218 (2d Dist. 1990), found that a driver arrested for DUI within five years of his prior assignment to court supervision for DUI—but more than five years after his prior DUI arrest—was not a "first offender" eligible for a judicial driving permit. *Id.* at 327, 561 N.E.2d at 220.

95. *See People v. Pine*, 129 Ill. 2d 88, 542 N.E.2d 711 (1989); *People v. Curley*, 188 Ill. App. 3d 37, 543 N.E.2d 1088 (3d Dist. 1989).

96. ILL. REV. STAT. ch. 95 1/2, para. 6-206.1 (1989).

97. *Id.* para. 6-206.1(B)(d).

98. *Id.*

Secretary of State, who must indicate why the judicial driving permit cannot be issued.<sup>99</sup>

In *People v. Pine*, the Supreme Court of Illinois held that the Secretary of State has standing to appeal a trial court's order directing that a judicial driving permit be issued.<sup>100</sup> In *Pine*, the defendant had been arrested in 1983 for DUI and placed under supervision. In 1988, she was again arrested and convicted for DUI. She petitioned the court for a judicial driving permit so that she could drive to and from work. The circuit court entered an order directing the Secretary of State to issue the permit.

The Secretary of State returned the order to the court with a statement that the defendant was not eligible for a such a permit because she had a previous DUI conviction within the last five years and therefore did not qualify as a first-time offender. Nevertheless, the court resubmitted the order to the Secretary of State. The Secretary appealed, but the appellate court dismissed the appeal for lack of standing. The Secretary of State petitioned for leave to appeal to the supreme court.<sup>101</sup>

The supreme court in *Pine* first held that when the Secretary of State has returned an order refusing to issue a judicial driving permit and has indicated why such an order cannot be entered, and the court has then returned the order to the Secretary of State, such an order is ripe for appellate review. Reasoning that the Secretary of State is granted broad authority over matters within the Illinois Vehicle Code and is intricately involved in judicial driving permit proceedings, the supreme court found that the Secretary of State has standing to appeal orders of the trial court directing that a judicial driving permit be issued.<sup>102</sup>

#### *F. Attorneys' Fees: Illinois Supreme Court Rule 137*

Under Illinois Supreme Court Rule 137, a court is authorized to impose sanctions in a civil proceeding on a party or an attorney who files a pleading or other court paper without making a reasonable inquiry into the facts or law on which the paper is based.<sup>103</sup>

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99. *Id.* Section 6-201(c) of the Illinois Vehicle Code provides that "[e]xcept as provided in Section 6-206.1, the Secretary of State shall have exclusive authority to grant, issue, deny, cancel, suspend and revoke driving privileges, drivers' licenses and restricted driving permits." *Id.* para. 6-201(c).

100. *People v. Pine*, 129 Ill. 2d 88, 103-04, 542 N.E.2d 711, 716 (1989).

101. *Id.* at 95, 542 N.E.2d at 712.

102. *Id.* at 100, 542 N.E.2d at 715.

103. ILL. REV. STAT. ch.110A, para. 137 (1989). Supreme Court Rule 137 permits sanctions for improperly signed pleadings, motions, and other papers:

Additionally, the rule provides for sanctions if the document is filed for improper purposes.<sup>104</sup> The sanctions that a court may impose range from a reprimand, to assessment of fees, to referral to the Attorney Registration and Discipline Commission.<sup>105</sup>

Supreme Court Rule 137 supersedes Illinois Code of Civil Procedure section 2-611.<sup>106</sup> Unlike section 2-611, which mandated sanctions in the event of a violation, Rule 137 gives the court discretion to impose sanctions. Otherwise, the two provisions similarly define sanctionable violations and the appropriateness of a particular sanction in a given situation. Thus, court opinions based on section 2-611 still have precedential value under the supreme court rule.

In *People v. King*,<sup>107</sup> the defendant's attorney filed a petition to vacate an order denying rescission of a statutory suspension. The petition contained allegations contrary to the evidence presented at the rescission hearing and also alleged that the attorney who represented the defendant at the rescission hearing simultaneously represented the arresting officer in another matter.

At the hearing on the petition to vacate, the attorney for the defendant presented no evidence. Instead, he merely argued the petition. The State, in reply and in support of a request for fees, presented the record of the original rescission hearing. Additionally, the State presented evidence contradicting the allegation that the defendant's original lawyer had represented the arresting officer in another matter at the time of the rescission hearing.

The trial court in *King* ruled that the attorney who filed the petition to vacate failed to make a reasonable inquiry into the facts and that the petition was not grounded in fact. Further, the trial court found the petition frivolous and assessed attorney's fees in the amount of \$150.00. On appeal, the appellate court affirmed and found that the trial court had not abused its discretion in imposing sanctions.<sup>108</sup> Thus, *King* and Supreme Court Rule 137 provide au-

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If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *may impose* upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.

*Id.* (emphasis added).

104. *Id.*

105. *Id.*

106. *Id.* ch. 110, para. 2-611 (1987) (repealed 1989).

107. 170 Ill. App. 3d 409, 524 N.E.2d 723 (4th Dist. 1988).

108. *Id.* at 416, 524 N.E.2d at 727.

thority to impose sanctions for pleadings or other papers filed in a rescission hearing that are frivolous or filed for an improper purpose.

### III. CRIMINAL DUI PROCEEDING

#### A. Pre-Trial Issues

##### 1. Supreme Court Rules 504 and 505

Illinois Supreme Court Rule 504 requires that an arrested motorist be given a date for appearance in court by the arresting officer or by the clerk of the circuit court. The date cannot be less than fourteen days or more than forty-nine days after the date of arrest. An accused who pleads not guilty on the appearance date is entitled to a trial on the merits, as long as the charged offense is punishable by a fine only. A continuance generally should not be granted because of the arresting officer's failure to appear on the appearance date.<sup>109</sup>

Illinois Supreme Court Rule 505 provides the requirements for notice to the accused. It also contains suggested forms for a citation and complaint, a conservation complaint, and notice to appear.<sup>110</sup> If the accused provides notice that he or she intends to plead not guilty, Rule 505 directs the clerk to set a new date not less than seven days nor more than forty-nine days after the original appearance date.<sup>111</sup> This provision is merely a direction for the performance of a ministerial task intended to speed up the proceedings, not to set an absolute deadline for trial.<sup>112</sup> Rule 505 further directs the clerk to notify all parties of the new date and time of appearance.<sup>113</sup>

In the event that the accused demands a trial by jury, the trial

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109. ILL. REV. STAT. ch. 110A, para. 504 (1989).

110. *Id.* para. 505. The suggested form reads:

#### AVOID MULTIPLE COURT APPEARANCES

If you intend to plead "not guilty" to this charge, or if, in addition, you intend to demand a trial by jury, so notify the clerk of the court within at least 10 days (excluding Saturdays, Sundays or holidays) before the day set for your appearance. A new appearance date will be set, and arrangements will be made to have the arresting officer present on that new date. Failure to notify the clerk of either your intention to plead "not guilty" or your intention to demand a jury trial may result in your having to return to court, if you plead "not guilty" on the date originally set for your court appearance.

*Id.*

111. *Id.*

112. *People v. Honnold*, 191 Ill. App. 3d 340, 345, 547 N.E.2d 755, 759 (4th Dist. 1989).

113. ILL. REV. STAT. ch. 110A, para. 505 (1989).

must be held within a reasonable time of the date of arrest.<sup>114</sup> Should the accused fail to notify the clerk of his or her jury demand as provided in Rule 505, the arresting officer's failure to appear on the date originally set for appearance may be considered good cause for a continuance.<sup>115</sup>

In order to invoke the right to a speedy trial, the accused, if not in custody, must file an appropriate, separate demand as provided in section 103-5 of the Illinois Code of Criminal Procedure.<sup>116</sup> Likewise, when a prosecutor simultaneously charges a defendant by a traffic ticket and an information, Rule 505 does not apply to the information, and the defendant must expressly request a speedy trial.<sup>117</sup>

## 2. Collateral Estoppel

A finding made at a rescission hearing will not have a preclusive effect on a subsequent criminal proceeding in the form of *res judicata* or collateral estoppel.<sup>118</sup> The doctrine of *res judicata* provides that a final judgment on the merits is conclusive as to the rights of the parties and their privies, and, as to them, precludes a subsequent suit involving the same claim, demand, or cause of action. In order for a prior judgment to be raised as an absolute bar, there must exist an identity of parties, subject matter, and cause of action.<sup>119</sup> Collateral estoppel, or issue preclusion, is a branch of *res judicata* that is applied to bar the trial of an issue that has been fairly and completely resolved in a prior proceeding.<sup>120</sup> The doctrine applies when a party or someone in privity with the party participates in two separate and consecutive cases arising on different causes of action, and some controlling fact or question material to the determination of both causes has been adjudicated against that party in the former suit by a court of competent

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114. *Id.*

115. *Id.* Rule 505 further provides that State agencies and units of local government may seek exemption from the requirements of the rule. Such an exemption may be granted after application to the Conference of Chief Circuit Judges. *Id.*

116. *Id.* (citing *id.* ch. 38, para. 103.5). Prior to the supreme court's amendment in August 1989, a timely demand for a jury trial pursuant to rule 505 qualified as a demand for a speedy trial. *See* *People v. Hamilton*, 169 Ill. App. 3d 105, 109, 523 N.E.2d 204, 207 (2d Dist. 1988).

117. *People v. Knott*, 189 Ill. App. 3d 790, 795, 545 N.E.2d 739, 742 (3d Dist. 1989); *People v. Dotson*, 173 Ill. App. 3d 541, 544, 527 N.E.2d 881, 883 (3d Dist. 1988).

118. *People v. Moore*, 138 Ill. 2d 162, 166, 561 N.E.2d 648, 650 (1990), *rev'g* 184 Ill. App. 3d 102, 105-06, 539 N.E.2d 1380, 1383 (5th Dist. 1989).

119. *Moore*, 138 Ill. 2d at 166, 561 N.E.2d at 650.

120. *Id.*; *see* *People v. Grayson*, 58 Ill. 2d 260, 319 N.E.2d 43 (1974).

jurisdiction.<sup>121</sup>

Collateral estoppel will not bar the issues raised in a statutory summary suspension hearing from being reconsidered in a subsequent criminal DUI proceeding.<sup>122</sup> In *People v. Stice*,<sup>123</sup> the Fourth District Appellate Court stated that a rescission hearing is an administrative proceeding designed to resolve one or more narrow issues quickly. The *Stice* court reasoned that if rescission hearings were given collateral estoppel effect, it would frustrate the goal of expediency because the State would be forced to call witnesses and generally treat the proceeding as a trial. The court concluded that collateral estoppel should not apply; otherwise, the goal of expediency in these civil proceedings would be defeated.<sup>124</sup>

The Illinois Supreme Court, in *People v. Moore*,<sup>125</sup> adopted the *Stice* court's reasoning.<sup>126</sup> In *Moore*, the supreme court noted that the Illinois General Assembly specifically directed that license suspension proceedings are to be swift and limited in scope.<sup>127</sup> The court further noted that if these proceedings were given preclusive effect, it would frustrate the legislative purpose. The practical effect would be that the State or municipality could not rely on the sworn policy report at these proceedings, resulting in the need to have the arresting officer and other witnesses testify at the summary suspension hearing.<sup>128</sup> Therefore, the goal of conducting swift hearings for the sole purpose of determining whether the court has sufficient reason to rescind summary suspension of a defendant's driving privileges would be hindered.<sup>129</sup> Finally, the court noted that no injustice would be done to either party by declining to give preclusive effect to license suspension hearings.<sup>130</sup>

### 3. Miranda Warnings

*Pennsylvania v. Bruder*<sup>131</sup> presented the United States Supreme Court with a case in which a driver was stopped by a police officer who administered field sobriety tests, including asking the driver to

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121. *Moore*, 138 Ill. 2d at 162, 561 N.E.2d at 648 (citing *Housing Auth. of LaSalle County v. YMCA of Ottawa*, 101 Ill. 2d 246, 461 N.E.2d 959 (1984)).

122. *Id.* at 167, 561 N.E.2d at 651.

123. 168 Ill. App. 3d 662, 523 N.E.2d 1054 (4th Dist. 1988).

124. *Id.* at 664-65, 523 N.E.2d at 1056.

125. 138 Ill. 2d 162, 561 N.E.2d 648 (1990).

126. *Id.* at 167, 561 N.E.2d at 651.

127. *Id.* at 169, 561 N.E.2d at 651.

128. *Id.*

129. *Id.* at 170, 561 N.E.2d at 652.

130. *Id.*

131. 488 U.S. 9 (1988).

recite the alphabet. The police officer also asked the driver whether he had consumed any alcohol, and the driver gave an affirmative response. After failing the field sobriety tests, the driver was placed in the police car and given *Miranda* warnings. The defendant was later convicted of DUI.

The Pennsylvania Superior Court held that the defendant should have been given *Miranda* warnings before the roadside questioning, since this questioning amounted to a custodial interrogation. As such, the court found that the defendant's answers to these questions should have been suppressed. The Pennsylvania Supreme Court denied the State's appeal, and the United States Supreme Court granted certiorari.<sup>132</sup>

The United States Supreme Court held that there was no need for the defendant to be given *Miranda* warnings, as the traffic stop did not involve "custody" for the purposes of the *Miranda* rule.<sup>133</sup> In its analysis, the Supreme Court relied on its previous decision in *Berkemer v. McCarty*,<sup>134</sup> which involved facts similar to those of *Bruder*. In *Berkemer*, the Court found that the "noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*."<sup>135</sup> The Court further reasoned that traffic stops, unlike prolonged station house interrogations, are brief. A traffic stop occurs in the "public view," in an atmosphere far "less 'police dominated' than that surrounding the kinds of interrogation at issue in *Miranda* itself."<sup>136</sup> Thus, the detained motorist's "freedom of action [is not] curtailed to 'a degree associated with formal arrest.'" <sup>137</sup> Accordingly, the *Bruder* Court held that a detained motorist is not entitled to a recitation of his constitutional rights prior to arrest, and his roadside responses to questioning are admissible.<sup>138</sup>

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132. *Id.* at 9-10.

133. *Id.* at 10.

134. 468 U.S. 420 (1984).

135. *Id.* at 440.

136. *Id.* at 438-39.

137. *Id.* at 440 (citing *California v. Beheler*, 463 U.S. 1121 (1983)).

138. *Pennsylvania v. Bruder*, 488 U.S. 9, 11 (1988) (citing *Berkemer*). *Bruder* follows the well-established rule that *Miranda* warnings must be given prior to any in-custody interrogation, but are not required for general on-scene questioning by investigating police. See also *People v. Parks*, 48 Ill. 2d 232, 269 N.E.2d 484 (1971); *People v. Acebo*, 182 Ill. App. 3d 403, 537 N.E.2d 1113 (3d Dist. 1989); *People v. Arias*, 179 Ill. App. 3d 890, 535 N.E.2d 89 (3d Dist. 1989); *People v. Schuld*, 175 Ill. App. 3d 272, 529 N.E.2d 800 (2d Dist. 1988); *People v. Pelc*, 177 Ill. App. 3d 737, 532 N.E.2d 552 (4th Dist. 1988).

#### 4. Consent

In Illinois, consent is not a prerequisite to the admissibility of breathalyzer results.<sup>139</sup> Therefore, even if the defendant claims that such a test was taken under a mistaken belief that it was mandatory, the results of that test will be admissible. The testing of blood, on the other hand, presents concerns and issues that go beyond consent. Use of blood tests in DUI cases requires that the practitioner and the bench be aware of and familiar with Illinois Department of Public Health standards for blood tests,<sup>140</sup> standards of admissibility,<sup>141</sup> the standard of compliance,<sup>142</sup> and chain of custody issues.<sup>143</sup>

#### B. Trial Issues

##### 1. Definition of DUI

Effective July 1, 1990, Illinois Vehicle Code section 11-501 precludes a person from driving or being in actual control of an automobile when there is *any* amount of drug, substance, or compound in a person's blood or urine resulting from the use or consumption of cannabis or a controlled substance.<sup>144</sup> Section 11-501.1 of the

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139. *People v. Brown*, 175 Ill. App. 3d 725, 530 N.E.2d 71 (2d Dist. 1988); *People v. Eaves*, 174 Ill. App. 3d 911, 529 N.E.2d 277 (3d Dist. 1988); *Village of Algonquin v. Ford*, 145 Ill. App. 3d 19, 495 N.E.2d 595 (2d Dist. 1986).

140. See ILL. ADMIN. CODE tit. 7, § 510.110 (1991).

141. Section 11-501.2(A) of the Illinois Vehicle Code sets standard of admissibility for blood tests in DUI cases. ILL. REV. STAT. ch. 95 1/2, para. 11-501.2(A) (1989).

142. The standard for admissibility when the Illinois Department of Public Health blood test standards must be applied is "substantial compliance." See *In re Ramos*, 155 Ill. App. 3d 374, 376, 508 N.E.2d 484, 486 (4th Dist. 1987).

143. A chain of custody foundation is required when the offered evidence is not readily identifiable or is susceptible to alteration by tampering or contamination; the chain of custody must be sufficiently complete as to render it improbable that the evidence was tampered with, exchanged, or contaminated. *People v. Shiflet*, 125 Ill. App. 3d 161, 177-78, 465 N.E.2d 942, 953-54 (2d Dist. 1984); *People v. Witanowski*, 104 Ill. App. 3d 918, 433 N.E.2d 251 (3d Dist. 1982). For a detailed analysis of the issues connected with blood tests in DUI cases, see Locallo, *Using Blood Tests in DUI and Reckless Homicide Prosecutions*, 77 ILL. B.J. 874 (1989).

144. ILL. REV. STAT. ch. 95 1/2, para. 11-501 (1989). This section and section 11-501.1 were amended effective July 1, 1990 to include provisions for controlled substances and cannabis. The Cannabis Control Act defines cannabis in the following manner:

"Cannabis" includes Marijuana, hashish and other substances which are identified as including any parts of the plant *Cannabis Sativa*, whether growing or not; the seeds thereof, the resin extracted from any part of such plant; and any compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds, or resin, including tetrahydrocannabinol (THC) and all other cannabinol derivatives including its naturally occurring or synthetically produced ingredients, whether produced directly or indirectly by means of chemical synthesis or by a combination of extraction and chemical synthesis; but shall



Code further provides for license suspension for a person who has any amount of a drug, substance, or compound resulting from the unlawful use or consumption of cannabis or a controlled substance that is detected in the person's blood or urine.<sup>145</sup>

## 2. Actual Physical Control Issues

Whether a defendant was in actual physical control of a vehicle is an issue of fact that must be decided on a case-by-case basis.<sup>146</sup> It is well established that the defendant need not actually be operating the vehicle.<sup>147</sup> Generally, physical control is proved by showing that the defendant was in the driver's seat, possessed the ignition key, and had the physical ability to start the engine and drive or move the vehicle.<sup>148</sup>

## 3. Felony Enhancement

In some instances, a misdemeanor motor vehicle offense may be enhanced to the status of a felony. Such felony enhancement is available in criminal DUI proceedings by invoking section 6-303 of the Illinois Vehicle Code. That section prohibits a driver whose license has been revoked from operating or being in actual physical control of a motor vehicle.<sup>149</sup> A second or subsequent conviction for this offense is felonious if the original suspension or revocation

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not include the mature stalks, of such plant . . . oil or cake made from seeds of such plant, any other compound manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil or cake, or the sterilized seed of such plant which is incapable of germination.

*Id.* ch. 56 1/2, para. 703(a) (1989).

145. *Id.* ch. 95 1/2, para. 11-501.1; see also *Berkemer v. McCarty*, 468 U.S. 420 (1984).

146. *People v. Cummings*, 176 Ill. App. 3d 293, 295-96, 530 N.E.2d 672, 674-75 (3d Dist. 1988).

147. *Id.*; *People v. Guynn*, 33 Ill. App. 3d 736, 738, 338 N.E.2d 239, 240-41 (3d Dist. 1975).

148. *Cummings*, 176 Ill. App. 3d at 295, 530 N.E.2d at 674; see also *People v. Brown*, 175 Ill. App. 3d 676, 530 N.E.2d 74 (2d Dist. 1988); *People v. Karjala*, 172 Ill. App. 3d 871, 526 N.E.2d 926 (3d Dist. 1988); *People v. Heimann*, 142 Ill. App. 3d 197, 491 N.E.2d 872 (3d Dist. 1986).

Some cases present scenarios in which a defendant claims to have been sleeping and therefore not in actual physical control of the vehicle. In *Guynn*, the court did "not see anything which would imply a legislative intent or public policy to permit an intoxicated person to 'sleep it off' behind the wheel of a car." *Guynn*, 33 Ill. App. 3d at 739, 338 N.E.2d at 241. The basic proposition of *Guynn* is that a sleeping person behind the wheel of a parked car can readily move the car into a driving position and endanger others. Further, the State is not required to prove the defendant's intent to put the vehicle into motion, so a sleeping defendant's intent is irrelevant in determining whether the State has met its burden of proof.

149. Section 6-303 provides in part:

was the result of a DUI.<sup>150</sup> The statute, however, does not specify whether a prior out-of-State DUI conviction produces the same result.<sup>151</sup>

It has been held that if a defendant pleads guilty to an offense, he cannot later claim that he was denied effective assistance of counsel when a prior conviction is used to enhance a subsequent conviction from a misdemeanor to a felony. A voluntary plea of guilty waives all nonjurisdictional errors, including violations of constitutional rights.<sup>152</sup> However, the United States Supreme Court has held that a prior misdemeanor conviction cannot be used to enhance a later misdemeanor to a felony when the defendant was not represented by counsel at the prior misdemeanor proceedings.<sup>153</sup>

#### 4. Defenses

The compulsory joinder or statutory double jeopardy provisions of sections 3-3 and 3-4 of the Illinois Criminal Code do not apply to offenses that are charged by complaint forms intended for use by police officers in making charges for traffic offenses.<sup>154</sup> Compul-

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(a) Any person who drives or is in actual physical control of a motor vehicle on any highway of this State at a time when such person's driver's license . . . is revoked . . . shall be guilty of a Class A misdemeanor.

. . . .  
(d) Any person convicted of a second or subsequent violation of this Section shall be guilty of a Class 4 felony if the original revocation or suspension was for a violation of Section . . . 11-501 [DUI].

ILL. REV. STAT. ch. 95 1/2, para. 6-303(a), (d) (1989).

150. *People v. Roby*, 172 Ill. App. 3d 1060, 1064, 527 N.E.2d 623 (4th Dist. 1988).

151. *People v. Shaw*, 189 Ill. App. 3d 808, 810, 545 N.E.2d 778, 779 (3d Dist. 1989) (citing ILL. REV. STAT. ch. 95 1/2, para. 6-303(d)). Section 11-501(d) of the Illinois Vehicle Code also contains a felony enhancement provision:

A person convicted of [DUI] shall be guilty of a Class 4 felony if: (1) Such person committed a violation of paragraph (a) for the third or subsequent time; or (2) Such person committed a violation of paragraph (a) while driving a school bus with children on board; or (3) Such person in committing a violation of paragraph (a) was involved in a motor vehicle accident which resulted in great bodily harm or permanent disability or disfigurement to another, when such violation was the proximate cause of such injuries.

ILL. REV. STAT. ch. 95 1/2, para. 11-501(d) (1989).

152. *People v. Hobson*, 185 Ill. App. 3d 54, 56, 540 N.E.2d 1030, 1031 (3d Dist. 1989).

153. *Baldasar v. Illinois*, 446 U.S. 222, 223 (1980). An Illinois court has found an exception to this proposition if, in the prior misdemeanor proceedings, the defendant knowingly waived his right to counsel pursuant to Illinois Supreme Court Rule 401. *People v. Masters*, 183 Ill. App. 3d 957, 959, 539 N.E.2d 893, 894 (4th Dist. 1989); *see also* ILL. REV. STAT. ch. 110A, para. 401 (1989).

154. *People v. Jackson*, 118 Ill. 2d 179, 192, 514 N.E.2d 983, 988 (1987); *People v. Helt*, 175 Ill. App. 3d 332, 334-35, 526 N.E.2d 842 (3d Dist. 1988). Section 3-3 of the Illinois Criminal Code provides in part:

sory joinder of offenses provides a substantive protection for the defendant.

Section 3-4(b) of the Illinois Criminal Code bars subsequent prosecution for a different offense, or for the same offense based upon different facts, under certain circumstances.<sup>155</sup> If the new offense charged is one in which the defendant could have been convicted in the former prosecution, the second prosecution is barred. However, compulsory joinder provisions of sections 3-3 and 3-4 of the Illinois Criminal Code do not apply to offenses charged by uniform citation and complaint forms intended to be used by a police officer in making a charge for traffic offenses, certain misdemeanors, and petty offenses.<sup>156</sup>

Even if the statutory double jeopardy provisions of the Illinois Criminal Code are inapplicable, the constitutional principles of double jeopardy may apply to a criminal DUI proceeding. More specifically, if the two offenses involve the same facts, double jeopardy may be applicable. The test used to determine whether there are two offenses or only one turns upon whether one offense requires proof of a fact that the other offense does not.<sup>157</sup> If one offense requires proof of an additional fact not required for the

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(b) If several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately.

ILL. REV. STAT. ch. 38, para. 3-3 (b), (c) (1989).

155. ILL. REV. STAT. ch. 38, para. 3-4(b) (1989).

156. *Jackson*, 118 Ill. 2d at 192, 514 N.E.2d at 980; *People v. Hogan*, 186 Ill. App. 3d 267, 269, 542 N.E.2d 178, 179 (3rd Dist. 1989).

In *Jackson*, the defendant was issued uniform traffic complaint citations for DUI and illegal transportation of alcohol as the result of an automobile accident in which his vehicle struck a tree, killing his passenger. Defendant, unrepresented by counsel, pled guilty to both charges. The trial judge accepted the pleas and set a sentencing date of December 28, 1982. On December 8, 1982, however, in the defendant's absence and without notice, the trial court granted the State's *nolle prosequi* motion on both charges. On December 20, 1982, the defendant was indicted on two counts of reckless homicide.

On appeal, the supreme court found that the legislature did not intend "that a driver could plead guilty to a traffic offense . . . and thereby avoid prosecution of a serious offense . . . such as reckless homicide, through the use of section 3-3 and 3-4 of the Criminal Code." *Jackson*, 118 Ill. 2d at 192-93, 514 N.E.2d at 989-90. Therefore, the supreme court determined, the State could indict defendant and use evidence of his driving under the influence and illegal transportation of alcohol to support the reckless homicide charge. *Id.* at 193-94, 514 N.E.2d at 989-90.

157. *People v. Totten*, 118 Ill. 2d 124, 136-37, 514 N.E.2d 959, 964 (1987); *People v. Helt*, 175 Ill. App. 3d 332, 334, 526 N.E.2d 842, 843 (3d Dist. 1988) (citing *Blockburger v. United States*, 284 U.S. 299 (1932)).

other, the two offenses are not the same for double jeopardy purposes.<sup>158</sup>

Supreme Court Rule 451(a) requires the use of Illinois Pattern Jury Instructions in criminal cases whenever applicable to a case, giving due consideration to the facts and governing law.<sup>159</sup> The purpose of an instruction is to guide the jury in its deliberations and to help it reach a proper verdict through the application of legal principles as applied to the evidence and the law.<sup>160</sup> When the pattern instructions do not fairly and accurately state the law, the trial court is authorized to modify the jury instruction.<sup>161</sup> Therefore, to insure that the intended meaning of a statute is not altered, the court should instruct the jury using the language of the statute.<sup>162</sup>

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158. *Totten*, 118 Ill. 2d at 136-37, 514 N.E.2d at 964; *Helt*, 175 Ill. App. 3d at 334, 526 N.E.2d at 843.

159. ILL. REV. STAT. ch. 110A, para. 451(a) (1989). An example, Illinois Pattern Jury Instruction 23.04F provides:

To sustain a charge of driving with an alcohol concentration of 0.10 or more the State must prove the following propositions:

*First*: That the defendant [(drove) (was in actual physical control of)] a vehicle; and

*Second*: That at the time, the defendant [(drove) (was in actual physical control of)] a vehicle, the alcohol concentration in the defendant's blood or breath was 0.10 percent or more.

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty.

ILLINOIS PATTERN JURY INSTRUCTIONS, CRIMINAL 23.04F (Supp. 1989); see also *People v. Hood*, 210 Ill. App. 3d 743, 748, 569 N.E.2d 228, 232 (4th Dist. 1991) (jury may properly be instructed that it may—but need not—infer that defendant was DUI because his or her blood alcohol content was 0.10 or more).

160. *People v. Hester*, 131 Ill. 2d 91, 98, 544 N.E.2d 797, 801 (1989).

161. *Id.* at 103-04, 544 N.E.2d at 803-04; ILL. REV. STAT. ch. 110A, para. 451 (1989).

162. *Hester*, 131 Ill. 2d at 103-04, 544 N.E.2d at 803-04. In *Hester*, the trial court instructed the jury that it “may presume” that the defendant was under the influence of intoxicating liquor. The Illinois Supreme Court reversed an appellate court decision that found the instruction given by the trial court to imply a permissive presumption, while the statute required a mandatory presumption.

Section 11-501.2(b)(3) of the Illinois Vehicle Code provides:

(b) Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any person while driving or in actual physical control of a vehicle while under the influence of alcohol, the concentration of alcohol in the person's blood or breath at the time alleged as shown by

### C. Sentencing

Once a defendant pleads guilty to or is found guilty of criminal DUI, the court must hold a sentencing hearing to impose an appropriate sentence. Whether the court follows section 11-501(f) of the Illinois Vehicle Code or section 5-4-1(a) of the Uniform Code of Corrections, it may direct that the defendant undergo a professional or social evaluation to determine whether an alcohol or other drug abuse problem exists and, if so, the extent of that problem. The Supreme Court of Illinois has held that these two statutory provisions are merely directory, not mandatory.<sup>163</sup>

Whether or not a defendant submits to evaluation prior to sentencing, the circuit court has authority to stay any term of imprisonment and to modify its sentence within 30 days, if justified by the results of the evaluation.<sup>164</sup> The circuit court's authority lies within its sound discretion to determine and impose an appropriate sentence.<sup>165</sup> The authority of the circuit court to modify its order, and the requirement of a professional evaluation, must be read in conjunction with the responsibility of the circuit court to promptly dispose of all the business before it.<sup>166</sup>

When a defendant is charged with DUI and is convicted and sentenced to conditional discharge, probation, periodic imprisonment, or imprisonment, the defendant's driver's license is considered revoked. If the defendant is placed under supervision, no

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analysis of the person's blood, urine, breath, or other bodily substance shall give rise to the following presumptions:

3. If there was at that time an alcohol concentration of 0.10 or more, it shall be presumed that the person was under the influence of alcohol.

ILL. REV. STAT. ch. 95 1/2, para. 11-501.2(b)(3) (1989). The legislative history reveals that the Illinois General Assembly rejected the use of a mandatory presumption in the statute. Under these circumstances, a mandatory presumption cannot be added or required by an instruction. *Hester*, 131 Ill. 2d at 103, 544 N.E.2d at 803.

163. *People v. Baker*, 123 Ill. 2d 233, 237-240, 526 N.E.2d 157, 160-63 (1988).

164. *Id.* at 238-40, 526 N.E.2d. at 160-62.

165. *Id.* at 239-41, 526 N.E.2d. at 160-63; *People v. LaPointe*, 88 Ill. 2d 482, 431 N.E.2d 344 (1981).

166. *Baker*, 123 Ill. 2d. at 238, 526 N.E.2d at 160. In *Baker*, the defendant was found in contempt by the circuit court for failing to undergo alcohol evaluation. *Id.* at 235, 526 N.E.2d at 159. After the appellate court reversed and remanded, the State appealed. *Id.* The Illinois Supreme Court reversed, finding: (1) the statute requiring a DUI defendant to submit to professional evaluation prior to sentencing is permissive, rather than mandatory; (2) a defendant may refuse to respond to a potentially incriminating question during a professional alcohol evaluation; and (3) since the requirement of professional evaluation prior to sentencing is permissive, the defendant in *Baker* was improperly found guilty of contempt for asserting the fifth amendment privilege. *Id.* at 237-44, 526 N.E.2d at 160-63.

judgment is entered until the completion of the supervision. If the supervision is successful, the charges are dismissed, no judgment is entered, and no revocation of the defendant's driver's license results.<sup>167</sup>

Section 5-6-1(d) of the Unified Code of Corrections provides that court supervision is not available as a sentencing alternative for a DUI defendant under one of three situations. Specifically, supervision is not available if within five years of the date of the current offense: (1) the defendant has been convicted of DUI or a similar local offense; (2) the defendant has been assigned court supervision for DUI or a similar local offense; or (3) the defendant has pleaded guilty to or stipulated to the facts supporting a charge of reckless driving or a similar local violation pursuant to a plea agreement.<sup>168</sup>

Recent statutory additions have affected sentencing of DUI defendants. For example, section 1005-5-3(b)(7) of the Illinois Criminal Code has been amended to allow the court to require a DUI defendant who has caused an emergency response service to respond to a situation created by the driver to pay restitution to the responding public agency in an amount not to exceed \$500.<sup>169</sup>

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167. See *People v. Johnson*, 174 Ill. App. 3d 812, 817, 528 N.E.2d 1360, 1363 (4th Dist. 1988) (Green, J., concurring). In *Johnson*, the defendant was charged with DUI and placed under court supervision. *Id.* at 813, 528 N.E.2d at 1360-61. As a condition of her supervision, the defendant was required to place an advertisement in the local daily newspaper, publishing a picture of herself when she was booked, along with an apology for her conduct. *Id.* at 813, 528 N.E.2d at 1361. The appellate court held that the conditions imposed upon the defendant were improper and would be vacated as inconsistent with the rehabilitative intent of the statute authorizing imposition of supervision. *Id.* at 815, 528 N.E.2d. at 1362.

The majority, while recognizing that the trial judge was attempting to put more "bite, or punishment," in the supervision process, felt that the effect of publication would go beyond the intent of the statute by possibly adding public ridicule as a condition. *Id.* The court reasoned that "[n]either the trial court nor [the appellate court] without professional assistance, can determine the psychological or psychiatric effect of publication. An adverse effect upon the defendant would certainly be inconsistent with rehabilitation . . . ." *Id.* The defendant in this case was a young woman with a history of being a good student and no prior criminal record. She was evaluated and found to have no alcohol or drug addiction. No accident was involved, nor was anyone injured involving the charge brought against her. *Id.*

In his concurring opinion, Presiding Justice Green did not find the condition imposed to be too harsh for the conduct involved. *Id.* at 816, 528 N.E.2d at 1362 (Green, J., concurring). Nor did Justice Green share the concern of the majority that the condition imposed by the trial judge may cause serious or permanent harm to the defendant. *Id.* at 817, 528 N.E.2d at 1363 (Green, J., concurring). However, he did find that the condition imposed in this case was far more drastic than any of those specifically authorized under section 5-6-3.1(c) of the Uniform Code of Corrections. *Id.*

168. *People v. Brom*, 189 Ill. App. 3d 910, 913, 545 N.E.2d 1061, 1062 (2d Dist. 1989); ILL. REV. STAT. ch. 38, para. 1005-6-1(d) (1989).

169. The amendment provides:

Also, section 1005-6-2 of the Illinois Criminal Code was amended to extend the possible period of probation or conditional discharge from one to two years, thereby allowing the court to monitor the defendant for a longer period of time.<sup>170</sup> Finally, reckless driving, often a lesser charge in DUI plea bargain agreements, has been increased from a Class B misdemeanor to a Class A misdemeanor, allowing for increased sentencing periods.<sup>171</sup>

## V. CONCLUSION

Attorneys who merely provide occasional counsel in this complex and specialized area of the law, and practitioners who spend a great deal of time on DUI cases, should remain aware of the distinctions between the two legal aspects of DUI. One such aspect is distinctly criminal, the other is wholly civil. At the same time, each are related, intertwined, and most likely indistinguishable to the client. While each aspect centers on the issue of whether the driver who is alleged to have driven a motor vehicle under the influence of alcohol or drugs is entitled to retain his or her driver's license, the differences between civil and criminal DUI proceedings should be understood by the attorney and fully explained to the client.

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In addition to any other fine or penalty required by law, any individual convicted of a violation of section 11-501 of the Illinois Vehicle Code or a similar provision of local ordinance, whose operation of a motor vehicle while in violation of section 11-501 or such ordinance proximately caused an incident resulting in an appropriate emergency response, shall be required to make restitution to a public agency for the costs of that emergency response. Such restitution shall not exceed \$500.00 per public agency for each such emergency response. For the purpose of this paragraph, emergency response shall mean any incident requiring a response by: a police officer as defined under section 1-162 of the Illinois Vehicle Code, a non-volunteer fireman carried on the rolls of a regularly constituted fire department, and an ambulance as defined under section 4.05 of the Emergency Medical Services (EMS) Act.

ILL. ANN. STAT. ch. 38, para. 1005-5-3(b)(7) (Smith-Hurd Supp. 1991).

170. ILL. REV. STAT. ch. 38, para. 1005-6-2 (1989).

171. *Id.* ch. 95 1/2, para. 11-503.