

Injection hearsay

Another time I represented a man who was charged with driving while impaired and had a prior driving while impaired charge within seven years.

The State's evidence against him was not overwhelming except that he tested over .16 on the intoxilyzer. I knew that the combination of that test result along with a prior offense would often result in a one year active sentence in prison.

Consequently, I argued under Crawford v. Washington, that the affidavit of the intoxilyzer operator should not be admitted unless he was physically present to testify.

In Crawford, the U.S. Supreme Court ruled that any evidence that is prepared for court is not admissible unless the person who prepared that evidence is available and is present in court.

Here's something you probably don't know: in North Carolina there is a statutory exception to the hearsay rule allowing admission of the affidavit of the intoxilyzer operator without his presence in District Court.

However, I argued that Crawford is a constitutional decision and thus overrides a statutory exception written into the North Carolina General Statutes.

I analogized by arguing that the miscegenation statute, which prohibited interracial marriage that remained in the North Carolina General Statutes for several years after the U.S. Supreme Court had overruled Plessy v. Ferguson and ruled that discrimination based on race was unlawful.

In essence the Constitution overrules any statute or law. The Judge agreed with my argument and suppressed the result of the intoxilyzer and found my client not guilty.

The District Attorney attempted to appeal that decision fearing that it set a bad precedent and would increase his work load substantially. I was able to persuade the appellate Judge in that case that the District Attorney did not follow the proper procedure from the rules of court and had the Judge dismiss the appeal.