

Temperature defense

I represented a man who tested a .08, which is the legal limit in North Carolina. Judges in Durham have historically found defendants guilty with a breath test result of .08, unless you can convince the Judge to exclude the breath test.

In fact, the North Carolina General Statutes say that proof of .08 breath alcohol level is proof of impairment, so I had an uphill battle to fight.

I know that the intoxilyzer machine assumes that your breath temperature will be thirty-four degrees centigrade and that each degree centigrade your breath temperature is higher than thirty-four degrees will result in a seven to twelve percent increase in a person's breath alcohol reading.

The thing here is that my client was in the hospital being treated with chemotherapy and radiation for prostate cancer. I was able to document his temperature hour by hour from his medical records.

I called my expert witness (a registered nurse) to testify as to the effects of an increase of temperature on a breath alcohol sample and to the latest studies, which have shown that human breath temperature averages thirty-five degrees centigrade.

The Judge allowed introduction of the breath alcohol level, but found that the State had not proved beyond a reasonable doubt that my client had a .08 blood alcohol level and entered a verdict of not guilty.