Rethinking DUI Defense in Colorado

What does the law really allow them to get in?

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When Can A Chemical Test Come In?

- In Colorado we have assumed that an Intoxilyzer Test comes into evidence with a minimal showing that the device was certified and that the Operator minimally complied with the CDPHE Rules and Regulations.

- WHY?

Due Process in A Criminal Case

- While a Statute can create permissible inferences in a criminal case which can satisfy evidentiary elements, it cannot shift the burden of proof to the Defendant.

    - In criminal cases, the use of presumptions raises serious concerns because these evidentiary devices potentially conflict with the basic principles that a defendant is presumed innocent and the prosecution must prove guilt beyond a reasonable doubt. *Ulster County,* 442 U.S. at 156, 99 S.Ct. at 2224; *Hendershott v. People,* 653 P.2d 385, 390-91 (Colo.1982), *cert. denied,* 459 U.S. 1225, 103 S.Ct. 1232, 75 L.Ed.2d 466 (1983). Permissive presumptions-because they leave the jury free to credit or reject the inference and do not shift the burden of proof-do not violate due process principles unless "under the facts of the case, there is no rational way the trier could make the connection permitted by the inference." *Ulster County,* 442 U.S. at 157, 99 S.Ct. at 2224. A mandatory presumption, however, is a "far more troublesome evidentiary device." *Ulster County,* 442 U.S. at 157, 99 S.Ct. at 2224. Due process prohibits the prosecution from resting its case entirely on a mandatory presumption "unless the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *Ulster County,* 442 U.S. at 167, 99 S.Ct. at 2229-30. Further, a mandatory presumption may not be constitutionally used against a criminal defendant if a reasonable jury could construe it as conclusive or shifting the burden of persuasion on an essential element of a crime. *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

- *Barnes v. People*, 735 P.2d 869, 872 (Colo. 1987).

Rule 201, Colorado Rules of Evidence

- **RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS**

- **(a) Scope of Rule.** This rule governs only judicial notice of adjudicative facts.
- **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- **(c) When Discretionary.** A court may take judicial notice, whether requested or not.
- **(d) When Mandatory.** A court shall take judicial notice if requested by a party and supplied with the necessary information.
- **(e) Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- **(f) Time of Taking Notice.** Judicial notice may be taken at any stage of the proceeding.
- **(g) Instructing Jury.** In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Judicial Notice In the Caselaw

Trial courts may take judicial notice of facts "not subject to reasonable dispute" that are "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." CRE 201(b). This rule "has traditionally been used cautiously in keeping with its purpose to bypass the usual fact finding process only when the facts are of such common knowledge that they cannot reasonably be disputed." *Prestige Homes, Inc. v. Legouffe,* 658 P.2d 850, 853 (Colo.1983).

A court may take judicial notice of its own records and adopt factual findings from a previous case as long as the previous case involved the same parties and the same issue. *See Hughes v. Jones,* 89 Colo. 455, 461, 3 P.2d 1074, 1076 (1931); *see also Linker v. Linker,* 28 Colo.App. 136, 146, 470 P.2d 882, 887 (1970). However, a court may not take judicial notice of facts on the very issue the parties are litigating. *See One Hour Cleaners v. Industrial Claim Appeals Office,* 914 P.2d 501, 505 (Colo.App. 1995).

In this case, the parties disputed the activities of GCC, or they at least disputed the characterization of those activities. This dispute bore directly on the central issue at trial—whether OXY exercised sufficient diligence in maintaining its water rights. Therefore, the facts regarding GCC's activities were not the type of facts that could properly be subject to the judicial notice rule. The facts are also not of the type that could be recognized as part of a court's own records. Although the same fact-finder presided over the earlier proceeding, the parties in interest were not the same, and it was therefore, improper for the water court to take judicial notice of GCC's activities from the *Chevron* trial.

- *Mun. Subdistrict, N. Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 711 (Colo. 1999).

A *Shreck* finding does not carry over from one case to another

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- *Mun. Subdistrict, N. Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 711 (Colo. 1999). (Emphasis added.)

Judicial Notice in Drug and Alcohol Driving Offenses

§ 42-4-1301(6)(c)

(c) In all actions, suits, and judicial proceedings in any court of this state concerning alcohol-related or drug-related traffic offenses, the court shall take judicial notice of methods of testing a person's alcohol or drug level and of the design and operation of devices, as certified by the department of public health and environment, for testing a person's blood, breath, saliva, or urine to determine such person's alcohol or drug level. The department of public health and environment may, by rule, determine that, because of the reliability of the results from certain devices, the collection or preservation of a second sample of a person's blood, saliva, or urine or the collection and preservation of a delayed breath alcohol specimen is not required. This paragraph (c) shall not prevent the necessity of establishing during a trial that the testing devices used were working properly and that such testing devices were properly operated. Nothing in this paragraph (c) shall preclude a defendant from offering evidence concerning the accuracy of testing devices.

Judicial Notice in Drug and Alcohol Driving Offenses

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§ 42-4-1301(6)(c)

Nothing in the Statute authorizes the Court to take judicial notice of the accuracy of a blood or breath test; the statutory authorization is limited to methods of testing and design and operation of devices.

If the CDPHE can't produce authoritative I9000 Documents, there is no basis for Judicial Notice

> **(b) Kinds of Facts.** A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Rule 201(b), COLORADO RULES OF EVIDENCE. See also, *Mun. Subdistrict, N. Colo. Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 711 (Colo. 1999)

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§ 42-4-1301(6)(c)

While included in 5 CCR 1005-2 (2007), § 1.2, with respect to the Intoxilyzer 5000EN with software 1358.XX installed, the finding was repealed by 5 CCR 1005-2 (2009). There is no finding under the authorization pursuant to § 42-4-1301(6)(c), which permits the Intoxilyzer 9000 to operate without sample capture.

If you request it, you have a right to "Reasonable Notice" of facts to be Judicially Noticed

> **(e) Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

- Rule 201(e), COLORADO RULES OF EVIDENCE.
- **File a pretrial REQUEST FOR NOTICE AND AN OPPORTUNITY TO BE HEARD as to any adjudicative fact to be judicially noticed.**

Instructing the Jury

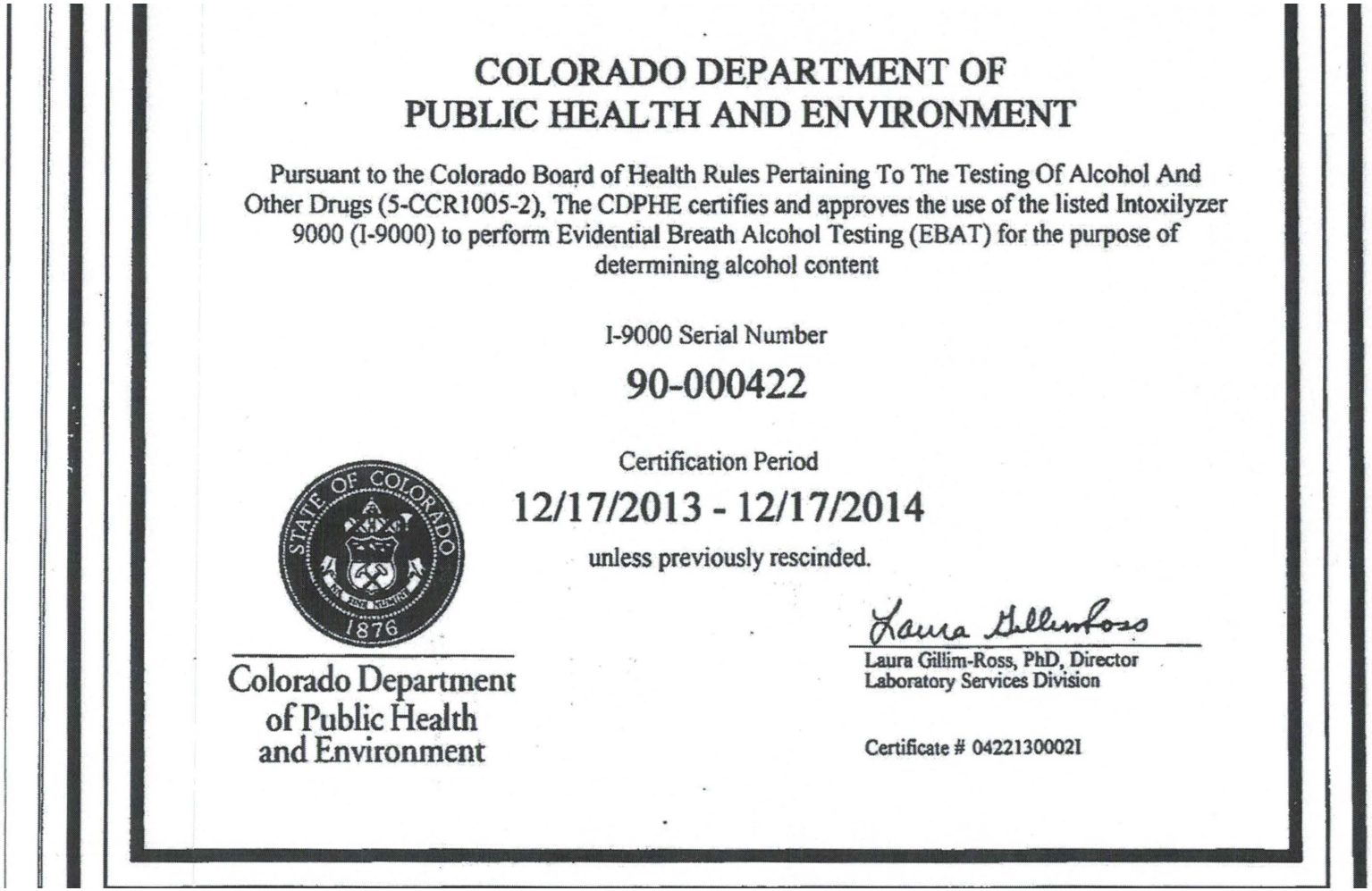
(g) Instructing Jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed**. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.**

Rule 201(g), COLORADO RULES OF EVIDENCE

Who Is Bringing In The Test?

- Blood Test – Analyst
  - § 16-3-309(5) Notice
  - Motion for Expert Discovery
  - Shreck Motion on Analyst and Lab Director
- I9000
  - § 16-3-309(5) Notice
  - Motion for Expert Discovery
  - Shreck Motion on Cop and any I9000 Witness
  - Subpoena Laura Gillim-Ross from CDPHE

Why Laura Gillim-Ross?



COLORADO DEPARTMENT OF
PUBLIC HEALTH AND ENVIRONMENT

Pursuant to the Colorado Board of Health Rules Pertaining To The Testing Of Alcohol And Other Drugs (5-CCR1005-2), The CDPHE certifies and approves the use of the listed Intoxilyzer 9000 (I-9000) to perform Evidential Breath Alcohol Testing (EBAT) for the purpose of determining alcohol content

I-9000 Serial Number

90-000422

Certification Period

12/17/2013 - 12/17/2014

unless previously rescinded.

Colorado Department
of Public Health
and Environment

Laura Gillim-Ross

Laura Gillim-Ross, PhD, Director
Laboratory Services Division

Certificate # 04221300021

5 CCR 1005-2 (2013), § 4.1.3.1

> 4.1.3.1 Evidential breath specimens must be analyzed using a certified EBAT instrument approved for use by the Department. Certification of the EBAT instrument will be based on scientific standards of performance established by the Department.

In response to CORA requests, the Department cannot produce any documents showing that they ever established the "scientific standards of performance" required by the Colorado Board of Health Rule. Gillim-Ross was copied on the Department's responses to those CORA requests. Why is she still signing certificates?

In any event, you want to subpoena Gillim-Ross so you have her, if the Court won't declare her as adverse, on direct; but, her testimony should force the People to call Groff (who you then get to cross).

Defense Pleadings in Every DUI Case

- Request for Notice under Rule 404(b), Colorado Rules of Evidence
- Notice Pursuant to § 16-3-309(5)
- Motion for Expert Discovery Orders
- Request for Notice of Judicially Noticed Facts
- Motion to Suppress Statements (Miranda and Voluntariness)
- Motion to Suppress for Violations of Fourth Amendment Rights
- Notice of Need for Shreck Determination – (Chemical Test, SFSTs, DREs, etc.)
- Notice that Trial May Exceed One Day

This Doesn't End at Motions

- The Court probably rules against us at motions; but, the validity of the test result and the nature of the fraud committed by the state to place a test result before the jury are matters for the jury.
- Even if the Court improperly takes judicial notice over your objection, the judicially noticed fact must be specifically set forth and the jury instructed that they are not bound under Rule 201, by the "Judicially Noticed Fact."

If the Court Won't Require the Analyst

- That's what Defense Subpoenas are for.
- If the prosecution has Urfer endorsed and not the analyst, subpoena the analyst. (Service by the Boulder County Sheriff is cheaper than the appellate filing fee and they will bill you for costs of service:
  $7.50 plus mileage § 30-1-104(1)(c))
  https://www.bouldercounty.org/safety/sheriff/pages/civilsection.aspx

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Items provided on a subscription basis are available for the subscribing firms use, but they are not to share the material with non-subscribers. The following are the current subscriptions offered by ColoradoWrits:

Colorado Intoxilyzer 9000 Lack of Foundation - $500.00

Jeff Groff Intoxilyzer 9000 cross examination - $500.00
Currently being updated, but is available now and will release shortly with the last few transcripts included.

The Denver Blood Cross (pending) - $500.00
Covers the Denver Technicians and the Fraudulent Certification of the Denver Police Department Toxicology Laboratory (Sassetti, Groff, Laberge and Gillim-Ross on the fraudulent certification of the Denver Police Department Toxicology Laboratory.) The motions, subpoenas, endorsement and exhibits are available now. The five witness crosses are still in progress, but will be complete before the first subscriber has a hearing.

The Groff and I9000 materials have an Offer of Proof for when the Court denies a *Shreck* hearing to make your record.

There will be an SFST and DRE cross as well, with the collected manuals for when the cop does not know what he was trained on.

To most effectively use these crosses, you should have a Tablet which handles Acrobat for both the trial attorney and the witness. Provide the DA and the Court with a CD/DVD with the documents, but work the witness with the tablet. When you need to impeach, you have the documents and page number (or page and line number for transcripts) to refer to the witness to.

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