



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Robert F. McDonnell
Attorney General

900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

September 22, 2008

The Honorable Christopher K. Peace
Member, House of Delegates
P.O. Box 819
Mechanicsville, Virginia 23111

Dear Delegate Peace:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask what evidence is acceptable in a prosecution for driving while intoxicated. Specifically, you ask whether the evidence may be the breath test result, recorded on the arrest warrant, or whether the certificate of analysis is required.

Response

In a prosecution for driving while intoxicated, it is my opinion that the certificate of analysis is the proper evidence of the defendant's blood alcohol level.

Background

You advise that in certain localities, when an individual suspected of driving while intoxicated is taken before a magistrate, the result of the breath test is entered on the arrest warrant. Further, you note that some trial court judges find this notation improper and refuse to consider it as evidence. Therefore, you state that the Commonwealth is unable to prove the necessary blood alcohol level to mandate the enhanced punishment under certain statutes.

Applicable Law and Discussion

Pursuant to §§ 18.2-268.7 and 18.2-268.9, a certificate of analysis of blood alcohol content is admissible as evidence. A certificate of analysis for a blood test, when performed in accordance with the statutory rules, "shall ... be admissible in any court, in any criminal or civil proceeding, as evidence of the facts therein stated and of the results of such analysis."¹ Additionally, such a certificate for a breath test, when performed in accordance with the statutory rules, "shall be admissible in any court in any criminal or civil proceeding as evidence of the facts therein stated and of the results of such analysis."²

¹VA. CODE ANN. § 18.2-268.7(B) (Supp. 2008).

²Section 18.2-268.9 (Supp. 2008).

The Honorable Christopher K. Peace
September 22, 2008
Page 2

The certificate for a breath test creates a rebuttable presumption of intoxication³ and is an exception to the rule of hearsay evidence.⁴

Conversely, a warrant, as a general rule, is not evidence of guilt and should not be accepted as such.⁵ Indeed, because the only “evidence” of an essential element of the crime of conviction came from the prosecutor’s statements and the indictment, the Court of Appeals of Virginia overturned a felony conviction for insufficient evidence.⁶

Warrants sometimes are accepted, absent any objection, as evidence on a particular point in criminal prosecutions, and Virginia appellate courts have upheld these convictions.⁷ However, it is the certificate of analysis, not the warrant, that is the proper evidence of a defendant’s blood alcohol content.

Conclusion

Accordingly, in a prosecution for driving while intoxicated, it is my opinion that the certificate of analysis is the proper evidence of the defendant’s blood alcohol level.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell

3:339; 3:1076; 1:941/08-065

³See 18.2-269(A) (Supp. 2008); see also *Wing v. Commonwealth*, Case No. 1760-03-4, 2004 Va. App. LEXIS 368, at *14-16 (Va. App. Aug. 3, 2004) (noting that § 18.2-269 creates rebuttable presumption that person tested was under influence when “breath test shows a reading of 0.08% or greater”).

⁴See *Luginbyhl v. Commonwealth*, 46 Va. App. 460, 466-67, 618 S.E.2d 347, 351 (2005) (noting that evidence that is not statement from human witness or declarant is not hearsay; breath test is generated from machine and result does not constitute hearsay), *substituted opinion, on reh’g at, en banc*, 48 Va. App. 58, 65-66, 628 S.E.2d 74, 78-79 (2006) (assuming without deciding that breath analysis result was harmless error and declining to address constitutional issue).

⁵See *Swift v. Commonwealth*, 199 Va. 420, 425, 100 S.E.2d 9, 13 (1957); see also *Crowder v. Commonwealth*, 41 Va. App. 658, 663-65, 588 S.E.2d 384, 387-88 (2003) (rejecting prosecutor’s statement of damage amount as listed in indictment).

⁶See *Crowder*, 41 Va. App. at 664-65, 588 S.E.2d at 387-88.

⁷See, e.g., *Johnson v. Commonwealth*, 21 Va. App. 102, 106-07, 462 S.E.2d 125, 127 (1995) (holding that arrest warrant was sufficient to prove criminal element that defendant was in custody).