



**THE UNAUTHORIZED  
GUIDE TO  
SURVIVING A DUI**

**WESTENDORF & KHALAF, PLLC**

# THE UNAUTHORIZED GUIDE TO SURVIVING A DUI CHARGE

(What Most Lawyers Won't Tell You)

By Westendorf & Khalaf, PLLC

# Foreword

We're sick of all the DUI marketing BS. Our firm lives by the rule of telling prospective clients the truth even when it means they will be less likely to hire us. Our motivation for writing this guide is to provide you the no-nonsense real truth about getting through a DUI.

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## Do I Really Need a Lawyer For a DUI?

If you're reading this right now, you may have just had one of the worst nights of your life. You were likely handcuffed, thrown in a police car, and spent several hours in jail. You might be wondering, do I really need a lawyer?

It's tempting to think that you can go to court by yourself, explain the circumstances to the prosecutor and judge, and work it out on your own. It's also easy to think that, if you're clearly guilty, you should save the money, plead guilty, and eat a conviction.

Don't be one of those people. The reality is that DUIs are a hot button political issue. Think about it:

- Prosecutors run campaigns based on being tough on DUIs.
- Legislators get elected by writing harsh DUI laws.
- Organizations like Mothers Against Drunk Driving (MADD) send representatives to watch DUI dockets and take notes on judges and prosecutors to ensure tough DUI consequences.

When you're charged with a DUI, there are powerful forces who want you convicted and punished. Your lawyer is the **only** person in the entire process looking out for your interests.

Consequences of a DUI conviction can include:

- jail time;
- losing your license;
- huge fines;
- skyrocketing insurance premiums; and
- loss of security clearances.

You wouldn't jump into a major surgery without professional medical advice. With these potential consequences hanging over your head, don't try to navigate the legal world without professional advice. Look at it as an investment in your future. Accept it now. You need a lawyer on your side.

## First Steps In A DUI Case

### **Bond Hearings:**

Once you're arrested for a DUI, you're going to be taken before the magistrate who will make an initial bond determination. What happens then often hinges on whether you have any past DUIs.

- **1st DUI offense.** If it's your first DUI, usually you'll be released on a PR Bond (personal recognizance) meaning you're released without paying any money, but you do have to sign a promise to return to court.

- **2nd DUI offense.** Getting a bond can be difficult starting with a second DUI offense. In some cities, judges won't release people charged with a second offense without proof that they're going directly into a treatment program.
- **3+ DUI offenses.** For those with three or more DUI offenses, it's not unusual for judges to require inpatient treatment before even considering bond. A good DUI attorney should know the respected local treatment programs and be able to guide you accordingly.

If you're charged with a second DUI offense or more, we highly recommend seeking treatment regardless of your bond situation.

First, let's face it, you probably need some help. Second, you're going to be in a much better legal position if the Court sees that you recognize you have a problem, and you're serious about getting help for it.

### **Alternative: SCRAM Bracelets**

Another bond option that has become popular in many cities is the use of SCRAM bracelets. These bracelets (don't get excited, they're like giant tethers) are worn 24/7 and take continuous readings from your skin to detect any alcohol you consume. If you so much as crack a Miller Lite, then you go back to the slammer.

There are numerous private companies that offer SCRAM bracelets. They're not cheap, but it sure beats sitting in jail.

## **Administrative License Suspension**

If you're arrested and provide a breath sample of 0.08% BAC or above, your license will be automatically suspended in what is known as administrative license suspension.

The suspension period is:

- 1st offense DUI: 7 days
- 2nd Offense DUI: 60 days

You're subject to the same administrative suspensions if you refuse to submit to the breath test (see [Virginia Code 46.2-391.2](#) for this rule). This is true even though no evidence has been presented against you in a court of law!

During the administrative license suspension period, you're not eligible for even a restricted license for driving to work, medical appointments, childcare, etc. **You cannot legally drive at all.** Period.

If you're caught driving during the administrative suspension period, you will be hit with an additional criminal offense. As soon as the administrative suspension is over, you can pick up your license from the clerk's office. Some clerk's offices will allow your attorney to pick it up for you.

You can request a hearing to try to lift the administrative suspension (based on lack of probable cause for arrest), but it is extremely rare for judges to grant these requests.

## Arraignment

Your arraignment is your first scheduled court date. It's also sometimes called "first appearance" or "determination of counsel". Most cities schedule arraignments within 2-3 weeks of your arrest date.

Don't panic. Your arraignment is **not** your trial. The arraignment is simply meant to establish:

1. What you are charged with.
2. What you plan to do for legal representation.
3. The actual trial date.

You do not enter a plea, and no witnesses or evidence will be presented against you at the arraignment. In fact, if you hire an attorney before the arraignment, most cities will not even require you to appear.

## Hiring the Best DUI Attorney

This is a big life decision. If you're doing it right, you should put some time and effort into finding the right attorney for you. It's an absolute must that you have have an in-depth conversation with the attorney before hiring them.

Not a conversation with the attorney's paralegal.

Not a look at the marketing brochure they sent to your email.

A real conversation with the actual attorney about the details of **your** case.

While a phone conversation will do, we strongly encourage you to schedule a face to face meeting. Most attorneys offer free consultations. This is the person who is going to be fighting for your freedom, and it's important for you to be comfortable with them.

When you meet with a prospective defense attorney, you should ask at least the following questions.

### **1. What percentage of your practice is criminal defense?**

Unless the answer is close to 100%, we suggest looking elsewhere. The lawyers who handle nothing but criminal cases are going to be the ones who know the judges, the prosecutors, and the relevant law in your case. They're going to know which defenses fly - and which ones don't. They'll know if there are alternative punishments that can keep you out of jail.

You can't afford to be represented by someone whose criminal defense practice is their side hustle.

### **2. How much of your practice is in the city where I'm charged?**

Different cities treat DUI cases in radically different ways. Even within the same city, different judges can have very different

perspectives on what constitutes reasonable doubt, and reasonable punishment.

That's why it's important for you to have an attorney who practices frequently in the city where you've been charged. Those attorneys know how the local judges think better than anyone.

Knowledge of these tendencies can be critical in a DUI case. An argument which is reasonable to one judge may inspire another judge to **bury you under the courthouse.**

Being "in the know" about the local court and the judges can make all the difference.

### **3. How do you typically prepare a DUI defense?**

Sadly, some attorneys talk a big game in the consultation, only to show up to court and tell you that your case is hopeless and you should just take a plea deal.

The attorneys that are worth hiring are going to review all discovery materials, including bodycam and dashcam recordings, with a fine toothed comb. They're going to follow up on any relevant information, including potentially:

- going out to the scene to take photos;
- challenging why you were stopped in the first place; and
- finding reasons to disqualify your breath test results.

If you are going to be convicted, it should be because there was no alternative - not because you hired a lazy attorney who did nothing other than show up to tell you to plead guilty.

#### **4. Is your fee a “flat fee” or are there other potential costs?**

We charge a transparent one time flat fee that covers the cost of your entire representation from start to finish. It doesn't matter if your case ends up being complicated, gets continued four times, or requires extra work out of the courtroom.

**We never want financial pressure to be a consideration in our client's decision-making process.**

Ever.

The fact is, some people may be best served by taking a deal and pleading guilty. However, you should never feel pressured to make that decision because of money.

#### **5. Does the fee include an appeal if necessary?**

With any misdemeanor DUI charge (the rare exception being direct indictments), you get two cracks at getting the best outcome.

- **General District Court (GDC).** This is your first stop. If you're dissatisfied with the result in GDC for any reason, you can appeal and get a complete do-over.
- **Circuit Court.** If you're convicted after trial in circuit court, your only basis for appeal would be if the judge made a

significant legal error in your case. These circumstances are rare and are not typically covered by standard attorney fee agreements.

We've represented many clients in their circuit court DUI appeals, after they've been convicted in lower court with another attorney. Most of these people had no idea that the cost of an appeal was *not* included in their first attorney's fee.

It's crucial to know what your attorney's fee is getting you. A \$2,000 bill for GDC representation might sound good - until you find out that getting you the best result is actually going to cost \$4,000 with your appeal.

## **6. Am I going to be able to contact you directly when I have questions?**

Many attorneys delegate most of their client interaction to paralegals or secretaries. After giving them your money, you might never hear from the attorney again, until you show up for court.

You don't want to put your future in the hands of an attorney who doesn't return your calls. If you have a question, or if something important comes up, you want to be able to communicate directly with the person representing you.

## 7. What are the possible results of my case?

If an attorney promises you that they'll get a certain result in the initial consultation, **run away**.

There are many, many variables in a DUI case. These can include:

- the quality of the evidence;
- whether there are suppression issues;
- the officer involved;
- the prosecutor appointed; and
- the judge hearing the case.

Any honest attorney will tell you that all they can promise is to do everything possible to get you the best result.

That being said, most cities have a standard first offense DUI sentence. Your attorney should be able to explain the typical DUI punishments in the city where you're charged, and give you an idea of where you'll land.

## 8. Extra Credit. Scout Defense Attorneys.

While you may feel you're too busy to take days off to go down to the courthouse, there really is **no better way** to find a good attorney.

Think about it: would an NFL general manager draft their future quarterback without ever seeing him in action?

Of course not.

If you have to go to court for an arraignment anyway, it's a great opportunity to spend an hour or two watching a DUI docket. You'll see which attorneys are the real deal and which are just empty suits.

You can even consider approaching an attorney who impresses you. There's a decent chance that they'll sit down and give you a consultation on the spot.

## What NOT To Do When Hiring A Lawyer

When you start calling attorneys, there are some things you'll want to avoid saying.

- Don't start the conversation by saying the police were rude or violated your rights.
- Don't say you're going to sue the police.
- Don't say that it's going to be an easy case.

These are hallmarks of difficult and unrealistic clients that every criminal defense attorney can identify a mile away. Most attorneys won't touch your case with a twenty-foot pole or they will double the fee they quote you, because you come across as "high maintenance."

Just tell your prospective attorney the facts. If your rights were violated, the attorney can figure that out for you.

## **1. Don't Be Swayed By Attorney Marketing**

If you google "criminal defense attorneys" or "DUI attorneys," you're going to see a lot of results.

Some of the attorneys appearing on your screen will be excellent. Some will be far less than excellent. The lawyer fresh out of a bottom tier law school and the seasoned courtroom veteran with decades of trial experience look the same in a google result.

How can you tell the difference between the real deals from the poseurs?

First of all, here are some things you should ignore:

### **Avvo Rating**

Avvo is a web company based in Seattle that has received well over \$100 million dollars in venture capital money with the aspiration to be the "Yelp" of the legal services world. We live in an age where everybody looks at star ratings and reviews before purchasing anything, so Avvo's appeal is understandable.

However, the reality is that their rating system is a meaningless gimmick. The rating is based on an algorithm that can be easily gamed so that many less than excellent lawyers gain a 5-star rating. Let me be clear: there are great attorneys with high Avvo ratings (including us), and there are lousy attorneys with high Avvo ratings.

The point is that one has nothing to do with the other.

## **Awards**

There are some criminal defense attorneys who claim to be "award winning." Their websites are festooned with little gold stars and ribbons. It certainly sounds impressive. Sorry to ruin the lovely image, but lawyer awards are a joke. We don't hand out trophies in this business.

Almost all of these "awards" are marketing scams. The attorney sends a check every year to a P.O. Box, and in exchange gets a certificate proclaiming that he or she is a "Superstar Rising Premier Attorney Deluxe!"

These scams endure because clients don't know any better, and because some attorneys are so pathetic that they actually think these things are worth something.

## **2. Don't Believe Promises That Are Too Good to be True**

"What's going to happen in my case?"

That's usually one of the first questions that we're asked by clients. And duh, We get it. Of course, that's why they called us.

However, there is usually no reliable answer in the first client interview. There are many, many variables in every case. The strength of the evidence, your prior record, the particular

prosecutor, the particular judge, whether there are suppression issues, etc, etc. etc.

**Anybody who talks to you and tells you that they're going to get your DUI dismissed or promises a specific outcome during the first interview is lying to you.** If an attorney tells you that your case is "easy" or promises you a specific result the first time you speak to them, move on.

We can't count how many cases we've had where a client was duped into hiring someone else based on false promises, only to come back to us later (a couple thousand dollars lighter) on to clean up the mess.

### **3. Don't Base Your Decision on Low-ball Fees**

Everybody would prefer if an experienced and competent attorney fell into their lap for free.

Sorry, it's not going to happen.

When you hire a good defense attorney, you're paying for wisdom, perspective, and seasoning developed over thousands of cases and decades of work. Good representation costs money. If an attorney is quoting you the lowest price in town, they're probably either desperate, or not very good.

You should absolutely call around to compare fees, but if your only criteria is hiring the cheapest lawyer you can find, you're doing it wrong.

#### **4. Don't Believe That Former Prosecutors Have An "In"**

You are going to find a number of attorneys who market themselves as former prosecutors. Some are legitimately experienced former prosecutors, who have become outstanding defense attorneys. Others were in the prosecutor's office just long enough to get a cup of coffee.

We're not saying that you shouldn't hire a former prosecutor (some of whom are among the best defense lawyers out there), but rather that you should be cautious of this sales tactic. If the attorney's sales pitch is that they have extra influence in the prosecutor's office, they're probably full of it.

The truth is that all defense attorneys know the prosecutors. Most of us have friendly working relationships with the prosecutors, and consider many of them to be friends. But the reality is that prosecutors don't dismiss cases because they like or used to work with the defense attorney.

### **Evidence In DUI Cases**

The first thing your attorney will do is file a motion for discovery. The prosecution will then be required to provide information about the evidence against you.

In a DUI case, that means that you will typically be getting the officer's written investigation notes.

This will include the arresting officer's observations, such as:

- whether you pulled over promptly in a safe area;
- whether you engaged in erratic driving behavior;
- whether you had signs of intoxication, like:
  - slurred speech;
  - the smell of alcohol;
  - bloodshot eyes;
  - a verbal admission of having been drinking; or
  - being unsteady on your feet.

The officer's notes will include info on how you did on the field sobriety tests. In most cities in Hampton Roads, you'll also receive the officer's bodycam footage, along with any breath or blood test results.

Be prepared that the court system moves at a snail's pace. You should expect it to take at least a month, if not longer, before your attorney receives the evidence.

Once they do get it, they should contact you. Any reputable attorney is going to want to review all the evidence with you, and discuss all your defense options well before your actual trial date.

## Common Defenses:

We could devote multiple volumes of books to possible DUI defenses, so we'll only cover the most frequently used ones here. This is why you need a lawyer - to help you choose the best possible defense for your specific case.

Your best DUI defense could include questioning:

- the basis for stopping you in the first place;
- the admissibility of the breath test;
- the reliability of the breath test;
- how the field tests were conducted;
- whether they can prove you were driving;
- whether they can prove that you didn't drink *after* an accident;
- whether they can prove that proper protocols were followed in collecting your breath or blood; or
- whether there is reasonable doubt as to the grade of offense.

There are many more possible defenses, and none of them are simple or guaranteed. The fact that it's complicated is exactly why you need a lawyer on your side.

# Frequently Asked Questions in DUI Cases

No doubt you have some questions by now. Here are some of the questions we get asked the most by clients charged with a DUI.

## **What Are My Chances of Getting a DUI Dismissed?**

We're going to tell you something that most lawyers won't tell you at the consultation: statistically speaking, you're probably going to get convicted no matter who you hire.

The DUI conviction rate in Virginia Beach is over 90%. That's in line with every city in Hampton Roads.

Let's say that you hire a brilliant DUI attorney. Your attorney is so good that clients who hire them are twice as likely to have their DUI dismissed. That attorney would still have 80% of their clients convicted.

## **Then Why Don't I Save the Money on Hiring an Attorney?**

First, you very well might fall into the pool of people who can win their case. You will never know if you don't have a good lawyer.

Second, even if you can't get the case dismissed, it's still crucial to have a good lawyer who can look for reasons to reduce your punishment.

A good lawyer can be the difference between 10 days sleeping on a filthy cold mattress at the local jail versus walking out of the courtroom and going home.

### **Should I Go To Trial or Take A Deal?**

Obviously, this is going to depend on the facts of your case.

There are compelling reasons to plead guilty in some cases. For example, If you're charged with DUI at .15 and the prosecutor offers to reduce the charge to below a .15, you might be looking at an amazing deal because you'd be getting out of serving mandatory jail time (required for DUIs where BAC is more than .15).

But while pleading guilty to DUI might make sense in some cases, guilty pleas are far too common.

The truth that many lawyers won't tell you is that, in most cases, the person who goes to trial and loses is getting the exact same sentence as the person who pleads guilty. If you're not going to get any extra punishment for a trial, you might as well plead not guilty and take a shot.

You never know what might happen - we've won cases that appeared nearly hopeless before the trial.

### **If I'm Found Guilty, What Will Happen To Me?**

As we've mentioned, DUI penalties are somewhat standardized. These can be found in [Virginia Code 18.2-270](#).

## Jail Time

First and second DUI offenses are both Class 1 misdemeanors, meaning the maximum punishment you could possibly receive is 12 months in jail. In reality though, almost nobody gets the maximum sentence, or anywhere close to it.

First offense convictions don't require jail time, unless there was a minor passenger (17 or younger) in the vehicle, or your BAC was a .15 or above.

The mandatory minimum jail time for 1st offense DUIs is as follows:

- If there was a minor in the car, the mandatory minimum is 5 days.
- If your BAC was .15 to .20, the mandatory minimum is 5 days.
- If your BAC was .21 or above, the mandatory minimum is 10 days.
- If there was a minor in the car and your BAC was .15 or above, the mandatory minimums are consecutive.

By “consecutive”, we mean the minimum jail time is added together. For example, if your BAC was .15 (5 days jail time required) and a minor was in the car (5 days jail time), the mandatory minimum jail time for the incident would be 10 days.

## **License Suspension**

Your license will be suspended for 12 months, although you will be eligible for a restricted license. The first 6 months of the restricted license require an ignition interlock device, an alcohol-detecting device that you must blow into before your car will start.

## **Fines**

In addition to jail time, the minimum fine for a first offense is \$250. If there was a minor in the car, the minimum fine increases to \$750.

You will also be court ordered to complete ASAP (an alcohol program) through the court. To add an insult to injury, the fines do not include expenses incurred through ASAP, court costs, paying for the interlock, or your soon to be skyrocketing insurance premiums.

## **The Good News**

Yes, there can be good news, especially if this is your first DUI offense!

### **First DUI Offense:**

If it's your first offense, and you blew less than a .15, you have a good chance of avoiding jail time, although this can be highly variable by city. You'll still get stuck with a conviction, fines, a

restricted license, required ASAP classes, and at least 6 months of an interlock on your car, but it's way better than spreading your checks for a sheriff's deputy.

Even if your BAC was .15 or above, you're likely looking at only getting the mandatory minimum unless there's some aggravating circumstance.

What's an example of an aggravating circumstance?

- You acted like a jerk to the cop.
- You blew an astronomically high BAC.
- You were driving the wrong way down the highway.

You get the picture.

The difference between a .14 and a .15 or between a .20 and .21 is big because of the mandatory time. On borderline cases, a good attorney is going to look for every angle to get your punishment reduced.

## **The Bad News**

If this is your second DUI arrest or more within 10 years (the time period is determined from arrest date to arrest date, not from dates of conviction), things can get ugly quickly, because you're establishing a pattern of behavior. Here are the minimum sentences you can expect.

### **Second DUI Offense:**

- Within 5 years of the first DUI arrest, carries a mandatory minimum of 20 days jail time, regardless of your BAC.
- Within 10 years of the first DUI arrest, carries a mandatory minimum of 10 days jail time regardless of your BAC.
- If your BAC was .15 to .20, add 10 days more mandatory minimum time.
- If your BAC was .21 or above, add 20 more days of mandatory minimum time.

### **Third DUI Offense:**

- Within a 10 year arrest period, you might as well start decorating your jail cell because you're going to be calling it home for a while. The charge is elevated to a class 6 felony (5 year maximum) and the mandatory minimum sentence is 90 days in jail. And that's if you're lucky.
- Within a 5 year arrest period, it's still a class 6 felony, but the mandatory jail time goes up to 6 months. And you should be whistling Bobby McFerrin and Pharrell tunes if you get the minimum. You face the very real possibility of significant prison time (as in a year or more in the slammer).

### **Fourth DUI Offense:**

- Within a 10 year arrest period, it's still a class 6 felony, but the mandatory time is 1 year. We've seen judges that won't blink

an eye at imposing the maximum sentence of 5 years on DUI fourth charges.

- Important note. Any DUI after you've been convicted of a felony DUI is treated as a DUI fourth regardless of the time frame. Even if ten, twenty, thirty years have gone by since the last conviction, it doesn't matter.

#### **46.2-391 Charges:**

- This has become an increasingly common companion charge to felony DUIs. Basically it's a separate charge for DUI while your license is suspended for a DUI 2nd or more offense. This is a very ugly and dangerous charge. It carries a 12 month mandatory minimum sentence that cannot be run concurrently with any other sentence. For example, if you're charged with DUI 3rd within 5 years and 46.2-391, your mandatory minimum sentence is 1 year and 6 months (6 months for the DUI and 12 months for the 46.2-391 charge).

## **Advice For Avoiding DUIs**

If you've already been charged with DUI, there's obviously nothing that you can do at this point to change the facts of your case. Your best bet is to use the advice here to find a good attorney.

But, you can help yourself in the future by being educated on a couple of things.

## **1. Don't Put the Keys in the Ignition**

Even if you're sleeping it off, or just chillin' in your car, if you've been drinking, **don't** put your keys in the ignition. Something people often find out the hard way, is that you don't have to be driving to get a DUI.

So you stumble out of the bar and walk to your car. You realize that you shouldn't be driving. You try to do the right thing by sleeping it off in your car. You turn on the heater and take a little nap. You're not doing anything wrong because you aren't driving, right?

**Wrong.**

You would be shocked how many DUIs involve cars that aren't even in motion. The Supreme Court of Virginia has said that "operation" of a car includes putting the key in the ignition without even turning the car on. It doesn't matter if you're trying to do the right thing by sleeping it off. Sitting in the driver's seat with keys in the ignition (even with the engine off) equals operation for DUI purposes.

So if you're hammered and need to sleep it off, lay in the passenger seat or climb in the backseat. Better yet, call an Uber.

## 2. Understand the “Legal Limit” of .08

It’s important to know that, although .08 is “the legal limit”, **you can still get a DUI, even if you’re below a .08.**

Virginia courts define being under the influence as consuming enough alcohol to affect a person’s “*manner, disposition, speech, muscular movement, general appearance or behavior, as to be apparent to observation.*”

All that needs to be proven is that alcohol affected any one of those things. That means that you can get convicted, even with a BAC under .08.

Under the law ([Virginia Code 18.2-269](#)):

- Blowing .08 or above means the judge **can** determine you were intoxicated, based on the test alone. And they almost always will.
- Blowing .06 or .07 means the judge **can’t** determine anything from the test alone. Other evidence would need to come into play. However, we have seen cities where the prosecutors still routinely push cases even when the BAC is .06 or .07.
- Blowing .05 or below means **the test alone is evidence that you were not intoxicated.**

However, believe it or not, we’re seeing an increasing trend of prosecutors attempting to prosecute, even when the cases are

based on “extrapolation” testimony that your BAC **would** have been higher at the time of driving.

### **3. Understand the Two Breath Tests**

Many people don’t realize that there are two breath tests involved in every DUI investigation: The preliminary breath test (PBT), and the official station test. You may be surprised to learn that **the preliminary breath test is mostly risk-free.**

The preliminary breath test (PBT) is offered by the officer at the scene of the DUI. The results of the PBT **cannot** be used against you in court, with the exception of challenging probable cause for the arrest (a rarely successful defense).

That means that it’s a mostly risk free test. If you blow below a .08, there is a decent chance that the officer will just let you go. Even if you’re PBT is extremely high, the results can’t hurt you in the courtroom.

If an officer is offering you the PBT, they’ve already decided to arrest you. So, you might as well take your chances.

The second breath test, however, **is admissible in court.**

People usually run into trouble with the second breath test, taken at the police station. This is the official test that is used in the courtroom. In most circumstances, you should decline this test.

When people who know the system (like prosecutors, police officers, or defense attorneys) get popped for drunk driving, they

almost always refuse the second breath test. That's because if you blow .08 or above on that test, it's going to be an uphill battle to get out of a DUI conviction. If you blow .15 or above, you're looking at mandatory jail time, even on a first DUI.

It's a sad irony that being a good, honest, and cooperative person is a liability, but the truth is that there is a good chance that you're handing your case to the prosecution if you agree to blow.

There is a downside to refusing the breath test, though. You will get hit with a refusal charge.

But first offense refusal is only a civil penalty. A civil penalty means no jail time, although it does carry a one year license suspension (see [Virginia Code 18.2-268.3](#)). That sucks (and you're not eligible for a restricted license if convicted of refusal), but it's better than gift wrapping a conviction for the prosecution and exposing yourself to mandatory jail time.

Even more reason to refuse the breath test, is that **refusing the test can't be used against you as evidence of intoxication** in the DUI prosecution (see [Virginia Code 18.2-268.10](#)).

Furthermore, there are also lots of judges/prosecutors who will dismiss refusal charges if you end up pleading guilty to the DUI in court (see [Virginia Code 18.2-268.4](#)).

## 4. You Can Decline Field Sobriety Tests (FSTs)

Field Sobriety Tests are super made-up dance moves, and you should decline to do them.

You get pulled over, and the cop thinks you're drunk. How do they prove it in court? The three most commonly used Field Sobriety Tests are:

1. the "walk and turn"
2. the "one leg stand", and
3. the "horizontal gaze nystagmus" (HGN) test.

These tests are all championed by the National Highway Traffic Safety Administration (NHTSA). The [NHTSA training guide](#) is considered to be the DUI field test bible across the nation.

However, they're not scientists: the NHTSA has used extremely questionable research methods to determine the legitimacy of these tests. Unlike the standards actual scientists are held to in their studies, the NHTSA hasn't opened their findings up to any meaningful sort of peer review.

A look at the NHTSA website will show you that their expertise relates more to vehicle safety and technology - not scientific studies or the physiology of the brain and body.

## Common FSTs

Regardless of how much as we might bitch and moan about them, FSTs are used. These are the tests that courts consider everyday when convicting people of DUIs, so let's review them.

### **Test #1**

Basically the cop says, "do these dance moves and don't mess up or I'm gonna tell the judge you were drunk... ready, go!" Then the police officer stares at you watching for mistakes when he already thinks you're probably drunk.

[Confirmation bias](#) is a very real thing, but unfortunately it isn't something they focus on in police school.

### **Test #2**

Tests 1 and 2 are similar. In this version, the police often ask you to perform your steps on an imaginary line that doesn't actually exist. Good luck disproving whatever it is the officer says he saw happening on a line that exists only in his imagination.

### **Test #3**

Test 3, or the HGN test, involves an officer conducting an ophthalmological medical examination on the side of the road and diagnosing you as drunk. The officer moves a pen or finger across your field of vision, you're supposed to track the object with your eyes. The theory is that if your eyeballs jerk too much as you track

the object (indicating what is known as nystagmus), you're probably drunk.

The problem is that officers aren't eye doctors and are completely unqualified to give a medical diagnosis. Nystagmus is a vision condition in which the eyes make repetitive, uncontrolled movements - but it can be caused by a variety of factors outside of intoxication.

Unfortunately, that hasn't stopped HGN testimony from being a standard part of almost every DUI prosecution. To make matters worse, we've dealt with a number of officers who don't even know how to conduct the test properly. They don't know how far to hold the object, how fast to move it, or what to look for. They use phrases like "sustained and distinct nystagmus at maximum deviation and onset prior to a 45 degree angle." But when you question them about what that means, you often get a blank stare.

Let us make something very clear: **you do not have to do the field sobriety tests.**

Say what?

Then why does everyone do them? We're not sure. Maybe they don't know their legal rights, because they didn't get this handy DUI guide.

If you're stopped by the police you must give basic identifying information and, if they ask, you have to step out of the vehicle for

officer safety purposes. **That's it.** You don't have to answer questions without an attorney present, and you can decline to do sobriety tests.

A little free advice though: be as nice as possible to the police when asserting your rights. They have tough jobs as it is and being a jerk will get you nowhere. Plus, the word "belligerent" is not your friend in a court of law.

Our advice is to politely decline to take the tests and tell the officer that you want to have an attorney present for any questioning or tests. If you've truly had nothing or very little to drink, tell the officer that you're happy to comply with a preliminary breath test.

The bottom line is that if you opt to do the FSTs, you're putting yourself at the mercy of an officer's subjective perceptions. You only get one shot at these, so if you get super nervous and screw up, tough luck.

## **5. Don't Get Comfortable With the Officer**

**Be careful about everything you say and do when you're pulled over.** While you're outside the car chumming it up, the officer will make a note of absolutely anything and everything you do to help build a case against you. For example:

- "SLIGHT SWAY WHILE STANDING!!"

Geez, everyone sways a bit when they stand. Imagine the perfectly symmetrical statue of a person you'd need to be to stand perfectly still without occasionally shifting your weight.

- "LEANED ON THE CAR FOR BALANCE!!"

What the hell? That means I'm drunk? It's not like you told me not to lean on my car.

- "GLASSY, WATERY EYES!!"

Yes, eyeballs have a natural watery lube in them. They'd hurt otherwise.

- "SLURRED SPEECH"

Not sure how an officer who's never heard you speak knows how you should sound.

- "BLOODSHOT EYES"

It's 3:00 in the morning. I'm tired. I'm wearing contacts. I have allergies. Etc.

I'm sure you get the point. Everything is evidence in the eyes of the police. The more you interact with them by doing their tests, the more you help them build their case against you.

# Final Thoughts

We hope that this information was useful to you. Being charged with a DUI is incredibly stressful, but arming yourself with the knowledge here is one of the best things you can do.

We know you don't want to fork over your hard earned money for a lawyer, but if you've been charged with a DUI, it's an easy call. It's truly an investment in your future, and well worth the cost of having the peace of mind that a professional is watching your back, and doing everything possible to achieve the best possible outcome for you.

If you're charged in Virginia Beach or anywhere else in the Hampton Roads area, feel free to give us a call. We give free consultations, and we're always 100% honest, even when it means that we end up turning away business.



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