



## QUIZ

# SHOULD I FIGHT MY DRUNK DRIVING CHARGE

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When charged with drunk driving, two of the first questions that come to most people's minds are:

- Should I consult a lawyer?
- Is my case worth fighting?

The answer to the first question is unequivocally yes. You need to get a lawyer involved to help you answer the second question. Without guidance from a lawyer who knows the law and the local police, prosecutors, and judges, you won't be able to realistically evaluate whether your case can be won or whether the prosecutor is offering you the best possible deal.

This quiz is designed to educate you about the factors you will need to weigh in making the decision to fight or plead guilty. After taking the quiz you likely won't have a definitive answer, but you will be much better prepared to discuss this important decision with your lawyer.

# I. WHAT ARE YOUR CHANCES OF WINNING?

The better your chances of winning, the more sense it makes to fight the charges. The pragmatic question is: how strong is the case against you? Your lawyer will examine these questions with you to make an assessment.

## QUESTION 1. REASON FOR THE STOP

Did the police have a legitimate reason (reasonable suspicion) to stop you?

- ☐ Yes.
- ☐ No.

If the answer is yes, the stop was probably legal, but there could still be flaws in the state's case that make the charges against you worth fighting.

If the answer is no, all evidence gathered at the stop, or after the stop, is inadmissible in court. You have a case definitely worth fighting.

**Explanation:** Before stopping you, the police must have reasonable suspicion that you (or someone in your vehicle) are involved in illegal activity. Your skin color, age, or ethnicity does not constitute reasonable suspicion.

Common reasons why police stop drivers are traffic violations (e.g., speeding), driving inappropriately for the road conditions, and vehicle violations (e.g., a broken tail light). Reasonable suspicion permits the police to make a brief investigation for what brought you to their attention. However, if the police discover evidence of a crime (such as drunk driving) while making the stop, the police can continue the stop to investigate their further suspicions.

For example, suppose a car is traveling unusually slowly and a police officer comes up from behind and signals the driver to stop. The officer is suspicious the driver was going unusually slowly because the driver was impaired. Upon approaching the stopped car, the officer sees the same thing the driver sees, a small child and a dog running along the shoulder of the road, which explains the slow driving. The officer detects no other problems and permits the driver to continue. However, if the police officer smells alcohol on the driver's breath, the officer now has reasonable suspicion to detain and investigate further.

A third scenario is also possible. A police officer makes the stop, sees the child and dog, but detains the driver and passengers longer because the officer does not think the car's occupants belong in that particular neighborhood. In such an instance, provided the driver does not consent to a search

or further investigation, the police officer has no legal basis to continue the stop and evidence found after the stop can be suppressed in court.

## QUESTION 2. ROAD-SIDE SOBRIETY TESTS

Did you perform road-side sobriety tests such as the horizontal gaze nystagmus (HGN) test, walk and turn test, and the one-legged stand test?

- ☐ Yes.
- ☐ No.

If you answered yes, the state probably obtained evidence against you when you performed the road-side sobriety tests.

If you answered no, you may have denied the state a critical piece of evidence.

**Explanation:** Although you may think you performed well on the tests, and you may have, the officer reports what he or she saw. The officer's perception may be different from what occurred or what you remember. The officer is looking for little "mistakes" that you may not have noticed to count against you. If you accumulated enough of these little mistakes, you failed the tests. Field sobriety tests are easy to fail.

If the tests were videotaped, the video will be important evidence that can significantly help or seriously hurt your case depending on how well you performed. Your lawyer will be able to get the video if one exists and review it with you to give you a sense of how helpful or damaging it is likely to be.

Field tests are important for two reasons. One, as noted above, the officer's observations can be used as testimony against you in court. Two, the officer must have sufficient evidence, or probable cause, to make an arrest. Probable cause means a reasonable person would believe the suspect had committed or was committing a crime.

Field tests are often used to gather evidence for probable cause to make an arrest. If you performed poorly on the field test, or at least if the police officer asserts you performed poorly on the field test, the officer has probable cause to make an arrest.

Your lawyer may challenge whether the police had probable cause for your arrest, especially if a videotape shows you performed well. If no probable cause existed for the arrest, the results of your subsequent breath or blood test can be suppressed (i.e., the results cannot be used against you).

### QUESTION 3. YOUR RIGHTS

When the officer arrested you, did the officer inform you of your right to remain silent and of the consequences of refusing to take a blood-alcohol test?

- ☐ Yes.
- ☐ No.

If you answered no, you may have a good case to fight.

**Explanation:** If the officer failed to give you your Miranda warnings, any statements you made after you were arrested (e.g., admitting you had been drinking) can be kept out of evidence. If the officer failed to inform you of the consequences of refusing to take a breath, blood, or urine test (usually an automatic license suspension and in some places additional criminal charges), the results of the test or the fact that you refused the test may be inadmissible.

### QUESTION 4. BLOOD-ALCOHOL TESTS

Did you submit to a blood-alcohol test (i.e., a breath, blood, or urine test)?

- ☐ Yes.
- ☐ No.

If you answered yes, read the explanation to question 5 below.

If you answered no, assuming no other aggravating factors are present, you probably have little to lose by going to trial.

**Explanation:** All states have implied consent laws. By driving on the highways you must submit to a blood-alcohol test when requested by a police officer or your driver's license will be suspended. Depending on the state, other penalties can be imposed.

Although your license will probably be suspended whether or not you are convicted, the state will not have a critical piece of evidence to use against you if you refused the test. Therefore, you have a better chance of winning than if the state had the results of a blood-alcohol test that are not favorable to you.

## QUESTION 5. PER SE OFFENSE OR NOT

Were the results of your blood-alcohol test less than the legal limit?

- ☐ Yes.
- ☐ No.

If the answer is yes, you may have a good case to fight.

**Explanation:** Most people are aware that a blood-alcohol reading of .08 or above constitutes driving while impaired, but you can be charged with drunk driving even if your blood-alcohol level is less than the legal limit. There are two definitions of what constitutes drunk driving a DUI or DWI. When your blood-alcohol level exceeds the legal limit, this is called a per se offense. However, drunk driving is also defined as having a sufficient amount of alcohol in your system that you are impaired regardless of your blood-alcohol content. Consequently, a person who has a low tolerance for alcohol may register a blood-alcohol level of .07, or lower, and be charged with drunk driving a DUI/DWI.

However, there is a huge difference between being charged and being convicted. The state will have a more difficult time convicting you if your blood-alcohol level is lower than the legal limit. The state will need evidence other than breath or blood test results (typically one or more witnesses to your driving and other behavior at the time you were stopped) to prove impairment.

If the answer is no and your blood alcohol was at or above the limit, there may be other ways to attack the accuracy and reliability of your test result.

**Explanation:** The validity of the test results can be attacked if the tests were not administered correctly. In addition, if your blood-alcohol test was right at the legal limit, your lawyer may be able to raise enough doubt about the results to win an acquittal for you.

Each case is different and you should consult a lawyer about your case. Your lawyer can investigate your particular situation to determine if the proper protocol was followed in administering your blood alcohol test.

If proper protocol was not followed, or the test was imprecise, you may have a winnable case in court. However, this decision, as all decisions concerning your case, should only be made in consultation with your lawyer.

## QUESTION 6. PHYSICAL DISABILITIES

Do you have physical disabilities that could have affected the results of the road-side tests or your blood-alcohol test?

- ☐ Yes.
- ☐ No.

If you answered yes, your physical disability can be introduced into evidence to explain poor performance on a field test or a falsely high blood-alcohol test result.

**Explanation:** Poor balance and stumbling can be caused by arthritis, sciatica, an inner ear infection and a host of other physical disabilities. The police officer conducting the roadside tests should ask you about these issues, but that does not always happen. In some instances, police officers have confused speech impediments with slurring words due to intoxication.

Diabetics are at particular risk for false charges of drunk driving DUI/DWI. In a 1 September 2006, article, the Diabetes Health magazine noted the symptoms of diabetes can mimic the signs of an intoxicated person. For example, slurred speech, dizziness, and blurred vision are all symptoms of diabetes and can be confused for intoxication by the police. According to Diabetes Health, diabetes can also cause a false positive on breathalyzers. See Diabetes Health at <https://www.diabeteshealth.com/dui-or-diabetes/>. In some instances, diabetes may also cause false positives in urine tests.

Be certain to inform your lawyer of any health condition or disability from which you suffer.

## II. WHAT'S AT STAKE FOR YOU?

The more you have to lose with a conviction on your record and the harsher the punishment you face, the stronger the incentive to fight the charges.

### QUESTION 7. YOUR PROFESSION

Are you a professional driver, such as a commercial truck, taxi, etc. driver?

- ☐ Yes.
- ☐ No.

If you answered yes, you have more at stake than the typical driver.

**Explanation:** A single drunk driving conviction can prevent you from earning a living. As you are probably aware, a blood-alcohol level of .04 constitutes impaired driving while operating a commercial vehicle. For the first conviction, you can lose your commercial driver's license for a year.

Furthermore, if you are convicted of a DUI/DWI drunk driving while operating a private vehicle you can also lose your commercial license for a year in states that have a stricter standard. See the following Federal Motor Carrier Safety Administration site, question 12, <https://www.fmcsa.dot.gov/regulations/title49/section/383.51>,

### QUESTION 8. PRIOR CONVICTIONS; ACCIDENTS AND INJURIES

Do you have one or more prior DUI/DWI drunk driving convictions or were you involved in an accident in which someone was injured or killed?

- ☐ Yes.
- ☐ No.

If you answered yes, you have more at stake than the first time offender.

**Explanation:** Harsher penalties are imposed on repeat offenders and on those involved in an injury accident. You may be facing felony charges and mandatory significant jail time. Furthermore, any DUI/DWI drunk driving charges you subsequently face will constitute another felony charge. If you are facing felony charges, there are also “collateral consequences” to consider, such as: prohibition on fire arms ownership, difficulties obtaining or renewing professional licenses, restrictions on eligibility for government programs, and deportation risk for non-citizens.

You should consult a lawyer immediately if faced with a felony charge.

Equally important, what constitutes “fighting” a charge depends on your situation. For example, if you are facing a first-time offense, “fighting” the charge can mean going the distance and seeking an acquittal. However, if you are facing a felony, “fighting” the charge may be seeking a plea bargain for a lesser offense or a deal on a reduced sentence.

### QUESTION 9. COSTS OF FIGHTING VS. COSTS OF CONVICTION

Are the costs of a conviction greater than the costs of fighting?

- ☐ Yes
- ☐ No

A yes answer obviously puts a check in the fight column. To answer this question you will need to get a breakdown of the costs from a lawyer.

**Explanation:** Your lawyer should be able to lay out the maximum penalties that could be imposed on you if you plead guilty and the anticipated costs of a defense. In addition to possible jail time, probation, and license suspension, a conviction, even for a first offense, can be very costly. Expenses may include some or all of the following: a fine; a fee for issuing a restricted license; a fee for



installation and maintenance of an ignition interlock device on your car; a license reinstatement fee once your suspension is over; a charge for probation (yes, you have to pay for it); costs of an alcohol and drug evaluation and an alcohol and drug education course; and sharply increased insurance rates for several years. You'll also have to factor in time lost from work.

## IN SUMMARY

The decision to fight drunk driving charges or plead guilty is yours. You will not be able to make a wise choice unless you are fully informed of the potential risks, costs, and benefits.

Here is a checklist distilled from the quiz of the most important factors to review with your lawyer before making your decision.

- How strong is the case against you?
- Did the police have reasonable suspicion to stop you?
- Did you take field sobriety tests?
- If you did, were they videotaped? Does the video help or hurt your case?
- Do you have any physical disability that could explain poor performance on the field sobriety tests?
- Did the police tell you your rights when you were arrested, including the right to remain silent and the consequences of refusing a breath, blood, or urine test?
- Did you take a breath, blood, or urine test?
- Is the result under the legal limit, at or slightly over the limit, far over the limit?
- If you tested over the limit, do you have any physical disability that could account for the result?
- Were the tests administered in accordance with proper protocols?
- What do you have at stake?
- Do you have a commercial driver's license or drive for a living?
- Do you have prior drunk driving convictions?
- Were you in an accident in which someone was injured or killed?
- How do the costs (economic and non-economic) of a conviction compare with the costs of defending your case?