



Date: July 24, 2023

Subject: Advisory Opinion

Purpose: I was asked by the Oak Lawn Police Department to offer an advisory opinion as to the procedures followed by their officers and investigators in reference to the investigation of the fatal traffic crash which occurred on June 5, 2023 at approximately 5:35pm.

My Background: I have been the Illinois Traffic Safety Resource Prosecutor (TSRP) since October of 2016. I was previously an Assistant State's Attorney (ASA) in the Adams County State's Attorney's Office in Quincy, Illinois for twenty years. As an ASA, I prosecuted tens of thousands of traffic cases including thousands of impaired driving cases which also included several fatal crashes. In the summer of 2016, I was awarded the National Traffic Safety Prosecutor of the Year award by the National Association of Prosecutor Coordinators.

Since holding the position of the Illinois TSRP, I have presented both statewide and nationally. I have trained thousands of officers and prosecutors on the procedures needed to successfully investigate and prosecute impaired driving cases. I serve on the Illinois Impaired Driving Task Force Committee and have received several awards and certificates for my efforts to combat impaired driving. My Curriculum Vitae is attached.

Materials Reviewed: In preparation of this opinion, I have reviewed the following items:

- 2-page Illinois Traffic Crash Report, case number 23-03318;
- 19-page "Incident/Investigation Report" prepared by the Oak Lawn Police Department, case number 23-03318;
- Crash Investigation Report prepared by Officer Craig Wilk, IDOT-CN: X003055599, CR#SH-23-00210590;
- Video from Ring Camera of nearby residence

Limitations of My Opinion: My opinion in this case is limited to the issue of impairment and the proper procedures performed by the officers involved in making the assessment not to arrest Ms. Cusack for the offense of Driving Under the Influence of Alcohol/Drugs (DUI). My opinion is not reflective of the Traffic Crash Reconstruction Report or any other issues related to the crash other than possible impairment and the steps taken by the officers in that regard.

One of the many courses which I teach is the proper use of the various Warnings to Motorists available to officers. In this case, given the circumstances of the crash, it is my opinion that the officers were presented with two options for the use of these Warnings – the Standard Warning to Motorist or the Traffic Crash Warning to Motorist. The officers in this case chose to use the Traffic Crash Warning. I believe that was the correct course of action for the reasons that follow. According to Chapter 625ILCS5/11-501.1, in order for an officer to read a suspect the Warning to Motorist and request a chemical test sample, the officer must have probable cause to believe that either the offense of Driving Under the Influence of Alcohol/Drugs or Leaving the Scene of a Fatal or Great Bodily Harm Crash has occurred. Since we know that Ms. Cusack did not leave the scene of the crash, my focus will be on whether or not the officer had probable cause to

believe that Ms. Cusack was driving under the influence of alcohol or drugs. Here is the relevant portion of that statute as to the use of this particular Warning:

(625 ILCS 5/11-501.1)

(Text of Section before amendment by P.A. 102-982)

Sec. 11-501.1. Suspension of driver's license; statutory summary alcohol, other drug or drugs, or intoxicating compound or compounds related suspension or revocation; implied consent.

(a) Any person who drives or is in actual physical control of a motor vehicle upon the public highways of this State shall be deemed to have given consent, subject to the provisions of Section 11-501.2, to a chemical test or tests of blood, breath, other bodily substance, or urine for the purpose of determining the content of alcohol, other drug or drugs, or intoxicating compound or compounds or any combination thereof in the person's blood if arrested, as evidenced by the issuance of a Uniform Traffic Ticket, for any offense as defined in Section 11-501 or a similar provision of a local ordinance, or if arrested for violating Section 11-401. If a law enforcement officer has probable cause to believe the person was under the influence of alcohol, other drug or drugs, intoxicating compound or compounds, or any combination thereof, the law enforcement officer shall request a chemical test or tests which shall be administered at the direction of the arresting officer. The law enforcement agency employing the officer shall designate which of the aforesaid tests shall be administered. Up to 2 additional tests of urine or other bodily substance may be administered even after a blood or breath test or both has been administered.

According to Officer Tholotowski's report on page 5 of 19, "R/O did not observe Cusack to have any obvious physical signs of impairment. Cusack was able to stand without swaying. Cusack was coordinated and did not need to use anything for balance. Cusack's speech was clear, logical, coherent, and not mumbled or slurred. R/O performed the Horizontal Gaze Nystagmus (HGN) test and no indicators/clues were observed."

According to Inv. Shilney's report on page 11 of 19, "While speaking with Cusack, I did not observe any signs of alcohol impairment. I could not detect any odor of alcohol coming from her breath or her person. Cusack was not slurring her words, her eyes were not bloodshot, and she was not swaying back and forth."

According to Inv. Kelly's report on page 12 of 19, "From approximately 1740 hours until approximately 1939 hours, I did not observe any signs of impairment from Cusack. I did not observe her to be swaying or have any difficulty walking/standing on her own, I did not observe her to be slurring her speech or having difficulty speaking coherently and I did not observe her eyes to be bloodshot/glassy."

As Inv. Hollingsworth noted in his report on page 19 of 19, "Officer Tholotowsky advised that Ms. Cusack did not have bloodshot/glassy eyes, nor was she exhibiting any uncoordination or slurred speech. Officer Tholotowsky advised that Ms. Cusack's speech was 'clear, logical and coherent' and that he did not have any probable cause to believe she was impaired by alcohol and/or drugs. I next spoke to Officer Shilney #371 and Sgt. Heilig #672, who were both on scene and had been speaking with Ms. Cusack during the on-scene investigation. Officer Shilney and Sgt. Heilig both advised me that neither of one them had detected any odor of alcoholic-based beverages coming from Cusack's person, and neither of them had observed any indicators or behaviors in the entire time they had been with Ms. Cusack that would lead them to believe she was impaired by alcohol and/or drugs."

It appears to me from the reports provided that the officers were exhaustive in their efforts to determine if impairment by alcohol or drugs was an issue. As noted by the reports, multiple officers had contact with Ms. Cusack independently and they all arrived at the same conclusion – that neither alcohol nor drugs were a factor in this crash.

In this case, the only indicators that would have led officers to believe that DUI was a possibility were her admission to having consumed alcohol and a "slight" odor of an alcoholic beverage coming from her person. This odor was so slight that only one officer detected it upon initial contact. Additionally, Officer Tholotowski had Ms. Cusack perform the Horizontal Gaze Nystagmus Test and noted 0 out of 6 possible clues. Had she been impaired by alcohol and assuming

the test was performed correctly according to the National Highway Safety Administration's adopted standards, she would have likely exhibited some clues on this test.

It has been a long-standing principal of law in Illinois that the odor of an alcoholic beverage alone does not constitute probable cause for an officer to believe that someone is under the influence of alcohol. In the case of People v. Motzko, 2017 Ill.App.(3d) 160154, 413 Ill.Dec.525, 78 N.E.3d517, the Court determined that the officer lacked probable cause to believe that the defendant was under the influence of alcohol following a motorcycle crash in which the defendant was speeding. In that case, the officer noted an odor of an alcoholic beverage coming from the defendant and also that the defendant had performed inadequately on a field sobriety test (FST). The Court held that speeding and a crash were insufficient grounds for DUI probable cause even when coupled with the odor and the FST. The Court went on to cite several other cases in which there were additional elements that might lead a reasonable person to conclude that an individual was under the influence of alcohol, but held that even with those additional factors, did not give rise to the level of probable cause needed for an arrest.

Given that the officers did not have probable cause to arrest Ms. Cusack for the offense of Driving Under the Influence of Alcohol, the officers were left with using the Traffic Crash Warning to Motorist. The statutory reference for this Warning is found under 625ILCS5/11-501.6. Here is the relevant portion of that statute:

(625 ILCS 5/11-501.6) (from Ch. 95 1/2, par. 11-501.6)

(Text of Section before amendment by P.A. 102-982)

Sec. 11-501.6. Driver involvement in personal injury or fatal motor vehicle accident; chemical test.

(a) Any person who drives or is in actual control of a motor vehicle upon the public highways of this State and who has been involved in a personal injury or fatal motor vehicle accident, shall be deemed to have given consent to a breath test using a portable device as approved by the Illinois State Police or to a chemical test or tests of blood, breath, other bodily substance, or urine for the purpose of determining the content of alcohol, other drug or drugs, or intoxicating compound or compounds of such person's blood if arrested as evidenced by the issuance of a Uniform Traffic Ticket for any violation of the Illinois Vehicle Code or a similar provision of a local ordinance, with the exception of equipment violations contained in Chapter 12 of this Code, or similar provisions of local ordinances. The test or tests shall be administered at the direction of the arresting officer. The law enforcement agency employing the officer shall designate which of the aforesaid tests shall be administered. Up to 2 additional tests of urine or other bodily substance may be administered even after a blood or breath test or both has been administered. Compliance with this Section does not relieve such person from the requirements of Section 11-501.1 of this Code.

As noted by this statute, the requirements to utilize this Warning are that there must be a fatal vehicle crash on a public roadway and the driver involved must have been issued a uniform traffic violation for any offense out of the Illinois Vehicle Code for something other than a Chapter 12 equipment violation. Given the unfortunate fact that Mr. Kurdi was deceased as a result of Ms. Cusack's vehicle striking him while standing outside of his truck and that the officers issued her a ticket for "Failing to Reduce Speed" which is not a Chapter 12 equipment violation, this appears to be the appropriate course of action.

The question then becomes, once the officers request the chemical test as they did in this case, what course of action do the officers have upon her refusal? According to the US Supreme Court case of Birchfield v. North Dakota, 579 U.S.438, 136 S.Ct.2160, 195 L.Ed.2d560 (2016), a warrantless blood test cannot be performed based on a search incident to arrest or on implied consent. In Birchfield, the Supreme Court was dealing with a case that involved individuals under arrest for the offense of DUI. As previously noted, there did not appear to be probable cause to believe that Ms. Cusack was DUI. Therefore, the only remedy for the officers at this point were to either gain her consent, pursue a search warrant, or simply indicate her refusal on the Law Enforcement Sworn Report. Clearly, the officers did not have her consent and they did not have the probable cause needed to obtain a search warrant. Therefore, the only remedy remaining was to note her refusal to submit to chemical testing on the Law Enforcement Sworn Report and move forward by investigating possible other contributing factors to this crash.

Conclusion: It is my opinion based upon my review of the reports that the officers involved did a thorough and comprehensive investigation by interviewing all of the witnesses and parties involved, securing a search warrant for the EDR on the vehicle, securing the recording of the surveillance cameras near the scene of the crash, reviewing the footage at the bar in which Cusack was at as well as securing a search warrant for Ms. Cusack's phone. I believe that the officers were correct in not arresting Ms. Cusack for the offense of DUI and that they followed proper protocols and procedures by utilizing the Traffic Crash Warning and noting her refusal on the form.

Sincerely,  
Jennifer Cifaldi  
Illinois Traffic Safety Resource Prosecutor