

## DUI cases in peril

### A clerical mistake regarding a breath-test machine may toss out rulings and cost a director his job.

*By Ty McMahan, Staff Writer*

Hundreds, if not thousands, of Oklahomans arrested for driving under the influence the past year could have their cases thrown out because of a clerical error.

The mistake — a model number left off a list of state-approved breath-alcohol detecting equipment — was made public in a lawsuit filed this week in Oklahoma County District Court. The lawsuit, which Oklahoma City attorney Mike Gassaway filed, seeks damages and civil relief for at least three people looking to take advantage of the legal loophole.

Steven Hill, Cari Breske and Vernon Doke are seeking more than \$10,000 from the state Department of Public Safety's Board of Tests for Alcohol and Drug Influence, or BOT. Each of the plaintiffs submitted to breath tests for alcohol content, the results of which were verified by a Guth 2100 simulator, an electronic device used to calibrate and standardize breath analyzers.

They contend the results should be thrown out because the Guth 2100 is not on the list of approved equipment — and at least one Oklahoma County judge seems to agree.

In February, Judge James Croy dismissed breath-test evidence in a DUI case after lawyer Charles L. Sifers argued, in part, that the Guth 2100 was not approved for use.

"This news spread quickly. ... The Department of Public Safety threw in the towel," Sifers wrote in "The Gauntlet," a legal journal. "It is setting aside all Guth 2100 cases which were — and are — still in their hearing and appeal pipeline."

McBeth Sample, Jr., state director of tests, said he made the clerical error when he submitted paperwork in 2003 to have the Guth 2100 added to the state approved list.

As a result, the Guth 2100 was not an approved device from July 11, 2004, to July 11, when it was approved.

"What caused this was a simple error," Sample said. "I knocked out the 2100 and didn't realize it."

Dr. Kenneth Blick, chairman of the Board of Tests, said Sample's error should not be taken lightly.

"We're talking about public confidence, and maybe changes are in order," Blick said.

"This is no small error, no matter what anybody tells you. This is a typo, but when it comes to public safety it is not acceptable."

#### Faceplate swap

Sample's error is not the only complaint listed in the lawsuit.

Another is that Sample, in an attempt to rectify the situation, ordered nameplates from state-approved machines for the Guth 2100 machines.

Sample said he swapped the nameplates because the manufacturer changed the name of the machines.

He said he spent about \$1,100 in state funds to order the new nameplates for more than 150 machines.

Sample said the Guth 2100 and the state-approved Guth 210021 are identical machines and the device inventor has offered to testify to that fact in court.

Gassaway said the machines are not the same and Sample's actions were an attempt to hide his mistake.

"Rather than cleaning up the paperwork, he takes it upon himself to spend thousands of the state's money to buy new faceplates," Gassaway said.

"That's like taking a Ford and putting a Cadillac emblem on it. They say it's the same machine. Well, it's not or it would have the same model number."

**'Fired or retire'**

Sample said he will have to fight to keep his job as director.

He said he was asked by the chairman to resign, which Blick denies.

"I don't have a choice unless the board doesn't vote to accept my resignation. Then I'll stay in," Sample said. "I was told I either had to be fired or retire."

Blick said the board will meet Tuesday to decide Sample's fate.

"He has not been asked to step down," Blick said. "I think the board's perceptions are that we need to have some changes."

Lt. Stewart Meyer, spokesman for the Department of Public Safety, said officials must review every DUI report filed the past year to see if the person arrested was tested with the Guth 2100.

He said the machines are used by all levels of law enforcement in Oklahoma, which means thousands of people possibly were tested with a device not approved for use.

He said the department is not sure how much time will be needed to search the files or how many revocations could be reversed.

"We as a department want to do what's right," Meyer said.

"If something has to be changed, we'll abide by what the courts come up with."