

The DUI Racket
Guest: Warren Redlich
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Warren Redlich is an attorney in Albany, New York, and is the author of *Fair DUI: Stay Safe and Sane in a World Gone MADD*.

WOODS: I want to dive right into your book *Fair DUI*. You have a website, FairDUI.org, that people should visit, and where they can get the book. You mention incidents in which people followed the rules and weren't necessarily guilty, and yet got in trouble anyway. I think our inclination is, "Look, I'm innocent, or I've had only one drink, let me just tell the officer that." You're saying that if you get pulled over in this sort of situation, the correct approach is to say nothing at all. Why is that?

REDLICH: Any lawyer would tell you that. You have the right to remain silent. Listen to the words of the Miranda warning. "You have the right to remain silent. Anything you say can and will be used against you in a court of law." They never say, "Anything you say might be used in your favor in a court of law." I've seen time and again people talk to the police, innocent people talk to the police, and their words are twisted against them. The short story is, I've never seen a case where my client talking to the police helped them. When you talk to the police, you are giving them evidence to use against you. That's the reality of it, so it's difficult for a lot of people to carry it, to pull it off. A lot of people aren't comfortable taking that approach of just not talking, and a lot of people aren't going to be able to do it.

Your followers, the people who follow the Ron Paul movement, who follow Tom Woods, are more likely to be able to do what's needed. You see these checkpoint videos. I think one of the things that motivated me was, I would watch these checkpoint videos, and I don't really agree with the way these guys handle the checkpoints where they go up and they say, "Am I being detained? Officer, am I legally required to answer your question?" First of all, you know you're not legally required to answer his question, so don't ask stupid questions. Second of all, he just told you to pull over. Of course you're being detained. I get frustrated with that, and I think people ought to do what lawyers would tell them to do, which is don't talk.

WOODS: Suppose I'm pulled over, and the presumption is I'm pulled over for speeding. I feel like I have talked my way out of a speeding ticket before. Maybe it would have been stupider for me not to say anything. Is there ever a case where you think it's possible to improve your situation by talking? Is it only DUI in which you ought to stay silent?

REDLICH: No, no, no. I'm saying if you're the activist, and you're trying to confront the police officer, there's a way to handle it. I definitely think if you haven't had anything to drink at all, most of the time you're in a community where you're comfortable. You have lighter skin, you're somebody that's dealt with the police before, and you've gotten along with them. I've been pulled over. I've had a nice conversation with the police, and I've gotten a warning instead of a ticket. That definitely works for people.

But you've had one drink. You went out to dinner with friends. You had one glass of wine. Maybe you had two, and you get pulled over. You think, "Well, I'll just be the same guy I normally am, and they'll go easy on me." You don't know when you're going to get that wrong cop who's going to decide, "Oh you had a drink? He's probably understating it. He probably had five. Let's take him down to the station and have him blow in the machine." And then you find out later those machines don't really work the way they're advertised.

WOODS: You told a story on the Mike Church Show about a guy who had some kind of foreign accent, and the police said he was slurring his speech.

REDLICH: Yes, I've seen that multiple times. I see it with Spanish-speaking clients. In this case, it was a Japanese client who was from Japan and whose English is limited, and the police officer testified in open

court under oath that my client had slurred speech. I don't know how he could possibly tell that a Japanese guy has slurred speech. Of course his speech was impaired, because he doesn't speak English that well.

WOODS: I think the reason people are so willing to cooperate is that we kind of have this naïve sense that the system works and the institutions in place are all fair, and they're just designed to get to the truth. You're suggesting that that's not necessarily the case, particularly with these standardized field sobriety tests that we sometimes see on TV cop shows. What are those tests, and what's wrong with them?

REDLICH: I think the one that's easiest for people to understand, especially on the radio, is the "walk the line test," or, as it's technically known, the "walk and turn test." The idea is that the police will instruct you to take nine steps heel to toe, turn around, take nine steps back. Then they're grading you on that. It depends. Different states do it differently. In New York, where most of my experience is, the police officer will testify that you stepped off the line. There's no line. It's an invisible line. How does he know where you thought the line was? In the instructions, and this is national, the instructions in the national manual from the National Highway Transportation Safety Administration, what they're supposed to say to you does not include the word "line." They tell you to walk heel to toe, so it's basically walking an invisible tightrope. You're not supposed to use your arms. They don't tell you you're not supposed to use your arms, but if you use your arms, that's a sign that you messed up. If you step off the invisible line, that's a sign. How wide is this line? Is it a foot wide? Is it an inch wide? We don't even know. It's in the officer's head.

These are excuses that police will use to claim probable cause to arrest you. They're just examples of it. There's a test where they look in your eyes, and they look for something called nystagmus. It's a nystagmus test. They look for whether your eye bounces or jerks uncontrollably, which is a human feature. We all do that, and the instructions tell them if you hold the eye all the way out to the side for long enough, sober people will show that. All these tests, we describe them in the defense lawyer community as tests designed to fail. Sober people can't pass these tests, or most sober people will fail these tests the way they're done. It's just a fiction that's created for a cop to come up with a justification to take you down to the station.

WOODS: If these tests are that flawed, then isn't this something that you as a defense lawyer can capitalize on in a courtroom?

REDLICH: Yes, but do you want to spend \$5,000 to \$10,000 on a lawyer? You're talking about doing a trial. Do you want to spend \$10,000 doing a trial? Sure, I'll make that argument. With a lot of judges, they rubberstamp everything the police do. The guy who testified that my client had impaired speech, slurred speech—was Japanese. The judge said, "Okay, I don't see a problem with that." I think part of when you say the system is fair, we count on the judges to be fair. We count on the judges to be what they call "neutral magistrates." But how many judges have you heard brag about how many DUI defendants they let off?

WOODS: Yeah, true.

REDLICH: Right? How many prosecutors? How many judges brag about how sensitive they are and how fair they are to defendants? No. The whole system is designed, especially where judges are elective and even when they're appointed. They've got to be tough on crime. They've got to be tough on DUI. If they're not tough on DUI, Mothers Against Drunk Driving's going to say, "This guy's a bad judge. Don't reelect him. Don't appoint him." So it's not a fair system.

WOODS: You're right that people expect judges to be fair, to look dispassionately at the evidence, but I think they also think that we have really good scientific means of determining a person's condition in terms of alcohol intake. So, for example, we have this "walking the line" test. We get the pen in front of the nose. We even have the Breathalyzer, and this is all super scientific. Well, what about the Breathalyzer? What should we know about that?

REDLICH: So first of all, the trade name Breathalyzer—I think that device is not commonly used in most

places. There are two different breath tests. There's the one that they do out in the field. They pull you over. They do these tests. They say, "All right, blow in this handheld device." And that device is called an Alco-Sensor, or a portable breath-screening device. That one is not admissible in court for the number it produces. It's usually admissible in court whether it was positive or zero. And of course, if it's zero, you don't end up in court, hopefully.

But the one that is most commonly referred to when you see a news story is, "Somebody blew this level." That is usually what people commonly refer to as the Breathalyzer, although people get confused about that. It might be called the DataMaster. In Florida, it's called the Intoxilyzer, and it's a larger device that's usually in a room. It's not huge, like the size of a Univac, but it's a larger device that's not handheld. Sometimes they have them in vans. You blow into this device, and you're supposed to blow a certain volume, and it reports a number.

There are tremendous flaws in these devices. I've seen plenty of cases. I was just at a seminar in Florida a week or two ago where this guy showed us a report from a device where the guy blew a zero volume, but he blew a .22 blood alcohol content, three times the legal limit, roughly with no volume. How do you blow a .22 with no air? Then in Florida they do a second breath test, so the second test he blew three liters and a 0.0. So how did this device report a .22 on the first test? We don't know. We don't know what's wrong with this.

They hid the source code. I don't know if you've seen this, but with the breath-testing devices, the manufacturers won't reveal their source code. So a defense lawyer says, "I want to attack the device itself. I want the source code." They won't turn it over, and the judges often won't make them. If the judges do make them, then they drop the case.

The only reason people think the test devices work is that the government and the mass media tell them they do. The practical reality is there are many flaws. A prime example that a lot of us see in my work is what's called mouth alcohol. You burp. In burping you bring up that residual alcohol that was in your stomach. When you blow you're not blowing alcohol from your lungs. You're blowing alcohol from your stomach, and that gives an abnormally high result. There's basically no protection for you against that kind of result. So if you had a drink six hours ago, eight hours ago, it turns out the way your physiology works, your eating works, your stomach didn't process that alcohol yet, because the alcohol gets processed in the small intestine. If it hasn't gone into the small intestine yet, that alcohol might still be in your stomach. You could blow an unusually high number. Keep in mind, the idea is they're supposedly measuring the alcohol in your blood, right? You with me on that?

WOODS: Yeah, sure.

REDLICH: So they don't take your blood. Even when they draw your blood, by the way, they don't actually measure your blood. They measure the gases that come off your blood. When you blow, they're measuring the alcohol in your breath, and they interpret that to mean what the alcohol in your blood probably was. Probably. There are many flaws in that, depending on your body temperature, for example, if you're running a fever of a couple degrees. That can throw the results off substantially. All kinds of things can throw off the result, especially mouth alcohol. Mouth alcohol can produce ridiculous results. I had a trial with a guy who blew a .16 after two glasses of wine over four hours. The jury found him not guilty. But multiple witnesses testified that he was sober. The police officer was one of the worst witnesses I've ever seen, and fortunately the jury said "not guilty," and recognized the guy was sober. That's the world that you live in, and he spent a lot of money to protect himself that you shouldn't have to spend.

WOODS: Let's talk about MADD. When I was growing up as a kid, I thought these were civic-minded moms who just wanted to make the world a better place, right? Mothers Against Driving Drunk. Is that not the case? Was I misled as a kid?

REDLICH: I think most of the people who get involved with it get involved with that motivation, but ultimately it's a special interest group that gets a lot of money funneled to it through the drunk-driving programs. If people actually stopped driving drunk, MADD would lose all its money, and the people who run MADD would be out of work. This is true with drug-policy reform groups, too. If we actually legalized drugs, all these guys wouldn't have any jobs, either. People don't realize that, for example, when you get arrested for drunk driving, they have you do a class. MADD runs the class, and they get \$25 a pop, so they get 100 people in the classroom, they get \$2,500. They do that once a month in my hometown. They get \$2,500. Just one town, 30,000 people in upstate New York. They're making \$2,500 a month off one town. They're doing this around the country. They do these classes. They make money off it. They get funded by people who sell devices.

They want a device in every car. They're still pushing this. They want a device in every car. Not just every car of anybody who's ever been convicted, but every car. They want every car to have a device in it. If it detects alcohol in the ambient air in the car—it's called DADSS, I think: Drug Alcohol Detection Safety System. Something like that. DADSS I'm sure is the acronym. They want that in every car, and the problem is, do you really want the government deciding whether your car's going to start by smelling the air in the car? This is absolutely true. It's DADSS. Look it up. There's a push right now from the National Transportation Safety Board to lower the BAC limit to .05. MADD actually hasn't jumped on board that one yet. I'm sure they're half on board with it. It depends which chapter you're talking about. I give credit. Some of the state chapters have said, no, we don't need to go to .05.

The ultimate problem on the road—first of all, you've got to recognize that somebody who's at a .05 or a .08, not to say that they wouldn't be safer if they didn't have that blood alcohol content, but they're not that dangerous. The real problems are people who are hammered. The real problems are people who are getting hammered all the time and driving.

There's something I've been talking about that really rattles people. I want you to consider someone who was an alcoholic. You've probably met someone in your life who was an alcoholic. I don't mean a sober alcoholic who's trying to recover and is in recovery and isn't drinking. I mean somebody who is regularly drinking alcohol on a daily basis to the point of intoxication. Ask yourself this question. Is that guy a better driver when he hasn't had any drinks at all or when he's had three drinks? Three drinks and that guy might be a .07 or .06 depending on his body weight. At no drinks that guy's a mess. Same thing with drug addicts.

People say, "We've got to do more. What about all the drugs, and people driving while they're on drugs?" Somebody who's a heroin addict is probably a better driver when he has a little heroin in him than when he hasn't had heroin in a couple days. People don't want to think about that, and the studies they do that say people are unsafe when they have a certain amount of alcohol—they take sober people who never drink. Then they give them drinks and they show, "Oh geez, these guys don't perform that well." They don't take alcoholics and see how they perform. That would be a very different study if you said, "Let's take somebody who actually drinks all the time and see how they perform in these driving tests." I think if you think about that example of the alcoholic, if you knew a raging alcoholic, would you think he'd be a better driver when he hasn't had any drinks in a couple of days or when he's had a couple of drinks in the last half hour?

WOODS: That thought never occurred to me. There's a one-size-fits-all application to this thing.

REDLICH: Our whole criminal justice system—you just triggered a wire with me—our whole criminal justice system is a one-size-fits-all system. It's an assembly process. I could go off on all these ideas. There's a lot of movement towards what's called diversion programs, where you take drug offenders or drunk-driving offenders, and you put them in some special program where they get educated and they get education on the system. They get a benefit out of it. They get a lesser conviction or whatever, and my favorite example of that—I know I'm going off the drunk driving thing, but Jared Lee Loughner, the guy who shot Gabrielle Giffords. He went through two diversion programs in Tucson, Arizona. Somehow they missed the fact that

the guy was a raving lunatic.

The problem is, it's an assembly line. They just stick everybody in a room. I had a client who had a specific drug problem, and I took him to a psychologist to evaluate him, and said this is an appropriate treatment program for this guy. We put it into the court and said, "Judge, we want this guy in this diversion program, and this is the treatment program he should have." The judge has his own evaluator, and he says, "Oh, he's perfect for my program." Right? Everybody goes into this guy's program, and it's a one-size-fits-all program. Mental health is not a one-size-fits-all thing, but that's what we do in our criminal courts. We treat mental health like it's a one-size-fits-all system. Our criminal justice system is one-size-fits-all. Mandatory minimums are a great example of that. One size fits all. It doesn't matter what your circumstances are. You get a minimum of ten years for that offense. So our criminal justice system is a disaster. Prohibition, of course, is a disaster.

Really, when you look at the drunk-driving laws, taking it back to that, ask yourself this question. Weren't the reckless driving laws that we had before the DUI laws enough? All you've got to do is, if a cop observes somebody driving in a dangerous manner, and he pulls them over and he determines he's drunk, he charges them with reckless driving, and the alcohol or the drugs, if it's drugs involved, are a factor in the reckless-driving charge. Why did we need to create this whole elaborate system of drunk-driving laws? We don't need that. That's a bigger question.

WOODS: I think there just might be something other than simply a desire to look out for the public good motivating some of these policies. In some cases, it's a desire for lucre on the part of law enforcement, or in other cases, it's a political question: we've got to appear to be tough on lawbreakers. Being tough, in turn, means being as unreasonable and as one-size-fits-all as we can.

Let's talk about what you have at FairDUI.org/flyer. You have a flyer that's tailored for New York, and I think one's tailored for Florida, that people could just put up on the car window when they're pulled over.

REDLICH: This is again motivated by checkpoint videos, and I don't like the way people do it. The idea is if you're pulled over in a checkpoint, or you're pulled over for a traffic stop, instead of rolling down your window and engaging in a conversation with a police officer, you hold up this flyer. The flyer has large print, three phrases, "I remain silent," which invokes your Fifth Amendment right to remain silent. It says "no searches," which means you're invoking your Fourth Amendment right to be free from unreasonable search and seizure, and it says, "I want my lawyer," which is your Sixth Amendment right to counsel. Then in smaller print, and it varies by state, it says, "Please put any tickets under the windshield wiper."

If you're pulled over for a traffic stop, the guy's going to write you a ticket. He's got to be able to give you the ticket. At least in New York and Florida, and I checked a few other states, California, New Jersey. I checked Ohio. There's no requirement that you sign the ticket. There's no requirement that they physically hand you the ticket. It says put any tickets under the windshield wiper, and their job is to serve you with the ticket. So you've accepted service under your windshield wiper. Now you don't have to roll down the window to get the ticket. The other thing people think is, "Well, I've got to hand them my driver's license, or I've got to hand them my insurance card or my registration card." Again, in the states I mentioned, there's no requirement that you hand it to them. There's a requirement that you show it to them. So if they say, "I need to see your license," you put your license up against the window so they can see it. Registration, insurance, whatever—you slap it up against the window, so they can see it. The card says, "I'm not required to hand you my license," and it cites the statute or the case that supports that. It says, "Thus I am not opening my window." Then it says, "I will comply with clearly stated lawful orders."

You as a driver, if you put this up, and the police officer says something to you, you have to make a decision, "Am I going to comply with what the police officer said?" And ideally again for your followers, for Ron Paul followers, they are more likely to do this. You want to record this encounter, because if the police officer

says, "If you don't roll down your window, I'm going to smash it in," most people probably don't want a smashed window. At that point, if you've got that recorded, you didn't voluntarily roll down your window. At a checkpoint, the cop's going to say, "Well, I needed to talk to them." Well, you just told him you weren't going to talk to him. "Well, I needed to smell inside his car." You said he couldn't search. "It's not a search." Yes, it is a search. There's a U.S. Supreme Court case fairly recent where they said a police officer could have a drug-sniffing dog sniff around the outside of a car. They didn't say Sparky could go inside the car. They only said Sparky could sniff around the outside the car. So I don't think Officer Johnson can smell inside your car, either. I'm relying on the U.S. Supreme Court, which some people think is a reliable authority.

I've got friends who are cops. I've dealt with cops in court, and of course, I've been pulled over. When you pull laws on police officers they get uncomfortable. They have a certain situation they're used to. They're used to people who aren't giving them a hard time. If you give it to them in a certain way where you're citing a specific law, now the cop's like, "Oh, crap. I've got to go look that one up, and I don't want to." If they're running a checkpoint, and they've got 1,000 cars waiting, for a lot of cops it's like, "I've just got to get out of here." Go ahead, and technically under the constitutional rules for checkpoints, they have to have written guidelines about how they're supposed to handle each situation that comes up. The written guidelines aren't going to include, "What do you do if a guy holds up a car and refuses to roll down a window and asserts his constitutional rights?" It's not going to be in their guidelines, so that creates a problem.