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Sunday, August 7, 2005

In the jury room, justice isn't easy

Once the doors close, what matters is the case before you, not what you know from 'Law & Order.'

By **Laura Berman / The Detroit News**



I was Juror No. 2 -- second from the left in the jury box. It began with a letter to report for duty to 48th District Court -- "duty" being a word that conveys drudgery, and became something quite different: an experience that challenged many assumptions we the jury held about drunken-driving laws and American justice. For a few hours, we held a man's life in our hands -- more so, we later learned, than we could have imagined.

As a reporter, I've spent hundreds of hours in courtrooms, studiously taking notes and critiquing the jurors' verdicts -- experience that I expected to render me too sophisticated to acquit because a



Clarence Tabb Jr. / The Detroit News

"God bless all of you," Fran Sinistaj says of the jury that acquitted him. " ... You saved my life."

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Living

glove doesn't fit.

But none of that mattered once the door was closed in a room behind Judge Diane D'Agostini's courtroom and six strangers were bound in a uniquely American, uniquely mysterious process. We acquitted a man because he had not been proved guilty.

We did that knowing that he'd blown .08 on two breath-alcohol tests, performed marginally on field sobriety tests, confessed to six or seven drinks and made comments that sounded incriminating.

In short, we did exactly what most of you think you'd never do if you sat on a jury.

Only later did I learn the defendant had a history of drunken driving, substance abuse and drug dealing that included stints in the state's toughest prisons and went back two decades -- so far back, in fact, that the state's repeat offender law for drunken driving oddly couldn't apply.

The immigrant who got the benefit of the doubt turned out to be a man who later said, "Please, don't make me sound as bad as I am."

And the disparity -- between the presented "facts" and the truth we divined, the man we thought we saw and the man who is -- compelled me to learn more. I interviewed virtually everyone who participated in the trial, including the two lawyers, the jurors and an

Michigan's law

In 2003, Michigan adopted a blood-alcohol threshold of .08 for drunken-driving offenses, replacing the previous standard of .10. Other aspects of the state's drunken-driving law were also changed.

- The old law presumed that anyone with a blood alcohol count of .10 percent or greater was operating under the influence; visibly impaired with a BAC between .07 and .10, and not impaired with a BAC of .07 percent or less. The new law eliminates a standard for impairment and there is no longer a standard to find a person not impaired. A prosecutor can charge impaired driving with .07 or less -- but the standard of proof is less clear.
- Although the operating while impaired offense now requires a lower standard of proof, the penalties are similar to operating while intoxicated. A first-time offender can get 93 days in jail for either offense, and points and fines are higher for operating while intoxicated. Third-time offenders in either category can be sentenced to five years in jail.

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alternate, and the defendant, trying to unravel how, in the privacy of a small room equipped with a coffeemaker and a table, we had reached the conclusion we did. The search led me to see just how fluid and unpredictable courtroom justice is. It convinced me that a key habitual offender provision of the drunken-driving laws should be changed and that the instructions for convicting on "impaired" driving could be strengthened. In the end, the defendant, Fran "Frank" Sinistaj, a man who has lived too long and hard ever to be termed innocent, used the system to his best possible advantage. He is today a free man, vindicated by the same system that will never permit him to become a U.S. citizen because of his criminal record. "God bless all of you," he said to me a couple of weeks later. "... You saved my life." And so we did.

Laying out the scene

From where I sat, the prosecutor's job looked easy. Sinistaj was arrested at 3:30 a.m. Feb. 23 on Woodward Avenue by Bloomfield Hills Police Officer Tom Van Simaey after the officer noticed him "swerving," as he described it in his police report. Joan Bacon, 59, the petite and soft-spoken prosecutor, would tell us that Sinistaj admitted to drinking four or five beers and two gin and



John T. Greilick / The Detroit News

Presiding over the 48th District Court drunken-driving case was Judge Diane D'Agostini, to whom the defendant promised, "You won't see me again."



Clarence Tabb Jr. / The Detroit News

tonics that night and that his blood-alcohol content measured on the DataMaster breath-analysis machine was exactly .08 - the threshold to be legally drunk in Michigan since 2003.

He'd failed a series of field sobriety tests like counting backward and standing on one foot with the other extended. "I really (expletive) up," the police officer quoted him as saying after he was pulled over. His breath smelled of alcohol. The police report said he wished he'd let a friend call a cab. He had appeared to be lost -- heading north instead of south to his Farmington Hills home.

Sinistaj was worried, but not so much that he'd abandoned hope. He maintained a practiced faith in the American system of criminal justice. After parting company with his first lawyer, Sinistaj, who owns an office cleaning business, hired Patrick Barone, a Birmingham lawyer who specializes in drunken-driving cases.

Barone, at 41, a perpetual, eager student of trial law tactics who had once hoped to become a surgeon, has schooled himself in the nitty-gritty underpinnings of this kind of law -- the science of metabolism and alcohol, the mechanics of breath-and-blood testing, the impact of health conditions on sobriety testing.

In pursuit of mastery in his narrow but burgeoning field, he's become certified to conduct field sobriety tests and to operate and maintain the DataMaster. The \$6,000 machine is used in Michigan police departments to measure blood-alcohol content

Joan Bacon is a former Oakland County prosecutor with 23 years of legal experience, but some jurors perceived her as a part-time prosecutor.



David Guralnick / The Detroit News

Defense attorney Patrick Barone has schooled himself in the underpinnings of drunken-driving cases, including the mechanics of breath-and-blood testing.

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as a tool in drunken-driving enforcement.

Despite her assurance in opening arguments, Bacon, a staff attorney at the firm of Secrest, Wardle in Farmington Hills, would later say she regarded the Sinistaj case as "close" and, potentially "a loser." She had hoped to work out a plea -- typical in drunken-driving cases -- but refused to reduce the crime to careless driving, because it was a traffic offense and she believed him to be guilty of a crime. She identified herself as a lawyer with a private firm -- a fact that led one of the jurors to disparage her later as "a rent-a-prosecutor." That's not fair to Joan Bacon -- she's a former Oakland County prosecutor with 23 years of legal experience. But some of the jury members perceived her as a part-time prosecutor.

Bacon had another concern about prosecuting Sinistaj: She was afraid of him. In two conversations after the trial, she told me that, because of his criminal past, she viewed him as posing a potential physical threat. She said she took varying routes home after seeing him in court so he wouldn't know where she lived.

But, in the end, Bacon insisted that her worry about the defendant did not influence her ability to prosecute. "The facts," she said, "are the facts."

Building a case

If only that were true.

Like defense lawyers, journalists know that the facts are rarely just the facts. To defense lawyer Barone, the "facts" were more like pencil marks than stone etchings: They could be rewritten, even erased. Bacon had to prove her facts beyond a reasonable doubt. Barone's mission was to raise doubt at every turn.

The .08 reading on the breath analysis? The lawyer raised questions about the machine's reliability, its maintenance and even the whereabouts of the "mysterious" state inspector who certified the machine's operation but did not testify.

Whipping out the DataMaster training manual, he proved the Bloomfield Hills police officer wrongly used tap water rather than distilled water to clean the machine.

The field sobriety tests? Well, imagine if you were stopped at 3 a.m. on a snowy Wednesday in February and asked to count backward from 93 to 75, or to stand on one foot, or to walk heel to toe in 25-degree weather, on an incline, with a police officer peering at you with a flashlight.

Sinistaj also benefited from what Lawyers Weekly has dubbed "the C.S.I. effect" -- that is, the idea that TV-watching jurors expect nearly absolute proof from prosecutors. If the state doesn't want to bother proving its case, how can a juror, in good conscience, convict?

Bacon called one witness -- the police officer -- to respond to the defense lawyer's technical questions. There she was hampered by his *lack* of technical knowledge. The officers are trained, as she later described it, only "to push the button."

"The state has experts, but they're difficult to get," she said. What her legal adversary called "the vast resources of the state" are, to prosecutors like Bacon, underfunded and understaffed bureaucracies with backlogs. "It takes months to get an expert," says Bacon, who put herself through college as a single, divorced mother and then, in her mid-30s, went to the Detroit College of Law.

Or perhaps it came down to money: The side with the open wallet won. The city of Bloomfield Hills was billed \$3,262.50 for its failed prosecution of Frank Sinistaj. Sinistaj cheerfully paid Barone \$10,000.

Ironically, the city didn't have to prosecute the case. Had Sinistaj been charged under state law, the county prosecutor could have taken the case. Oakland County Prosecutor David Gorcyca says his prosecutors are specially trained to rebut drunken-driving defenses but that cities have an incentive to keep cases: "They keep more of the fines and the fees," he said.

Wrapping it up

The case pitted Officer Van Simaey against Barone, who portrayed his client as a hard-working immigrant who didn't speak English well -- confused or nervous, perhaps, but not drunk.

In her closing rebuttal, Bacon faltered, her voice so low that it was inaudible in four places to the court reporter transcribing proceedings.

Was he intoxicated? Or merely tired?

Adding up the facts

In the jury room, we were six: an engineer, an insurance company owner, a Detroit Newspapers manager, a massage therapist who said she never had a drink in her life, an architect. Most of us were college-educated. And none of us wanted to go "soft" on drunken driving.

A quick poll showed everyone opting for "not guilty" or a lesser verdict of "impaired." The engineer among us, Brad Rohloff, was insistent about the fallibility of machines. Richard Poyle, the insurance company owner, was annoyed that the officer had started following Sinistaj because he had tinted windows -- not illegal with a doctor's prescription, which Sinistaj had. And Nasira Siddiqi, the teetotaler on our panel, distrusted the officer.

The .08 DataMaster readings -- exactly on the line -- surely had a margin of error. Even his six or seven admitted drinks were consistent with Barone's argument that an adult can metabolize a drink an hour -- and he'd been socializing for eight or nine hours.

As the jury forewoman, I wondered whether our sympathy for the defendant was encouraging "reasonable" doubt -- what prosecutors disparage as the "there but for the grace of God" effect.

"How will you feel tomorrow," I asked, "if you find out our defendant had priors,

and that we were bamboozled by a fast-talking lawyer?"

I knew that I wouldn't feel very good. But the system very specifically protects the rights of defendants. It requires the state to prove its case.

Something about Sinistaj made me feel uneasy: We all knew there was a reason that he was fighting so hard in court. Even so, I couldn't convict on a bad feeling and evidence that -- examined closely -- now struck us as shaky. And with the exception of myself and Jarrell DeBrohun, the architect, who teetered on the edge of an "impaired" verdict, the jurors were unconvinced by "the facts."

After an hour of deliberations, we were done. Turning away from the hopeful gaze of Sinistaj, I faced the judge and read the verdict: "Not guilty."

Coming to terms

Fran Sinistaj has no fewer than two prior drunken-driving convictions, three convictions for carrying weapons without a license and a history of substance abuse. He served 10 years of an 8- to 20-year sentence in state prisons after being busted in 1987 in a Farmington Hills parking lot with a pistol and almost a quarter-pound of cocaine.

But he was being tried as a first-time offender -- with a maximum 93 day sentence -- rather than as a repeat offender, because he'd last been convicted of drunken driving more than 10 years ago.

The habitual offender provision for drunken driving is "unique" among Michigan crimes, according to Allison Pierce, spokeswoman for the attorney general's office. If a driver goes more than 10 years between offenses, he or she avoids the enhanced penalties.

Sinistaj wasn't only fighting to stay out of jail. He was fighting for his life -- for the right to stay in the United States with his wife and three children. And he knew that in this post-September 11 climate, any new criminal conviction could -- and probably would -- trigger deportation proceedings against him.

"I might as well die then," the Albanian national said later, "because my life would be over if I had to go back there."

None of us wanted to set free a man with a history of drunken driving. But, more importantly, we did not want to unjustly convict a man. To Joan Bacon, who deals with the law's vagaries on a daily basis, the case was routine, the disappointment short-lived. "I'm not losing any sleep over this one," she told me.

I wish she had.

I wish she had seemed as committed to convicting Sinistaj as Patrick Barone did to keeping him free. I wish she had woven a tale that wasn't just the facts, but that put those facts into a context we could all better understand. Was there a way she might have refuted Barone's assertion that Sinistaj could have metabolized those six or seven drinks? Or to blunt his attack on the DataMaster without an expert?

Could we have been given clearer guidance for convicting on impaired driving, despite the law's murkiness?

But like my fellow jurors, I am no longer tortured by the verdict. We all played our assigned roles in this two-day drama in D'Agostini's courtroom.

In a meticulously fair trial, a man was judged strictly on the basis of evidence that pertained directly to what happened in the early hours of Feb. 23, 2005. For all kinds of reasons, the evidence crumbled. But the constitutional idea held: The state must prove its case beyond a reasonable doubt.

And Fran Sinistaj, who continues to live and work in the United States, affirms the value of the system.

"This is the greatest country," he told me, sitting in his living room, where a big-screen TV dominates one wall and an open cart of liquor backs up against another.

"The system works. The first time, when I was convicted, it worked. There were innocent people in prison, but I was guilty. I did my time. But this time, no."

He is relaxed, smiling, "the most charming man," just as Eileen Sitto, the alternate juror who said she would also have voted to acquit, first described him to me.

"This was a wake-up call for me," he said. "I had some other drunk-driving convictions, and I can't afford any more. ... I told the judge, 'You won't see me again.'"

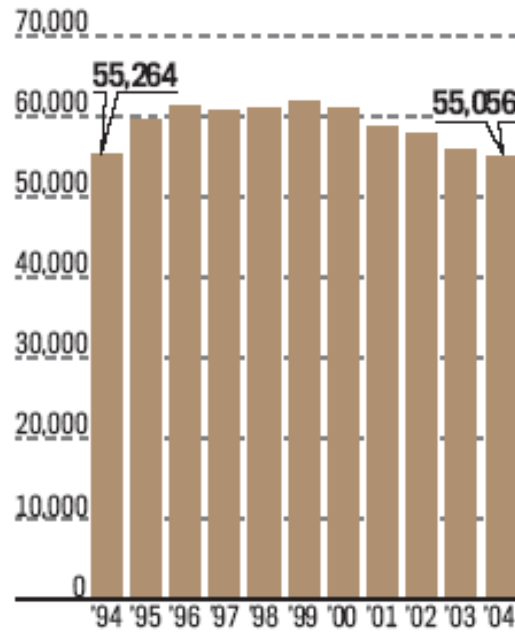
And he promises this: He won't ever again have more than two drinks and drive.

Laura Berman's column runs Sunday, Tuesday and Thursday in Metro. Reach her at (248) 647-7221 or lberman@detnews.com.

Drunken-driving arrests, fatalities decline

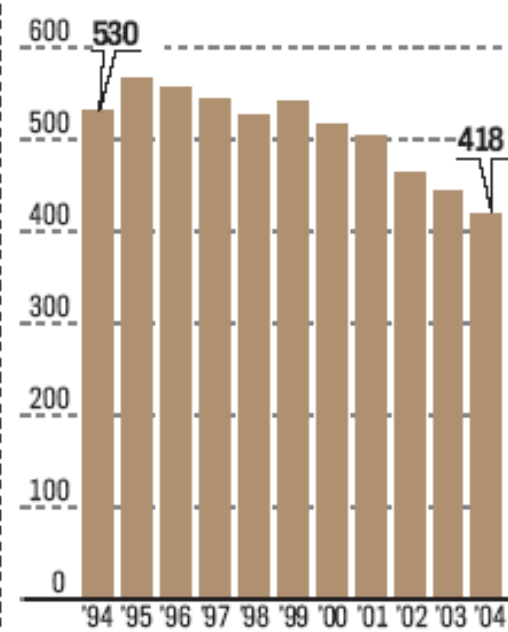
The number of Michigan arrests for operating a vehicle under the influence of liquor (OUIL) and alcohol-related road fatalities both have dropped significantly since 1994.

OUIL arrests (all agencies)



Source: Michigan Department of Highway Safety Planning

Alcohol/drug-involved fatalities



The Detroit News

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