



Dean's Message



Donald Ramsell

Wow! Looking back, the College has accomplished so many great things!

NCDD Membership Drives

The membership committee of the National College for DUI Defense instituted open enrollment several years ago, resulting in the addition of over 1,000 members of all genders and ethnicities to our rolls. We welcomed members across all groups. In 2021 alone we gained 190 new members. 30% of those are female.

2021-2022 Dean's Goal on Diversity and Inclusion

As you can see from the membership drives, diversity & inclusion has been a goal of NCDD for a number of years and was our stated goal for the 2021-2022 term when the new executive board was elected. During the Dean's speech at the fall 2021 Summer Session, the members were informed that one of the main goals for NCDD during the term of 2021-2022 would focus on Diversity and Inclusion.

2021-2022 Creation of Task Forces

With that goal in mind, in July 2021 we created 11 new Task Forces. These were and are to be populated by the general members of NCDD and also chaired by general members. Each Regent was assigned a task force to act as liaison.

Of the 124 persons who now sit on the task forces, 39 are female. 30% of our Task Force members are female. This 30% ratio matches our membership numbers for 2021.

In addition, Chairs were appointed to the eleven task forces – also with the input of each Regent who acts as its Liaison. Seven out of 11 task force chairs are female. In other words, 63% of our task forces have female Chairs.

The Work of the 2021-2022 NCDD Diversity Task Force

One of the new task forces created in July 2021 was the NCDD Diversity Task Force. In September 2021, the Diversity Task Force first met. As their FIRST goal they created a diversity policy for our National College. The Diversity Task Force also moved that one of their roles would be to ensure that NCDD remains inclusive in all of its activities, including our selection of speakers at our seminars and

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E.D.'S Corner



Rhea Kirk

Our 2022 Winter Session was a huge success! What fantastic speakers and so much fun to add music to it! Our SFST VI is SOLD OUT in Washington DC in April but call the NCDD Office if you would like to be placed on the Waiting List!! If you haven't attended this course with Anthony Palacios, don't miss the next one! Speaking of SOLD OUT, our Serious Science is almost SOLD OUT in June held in Arlington, Texas. Sign up soon if you want a space! Be watching for details on our

2022 Summer Session! You won't want to miss it! Keep watching the NCDD Website for the exciting BIG REVEAL! Also, MSE in New Orleans is right around the corner-March 24th & 25th! Don't Miss It!

Website Update:

Please make sure to watch for emails from individuals that have been charged with DUIs and DUI related matters. They should come to your email inbox and will contain the issue and contact information from the prospective client. Check your Junk or Spam Folders carefully. I hate for you to miss a business opportunity! Also, **make sure your profile bio and picture are up to date!**

2022 Dues:

Don't forget to take care of your NCDD 2022 Dues! The deadline was January 31! If you are on Auto-Renew, don't worry, your dues will be paid automatically on your anniversary date.

This reminder is just for those who aren't on Auto-Renew!

Think about changing to Auto-Renew so you don't have to remember to pay next year!

My Best to everyone for a very healthy spring!! Hope to see you in person very soon! --- Rhea Kirk

SAVE THE DATES!

Mastering Scientific Evidence (MSE)

New Orleans

MARCH 24 - 25, 2022

REGISTER NOW!
WWW.NCDD.COM

*Serious Science for Serious Lawyers
Advanced Court in Blood Alcohol Analysis &
Trial Advocacy*

Arlinton, Texas

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(Continued from cover - "Dean's Message")

webinars. This idea was welcomed and praised by the Board.

2021 Board Meeting – NCDD Adoption of Diversity Policy

In October 2021, the Board met in Las Vegas. Lynn Gorelick, Chair of NCDD Diversity Task Force, presented their diversity policy to the board which was passed unanimously! It was also moved that we add this statement of a commitment to diversity, inclusion, and nondiscrimination to our website at:

<https://www.ncdd.com/about-the-ncdd/mission-statement> .

It reads as follows:

The National College for DUI Defense and the NCDD Diversity Task Force Committee is committed to developing a membership that is representative of diversity in its many facets, including without limitation, race, color, national origin, immigration status, ethnicity, gender, age, socio-economic status, religion, sexual orientation, gender identity and disability (hereinafter referred to as "diverse"), by promoting and retaining such individuals to join and actively participate in the National College for DUI Defense. In an effort to strengthen and grow our membership and thereby to strengthen and grow the quality of our organization, NCDD will strive to provide opportunities for programming, events and initiatives that focus upon issues of import to a more diverse community. With such programming, events, and initiatives, NCDD may encourage and feature outreach, marketing, speakers, and content designed to be of particular interest to a more diverse community. Equally in keeping with NCDD's commitment to equality, programming will never exclude any person from participating based upon their gender, race, ethnic origin, sexual orientation, gender identity and/or expression, religion, age, disability, or other characteristics protected by law, nor will NCDD support programs that exclude on any of those bases.

Diversity of the Speakers for the 2022 NCDD Winter Session

The agenda for the Winter Session was developed by Dean Emeritus Doug Murphy and it follows our commitment to diversity. Out of 14 speakers, SIX are female. In other words, 42% of our speakers at Winter session are female. The seminar was fantastic and the speakers were fresh, energized, powerful and well worth listening to and watching. This was quite a pool of talent!

NCDD Webinar Proposal Form Includes Diversity Commitment

We also developed a Webinar Proposal form with a Diversity Statement that is now being used by the Webinar Committee. This form requires that each task force affirm at the bottom that they have committed to following the NCDD Diversity Policy prior to suggesting speakers for webinars. We are looking forward to each Task Force Webinar and we welcome others to submit ideas!

The Key to Diversity is in the Hands of All of Us

Everyone understands their role in promoting diversity and inclusion throughout our ranks and throughout our leadership. New members are the lifeblood of any association and we are no different. We open our doors and welcome all who practice DUI defense.

Conclusion

As one can see, diversity and inclusion are at the forefront of our Board's concerns and activities. Suggestions and discussions on achieving these goals are always appreciated. Feel free to send emails or make phone calls with any ideas.

Again, thank you for allowing me to serve this great and lauded institution.



Case Law Update *By Flem Whited III*

SCOTUS

***Lange v. California* 141 S.Ct. 2011 (2021)**

The Supreme Court, Justice Kagan, held that the flight of a suspected misdemeanor does not always justify a warrantless entry into a home, abrogating *City of Bismarck v. Brekhus*, 908 N.W.2d 715, *Com. v. Jewett*, 471 Mass. 624, 31 N.E.3d 1079, *People v. Wear*, 229 Ill.2d 545, 323 Ill.Dec. 359, 893 N.E.2d 631, *Middletown v. Flinchum*, 95 Ohio St.3d 43, 765 N.E.2d 330, *State v. Ricci*, 144 N. H. 241, 739 A. 2d 404.

People v. Lange, 72 Cal.App. 5th, 287 Cal.Rptr.3d 837 on remand. Court affirms conviction based on "Good Faith" exception.

See also the following cases on same subject:

State v. Wilson, 2022 WL 127957 (Iowa)

State v. Smith, 501 P.3d 398 (Mont.2022)

Interest of Y.W.-B., 265 A.3d 602 (Pa.2021)

State v. Willis, 500 P.3d 420 (Hawaii 2021)

ACTUAL PHYSICAL CONTROL

***State v. Myint*, 2021 WL 1168951 (Minn. App.) unpublished**

Conviction for DUI reversed where Defendant was not in or near vehicle when arrested. Vol 40, #12.

ARREST

***State v. Smith*, 2021 WL 3878712 (Mont.) unpublished**

DUI dismissed based on Speedy Trial grounds where delays not attributed to the Defendant caused her anxiety, promotions at work, excessive fees for drug testing, and loss of expert witness. Vol 40, #16.

***Reagan v. Idaho Transportation Department*, 2021 WL 1096672 (Idaho)**

Statute allowing arrest for DUI not committed in the officer's presence unconstitutional. Vol 40, #9.

APPEALS

***Commonwealth v. McKahan*, 2021 WL 100573 (Pa.Super.) en banc unpublished**

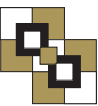
State waived appellate argument that lower court order should be reversed based on inevitable discovery by failing to make that argument in the lower court; further State made no argument on appeal that good-faith exception should apply; thus, lower court order excluding evidence affirmed. Vol 40, #4.

ATTEMPTED DUI

***People v. Cummings*, 61 Cal.App.5th 603275 Cal.Rptr.3d 829 (2021)**

Attempted DUI was a felony under statute governing additional public offense for multiple DUI violations within ten years and thus trial court did not err by accepting defendant's plea of no contest. Vol 40, #7.

Continued...



ATTORNEY CONFLICTS OF INTEREST

State v. Blevins,
2021 WL 5856680 (Kan. App.) unpublished

Defendant in fatal car crash gets new trial based on his attorney's conflicts of interest; Attorney was paid by passenger whom the Defendant alleged was driving; Based on this relationship the attorney failed to "fully" and "effectively" impeach her trial testimony; failed to hire his own DNA and blood experts. Vol 40, #24.

BLOOD TESTS

People v. Raider,
2021 WL 56538 (Colo.App.)
490 P.3d 1079 (Colo.App.), cert. granted 2021 WL 4200768 (Colo.)

As a matter of first impression, if a driver refuses testing and an officer lacks probable cause that the driver has committed one of the four enumerated offenses, the officer may not require the driver to submit to testing by obtaining a search warrant; A forced test of the defendant, pursuant to a warrant but without probable cause that the defendant had committed one of the enumerated offenses, is illegal; The four enumerated offenses are criminally negligent homicide, vehicular homicide, third degree assault and vehicular assault; The remedy is suppression of the results. Vol 40, #2.

State v. Rowell,
2021 WL 3775080 (S.C. App.)

Sufficient chain of custody presented to admit blood alcohol evidence – no requirement that every person that touched the sample testify; defendant failed to preserve any error in admitting blood alcohol evidence where almost 50% of his blood had been replaced rendering it unreliable. Vol 40, #16.

State v. Gilliam,
2021 WL 79181 (N.J. Super.) (not reported)

Police-created exigency did not excuse the officers' obligation to obtain a warrant before drawing defendant's blood; nothing about the crash or officer's obligations relating to the crash created any urgency. Vol 40, #4.

Johnson v. State,
956 N.W.2d 618 (Minn. 2021)

The rule announced in *Missouri v. McNeely*, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), is procedural and does not apply retroactively on collateral review of final test refusal convictions. Vol 40, #9.

State v. Adams,
2021 WL 5966232 (N.M.)

Emergency medical technician (EMT) who is employed by hospital or physician and who possesses proper education and experience may perform blood-alcohol draws as a laboratory technician. Vol 40, #24.

State v. Ruiz,
622 S.W.3d 549 (Tex.App.-Corpus Christi-Edinburg 2021)

After remand and a re-litigation of the Motion to Suppress the Court holds there were sufficient facts to support exigency circumstances. Vol 40, #8.

BREATH TESTS

People v. Easley,
2021 WL 3056473 (Ill.App.) (unpublished)

Conviction reversed because State failed to lay proper predicate to admit breath test logs under the business record exception. Vol #40, #17.

Williams v. State,
2021 WL 5344921 (Fla. App.)

Trial Court erred in prohibiting the Defendant from introducing into evidence single sample of breath test result. Vol 40, #19.

State v. Dye,
178 N.E.3d 584 (Ohio App.2021)

Dry Gas was not certified to be traceable to NIST. Vol 40, #21.

State v. Leinweber,
494 P.3d 973 (Or.App.2021)

Breath test should have been excluded based on violation of 15-minute observation period where the officer must testify that he "is certain" and "remains certain" that the subject has not vomited, regurgitated or taken anything by mouth even where expert witness testified that machine would not have noted a problem if there had been one. Vol 40, #15.

State v. Farrell,
172 N.E.3d 488 (Ohio App. 2021)

Court says dry gas standards traceable to National Metrology Institute Traceable Standards is not substantially similar to being traced to NIST standards. Vol 40, #11.

Taylor v. Commonwealth,
2021 WL 1051581 (Ky.App.) unpublished

Breath test improperly admitted where trooper did not recall whether he told defendant not to put anything in his mouth, or asked whether there was anything in his mouth. Vol 40, #7.

CAUSATION

Saquic v. State,
487 P.3d 764 (Kan.App. 2021)

Court holds defendant was not denied effective assistance of counsel based on failure to request special jury instruction on causation. Vol 40, #13.

Clark v. State,
315 So.3d 776 (Fla. App.) rev. granted 2021 WL 6014963 (Fla.)

Driver of ATV contributed to the cause of the crash where he placed himself in a position where the driver of the truck who struck him and his son could not have avoided the accident. Vol 40, #10.

People v. Jackson,
2021 WL 790330 (Cal.App.) (unpublished)

Conviction for causing crash while DUI affirmed notwithstanding State offered no crash reconstruction; exclusion of controlled substance in deceased's medical properly excluded as no evidence that his operation of the bicycle had anything to do with the crash. Vol 40, #6.

CHILD NEGLECT

Commonwealth v. Vela-Garrett,
251 A.3d 811 (Pa.Super. 2021)

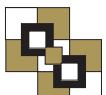
Driving under the influence of drugs insufficient without more to sustain conviction for Endangering Welfare of Children. Vol 40, #10.

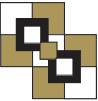
COMMENT ON RIGHT TO REMAIN SILENT

State v. Schumacher,
500 P.3d 698 (Or.App. 2021)

Officer's reference to Defendant's exercise of right to remain silent "jeopardized" his right to a fair trial; Trial Court's decision to do nothing to cure that "impropriety" immediately or otherwise results in reversal of conviction. Vol 40, #18.

Continued...





CONTINUED DETENTION

State v. Flanagan,
967 N.W.2d 376 (Iowa App. 2021)

Insufficient evidence to support continued detention of driver past the time required to write the passenger a seat belt violation citation; The Court found the trooper “less than expeditious” asking “off-topic” questions regarding where he had been, what medications he was taking, why his glasses were broken. Vol 40, #21.

Commonwealth v. Claybourn,
635 S.W.3d 818 (Ky. 2021)

Prior drug charges on driver’s record insufficient to support 10 minute delay for K-9 dog to arrive for sniff search; Officer abandoned writing ticket for driving on suspended license when K-9 arrived. Vol 40, #21.

State v. Dye,
178 N.E.3d 584 (Ohio App. 2021)

Odor of alcohol, bloodshot watery eyes not supported by competent substantial evidence to support continued detention;. Vol 40, #21.

State v. Mosier,
2021 WL 3573842 (Ka.App.) unpublished

Insufficient evidence to support continued detention other than odor of alcohol. Vol 40, #18.

State v. Kochendarfer,
2021 WL 3674160 (Az.App.) unpublished

Some questioning after driver received written warning was consensual but when trooper asked Defendant if he could search his truck consensual encounter ended and must be justified by reasonable suspicion. Vol 40, #18.

State v. Watkins,
170 N.E.3d 549 (Ohio.App. 2021)

Odor of alcoholic beverages, glassy, bloodshot eyes, and her admission to drinking one alcoholic beverage seven hours earlier did not supply officer with reasonable, articulable suspicion to detain. Vol 40, #10.

CROSS-EXAMINATION / COVID

C.A.R.A v. Jackson County Juvenile Office,
2022 WL 106134 (Mo.)

Fear of Covid-19 generally insufficient to excuse violation of Defendant’s right to confront and cross examine witnesses. Vol 40, #15.

DEFENSES

State v. Edgar,
2021 WL 871220 (Wash.App.) unpublished

Sufficient evidence presented to support “safely off the road” jury instruction where Defendant was in a parking lot asleep. Vol 40, #8.

State v. Wambugu,
2021 WL 863716 (Wash.App.) unpublished

Sufficient evidence was presented to support a “safely off the road” jury instruction. Vol 40, #7.

DRE

Bragaw v. State,
482 P.3d 1023 (Alaska App. 2021)

DRE protocol is scientific evidence subject to the Daubert/Coon standard; The trial court erred in admitting this evidence without first determining its scientific validity. Vol 40, #6.

DRIVE / ACTUAL PHYSICAL CONTROL

Woods v. Commonwealth,
2021 WL 3008771 (Ky.App.) unpublished

Insufficient evidence to support conviction where no proof that Defendant “intended” to drive vehicle lawfully parked. Vol #40, #17.

DUE PROCESS

State v. Stegall,
477 P.3d 972 (Idaho 2020)

Defendant’s right to due process was violated where officers refused to allow him to use a phone to contact an attorney until the morning after his arrest. Vol 40, #2.

DUI – DRUGS

State v. Jensen,
477 P.3d 335 (Mont. 2020)

Argument that 5 nanogram per milliliter does not correlate with impairment and has no scientific basis thus violating his substantive due process and equal protection rights rejected. Vol 40, #1.

State v. Taylor,
966 N.W.2d 510 (Neb. 2021)

Drugs prescribed to Defendant qualify as “any drug” in DUI statute and city ordinance; “any drug” is not limited to only the drugs tested by the State in DUI prosecutions. Vol 40, #20.

State v. Dacey,
491 P.3d 1205 (Idaho 2021)

Conviction reversed where trial court allowed lay police officer witness testify that Defendant was “on the downside” of meth high; on all future cases DRE witnesses must be listed as expert witnesses. Vol 40, #15.

State v. Schwartz,
957 N.W.2d 414 (Minn. 2021)

Crime of driving, operating, or being in physical control of vehicle with any amount of controlled substance in driver’s body does not require the State to prove that driver knew or had reason to know that controlled substance was in his body; crime of driving, operating, or being in physical control of vehicle with any amount of a controlled substance in the driver’s body is a public welfare offense, such that strict liability is appropriate. Vol 40, #10.

Rogers v. State,
2021 WL 386924 (Alaska App.) unpublished

Officer’s testimony that impairments he observed were from Klonopin a type of benzodiazepine, a central nervous system depressant but never testified that Klonopin was a trade name for clonazepam. Vol 40, #5.

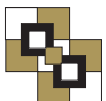
Commonwealth v. Given,
244 A.3d 508 (Pa.Super. 2020)

Defendant cannot be convicted of two counts of DUI of controlled substances where one count was for the active substance itself and the other was the metabolite of the same substance. Vol 40, #4.

State v. Fensler,
165 N.E.3d 401 (Ohio App. 2020)

Officer’s testimony that Benadryl is a “drug of abuse” defined as any controlled substance or over-the-counter medication that, when taken in quantities exceeding the recommended dosage, can result in impairment of judgment or reflexes is insufficient to sustain conviction. Vol #40, #4.

Continued...





FELONY DUI / PRIOR CONVICTIONS

State v. Loveless,
476 N.W.2d 1189 (Mont. 2020)

“Under the influence” requiring person’s ability to operate be “diminished” sufficiently similar to statute requiring there be “appreciable impairment” of bodily or mental faculties. Vol 40, #1.

Ba nka v. State,
476 P.3d 1191 (Nev. 2020)

Nevada Supreme Court says Defendant must be advised of mandatory minimum sanction in addition to mandatory maximum for plea to be voluntary. Vol 40, #1.

State v. Forrett,
961 N.W.2d 132 (Wis.App. 2021)

Prior refusal to submit to blood test cannot be used to enhance penalty for current conviction. Vol 40, #11.

State v. Rus,
956 N.W.2d 455 (S.D. 2021)

Statute providing that a person convicted of third-offense driving under the influence (DUI) “is guilty of a Class 6 felony” is not a punishment-enhancement statute but rather renders third-offense DUI a felony; preliminary hearing in is required; abrogating *State v. Helling*, 391 N.W.2d 648. Vol 40, #7.

People v. Lopez,
2021 WL 5998350 (Cal. App.) unpublished

Evidence of complaint filed and plea agreement insufficient proof of prior convictions to support enhancement. Vol 40, #25.

People v. Viburg,
500 P.3d 1123 (Colo. 2021)

Retrial of Felony DUI where conviction overturned by Colorado Supreme Court holding that prior offenses are elements of felony DUI is not barred by Double Jeopardy. Vol 40, #25.

Commonwealth v. Hayes,
2021 WL 5707051 (Pa.Super.)

Appellate Court says Trial Court must consider a prior Maryland “probation before judgment” a prior conviction for sentencing purposes. Vol 40, #22.

State v. Myers,
499 P.3d 1111 (Kan. 2021)

Kansas Supreme Court takes a look at legislative history of statute and concludes that there is no requirement of matching elements to use out-of-state conviction to elevate current DUI to a felony. Vol 40, #22.

State v. Santos-Ramirez,
493 P.3d 522 (Or.App. 2021) en banc

En banc Oregon Court of Appeals holds that Washington conviction for negligent driving is not an offense that “require proof that a person or the person’s driving was impaired by the use of intoxicant” thus, does not qualify as a prior offense. Vol 40, #14.

State v. Shepard,
2021 WL 864772 (Mo.App.) cause transferred to Missouri Supreme court October 5, 2021

Defendant’s certified driving record from another state is sufficiently reliable to establish the existence of the defendant’s prior convictions; trial court could have reasonably found that out-of-state driving under the influence convictions involved conduct driving while intoxicated (DWI) statute sought to deter, such that convictions could be considered for the purpose of enhancement of DWI offense. Vol 40, #8.

Daniels v. State,
246 A.3d 557 (Del. 2021)

Delaware Supreme Court says New Jersey prior DWI not sufficient-ly similar to Delaware’s DUI law since the New Jersey statute was divisible into conduct that violated the law in Delaware and some portions did not. Vol 40, #4.

FIELD SOBRIETY EXERCISES

State v. Reid,
492 P.3d 728 (Or.App. 2021)

Conviction reversed where officer allowed to testify that based on the clues he observed that Defendant failed sobriety exercises. Vol 40, #13.

State v. Johnson,
2021 WL 861803 (Wash.App.) unpublished

Officer’s testimony that SFST was “scientifically validated to be able to detect impairment” was improper and inadmissible. Vol 40, #8.

HGN

People v. Marsden,
491 P.3d 412 (Colo.App. 2021)

The weight of judicial authority favors admissibility of HGN test results without the need for additional evidence of scientific reliability on issue of impairment by a qualified witness. Vol 40, #5.

IMPLIED CONSENT

Commonwealth v. Veasy,
2020 WL 7863828 (Pa.Super.) unpublished

A person arrested for DUI must be read warnings under implied consent statute regardless of how cooperative they are if they are requested to submit to testing. Vol 40, #2.

Neely v. Department of Fire,
2021 WL 5629269 (La.App.)

City of New Orleans appeal of Civil Service Commission’s reinstatement of firefighter affirmed where they failed to show his actions of failing to provide urine sample violated Federal Workplace Drug Testing Program and DOT Guidelines. Vol 40, #23.

Basinger v. Kansas DoR,
2021 WL 4699078 (Kan.App.) unpublished

Appellate Court will not reverse trial court’s finding that Driver’s refusal was not willful. Vol 40, #20.

State v. Higheagle,
2021 WL 5088714 (Hawai’i App.) unpublished

State’s Implied Consent law does NOT preempt valid search warrant. Vol 40, #19.

Vaillarreal v. Administrative Director of Courts,
2021 WL 1986560 (Hawai’i App.) unpublished

Administrative suspension reversed where arrest report did not contain sufficient facts to support stop. Vol 40, #14.

Sally v. Administrative Director of Courts,
2021 WL 1986579 (Hawai’i App.) unpublished

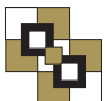
Administrative suspension reversed where arrest report did not contain sufficient facts to support crash occurred on “a public way, street, road, or highway”. Vol 40, #14.

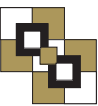
INDEPENDENT TEST

State v. Henry,
864 S.E.2d 415 (Ga. 2021)

Georgia Supreme Court says statement by person arrested for DUI

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requesting an independent test must be evaluated under a “reasonably would” test rather than “reasonably could” test overruling prior cases adopting the “reasonably could” test. Vol 40, #19.

State v. Johnson,
2021 WL 5858392 (Alaska App.)

Trooper convincing Defendant to get independent blood test from a government provider did not prohibit him from challenging the State’s breath test. Vol 40, #23.

MIRANDA

People v. Maslan,
2021 WL 3030282 (Ill.App.) unpublished

Defendant was “in custody” for Miranda when he was removed of his keys and cell phone and placed in the back seat of the officer’s vehicle at the scene of a crash. Vol #40, #17.

NECESSITY DEFENSE

Maciel v. State,
631 S.W.3d 720 (Crim. App. Texas 2021)

Defendant essentially admitted she committed DWI; conviction reversed where trial court refused to give “necessity” jury instruction. Vol 40, #20.

PER SE

State v. McAdory,
968 N.W.2d 770 (Wis.App. 2021)

Conviction for driving while under the influence of drugs reversed based on “due process” violations by trial judge and prosecutor. Vol 40, #22.

PLEAS / IMMIGRATION CONSEQUENCES

Ex Parte Barahona
2021 WL 3743852 (Tex.App.-Beaumont) unpublished

Alien Defendant received ineffective assistance of counsel regarding the immigration consequences of plea to his second DWI and should have been allowed to withdraw his plea. Vol 40, #16.

PUBLIC PLACE

State v. Serbus,
957 N.W.2d 84 (Minn. 2021)

Minnesota Supreme Court holds an intoxicated driver is in a public place if the driver is carrying a pistol in a vehicle on a public highway. Vol 40, #12.

State v. Krause,
480 P.3d 222 (Mont. 2021)

Parking space was a “way of the state open to the public”; dissenting judge would reverse as no proof that it was “adapted and fitted for public travel that is in common use by the public”; prosecutor’s question to witness whether they know the penalties for perjury did not rise to the level of misconduct. Vol 40, #5.

PUBLIC TRIAL

State v. Montonye,
2021 WL 1343527 (Minn.App.) unpublished

Defendant’s right to “public trial” violated where one juror was questioned while other prospective jurors were given a break and out of the courtroom. Vol 40, #9.

REASONABLE SUSPICION

State v. Warren,
955 N.W.2d 848 (Iowa 2021)

In a lengthy opinion the Iowa Supreme Court answered the four questions below all adverse to the Defendant; see the main opinion for the Court’s reasoning. Vol 40, #7.

Keizur v. State,
2021 WL 1016877 (Alaska App.) unpublished

Defendant leaving store that sold alcohol with cooler strapped to back of ATV and holding a can that couldn’t be identified as alcohol insufficient to support stop. Vol 40, #7.

State v. Malloy
498 P.3d 358 (Utah 2021)

Utah Supreme Court repudiates prior holding that said there is no “functional” or constitutionally relevant distinction between an officer opening a car door and a driver being asked to do so; but exclusion of evidence denied under Davis. Vol 40, #4.

People v. Rohrbach,
2021 WL 6015832 (Pa. Super.)

Vague prior reports of crime in a public parking lot insufficient to support stop. Vol 40, #25.

State v. Promer,
2021 WL 6015858 (Wis.App.)

Wisconsin Appellate Court rejects Defendant’s argument that Caniglia v. Strom eliminated the community caretaker doctrine as an exception to the Fourth Amendment’s warrant requirement. Vol 40, #25.

Daniel v. State,
2021 WL 6068133 (Tex.App.-Austin)

Officer’s observation of the Defendant crossing the dotted line separating outer from inner turn lane and then cross the dotted line two more times without interfering with any traffic insufficient to support stop; Court says Officer’s mistake of law was not reasonable as the law is clear in his jurisdiction. Vol 40, #24.

Mesenburg v. Comm of Public Safety
2021 WL 6110021 (Minn.App.)

Birchfield does not abrogate state statute requiring PBT based upon reasonable suspicion. Vol 40, #24.

State v. Lelyukh,
2021 WL 5872306 (Minn. App.) unpublished

Officer’s violation of Minnesota Governmental Data Practices Act to identify and locate Defendant results in suppression of all evidence. Vol 40, #23.

Commonwealth v. Stokes,
2021 WL 4704626 (Pa.CmwltH) unpublished

Officer’s mistake of fact leading to the traffic stop was not objectively reasonable. Vol 40, #21.

Commonwealth v. Yount,
2021 WL 5121283 (Pa.Super.) unpublished

Nothing about operation of vehicle as observed on dash cam would support reasonable suspicion to stop regardless of officer’s in-court testimony that he suspected a DUI driver. Vol 40, #20.

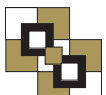
State v. Asterga,
2021 WL 4988310 (Tex.App.-El Paso)

State has failed to present a record showing the tribal police acted within the limited authority that U.S. v. Cooley allows respecting the detention of non-Indians on Indian lands. Vol 40, #19.

State v. Boger,
963 N.W.2d 742 (N.D. 2021)

Body Camera footage clearly contradicted testimony that tag light was inoperative; Mistake of fact clearly no objectively reasonable. Vol 40, #18.

Continued...





State v. Lane,
2021 WL 3673735 (Wis.App.) unpublished

Officer's observation of defendant leave bar on his motorcycle travel in the right lane, move to the left lane and back with no other traffic in close proximity insufficient to support stop. Vol #40, #17.

State v. VanBeek,
960 N.W.2d 32 (Wis. 2021)

Wisconsin Supreme Court holds that taking license back to patrol car is not a seizure based on the totality of the circumstances in this case; but is converted into a seizure when the police officer returned to vehicle, retained defendant's driver's license, and continued to pose repetitive questions to her and other occupant for nearly eight minutes in order to prevent them from leaving before K9 unit arrived; the officer did not have a reasonable suspicion of criminal activity to support the seizure. Vol 40, #14.

People v. Olson,
2021 WL 1157283 (Mich.App.) unpublished

Defendant had bloodshot eyes, neither defendant's speech nor his physical abilities suggested impairment by alcohol or other substance, and the deputy did not mention that he observed any odor of intoxicants insufficient to require submission to PBT. Vol 40, #9.

REFUSAL

Fullam v. Penn, DOT,
2021 WL 1186695 (Pa. Cmwlth.) unpublished

Insufficient evidence to support finding that driver "deliberately tried to delay or undermine the testing process. Vol 40, #12."

Murdoch v. Oregon Motor Vehicle Department
492 P.3d 809 (Or.App. 2021) review allowed 495 P.3d 681 (Or. 2021)

Trooper's modification of statutory advisory to include a threat to get a warrant when driver refuses "because that is what we do in this country" was not a "legally authorized procedure" and, as such the refusal sanction levied was itself invalid. Vol 40, #12.

Commonwealth v. McCarthy,
628 S.W.3d 18 (Ky. 2021) petition docketed in U.S. Supreme Court December 27, 2021

Kentucky Supreme Court says cannot admit or use refusal to submit to warrantless blood test to enhance penalty for current DUI conviction. Vol 40, #11.

State v. Dean,
2021 WL 1826222 (Kan.App.) unpublished

Prior DUI convictions from Kentucky and South Dakota should not be counted to enhance current Kansas conviction; both states gave broader definition of "vehicle" than Kansas at the time of the convictions; what the Defendant was actually doing at the time of the convictions was not discussed. Vol 40, #11.

Commonwealth v. Daigle,
162 N.E.3d 670 (Mass. App. 2021)

Massachusetts Court says State must still prove Breath Test was admissible to admit Defendant refused to submit. Vol 40, #4.

RESTITUTION

People v. Marrero,
60 Cal.App.5th 896; 275 Cal.Rptr.3d 177

Restitution award of \$350,000.00 to victim for attorney fees he paid after settlement with insurance company affirmed. Vol 40, #6.

RETROGRADE EXTRAPOLATION

Martin v. State,
2021 WL 2328147 (Nev.App.) unpublished

Personal factors normally required to admit retrograde extrapolation evidence not necessary because the number of blood samples taken from Martin (three) and the length of time between the draws were sufficient to establish his known alcohol elimination rate; retrograde extrapolation allowed into evidence. Vol 40, #13.

State v. Eighth Judicial Circuit Court (Armstrong), 267 P.3d 777 (Nev. 2011)

Prejudicial value of retrograde extrapolation off single sample taken over two hours from incident substantially out weighted probative value. Vol 40, #13.

ROADBLOCKS

State v. Alvarez,
2021 WL 3043306 (N.C.App.) unpublished

Trial court's order granting Defendant's motion to suppress on grounds that the State failed to demonstrate a valid primary programmatic purpose for the implementation of the checkpoint affirmed. Vol 40, #15.

SEIZURE

State v. VanBeek,
960 N.W.2d 32 (Wis. 2021)

Wisconsin Supreme Court holds that taking license back to patrol car is not a seizure based on the totality of the circumstances in this case; but is converted into a seizure when the police officer returned to vehicle, retained defendant's driver's license, and continued to pose repetitive questions to her and other occupant for nearly eight minutes in order to prevent them from leaving before K9 unit arrived; the officer did not have a reasonable suspicion of criminal activity to support the seizure. Vol 40, #14.

State v. Prouty,
492 P.3d 734 (Or.App. 2021)

Defendant, a front seat passenger in car lawfully stopped, was seized when troopers got him out of car after the arrest of the driver and asked him if he minded if they patted him for weapons; insufficient reasons for seizure under officer safety doctrine. Vol 40, #13.

State v. Phillips,
491 P.3d 99 (Or.App. 2021)

Court held no justification for cuffing Defendant for officer safety at scene of DUI stop. Vol 40, #13.

SPEEDY TRIAL

State v. Smith,
2021 WL 3878712 (Mont.) unpublished

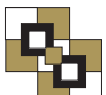
DUI dismissed based on Speedy Trial grounds where delays not attributed to the Defendant caused her anxiety, promotions at work, excessive fees for drug testing, and loss of expert witness. Vol 40, #16.

URINE TEST

City of Fargo v. Hofer,
952 N.W.2d 58 (N.D. 2020)

Urine test suppressed where administered under the implied consent statute and the execution of the search warrant did not cure the defect in the implied consent advisory. Vol 40, #1.

Continued...





VOIR DIRE

People v. Collins,

60 Cal.App.5th 540; 274 Cal.Rptr.3d 775 (2021)

Homicide conviction reversed as Trial Court improperly allowed State to strike black juror; the Defense properly objected and preserved the issue for appeal; conviction reversed to allow Trial Court to continue Batson hearing which unbelievably will allow the prosecution to justify the strike. Vol 40, #5.

NCCD WOMEN

NCCD Women Turn Out for NCDD Winter Session in Orlando!



L to R: Sylvia Goldman, Lisa Saltzman, Michelle Behan, Virginia Landry, Amanda Riek

LEGENDARY PASSINGS

DONALD NEWLOVE

Recovering alcoholic Donald Newlove passed away last August at the age of 93.

Newlove authored several books on alcoholism, including “Sweet Adversity” (1978) which joined two of his previous novels, “The Drunks” (1974) and “Leo & Theodore” (1972). Ironically, the latter was about jazz-playing Siamese twins connected at the hip who observed drunkenness all around them in nightclubs before themselves bottoming out to the ravages of alcoholism and ultimately recovering in Alcoholics Anonymous.

His novel “The Painter Gabriel” (1970) was described by Time Magazine as “one of the best fictional studies of madness, descent and purification” since Ken Kesey’s “One Flew Over The Cuckoo’s Nest.” Newlove was a high school dropout who later earned a high school equivalency diploma after serving in the Marines and Air Force. He joined Alcoholics Anonymous at age 34 and once described one of his hangovers as “a Zulu spear through my brain and eyes like carpets the wine has dried in.”

