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NCDD Journal

National College for DUI Defense

Editor:Paul Burglin

Winter, 2017

Winter Session January 19-20, 2018

Prescription Drug Defense Seminar in Atlanta

The NCDD is heading to Atlanta next month for a two-day, ground breaking seminar on how best to defend prescription-drug impaired driving cases. "With the vast increased use of opioids and marijuana," says Dean Mike Hawkins, "this is a 'don't want to miss it' seminar for College members."

Among those in the speaker lineup are Fran Gengo, PharmD. and James T. O'Donnell, PharmD., offering vital information on what lawyers need to know about prescription drug cases and how to challenge state expert witnesses. William "Bubba" Head will present specifically on Zolpidem (Ambien) cases --- the drug widely known to cause sleep driving. Anthony Palacios and Ron Lloyd will cover the NHTSA "Advanced Roadside Impaired Driving Enforcement (ARIDE)" and DRE training courses given to police officers.

The seminar is conveniently located at the Loews Hotel in Atlanta and will provide 11.00 hours of CLE credit, including one hour on Ethics.

E.D.'S CORNER

Rhea Kirk

It's hard to believe that 2017 is coming to a close! Dean Mike Hawkins and the curriculum committee have put together an amazing Winter Session agenda January 19 & 20. If you have not already done so I hope you make plans to attend. Not only will you learn a great deal, but you will also enjoy Midtown Atlanta and visiting with your fellow attendees. This will be a very informative seminar!

Our upcoming seminars:

· Mastering DUI Trial Skills – Jackson, MS Jan 10-12
· Mastering Scientific Evidence (MSE) - New Orleans March 22-23
· Serious Science-Drugs - Arlington, TX June 8-13
· Summer Session - Cambridge, MA July 19-21
· Vegas Defending with Ingenuity Las Vegas, NV Oct 11-13

Please visit the NCDD Website www.ncdd.com for more details for our upcoming events or call the NCDD Office 334-264-1950 for more information.

You will be getting an invoice for your 2018 annual dues soon! They are due by January 31.

I hope you all have a safe, healthy and happy holiday season! I look forward to seeing you at our NCDD seminars soon!

Rhea

Dean's Message

Mike Hawkins

What is the best thing about the NCDD?

I recently found myself asking this question because a fair amount of what I have devoted my time to since becoming Dean, is advocating for the College in a variety of ways. For example, I am very excited about our upcoming Winter Session in Atlanta in January, and I have been inviting as many lawyers as I can when I see them in court and around Atlanta.

I have been surprised to learn that many of the better lawyers I have known for years have not taken advantage of membership in the NCDD. So I find myself in the position of wanting to tell them about what they are missing. How much this organization has helped me improve as a lawyer, and has strengthened my commitment to defending my clients. And how I have made some great friends to bounce ideas off over the years.

When I first joined the NCDD in 1997 (20 years ago!) everything seemed new and exciting in the world of DUI Defense. I was amazed to learn from lawyers who were pioneers in developing this area of practice. As my involvement with the NCDD increased, my primary focus was seminars – the **Summer Session** was devoted to trial techniques, the **Winter Session** featured new speakers, the Fall Session was in **Las Vegas with NACDL** and had something for everyone, and **Mastering Scientific Evidence in New Orleans** with TCDLA and focused on science.

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Nancy Edwards Pryor awarded NCDD Public Defender of the Year at 2017 Summer Session in Cambridge, MA

Left to Right: Cynthia Nance, Dean Emeritus and Nathan G. Gordon Professor of Law and Director of Pro Bono and Community Engagement, University of Arkansas School of Law, Fayetteville, AR; NCDD Member Shelley Behan, Arkansas Public Defender Nancy Edwards Pryor, and NCDD Regent Mimi Coffey.

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

What's the best thing about the NCDD? Maybe it's our seminars.

But then a few of my mentors persuaded me that if I really wanted to step-up my game, that I should apply for our **ABA-approved Board Certification**. I was trying a lot of cases then, and the most frequent advice I was given was that just the process of studying for the exam would make me a better lawyer. And they were right. I never knew, for example, that there was a study that just focused on DUI motorcycles. Back then, the NHTSA studies had not even been peer reviewed (over the last 20 years they have, and it's not good for NHTSA). In short, I learned how much I had to learn.

What's the best thing about the NCDD? Maybe it's our ABA-approved Board Certification program.

After awhile, my most frequent contact with the College came through reading and posting on the **NCDD Listserve**. I think this is true for most of us. Sometimes it can be intimidating. Sometimes the volume of emails seems a bit much, but the daily opportunity to learn keeps us reading just about every subject line at least. The listserve has undoubtedly helped the most members in the most direct manner – by responding to our members' specific requests for help.

What's the best thing about the NCDD? It's gotta be our Listserve, right?

In the last decade, I have come to realize how much there is to learn about science in the DUI arena. For so many years, it seems, so many lawyers have not had the tools to understand how to challenge crime lab evidence. Many of the current members of the Board of Regents were tapped by the organization because of their superior knowledge of science – and more importantly, their ability to teach it.

The NCDD was on the forefront of bringing the challenge to our crime labs when we learned of their questionable methods end unreported errors. These discoveries led to the evolution of teaching that NCDD now offers in our "graduate level" ***Serious Science*** **programs**. These programs provide our members with access to the best hands-on training in the country to learn to successfully challenge chemical tests.

What's the best thing about the NCDD? Maybe it's our focus on the cutting edge of DUI Defense.

In the process of improving the seminars we offer to our members, it became evident that having ready access to studies, motions, and scientific articles and other materials is paramount to the success of our members. So the idea for our **Virtual Forensic Library** grew into what is now the largest resource of its kind for DUI Defense practitioners.

What's the best thing about the NCDD? Maybe it's our Virtual Forensic Library.

I could go on about the other amazing things our members are doing. Advocating for our collective clients' interests by filing **Amicus Curiae briefs** in appellate courts across the country. Planning and delivering seminars at no cost to Public Defenders that will allow in-the-trenches lawyers make a much-needed difference for indigent defendants charged with DUI. That all of us, within minutes, can find a lawyer in another state to ask a question or better yet, refer a case to.

Nah. All of those are second best. The best thing about the NCDD is the people I have met.

I've met some of my best friends thru the NCDD. But that's not what I mean. Being a DUI Defense lawyer is a hard job. It involves winning and losing. It involves a lot of hard work that often is underappreciated. It involves our clients' liberty, their career, and their reputation. It involves a lot of pressure. I have found great value in getting to know other lawyers who share my same struggles and trials and tribulations. Lawyers who face the same problems in running a small business---handling personnel problems, marketing problems, unreasonable prosecutors, and frustrating judges.

But more importantly, the best thing about the NCDD is the people I have met. I enjoy hearing the funny stories you have from cases and clients, and the tales of wins and losses. If we have not met, I hope to meet you at one of our upcoming seminars. I would love to hear what you think is the best thing about the NCDD. More importantly, I would love to hear how you think we might improve the way we serve our members. My hope for all of our members is that they would have a similar experience as me. And if there is anything I can do to accomplish that, I would love to hear from you.

The Unconscious DUI Driver And Implied Consent For A Blood Draw

In the wake of *Missouri v. McNeely*, 569 U.S. 141 (2013) and *Birchfield v. North Dakota*, 579 U.S. ___, 136 S.Ct. 2160 (2016), the following question arises:

May "implied consent" statutes, or consent forms signed as a condition for getting a driver's license, be constitutionally relied upon for lawful consent to a blood draw when dealing with an unconscious person who lacks the ability to revoke the consent?

California's "implied consent" law, like many sister-state statutes, includes the following provision for unconscious drivers:

"*A person who is unconscious or otherwise in a condition rendering him or her incapable of refusal is deemed not to have withdrawn his or her consent and a test or tests may be administered whether or not the person is told that his or her failure to submit to, or the noncompletion [sic] of, the test or tests will result in the suspension or revocation of his or her privilege to operate a motor vehicle. A person who is dead is deemed not to have withdrawn his or her consent and a test or tests may be administered at the direction of a peace officer.*" Calif. Veh. Code § 23612(a)(5).

Colorado's "express consent" (which is another way of saying implied consent for the subject statute) includes the following provision:

"*Any person who is dead or unconscious shall be tested to determine the alcohol or drug content of the person's blood or any drug content within such person's system as provided in this section.*" C.R.S. § 42-4-1301.1(8).

The California statute's clause "is deemed not to have withdrawn his or her consent," and States that have something similar in their statute, clearly implies a Legislative recognition that a *conscious* person may withdraw the purported consent. It is only possible to infer that right under Colorado's statute if one concludes the clause about unconscious persons is unnecessary in the statute unless conscious persons may withdraw the purported consent.

The Colorado Supreme Court held in *People v. Hyde,* 2017 CO 24 (2017) that Fourth Amendment consent to a blood draw exists on the basis of the statutory consent, unless the statutory consent is withdrawn. It cited *South Dakota v. Neville* (1983) 459 U.S. 553, 560, at n. 10, for the proposition that DUI suspects have no constitutional right to refuse a blood draw. It reconciled its holding with *McNeely* by concluding that *McNeely* only addressed the exigent circumstances exception as opposed to the consent exception. It declined to follow its own holding in *People v. Schaufele*, 2014 CO 43 (2014) on the same basis---that the People in *Schaufele* relied on the exigent circumstances exception as opposed to the consent exception.

The *Hyde* Court's reasoning is strained and suspect. Since its holding in *Neville*, the high Court has recognized in both *McNeely* and *Birchfield* the significant privacy concerns individuals have against the taking of their blood, and that blood searches implicate a constitutional right (i.e., the Fourth Amendment). It's conclusion that statutory consent to a blood draw on an unconscious person constitutes Fourth Amendment consent is counter to the following passage in *Birchfield*:

"*It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests,* ***and when they arise, the police may apply for a warrant if need be***."

McNeely (slip op., at 35) (emphasis added). When would the need for a warrant be with an unconscious DUI suspect if such individuals are deemed by statute to have surrendered their Fourth Amendment right to withdraw the statutory consent, as was done by the conscious suspect in *McNeely*? The *McNeely* Court noted that all 50 states have implied consent statutes.

The California Supreme Court will soon be issuing a ruling in *People v. Arredondo* (2016) 245 Cal.App.4th 186, 371 P.3d 240, *review granted*, Calif. Supreme Court Docket No. S233582. The Court of Appeal in *Arredondo* held that unconscious persons are not deemed by the statute to have given Fourth Amendment consent to a blood draw since they lack the ability to withdraw the purported consent. The exclusionary rule was not applicable, however, since the officer was determined to have acted in good faith reliance on the statute. The Court has limited the issues on review to the following:

(1) Did law enforcement violate the Fourth Amendment by taking a warrantless blood sample from defendant while he was unconscious, or was the search and seizure valid because defendant expressly consented to chemical testing when he applied for a driver's license (see Veh. Code, § 13384) or because defendant was "deemed to have given his consent" under California's implied consent law (Veh. Code, § 23612)?

(2) Did the People forfeit their claim that defendant expressly consented?

(3) If the warrantless blood sample was unreasonable, does the good faith exception to the exclusionary rule apply because law enforcement reasonably relied on Vehicle Code section 23612 in securing the sample?

Stay tuned.

Case Law Roundup

Case Highlights from Donald Ramsell (Illinois) and Paul Burglin (California)

Massachusetts Supreme Court Holds FST Performance Admissible in Marijuana OUI Prosecutions, But Bars Officers From Opining Impairment From It And Declares It Insufficient Standing Alone To Prove Impairment.

***Commonwealth v. Gerhardt* (2017)**
Mass. Supreme Court - Docket No. SJC 11968

Defendant was stopped while driving at night without rear lights on. He admitted to smoking marijuana and evidence of the same was found in the vehicle. He performed poorly on the WAT and OLS and the officer opined that this indicated impairment and concluded defendant was under the influence of marijuana.

The Court initially noted that the HGN, WAT, and OLS tests were developed specifically to measure alcohol consumption, and that there is wide-spread scientific agreement on the existence of a strong correlation between unsatisfactory performance and a blood alcohol level of at least .08%. In contrast, the Court cited various studies with conflicting conclusions as to whether these types of tests are indicative of marijuana intoxication. It found that "[t]he scientific community has yet to reach a consensus on the reliability of FSTs to assess whether a driver is under the influence of marijuana."

Accordingly, while finding an officer's observations of one's performance on these tests to nonetheless have some probative value, it held that unless an officer is qualified as an expert witness, he or she may only testify to their observations but may not opine that they indicate impairment.

"We emphasize as well another consequence of the lack of consensus regarding the FSTs: the fact that the FSTs cannot be treated as scientific "tests" of impairment means that evidence of performance on FSTs, alone, is not sufficient to support a finding that a defendant's ability to drive safely was impaired due to the consumption of marijuana, and the jury must be so instructed."

We also are asked whether a police officer may testify, without being qualified as an expert, to the effects of marijuana consumption and may offer an opinion that a defendant was intoxicated by marijuana. We conclude that an officer may not do so.

The Court made the following specific conclusions:

1. Police officers may not testify to the administration and results of FSTs as they do in operating under the influence of alcohol prosecutions. Police officers may testify to the administration of "roadside assessments" in the manner set forth in this opinion.

2. A lay witness may not offer an opinion that another person is "high" on marijuana.

3. A police officer may testify to observed physical characteristics of the driver such as blood shot eyes, drowsiness, and lack of coordination. The officer is not permitted to offer an opinion that these characteristics mean that the driver is under the influence of marijuana.

4. Jurors are permitted to utilize their common sense in assessing trial evidence.

The Court approved of the following model jury instruction for use in prosecutions for operating a motor vehicle under the influence of marijuana:

"You heard testimony in this case that the defendant, at the request of a police officer, performed or attempted to perform various roadside assessments, such as [Here outline the nature of the evidence, e.g.,

walking a straight line, balancing on one foot]. These roadside assessments are not scientific tests of impairment by marijuana use. A person may have difficulty performing these tasks for many reasons unrelated to the consumption of marijuana.

"It is for you to decide if the defendant's performance on these roadside assessments indicate that his [her] ability to operate a motor vehicle safely was impaired. You may consider this evidence solely as it relates to the defendant's balance, coordination, mental clarity, ability to retain and follow directions, ability to perform tasks requiring divided attention, and other skills you may find are relevant to the safe operation of a motor vehicle.

"It is for you to determine how much, if any, weight to give the roadside assessments. In making your determination, you may consider what the officer asked the defendant to do, the circumstances under which they were given and performed, and all of the other evidence in this case.

"Finally, evidence of how a defendant performed in roadside assessments, standing alone, is never enough to convict a defendant of operating under the influence of marijuana."

EDITOR'S NOTE: This was a marijuana-only impairment charge as there was no evidence of alcohol consumption. How the law and jury instructions will be given in a combined "alcohol and marijuana" case is uncertain from this opinion. Likewise uncertain is how an officer might possibly be qualified as an "expert" to render the opinions otherwise barred by this ruling.

NCDD Contributors:

Michael A. Delsignore and Julie Gaudreau submitted an *amicus* brief on behalf of the National College for DUI Defense.

NCDD faculty member Steven S. Epstein co-wrote an amicus brief on behalf of the National Organization for the Reform of Marijuana Laws.

Officer May Not Testify Defendant "Failed" One Or More Field Sobriety Tests Absent A Proper Foundation

State v. Beltran-Chavez
286 Or.App. 590, 400 P.3d 927 (2017)

Before an officer may testify that a Defendant "failed" one or more field sobriety tests to prove impairment, the prosecutor must lay a foundation that alcohol impairment is reliably measured through the subject tests.

Analysis of Blood Sample Permitted Despite Withdrawal of Consent Post-Blood Draw

People v. Woodard
Michigan Court of Appeals – Docket No. 336512 (2017)

Defendant lawfully consented to a blood draw but his attorney subsequently notified law enforcement that any implied consent to analyze the sample was withdrawn. The request was ignored and the sample analyzed for alcohol content without a warrant.

On an interlocutory appeal, the Court held that the testing of the sample "does not constitute a distinct search for Fourth Amendment purposes and any effort to withdraw consent after this evidence has been lawfully obtained cannot succeed."

"[T]here is persuasive authority holding that, once a blood sample has been lawfully obtained for purposes of analysis, the subsequent testing of that sample has `no independent significance for fourth amendment purposes.' *Dodd v Jones*, 623 F3d 563, 569 (CA 8 2010); *United States v Snyder*, 852 F2d 471, 474 (CA 9 1988). While these cases have often been decided in the context of blood seized via a warrant, they stand for the proposition that the testing of blood evidence is an essential part of the seizure,' *State v VanLaarhoven*, 248 Wis 2d 881, 891; 637 NW2d 411 (2001), and that `the right to seize the blood . . . encompass[es] the right to conduct a blood-alcohol test at some later time,' *Snyder*, 852 F2d at 474. Thus, these cases reason that the extraction and testing of blood are `a single event for fourth amendment purposes,' regardless of how promptly the subsequent test is conducted. *Id*. at 473-474."

Lawful Consent Not Established For Blood Draw

State v. Hawkins
North Dakota Supreme Court – Docket No. 20160354

Defendant's immediate arrest after refusing to take an onsite breath test contributed to coercive circumstances. The district court noted the fact an individual is in custody does not mean consent cannot be voluntarily given [cite]. The district court ultimately found "the setting of this circumstance, specifically that consent was refused, and then given only after the defendant is handcuffed and put in the back of a squad car after being told that refusal to submit is a crime does not lend itself to the voluntariness of consent." The district court concluded, "because there was no warrant for the collection of the blood, and because the consent was not voluntary under the totality of the circumstances, the results of the blood test must be suppressed." The district court considered the totality of the circumstances in reaching its factual determination that Hawkins' consent was not voluntary.

"Because the district court is in a superior position to judge credibility and weight, we show great deference to the court's determination of voluntariness." [cite]. Motion to suppress evidence affirmed.

Exigent Circumstances Found Sufficient To Excuse Warrant

State v. Holmes
Wisconsin Court of Appeals – Docket No. 2016AP746-CR

Defendant was arrested following a solo-vehicle roll-over accident causing lacerations and abdominal pain to himself. He was transported to a local hospital where he awaited further "flight for life" transport to another hospital for treatment. He refused a law enforcement request for a blood sample and the arresting officer was directed by his supervisor to drive to the next hospital and obtain one without a waiting for a warrant.

Both officers testified that securing and filling out a warrant would have taken approximately forty-five minutes, and the arresting officer said he did not know if a magistrate was available.

Before declaring its holding affirming Defendant's conviction, the Court stated, "Defendant presented no evidence that an alternative, more efficient procedure was available or that a magistrate or judge was available to issue a warrant."

"From an evidentiary perspective, Holmes' injuries, his emergency transport to two different hospitals, and the likelihood of medical treatment and administration of drugs, all would take up valuable time. Under these "special facts," exigent circumstances justified the warrantless blood draw."

It then made the following comments:

"We make a final point. Advancements in technology since Schmerber was decided in 1966 have greatly reduced the time and effort needed to secure a warrant for drunk driving investigations before an investigatory blood draw is performed. [cites]. In many jurisdictions, police officers or prosecutors apply for search warrants remotely via telephonic or radio communication, e-mail, or video conferencing, or use standard-form warrant applications. [cite]. We encourage Wisconsin counties that still adhere to traditional methods to explore reasonable, more expeditious means. "[W]here police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." [cite]."

EDITOR'S NOTE: It is hardly surprising that the Court found exigent circumstances in an accident case involving the necessity of medical treatment. However, this opinion is a classic example of burden shifting. The arresting officer did not check to see if a magistrate was available, no explanation was offered by the prosecution as to why the expedient procedure discussed by the Court in today's world for obtaining a warrant was not utilized, and Defendant was faulted for not presenting this latter

evidence himself. It is not the Defendant's burden to prove an exception to the search warrant requirement does not apply! The presumption of a warrantless search is that it's unconstitutional.

Defendant Not An "Unavailable Witness" For Purpose of Invoking Hearsay Exception Where He Exercises Fifth Amendment Right To Not Testify In Retrial.

State v. McInerney
New Jersey Appellate Division
___ A.3d ___ (2017)

Defendant sought to introduce his own testimony from his first trial while refusing to testify at his retrial under the Fifth Amendment. The Court held his testimony in the first trial constituted "out of court" statements within the meaning of the hearsay rule when sought to be introduced by the Defendant in a subsequent retrial.

Unlawful Detention Found Under Totality of Circumstances

State v. Newton
286 Or.App. 274, ___P.3d___ (2017)

A call came in to dispatch from a convenience store employee reporting a woman crying, apparently intoxicated, and arguing with a man in a van. He described the woman as "hysterical," described the man and the van, and reported that the woman had left in the van with the man driving. The officer went to the registered owner's address.

It was late at night as he walked up a private driveway, questioned defendant and his girlfriend, who were sitting in a parked van. He did not communicate that he was checking on the woman's welfare and did not limit his intrusion to checking on her welfare. Though he parked his patrol vehicle in a manner not blocking the van from leaving, he stood behind the van to check on defendant's status and to question the woman who had agreed to step out of the van.

He learned through a records check that Defendant had a suspended driver's license and arrested him.

Evidence suppressed for Fourth Amendment violation based on the totality of the circumstances (late at night, private driveway, standing behind van, investigating more than woman's welfare).

State v. Romano
800 S.E.2d 644 (2017)

At the time of his arrest for DWI the Defendant was making incoherent statements, his speech was slurred, he was unable to stand due to his obvious intoxication, and he smelled strongly of alcohol and vomit.

The officer did not attempt to obtain a warrant for defendant's blood nor did she believe any exigency existed. Instead, she relied on the implied consent statute which authorizes the taking and testing of blood from a person who has committed a DWI if the person is "unconscious or otherwise in a condition that makes the person incapable of refusal."

North Carolina Supreme Court holds that state statute authorizing law enforcement to obtain a blood sample from an unconscious defendant suspected of driving while impaired without first obtaining a search warrant was unconstitutionally applied to defendant. Three members of the Court dissented on the basis that the officer acted in good faith reliance on the statute (two of the three also contended that the nurse drawing the blood was not a government actor under the circumstances).

Court Rejects Contention That Blood-Analysis A Separate Search From Blood Draw.

People v. Woodard
Michigan Court of Appeals – Docket No. 336512

Before testing on Defendant's blood sample had been conducted, Defendant's attorney sent the arresting officer, prosecutor, and State Laboratory a document entitled "Notice of Defendant's Withdrawal of Consent to Search, Demand to Cease and Desist Further Warrantless Search, and Demand for Return of Blood Samples." In relevant part, the documented stated:

"NOW COMES the Defendant, GLORIANNA WOODARD, by and through counsel, the Maze Legal Group, PC, by William J. Maze, and hereby provides notice that she withdraws her consent for further voluntary search of her blood sample based upon the following:

1. Defendant, GLORIANNA WOODARD, is alleged to have voluntarily permitted a withdrawal of his [sic] blood on or about March 6, 2015.

***

6. Defendant now affirmatively withdraws her consent for further search, demanding that the police, prosecutor and state laboratory immediately cease and desist from further search of the blood evidence, demanding that these state actors immediately obtain a search warrant to justify any search and/or continued detention of the blood sample, returning the blood sample to Defendant forthwith if a warrant is not sought and obtained immediately by the government.

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9. If the Prosecuting attorney, Michigan State Police Forensic Science Division, or the Michigan State Police Jackson Post, desires to keep the blood sample and/or conduct any testing that has not already occurred on the blood sample, [Defendant] demands that any search be conducted pursuant to a warrant…"

The State proceeded to analyze the blood sample for alcohol with a test result of .21 percent. While conceding consent had been given for the blood draw, Defendant moved to suppress evidence of the blood-alcohol analysis on the basis that any consent for the analysis had been withdrawn and no warrant obtained.

Citing *Johnson v. Quander*, 440 F3d 489, 500; 370 US App DC 167 (2006), as persuasive authority, the Court affirmed the trial court's denial of Defendant's motion to suppress the test result, concluding that the search was completed with the consensual blood draw.

Obstruction of Justice Conviction Affirmed Based On Refusal To Cooperate With Breath Test Demand Authorized By Warrant

***State v. Kegley* (2017)**
Illinois Court of Appeals, Fourth District – Docket No. 4-16-0461 - UNPUBLISHED

Defendant was lawfully arrested on suspicion of DUI and driving on a suspended license. Defendant refused to provide a breath sample even after a warrant was obtained authorizing the police to obtain a sample of his breath, blood, or urine.

Defendant was found not guilty of DUI but convicted on obstruction of justice following a bench trial. The trial court concluded that Defendant intentionally prevented the collection of physical evidence and obstructed his own DUI prosecution by knowingly concealing his breath even after a valid search warrant had been issued.

Conviction affirmed on appeal. Defendant's contention that he was not required to affirmatively assist in the search of a breath sample was rejected. His claim that the police needed to have presented him with a copy of the warrant before demanding the search was deemed forfeited based on his failure to cite any legal authority in support of it.

Conviction Reversed Based On Erroneous Exclusion of Expert Witness Testimony Concerning Accident Reconstruction.

***People v. Makowski* (2017)**
California Court of Appeal, Second District, Div. 7 – Docket No. B257957 - UNPUBLISHED

Defendant struck and serious injured three pedestrians in a crosswalk while driving with a high blood-alcohol content. There is no stop sign or traffic signal at the crosswalk though it was marked with wide white lines. It was dusk, with some motorists driving with lights on and some not.

A videotape of the accident, taken by a surveillance camera located about 200 feet from the intersection, showed other cars passing through the crosswalk without slowing as the victims crossed the street.

"Marc A. Firestone (Firestone) is a physicist and forensic engineer. He has expertise in determining a vehicle's speed based on various factors, including stopping distance, damage to the vehicle, and the distance a pedestrian travels after being hit by the vehicle. He reviewed two videotapes of the accident, police reports and photographs of the scene of the accident, and he also visited the scene. He determined that defendant was probably driving 31 to 34 miles per hour at the time of the accident and could not have been driving more than 41 miles per hour; the speed limit at that location was 40 miles per hour. He was not allowed to present other testimony about perception and reaction times, how long it would take the vehicle to stop, and whether the key videotape, if taken with an infrared camera, would have made the scene appear lighter than the actual conditions at the [pedestrians] were struck."

In reversing Defendant's conviction, the Court ruled that Defendant "established adequate foundation, relevance and significant probative value to require admission of Dr. Firestone's testimony on the following issues: (1) perception and reaction times for an average person; (2) the distance defendant's car would travel given its speed, from time of perception to stopping; (3) the effect of glare on a person's ability to react; (4) whether other vehicles, including the vehicle defendant was following, obstructed his view and how that would have affected perception/reaction time; and (5) how an infrared camera affects the brightness of images taken in low light conditions." It did not find error in the court's discretionary decision to exclude that portion of Dr. Firestone's testimony about his visit to the scene of the accident and his own difficulty seeing as he drove toward the intersection, based on lack foundation that the conditions were substantially similar at the time of his visit.

Blood-Alcohol Test Result Suppressed For Lack of Lawful Consent, Notwithstanding Defendant Responding "Yeah" To Request.
***State v. Osterloh* (2017)**
Georgia Court of Appeals – Docket No. A17A1199
__ S.E.2d ___

Following an implied consent admonition (which the officer later testified Defendant appeared to comprehend), the officer asked Defendant if he would submit to a blood test and the Defendant said, "yeah." However, Defendant testified that he had no recollection of the admonition and the evidence clearly showed him to be seriously injured and talking gibberish. Under the totality of the circumstances, the trial court found there was no lawful consent to the blood draw and the ruling was affirmed on appeal.

Warrantless Blood Draws

People v. Brooks
2016 Il App (5th) 150095-U - UNPUBLISHED

Following car accident, police physically compelled Defendant to go to hospital emergency room (ER) for treatment of injuries including broken leg. Defendant tried to bolt from ambulance and police restrained him with handcuffs and assisted paramedics with getting him into ER. Defendant refused consent to blood draw following implied consent admonition. At least four police officers present but no warrant sought. Hospital staff drew blood sample as part of medical treatment and not at the request of law enforcement.

Held: Because the police compelled Defendant to obtain medical treatment, State action was involved in the blood draw. No showing of exigent circumstances as plenty of officers available to seek a warrant. Blood-alcohol evidence suppression order affirmed on appeal.

Commonwealth of Pennsylvania v. March
2017 PA Sup 18, ___A.3d ___

March was taken to a hospital following his involvement in an automobile accident. He was unconscious and not under arrest. Pennsylvania's statute allows one to withhold consent to a blood draw if under arrest for DUI, but since March was not under arrest that statutory provision was deemed inapplicable to him.

Oddly, the Court held the warrantless blood draw was constitutional even in the absence of a showing of exigent circumstances, based on statutory implied consent.

NOTE: Other courts are generally going in the opposite direction on this issue, finding that unconscious persons cannot be deemed to have impliedly consented when they lack the conscious ability to withdraw it. See, e.g., *People v. Schaufele* (Colorado Supreme Court – 13SA276 (2014).

Insufficient Showing of Reasonable Medical Procedure for Blood Draw Results In Suppression Order

Trusty v. State ex. Rel. Department of Public Safety
(2016) ___P.3d ___, 2016 OK 94 (Docket No. 114208)
2016 WL 5110451

Appellant was arrested for DUI after crashing his car. He was taken to a hospital where he consented to a blood draw. The Department of Public Safety (DPS) revoked his license for one year based on a .206 blood-alcohol test result. He appealed the suspension order to the District Court of Oklahoma County and a *de novo* hearing was held. The district court vacated the license revocation because the DPS did not call the nurse or any other witness to establish the blood draw was done in compliance with the rules and regulations of the Board of Tests for Alcohol and Drug Influence.

The Supreme Court affirmed, finding that a police sergeant's testimony was devoid of any showing that he possessed the necessary medical training to meet DPS's burden of establishing the following facts:

1. That the blood was drawn in accordance with accepted medical practices;

2. That [Appellee] did not suffer from hemophilia;

3. That [Appellee] was not taking anticoagulant medications;

4. That the blood was withdrawn by venipuncture;

5. That the puncture site had been properly prepared;

6. That necessary precautions to maintain asepsis and avoid contamination of the specimens; and

7. That the puncture site preparation was performed without the use of alcohol or other volatile organic disinfectant.

NOTE: NCDD member Charles Sifers represented the Appellee.

Checkpoint Established And Operated Without Supervision Held Unreasonable

Whelan v. State
2016 Ark. 343 (2016)

"With regard to establishing checkpoints, Corporal Lee testified that if the supervisors do not assign the checkpoint, `I will make a call and say, you know, we're going to do a checkpoint.'" That's what he did.

This unfettered discretion on the part of a field officer in establishing and conducting a DUI checkpoint was held unreasonable and violated the Fourth Amendment.

Willful Inhaling Of Dust-Off Product Held Basis For Impaired Driving

State v. Carson
(2016) ___N.W.2d ___, 2016 WL 4596517
Minn. Court of Appeals - Docket A15-1678

In Minnesota it's a crime to operate a vehicle while knowingly under the influence of a hazardous substance that affects the nervous system, brain,

or muscles of the person so as to substantially impair the person's ability to operate a motor vehicle. Minn. Stat. 169A.20(1)(3).

Defendant was found passed out in the drive-thru of a restaurant with a can of *Dust-Off* gas duster between her right arm and body. Gas duster is a refrigerant-based propellant cleaner used for cleaning electronic equipment by blowing particles and dust. Her blood sample showed the presence of difluoroethane (DFE) and a forensic toxicologist for the State testified that it's flammable, can cause injury if inhaled, and that the can is pressurized.

Because the statutory list of hazardous substances is not an exhaustive list, and in light of the expert's testimony about its nature, the product is deemed a hazardous substance within the scope of the impaired driving code.

NOTE: Her blood sample also showed the presence of Lorazepam and the officer found a six-pack of the dust buster including a cold one that indicated recent use! There was also ample circumstantial evidence to prove impairment.

Trial Tip Treasure

Insider Trading Is Not Just A Wall Street Crime

By Paul Burglin[1]

Imagine the value of having post-trial comments from jurors before deciding whether to keep them on future juries. Despite all the training and experience we might have in conducting *voir dire* and exercising juror challenges, the deck is stacked against us if the other side has such material. On Wall Street they call it insider trading.

Many prosecutorial offices collect such information and retain it in what is referred to as a "jury book." Some just compile criminal record and prior jury service data, but even that information can be rich.

In *People v. Murtishaw* 29 Cal.3d 733 (1981), defendant moved for discovery of any prosecution records or investigation of potential jurors, or in the alternative for funds to conduct a comparable defense investigation. His motion was denied in this death penalty case.

In future cases, the California Supreme Court declared, a trial court should have the *discretion* to permit a defendant, who lacks funds to investigate prospective jurors, to inspect prosecution jury records and investigations.

"Whatever doubts the courts may have, it is apparent that the prosecutor here believes the advantage he gains from jury investigations and records justifies the expense. When courts then deny defendants who cannot afford similar investigations access to the prosecutor's records, the result is that prosecutors in case after case will have substantially more information concerning prospective jurors than do defense counsel…Such a pattern of inequality reflects on the fairness of the criminal process."

Footnotes to the *Murtishaw* opinion are equally strong. Fn. 26: "The attorney who investigates the prospective jurors will thus retain an advantage in exercising peremptory challenges over his adversary who lacks access to that investigation." Fn. 27: "The danger posed by denial of discovery, however, is not merely that the prosecutor may conceal facts showing a juror is disqualified, but that he will obtain a significant advantage over the defense in exercising peremptory challenges." Fn. 28: "`[T]his practice ... creates the untoward image of a system in which the opportunity to rationally exercise peremptory challenges is governed by the size of the litigant's bank account or defense fund.'" [cite].

The flaw in *Murtishaw* is the assumption that adequate financial resources will level the playing field. It is impractical for a criminal defendant or his counsel to be interviewing jurors from every past trial, or for defendants to have that incentive. Yet prosecutors frequently seize on this language in *Murtishaw* to claim "work product" privilege in opposition to disclosure, along with the claim that the information contains privileged "mental impressions" of counsel.

In today's technological age, the ability of prosecutors to collect information on potential jurors is vast. Defense counsel should move for the full disclosure of all "jury book" information possessed by prosecutors, and resist these doubtful claims of privilege. The lack of equal access to key information about potential jurors constitutes a denial of Due Process and strikes at the heart of our criminal justice system. Full disclosure should be mandatory as opposed to discretionary, and if your trial judge orders only a partial release of information, insist that an *in camera* review of redacted material be shown to the judge and made a part of the trial court's file for appellate review.

[1] Paul Burglin is NCDD Board-Certified in DUI Defense, as approved by the American Bar Association, and has been practicing DUI defense in the California Bay Area for 32 years. He co-authors *California Drunk Driving Law* with Southern California attorney and NCDD Fellow Barry Simons.

SCOTUS RADAR

Imagine your client's stopped and arrested upon leaving a restaurant in retaliation for organizing a protest against police shootings. Probable cause for the detention and DUI arrest is established by his having driven slightly over the posted speed limit, the odor of alcohol on his breath, and what the officer claimed was slurred speech.

The SCOTUS has granted certiorari in *Lozman v. City of Riviera Beach, Florida* to determine the following issue:

Whether the existence of probable cause defeats a First Amendment retaliatory-arrest claim as a matter of law?

Hartman v. Moore (2006) 547 U.S. 250 held that a plaintiff who claims he was subject to a retaliatory prosecution in violation of the First Amendment must plead and prove the absence of probable cause for the prosecution. The high Court subsequently granted certiorari in *Reichle v. Howards* (2012) 566 U.S. 658, to determine whether that rule should be extended to claims of retaliatory arrest as well. But the Court left that question unanswered, instead resolving the case on grounds of qualified immunity. *Lozman* now presents the question *Reichle* avoided.

Plaintiff first appeared before the SCOTUS in 2013 and persuaded the Court that not every floating structure is a vessel and the City of Riviera could not seize and destroy his houseboat under a maritime statute (the City wanted to let a developer take over the marina). Chief Justice John Roberts said it was his favorite case of the term. Now, in a rarity, the high Court has agreed to hear one of Lozman's cases again on a different issue.

Lozman was not arrested on suspicion of DUI. He was hauled out of a public city council meeting in handcuffs for doing nothing other than trying to speak. A city councilwoman called for a police officer and when ordered to leave he refused and was arrested for disorderly conduct. Although it was clear the action was retaliatory (a tape obtained under the FOIA showed a stated intent to intimidate him and make him feel unwanted) and no charges were filed, the arrest was deemed lawful and his suit for retaliatory arrest and suppression of his First Amendment rights was ordered dismissed.

In *Reichle*, Justice Sotomayer noted that police can always come up with some basis for purported probable cause (and thus evade the claim of retaliatory action), while Justice Roberts pointed out that defendants can just as easily drum up claims of retaliation. For example, they can put a bumper sticker on their car that says, "I Hate the Police" and them assert that they were stopped for speeding because of the bumper sticker.

NCDD Regent Bill Kirk wows the crowd with his closing argument at the 2017 NCDD/NACDL Seminar in Las Vegas.

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Editor's Message: Contributions to the NCDD Journal are welcome. Articles should be about 1200-1500 words and relate to DUI/DWI defense. Trial Tips should be 200-300 words. Please prepare in Word and submit as an attachment to burglin@msn.com. The NCDD reserves the right to edit or decline publication. Thank you.