

Dean's Message



Paul Burglin

The past year has reminded us that nothing is certain in life and nothing should be taken for granted. Not our health, financial security, nor our relationships.

I did not envision having to cancel MSE (Mastering Scientific Evidence) in New Orleans and Summer Session at Harvard Law School. These are two of our annual four core seminars that unite and bond us as DUI/DWI defense attorneys. The social interaction and exchange

of ideas always fuels us to keep the battle going. Fortunately, with the hard work and determination of our faculty, we have been able to provide you with high quality CLE webinars during shelter-in-place orders and social distancing policies. We do look forward to the return of normal times, where once again we can be together working in break out training groups and sharing stories on the patio of the Charles Hotel in Cambridge, MA.

As criminal defense lawyers, we are well versed in meeting challenges. Legislators are forever enacting "get tough" laws at the behest of prosecutors, and judges (and clerks) are frequently adopting new rules and policies to derail our strategies. Yet there is something about us that creates that "herd immunity" we have been hearing so much about lately. We adapt and we fight on, and our adversaries are forced to maintain a begrudging respect for our tenacity and spirit.

Now is a great time to explore our virtual forensic library and access the 3,500-plus forensic science articles, briefs, transcripts, and motions. It is also a good time to study up on the science and law and sit for the NCDD Board Certification exam. With the American Bar Association's approval and recognition, it is the premier certification for DUI/DWI lawyers. You might also consider contributing to the work done by our amicus committee.

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E.D.'S Corner



Rhea Kirk

It's hard to believe that summer is here! We have lots of new things happening at the NCDD! Our new NCDD Website is up and running...I hope you make a habit of checking out the Blogs, Brief Bank, and Virtual Forensic Library! Also, something new that can bring you new clients: 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!

Updating our upcoming seminars:

2021 Winter Session: An exciting approach to our brand-new format to be held in Texas!

Watch for details about this fantastic new seminar coming up January 15-16, 2021!! SAVE THE DATE! You won't want to miss it!

Mastering Scientific Evidence (MSE): Everyone will be looking forward to being in New Orleans again on March 25-26, 2021! Great food, great fun, and a fantastic seminar!! You can register at: https://www.tcdla.com/TCDLA/Events/Event_Display.aspx?EventKey=A032521

Serious Science for Serious Lawyers: Advanced Training in Blood Drug Analysis and Trial Advocacy in Arlington, Texas. The date is May 21-26, 2021 at the Sheraton Arlington Hotel. Lab training will be held at Shimadzu Lab at the University of Texas, Arlington and space is limited so sign up early!

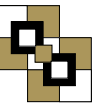
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IN THIS YEAR OF NCDD'S 25TH ANNIVERSARY, IT IS IMPORTANT TO RECOGNIZE THE LAWYERS WHO MET IN CHICAGO IN 1994 TO FOUND THIS COLLEGE:

LAWRENCE TAYLOR (LONG BEACH, CA) • DOUGLAS COWAN (SEATTLE, WA)
 WILLIAM C. HEAD (ATLANTA, GA) • JOHN HENRY HINGSON (PORTLAND, OR)
 REESE JOYE (CHARLESTON, SC) • PHIL PRICE (HUNTSVILLE, AL)
 JAMES FARRAGHER CAMPBELL (SAN FRANCISCO, CA) • GARY TRICHTER (HOUSTON, TX)
 FLEM WHITED (DAYTONA BEACH, FL)
 AND JAMES TARANTINO (PROVIDENCE, RI) (ATTENDED VIA TELEPHONE CONFERENCE)

IN ADDITION TO THESE TEN:

DON NICHOLS (MINNEAPOLIS, MN) AND VICTOR CARMODY (JACKSON, MS)
 WERE ON THE FIRST BOARD OF REGENTS.



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

In recent years, the NCDD has authored briefs in the U.S. Supreme Court in *Bullcoming v. New Mexico* and *Birchfield v. North Dakota*, and submitted briefs in many state Supreme Court cases. Our mission remains "Justice Through Knowledge."

There are many other ways to get involved with the NCDD. You can seek to be a member of our faculty. You can become a state delegate, join one of our committees, or become a sustaining member. You can submit an article or trial tip for the NCDD Journal, or write a blog for our website. We want to hear from you and we want your input. We are the NCDD family and each of you are a part of it!

I have been honored to serve as your Dean, and most fortunate to have a Board of Regents and Faculty so genuinely dedicated to our mission. Without them, along with our Executive Director Rhea Kirk and her assistant Hunter Shepherd, we could not possibly have survived this challenging year. I am fully confident that incoming Dean Doug Murphy will do a stellar job for you, and that we'll all be back at Harvard together in 2021!

(Continued from cover - "E.D.'S Corner")

Mark your calendars now and please visit the NCDD Website: www.ncdd.com for more details about our upcoming seminars or call the NCDD Office 334-264-1950 for more information.

I look forward to seeing each of you at one of our upcoming NCDD seminars soon!

--- Rhea Kirk

Case Law Roundup
By
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BLOOD SAMPLE – COMPLIANCE WITH STATE REQUIREMENTS

State v. Cyrek
2019 WL 5692691; 2019 Ohio 4515

Testimony that blood vial used to collect defendant's blood came from a "blood alcohol draw kit" which contained "white powder" used for "preserving blood specimens" and was of a product of the manufacturing process sufficient to show compliance with regulation requiring the vial contain a "solid anticoagulant."

State v. Hodges
457 P.3d 1093 (Okla. App. 2020)

Blood drawn and tested in Kansas according to their statutes and regulations admissible in prosecution in Oklahoma.

BREATH TEST – CONSENT

State v. Banks
434 P.3d 361 (Or. 2020)

Oregon Supreme Court holds that state's implied consent law does not prohibit a person from refusing a breath test; the state must demonstrate that the officer's question could reasonably be understood only as a request to provide physical cooperation and not as a request for constitutionally-significant consent to search; in this case, the state did not meet its burden as Ladd's question—"Will you take a breath test?"—was ambiguous. Ladd could have been asking defendant to physically submit to a test that was justified by a warrant exception, or Ladd could have been asking defendant for his consent to search, thereby establishing a warrant exception.

DISCOVERY

Hardman v. State
456 P.3d 1223 (Wy.2020)

No error in failing to produce SOP manual for blood testing and linearity studies for subject's blood test.

DEFENDANT'S THEORY OF DEFENSE

State v. Hollon
2019 WL 7160549 (Idaho App.) not reported
State v. Austin, 163 Idaho 378, 413 P.3d 778 (2018),

Conviction reversed where trial judge denied the defendant ability to allege rising blood alcohol defense.

Commonwealth v. Taylor
209 A.3d 444 (Pa.Super.2020)

Error to exclude defendant's expert witness's testimony that NHTSA's SFST while validated to detect relationship to consumption of alcohol to SFST that there has been no such validation relating to the consumption of drugs to the SFST.

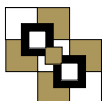
DUI – DRUGS – DRE - HGN

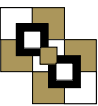
City of Seattle v. Levesque
460 P.3d 205 (Wash. App.2020)

Police officer was not qualified to opine as expert as to whether defendant was affected by a specific category of drugs or whether that effect rose to level of impairment, in prosecution for driving under the influence (DUI); officer was not a drug recognition expert (DRE), had completed only basic training and 40-hour DUI course, and at time of defendant's arrest, officer had completed only 13 DUI investigations, most of which involved assisting a lead officer.

State v. Sarkisian-Kennedy
2020 WL 399105 (Vt.); 2020 Vt. 6

Error to admit HGN without expert testimony and refusal to submit to PBT; Error was harmless – one judge dissenting.





DUI SUFFICIENCY OF EVIDENCE - PER SE CHARGE - IMPAIRMENT

State v. Christy
594 S.W.3d 286 (Mo.App.2020)

Trial court did not clearly err in finding no substantial evidence of intoxication, supporting dismissal when defendant’s blood alcohol concentration was below .08%.

Commonwealth v. Allen
2020 WL 1528036 (Pa. Super.) not reported

Insufficient evidence to uphold conviction for DUI-alcohol; trial court based its conclusion on Defendant’s red and glassy eyes, slow and slurred speech, irregular behavior, and failing two field sobriety tests; Appellate Court held that under established case law, that is not enough.

ENHANCEMENT

Commonwealth v. Monarch
200 A.3d 51 (Pa.2019)

Enhanced mandatory minimum sentence of one year based on defendant’s refusal to submit to warrantless blood test was unconstitutional; enhanced mandatory minimum sentence based on defendant’s alleged refusal to submit to warrantless breath test was invalid under *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314.

State v. Guzman and Heckler
455 P.3d 485 (Or.2019); 366 Or. 18

Oregon Supreme Court says that for out-of-state convictions to be “statutory counterparts” to Oregon DUII law there must be “close element matching” - Kansas and Colorado prior convictions do not pass the test.

State v. Anderson
941 N.W.2d 724 (Minn.2020)

Use of administrative license revocation may be used to enhance Misdemeanor DUI to Felony DUI.

Van Do v. State
2020 WL 1619995 (Tex.App.) not released for publication yet

Enhancement to Class A misdemeanor based on excessive blood alcohol level must be submitted to the jury.

State v. Holder
459 P.3d 1282 (Mont.2020); 2020 Mt. 61

Notation in National Crime Information Center (NCIC) sufficient proof of prior conviction.

State v. Yemane
2020 WL 1242983 (Minn. App.) unpublished

Pre *Birchfield* conviction is a qualifying offense and can be used to enhance misdemeanor DUI to felony.

State v. Lund
458 P.3d 1043 (Mont.2020); 2020 Mt. 53

Defendant could have been convicted in Alaska based on same conduct in Montana; thus, prior convictions in Alaska can be used as predicate convictions.

People v. Voburg
2020 WL 238715 (Colo. App.)

Prior convictions are an element of felony DUI must be proved to a jury. But compare *People v. Jiron*, 2020 WL 1057236 (Colo.App.)

and cases cited therein holding that a prior conviction is a sentence enhancer.

EVIDENCE – EXPERT TESTIMONY - DAUBERT

Kemp v. State
280 So.3d 81 (Fla.App.2019)

Expert testimony concerning braking by defendant prior to underlying vehicular collision was not reliable under Daubert, and thus inadmissible, and Improper admission of expert testimony that defendant’s car had braked prior to an accident was not harmless.

IMPLIED CONSENT – REQUEST FOR REVIEW HEARING

Creecy v. Kansas Department of Revenue
447 P.3d 959 (Kan.2019); 310 Kan. 454

Fifty dollar (\$50.00) fee assessed under K.S.A. 2014 Supp. 8-1020(d) (2) to review administrative suspension of driver’s license is unconstitutional on its face as statute requires the payment a fee, without provision for indigency, before a motorist can obtain the procedural due process.

Casiano v. State, Department of Transportation
434 P.3d 116 (Wy.2019); 2019 WY 16

Wyoming Supreme Court says prosecutor’s concession that BAC is inadmissible in criminal case is not collateral estoppel in the administrative suspension case.

MIRANDA

State v. Mast
459 P.3d 809 (Or.App.2020)

Failure to timely advise Defendant of Miranda rights results in exclusion of all statements, FST and breath alcohol test.

State v. Taylor
438 P.3d 278 (Or.App.2019)

Results of breath test should have been suppressed as a result of the Defendant’s claim that she did not understand Miranda warnings given by police.

OFFICER OPINION TESTIMONY

People v. Kubuugu
433 P.3d 1214 (Colo.2019); 2019 CO 9

Deputy’s testimony regarding defendant’s alcohol consumption was expert testimony where the deputy testified that Kubuugu exuded a metabolized alcohol odor, which indicated that Kubuugu drank a volume of alcohol consistent with the number of beer cans found in his car and that he consumed such alcohol before he entered the apartment complex that could not be elicited under guise of lay testimony.

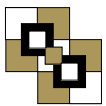
REFUSAL

State v. Thurlow
221 A.3d 548 (Me.2019); 2019 ME 166

Conviction for DUI reversed where jury instructed that they could consider defendant’s refusal to submit as evidence he was under the influence.

Howitt v. State
266 So.3d 219 (Fla. App.2019)

Defendant’s refusal to take breath test and submit to field sobriety test inadmissible as he was not advised of any adverse consequences of his refusals.





SEARCH & SEIZURE – BLOOD SAMPLE - WARRANT REQUIREMENT – EXCEPTIONS

Mitchell v. Wisconsin

--U.S.--, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019)

Exigent circumstances exception to Fourth Amendment's warrant requirement almost always permits blood test without a warrant where driver suspected of drunk driving is unconscious and therefore cannot be given a breath test; The Court did "not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." The Court vacated the Wisconsin Supreme court ruling that the statute authorizing a blood draw in the case where a driver is unconscious or incapable of consent allowed the blood draw. The case was remanded to give the Defendant a chance to show that his blood "would not have been drawn if police had not been seeking BAC information and that drawing the blood did not interfere with other pressing needs or duties" of law enforcement.

McGraw v. State

289 So.3d 836 (Fla.2019)

The Florida Supreme Court followed Mitchell in a case dealing with the same facts. It vacated the decision of the Fourth District Court of Appeals that held the implied consent provided by the statute was equivalent to actual consent. It remanded the case to the trial court with the same instructions as in Mitchell v. Wisconsin.

Garza v. State

458 P.3d 1239 (Wy.2020); 2020 WY 32

Respectfully objecting to having blood drawn as a result of a search warrant sufficient to support charge of obstructing arrest.

Hernandez v. State

824 S.E.2d 67 (Ga.App.2019)

State coerced motorist to consent to state-administered blood test by providing inaccurate information about the consequences of refusing test on Washington State driver's license.

Diaz v. Bernini

435 P.3d 457 (Ariz.2019)

Arizona Supreme Court holds the statutory requirement of express agreement to testing does not equate to or necessarily imply a voluntary consent requirement.

Cote v. State

435 P.3d 668 (Nev.2019) unpublished

Initial consent was rendered involuntary where driver was presented with a written warning that indicated that a decision to withdraw her consent would be futile because the officers would seek a warrant to obtain the blood draw, with force if necessary.

State v. Randall

930 N.W.2d 223 (Wis. 2019)

State did not perform "search" on motorist's blood sample when it tested sample for presence of alcohol - Dissent would hold that testing of blood constituted a "search" requiring warrant - subsequent withdrawal of consent did not render initial voluntary consent ineffective.

People v. Debruyne

2019 WL 3059769 (Mich.App.) unpublished

Officer's statements in affidavit for warrant were his conclusions of defendant's behavior rather than observation of facts.

State v. Oaks

2019 WL 560271 (Tenn.Crim.App.) unpublished

Facts surrounding crash did not establish exigent circumstances for blood draw; Officer's had established probable cause for the blood draw within minutes after the crash; Electronic means were available to the officers; Officer's testimony regarding amount of time necessary to obtain a warrant was speculation as none had ever tried before and not amounting to articulable facts.

Jacobson v. State

2020 WL 1949622 (Tex.App.) not released yet

No requirement that State obtain separate warrant to test blood lawfully seized by search warrant; Appellate Court says: "Appellant's blindly pounding on the square peg of Martinez (State v. Martinez, 570 S.W.3d 278, 281 (Tex. Crim. App. 2019)) cannot drive it into the round hole of his facts."

State v. Staton

2020 WL 1503125 (Tex. App.) not released yet

Search warrant authorizing State to take blood from defendant also authorized the State to conduct blood alcohol testing on the blood that was collected; State was not required to obtain an additional search warrant to authorize the testing and analysis of defendant's blood.

Commonwealth v. Trahey

2020 WL 1932770 (Pa.)

Analysis of whether or not there was exigent circumstances must consider the availability of a lawful breath test; there was no time-sensitive need to conduct a warrantless blood draw where, among other factors, a lawful breath test was available.

Commonwealth v. Mohasci

2020 WL 788880 (Pa.Super) not reported

Defendant's consent to blood draw was not knowing nor conscious as she subjectively believed that she would have faced enhanced criminal penalties if she refused to consent to a blood draw; the police failed to provide her with any warning pertaining to an effect of a potential refusal, nor did the police affirmatively tell appellant that she had a right to refuse the blood draw.

People v. Lopez

260 Cal.Rptr.3d 18; 46 Cal.App.5th 317

Officer's omission of implied consent law's admonitions was one factor for trial court to consider when it reviewed totality of the circumstances to determine if defendant's consent to warrantless blood draw was voluntary.

State v. Weddle

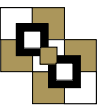
224 A.3d 1035 (Me.2020); 2020 ME 12

Warrantless blood draw performed at the scene of the accident pursuant to 29-A M.R.S. § 2522 violated Defendant's Fourth Amendment right to be free from unreasonable searches and seizures; Defendant's blood was taken without a warrant, without his consent, and without probable cause to believe that he was impaired by alcohol at the time his blood was drawn; No exception to the Fourth Amendment's warrant requirement applies.

State v. Pool

457 P.3d 890 (Idaho2020); 166 Idaho 238

Absent evidence that a defendant has affirmatively withdrawn his or her consent, implied consent for warrantless blood draws remains a valid exception to the Fourth Amendment warrant requirement.



SEARCH & SEIZURE – CONTINUED DETENTION

State v. Arreola-Botello 451 P.3d 939 (Or.2019)

All investigative activities, including investigative inquiries, conducted during a traffic stop are part of an ongoing seizure and are subject to both subject-matter and durational limitations -Police officer's questioning of defendant and request to search defendant's vehicle, during lawful traffic stop, violated state constitution's search and seizure provision; and Police officer's violation of state constitution's search and seizure provision warranted suppression of evidence obtained as result of subsequent search of vehicle.

State v. Berry 2019 WL 1503975 (Ohio App.)

Stop for speeding and two lane violations along with bloodshot and watery eyes and slight odor of alcohol insufficient to detain for field sobriety testing; Driver did not slur his words and provided his documents normally.

State v. Quitko 2020 WL 2374904 (Wis.App.) slip copy

Speeding and odor of alcohol insufficient to detain Defendant for further investigation.

SEARCH & SEIZURE – IN-HOME ARREST

People v. Hammerlund 939 N.W.2d 129 (Mich.2019); 504 Mich. 442

Defendant did not give up her expectation of privacy by reaching out her opened front door to grab her driver's license and other documents from officer - Officer entering front door to arrest for misdemeanor offense was illegal under Payton - Entry cannot be justified under fresh pursuit exception.

SEARCH & SEIZURE – INITIAL STOP

Peterson v. State 264 So.3d 1183 (Fla.App.2019)

Defendant's failure to maintain a single lane of traffic did not create a reasonable safety concern, and thus deputy did not have probable cause to believe that defendant committed a traffic violation.

City of Missoula v. Metz 451 P.3d 530 (Mont.2019); 2019 MT 264

Officer lacked a particularized suspicion to conduct a driving under the influence (DUI) investigation prior to completion of community caretaker stop that occurred in response to a 911 call requesting a welfare check on an apparently sleeping driver - Car was parked but running vehicle on a sunny morning, where defendant sat up in vehicle and rolled down window upon officer's approach - Officer did not observe any indication of a medical problem, officer's purpose upon making contact was simply to identify defendant, officer did not initially ask any questions about defendant's welfare but only asked him to get out of vehicle and provide identification.

State v. Martinez 450 P.3d 405 (N.M.App.2019); 2019-NMCA-063

Officer's conduct in opening defendant's car door during traffic stop amounted to a search that required a warrant.

Birkland v. Commissioner of Public Safety 940 N.W.2d 822 (Minn.App.2020)

Driver was not required to turn into the innermost lane while making left turn; No reasonable suspicion to stop.

City of Wheaton v. Ford 2020 WL 859253 (Ill.App.) not reported

Minor lane violations not enough to justify stop of Defendant's vehicle. Officer said that he saw the vehicle "veer right" and cross "the dash white [lines] which separate the curb side lane from the median side lane, and then it quickly corrected itself and went back into the median side lane." Officer said the vehicle "crossed onto the line by about *** six inches, maybe half a foot." He then testified that he observed a second instance of improper lane usage when the car "barely nicked the line and then slowly veered back into his lane."

Commonwealth v. Moyer 2020 WL 788876 (Pa. Super.) not reported

Crossing double yellow line while making right-hand turn at odd angle along with some minor driving observations cannot justify stop.

SEARCH & SEIZURE – MEDICAL BLOOD

State v. Martinez 570 S.W.3d 278 (Tex.Crim.App.2019)

Insufficient evidence existed to show that defendant intentionally abandoned blood which had been drawn by medical personnel for medical purposes following automobile accident; the third-party doctrine did not apply to blood drawn from defendant for medical purposes following automobile accident; and the State's acquisition and subsequent analysis of defendant's blood sample constituted a search for purposes of the Fourth Amendment.

State v. Eads 2020 WL 2177112 (Ohio App.) slip copy

Ohio Appeals Court holds Defendant has a Fourth Amendment privacy interest in medical records requiring State to seek warrant to obtain the records; The Carpenter Court clarified that an individual's reasonable expectation of privacy under the Fourth Amendment is not eliminated simply because records are held by a third party. *Carpenter v. United States*, ___ U.S. ___, 138 S.Ct. 2206, 2217, 201 L.Ed.2d 507 (2018).

SEARCH & SEIZURE – URINE SAMPLE

People v. Eubanks 2019 WL 6596704 (Ill.); 2019 IL 123525 slip opinion

Illinois Supreme Court says urine test for drugs may NOT be taken incident to arrest like a breath test for alcohol but requires a valid consent, exigent circumstances or a warrant; that the blood was drawn only for BAC purposes and that the process of obtaining a warrant would not have interrupted other needs or duties under Mitchell. Sentencing

People v. Ayala 2019 WL 6835716 (Cal.App.) (unpublished)

Condition of probation that allowed probation office unlimited access to his computers and recording devices for fleeing and eluding and driving with BAC above .15 stricken from probation order.

People v. Pringle 2020 WL 1041070 (Cal.App.) unpublished

Imposition of condition of probation for DUI that Defendant submit his computers and recordable media, including his cell phone to warrantless searches held to be unreasonable.

Bici v. State 2020 WL 1482183 (Fla.App.) slip opinion

Trial Court may not consider a Defendant's exercise of their constitutional rights against them at sentencing.

