HIGHWAY SAFETY LAW UPDATE

June 6, 2016 Office of the Prosecuting Attorneys Training Coordinator April/May/June, 2016

GTSB forms Impaired Driving Coalition

The Governor's Traffic Safety Bureau has announced the formation of an Impaired Driving Coalition to address impaired driving issues in Iowa.

The Coalition is an attempt to bring together traffic safety professionals and other interested persons to examine the causes of traffic crashes and to recommend initiatives to reduce impaired driving and lower the number of the injuries and deaths on Iowa's roadways.

The Coalition includes members of the Department of Public Safety (including the Governor's Traffic Safety Bureau and the Division of Criminal Investigation Criminalistics Laboratory) and other Iowa governmental agencies (the departments of Justice, Corrections, Transportation, Public Health, and Human Rights have all been asked to participate) as well as staff from Region 7 of the National Highway Traffic Safety Administration. Coalition members also include city, county, and state law enforcement agencies, as well as private partners interested in traffic safety.

Coalition members have been asked to review existing Iowa data, laws, regulations and programs and to propose a coordinated statewide impaired driving plan for preventing and reducing impaired driving behavior, which will then be submitted to the National Highway Safety Administration.

A new discovery request regarding the DataMaster

Prosecutors in Northwest Iowa have been receiving a discovery request in OWI cases where the defense attorney seeks the "zip" file created by the DataMaster instrument during a subject's breath test.

The requested zip file can be provided by the DCI Lab. The file contains the three things that make up the instrument's printout—the signature of the officer, the points that make up the graph, and the printout showing the results of the test and the identification data entered into the instrument by the officer. Prosecutors who receive such a request are asked to contact the Lab as soon as possible after receiving such a request.

Note that the zip file request is *not* a request for DataMaster source code. The Lab *cannot* comply with a request for source code, as the Lab does not have access to that code.

INSIDE THIS ISSUE

1	GTSB forms Impaired Driving Coalition
1	A new discovery request regarding the DataMaster
2	"Iowa's Drug Culture" conference announced
2	Cases of Interest from the Iowa Supreme Court
3	Recent Unpublished Opinions Involving Alcohol & Traffic Safety
11	Citations from previous issue of the HSLU

"Iowa's Drug Culture" conference announced

Prosecutors and law enforcement officers are invited to attend "Iowa's Drug Culture: What's on the Road Ahead?" to be held Tuesday, September 27 at Prairie Meadows in Altoona.

The event will focus on drugged driving enforcement and traffic safety issues, as well as drug abuse in Iowa schools, workplaces, and among the general population. **A description of the event is attached** to this issue of the *Highway Safety Law Update.*

The event is free and a continental breakfast and lunch will be provided, but seating is limited. Persons interested in attending should contact Mark Peterson at mapeterson@mn-ia.aaa.com.

Cases of Interest from the Iowa Supreme Court

Drug license suspension of section 910.5 must be mentioned during guilty plea

State v. Fisher, 877 N.W.2d 676 (Iowa, 4/8/16)

A defendant who entered a guilty plea to possession of marijuana successfully challenged on appeal the plea on the basis that he was not informed of the license suspension imposed as a result of the a conviction for the offense (see Iowa Code section 901.5), and also was not informed of the amount of surcharges to be imposed as a result of the conviction.

The license suspension of Iowa Code section 901.5 is imposed upon conviction of certain drug offenses, whether those offenses are related to driving or not—so such suspensions are considered a *direct* consequence of a guilty plea to such an offense--part of the punishment imposed. This punishment of a license suspension contrasts with the license revocation imposed as a result of an OWI conviction. OWI-based license revocations are considered *collateral* consequences of OWI convictions in that they are designed to protect the public from impaired drivers, rather than designed to punish a defendant. This distinction means that although licensing issues need not be spelled out in OWI pleas, such consequences must be part of guilty pleas in drug cases.

Finally, although courts should specify the amount of the criminal surcharge to be charged for a conviction, the Court in this case only discussed (but did not decide) whether a court's failure to so specify would be grounds for successfully attacking a future guilty plea. (***Note:*** to protect guilty pleas against future attacks, written guilty pleas as well as in-court colloquies should specify 1) whether a license sanction will be imposed as a result of the conviction, and in addition, 2) the total amount of fines and surcharges to be imposed as a result of the conviction.)

Consent searches: actual v. "apparent" authority to consent to a search

State v. Jackson, ___ N.W.2d ___ (Iowa, 4/29/16)

A resident of an apartment had actual authority to consent to a search of a *room* in which the defendant, a non-resident, was found "sleeping" (as the room was the resident's bedroom) but the resident did not have either actual authority or apparent authority to authorize the search of a *backpack* in the room.

After reviewing federal authorities, the Court determined that under the U.S. Constitution, "apparent authority" to consent to a search exists when the State is able to show that it is objectively reasonable for the officer to believe that the person granting consent had the actual authority to do so. In this case, the ownership of the backpack (and therefore, the authority of the resident to consent to a search of the backpack) was ambiguous for the following reasons: although the defendant was found "sleeping" in the apartment, officers did not ask him or the residents if the defendant was staying at the apartment or if he had any property in the apartment; no one suggested that the defendant had broken into the apartment and "the circumstances clearly suggested (the defendant) was an overnight guest"; although the resident consented to a search of the room for guns or evidence of a robbery, officers did not

Continued on page 3

Continued from page 2

ask if the backpack belonged to the resident and as it was cold outside and the defendant was found "sleeping" in pajama pants, officers should have realized that he would have other, warmer clothes available and "it was likely the clothes (the defendant) was wearing when he arrived at the apartment" were in the bedroom.

The Court identified these factors as giving rise to an ambiguity as to ownership of the backpack and therefore, officers should have questioned the actual authority of the apartment resident to consent to a search of the backpack to resolve the ambiguity. The State was unable to show that the officers took steps to resolve the ambiguity and therefore, could not rely upon the resident's consent to search, based upon the resident's apparent authority, as an exception to the warrant requirement. Evidence found in the back pack (including a gun and other evidence of the armed robbery) "and the fruits of the unlawful search" should have been suppressed; conviction reversed and case remanded.

RECENT **UNPUBLISHED DECISIONS** INVOLVING ALCOHOL AND TRAFFIC SAFETY

Citation of unpublished cases is governed by I.R.App.Pro. 6.904(2)(c), which provides that unpublished opinions do not constitute binding authority and requires that when citing an unpublished opinion, a party include an electronic citation where the opinion can be readily accessed on-line. (Note: all opinions may be accessed online in the Archives section of Opinions of the Iowa Court of Appeals or Supreme Court, at http://www.iowacourts.gov .

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(Recent Unpublished Decisions Arranged by County)

Black Hawk County Patrick Neill Moreno v. State, No. 14-1982 (Iowa Court of Appeals, filed April 6, 2016.) **Post conviction attacks on OWIs fail.** A PCR applicant challenging three OWI cases denied relief because the applicant entered a guilty plea in the first case yet did not argue that the attorney provided incompetent advice or that the result would have been different with competent advice, offered only speculations that he should have received a better plea offer in the second case, and in the third case, complained that his attorney failed to adequately argue a motion to suppress; no relief was possible in the first two cases, and the court reviewed the transcript and determined that the attorney in the third case was competent; "(b)ecause trial counsel did what (the defendant) now claims she should have done, post-conviction counsel breached no essential duty in failing to raise the issue, and this ineffective-assistance-of-counsel claim also fails."

Black Hawk County State v. Jasmin Alagic, No. 14-2142 (Iowa Court of Appeals, filed April 27, 2016.) **OWI 3rd, driving while barred, and driving while revoked convictions affirmed; issue of lack of an interpreter at sentencing preserved for post-conviction proceedings.** The defendant entered a guilty plea at a proceeding where a Bosnian-language interpreter was present, but no such interpreter was present at time of sentencing; defendant's claim that he received ineffective assistance by counsel's failure to insure the presence of an interpreter at the sentencing hearing preserved; the state of the record in the case made it "impossible to tell what (the defendant's) level of English proficiency is or which portions, if any, of the sentencing proceedings he was unable to understand."

Black Hawk County State v. Oliver Lee Lewis, No. 15-0530 (Iowa Court of Appeals, filed May 25, 2016). **Abuse of discretion for refusing to allow withdrawal of pleas; convictions for OWI, public intoxication, and driving while revoked vacated.** Defendant's guilty pleas were conditioned on placement in the OWI treatment program but defendant was ineligible for such placement and asked to withdraw the pleas; the court's failure to permit withdrawal of the plea, the scheduling of a sentencing hearing and the imposition of judgment and sentence was an abuse of discretion; "(b)ased on this nullification of a key aspect of the plea agreements. . . we conclude the district court abused its discretion in denying (the defendant's) request to withdraw his guilty pleas."

Buchanan County State v. Chad Michael Knight, No. 15-0258 (Iowa Court of Appeals, filed May 11, 2016.) **Pro se defendant unhappy with standby counsel denied relief; convictions affirmed.** Defendant convicted of OWI 2nd and third offense possession of a controlled substance requested substitute standby counsel on the eve of trial after failing to communicate with appointed standby counsel for six months; defendant's claim of a constitutional right to effective standby counsel is not supported by authority and, to the extent that the claim is valid, it is properly pursued on post conviction relief.

Continued on page 4

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Buena Vista County In the interest of Y.B. and Y.B., No. 16-0494 (Iowa Court of Appeals, filed May 11, 2016.) **Foster care for children affirmed.** After a woman was arrested for OWI, she sent her children to her sister's home for care, from which they were taken by the children's father; the father failed to cooperate with DHS, had no stable home, had a "long criminal history" and limited contact with the children prior to DHS; trial court's determination that the children be placed in foster care rather than with the father supported in the record, and "efforts for reunification should focus on the mother as the parent from whom custody was taken."

Cedar County State v. Dawn Marie Lienau, No. 15-1407 (Iowa Court of Appeals, filed May 25, 2016). **Counsel not ineffective; driving while barred conviction affirmed.** District court ruling on the admissibility of DOT records (based upon the Supreme Court ruling in State v. Shipley, 757 N.W.2d 228 (Iowa, 7/18/08)) was correct and any appellate challenge would have been meritless; counsel not ineffective for advising defendant to plead guilty after received ruling.

Clinton County State v. Cody Eugene Olson, No. 15-1603 (Iowa Court of Appeals, filed May 11, 2016.) **Defendant's failure to file a motion in arrest of judgment after OWI guilty plea forecloses challenge on appeal.** The defendant's guilty plea and conviction affirmed in a summary opinion, with claims of ineffective assistance preserved for possible post-conviction relief.

Dubuque County Justin Jentz v. State, No. 15-0710 (Iowa Court of Appeals, filed May 25, 2016). **Defendant who was convicted of a felony did not suffer prejudice even though he thought he was facing a misdemeanor.** Defendant whose attorney failed to tell him he was facing a felony charge (and who rejected a plea offer to misdemeanors) did *not* receive ineffective assistance of counsel because he did *not* prove he would have accepted the plea offer; his testimony at the PCR hearing was "indecisive at best" and given that the State indicated that it would proceed against him as an habitual offender if the current conviction was quashed and that such an outcome, the court noted, would mean "he is now willing to risk a potential fifteen-year sentence with a three-year mandatory minimum when he has already served his time under the original sentence and been discharged" the court was not persuaded that the defendant suffered prejudice in the case; the trial court's denial of post conviction relief affirmed.

Iowa County John Robert George v. State, No. 15-0733 (Iowa Court of Appeals, filed May 11, 2016.) **Subsequent misidentification of driver not basis for relief from earlier driving under suspension conviction.** Fact that an officer who cited the defendant in 2012 mistakenly identified the applicant in 2014 was not "newly discovered evidence" requiring relief from the 2012 conviction; the misidentification did not exist at the time of the first conviction and at best was merely impeachment evidence; post conviction relief properly denied.

Linn County State v. Brandon Lynn Schaul, No. 15-0466 (Iowa Court of Appeals, filed May 11, 2016.) **Instruction regarding defendant's impairment by alcohol *or drugs* supported by the evidence.** Defendant's objection to jury instruction which provided for impairment "by alcohol *or other drug or a combination of such substances"* properly refused by the trial court; defendant admitted to smoking marijuana the afternoon of the crash, and had evidence of cannabinoids in his system; "(t)he State's expert explained that when combined with alcohol, marijuana had an additive effect—making it more detrimental than consuming alcohol or marijuana individually"; this evidence supported the trial court's refusal to remove the reference to drugs from the marshalling instructions.

Continued on page 5

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Linn County State v. Brandon Lynn Schaul, No. 15-0466 (Iowa Court of Appeals, filed May 11, 2016.) **Sufficient evidence of impairment by alcohol and marijuana.** Defendant admitted to consuming 8-10 beers, smelled like alcohol, admitted to smoking marijuana, and presented expert retrograde evidence that his alcohol concentration was .072 at the time of the collision; a State's expert testified that an alcohol concentration of .05 is impaired and that with a .07, a driver is "2.1 times more likely" to be in a crash than a sober driver; the defendant was "disoriented, dazed, in shock, very upset, in an excited state, and very agitated" and repeatedly crawled in and out of his vehicle, through a broken window searching for something; the foregoing was sufficient evidence for a jury to find the defendant guilty of vehicular homicide and OWI causing serious injury.

Linn County State v. Brandon Lynn Schaul, No. 15-0466 (Iowa Court of Appeals, filed May 11, 2016.) **Defendant's impairment caused the victims' death and serious injuries.** Intoxicated defendant who crossed the center line and killed a young woman and seriously injured her daughter "caused" the death and serious injury; the defendant did not contest that his *driving* had caused the crash but argued that his operation while intoxicated did *not* cause the crash; however, "there were no weather or road conditions that impacted this collision" and the crash reconstructionist concluded that the defendant "crossed completely into the oncoming lane, driving fifty-five miles per hour, and struck (the victim's) vehicle head-on without applying his brakes"; a State's witness testified to impairment by alcohol and marijuana and the court concluded that the evidence provided "substantial evidence to support the causation element of the offenses."

Linn County State v. Brandon Lynn Schaul, No. 15-0466 (Iowa Court of Appeals, filed May 11, 2016.) **Defendant's medical records/hearsay issue preserved for possible post conviction relief.** Defendant's expert witness relied on the defendant's medical records to express opinions, so when the State offered those records, the trial court denied an objection based on physician-patient privilege; on appeal the defendant claimed counsel was ineffective for failing to object on hearsay grounds; the court of appeals preserved the issue for possible post conviction relief.

Marshall County State v. Jeffrey R. Flowers, No. 15-1956 (Iowa Court of Appeals, filed May 25, 2016). **Guilty pleas to two counts of theft and two counts of driving while barred were knowing and voluntary; convictions affirmed.** "On the record before us, it is crystal clear (the defendant) understood the rights he was waiving and did so voluntarily and intelligently"; counsel was not ineffective for failing to file a motion in arrest of judgment.

Mitchell County State v. Tylor David Patrick, No. 15-0207 (Iowa Court of Appeals, filed March 23, 2016.) **Credible evidence (including retrograde extrapolation) supports guilty verdict in vehicular homicide.** Trial court's denial of motion for new trial affirmed on appeal; evidence of the defendant's blood alcohol content, expert witness' retrograde extrapolation of those results, "the expert testimony that I found to be credible that an intoxicated person would not have the full ability to operate a motor vehicle properly, and evidence that the defendant was swerving as he drove down the road and eventually lost control of his vehicle" supported the jury's verdict.

Mitchell County State v. Tylor David Patrick, No. 15-0207 (Iowa Court of Appeals, filed March 23, 2016.) **Jury instruction on causation properly given.** Trial counsel was not ineffective for "failing to request a jury instruction defining causation, or object to the lack thereof" where the trial court in fact gave the uniform instruction on causation, as urged by the Iowa Supreme Court in State v. Adams, 801 N.W.2d 365 (Iowa, 1/20/12).

Continued on page 6

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Muscatine County State v. Tanya Lynn Coder, No. 15-0786 (Iowa Court of Appeals, filed March 23, 2016.) **No plate light justifies stop.** Officer's testimony (corroborated by video) that the defendant's license plate light did not work in violation of Iowa Code section 321.388 was probable cause to stop vehicle.

Muscatine County State v. Tanya Lynn Coder, No. 15-0786 (Iowa Court of Appeals, filed March 23, 2016.) **804.20 complaint not decided because other evidence of defendant's intoxication was "overwhelming".** Defendant on appeal argued that her 804.20 rights were violated (she asked to call husband and call was allowed, but was told husband "would not be able to come back to the holding cell to meet with her"; then she placed four calls to an attorney but was not able to speak with the attorney—and she told the officer that she would not consent until she spoke with an attorney, whereupon the officer told her that she had to take the test within a two hour window and the officer would consider her decision a refusal); however, evidence of defendant's intoxication was so overwhelming the court of appeals did not reach the merits of her 804.20 complaint; she had an open container when stopped, volunteered that she had been drinking, eyes were bloodshot and water, had difficulty maintaining balance, failed SFSTs "demonstrating the maximum level of impairment" and the trial court did not consider the test refusal in reaching its decision.

Polk County William Lee Torrence and Cheri Leigh Torrence v. Murphy's Bar & Grill, Inc. and Escape Lounge, L.L.C., No. 15-0326 (Iowa Court of Appeals, filed April 27, 2016.) **Crash victims denied dramshop coverage.** Summary judgment properly granted to two bars defending dramshop cases in which the primary victim suffered "serious and permanent injuries" from a fatal crash where the intoxicated driver who died tested 0.27; plaintiffs did not establish that either establishment had "sold and served" alcohol to the decedent when he was intoxicated; evidence showed that the decedent had been sold and served two beers and a shot of whiskey at one of the bars about two hours before the crash, but there was no evidence from which to infer that he was intoxicated at that time nor was there evidence that the decedent had been sold or served any alcohol at all from the other bar.

Polk County William Lee Torrence and Cheri Leigh Torrence v. Murphy's Bar & Grill, Inc. and Escape Lounge, L.L.C., No. 15-0326 (Iowa Court of Appeals, filed April 27, 2016.) **No basis to infer intentional destruction of evidence.** Plaintiffs' argument that one of the defendant bars destroyed evidence was not sufficient to overcome summary judgment; plaintiffs did not request video tapes until after they were overwritten according to a predetermined schedule, and other missing evidence was explained (and those explanations were not contradicted by the plaintiffs); the trial court properly refused an adverse inference based upon the missing evidence; summary judgment for the bars in dramshop action affirmed.

Polk County State v. Dallas Leroy Hawkins, No. 15-1454 (Iowa Court of Appeals, filed April 27, 2016.) **Appellate court will not consider issues based upon a video not in the record; OWI and possession of crack cocaine convictions affirmed; PBT issue preserved for post conviction relief.** Trial counsel did not challenge whether the arresting officer had grounds to request a PBT and appellate counsel presented the argument based upon a video not in the record; the "video was not filed in the district court and is not a part of the record. Even if we had access to the video, we could not consider it on appeal"; issue preserved for possible post conviction relief.

Polk County State v. Jared Joseph Giunta, No. 15-1867 (Iowa Court of Appeals, filed May 11, 2016.) **Once judgment is entered, a defendant whose sentence is reconsidered is not eligible for a deferred judgment.** A defendant who was denied a deferred judgment at sentencing, was sentenced, and then whose sentence was reconsidered by the court pursuant to Iowa Code section 902.4 was not eligible for entry of a deferred judgment at reconsideration; reconsideration is for sentencing options after judgment has been entered, and not for whether or not judgment should have been or (should be) entered or deferred.

Continued on page 7

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Polk County Carl Eric Olsen v. Iowa Board of Pharmacy, No. 14-2164 (Iowa Court of Appeals, filed May 11, 2016.) **No requirement that the Board recommend reclassification of marijuana.** Although the Board of Pharmacy recommended reclassification of marijuana in 2010, the Board declined to do so in 2014; despite statutory language that the Board "shall" make recommendations to the legislature, the Code provides the Board with discretion in its recommendations and the "narrow" reading of a specific statute ignores the broad authority given the Board; "the Board could reasonably conclude it was unnecessary to repeat its recommendation"; and "although the Board must make annual recommendations, section 124.201 does not require a running list of its past recommendations on an annual basis"; the trial court's decision (which affirmed the Board's rejection of a citizen's petition seeking such an recommendation for reclassification) affirmed.

Polk County State v. Alston Ray Campbell, No. 15-0648 (Iowa Court of Appeals, filed May 11, 2016.) **Claims of ineffective assistance of counsel must be pursued in post conviction proceedings; OWI 2nd conviction affirmed.** Defendant's six claims on appeal that his "successive trial counsel were ineffective" could not be addressed on the basis of the inadequate record before the court; the claims were preserved for possible post conviction relief.

Polk County State v. Charles Walter Allen Torsky, No. 15-0314 (Iowa Court of Appeals, filed May 11, 2016.) **Traffic stop supported by reasonable articulable suspicion, OWI conviction affirmed.** Officer who observed the defendant's vehicle driving on the right hand fog line, weave within the right lane, vary speed between 40 and 48 mph in a 55 mph zone, and who observed another vehicle attempt to pass the defendant several times (but stop the pass due to the defendant's weaving) and finally, observe the defendant weave over the right fog line on several occasions while the officer followed the defendant for two miles had, "under the totality of the circumstances. . . reasonable suspicion to initiate a traffic stop and conduct further inquiry."

Scott County State v. Dawayne McGowan, No. 15-0561 (Iowa Court of Appeals, filed March 23, 2016.) **Failure to make plea agreement part of the record requires resentencing.** Driving while barred sentence vacated where trial court referred to a plea agreement as one of the reasons for imposing its sentence, but the plea agreement itself was never made part of the record; a reviewing court, "when looking at the record, cannot determine precisely what was considered by the district court or even if the district court followed the plea agreement in whole or in part. . ."; sentence vacated and remanded for resentencing with instructions for the sentencing court to make the plea agreement part of the record.

Scott County State v. Marchello Rembert, No. 15-1091 (Iowa Court of Appeals, filed April 27, 2016.) **OWI guilty plea supported by factual basis.** The defendant admitted to being the driver in a one-vehicle crash, paramedics and officers smelled an alcoholic beverage on his breath and when asked if he had been drinking and smoking marijuana, the defendant replied "probably" to both questions; "(a)nd (the defendant) did admit he operated a motor vehicle while intoxicated."

Scott County State v. Jayel Antrone Coleman, No. 15-0752 (Iowa Court of Appeals, filed April 27, 2016.) **Once car is properly stopped, officer may ask for license, registration and insurance.** Officer who learned that the registered (female) owner of a car was under suspension was permitted to stop car and after learning that the driver was a male, the officer could lawfully ask for the driver's license, registration and insurance information; driving while barred conviction affirmed. (***Note:*** the opinion and concurring opinion in this case should be reviewed when considering whether a given traffic "detention" is constitutionally permissible. See Rodriguez v. U.S., 575 U.S. __, 135 S.Ct. 1609, 191 L.Ed.2d 492 (4/21/15).)

Continued on page 8

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Scott County State v. Tiano Nishan Trice, No. 15-0437 (Iowa Court of Appeals, filed May 11, 2016.) **Detention during brake light stop justified by suspicion of drug activity.** Officers who detained vehicle for several minutes after stopping the vehicle for a brake light violation were justified in extending the detention and broadening the scope of their inquiry; the vehicle occupants had recently been at a building known for high drug trafficking, had been in and out of the building within two minutes, had lied about their previous whereabouts, and the defendant's previous criminal activities were known to the officers; these facts supported an extended detention which, at twelve minutes, was "not unreasonably long" and which was, in part, caused by the driver's difficulty in finding insurance information; the stop, the detention and subsequent consensual search which resulted in the discovery of drugs were justified and the defendant's motion to suppress was properly denied.

Scott County State v. Dionte Williams, No. 15-0190 (Iowa Court of Appeals, filed May 11, 2016.) **Marijuana sentence improper but driving while barred conviction not disputed on appeal; remand for entry of proper sentence.** After advising the defendant that the maximum sentence for possession of marijuana was 6 months, the trial court entered a sentence of one year for the offense, concurrent with a two year sentence for driving while barred and a ten year sentence for possession with intent to deliver cocaine; the marijuana sentence was vacated and remanded for entry of a proper sentence on that charge while the other convictions and sentences were unaffected by the ruling.

Scott County State v. Kai Robert Miller, No. 15-0915 (Iowa Court of Appeals, filed May 11, 2016.) **Vehicular homicide convictions affirmed; defendant's actions "caused" victims' deaths.** Court rejects defendant's argument that, because the deceased driver/victim of the other car was also under the influence, he, the defendant, was relieved of criminal responsibility for the deaths involved; the defendant's actions were a "substantial" factor in causing the deaths (defendant was traveling 68.5 mph in a 35 mph zone and entered an intersection where he struck the victims' car broadside, with an impact "so forceful that it caused the front passenger seat in (the victims') car to be 'crushed all the way on top of the driver's seat'", and there was no indication that the defendant had attempted to slow down or apply the brakes); although the victim driver also was intoxicated, "a reasonable juror could have found that (the victim driver's) intoxication did not 'break[] the chain of causal connection between the defendant's actions and' the deaths and serious injuries" which resulted from the defendant's intoxicated driving.

Scott County State v. Kai Robert Miller, No. 15-0915 (Iowa Court of Appeals, filed May 11, 2016.) **Trial counsel not ineffective for failure in jury instructions; vehicular homicide convictions affirmed.** Trial counsel was not ineffective for failing to request a "concurrent causes" instruction; the language the trial court used in its causation instruction "was drawn from a uniform jury instruction approved" in State v. Adams, 810 N.W.2d 365 (Iowa, 1/20/12) (a case which, in a footnote, suggested that trial counsel in that case had been ineffective in failing to focus on causation)

Scott County State v. Aaron Lu Chrisp, No. 14-1817 (Iowa Court of Appeals, filed May 11, 2016.) **Stop supported by reasonable articulable suspicion; OWI conviction affirmed.** Officers had grounds to stop a vehicle which matched "the make, model, and license plate number" of a vehicle seen "driving away from a bar fight that involved a knife and property damage"; the stopping officer smelled alcohol and started an OWI investigation that resulted in a conviction; the information available at the time of the stop justified that stop for investigatory purposes.

Continued on page 9

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Scott County State v. Jazmond Turner, No. 15-0759 (Iowa Court of Appeals, filed May 25, 2016). **Sufficient evidence to conclude defendant was the driver; eluding conviction affirmed.** Officers' identification of the defendant as the driver was sufficient where the first officer recognized the defendant from a previous interaction, the license plate identified the defendant as the owner of the vehicle and records came back showing a photo of the defendant and a second officer saw the same records and photo and identified the defendant as the driver; this was sufficient evidence for a jury to conclude that the defendant was the driver, and reject his claim that his younger brother was the driver.

Scott County State v. Craig Aaron Hermann, No. 15-0938 (Iowa Court of Appeals, filed May 25, 2016). **"Someone" coming to the jail requires an 804.20 explanation.** Defendant who, after phone calls, told officers that "someone" was coming to the jail, *by the use of that word* invoked his right (under 804.20) to consult with a family member and/or consult privately with an attorney before deciding whether to submit to a test; this invocation triggered a duty by the officer to advise the defendant that family members could visit with him and an attorney could consult privately with him; further, although the court pointed out that there was no "absolute right to delay making a decision about the test until an attorney or family member arrived", "there was still approximately one hour left before the end of the two-hour period for chemical testing", and the officer's reason for not waiting for "someone" to appear ("it was a Friday night and we had several calls waiting") did not outweigh the defendant's rights under 804.20; trial court ruling denying suppression of the .184 breath test reversed; case remanded for further proceedings.

Story County State v. Hannah Benck, No. 15-0550 (Iowa Court of Appeals, filed March 23, 2016.) **Reasonable grounds to invoke implied consent—per se controlled substances.** Trial court properly denied defendant's motion to suppress where officer invoked implied consent without observing any impairment, but with knowledge that the driver had smoked marijuana; officer had reasonable grounds to believe the defendant had "any amount of a controlled substance" in her person, in violation of Iowa Code section 321J.2(1)*(c)*.

Story County State v. Victor Lawrence Markley, No. 15-0165 (Iowa Court of Appeals, filed April 27, 2016.) **No violation of 804.20.** Defendant's assertion of specific officer "duties" under Iowa Code section 804.20 rejected on appeal: there is no "duty" to inform a person of the calls, but calls must be provided if requested; officers who turn down a requested phone call must explain the scope of the statutory right to the permitted calls, but otherwise there is no such duty; there is no "duty" to tell someone of the persons who can be called or the purposes of such calls unless a call is denied; "the officer here did not misstate the law and did not undermine, but honored, (the defendant's) right to make phone calls"; OWI 3rd conviction as an habitual offender affirmed.

Story County State v. Jonathan Kay Davis, No. 14-1976 (Iowa Court of Appeals, filed April 27, 2016.) **Per se controlled substances alternative of OWI statute does not require impairment.** "The supreme court has held section 321J.2 allows conviction solely upon proof the defendant had 'any amount' of a controlled substance in his body, without regard to whether the defendant was actually impaired." See State v. Comried, 693 N.W.2d 773 (Iowa, 3/18/05).

Story County State v. Jonathan Kay Davis, No. 14-1976 (Iowa Court of Appeals, filed April 27, 2016.) **Lack of correlation between impairment and evidence of a drug is not fatal to the OWI per se statute.** "The lack of any numerical correlation or direct relationship between the amount of marijuana metabolites in a person's system and the impairment of that person's ability to drive does not foreclose the finding that the statute is rationally related to protecting the public. The statute is aimed at keeping

Continued on page 10

RECENT **UNPUBLISHED DECISIONS** INVOLVING ALCOHOL AND TRAFFIC SAFETY

Citation of unpublished cases is governed by I.R.App.Pro. 6.904(2)(c), which provides that unpublished opinions do not constitute binding authority and requires that when citing an unpublished opinion, a party include an electronic citation where the opinion can be readily accessed on-line. (Note: all opinions may be accessed online in the Archives section of Opinions of the Iowa Court of Appeals or Supreme Court, at http://www.iowacourts.gov .

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drivers who are impaired because of the use of illegal drugs off the highways. Unlike the blood alcohol concentration test used to measure alcohol impairment there is no similar test to measure marijuana impairment. There is, though, as was used here, a test to measure the use of marijuana, a drug illegal in the State of Iowa, in a person's body. There being no reliable indicator of impairment, the legislature could rationally decide that the public is best protected by prohibiting one from driving who has a measurable amount of marijuana metabolites." Quoting Loder v. Iowa Dept. of Transp, 622 N.W.2d 513 (Iowa App., 12/13/00).

Story County State v. Jonathan Kay Davis, No. 14-1976 (Iowa Court of Appeals, filed April 27, 2016.) **Reference to crack does not require new trial.** In marijuana-based OWI trial, an officer's' reference to prior crack usage by the defendant was cured by an immediate objection by trial counsel; the objection was sustained by the court, the matter was stricken from the record, and the court issued a "strong admonition" to the jury; the problem was dealt with properly and the trial court did not err by denying the defendant's motion for a mistrial.

Woodbury County State v. John William Ness, No. 15-0133 (Iowa Court of Appeals, filed March 23, 2016.) **Entry into home justified by exigent circumstances.** Officer who forced entry into defendant's home was justified in acting without a warrant where three separate emergency calls reported the defendant's conduct, including his dangerous driving and threats to "blow up houses on the block (and) kill everybody"; when officer took defendant into custody, officer had concerns for the officer's safety and that of the neighborhood "where he's threatening to blow people up or blow houses up, run kids over, I don't know what he has in his house. I don't want to give him the opportunity to go back into his house to grab whatever explosive device he may have had to blow up houses"; OWI 2nd and assault convictions affirmed. (Court did not consider State's alternate argument that the entry was justified by community caretaking.)

Woodbury County State v. John William Ness, No. 15-0133 (Iowa Court of Appeals, filed March 23, 2016.) **Test for exigent circumstances to enter a home without a warrant.** To justify a warrantless entry into a home the following guidelines must be considered: a grave offense is involved, the suspect is reasonably believed to be armed, there is probable cause to believe the suspect committed the crime, there is strong likelihood of escape if not apprehended, there is strong reason to believe he is on the premises, and the entry, though not consented to, is peaceable; although not all factors were present in this case, OWI "'is a relatively serious crime", the officer reasonably believed the defendant may have been armed and "that there was a danger of violence and injury to the officers"; defendant had threatened to blow up and shoot his neighbors and a witness said the defendant had almost hit two of the neighbors with his vehicle" and the officer confirmed that the defendant was on the premises when entry occurred; trial court properly denied the defendant's motion to suppress.

Woodbury County State v. John William Ness, No. 15-0133 (Iowa Court of Appeals, filed March 23, 2016.) **Deposition of unavailable witness entered into the record; court does not determine the propriety of the decision.** At trial, the State asserted (and the court found) that a witness was unavailable for purposes of rule 5.804(b)(1), and that witness's deposition was read into the record; "assuming without deciding" that the trial court ruling was in error, the evidence was cumulative of other evidence admitted without objection. (Note: defendant did not raise a confrontation/cross-examination objection at trial and therefore it was not preserved for appeal.)

Citations from previous issue of the Highway Safety Law Update

State v. Prusha, 874 N.W.2d 627 (Iowa, 2/12/16)
State v. Lamoreux, 875 N.W.2d 172 (Iowa, 2/19/16)

Prepared by the

Prosecuting Attorneys Training Coordinator (PATC)

Under a project approved by the Governor's Traffic Safety Bureau (GTSB), in cooperation with the National Highway Traffic Safety Administration (NHTSA). The opinions, findings, and conclusions expressed in this publication are those of the author and not necessarily those of the PATC, GTSB, NHTSA, or the Iowa Department of Justice. **Definition of what is *not* funny: getting ready to put out this newsletter, and finding that the entire directory has disappeared from your computer. Not, not funny. Go someplace else for your jollies—and consider yourself lucky you are even reading this!**

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Back to page 1 ▲

Tuesday, Sept. 27, 2016 • 8:30 a.m. – 3:30 p.m.

Registration and continental breakfast start at 8 a.m.

Prairie Meadows Casino • 1 Prairie Meadows Dr, Altoona, IA

FREE EVENT (lunch provided) • LIMITED SEATING • RSVP REQUIRED

See Agenda on Back

Who should attend?

Law Enforcement
Elected Officials
Courtroom Officials
Health Professionals
School Administrators
Traffic Safety Professionals
Employer Safety Representatives

Join leading experts to enhance your knowledge of drug use (legal and illegal) and its potential impact on driving. Learn about challenges and countermeasures to this ever evolving issue. As fellow stakeholders in the traffic safety field, we welcome you to attend the summit and join us in the process of building a common knowledge foundation from which we can all proceed.

To RSVP, contact Mark Peterson at mapeterson@mn-ia.aaa.com

The Auto Club Group · Auto Club Group Traffic Safety Foundation · Iowa Department of Public Safety · Iowa State Patrol · Blank Children's Hospital UnityPoint Health · GTSB · Iowa-Illinois Safety Council Chapter of National Safety Council

Iowa's Drug Culture – What's on the Road Ahead?

Tuesday, September 27, 2016

8:00 a.m.	**Continental Breakfast**
8:30 a.m.	**Welcome** Kevin Bakewell, Senior Vice President & Chief Public Affairs Officer, AAA-The Auto Club Group Roxann Ryan, Commissioner, Iowa DPS Susan DeCourcy, Regional Administrator, NHTSA Region 7
9:00 a.m.	**National Trends** Jake Nelson, MPH, MPP, Director, Traffic Advocacy and Research, AAA
10:00 a.m.	**Iowa Crash Tends Overall/Impairment** Vince Kurtz, Trooper, Iowa State Patrol
10:45 a.m.	Break
11:00 a.m.	**Drug Abuse in Iowa: What's Trending?** Linda Kalin, RN, BS, CSPI, Executive Director, Iowa Poison Control Center
12:00 p.m.	Lunch
1:00 p.m.	**Drugged Driving Enforcement and Awareness** Jim Meyerdirk, Drug Recognition Expert Coordinator, Iowa Governor's Traffic Safety Bureau
2:00 p.m.	**Panel Discussion** ***Prosecuting Attorney*** – Maurice Curry, Assistant Polk County Attorney ***High Schools*** – Adam Choat, Officer, Pleasant Hill Police Department ***Employers*** – Tess Benham, Sr. Program Manager, Prescription Drug Overdose Initiative, National Safety Council
3:15 p.m.	**Wrap Up** Jake Nelson, MPH, MPP, Director, Traffic Advocacy and Research, AAA