LAW UPDATE

HIGHWAY SAFETY

July 3, 2014 Office of the Prosecuting Attorneys Training Coordinator April, May, June, July, 2014

Why all the paperwork from IDOT?

A question from our electronic mailbag: A county attorney asks: "My people wonder why we are getting 85 page reports from IDOT for our suspension, revocation or barred driving cases? They wanted to know what happened to the IDOT (the Iowa Department of Transportation)?"

The Iowa Supreme Court case of State v. Kennedy, 846 N.W.2d 517 (Iowa, 5/9/14) is what "happened to the IDOT." (See the discussion of Kennedy on page 3 of this newsletter.)

When the State prosecutes a license sanction case it is necessary to prove that the person was indeed under the license sanction at the time the charge was filed. The IDOT is the agency which maintains driving records, and therefore, proof of a sanction is by records maintained by the IDOT. The records provided to prosecutors are copies of the official IDOT records, and are certified as such by the appropriate IDOT custodian of records.

These properly certified IDOT records are then admissible in the license sanction prosecution without the testimony of the custodian because *the records themselves were not prepared for the prosecution.* The IDOT records were created and maintained without reference to any particular case, and the IDOT certification simply acknowledges that fact. Therefore, the records are not considered "testimonial" in nature, and as such do not implicate constitutional rights of confrontation and cross-examination, and are admissible as an exception to the hearsay rule. See State v. Shipley, 725 N.W.2d 228 (Iowa, 7/18/08).

In these same prosecutions, however, it is not enough to prove with certified records that the IDOT has imposed a sanction against a person. In these prosecutions, the State must also prove that the IDOT provided notice of the sanction to the person. See State v. Green, 722 N.W.2d 650 (Iowa, 10/13/06).

The IDOT notice is typically provided by regular mail, and proof of the mailing is by affidavit—the IDOT employee who takes the notices to the post office swears that he/she mailed the notices.

But State v. Kennedy is a case at the crossroads of State v. Shipley and State v. Green. In Kennedy, the IDOT records of license sanction were properly certified and admissible. However, the Kennedy affidavit of mailing of the notices was prepared especially for the case. The affidavit of mailing in Kennedy read, in essence, "I swear that I mailed notice of this sanction on a certain day when I mailed lots of other notices."

Because the affidavit of mailing in Kennedy was a document created *for that case*, that affidavit was "testimonial" in nature, and admission of the document was a violation of the defendant's constitutional rights of confrontation and cross examination. If, however, the Kennedy affidavit of mailing had been prepared *on the actual date that the notice was mailed,* the affidavit would have qualified as non-testimonial and would have been admissible under Shipley.

So: to return to the question: "Why we are getting 85 page reports from IDOT for our suspension, revocation or barred driving cases?" Because the affidavit of mailing required by Green must (under Shipley) be created *on the date of mailing.* And since it is not unusual for the IDOT to send out 85 pages of notices on any given day *and* the notice for a given prosecution is on just one of those 85 pages, the IDOT must send the prosecutor all 85 pages to insure admission of the relevant page.

And what is a prosecutor to do? Explain the situation to the defense attorney and request a stipulation which permits a redaction of all records which are irrelevant to the case at hand. And then calm down, and rest assured that the IDOT is attempting to resolve this problem.

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United States Supreme Court

Anonymous tip of observed reckless/impaired driving supports traffic stop

Navarette v. California, 572 U.S. ___, 134 S.Ct. 1683, 188 L.Ed.2d 680 (4/22/14) (No. 12-9490, United States Supreme Court, filed April 22, 2014.) Justice Thomas. Police received an anonymous call that was relayed to officers as follows: "'Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8-David94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.' " Officers located and stopped the pickup. The driver and his passenger were ultimately charged with transporting marijuana. They filed a motion to suppress, arguing that the anonymous call was an insufficient basis to stop them. The California trial court denied the motion and the defendants were convicted. A California appellate court affirmed the trial court, and the defendants sought review by the United States Supreme Court.

The United States Supreme Court also rejected the defendants' argument and affirmed their convictions. Although anonymous, the call "bore adequate indicia of reliability for the officer to credit the caller's account": the call identified a specific vehicle, the caller was an eyewitness, and the pickup was observed 19 miles south of the claimed incident (18 minutes after it occurred). Therefore, the call was substantially contemporaneous with the incident as reported. "In evidence law, we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy. . ." See Fed. Rule Evid., 803.(1) and (2) (present sense impressions and excited utterances; see also I.R.Ev. 5.803(1) and (2).) The report gave rise to a reasonable articulable suspicion that the operator of the pickup was impaired, and therefore, the officer had a basis under the 4th Amendment to stop the vehicle.

(**Note:** Iowa permits vehicle stops based upon sufficiently detailed anonymous tips of impaired or dangerous driving observed by the tipster, see State v. Walshire, 634 N.W.2d 625 (Iowa, 10/10/01). However, a tip of *future* impaired or dangerous driving does not support such a stop. See State v. Kooima, 833 N.W.2d 202 (Iowa, 6/28/13) (an anonymous tip of impaired driving must include "personal observation of erratic driving" and other facts to be sufficiently reliable to support a stop by an officer who has not observed any equipment or traffic violations or erratic driving; *an anonymous call that an intoxicated person is preparing to drive away is not sufficient.*) In all cases, where safety permits, officers should attempt to confirm impaired driving through personal observation of the vehicle's driving behavior.)

Cell phones may not be searched "incident to arrest"

Riley v. California, 573 U.S. ___, __ S.Ct. __, __ L.Ed.2d __, (6/25/14) (Nos. 13-132 and 13-212, United States Supreme Court, filed June 25, 2014.) In the absence of exigent circumstances, cell phones seized incident to arrest may not be searched without first obtaining a search warrant.

Iowa Supreme Court

All numbers and letters (including county name) must be visible on plate

State v. Harrison, 846 N.W.2d 362 (Iowa, 5/2/14) (No. 12-0139, Iowa Supreme Court, filed May 2, 2014.) Justice Waterman. Officers received information from a confidential informant that if they went to a certain address, they could find "a black male. . .slinging dope" in a red Jeep Cherokee with Iowa license plate of 994 RDB. Officers went to the address and saw the vehicle, but it was unoccupied. They then saw a black male get into the Jeep and drive away. The officers followed the Jeep, lost it at one point, and then located it again and followed it back to the address where they had first seen it. When the Jeep drove away a second time, the officers followed it for three miles and then initiated a traffic stop on the basis that the Jeep's license plate frame covered up the county name on the plate, in violation of Iowa Code section 321.37(3). The defendant was found with eighteen pre-packaged crack cocaine rocks and was charged with possession with intent to deliver, a tax stamp violation, and driving under suspension, but was not charged with violating Iowa Code section 321.37(3). He filed a motion to suppress. One judge denied the motion on the basis that the stop was supported by reasonable articulable suspicion of drug dealing. The trial judge re-evaluated the motion to suppress and ruled that Iowa Code section 321.37(3) required that the county name be visible on a license plate. The trial judge upheld the stop on the basis that the officers had observed a violation of that statute. The defendant was convicted and appealed.

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The Supreme Court affirmed the conviction, and affirmed the validity of the stop on the basis that the covered county name on the license plate was a violation of Iowa Code section 321.37(3). That Code section makes it unlawful "“for the owner of a vehicle to place any frame around or over the registration plate which does not permit full view of all numerals and letters printed on the registration plate.” The Court rejected the defendant’s argument that the legislature intended the section to apply only to the large letters and numbers in the center of the plate. The Court concluded that “the plain language of Iowa Code section 321.37(3), read together with section 321.166(2), dictates the outcome of this appeal. Iowa Code section 321.166(2) requires a license plate such as (the defendant’s) to ‘display the name of the county.’” When an officer observes a license plate frame which covers the name of the county on the plate (as is the case when an officer observes any other traffic offense, see State v. Mitchell, 498 N.W.2d 691 (Iowa 1993)) the officer has grounds to stop the vehicle.

DOT affidavits of mailing must be created on the date of mailing

State v. Kennedy, 846 N.W.2d 517 (Iowa, 5/9/14) (No. 11-1685, Iowa Supreme Court, filed May 9, 2014.) Justice Wiggins. The defendant was charged with driving while revoked in violation of Iowa Code section 321J.21. The State’s proof of the revocation was a “Certified Abstract of Driving Record”, a fifteen-page document containing an abstract of the defendant’s driving history from the Iowa Department of Transportation (IDOT) records with a certification from the director of IDOT’s Office of Driver Services that the abstract was a true and accurate copy of the official record. The rest of the document was a certification detailing the process used to mail the license sanction notices and “attesting the IDOT mailed sanction notices that corresponded to Kennedy’s sanction numbers. Each of these certifications contained the official notices to Kennedy and the corresponding certificates of bulk mailing associated with each notice.” The defendant objected to the document on the basis that it violated his right to confrontation and cross-examination. The trial court admitted the document and the defendant was convicted.

The Iowa Supreme Court found that admission of the affidavits of mailing did, in fact, constitute a violation of the defendant’s rights to confrontation and cross examination, but that other, overwhelming evidence existed to support the defendant’s conviction. The Court dealt with the document in two parts—the Certified Abstract of Driving Record in one analysis, and the proof of mailing in a second analysis. The Certified Abstract itself is not a confrontation and cross-examination violation, because it is “non-testimonial.” The record was not created because of this criminal prosecution but in fact, “it would have existed even if there was not a subsequent criminal prosecution.” The certification attached to the abstract is also non-testimonial, in that it is merely a certification of “the authenticity of a copy of a preexisting document.”

However, the second part of the document, the affidavits of mailing which recited that the notices were sent to the defendant, were created *after* charges were filed and therefore, rather than merely attesting to the existence of a record, these affidavits “made factual representations the IDOT mailed the notices on particular dates.” Therefore, the affidavits of mailing were created for this prosecution, and that distinction makes the affidavits of mailing “testimonial” because they were created “under circumstances that would lead an objective witness to reasonably believe the affidavits would be available for use at a later trial.”

Although the affidavits of mailing were improperly admitted, the admission was harmless error and the Court affirmed the conviction. The admissible certified abstract “contained the same information as the inadmissible affidavits” including the effective dates of the defendant’s revocation under 321J, showing that the revocation was in effect at the time the defendant was arrested. “Therefore, the inadmissible affidavits of mailing did not have an effect on the verdict and the district court’s admission of the affidavits of mailing constituted harmless error.”

Driver’s request for 2nd breath test triggers a requirement that the officer notify the person of the right to an independent test

State v. Lukins, 846 N.W.2d 902 (Iowa, 5/16/14) (No. 12-2221, Iowa Supreme Court, filed May 16, 2014.) Justice Zager. The defendant was arrested for OWI and provided a breath test of .207. He then “made several statements to the arresting officer indicating his desire to retake the breath test” but the officer denied this request. The defendant then filed a motion to suppress the breath test, arguing that the officer’s refusal to permit a “retake” of the breath test amounted to a denial of an independent test under Iowa Code section 321J.11. The trial court denied the motion and the defendant was found guilty. The Court of Appeals reversed the conviction, holding that the trial court should have granted the motion to suppress. The State sought review.

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The Supreme Court affirmed the decision of the Court of Appeals, holding that the officer had denied the defendant an independent test and that as a consequence, the breath test of .207 should have been suppressed. Although the district court had found that the discussion between the officer and the defendant was a request to re-take the breath test and that there had been no request for an independent test, the Supreme Court determined that the defendant's statements *could reasonably have been interpreted as a request for an independent test*, and therefore, the officer should have "inform(ed) the detainee of his or her right according to the terms of Iowa Code section 321J.11." The Court ruled that the officer's failure to so inform the defendant required suppression of the breath test. The case was remanded for retrial.

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 State v. Patrick Moreno, No. 13-1053 (Iowa Court of Appeals, filed June 11, 2014.) **Probable cause to stop car for window obstruction.** Officer who saw a car moving "awfully slow" (10 mph in a 25 mph zone) with its windshield wipers operating at high speed when there was no precipitation, with its rear window completely covered by ice or snow and which crossed the center line of the street, had probable cause to stop the car for a violation of Iowa Code section 321.438(1) (obstructed windows); stop was valid and subsequent OWI conviction affirmed.

Black Hawk County State v. Jeremy L. Rutter, No. 13-0985 (Iowa Court of Appeals, filed June 11, 2014.) **Sheriff, not district court, must calculate "time served."** Defendant's motion to amend a driving while barred sentencing order to re-calculate credit for time served properly denied by the district court as the sheriff is to make that determination; see Iowa Code sections 901.6, & 903A.5(1).

Cerro Gordo County State v. Aaron Michael Hermen, No. 13-1060, (Iowa Court of Appeals, filed April 16, 2014.) **Plea agreement honored.** Prosecutor's recommendation of agreed upon sentence was appropriate and not a "wink and a nod"; the prosecutor outlined the sentences, "assured the court the sentences were reasonable, and explicitly asked the court to adopt the recommendation"; OWI 3rd, domestic violence by strangulation, and child endangerment convictions and sentences affirmed.

Cerro Gordo County State v. Jacob Douglas Fesco, No. 13-1736 (Iowa Court of Appeals, filed June 25, 2014.) **Lack of substance abuse evaluation not grounds to disturb sentence imposed.** Where defendant was ordered to submit to a substance abuse evaluation, failed to do so and failed to appear at sentencing, and where the PSI contained "a significant amount of information regarding (the defendant's) substance abuse and treatment history" the public interest in securing an evaluation was served, and sentencing could go forward without an evaluation; sentence affirmed.

Cerro Gordo County State v. Jacob Douglas Fesco, No. 13-1736 (Iowa Court of Appeals, filed June 25, 2014.) **Defendant's claim that trial court had agreed to be bound by a sentencing recommendation not proven.** Defendant did not produce a transcript or any other record to support a claim on appeal that the trial court had agreed to be bound by the parties' sentencing recommendation; "(q)uite simply, we are not at liberty to speculate as to what occurred in front of the plea court. (The defendant's) failure to provide necessary record in support of his claim requires the claim be denied."

Chickasaw County Mitchell Kelleher v. American Standard Insurance Company of Wisconsin, No. 13-1132 (Iowa Court of Appeals, filed April 30, 2014). **Insurance coverage denied for intentional act.** Insured who drove at a pedestrian (who ran out of the way), then "put his car in reverse, punched the gas, and backed over" the pedestrian causing a compound fracture of the leg was not covered under a policy which excluded "bodily injury or property damage caused by an intentional act." (Insured had assigned his rights to the pedestrian/victim, the plaintiff in this case.)

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Floyd County State v. Jason Ward Cagley, No. 13-0500 (Iowa Court of Appeals, filed June 25, 2014.) **No standing to object to search of car.** Defendant had no possessory interest in car owned by his mother and driven by his brother; therefore, defendant had no standing to object to the search of his gym bag which had been left in the car.

Franklin County State v. Jordan Lee Brown, No. 13-0995 (Iowa Court of Appeals, filed May 14, 2014.) **Test results (after an initial refusal to test) need not be suppressed due to the refusal.** Test results obtained after an OWI defendant refused testing, then fell asleep and, when awakened—and the officer repeated the warnings—consented to the test need, not be suppressed where there is no showing that the test was coerced; the record affirmatively shows that the officer "took steps to ensure (the defendant) was 'reasonably informed of the consequences of refusal to submit to the test or failure of the test.'"

Linn County State v. Darius Lovell May, No. 13-0628 (Iowa Court of Appeals, filed April 30, 2014). **No requirement State file a written resistance to a suppression motion.** Appellate court rejects defendant's argument that he was entitled to suppression of evidence on the basis that the State did not file a written resistance to a suppression motion but instead orally resisted and presented evidence in opposition to the motion. "We find no legal authority to support a conclusion a response to a motion must be in writing. We agree with the court's determination the motion to suppress should be addressed on the merits."

Linn County State v. Darius Lovell May, No. 13-0628 (Iowa Court of Appeals, filed April 30, 2014). **Drug evidence discovered from garbage hit sufficient to provide probable cause for a search warrant.** Search warrant application detailing evidence seized from garbage bags outside a residence sufficient by itself, to constitute probable cause to support the warrant.

Madison County State v. Walter Scott Sutton, No. 13-0810 (Iowa Court of Appeals, filed May 14, 2014.) **Public intoxication plea supported by factual basis.** Written plea with the words "I did appear in [a] public area and I was intoxicated with being convicted at least twice before of same crime" and the minutes of testimony (a police officer who was expected to testify that the defendant emitted a "strong odor" of an alcoholic beverage, and that the defendant was unable to communicate due to the defendant's intoxication) established a factual basis for the plea.

Madison County State v. Walter Scott Sutton, No. 13-0810 (Iowa Court of Appeals, filed May 14, 2014.) **Well-drafted written guilty plea with written waiver of presence and well-drafted order can establish a knowing and voluntary plea for serious and aggravated misdemeanors.** This opinion highlights a review of published and unpublished cases utilizing written guilty pleas with waivers of presence, and finds that a district court can be satisfied from the documentation provided (and in the absence of an in-person colloquy) that a defendant's guilty plea is knowing and voluntary. (***Note:*** a dissent argues that precedent requires a colloquy to determine whether the plea is knowing and voluntary.)

Polk County State v. Nicholas N. Ford, No. 13-0348 (Iowa Court of Appeals, filed April 16, 2014.) **Guilty plea/conviction for driving while barred affirmed.** An entry in the minutes of testimony that a DOT employee would testify that this defendant's license was barred at the time of the offense is sufficient to provide factual basis for a conviction.

Polk County State v. Alston Ray Campbell, No. 13-0558 (Iowa Court of Appeals, filed April 16, 2014.) **Known citizen's tip for OWI properly relied upon for stop.** A tip from a known citizen (who "could be held accountable for the information provided") in which the citizen reported personal observation of erratic driving was sufficient to support a vehicle stop

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Polk County State v. Steven Sherwood Bunce, No. 13-0124 (Iowa Court of Appeals, filed April 16, 2014.) **Reasonable grounds to request PBT.** Field sobriety testing is not the sole basis for determining whether "reasonable grounds exist" to request a PBT; the "totality of an officer's observations" allows an officer to request a PBT (observations which included, in this case, the time of night, the fact that the defendant was speeding, the defendant's reluctance to speak to the officer, the odor of alcohol, bloodshot eyes, as well as the defendant's failure of the HGN.)

Polk County State v. Steven Sherwood Bunce, No. 13-0124 (Iowa Court of Appeals, filed April 16, 2014.) **Reasonable grounds is not "a mathematical calculation."** Court of Appeals rejects an "implication that reaching a reasonable-ground determination under section 321J.5 requires a mathematical calculation where a court must tally the field sobriety test clues showing impairment against the clues not showing impairment. The conditions leading to a finding of reasonable grounds or probable cause "are not technical they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." See State v. Dawdy, 533 N.W.2d 551 (Iowa 1995).

Polk County State v. Dennis Earl Ewing, No. 13-0559 (Iowa Court of Appeals, filed April 16, 2014.) **Motor vehicle theft conviction reversed due to faulty jury instructions.** Proof of theft requires proof that a person *knew* a given item was stolen; counsel was ineffective for not objecting to a jury instruction which allowed the jury to find the defendant guilty if he "knew the vehicle was stolen or *had reasonable cause to believe that such property had been stolen*"; conviction reversed and case remanded for retrial.

Polk County State v. Michael Lomax, No. 12-0977 (Iowa Court of Appeals, filed April 30, 2014). **No expectation of privacy in a hospital emergency room.** Medical personnel (and not patients) control access to hospital emergency rooms; therefore, although a patient has an expectation of privacy to his/her belongings in the room, there is no need for law enforcement to secure a warrant to enter a hospital emergency room.

Polk County State v. Michael Lomax, No. 12-0977 (Iowa Court of Appeals, filed April 30, 2014). **Reasonable grounds to invoke implied consent.** Officer detected a strong odor of alcohol emanating from the defendant in the emergency room and in addition, witnesses reported that the defendant was driving erratically at a high rate of speed (which the officer testified was, in his experience, consistent with the severity of the crash); and the crash occurred at 3:00 a.m. "a time of night known to law enforcement to be associated with intoxicated drivers"; the totality of these circumstances is consistent with intoxicated driving and constitutes reasonable grounds to conclude that the defendant had been operating a motor vehicle while intoxicated.

Polk County State v. Michael Lomax, No. 12-0977 (Iowa Court of Appeals, filed April 30, 2014). **Preparing for blood draw is not an invocation of implied consent.** Officer's direction to dispatch to contact the medical examiner for a possible blood draw was not a reasonable grounds determination; "the statute requires the reasonable grounds to be made at the time action is required. . . (and). . .it was at the hospital when (the officer) detected the smell of alcohol on (the defendant's) person, which, combined with the other information (the officer) possessed, gave rise to the reasonable grounds determination" and it was only after this determination that blood was drawn and urine was collected.

Polk County State v. Michael Lomax, No. 12-0977 (Iowa Court of Appeals, filed April 30, 2014). **Arrest of officer does not give rise to a *Brady* violation.** Fact that an officer was arrested for possession of a controlled substance (and that this was not disclosed to the defense) did not amount to a *Brady* violation; defendant did not show that the arrest was material to the case and there was no reasonable probability that

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disclosure of the information would have changed the outcome; the trial court found that giving no weight whatsoever to that officer's testimony, evidence provided by the other officers was sufficient to support invocation of implied consent.

Polk County State v. Donnell Christopher Pearl, No. 13-0796 (Iowa Court of Appeals, filed April 30, 2014). **Prosecutor honored plea agreement; car theft conviction and sentence affirmed.** "(T)he prosecutor here did not breach the spirit of the agreement" and the court did not abuse its discretion by sentencing the defendant to consecutive terms.

Polk County State v. William Lewis Kinney, No. 13-0980 (Iowa Court of Appeals, filed April 30, 2014). **Filing of complaint while defendant is in State custody is not "arrest" by county authorities.** Defendant in State custody (at the Newton prison) against whom a new complaint was filed and who, as a result, we denied placement at a work release center, was not "arrested" for speedy indictment purposes either by the filing of the complaint nor by the denial of work release placement.

Polk County State v. Michael Glen Riley, No. 13-1398 (Iowa Court of Appeals, filed May 29, 2014.) **Pat down search justified.** Officer who that the defendant was under the influence of some narcotic believed (based on personal observation, the statements of witnesses, and the officer's training and experience) and to whom the defendant admitted having a knife in his possession was "justified in conducting a pat-down search in order to secure the knife, and any other weapon (the defendant) may have in his possession, for the officer's safety and the safety of the surrounding public."

Polk County State v. Michael Glen Riley, No. 13-1398 (Iowa Court of Appeals, filed May 29, 2014.) **Active resistance to pat down search justified handcuffing.** Where defendant resisted pat-down search and repeatedly refused to comply with directions to keep his hands out of his pocket, the officer acted reasonably in wrestling him to the ground and handcuffing him; this action was not a "de facto arrest" but rather a reasonable use of physical coercion to effect the pat down search.

Polk County In the Matter of Property Seized for Forfeiture from Charles Clark, d/b/a/ Day Dreams, No. 13-0062 (Iowa Court of Appeals, filed June 11, 2014.) **Glass pipes not paraphernalia and not forfeitable.** In the absence of any evidence of use or attempted use of items with controlled substances, glass pipes found "in a retail store where no illegal substances were found" are not paraphernalia under Iowa law and are not forfeitable.

Polk County State v. Cody Dean Radke, No. 13-0516 (Iowa Court of Appeals, filed June 11, 2014.) **Reasonable suspicion to seize defendant.** Officers had reasonable suspicion to seize defendant where he was riding in a vehicle linked to a violent burglary, police were conducting an operation to retrieve property stolen during that burglary, the defendant matched the description of one of the burglars, and the defendant retrieved a back pack from the vehicle's trunk, action which, given the violence perpetrated at the burglary, gave rise to suspicion that the defendant "was involved in ongoing criminal conduct that may have placed them in danger."

Polk County State v. Anthony Allen Mundy, No. 13-1370 (Iowa Court of Appeals, filed June 25, 2014.) **Trial court abused its discretion by denying motion to suppress on the basis that it was not filed in a timely manner.** Defendant demonstrated "good cause" for late filing of a motion to suppress where both the adult and juvenile public defender offices withdrew due to a conflict of interest and the attorney ultimately appointed filed the motion within one month of her appointment; the attorney was reasonably diligent in pursing the motion and the motion did not constitute surprise or prejudice the State; the trial court did not carefully weigh "the interest of the defendant in a full and fair trial against the interests of avoiding surprise and delay" and therefore abused its discretion in finding the motion was untimely filed; case remanded for consideration of the motion.

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Polk County State v. Anthony Allen Mundy, No. 13-1370 (Iowa Court of Appeals, filed June 25, 2014.) **Trial courts should consider the potential of post-conviction relief based upon ineffective assistance of counsel when ruling on the timeliness of suppression motions.** "The failure to timely file a motion to suppress could give rise to an ineffective-assistance-of counsel claim" in the event of a conviction, therefore, although "the specter of a looming ineffective-assistance-of-counsel claim" does not excuse non-compliance with filing deadlines, where "the State does not articulate any reason for disallowing the untimely filed motion other than mere non-compliance, the interests of judicial economy should be a factor in the trial court's consideration."
Polk County State v. Mark Aaron Thompson, No. 13-1764 (Iowa Court of Appeals, filed June 25, 2014.) **Defendant must provide record for appeal for unreported sentencing proceedings.** A defendant unhappy with the outcome of an unrecorded proceeding must provide a reviewing court with some type of record to provide a basis for meaningful review; the defendant's failure to do so waives the claim on appeal. (***Note:*** while acknowledging that precedent controls the outcome in this case, the opinion urges the Supreme Court to reconsider its precedent for unrecorded hearings "require reasons for sentencing be set out in a written order'; see discussion accompanying footnote #3.)

Pottawattamie County State v. Alan Scott Lawton, No. 4-030 / 13-0605 (Iowa Court of Appeals, filed April 30, 2014). **Car theft conviction affirmed but remanded for re-sentencing; foundation for telephone conversation reviewed.** Case remanded for resentencing where trial court failed to articulate its reasons for imposing a sentence; case is significant for its discussion of foundation supplied for introduction of recorded jail conversation.

Scott County State v. King P. Flowers, No. 13-0580 (Iowa Court of Appeals, filed April 16, 2014.)
Prior felony convictions proven. Defendant's habitual offender status was proven by certified records from Illinois with matching name and date of birth; in addition, the trial court was asked to compare handwriting on the Illinois records with the defendant's known signature on a waiver of jury trial from the instant case; the unique name, date of birth and handwriting comparison were sufficient evidence to prove the defendant's prior felonies beyond a reasonable doubt.

Scott County PR Pub, LLC d/b/a/ The Quarry v. Iowa Alcoholic Beverages Division, No. 13-1016 (Iowa Court of Appeals, filed April 16, 2014.) **Failure to report convictions grounds for refusing to renew license.** Liquor licensee's failure "on multiple occasions" to accurately report prior criminal convictions supports the licensing authority's decision to deny renewal of the license.

Scott County State v. Isaac Andrew Baldon, No. 13-0681 (Iowa Court of Appeals, filed May 14, 2014.) **Probable cause to search a car—odor of marijuana.** "When an officer smells marijuana emanating from a vehicle, if gives the officer probable cause to search that vehicle." Citing State v. Eubanks, 355 N.W.2d 57 (Iowa 1984).

Scott County State v. Larry Allen Bell, No. 13-0902 (Iowa Court of Appeals, filed May 29, 2014.) **Consecutive sentences not an abuse of discretion.** Trial court's overall sentencing plan of protecting the community and preventing the defendant from re-offending provides sufficient basis for consecutive sentences imposed for driving while barred and interference with official acts. (***Note:*** dissent argues that to impose consecutive sentences, precedent requires judges articulate a specific reason justifying the sentences, and that such a statement does not appear in this case.)

Scott County State v. Collin Rush-Brantley, No. 13-0445 (Iowa Court of Appeals, filed June 25, 2014.) ***Pro se* defendant's convictions reversed as trial judge gave inadequate warnings on the dangers of self-representation.** Defendant who fired several attorneys, identified his non-attorney mother as his "executive (and only)

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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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attorney", and who ultimately was permitted to proceed *pro se* successfully challenged his convictions for two counts of delivery because although the trial court engaged in two separate colloquies with the defendant, the court did not explain the dangers of self-representation or discuss the advantage of having competent and trained counsel; therefore, the defendant's wavier of counsel was not effective.

Sioux County State v. Rodney Charles Osterkamp, No. 12-1898 (Iowa Court of Appeals, filed April 16, 2014.) **Sufficient evidence of OWI.** Defendant, who was intoxicated when officers met with him, admitted that he had driven to the location and admitted he had not consumed alcohol since arriving at the location; also, one of the motorcycles at the location was warm, indicating that it had recently been operated; these facts would permit a reasonable trier of fact to determine that the defendant operated a vehicle while intoxicated.

Story County State v. Laura Danielle Nemeth, No. 13-0529 (Iowa Court of Appeals, filed June 25, 2014.) **No 804.20 violation where officer provided opportunity to make calls but did not tell the defendant why or whom she could call.** As the trial court succinctly put it: "He didn't have to tell her why she could make calls. He didn't have to tell her who she could call. He offered her to make any telephone calls she wanted to, which she did." Conviction affirmed.

Story County State v. Laura Danielle Nemeth, No. 13-0529 (Iowa Court of Appeals, filed June 25, 2014.) **Officer did not unreasonably limit phone calls; no 804.20 violation.** Where officer permitted defendant to use her cell phone while driving to the jail, read the defendant an 804.20 advisory and asked if she wanted to make any calls for any reason and the defendant called her father and did not ask to make any other calls and signed a document acknowledging she had "made all the phone calls" that she wished to make, the officer did not then have to ask her one more time if she wanted to make any phone calls. OWI conviction affirmed.

Webster County State v. Jahlee LaShawn Price, No. 13-0587 (Iowa Court of Appeals, filed April 16, 2014.) **Officer may ask for identification.** An officer does not need grounds to ask for a person's identification; "(n)ot all police contacts are considered a seizure within the meaning of the Fourth Amendment."

Webster County State v. Jahlee LaShawn Price, No. 13-0587 (Iowa Court of Appeals, filed April 16, 2014.) **Pat down of companion justified.** Where one officer was executing an arrest warrant in a location which had been the site of frequent investigations, and a second officer observed the arrestee's companion's body language indicate "something was amiss" including furtive glances among the companion, the arrestee, and others at the scene, and the companion, when asked if he was armed, put up his hands and backed away, second officer had reasonable articulable suspicion to believe the companion was armed, and was justified in conducting a pat-down search of the companion. (The "companion" was the defendant in this carrying weapons case.)

Webster County State v. Jahlee LaShawn Price, No. 13-0587 (Iowa Court of Appeals, filed April 16, 2014.) **After weapon found, search incident to arrest was appropriate.** Officer who found a weapon as a result of a permissible pat-down search had grounds to arrest the defendant for carrying weapons, and subsequent search incident to arrest was justified.

Webster County State v. James Allen Wehr, No. 3-1212 / 13-0386 (Iowa Court of Appeals, filed April 30, 2014). **Right to proceed pro se.** OWI defendant's conviction overturned where trial court denied defendant's request to proceed pro se and failed to conduct an on-the-record inquiry or to make appropriate findings.

Webster County State v. Rex Alan Neil Miller, No. 3-1194 / 12-1448 and State v. Dillon Gary Vosika, No. 3-1195 / 12-1449 (Iowa Court of Appeals, filed April 30, 2014). **Restitution award affirmed in operating without owner's consent case.**

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

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Defendants' challenge to restitution award rejected; defendants' argument that the award was based upon inadmissible hearsay rejected as Court determined that restitution is part of the sentencing hearing, and hearsay is permitted in sentencing proceedings. (This case is unique in that it was decided by a five judge panel—normally, the Court decides cases in three judge panels. The decision drew two dissents. Chief Judge Danilson argued that the evidence in the case did not support the amount of the restitution award, and Judge Mullins argued that restitution determinations should be decided only upon evidence admissible under the rules of evidence.)

Winnebago County State v. Thaddeus John Ellenbecker, No. 3-968 / 12-2229 (Iowa Court of Appeals, filed May 14, 2014.) **Too many assurances that a person is "not under arrest" may compel the opposite conclusion.** DCI agents' "frequent and continued assurances" that the defendant had not been arrested and was not in custody" are not determinative in question of whether this defendant was in custody for purposes of *Miranda* warnings; although "no one fact is controlling" on the issue, the facts of this case "compel" the conclusion that the questioning was custodial and the confession obtained in the absence of *Miranda* warnings should have been suppressed. (The agents' repeated assurances drew a footnote containing the following observation: "The (agents) doth protest too much, methinks." William Shakespeare, *Hamlet*, Act 3, Sc.2, line 220.)

Winneshiek County Andrea B. Hemesath v. Iowa Department of Transportation, Motor Vehicle Division, No. 13-1621 (Iowa Court of Appeals, filed June 11, 2014.) **DOT has discretion to revoke license; case remanded for agency to exercise that discretion.** Driver with an Iowa license whose Wisconsin driving privileges were revoked in 2005 for implied consent may face an Iowa license revocation in 2012 under operation of Iowa Code section 321.205; however, Iowa DOT is not *required* to revoke the driver's license but must exercise its discretion in making the decision; trial court properly ruled that the DOT failed to exercise its discretion but improperly ordered the revocation ended; case remanded to the DOT to allow the agency an opportunity to exercise its discretion in the determination.

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Citations from previous issue of the Highway Safety Law Update

Bearinger v. Iowa Dept. Transp., Motor Veh. Div.,844 N.W.2d 104 (Iowa, 3/14/14)

State v. Heinrichs, 845 N.W.2d 450 (Iowa App., 9/18/13)

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. If I did something as part of my job, and then certified that I did it on the same day I did it, my certification is non-testimonial and I don't have to testify to it. If, on the other hand, I did something as part of my job, but didn't certify that I did it until sometime later, when someone really cared whether I did it, then my certification that I did it probably *is* testimonial. And I would have to testify to that. Any questions?

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