# HIGHWAY SAFETY LAW UPDATE

Sept. 30, 2014 Office of the Prosecuting Attorneys Training Coordinator August, September, 2014

## Published cases, plates, and "mistakes"

This issue of the *Highway Safety Law Update* discusses seven published cases of the Iowa Court of Appeals. That Court issues hundreds of opinions each year, but only a small fraction of these cases are ordered published (and hence, "citable" using the National Reporting System citations, without need to include an on-line citation or a copy of the case, see I.R.App.Pro. 6.904(2)(c).)

Two of these seven cases (State v. Hollie, on page __ and State v. Knight on page _) concern the validity of traffic stops of vehicles with "paper plates"—motor vehicle registration cards, valid for 45 days, on DOT supplied forms which contain the words "registration applied for" and contain information identifying the dealer and the date of delivery. See Iowa Code section 321.25.

State v. Hollie determines that it is never permissible to stop a vehicle just because it has a paper plate/registration card. The Hollie case explains in no uncertain terms that officers have no right to stop a vehicle with a paper plate just to see if the plate is valid. There is no "unfettered cart blanche authority on the part of officers to make random investigatory stops".

State v. Knight also involves a paper plate stop where, at the time of the stop, the officer believed the vehicle had no plate at all. The Knight case explains the distinction between "mistake of law" stops and "mistake of fact" stops, and why the latter stops are valid, while the former are not.

In Knight, an officer observed a vehicle at 3:45 a.m. with no front plate, no rear plate, and no observable paper plate. It was not until the stop had occurred that the officer could see a paper plate in the tinted rear window, and this was visible only when the officer used a spot light to light the area. The facts and circumstances of the case made it objectively reasonable for the officer to believe the defendant was driving a vehicle with no license plates—and to drive with no plates (or no registration card/paper plate) is a violation of the Iowa Code—so the stop was valid.

The stop in Knight could be defended on the basis that the law forbids operation without any plates or registration cards, and the officer reasonably believed, based upon objectively reasonable grounds, that the vehicle was traveling without plates. The officer was mistaken, but the mistake was a "mistake of fact" and hence, the stop was valid.

Compare the Knight case with the Iowa Supreme Court's decision in State v. Tyler, 830 N.W.2d 288 (Iowa, 4/26/13). In Tyler, the officer observed a license plate that was covered with a tinted cover, making the plate difficult to read. The officer "found it difficult to run the license plate. . ." and stopped the vehicle. However, the State could point to no statute which outlawed a license plate cover—so the stop was based upon an officer's belief that a law existed which did not, in fact, exist.

This type of a stop, a "mistake of law" stop, cannot be the basis of a valid vehicle stop, and evidence seized pursuant to such a stop should be suppressed. Other recent "mistake of law" cases include a situation where an officer mistakenly believed a city ordinance outlawed "U-turns" on a city street, but no such ordinance existed, see State v. Louwrens, 792 N.W.2d 649 (Iowa, 11/24/10), and a situation where an officer believed a speed zone was 25 mph and stopped a car exceeding that speed, but the speed zone was actually 45 mph, and the person was traveling at a legal speed, see State v. Jesse Legore, No. 3-469 / 12-1334 (Iowa Court of Appeals, filed July 10, 2013.))

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Finally, in another (unrelated) "license plate" case decided in 2014, the Iowa Supreme Court has determined that license plate frames must not cover the name of the state or county of issuance, as Iowa Code section 321.37(3) 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" and Iowa Code section 321.166 requires that plates contain the name of the state and the county. See State v. Harrison, 846 N.W.2d 362 (Iowa, 5/2/14) (discussed in the last issue of the *Highway Safety Law Update*.)

# Published opinion of the Iowa Supreme Court

## *Judge suspended for appearing at courthouse in an intoxicated state*

In the Matter of Dean, ___ N.W.2d ___ (Iowa, 9/12/14) (No. 14-0510, Iowa Supreme Court, filed September 12, 2014.) Justice Appel. District Associate Judge Emily Dean arrived in a courthouse "in an intoxicated state and could not perform her scheduled duties." The Attorney General investigated the judge's conduct and reported to the Iowa Commission on Judicial Qualifications that the judge was persuaded to leave the courthouse and was ultimately hospitalized for "severe alcohol intoxication." The judge admitted to alcoholism and described two in-patient programs she had attended but left before completion. The Attorney General's report also detailed other incidents in which the judge was intoxicated. The Commission charged the judge with violating two canons of the Iowa Code of Judicial Conduct in that her actions eroded confidence in the judiciary and that she failed to demonstrate the competence and diligence required in performing judicial duties. The judge admitted the charges and the Commission recommended the judge be suspended for three months.

The Iowa Supreme Court suspended the judge for thirty days. The Court found "ample evidence" to support the charges. In fashioning a sanction, the Court reviewed but did not take guidance from cases in which judges had been convicted of OWI and had received public reprimands for that conduct. Those cases "did not involve intoxication of a judge when reporting for judicial duties at the courthouse", behavior which ". . .has an obvious direct linkage to the performance of judicial duties and to public respect for the integrity of the judicial process." The Court reviewed aggravating and mitigating factors in the case and concluded that despite the seriousness of the violations, "after a substantial period of difficult and painful struggle with alcoholism, (the judge) has confronted her disease and now has demonstrated a deep personal commitment to recovery" and that based upon the facts and circumstances of the case, "in order to protect the integrity of and respect for the judiciary, the application of the Commission should be granted and a thirty-day suspension without pay should be imposed. . ."

# Published opinions of the Iowa Court of Appeals

## *Paper license plate stop unsupported by facts*
## *No "unfettered cart blanche authority" for "random investigatory stops"*

State v. Hollie, ___ N.W.2d ___ (Iowa Ct. App., 6/26/13) (No. 3-501 / 12-0727, Iowa Court of Appeals, filed June 26, 2013; published by order of April 14, 2014.) Judge Doyle. An officer stopped the defendant's car because it had a paper plate/registration card, and during the stop learned that the defendant was barred. Defense counsel filed a motion to suppress the stop which the State resisted on the basis that the motion was untimely, and no good cause was shown for the late filing. The trial court agreed that no good cause was shown for the late filing and denied the defendant's motion, without reaching the merits. The defendant waived a jury trial, was tried by the court, was convicted, and appealed.

The Court of Appeals reversed the conviction. The motion to suppress was filed 69 days after arraignment, well beyond the 40 days provided for in I.R.Crim.Pro. 2.11(4). The trial court found that the reason for the late filing (the attorney "intended to file the motion to suppress but just didn't get around to doing it in a timely fashion") was not good cause to excuse the late filing. However, although the defendant was unable to convince the Court of Appeals that the trial court should have allowed the late filed motion, the Court of Appeals reversed the conviction on the basis that the defendant's attorney was ineffective for failing to timely file the suppression motion.

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By failing to timely file the motion, the attorney breached a duty and prejudice resulted to the defendant, because the officer had no specific reason for believing there was anything wrong with the paper plate. "The officer had no specific and articulable facts upon which to reasonably believe criminal activity was afoot. The officer's stated excuse for pulling (the defendant) over was, at best, a sweeping suspicion or hunch of criminal activity on the part of people in general. Our jurisprudence does not recognize an unfettered cart blanche authority on the part of officers to make random investigatory stops. . ." Conviction reversed and case remanded.

## ***Confusion between aggravated misdemeanor and felony does not undermine validity of conviction***

State v. Jentz, ___ N.W.2d ___ (Iowa Ct. App., 11/6/13) (No. 3-578 / 12-1619, Iowa Court of Appeals, filed November 6, 2013; published by order of August 27, 2014.) Judge Vogel. The defendant was charged with OWI and aggravated misdemeanor possession of marijuana by a trial information filed February 16, 2011. He failed to appear for a pre-trial conference in April, 2011, and a warrant was issued. That warrant was later withdrawn, but he again failed to appear in September. In late October, he was arrested in Florida and although he signed a consent to extradition in November, he was not extradited and was instead held in Florida until he entered a guilty plea and was sentenced to the Florida charge in April, 2012. He was then picked up by Iowa authorities and returned to Iowa, where he unsuccessfully attempted to have the prosecution dismissed on the basis that he was not being tried within one year of his arraignment. The OWI and possession cases were submitted to the jury on May 30, 2012. Only after a guilty verdict was returned and the parties reconvened for the enhancement phase did they become aware that the possession of marijuana charge was, in fact, a felony offense rather than an aggravated misdemeanor (The pending offense was properly a felony because an earlier conviction was for *manufacturing* marijuana, rather than possession, and therefore, based on the nature of the predicate offense of manufacturing, the pending offense was properly a felony.) Over defense objections, the court permitted the State to prove up the prior offenses which brought the charge to a felony level, and then sentenced the defendant as a felon. The defendant appealed, arguing that he should not have been sentenced as a felon, that his attorney was ineffective for failing to advise him that the offense was a felony, that his speedy trial rights were violated, and that the State did not adequately prove that he was the same person who had been earlier convicted of marijuana offenses.

The Court of Appeals affirmed. The Court preserved the claim of ineffective assistance of counsel for possible post conviction release. The Court then reached the merits of the defendant's speedy trial complaint by determining that a defendant's incarceration in another state was "good cause" for a delay in speedy trial. Although the defendant's waiver of the 90 day speedy trial did not include a waiver of the one year speedy trial requirement, the Court agreed with the State's argument that "it is simply unrealistic to require Florida to forego its prosecution, potentially violating its own speedy trial rules, to send (the defendant) to Iowa then back to Florida upon the resolution of the Iowa charges, but claim Iowa is violating its speedy trial rules if Florida refuses to do so." The Court also rejected the defendant's claim that the State had failed to prove that he was the same person previously convicted of the offenses. The prior convictions were incurred under "the exact same name, (Justin Robert Jentz) which is in itself unique, combined with the birth date and the fact these crimes were all committed in eastern Iowa, is sufficient proof of identity" to support the jury's verdict.

The Court also agreed with the trial court that although the case was charged as an aggravated misdemeanor under an "AG" court file number, the defendant was properly sentenced as a felon. Although the parties had believed that the case was an aggravated misdemeanor, the trial court determined "the language of the statute controlled over the misconception of the attorneys" and sentenced the defendant as a felon. The primary difference in the actual trial between a felony and a misdemeanor is that the defendant did not receive the appropriate amount of peremptory strikes during jury selection. "However, this is not a constitutionally mandated right, and (the defendant) failed to establish that prejudice resulted from this error." Convictions affirmed.

***Note:*** Judge Tabor dissented, arguing that the loss of preemptory strikes was a structural error that mandated automatic reversal.

## ***'No plate' stop valid even though there was a paper plate***

State v. Knight, ___ N.W.2d ___ (Iowa Ct. App., 2/5/14) (No. 3-1210 / 13-0230, Iowa Court of Appeals, filed February 5, 2014; published by order of August 27, 2014.) Judge Tabor. An officer stopped a car for having neither a front nor a rear license plate. The driver and passenger got out and began walking toward the officer with their arms raised. The officer ordered them back into their car, trained a spotlight on the car, and then walked toward the driver's door. As he got closer to the car, for the first time the officer observed a piece of white paper "that could



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possibly (have been) a temporary registration tag" attached to the rear, darkly tinted window. The officer spoke with the driver (the defendant), noticed the odor of alcohol and other indications of intoxication, and then had the driver perform field sobriety tests. When the officer told the defendant he was under arrest for OWI, the defendant ran from the scene. He was ultimately caught and when searched was found with cocaine, crack cocaine, and marijuana. The defendant was charged with OWI and multiple drug offenses and he filed a motion to suppress, arguing that the stop which led to the arrest was unconstitutional. The trial court denied the motion, the defendant was convicted at trial and appealed.

The Court of Appeals affirmed the conviction. When the officer stopped the defendant's car, he believed, based upon objectively reasonable facts, that the defendant had no plates on the car. The district court determined that the officer "acted reasonably when he stopped the car for not having license plates. Here, the traffic stop was made at 3:45 a.m. in a part of Fort Dodge known for drug dealing. The back window of the Defendant's car was tinted. The car had no plates. The temporary registration sticker in the rear window was not visible without use of a spot light." This type of stop, "an objectively reasonable mistake of fact" is not a Constitutional violation, and the trial court propery overruled the motion to suppress. See State v. Lloyd, 701 N.W.2d 678 (Iowa, 8/5/05.)

## ***No warrant needed to enter emergency room***
## ***Implied consent properly invoked***

State v. Lomax, ___ N.W.2d ___ (Iowa Ct. App., 4/30/14) (No. 12-0977, Iowa Court of Appeals, filed April 30, 2014; published by order of August 27, 2014.) Judge Vogel. The defendant was the driver of a car traveling in excess of 100 m.p.h. which crashed into a car driven by Jennifer Garcia, killing her and seriously injuring her four passengers. Officers managed the "chaotic" scene (the victims' car was burning, and the defendant was trapped in his crushed car) and spoke with witnesses about the crash. The defendant was taken to the hospital. An officer went to the hospital, and on the way, made arrangements to have the medical examiner be prepared to draw blood or urine. The officer entered the emergency room and observed the odor of alcohol emanating from the area where the defendant was being treated. A doctor certified that the defendant's condition was such that he was unable to consent or refuse an implied consent request. Blood was drawn and urine gathered via a catheter that was already in place. The blood test showed an alcohol concentration of .175, and the defendant was charged with OWI causing death and four counts of OWI causing serious injury. He filed a motion to suppress, asserting that the officer improperly entered the emergency room without a warrant (arguing that the defendant had an expectation of privacy in the emergency room), and asserting that the officer did not have grounds to invoke implied consent. The trial court denied the motion. The defendant was convicted and appealed.

The Court of Appeals affirmed the convictions. The Court rejected the defendant's contention that he had an expectation of privacy in the emergency room. The hospital staff, not the state, has control of emergency rooms. "(W)hile a patient has an expectation of privacy in their belongings brought into the emergency room, no such expectation of privacy exists in the trauma center locale, which is under the exclusive control of the hospital staff." The Court also agreed that the officer had reasonable grounds to believe the defendant was OWI, and therefore, had properly invoked implied consent. The officer "detected a strong odor of alcohol emanating from (the defendant) in the emergency room"; witnesses reported the defendant's car was traveling erratically and at a high rate of speed (observations 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"—all factors "consistent with intoxicated driving" and therefore, grounds to invoke implied consent. The fact that the officer had earlier planned for the *possibility* of invoking implied consent by arranging in advance to have the medical examiner available for a possible blood or urine draw does not mean the officer prematurely invoked implied consent; the officer invoked implied consent at the hospital, after detecting the odor of alcohol—a fact that, when combined with the other information, gave rise to reasonable grounds. Convictions affirmed. (***Note***: the Court also rejected a claim that the State had committed a *Brady* violation.)

## ***Self-representation improperly denied, OWI conviction reversed***

State v. Wehr, ___ N.W.2d ___ (Iowa Ct. App., 4/30/14) (No. 3-1212 / 13-0386, Iowa Court of Appeals, filed April 30, 2014; published by order of August 27, 2014.) Judge Bower. The defendant was charged with OWI. He appeared *pro se* and demanded a speedy trial. The morning of trial, he appeared *pro se*, asked for a continuance so he could obtain counsel, and waived speedy trial. The case was continued. On the next trial date, he again appeared *pro se*. The court advised the defendant of his right to proceed without an attorney. The defendant said that he had "talked



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to a few attorneys but he could not afford their retainer." The court then reviewed the defendant's financial situation, appointed counsel, and continued the trial a second time. The morning of the next trial date the defendant advised the court he was dismissing his attorney and wanted to proceed *pro se*. After a short discussion, the court denied the defendant's motion to dismiss his attorney, and the case was tried by the defendant's attorney. The defendant was convicted and appealed, arguing that the trial court improperly denied his request to proceed *pro se*.

The Court of Appeals reversed. The Court found that, on the morning of the trial, the defendant "clearly and unequivocally" invoked his right to represent himself. The request was made before jury selection. Therefore, the trial court should have conducted an inquiry under Faretta v. California, 422 U.S. 806, (1975), to determine whether the request to proceed without an attorney was made knowingly and intelligently, and also to allow the court to discern and make findings on whether the request was merely an attempt to delay the trial. The court's questioning of the defendant on the morning of trial was insufficient. "Importantly, the district court did not ask (the defendant) if he was requesting a continuance or question (him) to probe for evidence of any dilatory intent. . ." The court also did not make a finding that the defendant's desire to proceed pro se was merely a tactic to delay the trial. Conviction reversed and case remanded for a new trial.

## ***Written guilty plea valid; public intoxication conviction affirmed***

State v. Sutton, ___ N.W.2d ___ (Iowa Ct. App., 5/14/14) (No. 13-0810, Iowa Court of Appeals, filed May 14, 2014; published by order of August 27, 2014.) Judge Mullins. The defendant was charged with aggravated misdemeanor public intoxication, and tendered a written plea that stated: "I did appear in [a] public area and I was intoxicated with being convicted at least twice before of same crime." At no point did the defendant appear in court during the guilty plea. The plea was accepted. The defendant was found guilty and sentenced to two years in prison, and appealed, arguing that his counsel was ineffective by failing to file a motion in arrest of judgment based on the lack of a factual basis for his plea and the court's failure to ensure he understood the nature of the charge.

The Court of Appeals affirmed the conviction. The written guilty plea included a statement that the defendant "did appear in public area" and "was intoxicated." The plea also stated that the court could look to the minutes of testimony and law enforcement reports to determine the facts supporting the offense, and those documents with the plea provided a factual basis for the guilty plea. The defendant also claimed that when the judge accepted a written plea without an in-court colloquy, the court failed to properly ensure that he understood the nature of the charge. However, in-court colloquies are not required for every serious and aggravated misdemeanor, "as long as the written guilty plea is adequate, the defendant waives presence, nothing else appears in the record to dilute the strength of the written guilty plea, the court exercises its discretion to waive the in-court colloquy, and the court is satisfied the plea is voluntarily and intelligently offered. In other words, it is possible for a court to substantially comply with rule 2.8(2)(b) by accepting a well-drafted written guilty plea, properly documented by a well-drafted order accepting the plea, without having engaged the defendant personally in court." The Court determined that the plea in this case complied with the rules of criminal procedure and the requirements of State v. Meron, 675 N.W.2d 537 (Iowa, 2/25/04), and affirmed the conviction.

***Note:*** In determining that the record contained a factual basis for the charge, the Court specifically held "that for someone to be guilty of public intoxication under section 123.46, the person must be under the influence of an alcoholic beverage." Also, Judge Vaitheswaren dissented from the main holding about the validity of written guilty plea, arguing that although "(t)he majority provides compelling reasons for dispensing with an on-the-record colloquy in aggravated misdemeanor cases supported by written pleas that waive the colloquy", her reading of precedent of the Iowa Supreme Court (and specifically, State v. Meron) requires some on-the-record discussion between the court and the defendant before a plea can be valid.

## ***Motor home burglary is aggravated misdemeanor 'motor vehicle' burglary***

State v. Alexander, ___ N.W.2d ___ (Iowa Ct. App., 7/16/14) (No. 13-1301, Iowa Court of Appeals, filed July 16, 2014; published by order of August 27, 2014.) Judge Potterfield. The defendant broke into an unoccupied motor home and stole a TV. (The motor home was being stored in a fenced lot.) He was charged with felony burglary on the basis that he broke into an "occupied structure." He challenged the charge, arguing that his burglary was improperly classified as a felony because the motor home was an "*unoccupied motor vehicle*" and therefore, he should have been charged as an aggravated misdemeanor under Iowa Code section 713.6A(2). ("Burglary in the third degree involving a burglary of an unoccupied motor vehicle or motor truck as defined in section 321.1, or a vessel defined in section 462A.2, is an aggravated misdemeanor. . .") The trial court rejected the argument and



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ruled that the charge was properly a felony. The defendant was convicted and sentenced as a felon, and he appealed.

The Iowa Court of Appeals vacated the conviction and sentence. The "unoccupied motor vehicle" exception to the general burglary statute "lessen(s) the severity of the penalty imposed upon defendants who enter a vehicle in which no one is present. . .(which is). . .*consistent* with the public policy underlying burglary statutes. . ." (emphasis in original). If a burglar enters a motor home and someone is inside, "the burglar is subject to the penalty attendant a class "D" felony because section 713.6A(2) is not applicable. When the vehicle is unoccupied, on the other hand, there is no danger to anyone's personal safety, and the severity of the sentence may be lessened." The felony conviction and sentence were vacated and the case remanded for resentencing as an aggravated misdemeanor.

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

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## (Recent Unpublished Decisions Arranged by County)

***Audubon County*** State v. Kendall Lee Ware, No. 13-1072 (Iowa Court of Appeals, filed August 13, 2014.) **Reckless driving not a lesser included of OWI.** OWI requires a person "operate" a motor vehicle; reckless driving requires that a person "drive" a motor vehicle; because a person can "operate" a motor vehicle without "driving" it, reckless driving is not a lesser included offense of OWI; trial court was not required to submit a "lesser included" reckless driving alternative to a charge of OWI vehicular homicide, and conviction for OWI vehicular homicide affirmed.

***Black Hawk County*** State v. Jamerious Lanier Smith, No. 13-0993 (Iowa Court of Appeals, filed July 16, 2014.) **Physical evidence seized as a result of a voluntary, (but un-*Mirandized*) statement is admissible.** Defendant (who was not *Mirandized*) who voluntarily told officers that he had something "illegal" on him was not entitled to suppression of the drugs subsequently found; see United States v. Patane, 542 U.S. 630, (2004) (non-testimonial evidence derived from voluntary statements which were not preceded by Miranda may be admissible.)

***Black Hawk County*** State v. Isaac Lee Kidd, No. 12-1917 (Iowa Court of Appeals, filed July 30, 2014.) **Documentation too prejudicial in possession of firearms as a felon case.** In proving defendant's status as a felon and identity as the person previously convicted, the felony judgments themselves contained sufficient identifying information (defendant's name, date of birth, and social security number) to prove those issues; admission of the remaining documents (complaints, face sheets of trial informations, written pleas of guilty and an application for appointment of counsel and financial affidavit) was unduly prejudicial; conviction reversed and remanded.

***Black Hawk County*** State v. Marcus Gamblin, No. 13-0603 (Iowa Court of Appeals, filed July 30, 2014.) **Passenger ordered out of car during stop.** Officers may order passengers out of a car during a traffic stop (Maryland v. Wilson, 519 U.S. 408, 415 (1997)) and given this passenger's furtive movements in and outside the car and uncooperative behavior, *Terry* handcuffing and a *Terry* pat-down search were justified. (Court of Appeals declined to interpret Iowa Constitution to require reasonable articulable suspicion as a pre-requisite to ordering passenger out of a car, but noted that even if that standard applied, it was satisfied in this case.)

***Black Hawk County*** State v. Dontrayius Eugene Carey, No. 12-0230 (Iowa Court of Appeals, filed August 13, 2014.) **"Shots fired" pat down followed by "plain feel" seizure of marijuana.** Officer properly conducted a pat down search of a suspect following a report of "shots fired" in the neighborhood; during the search the officer felt an object which, based on experience, was immediately identified as a baggie of marijuana; court rejected challenges to both the pat down and the seizure of the marijuana (based upon the "plain feel" exception discussed in Minnesota v. Dickerson, 508 U.S. 366, 375-76 (1993)); conviction reversed on other grounds.



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***Black Hawk County*** State v. Dontrayius Eugene Carey, No. 12-0230 (Iowa Court of Appeals, filed August 13, 2014.) **Removal and subsequent exclusion of defendant from courtroom.** Analysis of procedures to be used to address a defendant's obstreperous conduct which may lead to removal of the defendant from the courtroom; in this case, trial court's warnings and ultimate removal of the defendant were appropriate and not grounds for reversal of conviction; however, the trial court abused its discretion by continuing to exclude the defendant "from trial without conducting an on-the-record hearing with (the defendant) present to determine whether (the defendant) could be returned to the courtroom."

***Black Hawk County*** State v. Michael James Grommet, No. 13-0962 (Iowa Court of Appeals, filed September 17, 2014.) **"Test drive" theft ripens to auto theft.** Defendant who used a false name at a dealership, who told the dealership that he owned a potential trade-in car "free and clear", and who, when called about the car told the dealership he was at a bank getting money to buy the car but who did not return from the "test drive" committed theft of the car; although the defendant had permission to take the car for a test drive, "he was only authorized to take it for a test drive" and his unlawful "possession or control". . ."began and a theft was completed when he used the vehicle in a manner beyond the authorization he was granted."

***Cerro Gordo County*** State v. Scott Kramer, No. 13-1025 (Iowa Court of Appeals, filed July 30, 2014.) **Driving left of center is grounds to stop.** Officer's stop of defendant who drove left of center affirmed; although the defendant claimed he was trying to avoid a pothole and cars parked on the side of the road, the officer testified the parked cars did not require the defendant to move into the oncoming lane of traffic; the Court of Appeals deferred to the trial court's credibility determination; OWI 2nd conviction affirmed.

***Cerro Gordo County*** State v. Michael Leer Jr., No. 13-1830 (Iowa Court of Appeals, filed August 13, 2014.) **DataMaster test offer was timely and test results were properly admitted.** Trial court's finding that the PBT was refused at 3:15 a.m. and that the defendant was offered the DataMaster test at 5:05 was supported by substantial evidence; trial court properly admitted subsequent test results over defendant's objection. "The fact the evidence is disputed does not mean the district court's ruling was not supported by substantial evidence."

***Cerro Gordo County*** State v. Joseph Lee Barnes, No. 14-0395 (Iowa Court of Appeals, filed September 17, 2014.) **Any and all operation is barred when a person is barred.** Defendant's conviction for operating while barred (defendant drove his car from his backyard to his driveway) affirmed on the basis of State v. Burns, 541 N.W.2d 875 (Iowa 1995) (defendant guilty of operating while barred for driving his Chevy Blazer in the barnyard of his farm.)

***Dallas County*** State v. Ryan Michael Krebs, No. 13-0975 (Iowa Court of Appeals, filed September 17, 2014.) **Video of wide right turn supports stop.** Video of defendant making a wide right turn and crossing the center line in the process is probable cause the defendant violated Iowa Code section 321.311(1)(a); the video evidence establishes the violation even though the officer did not rely upon this violation to stop the defendant; OWI conviction affirmed. (***Note:*** a dissent by Judge Doyle argued that the State could not rely upon the violation to affirm the conviction unless the officer relied upon it in executing the stop.)

***Johnson County*** State v. Zachary Lee Swenka, No. 13-1821 (Iowa Court of Appeals, filed September 17, 2014.) **Sentencing did not rely upon unproved conduct alleged in victim impact statements.** Trial court "sympathetically acknowledged the parents of the victim and thanked them for their statements" but did not rely upon their statements in fashioning the sentence imposed; prison sentence in motor vehicle involuntary manslaughter conviction affirmed.



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***Johnson County*** State v. Zachary Lee Swenka, No. 13-1821 (Iowa Court of Appeals, filed September 17, 2014.) ***Alford* plea was knowing and voluntary.** An *Alford* plea is voluntary if the plea "represents an voluntary and intelligent choice among the alternative courses of action open to the defendant"; here, the written plea made "multiple acknowledgements" that the plea was made with the advice of counsel, was voluntary, intelligent, and of the defendant's own free will; in addition, "(t)he voluntary and intelligent nature of the plea was confirmed during the plea colloquy."

***Marshall County*** State v. Tyler Ward Shipley, No. 13-2073 (Iowa Court of Appeals, filed September 17, 2014.) **Three assaults on peace officers during a single car chase.** Defendant's *Alford* plea for three counts of assault on a peace officer supported by evidence that during a single eluding episode, the defendant swerved his car in an attempt to drive pursuing officers off the road on at least three separate occasions involving three separate law enforcement vehicles; "each was directed at a different vehicle and different officer and each was a discrete act"; defendant's convictions and prison sentences for eluding, OWI 3rd, and three counts of assault on a peace officer affirmed.

***Montgomery County*** State v. Amy Jo Ross, No. 13-0686 (Iowa Court of Appeals, filed August 13, 2014.) **Driving while barred guilty plea/conviction/sentence affirmed despite lack of adequate record.** Where defendant "simply states there was no written plea or waiver filed in the case and no verbatim record of the plea proceeding" and "makes no claim of innocence, no claim there was not a factual basis for her plea, no claim her plea was involuntary or unintelligent, no claim that counsel was ineffective in some aspect of the plea proceeding, and no claim she would not have pled guilty if proper procedures had been followed. . .(and). . .has failed to recite how error was preserved or offer any exception to the error preservation requirement" no issue was preserved that would be justiciable; conviction and sentence affirmed.

***Muscatine County*** State v. Ryan Wayne Larue, No. 13-1484 (Iowa Court of Appeals, filed September 17, 2014.) **Driving while barred and domestic violence convictions affirmed.** Driving while barred conviction not challenged on appeal; case discusses validity of plea to domestic violence charge.

***Polk County*** State v. Chad Jay Rouse, No. 3-1256 / 13-0981 (Iowa Court of Appeals, filed July 16, 2014.) **No discretion in sentencing serious injury by motor vehicle where OWI involved.** Where defendant entered guilty pleas to serious injury by motor vehicle (reckless driving) and a separate count of OWI, the court had no discretion to suspend the serious injury sentence; Iowa Code section 707.6A(7) prohibits a deferred judgment or suspended sentence for serious injury by motor vehicle where the offense involved "operation of a motor vehicle while intoxicated."

***Polk County*** State v. Chad Jay Rouse, No. 3-1256 / 13-0981 (Iowa Court of Appeals, filed July 16, 2014.) **Equal protection not offended by mandatory prison for serious injury by motor vehicle (reckless driving) where OWI involved.** Defendant's mandatory prison sentence for serious injury by motor vehicle (reckless driving) where OWI is involved does not violate equal protection; although a person convicted of vehicular homicide by motor vehicle (reckless driving) may receive a deferred judgment or suspended sentence, the heightened public safety risk where an OWI is involved justifies the difference in sentencing between the two offenses.

***Polk County*** State v. Todd Carber, No. 4-054 / 13-0916 (Iowa Court of Appeals, filed July 16, 2014.) **No discretion in sentencing serious injury by motor vehicle where OWI involved.** (Memorandum opinion; see State v. Chad Jay Rouse, No. 3-1256 / 13-0981 (Iowa Court of Appeals, filed July 16, 2014 for analysis.)



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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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***Polk County*** State v. James R. Thielman, No. 13-1218 (Iowa Court of Appeals, filed July 16, 2014.) **Smell of marijuana is probable cause, but no exigency existed to permit warrantless entry into apartment.** The smell of marijuana is probable cause to search an apartment, but a concern that the marijuana may be destroyed is not a sufficient exigency to permit a search of an apartment without a warrant; "(t)he State has not asserted specific and articulable grounds, beyond the smell of burning marijuana, to show it was probable evidence would be concealed or destroyed if the officers waited to obtain a warrant."

***Polk County*** State v. Ryan Michael Cornelius, No. 13-1491 (Iowa Court of Appeals, filed August 27, 2014.) **Reckless driving behavior established; serious injury by motor vehicle conviction affirmed.** Defendant was driving at a high rate of speed, crossed into a lane of oncoming traffic to pass a vehicle and then ignored a traffic control device and went through an intersection, traveling so fast that he became airborne before striking a utility pole, a house, a fence, and a tree at a speed estimated at "between two and three times" the posted limit; the passenger's testimony supported a finding that the high speed travel through the intersection was conscious behavior on the defendant's part; conviction for serious injury by reckless driving affirmed.

***Poweshiek County*** State v. Fernando Lopez-Gonzalez, No. 13-1314 (Iowa Court of Appeals, filed July 30, 2014.) **Defendant's failure to preserve error bypassed to avoid postconviction relief.** "If a motion for judgment of acquittal lacks specific grounds, those grounds are not preserved. . .However, in an effort to stave off a potential postconviction relief proceeding. . .we elect to bypass this error preservation concern and proceed to the merits of (the) claim." (Authorities omitted.)

***Ringgold County*** State v. David Shane Anderson, No. 13-1274 (Iowa Court of Appeals, filed August 27, 2014.) **Passenger's consent to search was voluntary.** Passenger/owner of stopped vehicle consented to search of car; officer asked if passenger knew the driver's license of the person who was operating the car was suspended, and ultimately asked to search the car; the officer testified the passenger "said she would give me consent to search. . .I said, 'You realize you have the right to refuse that?' and she said 'Yes.' I think she said something along the lines of, 'Why would I do that?' or something to that effect."

***Ringgold County*** State v. David Shane Anderson, No. 13-1274 (Iowa Court of Appeals, filed August 27, 2014.) **Circumstances of passenger's consent to search.** Passenger/owner gave consent while seated in the passenger seat of the patrol car; the officer did not use threats, physical intimidation, or punishment; the officer made no promises or misrepresentations; the passenger was not under arrest, and the officer advised her of her right to refuse consent; although the officer's drug dog was in the back of the patrol car, "(a)t no point prior to giving consent to search did (the passenger/owner) express any concern about the presence of the dog."

***Scott County*** State v. Isaiah Joshua Alexander, No. 13-1301 (Iowa Court of Appeals, filed July 16, 2014.) **Unoccupied motor home is "motor vehicle".** Burglary conviction reduced from burglary 2nd to burglary 3rd where defendant had broken into an unoccupied motor home; motor home is a "motor vehicle" under Iowa Code section 321.1(42)(a) and therefore, appropriate charge is aggravated misdemeanor charge of Iowa Code section 713.6A(2), rather than the felony offense of Iowa Code section 713.6A(1).

***Scott County*** State v. Dawayne McGowan, No. 13-2055 (Iowa Court of Appeals, filed July 30, 2014.) **Driving while barred convictions affirmed.** Defendant's convictions for driving while barred affirmed; complaints of ineffective assistance of counsel for various actions of counsel preserved for possible postconviction relief.



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

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***Story County*** State v. Martin Leon Morales, No. 13-1301 (Iowa Court of Appeals, filed July 16, 2014.) **Substantial evidence of intoxication.** A reasonable juror could have concluded the defendant was intoxicated where his car was observed as having its turn signal on when it was not necessary, and after coming in contact with the defendant, the officer noted the smell of alcohol, "bloodshot and watery eyes and slurred speech" confusing answers to the officer's questions, and impairment on the horizontal gaze nystagmus. (***Note:*** the stop was based upon a citizen's tip; convictions for OWI 3rd offense and driving while barred affirmed.)

***Webster County*** State v. Mandell Clark, No. 13-1738 (Iowa Court of Appeals, filed July 30, 2014.) **Sentence agreed to by the parties.** Defendant's complaint that the trial court adopted an agreed upon sentence recommended by the parties and did not recite specific reasons for imposing the sentence selected not grounds for appellate relief; although such sentencing is not favored, it is permitted by State v. Snyder, 336 N.W.2d 728 (Iowa 1983).

***Woodbury County*** State v. John Penn-Kennedy, No. 13-1615 (Iowa Court of Appeals, filed September 17, 2014.) **Speedy indictment violation; defendant "arrested" for OWI at time of contact with police.** Defendant who was charged with and booked for public intoxication was in fact "arrested" for OWI under the test of State v. Wing, 791 N.W.2d 243 (Iowa, 12/3/10), and subsequently filed trial information was untimely and should have been dismissed; the officer did not observe the defendant commit public intoxication (the defendant was in his car and therefore not in "public", see State v. Lake, 476 N.W.2d 55 (Iowa 1991)) and therefore the officer could not arrest for that simple misdemeanor without a warrant; in addition, circumstances of the arrest would lead a reasonable person in the position of the defendant to believe that the encounter was an arrest for OWI; conviction reversed and case remanded for dismissal.

## Citations from previous issue of the Highway Safety Law Update

Navarette v. California, 572 U.S. ___, 134 S.Ct. 1683, 188 L.Ed.2d 680 (4/22/14)
Riley v. California, 573 U.S. ___, 134 S.Ct. 2473, 189 L.Ed.2d 430 (6/25/14)
State v. Harrison, 846 N.W.2d 362 (Iowa, 5/2/14)
State v. Kennedy, 846 N.W.2d 517 (Iowa, 5/9/14)
State v. Lukins, 846 N.W.2d 902 (Iowa, 5/16/14)

**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. Six more months and 62. And Rule of 88. And 30 years in IPERS. Daydreaming here? Nah.. . . . . .Well, maybe.

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