



HIGHWAY SAFETY

LAW UPDATE



December 1, 2014

Office of the Prosecuting Attorneys Training Coordinator

Oct, Nov, Dec, 2014

Drugged Driving Workshop for Prosecutors

A day long workshop on drugged driving issues faced by Iowa prosecutors is scheduled for Friday, December 12 at the DCI Lab's conference room in Ankeny, Iowa.

The workshop features DCI criminalists Traci Murano and Justin Grodinsky on testing issues, Assistant Polk County Attorney Brendan Greiner on prescription drugs and discovery issues in prescription drug cases, Kim Wadding from the ILEA on general impairment and "no test" cases, and two DRE officers: Brian Beckman on DRE and ARIDE training and how that training can assist prosecutors in the courtroom, and Brad Reinhardt on synthetic drugs.

The workshop agenda and application form are attached to this issue of the *Highway Safety Law Update*. Continuing Legal Education credits will be applied for.

Free Webinar on CDL "Masking"

Susan Glass, the Traffic Safety Resource Prosecutor for Missouri, has announced a series of traffic safety webinars free to prosecutors and law enforcement officers across the country. The monthly webinars will cover a variety of topics of interest to traffic safety professionals.

The next webinar, "Unmasking CDL Convictions," will be held on **Tuesday, December 9, from 2:00-3:00 pm (Central Time)**. This will be the third installment of *Traffic Tuesdays: The National TSRP Webinar Series*. This webinar will be presented by Kristen Shea, a Senior Attorney with the National Traffic Law Center.

This webinar focuses on how criminal convictions (and deferred judgments) may affect a person's Commercial Drivers License and federal requirements that States not "mask" a CDL holder's criminal activity. The webinar will discuss the challenges of State compliance with anti-masking regulations and will include a brief explanation of those regulations and how they are generally interpreted and enforced.

For example, Iowa permits entry of a deferred judgment or deferred sentence in an OWI case. The webinar will discuss how a deferred judgment/sentence affects the

holder of a CDL, and the State's reporting requirements regarding that deferred judgment/sentence.

In addition, federal regulations require reporting of some offenses *other than traffic offenses* committed by CDL holders. According to Ms. Glass, "prosecutors in particular should watch this webinar to ensure that they are compliant with all applicable federal regulations when dealing with a defendant who holds a CDL."

There is no cost to participate in this webinar, but space is limited. Click here to register:

<https://www3.gotomeeting.com/register/459452638>

After registering you will receive a confirmation email containing instructions on how to join the webinar. In order to make sure that you are able to log on, please register *at least 4 hours in advance*.

Also, please make sure you retain the confirmation email sent to you. The confirmation email will come from gotowebinars@citrixonline.com. (You may wish to add this to your list of "safe" addresses so that it does not go to your spam or junk mail folder.) **You will not be able to join the webinar if you do not receive a confirmation email.**

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If you have any questions or need any assistance in registering for this webinar, please feel free to contact Ms. Glass at Susan.Glass@mops.mo.gov.

Future traffic safety webinars on topics as diverse as blood tests, OWI defenses, and search warrants are scheduled for January 9, February 10, March 10, April 18, May 12, and June 9. *These webinars are presented by national Traffic Safety Resource Prosecutors and are funded by the National Association of Prosecutor Coordinators/National Highway Traffic Safety Agency (NAPC/NHTSA) Cooperative Agreement, project No. DTNH22-10-H-0029*

Published opinions of the Iowa Supreme Court

Request for “private” attorney call triggers requirement that the officer advise that the attorney may come to the station for consultation

State v. Hellstern, ___ N.W.2d ___ (Iowa, 11/21/14) (No. 13-1228, Iowa Supreme Court, filed November 21, 2014. Justice Waterman. The defendant was stopped for crossing white lines separating traffic lanes. The officer observed signs of intoxication and asked the defendant to perform SFSTs. The defendant originally agreed to perform the tests but then refused to do so. He was arrested and taken to the station, where the officer read the implied consent advisory, requested a test, and then offered the defendant the opportunity to make telephone calls. The defendant called a law firm four times and left one message. He then called five different attorneys and left voice messages, and sent a text to an attorney friend. This attorney friend then called the defendant. The officer stayed in the room, and the defendant asked for privacy during the call. The defendant asked “Can I have a moment with my attorney?” and the officer ultimately responded “You can, but . . . Not on the phone.” (Iowa Code section 804.20 provides that telephone calls are to be made in the presence of the officer, but also provides that an attorney may come to the station for a private, in-person consultation. The officer did *not* tell the defendant that his attorney could come to the station for a private consultation.) The defendant ultimately “made fourteen phone calls, left five voice mails, sent one text message, and received a single phone call from (an) attorney. . . (and then). . . indicated he did not want to make any additional phone calls. When asked, he agreed that (the officer) had not hindered him from making any calls he wished to make.” The defendant consented to testing and tested .194 on the DataMaster. He filed a motion to suppress the test on the basis that the officer had denied him his right to an in-person consultation with an attorney under Iowa Code section 804.20. The trial court denied the motion and the defendant was convicted and appealed.

The Supreme Court reversed the conviction, holding that the defendant’s right to have an attorney come to the police station for a private consultation had been violated, and therefore, the breath test should have been suppressed. The Court reviewed case law developments under Iowa Code section 804.20, which provides for contact by a defendant with family members and attorneys. The statute does *not* provide that an officer must advise a person of the rights under 804.20, but the Court has found that if a person asks to make a call or asks to call someone *other than* a family member or an attorney, the officer is required to affirmatively advise the person of the right to call a family member and an attorney. Similarly, the statute does *not* provide that an officer must advise a person of the right to a confidential, in-person consultation with an attorney. The Court determined, however, that if, as in this case, a person asks for a private consultation with an attorney, the officer “must disclose. . . that the lawyer would have to come to the jail for a confidential conference.” Although these interpretations are arguably not mandated by the statute, the Court determined that it could “infer by its silence that the legislature acquiesced in our consistent interpretations of the disclosure obligations in this statute dating back to . . . 1990.” Conviction reversed and case remanded.

Note: a concurring opinion states that “it is time to reverse our prior cases and require a peace officer to advise an arrested person of the statutory right to counsel.”

Also: the defendant in this case is an attorney, and the attorney friend that he spoke with on the phone “practices family and criminal law.” Under the facts of this case, the arresting officer denied a lawyer his legal rights under Iowa Code section 804.20 because the officer didn’t tell the arrested lawyer that if the lawyer with whom the arrested lawyer was speaking came down to the jail, she could have a private, in-person consultation with the arrested lawyer (provided, of course, that the private, in-person consultation could have occurred in a timely manner under the implied consent law.)

Live, in-person testimony required for OWI causing serious injury trial

State v. Rogerson, ___ N.W.2d ___ (Iowa, 1-/24/14) (No. 13-1329, Iowa Supreme Court, filed October 24, 2014.) Justice Mansfield. The defendant was the driver of a car that crashed causing serious injury to four passengers. He was charged with four counts of causing serious injury by OWI, in violation of Iowa Code section 707.6A(4). Prior to trial the State filed a motion seeking permission to allow several witnesses “to testify remotely via two-way videoconferencing technology rather than physically appearing in court.” Three of these witnesses lived outside of Iowa; the other witnesses were employees of the DCI Lab. The defendant resisted, arguing that permitting such video testimony would violate his Sixth Amendment right to confront witnesses. The trial court granted the State’s motion, and the defendant sought pre-trial review by the Iowa Supreme Court.

The Supreme Court reversed the trial court’s ruling. The Court ruled that under the Confrontation Clause of the Sixth Amendment, in almost all cases, a defendant has a right to in-court, in-person testimony from witnesses. The limited exception to the rule is where (in child abuse cases, for example) denial of such testimony is necessary to further an important public policy (i.e., protecting victims of child abuse from “the psychological harm of testifying”) and the reliability of such testimony is “otherwise assured” (the technology to be used assures that the defendant is still able to cross-examine the child, and all parties can see the child’s demeanor and body language while testifying.) That exception was not met in this case. The fact that the State’s victims/witnesses “resided a significant distance from Iowa” and had suffered serious injuries from the crash was insufficient to permit the video testimony. (The State did not show that the witnesses were physically unable to travel.) Similarly, although it would have been convenient and less expensive for the DCI Lab employees to testify by video conference, those concerns do not rise to the level of an important public policy that would excuse the State from producing the witnesses for live testimony.

(Recent Unpublished Decisions Arranged by County)

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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Cerro Gordo County State v. Brandon Clark Manning, No. 13-1111 (Iowa Court of Appeals, filed October 15, 2014). **Search by a citizen is not the same as search by police.** A “curious” citizen (not operating at the direction or knowledge of the police) opened the defendant’s flash drive and discovered indecent photographs; the drive was ultimately turned over to police who viewed the drive’s contents without a warrant; the citizen’s search was not in violation of the Fourth Amendment as that constitutional provision governs police—not private—conduct; the subsequent police search of the drive did not exceed the scope of the citizen’s search, and the trial court properly denied suppression of the contents of the drive.

Cerro Gordo County State v. William J. Burns, No. 13-1688 (Iowa Court of Appeals, filed October 29, 2014.) **Refusal to consent to testing is refusal to submit to PBT.** Where a defendant refuses all testing, there is no requirement that the officer say the words “PBT” or “preliminary breath test” before invoking implied consent; a defendant’s repeated refusal to consent to any test, combined with reasonable grounds, substantially complies with Iowa Code section 321J.6 and is sufficient to invoke implied consent.

Cerro Gordo County State v. William Frank Fetner, No. 14-0363 (Iowa Court of Appeals, filed November 13, 2014.) **Driving while barred affirmed.** Defendant’s challenge to a sentence entered in a multiple count plea agreement rejected; sentence (including sentence for driving while barred conviction) affirmed.

Cerro Gordo County State v. Aaron Michael Herman, No. 14-0700 (Iowa Court of Appeals, filed November 13, 2014.) **Driving while barred sentence affirmed.** Trial court’s 30 day sentence supported by the record and adequately explained by the court.

Cerro Gordo County State v. Aaron Michael Herman, No. 14-0700 (Iowa Court of Appeals, filed November 13, 2014.) **Prosecutor’s use prior history appropriate and recommendation was in line with plea agreement.** Prosecutor’s recommendation of 10 days in jail, supported by argument referencing the defendant’s prior criminal history, was a “candid, straightforward recitation of some of (the defendant’s) criminal history (provided) as appropriate support for the recommendation it promised in the

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plea agreement” and was not a breach of the plea agreement; “(o)n this record, we find the State did not breach the plea agreement.”

Hamilton County State v. Monte Dean Neubauer, No. 13-0227 (Iowa Court of Appeals, filed October 1, 2014.) **Cerro Gordo County probationer sentenced to Hamilton County jail on new charge from Hamilton County.** Fact that defendant was on probation to the Department of Correctional Services at the time he was sentenced for driving while barred in Hamilton County does not require that he be sentenced to serve his time in another county (here, defendant claimed he needed to be sentenced to a facility in Cerro Gordo County); unlike a parolee, a person on probation is not “presently committed” to the Department of Corrections and therefore, there is no requirement that a probationer be sentenced to a DOC facility; as such, the defendant was properly confined in Hamilton county, in “a place to be furnished by the county where the conviction was had.” Iowa Code section 903.4.

Johnson County State v. Daniel Hopkins Slade, No. 13-1101 (Iowa Court of Appeals, filed November 26, 2014.) **Grounds to stop a boat.** DNR officers had grounds to stop a boat which appeared to have more passengers than permitted; after the stop, it was determined that only 14 people were permitted on the boat at full capacity, but 16 people were on the boat; “the officers had specific and articulable cause to believe there was a violation” of Iowa Code section 462A.13 and therefore, the investigatory stop was valid as an exception to the warrant requirement of the Fourth Amendment; trial counsel was not ineffective for failing to file a motion to suppress; the defendant’s boating while intoxicated conviction affirmed.

Plymouth County Richard Allen Heien v. State, No. 13-1006 (Iowa Court of Appeals, filed October 1, 2014.) **Post conviction relief in vehicular homicide case is untimely.** Petition for post conviction relief in a vehicular homicide case was filed too late (there is a three year statute of limitations for such actions under Iowa Code section 822.3; conviction was entered in April, 2006 and appellate action was completed in April, 2007; therefore, petition filed in January, 2013, (which did *not* allege a ground which could not have been raised in a timely manner) was untimely under the statute.

Plymouth County Richard Allen Heien v. State, No. 13-1006 (Iowa Court of Appeals, filed October 1, 2014.) **Causation in vehicular homicide is not a “new” issue.** Defendant’s claim that the causation requirement fully articulated in State v. Adams, 810 N.W.2d 609 (Iowa, 1/20/12) (which requires that a person’s act of OWI must be a proximate cause of a resulting fatality) changes or overrules prior law is rejected by the Court of Appeals; “Adams was not new law, rather it was a clarification of the law. . .” and the applicant in this case has “filed nothing to show that his claims are based on new evidence or are new legal claims.” Denial of post conviction relief affirmed.

Polk County State v. Benjamin Lyon, No. 13-1938 (Iowa Court of Appeals, filed October 1, 2014.) **License plate lights out.** Officer was within 50 feet of defendant’s car when non-functioning license plate lights were observed; stop valid; OWI conviction affirmed.

Polk County State v. Benjamin Lyon, No. 13-1938 (Iowa Court of Appeals, filed October 1, 2014.) **804.20 rights honored.** Officer gave defendant “every opportunity to make any phone call (the defendant) wanted to make and did nothing to limit those calls.”

Polk County State v. Cassandra Colosimo, No. 13-1066 (Iowa Court of Appeals, filed October 1, 2014.) **Miranda does not apply to implied consent.** Although OWI suspects have a “limited statutory right” to counsel under Iowa Code section 804.20, such suspects do not have a right to refuse testing after *Miranda* warnings as *Miranda* rights do not apply to implied consent procedures.

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Polk County State v. Cassandra Colosimo, No. 13-1066 (Iowa Court of Appeals, filed October 1, 2014.) **Defendant who refused implied consent testing ‘unless my attorney is present’ was properly considered a “refusal” for purposes of OWI trial.** OWI defendant who insisted on the presence of her attorney (and who was given opportunities to attempt to reach her attorney pursuant to Iowa Code section 804.20, but was unsuccessful in those attempts) was properly considered a “refusal” for OWI, and the State was entitled to a “refusal” instruction at time of trial.

Polk County State v. Cassandra Colosimo, No. 13-1066 (Iowa Court of Appeals, filed October 1, 2014.) **Defendant’s “confusion” does not make her refusal involuntary.** Defendant’s claim that she was confused about her ability to have a lawyer present (because the arresting officer had twice read *Miranda* warnings before asking whether she consented to or refused implied consent testing) does not make the refusal to test involuntary; in Iowa, “anything less than unqualified, unequivocal consent is refusal.” (citation omitted.)

Polk County State v. Cassandra Colosimo, No. 13-1066 (Iowa Court of Appeals, filed October 1, 2014.) **Defendant’s constitutional right to a fair trial denied with audio and video of her asserting a right to counsel.** Defendant’s right to due process was violated when audio and video of her demanding the presence of counsel were played for the jury where defendant had been provided *Miranda* warnings (although such warnings are not applicable to implied consent proceedings) and the warnings implicitly assured her that her demand for a lawyer would not penalize her; “(a)ny breach of this implied assurance is a breach of fundamental fairness. . .” (citation omitted, emphasis in opinion); OWI conviction reversed and case remanded for re-trial.

Polk County State v. Richard Sean Nelson, No. 13-1112 (Iowa Court of Appeals, filed October 15, 2014). **Driving in the oncoming lane is grounds to stop.** Officer had probable cause to stop vehicle coming toward him; vehicle was crossing into the officer’s lane (see Iowa Code section 321.297, providing that vehicles “shall be driven upon the right half of the roadway. . .”); OWI conviction affirmed.

Polk County State v. Orlando Taiwan Hickman, No. 14-0269 (Iowa Court of Appeals, filed October 15, 2014). **Prosecutor’s “recommendation” too weak.** Although prosecutor agreed to recommend probation and actually made the recommendation, statements made at sentencing which suggested the defendant would fail at probation violated the spirit of the plea agreement; defense counsel’s failure to object during the prosecutor’s statement’s was ineffective assistance of counsel; conviction affirmed, but case remanded for re-sentencing.

Polk County John Doe v. Iowa Board of Pharmacy, No. 14-0089 (Iowa Court of Appeals, filed November 26, 2014.) **Pharmacy Board’s order for mental and physical evaluation supported by the record.** Pharmacist sought review of licensing board’s order that he undergo an evaluation; record showed that pharmacist had been convicted of OWI but did not report the conviction to the Board, had “reported to work on numerous occasions showing signs of heavy drinking the previous evening and has . . . problems with short term memory loss, personal hygiene, and soiled clothing at work”; although the pharmacist provided a substance abuse evaluation to the Board, the evaluation was based only upon statements made by the pharmacist to the evaluator, who provided a recommendation without the benefit of any other source of information; “(t)he Board is not required to accept expert testimony when the factual basis for those opinions is incomplete or inaccurate”; Board’s order for evaluation affirmed.

Scott County State v. Teneka Hayes, No. 14-0259 (Iowa Court of Appeals, filed October 1, 2014.) **Driving while barred guilty plea affirmed.** Defendant’s claim that her guilty plea was not entered voluntarily and intelligently rejected; “The district court explicitly found in the Judgment and Sentence that Hayes entered the plea knowingly and voluntarily, as well as found a factual basis within the record. The written plea

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form, the waiver of presence, and the court's findings all comply with Iowa Rule of Criminal Procedure 2.8(2)(b). Consequently, any objection or motion in arrest of judgment filed on this basis would not have been granted, and trial counsel was not ineffective for failing to present this argument."

Scott County State v. Luekinna Mitchell, No. 13-1825 (Iowa Court of Appeals, filed October 1, 2014.) **First offense OWI conviction affirmed.** Defendant's claims that counsel was ineffective preserved for possible post-conviction relief.

Scott County State v. Kimberly Kay Krana, No. 13-1700 (Iowa Court of Appeals, filed October 29, 2014.) **Evidence sufficient to show defendant was the driver.** Officer observed a woman, (later identified as the defendant) drive a car into a parking lot and get out of the driver's side door and walk away; when ordered to stop, the defendant returned to the car and got into the back seat; the officer's testimony (despite defense testimony identifying someone else as the driver) was sufficient to support defendant's conviction for operating while barred; "if the jury found the testimony of the arresting officer more credible than the other witnesses, the evidence would have been sufficient. . "

Story County State v. William Lloyd Bugely, No. 13-2017 (Iowa Court of Appeals, filed October 15, 2014). **Driving while barred prison sentence affirmed.** Where defendant's written plea stated that he understood the maximum possible for the offense and that, despite the State's agreement to recommend a lesser sentence, he understood that the court was not bound by the recommendation, the court's imposition of two years in prison was within the authority of the court; counsel was not ineffective for failing to file a motion in arrest of judgment challenging the voluntariness of the plea.

Story County State v. Carlos Jimenez-Reyes, No. 14-0278 (Iowa Court of Appeals, filed November 13, 2014.) **Parked car not stopped; no basis for suppression of evidence.** Where officer approached a stopped car in a parking lot and tapped on the window, the officer did not "stop" the defendant; when the defendant rolled down his window and the officer smelled marijuana, the officer had probable cause to search the vehicle; conviction for possession of marijuana affirmed.

Wapello County State v. Tony Christopher Williams, No. 13-1671 (Iowa Court of Appeals, filed November 26, 2014.) **Brake light provides grounds to stop car.** Officer's testimony that a traffic stop was initiated because of a faulty brake light (see Iowa Code section 321.387) was credible to the trial court and supported the stop; "(t)he officer's testimony demonstrated that either the brake light's functionality was impaired or she made a reasonable mistake of fact in believing she observed an impaired brake light. The officer noted she did not know Williams prior to the incident, had no other reason to initiate the stop, and pulled him over only to inform him of his defective brake lights." OWI conviction affirmed.



Citations from previous issue of the Highway Safety Law Update

In the Matter of Dean, ___ N.W.2d ___ (Iowa, 9/12/14)
State v. Hollie, 854 N.W.2d 695 (Iowa Ct. App., 6/26/13)
State v. Jentz, 853 N.W.2d 257 (Iowa Ct. App., 11/6/13)
State v. Knight, 853 N.W.2d 273 (Iowa Ct. App., 2/5/14)
State v. Lomax, 852 N.W.2d 502 (Iowa Ct. App., 4/30/14)
State v. Wehr, 852 N.W.2d 495 (Iowa Ct. App., 4/30/14)
State v. Sutton, 853 N.W.2d 284 (Iowa Ct. App., 5/14/14)
State v. Alexander, 853 N.W.2d 295 (Iowa Ct. App., 7/16/14)

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. **The holding in the [Hellstern](#) case suggests that there may be a new tort on the horizon: ineffective assistance of police officer, a tort which arises if a police officer does not advise a lawyer of his or her legal rights. If it happens, you read it here first!**

Submissions and / or comments may be sent to:

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AGENDA

DRUGGED DRIVING WORKSHOP FOR PROSECUTORS

**December 12, 2014
DCI Lab – Ankeny, Iowa**

8:00am-8:30am	Registration	
8:30am-9:00am	Working With Officers on No Test Cases	Kim Wadding Iowa Law Enforcement Academy
9:00am-10:15am	Officers as Expert Witnesses: DRE and ARIDE	Brian Beckman DRE, Department of Public Safety
10:15am-10:30am	Break	
10:30am-11:15am	Synthetics and Impaired Driving	Brad Reinhardt DRE, Iowa City Police Department
11:15am-12:15pm	Urine Testing and Laboratory Results	Traci Murano DCI Lab
12:15pm-1:00pm	Lunch provided	
1:00pm-2:00pm	Blood Testing and Measurement Uncertainty	Justin Grodinsky DCI Lab
2:00pm-2:10pm	Break	
2:10pm-3:10pm	Discovering and Proving the Prescription Drug Case	Brendan Greiner Assistant Polk County Attorney
3:10pm-3:40pm	OWI Caselaw Update	Peter Grady Assistant Attorney General
3:40 pm	Adjourn	Activity #

Registration Form

**DRUGGED DRIVING
WORKSHOP FOR PROSECUTORS**

December 12, 2014

DCI Laboratory, Ankeny, Iowa

Sponsored by the:
Iowa County Attorneys Association and the
Office of the Prosecuting Attorneys Training Coordinator

CONTINUING LEGAL EDUCATION CREDITS WILL BE APPLIED FOR

Name: _____

Title: _____

County: _____

Address: _____

City: _____ Zip: _____

E-mail: _____

Registration fee: \$55
Materials & lunch provided

Submit Registration form
no later than December 5th.

Please make checks payable to the Iowa County Attorneys Association. Unless the fee is enclosed with your registration, your office will be invoiced.

Questions
Contact Sue Apple
Iowa County Attorneys Association
Hoover Bldg., 1st Fl.
Des Moines, IA 50319
515.242.6114 (p)
515.281.4313 (f)

Vegetarian meal request

Submit form to:
Iowa County Attorneys Association
1st Floor, Hoover State Office Bldg.
Des Moines, Iowa 50319
OR FAX to: 515-281-4313
OR e-mail: sue.apple@iowa.gov

A confirmation email will be sent to the email address listed a week prior to the workshop.

Cancellation Policy: Registration cancelled on or before Friday, December 5, 2014 will receive a full refund. After that date there are no refunds.