LAW UPDATE HIGHWAY SAFETY

July 31, 2019 Office of the Prosecuting Attorneys Training Coordinator Apr/May/June/July, 2019

PATC Update

Normally, I would start the newsletter off with the County Spotlight; however, this issue I am taking a break and I will instead highlight the intern, Zachary Parle, that worked in the PATC division this summer. Do not worry, the County Spotlight will return with the next issue of the newsletter.

Zachary is a baseball fanatic, especially the St. Louis Cardinals. Prior to law school, Zachary received a degree in Economics from the University of Iowa. During his time at the University of Iowa, Zachary has worked as a Student Baseball Manager. Zachary spent this summer handling a variety of different tasks, including proofreading this newsletter.

Zachary started his internship with PATC on May 20, 2019 after finishing his first year of law school at the University of Iowa. Some of you may have received a phone call or a letter from Zachary as one of his main projects involved forfeitures and ensuring the forfeiture database was up to date. Zachary also helped facilitate both Iowa Acts of Interest to Law Enforcement conferences in June, as well as attending various traffic safety presentations. Zachary just finished putting together a Jury Challenge Analysis, including guidelines for Standard Deviation and Calculating Jury Population, in light of recent cases (Plain, Lilly, Veal, and Williams).

Zachary's last day with PATC is August 1, 2019. In August, Zachary will start his second year of law school, with a goal of becoming a Judge Advocate General in the Marine Corps after graduation. The PATC division wishes Zachary the best of luck in his future endeavors.

Warrantless Blood Draws???

On June 27, 2019, the United States Supreme Court issued Mitchell v. Wisconsin (discussed in greater detail on page 4) regarding warrantless blood draws of unconscious motorists. Mitchell authorized law enforcement officers to perform warrantless blood draws of unconscious motorists **if** they have probable cause to believe the unconscious motorist was driving while impaired. Mitchell does provide motorists with an opportunity to attack the warrantless blood draw by either showing: (1) there was not sufficient probable cause to believe the motorist was impaired, or (2) that law enforcement was not too busy to obtain a search warrant and the hospital would not have drawn blood but for to determine the motorist's BAC.

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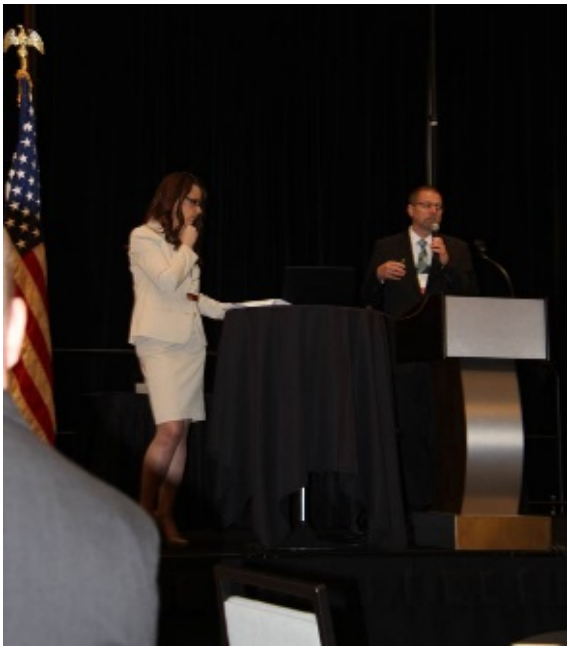
Despite the ruling allowing warrantless blood draws of unconscious motorists in Mitchell, the best practice is to always try to obtain a search warrant if possible. The ruling in Mitchell does not change the State's requirement of establishing that probable cause existed prior to performing a warrantless blood draw. **Remember**, the Iowa Supreme Court recently stated "While the United States Supreme Court has departed from the traditional warrant preference approach under the Fourth Amendment, we have declined to do so under the search and seizure provision of article I, section 8 of the Iowa Constitution."[1] The Iowa Supreme Court prefers search warrants.[2] Furthermore, if law enforcement obtains a search warrant and it is challenged, the Court is supposed to resolve any doubts in favor of upholding the validity of the search warrant.[3] If the question on a search warrant is whether there was sufficient probable cause, "[c]lose cases must be resolved in favor of upholding warrants, as public policy is promoted by encouraging officers to seek them."[4] **Therefore, the best practice remains to always try to obtain a search warrant if possible.**

2019 Iowa Governor's Highway Traffic Safety Conference



On April 23-24, 2019, the 2019 Iowa Governor's Highway Traffic Safety Conference was held in Coralville, Iowa. "The Governor's Highway Traffic Safety Conference brings together key local, state and national traffic safety professionals to discuss important issues, share strategies, highlight successes and recognize important contributions to traffic safety in Iowa."[5] During this year's conference, attendees heard from a variety of presenters, including Dr. Daniel McGehee[6] regarding Autonomous Vehicles.

Another highlight from conference was the annual OWI/Traffic Safety Case Law Update, which was co-presented by Assistant Pottawattamie County Attorney (and former Iowa TSRP) Christine Shockey and current Iowa TSRP Jeremy Peterson. This year's presentation highlighted the numerous new U.S. Supreme Court, Iowa Supreme Court, and Iowa Court of Appeals cases that affected OWI/traffic safety. The presentation concluded with a look at what motorized devices would qualify as "motor vehicle" under of Iowa Code section 321J.2.

2019 National Traffic Safety Resource Prosecutor Conference

The 2019 National Traffic Safety Resource Prosecutor (TSRP) Conference was held in Williamsburg, Virginia from April 29, 2019 through May 1, 2019. The Conference included a Roundtable Discussion on Drug-Impaired Driving and presentations on: sovereign citizens, DRE reconstructions, drone use for accident reconstruction, cross examination, and naturalistic cannabis and driving research.

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[1] State v. Ingram, 914 N.W.2d 794, 816 (Iowa 2018)
[2] State v. Ingram, 914 N.W.2d 794, 816 (Iowa 2018) (citations omitted).
[3] State v. Godbersen, 493 N.W.2d 852, 854–855 (Iowa 1992) ("Further, due to the preference for warrants, any doubts are accordingly resolved in favor of their validity.") (citation omitted).
[4] State v. Green, 540 N.W.2d 649, 655 (Iowa 1995) (citations omitted).
[5] https://register.extension.iastate.edu/gtsb
[6] Dr. McGehee is the director of the National Advanced Driving Simulator and Simulation Center at the University of Iowa.

I also had the honor giving a short presentation during one of the breakout sessions, regarding the Lethal Weapon Workshop that was held last August 2018 in West Des Moines, Iowa. During my presentation I gave a brief overview of the curriculum and discussed what the attendees enjoyed and would change about the workshop.

Overall, the National TSRP Conference was a success and an invaluable learning opportunity for me. I made some great connections and learned about exciting training options that other TSRPs are doing.

July 31, 2019 – National Heatstroke Prevention Day[7]

In 2018, 52 children died due to "vehicular heatstroke" in the United States.[8] As of July 29, there have been 23 children deaths due to "vehicular heatstroke" in the United States in 2019, including 1 in Iowa[9].[10] Since 1998, over half of the deaths involved children under the age of 2.[11] July 31st it is National Heatstroke Presentation Day and the National Highway Traffic Safety Administration (NHTSA) has tips on how to prevent "vehicular heatstroke", including:

Always Look Before You Lock

- Always check the back seats of your vehicle before your lock it and walk away.
- Keep a stuffed animal or other memento in your child's car seat when it's empty, and move it to the front seat as a visual reminder when your child is in the back seat.
- If someone else is driving your child, or your daily routine has been altered, always check to make sure your child has arrived safely.

Keep in Mind a Child's Sensitivity to Heat

- In 10 minutes, a car's temperature can rise over 20 degrees.
- Even at an outside temperature of 60 degrees, the temperature inside your car can reach 110 degrees.
- A child dies when his/her body temperature reaches 107 degrees.

Understand the Potential Consequences of Kids in Hot Cars

- Severe injury or death
- Being arrested and jailed
- A lifetime of regret

https://www.nhtsa.gov/child-safety/tips-avoid-child-heatstroke

[7] https://www.trafficsafetymarketing.gov/get-materials/child-safety/heatstroke-prevention
[8] https://www.noheatstroke.org/index.htm
[9] https://www.noheatstroke.org/16_2019.html
[10] https://www.noheatstroke.org/index.htm
[11] https://www.noheatstroke.org/index.htm

This Summer, help remind people how dangerous the heat inside your vehicle can be!

The Time to Reorder Criminal Law Handbook is Coming Up

The newest edition of the Criminal Law Handbook, which contains the most recent versions of the OWI and Traffic Offenses in Iowa manual and the Iowa Charging Manual, will be released in September, 2019. The manual uses software that makes outdated editions inaccessible, and therefore readers must re-order a new copy of the Criminal Law Handbook every six months. If you already have a CD containing only the OWI and Traffic Offenses in Iowa manual, this will remain valid until September 30, 2019, but will not contain the latest updates between March, 2019 and the present.

Order forms for the Criminal Law Handbook will be sent to all county attorneys soon.

Opinions of the United States Supreme Court

Mitchell v. Wisconsin, 588 U.S. ___, (06/27/2019). **When a "driver is unconscious and therefore cannot be given a breath test[,] . . . the exigent-circumstances rule almost always permits a blood test without a warrant."** Law enforcement received a report that the defendant was intoxicated and driving. When law enforcement found the defendant, he was slurring his words, stumbling, and had trouble standing. Due to the defendant's intoxicated state, the officer elected not to do the SFSTs and instead had the defendant give a PBT sample, which registered .24. The defendant was arrested for OWI and by the time the officer arrived

with him at the police station for the chemical breath test, he was unable to give a breath sample due to his intoxication. The officer then took the defendant to the hospital to obtain a blood sample; however, when they arrived, the defendant was unconscious. The officer then sought a warrantless blood draw as provided under the Wisconsin code. Wisconsin has a statute (§343.305(3)(b)) that is similar to Iowa Code section 321J.7 ("A person who is dead, unconscious, or otherwise in a condition rendering the person incapable of consent or refusal is deemed not to have withdrawn the consent provided by section 321J.6"). The defendant filed a motion to suppress the blood test results as an unlawful warrantless search in violation of the 4th Amendment. Held, when a "driver is unconscious and therefore cannot be given a breath test[,] . . . the exigent-circumstances rule almost always permits a blood test without a warrant." The Court explained the "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application." The Court further explained that "[b]oth conditions are met when a drunk-driving suspect is unconscious[.]" Therefore, "[w]hen police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may almost always order a warrantless blood test to measure the driver's BAC without offending the Fourth Amendment." However, the Court did state: "We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." **Despite the ruling in Mitchell, the best practice is to always try to obtain a search warrant if possible.**

Opinions of the Iowa Supreme Court

Warren County State v. Keegan Craig Smith, 926 N.W.2d 760 (Iowa April 26, 2019) No. 18-0305. **The defendant's right for independent testing was not violated because "only statements regarding additional testing are sufficient to invoke the statutory right."** After stopping the defendant, an officer requested the defendant perform the Standard Field Sobriety Tests (SFSTs) and provide a sample for the PBT. During this process, the defendant stated on multiple occasions that if he refused to perform any of the requested tests, the officer would just obtain a blood sample from him for testing. After the defendant performed the SFSTs and provided a sample for the PBT that was over .08, the defendant was arrested and transported to the jail. At the jail, the defendant provided a chemical test with a result of .188. The defendant did not inquire about independent testing, retesting, or any questions about other testing. The defendant was then charged with OWI 1st. The defendant appealed the denial of his motion to suppress, arguing that his right to independent testing under Iowa Code section 321J.11 was violated. Held, the defendant's "[s]tatements regarding chemical testing in lieu of the officer's testing are insufficient to invoke section 321J.11." The Court stated: "More important than the form of [the defendant's] statements is the substance of his statements. . . . Because the statute only provides the right to independent testing in addition to testing administered by the officer, only statements regarding additional testing are sufficient to invoke the statutory right."

Ringgold County State v. Timothy Alvin Newton, 929 N.W.2d 250 (Iowa 6/7/2019) No. 16-1525. **OWI based on "any amount of a controlled substance" is not unconstitutionally vague and does not lead to arbitrary enforcement.** Defendant was convicted of OWI 2nd and child endangerment based upon the "any amount" alternative in 321J.2(1)(c). The defendant raised a due process violation for vagueness. Defendant argued that a person is not on notice when they are in violation of the law because metabolites of drugs can appear in urine long after impairment is no longer present. Held, "the clause of the OWI statute that makes it unlawful for a person to operate a motor vehicle with any amount of a controlled substance in his or her person does not violate the Due Process Clause of either our Federal or State Constitution as applied to this

case." As long as a person is aware of the described conduct (consuming controlled substances) that places a person in jeopardy of violating the statute, due process is satisfied, and the statute does not lead to arbitrary enforcement because a law enforcement officer needs reasonable grounds to believe that a person is impaired in order to invoke implied consent. The Court further found: "When a prosecution under the statute is driven by reasonable grounds of an ongoing impairment, as in this case, the "any amount" standard is rationally related to the compelling safety concerns of the State." The majority did note that an officer needs to have reasonable grounds of impairment at the time of invoking implied consent (i.e., not based on the fact that the suspect is known to have used drugs on a regular basis) to avoid a successful challenge to the statute.

Polk County Alex Wayne Westra v. Iowa Department of Transportation, ___ N.W.2d ___ (Iowa June 14, 2019) No. 18-1050. **Prior to "May 11, [2017,] DOT officers lacked authority to issue traffic citations unrelated to the operating authority, registration, size, weight, or load."** On May 9, 2017, an Iowa DOT officer initiated a traffic stop after observing the defendant slow down and appear to get ready to use median crossover without authorization. When the officer approached the vehicle, the officer observed an odor of alcohol and discovered an open container in the vehicle. The defendant refused the SFSTs and other testing. The State did not charge the defendant with an OWI, but he was charged with two simple misdemeanors, open container (Iowa Code section 321.284) and stopping on a travelled portion of a highway (Iowa Code section 321.354). The defendant successfully got the simple misdemeanors dismissed, because on May 9, 2017, the DOT officer lacked authority to initiate the traffic stop. (Please note, effective May 11, 2017, Iowa Code section 321.477 was amended to allow DOT officers to enforce Chapter 321 upon being designated by the department through a resolution.) Although the simple misdemeanors were dismissed, the DOT still revoked his driver's license for one year for refusing to provide a chemical test (Iowa Code section 321J.9). At an administrative hearing, the defendant challenged the officer's authority to initiate the stop, but the DOT affirmed the revocation. The defendant then appealed to the district court, which found that although the officer did not have the authority to initiate the traffic stop, the exclusionary rule under the Iowa Constitution does not apply to license revocation proceedings. Held, under State v. Werner, 919 N.W.2d 375 (Iowa 2018), the DOT officer lacked authority to initiate the traffic stop for a violation of stopping on a travelled portion of a highway (Iowa Code section 321.354).

Polk County Alex Wayne Westra v. Iowa Department of Transportation, ___ N.W.2d ___ (Iowa June 14, 2019) No. 18-1050. **The exclusionary rule under Article 1, Section 8 of the Iowa Constitution does not apply in license revocation proceedings when the sole issue is the officer's authority to make a traffic stop.** On May 9, 2017, an Iowa DOT officer initiated a traffic stop after observing the defendant slow down and appear to get ready to use median crossover without authorization. When the officer approached the vehicle, the officer observed an odor of alcohol and discovered an open container in the vehicle. The defendant refused the SFSTs and other testing. The State did not charge the defendant with an OWI, but he was charged with two simple misdemeanors, open container (Iowa Code section 321.284) and stopping on a travelled portion of a highway (Iowa Code section 321.354). The defendant successfully got the simple misdemeanors dismissed, because on May 9, 2017, the DOT officer lacked authority to initiate the traffic stop. (Please note, effective May 11, 2017, Iowa Code section 321.477 was amended to allow DOT officers to enforce Chapter 321 upon being designated by the department through a resolution.) The DOT then revoked his driver's license for one year for refusing to provide a chemical test (Iowa Code section 321J.9). At an administrative hearing, the defendant challenged the officer's authority to initiate the stop, but the DOT affirmed the revocation. The defendant then appealed to the district court, which found that although the officer did not have the authority to initiate the traffic stop, but the exclusionary rule under the Iowa Constitution does not apply to license revocation proceedings. Held, Iowa Code "section 321J.13, limits the issues that can be raised in a license revocation proceeding; the officer's statutory authority is not one of those issues." The Court found "that article I, section 8 simply has no play in a license revocation proceeding when the issue is whether to suppress a stop that was supported by reasonable suspicion but

exceeded the officer's statutory authority." See Westendorf v. Iowa Department of Transportation, 400 N.W.2d 553, 557 (Iowa 1987) (The exclusionary rule under the 4th Amendment has no application in license revocation administrative proceedings), *superseded by statute as recognized by* Brownsberger v. Department of Transportation, 460 N.W.2d 449, 450–51 (Iowa 1990); See Manders v. Iowa Department of Transportation, 454 N.W.2d 364 (Iowa 1990) (upheld "the DOT's refusal to consider the diver's claim that the stop of his vehicle lacked reasonable cause[,]" Iowa Code section 321J.13(6) only applies if there is an order out of a parallel criminal proceeding); Compare Brownsberger v. Department of Transportation, 460 N.W.2d 449 (Iowa 1990) (revocation rescinded after the defendant's motion to suppress was granted in a parallel criminal case). The Iowa Supreme Court did note that State v. Taeger, 781 N.W.2d 560 (Iowa 2010) precludes the dismissal of a criminal OWI charge "'to avoid the application of Iowa Code section 321J.13(6)[.]'"

Black Hawk County State v. Scottize Danyelle Brown, ___ N.W.2d ___ (Iowa 06/28/2019) No. 17-0367. **Pretextual stops are constitutional under section 1, article 8 of the Iowa Constitution; traffic stops are analyzed under an objective test.** A law enforcement officer first observed the defendant cross the centerline of the road early in the morning and travel through an intersection as the light switched from yellow to red. After following the defendant, the officer observed one of the license plate lights on the vehicle was not operating correctly. The officer then ran the license plates and subsequently determined that the registered owner of the vehicle had some sort of link to gang activity. After the officer became aware of this, the officer initiated a traffic stop. When the officer made contact with the defendant, he observed an odor of alcohol and an open container of beer in the vehicle. The defendant denied ownership over the open container, but admitted to drinking earlier. The officer then discovered the defendant's license was suspended. The officer transported the defendant to the police department where he administered SFSTs and was subsequently charged with OWI 2nd offense. The defendant filed a motion to suppress, arguing the officer subjected her to an unlawful pretextual stop in violation of the United States Constitution (4th Amendment) and the Iowa Constitution (article I, section 8). The district court denied the defendant's motion to suppress and she appealed to the Iowa Supreme Court. Held, "the subjective motivations of an individual officer for making a traffic stop are irrelevant as long as the officer has objectively reasonable cause to believe the motorist violated a traffic law." The Court stated: "We should not penalize law enforcement for enforcing the law." The Court did note that if a defendant wants to challenge the stop as selective enforcement, they have to challenge it as a violation of the Equal Protection Clause ("'the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment.'" *quoting* Whren v. United States, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774 (1996)). The Court further stated: "the Equal Protection Clause prohibits selective enforcement of the law based on racially discriminatory grounds."

Black Hawk County State v. Scottize Danyelle Brown, ___ N.W.2d ___ (Iowa 06/28/2019) No. 17-0367. **The defendant's counsel was not ineffective for failing to challenge whether there was probable cause to initiate a traffic stop.** A law enforcement officer observed the defendant's vehicle cross the centerline of the road early in the morning, travel through an intersection as the light switched from yellow to red, and one of the license plate lights on the vehicle was not operating correctly. After the officer also became that the registered owner of the vehicle had some sort of link to gang activity, the officer initiated a traffic stop. When the officer made contact with the defendant, he observed an odor of alcohol and an open container of beer in the vehicle. The defendant denied ownership over the open container, but admitted to drinking earlier. The officer then discovered the defendant's license was suspended. The officer transported the defendant to the police department where he administered SFSTs and was subsequently charged with OWI 2nd offense. On appeal, the defendant argued that her counsel was ineffective for failing to challenge whether the State had sufficient probable cause to initiate a traffic stop. Held, the defendant's counsel was not ineffective for failing to challenge whether there was probable cause to initiate a traffic stop; the officer observed a the defendant's vehicle commit a traffic violation (Failure to Obey Traffic Control Device – Iowa

Code section 321.257). A traffic violation, no matter how minor, "is sufficient probable cause to stop a motorist." *See* State v. Tague, 676 N.W.2d 197, 201 (Iowa 2004).

Story County State v. Kayla Haas, ___ N.W.2d ___ (Iowa 06/28/2019) No. 17-1798. **"[T]he subjective motivations of an individual officer in making a traffic stop under article I, section 8 of the Iowa Constitution are irrelevant as long as the officer has objectively reasonable cause to believe the motorist violated a traffic law."** Law enforcement officers ran the plates of a vehicle parked outside a residence they had under surveillance. The officers discovered that the defendant was the registered owner of the vehicle and her license was barred. Later, the officers saw three people, two males and one female, enter the vehicle and drive away. The officers did not see which of the three was driving the vehicle, but they initiated a traffic stop on the vehicle. The defendant was subsequently charged and convicted of DWB (driving while barred). The defendant appealed, arguing "she was subject to an impermissible pretextual seizure" under Article 1, Section 8 of the Iowa Constitution. Held, under State v. Brown, ___ N.W.2d ___ (Iowa 2019), "the subjective motivations of an individual officer in making a traffic stop under article I, section 8 of the Iowa Constitution are irrelevant as long as the officer has objectively reasonable cause to believe the motorist violated a traffic law."

Story County State v. Kayla Haas, ___ N.W.2d ___ (Iowa 06/28/2019) No. 17-1798. **Officers had reasonable suspicion to stop the vehicle because the defendant was the registered owner and her driver's licensed was barred.** Law enforcement officers ran the plates of a vehicle parked outside a residence they had under surveillance. The officers discovered that the defendant was the registered owner of the vehicle and her license was barred. Later, the officers saw three people, two males and one female, enter the vehicle and drive away. The officers did not see which of the three was driving the vehicle, but they initiated a traffic stop on the vehicle. The defendant was subsequently charged and convicted of DWB (driving while barred). The defendant appealed, arguing there was insufficient reasonable suspicion to support a traffic stop. Held, "there was reasonable suspicion to initiate an investigatory stop of the vehicle [the defendant] was operating" because the officers had "reasonable suspicion she was driving while barred." "Though the officers did not see who was driving the vehicle, it was still reasonable to assume that Haas, as the registered owner of the vehicle, would be doing 'the vast amount of the driving.'" *quoting* State v. Vance, 790 N.W.2d. 775,781 (Iowa 2010). "At the very least, the officers had reasonable suspicion to stop Haas's vehicle after they observed her and two other people getting into the vehicle before leaving the area."

Story County State v. Kayla Haas, ___ N.W.2d ___ (Iowa 06/28/2019) No. 17-1798. **No ineffective assistance of counsel for failing to challenge whether license plate light was working properly.** Law enforcement officers ran the plates of a vehicle parked outside a residence they had under surveillance. The officers discovered that the defendant was the registered owner of the vehicle and her license was barred. Later, the officers saw three people, two males and one female, enter the vehicle and drive away. The officers did not see which of the three was driving the vehicle. While the officers followed the vehicle, they also observed that the license plate light appeared to be malfunctioning, in violation of Iowa Code section 321.388. The officers then initiated a traffic stop on the vehicle. The defendant was subsequently charged and convicted of DWB (driving while barred). The defendant appealed, arguing "her trial counsel was ineffective for declining to challenge whether the license plate was malfunctioning[.]" Held, trial counsel was not ineffective for not challenging "whether the license plate [light] was malfunctioning[.]" The Court found the video evidence failed to contradict the officer's testimony. The Court further found that even if the defendant's counsel breached an essential duty by not challenging the license plate light, there was no prejudice because there was reasonable suspicion to support the traffic stop to investigate if the defendant was operating the motor vehicle while her license was barred.

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 https://www.iowacourts.gov/).

(Recent Unpublished Decisions Arranged by County)

Black Hawk County State v. Destiny Brown, No. 18-0747 (Iowa Court of Appeals, filed May 1, 2019). **Even if the officer had observed the temporary registration tag in the window, the officer did not unlawfully extend the stop by requesting purchase paperwork because the writing on the tag was not readable.** A law enforcement officer initiated a traffic stop on the vehicle the defendant was driving after he did not observe any license plate or temporary registration tag. The vehicle's back window had dark tint, was dirty, and the rear exhaust was "'billowing up from the rear driver's side'". When the officer requested the defendant's purchase paperwork, registration, and driver's license, the defendant responded she did not have a driver's license. The officer confirmed the defendant did not have a valid driver's license and she later admitted to having drug paraphilia in the vehicle. A subsequent search of the vehicle led to the discovery of drugs and drug paraphernalia. At some point during the traffic stop, the officer discovered there was a temporary registration tag affixed in the rear window on the driver's side. The defendant's motion to suppress challenging the continued detention during the traffic stop was denied and she appealed. Held, because the temporary registration tag in the rear window was obstructed (dirty, dark tint, exhaust), "even if [the officer] had seen the tag before making contact with [the defendant], the continued detention of [the defendant] for the purpose of requesting information was reasonable and permissible."

Black Hawk County State v. Brandon Samuel Proctor, No. 18-0898 (Iowa Court of Appeals, filed June 19, 2019). **The district court did not err in denying the defendant's request for a jury instruction on operating without owners consent as a lesser included offense of theft under the theory of exercising control over stolen property.** A law enforcement officer attempted to stop a vehicle that had been reported stolen the day before, but the vehicle took off at a high rate of speed. Law enforcement eventually found the vehicle in a wood area. The vehicle was abandoned after it drove "through a fence and struck a tree[.]" Law enforcement found the defendant walking nearby and he admitted to: driving fast, striking a tree, and that there was an issue with the vehicle. Law enforcement also found the defendant's cellphone in the vehicle. The defendant's driver's license was also barred. A jury found the defendant guilty of DWB (driving while barred), theft in the first degree, criminal mischief, and trespass. The defendant appealed and argued the district court erred in denying his request for a jury instruction on operating without owners consent as a lesser included offense of theft 1st. Held, the district court did not err in denying the defendant's request for a jury instruction on operating without owners consent as a lesser included offense of theft 1st. See State v. Barnes, No. 16-0629, 2017 WL 3283282, at *9 (Iowa Ct. App. Aug. 2, 2017) (operating without owners consent is not a lesser included offense of theft under the theory of exercising control over stolen property).

Black Hawk County State v. Brandon Samuel Proctor, No. 18-0898 (Iowa Court of Appeals, filed June 19, 2019). **There was "sufficient evidence to show [the defendant] knew or reasonably should have known the pickup had been stolen."** A law enforcement officer attempted to stop a vehicle that had been reported stolen the day before, but the vehicle took off at a high rate of speed. Law enforcement eventually found the vehicle in a wooded area. The vehicle was abandoned after it drove "through a fence and struck a tree[.]" Law enforcement found the defendant walking nearby and he admitted to: driving fast, striking a tree, and that there was an issue with the vehicle. Law enforcement also found the defendant's cellphone in the vehicle. The defendant's driver's license was also barred. A jury found the defendant guilty of DWB (driving while barred), theft in the first degree, criminal mischief, and trespass. The defendant appealed and argued there was insufficient "evidence to show he knowingly exercised control over stolen property."

Held, the defendant "knew or reasonably should have known the pickup had been stolen." The court also found that there was sufficient evidence to support the defendant's conviction of felony eluding.

Black Hawk County Undray Jermaine Reed v. State, No. 18-0561 (Iowa Court of Appeals, filed July 3, 2019). **Appellate counsel was ineffective for not challenging the defendant's other convictions due to the prosecutorial misconduct during closing arguments.** The defendant was convicted of possession of a controlled substance, DWR (driving while revoked), and eluding. The defendant appealed only his conviction for possession for a controlled substance and the case was remanded for a new trial on that count due to prosecutorial misconduct during closing arguments. The defendant then filed an application for postconviction relief arguing his appellate counsel was ineffective for not challenging his convictions for DWR and eluding due to the prosecutorial misconduct during closing arguments. Held, appellate counsel was ineffective for not challenging the defendant's convictions for DWR and eluding due to the prosecutorial misconduct during closing arguments. The Court of Appeals found the prosecutor's statements "He's telling you the truth" and "He's being honest" were impermissible vouching regarding the officer's credibility. Reversed and remanded with instructions to vacate the conviction and order a new trial.

Boone County State v. Kari Lee Fogg, No. 18-0483 (Iowa Court of Appeals, filed May 1, 2019). **The defendant had the ability to drive away and was not seized when approached by a law enforcement officer.** After a law enforcement officer observed the defendant driving slowly in a residential area, turn down an alley, and park in the middle of the alley, the officer entered the other end of the alley and parked approximately ten to twenty feet in front of the defendant's vehicle. The law enforcement officer then exited the vehicle, but did not activate the patrol vehicle's emergency lights. Despite the position of the officer's vehicle, the defendant could have backed out of the alley or turned around in a driveway. When the officer approached the defendant, he did not retrieve his firearm, his voice was calm and casual, and did not physically touch the defendant. Held, under the totality of the circumstances, the defendant was not seized.

Boone County State v. Kari Lee Fogg, No. 18-0483 (Iowa Court of Appeals, filed May 1, 2019). **No ineffective assistance of counsel.** The defendant argued her counsel was ineffective for failing to object to certain arguments by the State during its closing and rebuttal arguments. Held, there was no ineffective assistance of counsel; the defendant failed to show that the outcome would have changed had her counsel objected to the State's comments.

Crawford County State v. Ramon Hernandez-Mendoza, No. 18-0083 (Iowa Court of Appeals, filed May 1, 2019). **Counsel not ineffective for failing to argue the state failed to show causation on a judgment of acquittal motion.** The defendant was operating a motor vehicle with three minors and another passenger when he drove into the ditch and then into the river. When law enforcement arrived, two the of minors had made it out of the river, but the defendant, the third minor, and the passenger were clinging to the river bank. The law enforcement officer was able to get the defendant and the other passenger out of the river, but the third minor was swept away and died. The third minor was discovered approximately seven days later. An autopsy revealed the third minor passed away due to "drowning with hypothermia being a significant other condition." The defendant admitted to smoking marijuana and drinking prior to driving. The defendant was convicted of vehicular homicide, multiple controlled substance violations, and multiple counts of supplying alcohol to a minor. The defendant appealed arguing his counsel was ineffective for not arguing the state failed to show causation on a judgment of acquittal motion. Held, "counsel was not ineffective for failing to

raise causation in a motion for judgment of acquittal[;]" there was sufficient evidence that the defendant's impaired "driving was a factual cause and—if applicable—a proximate cause of [the victim's] drowning[.]" The Court cited State v. Tyler, 873 N.W.2d 741, 750 (Iowa 2016) in that the Iowa Supreme Court "left open the possibility that criminal causation might still require more than proof of but-for factual causation."

Dallas County State v. Dana Robert Cherry, No. 18-1044 (Iowa Court of Appeals, filed May 1, 2019). **District court correctly refused to consider the defendant's motion in arrest of judgement because it was untimely.** The defendant pled guilty to driving while barred (DWB). Prior to sentencing, but over sixty days after entering a plea of guilty, the defendant filed a motion in arrest of judgment. Iowa Rules of Criminal Procedure 2.24(3)(b) requires a motion in arrest of judgment to be filed within forty-five (45) days from a plea of guilty or five (5) days before sentencing. Held, the district court correctly refused to consider the defendant's motion in arrest of judgement because it was untimely.

Dubuque County State v. Curt Douglas Steffen, No. 17-1959 (Iowa Court of Appeals, filed June 5, 2019). The defendant's plea colloquy regarding his prior OWI conviction was lacking because it failed to advise the defendant that in order for the State to rely on a prior conviction, he had to either have been represented by counsel or properly waived representation. The Court also called into question State v. Carney, 584 N.W.2d 907 (Iowa 1998) and whether the defendant's prior conviction colloquy adequately advised the defendant of the maximum punishment of admitting to the prior conviction because it failed to mention the enhanced license revocation.

Grundy County State v. Jamie Michael Ubben, No. 18-0915 (Iowa Court of Appeals, filed July 24, 2019). **Inevitable discovery permits the use of the handgun as evidence.** Law enforcement officers discovered the defendant passed out in his truck that was parked in the middle of a snow covered rural road. The defendant was in the driver's seat, with the truck running and the music on loud. The officers were able to observe a magazine clip, a gun holster, and beer inside the truck. It took the officers almost 12 minutes to wake the defendant. The officers further observed an odor of alcohol. The defendant showed multiple signs of intoxication, including failing the HGN and providing a PBT sample well over .08. The officers placed the defendant in a patrol vehicle and then opened the truck doors. The officers then discovered a handgun sitting on the passenger seat. The defendant was advised he was under arrest for carrying weapons and OWI. One of the officers then inventoried and had the defendant's truck towed. The defendant filed a motion to suppress the handgun as an illegal warrantless search. During the suppression hearing, an officer testified about the agencies inventory policy. The defendant's motion was denied. Held, "the gun was admissible as an inevitable discovery made during a law inventory search."

Grundy County State v. Jamie Michael Ubben, No. 18-0915 (Iowa Court of Appeals, filed July 24, 2019). **No 804.20 violation; the defendant was given an opportunity to make phone calls prior to signing that he was refusing chemical testing.** Law enforcement officers discovered the defendant passed out in his truck that was parked in the middle of a snow covered rural road. The defendant was in the driver's seat, with the truck running and the music on loud. The officers were able to observe a magazine clip, a gun holster, and beer inside the truck. It took the officers almost 12 minutes to wake the defendant. The officers further observed an odor of alcohol. The defendant showed multiple signs of intoxication, including failing the HGN and providing a PBT sample well over .08. The officers placed the defendant in a patrol vehicle and then opened the truck doors. The officers then discovered a handgun sitting on the passenger seat. The

defendant was advised he was under arrest for carrying weapons and OWI. The defendant was transported to the law enforcement center and booked into jail. The officer read implied-consent to the defendant and informed the defendant he could not explain it, but gave the defendant the opportunity to read it. The defendant then requested to contact an attorney and the officer asked him to sign "consent" or "refuse" on the implied-consent form, but then immediately advised him he could call an attorney or family member. The defendant called his father and when he hung up, informed the officer he was refusing chemical testing. The officer gave the defendant an opportunity to call someone else, which he called a female. During the defendant's call with a female, the defendant's cellphone was ringing and disrupting the call, so the officer silenced the ringing to allow the defendant to finish his phone call with the female. At the conclusion of this call, the defendant signed the form saying he refused chemical testing. The defendant filed a motion to suppress arguing his 804.20 rights were violated (should have been allowed to call attorney during transport and there was an unreasonable delay in getting the opportunity to make a phone call). The defendant's motion was denied. Held, no 804.20 violation; the defendant was given an opportunity to make phone calls prior to signing that he was refusing chemical testing.

Hardin County State v. Nikolas A. Stephens, No. 18-1149 (Iowa Court of Appeals, filed June 5, 2019). **No abuse in discretion for excluding evidence regarding the victim's impairment as irrelevant in a trial for leaving the scene of an accident resulting in a death.** Before the defendant's trial for leaving the scene of an accident resulting in a death, the State secured an order precluding the defense from presenting any evidence regarding the pedestrian victim's impairment due to alcohol or drugs as irrelevant. The defendant appealed the ruling. Held, no abuse in discretion for excluding evidence regarding the victim's impairment; the evidence was not relevant as to whether the defendant "knew or had reason to know he hit a person."

Hardin County State v. Nikolas A. Stephens, No. 18-1149 (Iowa Court of Appeals, filed June 5, 2019). **No abuse in discretion for omitting nonrelevant jury instructions.** The defendant requested civil jury instructions regarding "the victim's alleged negligence" at his trial for leaving the scene of an accident resulting in a death. The court denied the requested civil jury instructions. Held, the requested jury instructions did not have any application to this case; the jury instructions were not relevant as to whether the defendant "knew or had reason to know he hit a person."

Hardin County State v. Nikolas A. Stephens, No. 18-1149 (Iowa Court of Appeals, filed June 5, 2019). **No abuse in discretion for admitting relevant evidence.** During the defendant's trial for leaving the scene of an accident resulting in a death, the State introduced a text message sent from the defendant's phone a couple days after the incident to show that the defendant was avoiding law enforcement. Held, the court did not abuse its discretion in admitting the text message; the text message was relevant regarding whether the defendant was avoiding law enforcement and whether he was aware the incident resulted in death to another.

Hardin County State v. Bob Kent Knipfel, No. 18-1739 (Iowa Court of Appeals, filed June 19, 2019). **No abuse in discretion by the sentencing judge for not following the parties' and PSI's recommendations.** After pleading guilty to OWI 2nd, the defendant appealed his sentence (indeterminate two-year prison sentence). Held, the sentencing court did not abuse its discretion. It properly considered the protection of the community, the PSI recommendation was not binding on the court, and the parties sentence recommendation was also not binding on the court (the defendant acknowledged in his plea that the court may reject the agreement).

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

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Johnson County State v. Tyler Ferguson, No. 18-1137 (Iowa Court of Appeals, filed May 15, 2019). **No abuse in discretion in revoking the defendant's probation.** Four months after pleading guilty to OWI 1st and receiving a deferred judgement, the defendant was charged with driving while revoked (DWR). The defendant's probation was revoked based on the new charge/conviction (DWR) and judgment was entered. Held, no abuse in discretion in revoking the defendant's probation.

Mahaska County In re K.E., No. 18-0796 (Iowa Court of Appeals, filed May 1, 2019). **There was sufficient evidence to show K.E. knew the four-wheeler was stolen.** A stolen four-wheeler was found on property owned by K.E.'s father. The four-wheeler had been painted a different color and the ignition switch had been changed. K.E.'s friend denied giving K.E. the four-wheeler and pictures of the four-wheeler did not match K.E.'s claim it was "junk". K.E. and his father also tried to diminish their familiarity with the vehicle, despite the fact they transported it to law enforcement. Held, there was sufficient evidence to show K.E. knew the four-wheeler was stolen.

Mills County State v. Timothy Edward Runyon, No. 18-1684 (Iowa Court of Appeals, filed June 5, 2019). **Under the totality of the circumstances, there was sufficient "reasonable suspicion to believe criminal activity was afoot."** During the evening hours, and after a business had closed, an officer observed the defendant drive from the back area of private property. Law enforcement had previously been called to the area due to other criminal activity. Initially the defendant drove towards the officer, but he then changed direction and proceeded to leave the area. The officer initiated a traffic stop and the defendant was subsequently charged and convicted of OWI 2nd. The defendant's motion to suppress arguing the officer did not have sufficient "reasonable suspicion to believe criminal activity was afoot" was denied. Held, traffic stop was constitutional; under the totality of the circumstances, there was sufficient reasonable suspicion to support the investigatory stop.

Polk County State v. Jose Manuel Domingo Mendez, No. 18-0442 (Iowa Court of Appeals, filed April 17, 2019). **Sufficient evidence of constructive possession of contraband despite other passengers in vehicle.** The defendant was the driver of his girlfriend's vehicle that contained three other passengers. Law enforcement discovered over twelve grams of methamphetamine, the defendant's cell phone, and small baggies in the open armrest center console. The drugs were located in a location were all four occupants could reach it. The defendant also had $275 in cash and methamphetamine in his pocket. Law enforcement did not find drugs on any of the other passengers. The other passengers did not show signs of being under the influence of methamphetamine, but the defendant did exhibit signs of methamphetamine impairment. The defendant denied knowing the methamphetamine was in the center armrest console. Held, there was sufficient evidence of the defendant's constructive possession of methamphetamine in the center console despite the other passengers in the vehicle. "A reasonable jury could infer the armrest-console methamphetamine belonged to Mendez when he had a smaller quantity in his pocket, his phone was found in the same location, he had possession and control of the vehicle, and he was under the influence while none of the passengers had drugs on them and were not under the influence of drugs."

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Polk County State v. Abraham Petro Riko, No. 17-1534 (Iowa Court of Appeals, filed April 17, 2019). **Sufficient evidence the defendant was operating the motor vehicle.** The defendant ran from police on two separate occasions, mere minutes apart. On the second occasion, the defendant was driving a stolen automobile and attempted to elude law enforcement in the vehicle. The law enforcement officers attempted a PIT maneuver to stop the defendant, but he drove away and the officers followed. Eventually the defendant's vehicle crashed and he ran from the scene. The defendant was found in a trash can near the crashed vehicle. The defendant's arrest photo matched earlier descriptions of the defendant, including "a distinctive white belt[.]" The defendant contested the officers' identification of him because they only saw him for a few seconds. Held, there was sufficient evidence the defendant was operating the motor vehicle. The defendant's "flight and hiding are factors from which the jury could infer he was the driver." *See* State v. Wilson, 878 N.W.2d 203, 211 (Iowa 2016).

Polk County State v. Abraham Petro Riko, No. 17-1534 (Iowa Court of Appeals, filed April 17, 2019). **Substantial evidence to show the defendant had knowledge that the vehicles were stolen.** When the defendant ran from the first vehicle, he threw a computer at the officer. Later, the defendant did not pull over in the second vehicle when officers attempted to stop his vehicle and he attempted to elude the officers. After the defendant crashed the second vehicle, he fled the scene and was found hiding in a garbage can. The defendant argued there was insufficient evidence to show he knew the vehicles were stolen. Held, there was substantial evidence (the defendant's actions, including fleeing law enforcement) to show the defendant had knowledge that the vehicles were stolen.

Polk County State v. Abraham Petro Riko, No. 17-1534 (Iowa Court of Appeals, filed April 17, 2019). **There was sufficient evidence to show the defendant was engaged in a felony while he was eluding law enforcement.** Law enforcement attempted to initiate a traffic stop on the stolen vehicle the defendant was driving. The defendant did not pull over and attempted to elude the officers. After the defendant crashed the stolen vehicle, he fled the scene and was found hiding in a garbage can. The defendant argued there was insufficient evidence to show that when he was eluding he was also engaged in a felony. Held, there was sufficient evidence to show the defendant was engaged in a felony while he was eluding law enforcement. "Because Riko was participating in theft by exercising control over the stolen Camry while he led law enforcement on a high-speed chase, there was substantial evidence of the charge."

Polk County State v. Abraham Petro Riko, No. 17-1534 (Iowa Court of Appeals, filed April 17, 2019). **The defendant's counsel not ineffective for failing to object to the use of "and/or" in the eluding jury instruction.** A jury convicted the defendant of eluding. Element number 4 in the eluding jury instruction used the expression "and/or" ("'At the time of this offense, the defendant was also engaged in the offense of theft in the second degree and/or assault on a peace officer with a dangerous weapon.'"). The defendant argued his counsel was ineffective for failing to object to this jury instruction. Held, no ineffective of assistance of counsel; the defendant failed to assert that if a different instruction had been used a different outcome would have happened.

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Polk County State v. Thomas Van Rawls Jr., No. 18-0882 (Iowa Court of Appeals, filed May 15, 2019). **There was no abuse in discretion in ordering the sentences to be served consecutively.** The defendant plead guilty to multiple charges, including driving while barred (DWB), stemming from criminal acts that occurred on three sperate days during an approximately eight month period. The court ordered his sentences to run consecutively because the offenses were done while the defendant was on probation and the serious nature of the offenses. The defendant appealed the imposition of consecutive sentences. Held, there was no abuse in discretion in ordering the sentences to be served consecutively. The case was affirmed in part, but remanded to reorder restitution.

Polk County State v. Nathan Skeries, No. 18-1432 (Iowa Court of Appeals, filed June 5, 2019). **A vehicle's headlights/fog lights not illuminating at least 100 feet is reasonable suspicion to initiate a traffic stop.** Late at night, an officer observed the defendant driving a jeep with the headlights off and only the fog lights on. The officer testified he thought the defendant was violating Iowa Code section 321.409(1)(b) because he did not think the fog lights cast a beam of at least 100 feet forward. The officer then observed the defendant swerve over the lane divider. After initiating a traffic stop, the officer observed indications of impairment. The defendant's motion to suppress arguing the officer lacked reasonable suspicion that criminal activity was afoot because his fog lights "sufficiently illuminated the road" was denied. Held, there was sufficient reasonable suspicion to stop the defendant's vehicle and investigate whether it was violating Iowa Code section 321.409(1)(b).

Polk County State v. Nathan Skeries, No. 18-1432 (Iowa Court of Appeals, filed June 5, 2019). **Using fog lights instead of headlights and swerving over the lane divider provides reasonable suspicion to initiate a traffic stop to investigate a potential OWI.** Late at night, an officer observed the defendant driving a jeep with the headlights off and only the fog lights on. The officer then observed the defendant swerve over the lane divider. After initiating a traffic stop, the officer observed indications of impairment. The defendant's motion to suppress arguing the officer lacked reasonable suspicion that criminal activity was afoot was denied. Held, a driver's use of fog lights instead of headlights and swerving over the lane divider provides reasonable suspicion to initiate a traffic stop to investigate a potential OWI.

Scott County State v. Rodney D. Beck, No. 18-0659 (Iowa Court of Appeals, filed April 3, 2019). **No ineffective assistance of counsel for failing to object to relevant evidence.** A detective was surveilling the defendant pursuant to a drug investigation and observed him get into a rental vehicle and drive to multiple locations. During this time, the defendant's driving privileges were barred and suspended. At trial, the detective testified the defendant stopped at a tire shop for over an hour. Prior to trial, the trial court precluded the State from presenting evidence that the defendant was under a drug investigation, but it could present evidence that the detective did have the defendant under surveillance. A jury convicted the defendant of driving while barred (DWB) and driving while suspended. The defendant appealed arguing the detective's testimony about the tire shop was designed to give the impression to the jury that the defendant was committing other criminal acts and thus he was a bad guy. Held, there was no ineffective assistance of counsel for failing to object to the statement; the evidence was relevant.

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Scott County State v. Rodney D. Beck, No. 18-0659 (Iowa Court of Appeals, filed April 3, 2019). **No abuse in discretion; the sentencing court gave sufficient reasons for its sentence.** A jury convicted the defendant of driving while barred (DWB) and driving while suspended. The defendant was sentenced to fifty-seven more days than he had requested. The sentencing court cited the defendant's history of driving convictions and considered the required sentencing factors. The defendant appealed arguing the sentencing court failed to adequately state the reasons for the sentence. Held, there was no abuse in discretion; the sentencing court gave sufficient reasons for its sentence.

Scott County State v. Robert Allen Brown, No. 18-1031 (Iowa Court of Appeals, filed April 3, 2019). **There was sufficient evidence to support the guilty plea.** When the defendant pled guilty to OWI 3rd, he took part in a plea colloquy and admitted to operating a motor vehicle while his abilities were impaired. The minutes of testimony also indicated the initial call was about an erratic driver, the defendant was found in the driver's seat with an odor of alcohol, he exhibited impaired balance and slurred speech, and there was vomit and alcohol in the vehicle. The defendant appealed an argued his counsel was ineffective because there was an insufficient factual basis for his plea of guilty. Held, based on the minutes of testimony and the plea colloquy, there was a sufficient evidence to support the guilty plea and his counsel was not ineffective.

Scott County State v. Shannon Christopher Turner, No. 18-1599 (Iowa Court of Appeals, filed April 17, 2019). **No abuse in discretion in sentencing the defendant to prison.** The defendant pled guilty to assault with intent to commit sexual abuse and OWI. After acknowledging the defendant's lack of criminal history, one of the offenses was a crime of violence, treatment options, family circumstances, and the PSI, the court sentenced the defendant to prison, with both offenses to be served concurrently. Held, there was no abuse in discretion in sentencing the defendant to prison.

Scott County State v. Roosevelt Jerry Smith Sr., No. 18-1162 (Iowa Court of Appeals, filed June 5, 2019). **No abuse in discretion; sentence was "within the statutory limits."** The defendant pled guilty to DWB (driving while barred) and was sentenced to a period of jail pursuant to a plea agreement. The defendant then appealed arguing the court failed to use its discretion and sentence him to supervised probation instead of jail. Held, no abuse in discretion; the sentence was "within the statutory limits."

Sioux County State v. Douglas Earl Hutchison, No. 18-1843 (Iowa Court of Appeals, filed July 24, 2019). **Community-caretaking exception did not apply.** After law enforcement received information from a concerned citizen that observed a vehicle being driven recklessly, including going in a ditch twice and a cornfield. Law enforcement found the vehicle, with cornstalks on it, located in a private driveway. Law enforcement did not locate anyone with the vehicle and no one answered when they knocked on the residential door. Law enforcement knocked on a door to the garage and heard a response state "I'm coming." Law enforcement then opened the door and entered the garage, where the encountered the defendant. The defendant was subsequently charged with OWI. The defendant filed a motion to suppress based on an illegal entry into the garage, but the district court denied the motion, finding the community-caretaking exception applied. Held, the community-caretaking exception did not apply; the officers' actions were not to help the defendant, but an attempt to determine who had driven the vehicle into the ditch and cornfield. Conviction reversed and case remanded.

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Story County State v. Jose Manuel Cruz Ordonez, No. 18-0407 (Iowa Court of Appeals, filed April 17, 2019). **The HGN test does not violate the defendant's "right against self-incrimination."** During an OWI investigation, the defendant show signs of impairment when he performed the HGN test. The defendant filed a motion to suppress the HGN test results as a violation of his "right against self-incrimination", which the district court denied. Held, under prior precedent, the HGN test does not violate the defendant's "right against self-incrimination." *See* State v. Marks, 644 N.W.2d 35, 37 (Iowa Ct. App. 2002); State v. Mannion, 414 N.W.2d 119 (Iowa 1987); and State v. Rauhauser, 272 N.W.2d 432 (Iowa 1978). The HGN "elicited a physical, non-testimonial response rather than a communicative, testimonial response." The Court further stated: "Nor does the claimed absence of an opportunity to 'deny the test' implicate the Fifth Amendment right against self-incrimination."

Story County State v. Jose Manuel Cruz Ordonez, No. 18-0407 (Iowa Court of Appeals, filed April 17, 2019). **The officer's request for the defendant to perform the HGN was not a search under the Fourth Amendment.** During an OWI investigation, the officer had the defendant perform the HGN test, which indicated signs of impairment. The defendant filed a motion to suppress the HGN test results as an unlawful warrantless search, which the district court denied. Held, the officer's request for the defendant to perform the HGN (i.e., SFSTs) was not a search under the Fourth Amendment. Citing State v. Marks, 644 N.W.2d, 35, 38 (Iowa Ct. App. 2002): "'When an officer has reasonable cause to believe the driver is operating while intoxicated, a suspect may be briefly detained, asked to perform field sobriety tests and comply with other investigatory requests, without violating the suspect's Fourth Amendment rights."

Wapello County State v. David Alan Francis, No. 18-0831 (Iowa Court of Appeals, filed June 5, 2019). **No abuse in discretion in precluding irrelevant evidence.** A law enforcement officer observed the defendant stumble while walking through a parking lot outside of a bar and grill, get inside his vehicle, and turn it on. The officer approached the defendant and observed an odor of alcoholic beverage, slurred speech, and bloodshot and watery eyes. After the defendant did not pass the SFSTs, he submitted a chemical breath test with a BAC of .139. Prior to trial, the defendant provided notice that he intended to introduce evidence that he suffered from PTSD and suicidal ideation to explain why he was in his car and show why he was not intending to operate the motor vehicle. The district court found the defendant could mention he was a veteran and that he left the bar due to veteran issues, but precluded the defendant from mentioning PTSD because their was no credible evidence that he suffered from PTSD and precluded him from discussing any suicidal ideations because it was irrelevant. At trial, the defendant denied he started the vehicle. The defendant was subsequently convicted of OWI 3rd. Held, "the district court not abuse its discretion" in precluding the defendant from presenting PTSD and suicidal ideation evidence because it was not relevant; the proposed evidence was not relevant regarding whether the engine was on or off.

Wapello County State v. David Alan Francis, No. 18-0831 (Iowa Court of Appeals, filed June 5, 2019). **Defendant does not have to "drive" a motor vehicle to "operate" it.** A law enforcement officer observed the defendant stumble while walking through a parking lot outside of a bar and grill, get inside his vehicle, and turn it on. The officer approached the defendant and observed an odor of alcoholic beverage, slurred speech, and bloodshot and watery eyes. After the defendant did not pass the SFSTs, he submitted a chemical breath test with a BAC of .139. At trial, the defendant testified he did not turn the vehicle on and a witness testified that the engine was not on when the officer approached the vehicle. The defendant was subsequently convicted of OWI 3rd. Held, there was sufficient evidence to prove the defendant was

"operating" the motor vehicle. A defendant does not have to drive a motor vehicle to operate it. State v. Weaver, 405 N.W.2d 852, 854 (Iowa 1987).

Warren County State v. Randall Lee Brooks, No. 18-1381 (Iowa Court of Appeals, filed April 17, 2019). **Improper collateral attack on prior DOT decisions during his criminal proceeding for driving while barred.** A jury found the defendant guilty of driving while barred (DWB). Prior to the jury trial, the district court denied the defendant's request to attack a prior citation that ultimately led to him being barred. Held, no abuse in discretion by the district court when it denied the defendant the opportunity to collaterally attack the reason for his barment.

Warren County State v. Randall Lee Brooks, No. 18-1381 (Iowa Court of Appeals, filed April 17, 2019). **No abuse in discretion for denying the defendant's request for continuance "to pursue administrative remedies."** A jury found the defendant guilty of driving while barred (DWB). Prior to the jury trial, the district court denied the defendant's request for continuance "to pursue administrative remedies." Held, no abuse in discretion for denying the defendant's continuance request; "the time for administrative remedies had passed[.]"

Warren County State v. Randall Lee Brooks, No. 18-1381 (Iowa Court of Appeals, filed April 17, 2019). **The defendant failed to preserve error on his claim the court violated "his right to be present at trial."** A jury found the defendant guilty of driving while barred (DWB). During the trial, the defendant failed to return to the courtroom at the required time after a break. The defendant did appear prior to the jury entering, but after an offer of proof regarding a prior ticket was made by his counsel. The defendant failed to object at trial. Held, "[b]ecause the claim was not raised to the trial court, error was not preserved." The court did preserve the claim for any postconviction action.

Warren County State v. Timothy Douglas Seils, No. 18-0481 (Iowa Court of Appeals, filed May 15, 2019). **"[T]he foundation requirements for implied consent had not been met" when implied consent was invoked.** After receiving a report of a possible intoxicated driver, an Iowa State Trooper initiated a traffic stop on the defendant's vehicle after observing the defendant make a wide turn (veering into oncoming traffic). The trooper observed the defendant had an odor of alcoholic beverage, watery and bloodshot eyes, and his balance was a little off. After the defendant refused the SFSTs, he attempted to run into his home before he was stopped by a trooper, handcuffed, and arrested for interference. The defendant was transported to jail where he refused to provide a chemical breath test after implied consent was invoked. During a suppression hearing, the trooper admitted that the defendant was only arrested for OWI after implied consent was invoked. The defendant argued none of the factors listed in 321J.6(1)(a) existed when implied consent was invoked. Held, "the foundation requirements for implied consent had not been met" when implied consent was invoked; evidence of the defendant's refusal of the chemical test should have been suppressed. The case was remanded for a new trial.

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Warren County State v. Timothy Douglas Seils, No. 18-0481 (Iowa Court of Appeals, filed May 15, 2019). **It was not harmless error to allow illegally seized evidence in at trial.** After receiving a report of a possible intoxicated driver, an Iowa State Trooper initiated a traffic stop on the defendant's vehicle after observing the defendant make a wide turn (veering into oncoming traffic). The defendant pulled into his drive and stopped inside his garage. After the defendant exited the vehicle, the trooper observed the defendant had an odor of alcoholic beverage, watery and bloodshot eyes, and his balance was a little off. After the defendant refused the SFSTs, he attempted to run into his home before he was stopped by a trooper, handcuffed, and arrested for interference. The defendant was placed in the patrol vehicle and then law enforcement searched the defendant's vehicle (located inside the garage). Law enforcement found beer bottles, with at least one already opened. The defendant's motion to suppress to keep the beer bottles out of evidence due to an illegal search was denied. On appeal, the state conceded that none of the exceptions to the warrant requirement applied, but argued it was harmless error when the district court allowed the beer bottles to be admitted as evidence. Held, it was not harmless error to admit the beer bottles as evidence in the defendant's OWI trial. The case was remanded for a new trial without the beer bottles being used as evidence.

Webster County State v. Robert Earl Rivers Jr., No. 18-0365 (Iowa Court of Appeals, filed May 15, 2019). **Peremptory strikes are constitutional.** A jury convicted the defendant of driving while barred (DWB) and aggravated eluding. During jury selection, Juror 25 stated he was a family friend of the defendant's family, but he could remain impartial. The State used its third (of four) peremptory strike to remove the only African American potential juror, Juror 25. The defendant then made a Batson challenge and also argued peremptory strikes are unconstitutional under the Iowa and United States Constitutions. The State argued it struck Juror 25 because he stated was a family friend of the defendant's family. Held, the defendant failed to show how peremptory strikes are unconstitutional ("we agree with the State that 'Rivers has failed to demonstrate that nebulous concerns about Batson warrant abandoning Iowa's traditional approach to peremptory challenges, which enable all litigants to protect themselves from unspoken bias that may infect deliberations.'" (emphasis in original)).

Webster County State v. Robert Earl Rivers Jr., No. 18-0365 (Iowa Court of Appeals, filed May 15, 2019). **There was sufficient evidence to establish the defendant as the driver.** Two law enforcement officers who were familiar with the defendant from prior interactions, observed him operating a motor vehicle. Law enforcement verified that the defendant's "driver's license was barred." When law enforcement attempted to initiate a traffic stop, the defendant led them on a high-speed chase, eventually crashing into a house. The defendant then fled on foot before he could be apprehended. Law enforcement discovered a cellphone in the vehicle. After obtaining a search warrant for the phone, they discovered an e-mail address associated with the defendant, the defendant had used the phone number as his contact number with an official from the state, and one text message was sent to a "Rob". At trial, the defendant's sister provided testimony that the cellphone was her son's. The State presented a witness from the DOT that testified the defendant's license was barred and had been mailed notice he was barred; however, the notice documentation was not entered into evidence as an exhibit. A jury convicted the defendant of driving while barred (DWB) and aggravated eluding. The defendant appealed arguing the evidence establishing him as the driver was only circumstantial. Held, there was sufficient evidence to establish the defendant as the driver of the vehicle.

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

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Webster County State v. Robert Earl Rivers Jr., No. 18-0365 (Iowa Court of Appeals, filed May 15, 2019). **"[N]otice to a defendant of the barred status his driver's license is not an essential element of driving while barred."** Two law enforcement officers who were familiar with the defendant from prior interactions, observed him operating a motor vehicle. Law enforcement verified that the defendant's "driver's license was barred." When law enforcement attempted to initiate a traffic stop, the defendant led them on a high-speed chase, eventually crashing into a house. The defendant then fled on foot before he could be apprehended. Law enforcement discovered a cellphone in the vehicle. After obtaining a search warrant for the phone, they discovered an e-mail address associated with the defendant, the defendant had used the phone number as his contact number with an official from the state, and one text message was sent to a "Rob". At trial, the defendant's sister provided testimony that the cellphone was her son's. The State presented a witness from the DOT that testified the defendant's license was barred and had been mailed notice he was barred; however, the notice documentation was not entered into evidence as an exhibit. A jury convicted the defendant of driving while barred (DWB) and aggravated eluding. The defendant appealed arguing there was not sufficient evidence that he knew he was barred or had notice from the DOT that he was barred. Held, pursuant to State v. Williams, 910 N.W.2d 586, 594 (Iowa 2018), "notice to a defendant of the barred status his driver's license is not an essential element of driving while barred."

Webster County State v. Robert Earl Rivers Jr., No. 18-0365 (Iowa Court of Appeals, filed May 15, 2019). **Counsel was not ineffective for failing to challenge the admitted evidence obtained from the cellphone.** Two law enforcement officers who were familiar with the defendant from prior interactions, observed him operating a motor vehicle. Law enforcement verified that the defendant's "driver's license was barred." When law enforcement attempted to initiate a traffic stop, the defendant led them on a high-speed chase, eventually crashing into a house. The defendant then fled on foot before he could be apprehended. Law enforcement discovered a cellphone in the vehicle. After obtaining a search warrant for the phone, they discovered an e-mail address associated with the defendant, the defendant had used the phone number as his contact number with an official from the state, and one text message was sent to a "Rob". At trial, the defendant's sister provided testimony that the cellphone was her son's. The State presented a witness from the DOT that testified the defendant's license was barred and had been mailed notice he was barred; however, the notice documentation was not entered into evidence as an exhibit. A jury convicted the defendant of driving while barred (DWB) and aggravated eluding. The defendant appealed arguing his counsel was ineffective for failing to challenge the admitted evidence from the cellphone. Held, counsel was not ineffective for failing to challenge the admitted evidence obtained from the cellphone. Even if the cellphone evidence was excluded, there was still sufficient evidence to establish the defendant as the driver of the motor vehicle; thus, the defendant failed to show he was prejudiced by counsel's failure to challenge the evidence.

Woodbury County State v. Melton Ray Carter, No. 18-1502 (Iowa Court of Appeals, filed June 5, 2019). **Probable cause established when a trained officer with sufficient knowledge smells an odor of marijuana.** While sitting in a patrol vehicle, a law enforcement officer detected an odor of marijuana when the defendant walked by at a distance of approximately 30 to 40 feet and no other person was in that area. The officer then exited the vehicle and as he approached the defendant, he determined the odor was coming directly from the defendant. After the defendant denied the officer's request to search, the officer searched the defendant due to the odor of marijuana and discovered marijuana on the defendant. Held, "the odor of

marijuana emanating from a person, by itself, when detected by a police officer, who has adequate knowledge and training to recognize the smell, constitutes probable cause."

Woodbury County State v. Phillip Orlando Naylor, No. 18-0467 (Iowa Court of Appeals, filed June 5, 2019). **An anonymous caller/citizen informant does not have to observe or report any erratic driving to establish reasonable suspicion to support a traffic stop.** An anonymous caller (citizen informant) called 911 on two separate occasions to report the same intoxicated driver. During the first call, the citizen informant reported: a detailed description of the defendant's motor vehicle (but did not provide the license plate) he was driving and personal observations of the defendant's conduct (could not walk; yelling at people; and grabbed a street sign) as he approached the vehicle. On the second call, the citizen informant reported: a detailed description of the second vehicle and the direction he was driving. Held, the information the citizen informant gave regarding the defendant's non-driving conduct "carried sufficient indicia of reliability to provide the officer with reasonable suspicion for the traffic stop." An anonymous caller does not have to observe or report any erratic driving to establish reasonable suspicion to support a traffic stop. Other factors, such as stumbling out of a bar toward the vehicle, behavior in a parking lot, or trouble walking prior to getting into the vehicle may be sufficient to establish reasonable suspicion to support a traffic stop. The Court looks at the "totality of circumstances" in determining whether there was reasonable suspicion to support a traffic stop.

Worth County State v. Tricia Ann Hannegrefs, No. 18-1419 (Iowa Court of Appeals, filed June 19, 2019). **The State has to disprove "beyond a reasonable doubt" a successfully raised compulsion defense.** After the defendant was convicted by a jury of driving while barred (DWB), she appealed arguing her counsel was ineffective for failing to properly instruct the jury on the compulsion defense. Held, counsel was ineffective for failing to instruct the jury that the State has to disprove the compulsion defense "beyond a reasonable doubt" after a defendant successfully raises the defense.

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