HIGHWAY SAFETY LAW UPDATE

November 17, 2017 Office of the Prosecuting Attorneys Training Coordinator July/Aug/Sept/Oct, 2017

The Use of SFSTs in Marijuana-Impaired Driving Cases – Iowa Perspective

On September 19, 2017, the Massachusetts Supreme Court ruled on an impaired driving case involving marijuana where field sobriety tests were conducted. The case, *Commonwealth v. Gerhardt*, 81 N.E.3d 751 (Mass.2017), has been cited and commented on extensively in the traffic enforcement community as being highly impactful on the future of enforcement of impaired driving laws at the same time that marijuana is gaining increasing acceptance amongst the public as a harmless substance, misinformation abounds, the scientific community splits, and more and more states move towards legalization.

The case arose out of a traffic stop at 12:20 AM in Millbury, Massachusetts. The defendant, Thomas Gerhardt, was driving a Suzuki Grand Vitara, without rear lights. When the officer approached the vehicle, he detected the distinct odor of marijuana and saw a large amount of what he identified as cigar tobacco on the floor. When asked how much marijuana was in the car, the defendant responded that there were a couple of roaches in the ashtray. He pulled two largely-consumed rolled cigarettes from the ashtray and handed them to the officer, and then admitted to smoking approximately one gram of the substance. The officer had the defendant perform the HGN, the walk-and-turn test, and the one-leg-stand test. He also had the defendant recite the alphabet form D to Q and count backward from seventy-five to sixty-two. The officer concluded that based upon the defendant's performance on the walk-and-turn and one-leg-stand tests, that he was impaired.

The court ruled the following:

1. Because the effects of marijuana may vary greatly from one individual to another, and those effects are not yet commonly known, neither a police officer nor a lay witness who has not been qualified as an expert may offer an opinion as to whether a driver was under the influence of marijuana.[1]

2. Field sobriety tests have probative value beyond alcohol intoxication in that they are, "relevant to establish a driver's balance, coordination, mental acuity, and other skills required to safety operate a motor vehicle, and FSTs are admissible at trial as observations of the police officer conducting the assessment."[2]

3. Field sobriety tests cannot be considered scientific evidence establishing impairment as a result of marijuana consumption.[3]

4. Field sobriety tests in marijuana impairment cases shall be referred to as "roadside assessments," not "tests" and a police officer shall not refer to the driver's performance as "pass" or "fail" or "whether performance indicated impairment."[4]

5. Evidence of the performance on field sobriety tests alone cannot support a finding that the defendant's ability to drive safely was impaired due to the consumption of marijuana, and the jury must be instructed so.[5]

[1] *Commonwealth v. Gerhardt,* 81 N.E.3d 751, at 758 (Mass.2017)
[2] Id. at 759.
[3] Id. at 759.
[4] Id. at 760.
[5] Id. at 762.

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In reaching the above conclusions, it is worth noting a few statements that the court made. First, the court stated field sobriety tests, "were developed specifically to measure alcohol consumption" (see discussion on validation studies in this article). In contrast, the court reasoned that there is no scientific agreement on whether the field sobriety tests are indicative of marijuana impairment.

Second, the court indicated that the effects of alcohol impairment are well known and within the common knowledge of jurors so a police officer can testify as a lay witness as to the defendant's alcohol intoxication. However, the court held that no generalized knowledge exists as to the physical or mental effects of marijuana intoxication and therefore only an expert can testify as to a conclusion of impairment by marijuana. The court went on to say there are no scientific studies that validate particular physical characteristics as indicators of marijuana impairment.

Finally, the court found that performance of roadside FSTs were not to be described as "pass" or "fail." In Iowa, *State v. Murphy*, 451 N.W.2d 154 (Iowa 1990), held that a properly trained officer can testify regarding the FSTs, the defendant's failure of those tests, and the officer's resulting opinion regarding intoxication from the performance of those tests without the need for a more scientific interpretation.[6] *Murphy* was a case involving intoxication by alcohol, not marijuana, but the holding in *Gerhardt* is inconsistent with the present state of case law in Iowa.

There are many arguments that can be made in Iowa to counter the detailed ruling by the Massachusetts Supreme Court – primarily that Massachusetts law is in no way binding on Iowa courts. However, if the defense in your marijuana-impaired driving case makes similar arguments to those in Massachusetts (and they will), please consider the following counter-arguments:

1. Law Enforcement Opinion of Impairment

   Officers in Iowa are trained to detect impairment by drugs. If is VERY IMPORTANT that officers testify in DETAIL as to their training and experience. This includes any drug impairment training they received at the academy and any ARIDE, DRE, or other OWI-related training they have received. Elicit testimony about how these OWI-related trainings include recognizing the common signs and symptoms of alcohol and drug impairment. In addition, testimony should be given as to how long the officer has been in law enforcement and the officer's experience dealing with impaired people – not just in OWI cases – and that there are common signs and symptoms routinely seen. Discuss the fact that marijuana impairment is not a new thing or a novel observation made by officers simply because marijuana is moving towards legalization, and that the classic signs of marijuana impairment are commonly known enough to be the subject of movies and television shows that are understood by general audiences.[7]

   Iowa Courts have determined that officers may testify as to their **non-scientific expert opinion** of drug impairment, including marijuana, if they have sufficient training and experience in drug impairment detection. In addition, Iowa's per se drug law in §321J.2(1)(c) also prohibits a person from driving with detectable amounts of drugs in their system, without impairment. Each of the following cases should be included in your record made to the court.

   In *State v. Comried*, 693 N.W.2d 772 (Iowa 2005), the Court ruled that under Iowa's "per se drug" alternative under §321J.2(1)(c), any amount of a controlled substance in the blood or urine above the threshold levels is sufficient to prove a violation of the law.

   In *State v. Childs*, 898 N.W.2d 177 (Iowa 2017), the Court ruled that any amount of a prohibited drug in one's body, including a non-impairing metabolite, violates Iowa Code §321J.2(1)(c), regardless of whether the ability to drive is impaired.

   In *State v. J.D. Ray Anderson*, No. 1-675/10-2123, 2011 WL 3925557 (Iowa Ct.App.2011), the court held that the testimony of two patrol officers and a booking officer as to their observations of impairment by "some type of drug," in addition to an admission, was sufficient to sustain a jury's finding of impairment.

   In *State v. Vincent Reis Schawl*, No. 2-630/11-1471, 2012 WL 4097262 (Iowa Ct.App.2012), the court held that the strong odor of marijuana in the car, the presence of drug paraphernalia, and observations made by the patrol officer were sufficient to sustain a finding of impairment by marijuana.

   In *State v. Denise Marie Vesey*, No. 3-673/12-1753, 2013 WL 4504915 (Iowa Ct.App.2013), the court held that a patrol officer's testimony regarding observations and demeanor, along with an admission that she shouldn't have been driving, were substantial evidence to support an OWI-drugged conviction.

   In *State v. Scott Anthony Sappingfield*, No. 14-1716, 2015 WL 7567555 (Iowa Ct.App.2015), the court held that a DRE evaluation and other officer's observations, without a chemical test, were sufficient to support an OWI-drugged conviction.

[6] *State v. Murphy*, 451 N.W.2d 154, at 158 (Iowa 1990).

[7] For example, Paramount Pictures released Cheech & Chong "Up in Smoke" in 1978 and seven additional films followed, including an eighth film currently in production. The FOX network also successfully marketed eight seasons of "That 70's Show" which included several actors commonly appearing to be under the influence of marijuana.

In *State v. Mark James Rial*, No. 02-2095, 2004 WL 239860 (Iowa Ct.App.2004), the court held that SFST results were properly admitted even where the officer testified to inconsistencies in administration methods from those in the training manual; such inconsistencies went to weight.

2. Studies Relating Marijuana Impairment and Field Sobriety Tests
There are recent studies that have assessed the use of field sobriety tests as useful indicators of marijuana impairment. The studies each looked at over 300 marijuana-only impairment cases and recognized common signs and symptoms of marijuana impairment.

Declues, Perez, & Figueroa, "A Two-Year Study of Δ 9-tetrahydrocannabinol Concentrations in Drivers: Examining Driving and Field Sobriety Test Performance," 61 J. Forensic Sciences (2016).
https://www.ncbi.nlm.nih.gov/pubmed/28631315

Hartman, Richman, Hayes, & Heustis, "Drug Recognition Expert (DRE) Examination Characteristics of Cannabis Impairment," 92 Accident Analysis and Prevention (2016)
http://www.sciencedirect.com/science/article/pii/S0001457516301191

3. Other Arguments
   a. At the time FSTs are conducted an officer does not know with absolute certainty every substance or combination of substances that may be impairing the person. Officers make arrests based on observations of impairment, and field sobriety tests are used to determine if a person can divide their attention, follow directions, and demonstrate coordination or balance. Officers should be careful not to draw an immediate conclusion at the roadside as to what particular substance or substances is contributing to the signs of impairment, but instead focus on the factors that indicate that a person is under the influence of intoxicants in general. It is permissible to say that based upon training, the officer believes a particular substance is causing at least some of the impairment, but that it is not possible to definitively exclude all other substances.
   b. In the field sobriety validation studies, conducted in Colorado, San Diego, and Florida, there are several references to drug impairment and the use of field sobriety tests. Look at the appendix to each study as well as conducting a search for the word, "drug" and you will find plenty of references to the fact that these studies took into consideration that the field sobriety tests would be used when a person is impaired, even in part, by drugs.
   c. The DRE protocol includes the use of field sobriety tests, and has been the basis not only of OWI convictions, but even in CINA cases to prove that parents were using drugs while caring for their children.[8] In addition, the DRE validation studies incorporate the field sobriety tests as part of the testing battery. Argue that the use of the standard field sobriety tests have been incorporated in drug impaired driving investigations in Iowa for almost thirty years,[9] and that properly trained officers have been allowed to testify, as experts, regarding the effects of using drugs, since at least 1976. [10]
   d. The drug recognition expert program was developed by the Los Angeles Police Department in the early 1970's and was validated by the National Highway Traffic Safety Administration in the 1980's. As recently as 2016, Arizona also conducted a field validation study for the drug recognition program, and validated the use of the SFSTs in the protocol for detection of impairment by drugs.[11] Alcohol is considered a drug and there is no scientific basis for parsing out alcohol impairment from drug impairment, let alone impairment by a particular drug.
   e. The opinion of the Massachusetts court is unworkable under Iowa law. The court stated that there are no scientifically established tests for marijuana impairment. This would also mean that there would need to be specific tests for methamphetamine impairment, cocaine impairment, and every other impairing substance possible. The bottom line is that SFSTs are divided attention tests. The ability to divide your attention is necessary to the safe operation of a motor vehicle and SFSTs are not intended to conclusively determine impairment by one particular substance. Using the logic of the Massachusetts court would also require the development of a test for multiple substances, as poly-drug use is not uncommon.

When faced with a drug-impaired OWI case, the prosecutor should always consider the charging alternatives in 321J.2(1), and choose only those alternatives that are supported by the facts, while never disregarding the jury instruction that defines impairment and focusing the testimony of the witnesses on proving those factors in the absence of a positive test result that support the per se drug prohibition in §321J.2(1)(c).

This article was written in collaboration with Oregon TSRP Deena Ryerson.

[8] *In the Interest of G.D. and A.D.*, No. 16-1895, 2017 WL 512796 (Iowa Ct.App.2017).

[9] *Bankson v. Iowa Dept. of Transp.*, 444 N.W.2d 515 (Iowa Ct.App.1989).

[10] *State v. Ogg*, 243 N.W.2d 620 (Iowa 1976).

[11] Drug Recognition Expert Report, International Association of Chiefs of Police, http://www.decp.org/drug-recognition-experts-dre/

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Citations from the previous issue of the
Highway Safety Law Update

State v. Storm, 898 N.W.2d 140 (Iowa 6/30/17)
State v. Childs, 898 N.W.2d 177 (Iowa 6/30/17)
State v. Pettijohn, 899 N.W.2d 1 (Iowa 6/30/17)

(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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Black Hawk County State v. Cain M. Hendrickson, No. 17-0101 (Iowa Court of Appeals, filed August 2, 2017). **Sentencing court may rely on minutes of testimony without objection as factual basis for guilty plea, including admissions, and rules of evidence do not apply to sentencing hearings.** Defendant pled guilty to OWI, and appealed his sentence alleging that sentencing court relied on improper factors, specifically that he consumed bath salts as disclosed in the minutes of testimony, his trial counsel was ineffective for failure to deny the admission to his use of bath salts, the statement in the minutes of testimony regarding use of bath salts did not meet the requirements for an admission exception, the court improperly considered juvenile offenses, and the court relied on prior offenses referenced in his substance abuse evaluation. Held that where the charge of OWI in the trial information is based upon any manner by which the statute could be violated, and the defendant specifically agreed in writing that the court may rely on the minutes of testimony to establish a factual basis for the plea, and the rules of evidence, except those pertaining to privilege, do not apply to sentencing proceedings. No abuse of discretion or failure of trial counsel to perform an essential duty found.

Black Hawk County State v. James Robison, No. 16-1263 (Iowa Court of Appeals, filed September 13, 2017). **Prior judgments cannot be collaterally attacked at a later time, even if erroneous, unless the court lacks subject matter or personal jurisdiction.** Defendant was stopped for speeding, and he was also in violation of the terms of his temporary restricted license. Defendant filed a motion to dismiss stating his license status was impaired due to unfair fines and fees assessed in the past. Held that if the court had jurisdiction of the person and the subject matter at the time the prior judgment was entered, it is conclusive and not subject to collateral attack, even if erroneous.

Black Hawk County Deanthony D. Kirkland v. State, No. 16-0642 (Iowa Court of Appeals, filed September 13, 2017). **Pretextual traffic stops are judged on an objective basis.** Defendant was a robbery suspect when he was stopped for equipment violations. Defendant argued his counsel was ineffective for failure to file a motion to suppress the stop as pretextual, and failing to obtain a recording of the stop to establish that his vehicle was in good working order. Held that although pretextual stops are permissible under the federal constitution, the Iowa Constitution requires that traffic stops be tested objectively, and that defendant did not establish that a recording of the stop even existed, therefore counsel was not ineffective where officers observed a traffic violation, however minor.

Boone County State v. Conner Daniel Carney, No. 16-1618 (Iowa Court of Appeals, filed July 19, 2017). **Speedy indictment not violated where arrest did not take place until defendant taken into custody under conditions required by statute for arrest.** Defendant was convicted of OWI and claimed on appeal that state did not file the indictment within 45 days of his arrest, in violation of State v. Wing, 791 NW2d 243 (Iowa 2010). Officers investigated the defendant at the hospital following a personal injury collision, and invoked implied consent. Defendant argued that his interaction with police at the hospital would cause a reasonable person to feel they were under arrest, and the trial information was not filed until sixty-five days later. Held that pursuant to State v. Williams, 895 NW2d 856 (Iowa 2017), the doctrine in Wing is overruled and because the trial information was filed within forty-five days of the time the defendant was taken into custody in a manner authorized by law, no speedy indictment violation occurred.

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Boone County State v. Conner Daniel Carney, No. 16-1618 (Iowa Court of Appeals, filed July 19, 2017). **Officer not required to allow a motorist to change their mind after a test refusal, but a second request is permissible.** Defendant was involved in personal injury collision and implied consent was invoked at the hospital. The defendant initially refused a breath test, but when implied consent was explained again, he consented to a blood test. Held that 321J does not prevent an officer from requesting another sample after an initial refusal, distinguishing Welch v. Iowa Dept of Transp., 801 NW2d 590 (Iowa 2011), as applying only to license revocation cases.

Boone County State v. Loren Anton Goodwin, No. 16-1407 (Iowa Court of Appeals, filed August 2, 2017). **Failure to advise of motion in arrest of judgment and mandatory surcharge renders plea involuntary.** Defendant pled guilty to driving while barred and challenged his plea alleging he was not fully advised of the consequences. Defendant was not informed of his right to file a motion in arrest of judgment, so challenge to plea on direct appeal was allowed. Defendant alleged he was not informed of the applicable surcharge. Held that under the substantial compliance standard, failure to advise of the mandatory surcharge rendered his plea involuntary, conviction vacated.

Boone County State v. Deshaun Williams, No. 16-0894 (Iowa Court of Appeals, filed August 16, 2017). **Sufficient evidence of intoxication to sustain OWI conviction.** Defendant was convicted of OWI 3rd offense as a habitual offender and driving while barred. Defendant challenged sufficiency of the evidence that he was the driver and was intoxicated. An anonymous caller reported to 911 that the defendant's vehicle had nearly hit her car at 2:00 am. The caller followed the vehicle until it stopped, and did not witness anyone enter or exit the vehicle. Video evidence showed officers arrival and approach of the defendant's stopped vehicle, where they found the defendant in the driver's seat with the engine running. The defendant smelled strongly of an alcoholic beverage, exhibited slowed and slurred speech, and had vomited on himself. He stumbled when he exited the vehicle, and asked officers why he was pulled over, requiring them to explain that he was already stopped. Defendant refused SFSTs. Held that substantial evidence existed to support verdict that the defendant operated the vehicle and was intoxicated at the time of operation.

Boone County State v. Deshaun Williams, No. 16-0894 (Iowa Court of Appeals, filed August 16, 2017). **Evidence of mailing notice not required in DWB case.** Defendant was convicted of OWI 3rd offense as a habitual offender and driving while barred. Defendant challenged sufficiency of the evidence that he was mailed notice of his driving status. A deputy testified that the defendant's license was barred, and a certified driving record also showed this fact. Held that while State v. Green, 722 NW2d 650 (Iowa 2006) requires that evidence be presented showing the DOT mailed notice of a suspension, notice is not an element of driving while barred pursuant to State v. Cook, 565 NW2d 611 (Iowa 1997), because suspension requires thirty days advance notice, while the statutory provisions governing barment do not require that a specified period of time elapse before the status takes effect. A dissenting opinion would find that evidence of mailing is necessary in a DWB case.

Bremer County State v. Jeffrey Marcellinus Friis, No. 16-1799 (Iowa Court of Appeals, filed July 6, 2017). **Insufficient record to consider ineffective assistance of counsel preserved for PCR proceedings.** Defendant convicted of PCS-3rd, eluding, carrying weapons, OWI, and theft. Claim of ineffective assistance of counsel filed for failure to advise of immigration consequences and failure to file a motion in arrest of judgment, but record insufficient to consider either claim, error preserved for PCR proceedings.

Buchanan County State v. Mark Page, No. 16-1404 (Iowa Court of Appeals, filed September 13, 2017). **Custody not found where suspect voluntarily accompanies officer to sit in patrol car.** Defendant was stopped for speed and immediately lit a cigarette when approached by the officer. The officer testified that in his experience, people will do this to mask the odor of marijuana. The officer also noted that the defendant's hands were shaking, his eyes were bloodshot and watery, and he struggled to retrieve his registration. Defendant was asked to sit in the passenger seat of the patrol car, with the doors unlocked, and sign the citation on the in-car computer. While in the patrol car, defendant was asked if he had smoked marijuana recently, and he admitted to smoking that morning. After failing SFSTs, defendant was arrested for OWI and read his *Miranda* rights. Defendant argued he was in custody when he was asked whether he had smoked recently. Held that defendant was asked to get into the patrol car, that there were good reasons including safety to ask him to sit in the patrol car, and that defendant agreed to do so voluntarily, with the doors remaining unlocked, therefore no reasonable person in his position would feel as if they were in custody.

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Cedar County State v. Scott Bowman, No. 16-1449 (Iowa Court of Appeals, filed August 16, 2017). **No right to jury trial for petty offenses and pro se litigants held to same standard as attorneys in knowledge of the law.** Defendant was charged with speeding and filed a late request for a jury trial. The request was denied, and defendant was found guilty at a bench trial. Defendant sought discretionary review, claiming the court should have personally informed him of the deadline for requesting a jury trial. Held that there is no right to a jury trial for petty offenses and pro se litigants are not held to a different standard than attorneys and forgo representation at their own risk.

Cedar County State v. Stacy James Levell, No. 17-0012 (Iowa Court of Appeals, filed October 11, 2017). **Stop of vehicle associated with wanted person insufficient to support reasonable suspicion for stop.** Officer ran a check of a license plate and discovered that the vehicle was associated with the defendant, who had a warrant for his arrest, but was not registered to him. The officer followed the vehicle to a rest area, and activated his emergency lights as he pulled in next to the vehicle, which was already stopped. The defendant was identified as the driver, and a license check revealed he was also revoked and barred, and he was convicted of both offenses. Defendant appealed the basis of the stop, and the state argued that there was no seizure, and if there was, it was supported by reasonable suspicion. Held that the officer's act of activating his lights, parking next to the defendant, exiting his patrol car, and approaching the driver's window amounted to a seizure, and since the vehicle was not registered to the defendant and the officer did not ascertain that he was the driver before the seizure, it was unsupported by reasonable suspicion. (A dissent found no compulsion or seizure during the encounter.)

Dallas County State v. Benjamin Royer, No. 16-1206 (Iowa Court of Appeals, filed October 11, 2017). **Evidence of refusal of PBT properly used as consciousness of guilt.** Defendant was involved in a collision after running a stop sign, and fled the scene on foot. He was found a short time later, and taken to the hospital, where the odor of alcohol was detected. He refused a PBT both at the hospital and after being transported to the police station after receiving treatment. He was convicted of OWI-3rd, leaving the scene, DWB, and DWR. Held that it was proper to admit evidence that defendant refused a PBT and was properly used to indicate consciousness of guilt, and even if improper, the error was not prejudicial in light of the overwhelming evidence of defendant's intoxication, which included testimony by two officers, the treating paramedics, and video footage showing unsteadiness, slurred and slow speech, and agitation, along with the discovery of a vodka bottle and a beer can in the vehicle.

Dallas County State v. Benjamin Royer, No. 16-1206 (Iowa Court of Appeals, filed October 11, 2017). **Error not preserved on alleged prosecutorial misconduct where defendant did not move for mistrial.** Defendant was involved in a collision after running a stop sign, and fled the scene on foot. He was found a short time later, and taken to the hospital, where the odor of alcohol was detected. He refused a PBT both at the hospital and after being transported to the police station after receiving treatment, and the officer testified that he told defendant he could prove his sobriety by taking the PBT. The court overruled a motion in limine to exclude evidence of his refusal to take the PBT and the statement that he could prove his sobriety, which was overruled, and the defendant did not object to the testimony at trial or move for a mistrial, and only objected during closing arguments. He was convicted of OWI-3rd, leaving the scene, DWB, and DWR. Held that error was not preserved for appeal where defendant did not move for a mistrial for prosecutorial misconduct.

Dallas County State v. Benjamin Royer, No. 16-1206 (Iowa Court of Appeals, filed October 11, 2017). **Evidence of habitual offender status and prior arrest for no driver's license not unduly prejudicial in trial for DWB, despite stipulation.** Defendant was involved in a collision after running a stop sign, and fled the scene on foot. Defendant was convicted of OWI-3rd, leaving the scene, DWB, and DWR. During trial, an officer testified that defendant was barred for being a habitual violator, and revoked for a previous OWI. The defendant requested a mistrial, which was overruled. The owner of the vehicle then testified that defendant had been previously arrested for driving without a license, because that was when she revoked his permission to use her vehicle. Defendant again moved for a mistrial, which was overruled. Defendant appealed on the basis of improper admission of prior bad act evidence under Rule 5.404(b)(1). Held that the rule does not exclude all prior crimes, wrongs, or acts, and that evidence is admissible if relevant to a legitimate, disputed factual

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issue, and as long as it is materially relevant, there is clear proof that the defendant is the one who committed the act, and the danger of unfair prejudice is outweighed by the probative value, there is no abuse of discretion in admitting the evidence, and the defendant cannot control the state's case by stipulating to certain facts.

Dallas County State v. Benjamin Royer, No. 16-1206 (Iowa Court of Appeals, filed October 11, 2017). **Mailing of notice is not an element of DWB and no proof of mailing need be shown.** Defendant was convicted of DWB and challenged the evidence of mailing of notice. Held that the offense of DWB has only two elements; i.e., 1) operating a motor vehicle, and 2) while barred; thus notice of mailing was not an element and was not required under Chapter 321.

Dallas County State v. Benjamin Royer, No. 16-1206 (Iowa Court of Appeals, filed October 11, 2017). **Mailing of notice is not an element of DWR and no proof of mailing need be shown**. Defendant was convicted of DWR and challenged the evidence of mailing of notice. The defendant requested the following instructions: 1) defendant was operating a motor vehicle, 2) upon a public street; 3) while his license was revoked; and 4) the DOT provided notice of the revocation to the address last reported to the DOT. Held that these instructions do not accurately state the law, as they omit that the revocation must be under Chapter 321J and erroneously add the mailing of notice as an element. Driving while revoked has only two elements; 1) operating a motor vehicle, and 2) while revoked due to a violation of chapter 321J. Mailing is not an element and evidence was sufficient to support the convictions.

Dallas County State v. Benjamin Royer, No. 16-1206 (Iowa Court of Appeals, filed October 11, 2017). **Failure to state reasons for consecutive sentences remanded for resentencing.** Defendant was convicted of OWI-3rd, leaving the scene, DWR, and DWB. The sentences for OWI-3rd and leaving the scene were ordered to run consecutively. Defendant appealed alleging that the court failed to state the reasons for the consecutive sentences. The state conceded that the reasons were not made part of the record and the case was remanded for resentencing as the remedy.

Delaware County State v. Dean William Dempster, III, No. 16-1756 (Iowa Court of Appeals, filed August 16, 2017). **Parents of victim lack standing to challenge restitution order in vehicular homicide case.** Defendant was ordered to pay $150,000.00 restitution to victim in vehicular homicide. Defendant filed for offset for insurance money paid both by his own insurer and the vehicle owner's insurer. A hearing was held and the offset for both amounts was applied. A month later, the victim's parents sent a letter to the court asserting that the defendant should not have received the offset for monies paid by the owner of the vehicle's insurer. Without hearing, the court then "clarified" its prior restitution order and only applied the amount paid by the defendant's insurer, leaving the defendant with an amount due. Defendant filed a motion to set aside the amended order, which was denied without hearing. Defendant claimed on appeal that he was denied due process and that the victim's parents had no standing to challenge the first restitution order. Held that the state, not the victim's parents, had a personal or legal interest in the punishment defendant received and the restitution plan under Iowa Code 910.7(1), and the parents lacked standing because the victim's estate and the parents in their individual capacity had already settled their claims against the defendant. Amended restitution order reinstated.

Dubuque County State v. Mark Roger Scholtes, Sr., No. 16-1967 (Iowa Court of Appeals, filed August 16, 2017). **Conviction on eluding causing bodily injury and lesser included offense of eluding not inconsistent.** Defendant was convicted of eluding while exceeding the speed limit by 25 miles per hour or more and resulting in bodily injury, and the lesser included offense of eluding while exceeding the speed limit. Defendant alleged that verdicts were inconsistent, requiring reversal of district court ruling on motion in arrest of judgment. Held that verdicts were not inconsistent because the lesser offense must be committed to convict of the greater offense, and there were no other elements that made the verdict unclear.

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Dubuque County State v. Mark Roger Scholtes, Sr., No. 16-1967 (Iowa Court of Appeals, filed August 16, 2017). **Sufficient evidence that defendant was operator of vehicle involved in eluding.** Defendant was convicted of eluding and challenged the sufficiency of the evidence that he was the driver. Testimony at trial was that the vehicle belonged to the defendant's spouse, the spouse testified that the vehicle was at the house when she left, that the spouse's car broke down so she called the defendant, and shortly thereafter, the vehicle involved in the incident was located by a deputy on a route that corresponds with the route between the defendant's house and the spouse's car, and the other occupant located at the crash scene testified the defendant was the driver and that he doesn't even know how to drive. Further, the defendant's phone was found just outside the driver's side door of the vehicle. Held that sufficient evidence existed to support the verdict and motion for new trial properly denied.

Dubuque County State v. Nicholas Louis Konzen, No. 16-0418 (Iowa Court of Appeals, filed September 27, 2017). **Trained officer detecting distinct odor of marijuana sufficient for automobile exception to warrant requirement.** Defendant stopped for expired registration. While interacting with the defendant, the officer smelled marijuana coming from inside the vehicle. Officer testified to years of extensive experience and specific training in this regard, and other officers who arrived on scene also detected the odor. The vehicle was searched and marijuana and paraphernalia were located. Held that a trained officer's detection of a sufficiently distinct odor, by itself or with other facts, can establish probable cause, and the mobility of the vehicle provides the exigency, allowing for an extensive search of the vehicle.

Floyd County State v. Robert Earl Brandhorst, No. 16-1955 (Iowa Court of Appeals, filed September 27, 2017). **Circumstantial evidence sufficient to prove that defendant was driver for purposes of DWB conviction.** Deputy observed a vehicle drive away from his location, and followed him to a nearby property. Deputy walked behind a building and located defendant in the driver's seat of the vehicle, but defendant claimed that another man was driving but had fled the scene. A witness testified that she saw a man run between ditches nearby. Deputy identified defendant as the driver he saw earlier, and stated that when he asked why he had driven to that location, the defendant answered, "because I don't have a license." The keys were under the driver's seat, and the passenger seat was cluttered and did not appear to have anyone recently sitting there. The defendant could only identify the alleged driver by first name only. Held that jury could reasonably have found the deputy to be more credible, and sufficient evidence supported the finding that he was the driver.

Floyd County State v. Robert Earl Brandhorst, No. 16-1955 (Iowa Court of Appeals, filed September 27, 2017). **Speedy trial waived by defense motion to continue.** Defendant charged with DWB appealed on basis that his right to trial within one year was violated. The record of an unreported pretrial conference indicated that counsel for defendant waived speedy trial, and entered a continuance, "by agreement of the parties." Defendant's counsel argued that she intended to waive in another case and was confused. Held that the record supported a waiver by defendant's counsel of speedy trial and reiterated the holding in State v. O'Connell, 275 NW2d 197 (Iowa 1979) that speedy-trial rights can be waived by continuance motions made by defense counsel.

Floyd County State v. Robert Earl Brandhorst, No. 16-1955 (Iowa Court of Appeals, filed September 27, 2017). **Driving While Barred as a habitual offender is an element, not a sentencing enhancement, no separate colloquy required.** Defendant charged with DWB stipulated that he was a habitual offender, resulting in his barred status. Defendant appealed on the basis that court did not engage in separate colloquy regarding his rights in admitting his habitual offender status. Held that in a DWB case, the habitual offender status is an element of the offense, and when the defendant stipulates to it, he is not stipulating to a sentencing enhancement requiring a separate colloquy, and there is no due process requirement to undertake a guilty plea colloquy prior to accepting a stipulated factual record. A challenge would need to come in the form of objection pointing out a deficiency in the factual record, and failure to do so constitutes failure to preserve error.

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Greene County State v. Daniel Blain Pierce, No. 16-1511 (Iowa Court of Appeals, filed July 6, 2017). **Sufficient evidence of intent to permanently deprive to sustain conviction for theft of motor vehicle by taking where defendant abandoned vehicle in remote location.** Defendant pled guilty to theft of a motor vehicle and provided a factual basis that he intended to deprive the owner, but did not specify that his intent was to permanently deprive. Defendant filed motion in arrest of judgment, which was denied. On appeal, issue raised of ineffective assistance of counsel for allowing plea without sufficient factual basis on issue of intent. Held that court could rely on the minutes of testimony, which were sufficient where they stated that defendant took the vehicle and abandoned it in a remote location.

Greene County State v. Daniel Blain Pierce, No. 16-1511 (Iowa Court of Appeals, filed July 6, 2017). **Lack of investigation by defense counsel into existence of detainer in another jurisdiction as pertaining to voluntary guilty plea preserved for PCR proceedings.** Defendant pled guilty to theft under a plea agreement that he would be released pending sentencing. At plea taking hearing, state announced that it was the intention of the parties that the defendant would be released prior to sentencing. Defendant learned shortly after the plea that he had a detainer from another county and would not be released. Defendant filed a motion in arrest of judgment, claiming he would not have pled had he known of the detainer. Court denied motion on the basis of contract doctrine of mutual mistake of fact, as neither the state nor the defendant claimed they knew about the detainer. Defendant did not argue that state reneged on the plea agreement, but instead argued that counsel was ineffective for not investigating the possibility that he had an outstanding warrant. Held that record was inadequate to determine what omissions, if any, were made by defense counsel, issue preserved for post-conviction relief proceedings.

Guthrie County State v. Jason Randall Clark, No. 16-1521 (Iowa Court of Appeals, filed August 2, 2017). **Probable cause existed to justify traffic stop.** Officers heard tire squealing at an intersection and observed the defendant drive through the intersection. No other cars were present. A traffic stop was initiated and defendant was eventually arrested for OWI. Motion to suppress was denied on the basis that officers had reasonable suspicion to believe careless driving had occurred. Defendant appealed, arguing that probable cause is necessary for a traffic stop, not merely reasonable suspicion. Held that probable cause did exist to justify the traffic stop on the basis of the squealing tires, so argument that the stop need only be justified upon reasonable suspicion was not addressed.

Hancock County State v. Antoine Lamont Smith, No. 17-0019 (Iowa Court of Appeals, filed September 13, 2017). **Court is allowed to determine weight to give each sentencing factor, no abuse of discretion found.** Defendant was sentenced for PCS-intent, OWI, and eluding, and appealed his concurrent prison sentence alleging that the court relied solely on one factor – the nature of the offense – and applied a fixed sentencing policy. Held that where the record showed the court considered all factors, the court is allowed to determine what weight to give each factor, and the court did not apply a fixed policy where the circumstances of the offenses and their commission in combination were also considered.

Johnson County State v. Luis Avalos, No. 16-0767 (Iowa Court of Appeals, filed July 19, 2017). **Error not preserved for appellate review.** Defendant challenged the sufficiency of the evidence of his intoxication following his conviction for OWI, but did not raise this issue at the trial court level. Defendant "invited" state to waive objection to the preservation issue, which was not accepted. Held that even if state concedes error preservation, appellate court not bound by concession and as defendant also did not raise a claim on grounds of ineffective assistance of counsel, error not preserved for further review.

Johnson County Gerard v. City of North Liberty and Mitchell Seymour, No. 16-1885 (Iowa Court of Appeals, filed August 16, 2017). **No special duty of care imposed upon law enforcement having custody of a restrained person.** Plaintiff brought negligence action against city and a police officer for negligence when she fell on a step at the police station while being moved after her arrest. Plaintiff requested a jury instruction that officer had a special duty of care due to her restraint in handcuffs, but trial court only used model ordinary care instruction and a further explanation that law enforcement officers have a duty of ordinary care to aid and protect individuals who are under their control and whose freedom has been imposed upon such that they have lost their normal ability to self-protect. Verdict in favor of the defendant was entered and plaintiff appealed the failure of the trial court in instructing the jury on a special duty of care. Held that when an individual is detained or placed in custody, he is owed a common law duty of care, not a special or heightened duty of care.

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Jones County State v. Kevin Lee Glassmeyer, No. 17-0206 (Iowa Court of Appeals, filed August 16, 2017). **Vehicle is a dangerous weapon as used in assault on a peace officer.** Defendant drove a stolen vehicle into two patrol cars, and pled guilty to assault on a peace officer with a dangerous weapon, and several other charges. Defendant then alleged that guilty plea lacked factual basis because state failed to show that vehicle was a dangerous weapon, and that court should have asked him if he drove the vehicle with the intent to cause serious injury or death. Held that factual basis can be discerned from 1) inquiry of defendant; 2) inquiry of prosecutor; 3) examination of presentence report; and 4) minutes of evidence. Minutes of evidence established that defendant drove the vehicle straight into the patrol cars set up as a barrier, in a manner that indicated his intent to cause serious injury or death to officers, and intent can be inferred from the normal consequences of one's actions.

Linn County John Roger Shepherd v. State, No. 16-0536 (Iowa Court of Appeals, filed July 6, 2017). **Dismissal in the absence of structural defect of PCR petition is discretionary, no abuse where defendant failed to prosecute and participate.** Defendant was convicted of OWI-3rd offense. Defendant filed post-conviction relief petition (PCR), and after thirteen continuances and trial counsel withdrawals at defendant's request, PCR petition was ultimately dismissed under Rule 1.944(2). Defendant filed a motion for reinstatement, but did not allege that matter was dismissed because of oversight, mistake, or other reasonable cause. Defendant claimed ineffective assistance of counsel, which preserved error. Held that no structural error in the framework within which the trial proceeded existed, and defendant's failure to advise counsel of his whereabouts for the final trial date suggested he had abandoned his case, misconduct is a factor for consideration, and the denial of discretionary reinstatement was not an abuse of discretion.

Linn County State v. Shane W. Trimble, No. 16-2181 (Iowa Court of Appeals, filed September 13, 2017). **Sentence within statutory guidelines cloaked with presumption of reasonableness.** Defendant was sentenced on DWB charge and the court summarily stated that it considered the defendant's age, family circumstances, education, prior criminal history, and facts and circumstances of the offense, as well as the benefit to the defendant, the community, and the plea agreement. Defendant appealed, stating that the court failed to state on the record its reasons for sentencing. Held that sentences within the statutory guidelines are cloaked with presumption in their favor absent indications that court considered improper factors.

Louisa County State v. Lucas Benjamin Leonhard, No. 16-1318 (Iowa Court of Appeals, filed August 2, 2017). **Defendant's allegation that he lied to the court during factual basis does not render plea involuntary, and no pervasive conflict existed to justify substitution of counsel to pursue motion in arrest of judgment.** Defendant pled guilty to felony eluding, and filed a motion in arrest of judgment, claiming his counsel did not adequately advise him of trial outcomes and that he lied to the court when providing a factual basis. The trial court denied the motion and did not appoint new counsel. Defendant appealed, claiming that there was no factual basis for his plea and that his fifth and sixth amendment rights were violated for failure to appoint new counsel. Held that factual basis for plea was sufficient even where defendant claims he lied, and that no pervasive or severe conflict existed with his attorney sufficient to require substitution, where in fact the defendant stated he was satisfied with the performance of his attorney, and that no one put pressure on him to plead guilty.

Madison County State v. Randy Lee Barnes, Jr., No. 16-0629 (Iowa Court of Appeals, filed August 2, 2017). **Sufficient evidence of eluding while participating in the felony offense of possession of stolen property.** Officers pursued a stolen vehicle and defendant was eventually convicted of felony eluding while participating in a public offense, that being the theft by exercising control over the stolen vehicle. Defendant testified at trial that he was the person who actually took the vehicle, and moved for judgment of acquittal arguing that the actual taker of the property cannot be convicted of theft by exercising control. Defendant also argued that as the taker of the vehicle, the commission of the theft was complete before the eluding took place, and therefore was not participating in a felony when he eluded police. Held that theft by possession of stolen property is a continuing offense that can be the basis of a felony for purposes of eluding while participating in a felony, even if the person is also the original taker of the property, because an affirmative finding that defendant was the taker would have led to a verdict that he also exercised control over stolen property, knowing it was stolen.

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Madison County State v. Randy Lee Barnes, Jr., No. 16-0629 (Iowa Court of Appeals, filed August 2, 2017). **Operation Without Owner's Consent not a lesser included offense of Theft by Exercising Control over Stolen Property.** Defendant was convicted of Theft by Exercising Control over Stolen Property, involving a motor vehicle. Court did not instruct on lesser included offense of Operation Without Owners Consent. Held that Operation Without Owner's Consent is not a lesser included offense of Theft by Exercising Control using the impossibility test, because the theft can be committed without proving the property was an automobile, who specifically owned that automobile, and that control over the automobile was without the owner's consent.

Marshall County State v. Brice Turner, No. 16-1241 (Iowa Court of Appeals, filed September 13, 2017). **Reasonable suspicion to investigate for OWI.** Defendant failed to stop after being signaled to do so after entering a park after hours driving a vehicle with no taillights. After a short pursuit, defendant eventually stopped and the officer detected an odor of alcohol emitting from him. He refused SFSTs, and the breath test. Defendant challenged the stop on the basis of no probable cause, and also claimed there was insufficient evidence to convict him of eluding or investigate him for OWI. Held that after defendant failed to immediately stop his vehicle, he was properly arrested for eluding, and the odor of alcohol combined with driving through a lawn, unwillingness or inability to follow commands at the scene, and the manner of his movements, all created reasonable suspicion to continue the investigation for OWI.

Marshall County State v. Brice Turner, No. 16-1241 (Iowa Court of Appeals, filed September 13, 2017). **Sufficient evidence supports conviction for eluding.** Defendant failed to stop after being signaled to do so after entering a park after hours driving a vehicle with no taillights. After a short pursuit, defendant eventually stopped and was arrested for eluding and OWI following investigation. Defendant testified that he did not stop because he is afraid of the police and wanted to be in a well-lit location during the stop. Defendant argued that the word "willfully" in the eluding statute allows a driver to move to a location he feels is safe to stop, not necessarily the place the officer wants him to stop. Held that the proper definition of willful for purposes of the eluding statute is an act done, "intentionally, deliberately, and knowingly," not by mistake or accident, and the state was not required to show the defendant intended to violate the statute, rather only that his action of failing to stop was intentional, deliberate, and knowing.

Marshall County State v. Brice Turner, No. 16-1241 (Iowa Court of Appeals, filed September 13, 2017). **Sufficient evidence supports conviction for OWI.** Defendant refused two of the three SFSTs and a breath test, but was convicted of OWI on the basis of his impaired judgment in eluding a peace officer, his movements, the odor of alcohol, his unwillingness or inability to communicate, and signs of nystagmus. Defendant testified he only consumed three beers, and that he merely could not hear officers' commands because of the noisy scene. Held that despite his opposite explanation, trial court was at liberty to make credibility determinations and videotape evidence supported the observations testified to by officers, sufficient evidence of intoxication found when evidence viewed in light most favorable to the verdict.

Marshall County State v. Jonathon A. Faber, No. 16-1553 (Iowa Court of Appeals, filed September 13, 2017). **Rules for computing timeliness of filing trial information are public policy and not constitutional, and arrest does not occur until appearance before magistrate.** Defendant was seriously injured as the driver in a collision, and refused all testing at the hospital. He was told by the officer that he was being charged with OWI and other offenses, but no citations were issued. Defendant was then transported to another hospital, and underwent a long period of rehabilitation. Five months later, he was arrested and charged with OWI, and a trial information was filed 46 days after the March arrest. Defendant moved to dismiss for violation of speedy indictment, arguing that he was arrested when the officer told him he would be charged with OWI while at the hospital, or in the alternative, that the filing extension under Iowa Code § 4.1(34) was a legislatively enacted due process violation. Held that any statements the officer made at the hospital resulting in a subjective belief by the defendant that he was under arrest was of no consequence because he was not taken before a magistrate for an initial appearance pursuant to State v. Williams, 895 N.W.2d 856 (Iowa 2017), and that since the forty-fifth day for filing a trial information fell on a Sunday, the trial information was still timely pursuant to the rule extension, which is legislative public policy and not constitutional.

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Muscatine County State v. Cristina Kaye Briones, No. 17-0798 (Iowa Court of Appeals, filed October 25, 2017). **Knowledge of license status not an element of Driving While Barred.** Defendant claimed ineffective assistance of counsel for allowing her to plead guilty to DWB and thereby foreclosing the possibility of challenging the issue of her driving status. The Court treated this as a challenge to the factual basis of her guilty plea. Defendant argued that she was unaware of her license status at the time of her plea. Held that there are only two lements of DWB; 1) operation of a motor vehicle; 2) while license was barred; knowledge of license status is not an element or a defense and a factual basis existed as established by the minutes of testimony, therefore counsel was not ineffective.

Palo Alto County State v. Marjan Stojanov, No. 16-1535 (Iowa Court of Appeals, filed July 19, 2017). **Trial court credibility findings not disturbed in finding that police encounter was consensual.** Defendant was convicted of OWI after an unsuccessful motion to suppress alleging that police encounter was a seizure without reasonable suspicion. Testimony of officer and defendant at the suppression hearing was entirely inconsistent. The officer testified that he pulled alongside the defendant's car and asked permission to speak to him until he developed reasonable suspicion of his intoxication, and defendant testified that officer blocked him in and commanded him to return to his vehicle after he was attempting to walk away. Trial court ruled that officer was more credible because his testimony was internally consistent, his memory was clear and unimpaired, he had no preexisting bias against the defendant or knowledge of him whatever, and testified he was well aware he had no grounds to detain him during the initial encounter so acted with caution to not use police coercion or restrain his movement in any manner. Credibility determinations by trial court, while not binding, are given deference due to its superior position to examine and view the witnesses.

Polk County State v. Larry Perry, No. 16-0884 (Iowa Court of Appeals, filed July 6, 2017). **Substantial evidence of actual possession where drugs found in path where defendant fled.** Defendant was convicted of PCS-3rd offense and DWB. Defendant challenged sufficiency of the evidence for possession of drugs. Video from the stop showed the defendant exit the vehicle and make a throwing motion, and then flee on foot. A baggie of methamphetamine was later located in the area where the defendant made a throwing motion, and keys to the vehicle were found along the path where the defendant fled. Held that actual possession can be found where substantial evidence supports a finding that the contraband was on the defendant's person at one time. Evidence showed that baggie found was in near perfect condition, suggesting it had not been there long, and jury could have inferred physical possession immediately prior to arrest rather than coming from some other source.

Polk County State v. Larry Perry, No. 16-0884 (Iowa Court of Appeals, filed July 6, 2017). **Trial counsel not ineffective for failure to sever charges in trial information.** Defendant was convicted of PCS-3rd offense and DWB. Defendant claimed ineffective assistant of counsel for failure to move to sever the counts of the trial information. Facts alleged were that after a traffic stop where defendant drove with a barred license, he exited the vehicle, threw a baggie of methamphetamine on the ground, and fled on foot. Held that Iowa Rule of Crim. Pro. 2.6(1) provides for two or more offenses arising out of the same transaction or occurrence to be tried together, even if they are not part of the same "common plan or scheme." Therefore, trial counsel not ineffective for failure to pursue a meritless issue.

Polk County State v. Daniel Louis Chandler, No. 16-0925 (Iowa Court of Appeals, filed July 19, 2017). **Double jeopardy not implicated in trial on the minutes for habitual offender status.** A traffic stop was conducted by an officer based upon her knowledge that the driver had a temporary restricted license only allowing travel to and from work as a landscaper, and may be in violation because of the day of the week (Sunday), the time of day (10:30 pm) the season (winter) and the fact that he had a passenger. Held that taken together, these facts constituted reasonable articulable suspicion that the defendant was operating the vehicle in violation of his temporary restricted license, stop upheld.

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Polk County State v. Daniel Louis Chandler, No. 16-0925 (Iowa Court of Appeals, filed July 19, 2017). **Reasonable articulable suspicion justified stop for violation of temporary restricted license.** Defendant was tried on the minutes of testimony and convicted of possession of a controlled substance (third offense) as a habitual offender and interference with official acts causing bodily injury. Defendant argued on appeal that the court subjected him to double jeopardy when it found him guilty of the underlying offense and then applied the habitual offender enhancements. Held that where both issues were resolved in a trial on the minutes during the same proceeding, double jeopardy principles do not apply, and defendant can waive the bifurcated proceedings that typically are required under Iowa Rule of Criminal Procedure 2.19(9).

Polk County State v. Daniel Louis Chandler, No. 16-0925 (Iowa Court of Appeals, filed July 19, 2017). **Stipulation to minutes of evidence adequate to prove predicate offenses for purposes of sentencing enhancement.** Defendant was tried on the minutes of testimony and convicted of possession of a controlled substance (third offense) as a habitual offender and interference with official acts causing bodily injury. Defendant argued on appeal that the state did not satisfactorily prove the prior convictions upon which the enhancements were predicated. Held that defendant waives error regarding proof of priors when he stipulates to the minutes of evidence and adequate evidence of the priors is contained in the minutes.

Polk County State v. Marcus Antino Hall, No. 16-0957 (Iowa Court of Appeals, filed July 19, 2017). **Probable cause for traffic stop based upon malfunctioning brake light.** A traffic stop was initiated on the defendant's vehicle for a malfunctioning brake light, but the defendant failed to stop. Following a pursuit, the defendant was charged and eventually convicted of driving while barred, eluding, and OWI. Defendant filed a motion to suppress, challenging the officer's assertion that the light was malfunctioning. Held that the defendant was seized the moment the officer activated his emergency lights and attempted to initiate the traffic stop, and that the officer's testimony that one of the two bulbs in the brake light was burned out or malfunctioning because it was not as bright as the other was credible and amounted to probable cause to stop the vehicle.

Polk County State v. Marcus Antino Hall, No. 16-0957 (Iowa Court of Appeals, filed July 19, 2017). **Sufficient evidence of OWI and eluding based solely on officer observations and video evidence.** Defendant was convicted of OWI and eluding. Officers testified at trial concerning the defendant's erratic driving, failure to stop after being pursued by uniformed officers in marked patrol cars, driving in excess of twenty-five miles over the speed limit, the odor of marijuana coming from his person, watery eyes, dilated pupils, admission to smoking marijuana earlier in the day, and DRE examination that concluded he was under the influence of cannabis. Held that reasonable jury could disregard alternative explanations and credit the officers testimony, convictions upheld.

Polk County State v. Bryce Lamont Meeks, No. 16-1611 (Iowa Court of Appeals, filed July 19, 2017). **Waiver of verbatim record of "these proceedings" at plea hearing suffices as waiver of record for sentencing.** Defendant pled guilty to DWB, and appealed on basis that court did not provide a verbatim record of his sentencing hearing or establish that he waived such a record, alleging this amounted to a procedural defect requiring his sentence to be vacated. At the time of the plea, defendant filed a written statement that he waived the right to have a verbatim record of the proceedings. Defendant later attempted to distinguish the waiver during the plea from the waiver of the sentencing hearing. Held that the words, "these proceedings" refer to both the plea and sentencing proceedings, therefore defendant expressly waived his right to a verbatim record for both and the court did not err by failing to state on the record that he waived his right to a verbatim record for purposes of sentencing.

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Polk County State v. Shirley Phillips, No. 16-1874 (Iowa Court of Appeals, filed August 2, 2017). **Sentencing court not required to specifically acknowledge each claim of mitigation urged by defendant in imposing sentence.** Defendant pled guilty to two counts of OWI, the second offense occurring during the period she absconded on the first offense. Defendant was sentenced to one year incarceration on each offense, consecutive. Defendant appealed on the basis of abuse of discretion, alleging the court failed to take into consideration the nonviolent nature of the offense and the fact that she took responsibility by pleading guilty. Held that sentencing court has no duty to specifically acknowledge each claim of mitigation urged by the defendant, and where the sentencing order provided for the consideration of the nature and circumstances of the crime, protection of the public, the defendant's criminal history, substance abuse history, propensity for further offenses, and statutory requirements, and also stated specific reasons for the imposition of consecutive sentences in that this was a 3rd and 4th lifetime offense and the defendant absconded, no abuse of discretion found.

Polk County State v. Debbie Lin Campbell, No. 16-0640 (Iowa Court of Appeals, filed August 2, 2017). **Probable cause to search under automobile exception must exist at time of search, not when vehicle is stopped.** Defendant was a passenger in a vehicle stopped for expired registration. Defendant exited the vehicle with her purse when asked to step out so officers could inventory the vehicle. Defendant was told to place her purse back in the car, and it was searched after locating marijuana in another part of the car. The purse contained pills for which she had no valid prescription. Held that the automobile exception allows a search of all containers that are in the vehicle when the probable cause to search arises, not all containers in the vehicle when the vehicle is stopped. Since she removed her purse prior to the inventory, and the purse was seized when she was ordered to return her purse to the car, the search was invalid because there was no reasonable suspicion that she was committing a crime and no probable cause to search the purse at the time she was ordered to return it to the vehicle.

Polk County State v. Dennis Lee Korf, No. 16-1335 (Iowa Court of Appeals, filed August 16, 2017). **Observations and DRE evaluation sufficient to prove intoxication for purposes of OWI.** Defendant was convicted of OWI and challenged the sufficiency of the evidence of intoxication. Defendant made an illegal left turn despite officer's orders and signage, and had difficulty retrieving his documents for the officer. He scored six of six clues on the HGN, and his DataMaster test was .025%. A DRE evaluation concluded he was under the influence of alcohol and a narcotic analgesic based on odor, bloodshot watery eyes, low body temperature, below average pupil size, and eyelid tremors. Defendant also admitted to doubling up on tramadol, a narcotic analgesic. Held that officer testimony and observations amounted to substantial evidence from which a rational fact finder could conclude he was under the influence of alcohol and another drug.

Polk County State v. Asada Shakur Moore, No. 16-0834 (Iowa Court of Appeals, filed August 16, 2017). **License plate must be fully viewable; partially obstructed plate, even if readable, is sufficient probable cause to justify traffic stop.** Defendant was stopped during a special patrol project for obstructed license plates. The officer discovered she was barred and was in violation of her temporary restricted license. The officer was able to relay the information from the plate to dispatch despite the obstruction. Motion to suppress alleged that the stop was pretextual because the officer was working a special patrol to look for intoxicated drivers, and since the officer could relay the information from the plate to dispatch, the plate was not actually obstructed. Held that even if the stop was pretextual, that fact standing alone is not sufficient to invalidate the stop, and the officer's stated reasons for the stop were credible because Iowa Code 321.37(3) requires the county name to be in "full view," not partially covered, even if readable.

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Polk County State v. Asada Shakur Moore, No. 16-0834 (Iowa Court of Appeals, filed August 16, 2017). **Sufficient evidence of notice for proof of driving while barred.** Defendant was charged with driving while barred, and the state introduced testimony of a DOT witness that two certificates of bulk mailing were sent prior to the date of the stop, and also introduced a post office report from the DOT showing that the defendant's notice was mailed to her most recent address and the sanction number that was being sent to her, which matched the sanction number on the driving file. Held that this amounted to substantial evidence of mailing. In a footnote, the court noted that it did not consider the affidavit of mailing, which was not dated, not attached to anything to show it corresponded to the notice, and the testimony only reflected that it was a boilerplate form kept in a separate folder and constituted the entirety of the proof of mailing.

Polk County State v. Jonathan Leyva Rodriguez, No. 16-1159 (Iowa Court of Appeals, filed August 16, 2017). **Sufficient evidence of operation for vehicular homicide and leaving the scene convictions.** Defendant was convicted of vehicular homicide by OWI and leaving the scene, among other charges, following a collision with a group of bicyclists. The defendant was located a short time after the collision at his home, because a witness noted the license plate of the vehicle. Defendant challenged the sufficiency of the evidence that he was the driver of the vehicle at the time of the collision. Witnesses to the collision testified that they observed a white SUV strike the bicyclists, the license plate matched that of a white SUV belonging to the defendant's girlfriend, defendant's girlfriend testified that defendant drove her vehicle the night before and did not arrive home until after the collision, the vehicle had new damage on the passenger side when she saw it, that the defendant was visibly intoxicated when he came home that morning. Held that a rational trier of fact could conclude that the defendant was the person operating the vehicle at the time of the collision.

Polk County State v. Jonathan Leyva Rodriguez, No. 16-1159 (Iowa Court of Appeals, filed August 16, 2017). **Lay witnesses and trained officers can testify regarding opinion as to impairment without violating the province of the jury.** Defendant was convicted of vehicular homicide by OWI and leaving the scene, among other charges, following a collision with a group of bicyclists. The investigating officer testified that based upon the defendant's BAC and other signs, he believed the defendant was impaired at the time of the collision. Defendant alleged ineffective assistance of counsel for failure to object to the officer's testimony on the grounds that it went to the ultimate issue and invaded the purview of the jury. Held that a lay witness as well as a trained officer may testify regarding opinion on impairment when they have had the opportunity to view the person, and bloodshot watery eyes, slurred and mumbled speech, and failure of the field sobriety tests may provide the basis of an opinion; counsel not ineffective for failure to object.

Polk County State v. Jonathan Leyva Rodriguez, No. 16-1159 (Iowa Court of Appeals, filed August 16, 2017). **Victim impact statements may properly include opinions regarding appropriate sentence for offense.** Following his conviction for vehicular homicide, leaving the scene, and other charges, victim impact statements expressing an opinion regarding the sentence the court should impose were read at sentencing. Defendant claimed ineffective assistance of counsel for failure to object to comments that he believed exceeded the statutorily permitted contents of statements under Iowa Code 915.21(2). Held that opinions regarding the sentence the court should impose fall under the allowable, "other information related to the impact of the offense on the victim," therefore counsel did not breach an essential duty by failing to object to these statements.

Polk County State v. Johnny Lee McFadden, Jr., No. 16-1184 (Iowa Court of Appeals, filed September 27, 2017). **Traffic stop unlawfully prolonged to request consent to search, not cured by admission to possession of contraband.** Defendant was stopped in a high crime neighborhood for a partially obscured license plate. A backpack was observed in the vehicle, which the officer felt was suspicious because there were no children in the car. Consent to search the backpack was denied, but the officer testified the defendant became nervous and his demeanor changed once he was asked. The officer advised the defendant that unless the backpack contained a gun or drugs, he had nothing to worry about. At that point, the defendant admitted it contained marijuana. The vehicle and backpack were searched, drugs were found, and defendant was convicted of PCS-intent. Held that although the stop of the vehicle was valid (even a dirty license plate can constitute a traffic violation under §321.38), the traffic stop was unlawfully prolonged when the officer went beyond inquiries incident to the stop such as checking paperwork and warrant status, and

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did not proceed with the task of issuing a citation or warning, but instead requested consent to search without reasonable suspicion. The defendant's admission regarding the contents of the backpack cannot be considered because it came after the stop was unlawfully prolonged.

Polk County State v. Steven Wayne Six, No. 17-0155 (Iowa Court of Appeals, filed September 27, 2017). **Plea to misdemeanor without in-court colloquy is voluntary when supported by written guilty plea.** Defendant challenged the voluntariness of his guilty plea to operation without owner's consent because the court failed to engage in a colloquy, failed to inform him of the 35% surcharge that applied to the fine, and failed to advise him that he would be sentenced immediately. Held that where defendant is pleading to a serious or aggravated misdemeanor and the written guilty plea acknowledges the surcharge and provides a sufficient basis for the court to find, and the court does find, that the plea was knowing, intelligent, and voluntary and defendant waived the in-court colloquy, the lack of in-court colloquy alone does not stand as the basis for a claim of involuntariness. The record was devoid of any evidence of how immediate sentencing prejudiced the defendant, so that issue was preserved for potential postconviction proceedings.

Polk County Harrison v. City of Ankeny & Matt LNU, No. 16-0123 (Iowa Court of Appeals, filed October 11, 2017). **Statutory immunity applies to persons not under the control of the municipality, summary judgment properly granted.** Plaintiff, a confidential informant, sought damages against the Ankeny Police Department and an individual officer after she was sexually assaulted by the target of an investigation in the target's home, based upon negligent supervision resulting in tortious infliction of emotional distress. The court granted summary judgment due to statutory immunities, lack of a duty of care, lack of foreseeability, assumption of the risk, and failure of the claim as a matter of law. Held that viewing the evidence in the light most favorable to the nonmoving party, any disputed facts were not material to the resolution of the case, the target of the investigation was not under the supervision or control of the city so statutory immunity applied, and since the city was statutorily immune, no other claim need be decided.

Polk County State v. Richard Lee Newman, No. 16-2094 (Iowa Court of Appeals, filed October 11, 2017). **Sufficient evidence of intoxication for OWI where defendant fled in a vehicle and on foot, combined with other factors.** Defendant was convicted of OWI and eluding after the jury was instructed that the state needed to prove he was under the influence. Defendant challenged the sufficiency of the evidence that he was under the influence based upon the video. The standard jury instruction defining, "under the influence" was used. The defendant was driving a car without a license plate, suddenly accelerated through a parking lot when police tried to stop him, led officers on a high-speed chase through a neighborhood, crashed into a parked car, and fled on foot. Once apprehended, the officer could smell the odor of alcohol and noted that the defendant had bloodshot eyes, his speech was slurred, he swayed, and staggered when he walked. A partially consumed bottle of brandy was found in his car, and defendant admitted he would test positive for alcohol. Two officers disagreed about the slurred speech, but the jury could have found the more experienced officer to be more credible. Held that flight was evidence of visibly excited emotions or impaired judgment, and despite his lucid conversation with officers, the jury only needed to find one factor in the jury instruction on intoxication to find that the defendant was under the influence.

Pottawattamie County State v. Erika Orquida Lopez-Cardenas, No. 15-2040 (Iowa Court of Appeals, filed August 2, 2017). **Improper expansion of traffic stop following initial seizure for dark windows.** Defendant was a passenger in a vehicle stopped for dark windows. The officer confirmed the window tint violation within seconds, and the license status of the occupants within minutes. The trooper then asked several questions unrelated to the stop, and when told that the drug dog was delayed, waited to issue any citations until the drug dog arrived, for a total of 49 minutes. During this time, the officer noted nervousness, the presence of No Doz pills in the vehicle, the presence of several cell phones, minimal clothing on a trip from California, defendant's failure to bring her own children on the trip, the defendant's lack of knowledge of the precise age of the minor in the vehicle, the observation that the vehicle was "sitting low," and that he could see fertilizer in the vehicle.

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Held that authority for a seizure ends when the tasks tied to the traffic infraction are or reasonably should have been completed, and while an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, he must not do so in a way that prolongs the stop, absent reasonable suspicion. Without the delay, the other circumstances articulated by the officer did not amount to reasonable suspicion to prolong the stop to allow for the dog sniff. Convictions vacated and case remanded for suppression of evidence.

Story County State v. Terry Lee Coffman, No. 16-1720 (Iowa Court of Appeals, filed August 2, 2017). **Community caretaking function for vehicle parked on side of rural highway at night, seizure of the vehicle was reasonable.** Defendant was parked on the shoulder of a rural highway at 1:00 am with brake lights engaged, when a deputy turned on his overhead lights to check the welfare of the people in the vehicle. The odor of alcohol was detected, which eventually led to defendant's arrest for OWI. State argued the community caretaking exception and the motion to suppress was denied. Held that there was a seizure when the deputy activated his lights, but that the public servant doctrine applied due to the stopped vehicle, the brake lights, the time of night, and no other traffic or possible assistance nearby, and that the public interest in the welfare of motorists outweighed the defendant's individual privacy interest. The Court also stated that the seizure was necessary because pulling alongside the vehicle would have required the officer to stop in the traveled portion of the roadway, and activating the overhead lights was necessary to alert the defendant and other travelers that there was a car by the side of the road.

Warren County State v. Richard Lloyd Tate, No. 16-1929 (Iowa Court of Appeals, filed September 13, 2017). **Defendant must be given an opportunity to demonstrate "some merit" for applications for expert witnesses and investigators as state expense.** Defendant was charged with OWI and his applications for a court-appointed investigator and expert witness were summarily denied without hearing or resistance by the State. Defendant filed a motion to enlarge, amend, and reconsider, and requested to file an offer of proof, which was also summarily denied. Defendant appealed pursuant to State v. Dahl, 874 N.W.2d 348 (Iowa 2016), and the state resisted on the grounds that defendant failed to meet the "some merit" standard and therefore was not entitled to an ex parte hearing on the motions. Held that where the record contains no explanation for each denial by the court, no resistance by the state, and an unreported hearing, there was no opportunity for the defendant to demonstrate that his application had "some merit," abuse of discretion found for failure to follow Dahl protocol.

Woodbury County State v. Isiac Joseph Brown, No. 16-0359 (Iowa Court of Appeals, filed September 13, 2017). **Objective standard applied to test alleged pretextual traffic stop.** Defendant was a robbery suspect when he was stopped for equipment violations. Defendant argued his counsel was ineffective for failure to file a motion to suppress the stop as pretextual, and failing to obtain a recording of the stop to establish that his vehicle was in good working order. Held that although pretextual stops are permissible under the federal constitution, the Iowa Constitution requires that traffic stops be tested objectively, and that defendant did not establish that a recording of the stop even existed, therefore counsel was not ineffective where officers observed a traffic violation, however minor.

Wright County State v. Shad Robert Eckley, No. 17-0092 (Iowa Court of Appeals, filed August 2, 2017). **No abuse of discretion where sentencing court considered multiple factors.** Defendant was convicted of OWI and eluding, and appealed his sentences alleging they were based on a fixed policy or focused on only a single factor, specifically his criminal history. At sentencing, the court specifically stated it considered the defendant's age, employment history, family circumstances, criminal history, demeanor at sentencing, substance abuse history and needs, mental health history and needs, facts and circumstances of the offenses, and information in the PSI and other information presented during the sentencing hearing. No abuse of discretion found.

Please join us for "**Ethics in Impaired Driving Cases: Are You Tracking Too Close to Justice Souter's Wind?**" a webinar presented by Tom Kimball, director of the National Traffic Law Center (NTLC), which will be held on **Tuesday, December 12, 2017**, at **2:00 pm EST.** This is the latest installment of **Traffic Tuesdays**, the **National TSRP Webinar Series**.

This webinar will address the following issues:

ABA Standards
Discovery and Disclosure of Newly Obtained Evidence
Pre-trial Publicity
Candor to the Court
Disclosing Legal Authority to the Court
Jury Selection
Avoiding Unnecessary Delay
Literary Agreements and Arguments

There is no registration fee for this webinar, but you must register in advance: Click here to register: https://attendee.gotowebinar.com/register/7301662672645496 34

After registering you will receive a confirmation email containing instructions on how to join the webinar. In order to ensure 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. Please be careful to enter your email address correctly. **You will not be able to join the webinar if you do not receive a confirmation email.**

This webinar is being conducted on the national TSRP Program webinar account. The account is funded through the NAPC/NHTSA Cooperative Agreement, Project Number DTNH22-10-H-00289.

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