HIGHWAY SAFETY LAW UPDATE

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Focus on School Bus Safety – Kadyn's Law

In 2012, the Iowa Legislature passed the "Keep Aware Driving – Youth Need School Safety Act," also known as Kadyn's law, in response to the tragic death of Kadyn Jade Halverson, who was struck by a pickup and killed while trying to cross the road to board a school bus. The law, codified in Iowa Code §§321.372 and 321.372A, increased the criminal penalties for passing a stopped school bus and created license sanctions for these offenses under Iowa Administrative Rule 761-615.17(2)(d).

Kadyn's law places requirements both on drivers of school buses and on motor vehicle operators encountering stopped school buses. One of the most significant aspects of the law is the requirement that bus drivers use flashing warning lamps and extend a stop arm when discharging students, and that drivers, including those operating motor vehicles on private roads or driveways, reduce their speeds and come to a complete stop when the bus is stopped and the signal arm is extended. The prohibition on passing or overtaking a stopped school bus with flashing lights and a stop arm extended applies to vehicles on both sides of the roadway. The only exception to this is if the highway provides two or more lanes in each direction and the vehicle is traveling in the opposite direction of the school bus. Vehicles required to stop for school buses is explained with an excellent graphic which can be found at https://iowadot.gov/schoolbus/highway-safety/requiredstopping.

School bus drivers are most often the witnesses to what has become commonly known as "Stop Arm Violations." Iowa Code §321.372A provides that a school bus driver who observes such a violation may report the incident in writing and deliver the report to a peace officer within 72 hours of the violation. Within 7 calendar days after receiving the report of violation, the peace officer must initiate an investigation, contact the owner of the vehicle, and request information identifying the driver of the vehicle at the time of the violation. Pursuant to Iowa Code §321.484, if the peace officer has reasonable cause to believe that a driver has violated the "Stop Arm" requirements, and the officer requests driver identification information from the owner, the owner shall identify the driver to the best of their ability, unless the identification would be self-incriminating. Failure to identify the driver unless self-incriminating is a simple misdemeanor. In addition, many buses are equipped with cameras that can help identify the vehicle and the driver, although this is not always possible even with cameras due to footage quality and vantage point of the cameras.

Several media and other informational sources have recently reported that since the enactment of Kadyn's law, convictions are declining. In 2012, the year of enactment, citation and conviction rates were about even, with just over 1,000 citations and just under 1,000 convictions.
In 2016, 868 citations were issued, resulting in 581 convictions. School bus drivers, school officials, and concerned parents are questioning the reasons for this downward trend. Unfortunately there is no single, simple answer. A combination of stricter penalties and license ramifications have undoubtedly led to more aggressive defenses to these violations, inaccurate or inadequate initial reporting can impede investigations, and plea bargaining and other factors have all affected conviction rates.

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In addition to accurate reporting, the bus driver must also comply with rules regarding the stopping of the bus. Citations have been dismissed due to a bus driver opening the entrance door, thereby activating the red lights and stop arm, prior to the bus coming to a complete stop as required under the code. This is usually demonstrated when the violation is on camera. Lastly, bus drivers must make sure that the bus is stopped at the designated bus stop location, and that this location is an appropriate distance for warning the approaching driver. When a bus stop is located in an area that limits visibility, such as a hill or a corner, or located at a 4-way intersection, a defense may exist for a vehicle that approaches from the left or right.

Once law enforcement receives a report, the Code requires that an investigation be initiated within seven days. If, after contacting the owner, the driver cannot be identified or the owner claims a self-incrimination privilege, the officer may cite the owner. Proof that the motor vehicle was correctly identified and that the defendant was the owner at the time of the violation gives rise to a permissible inference that the owner was the driver who committed the violation. Even with this permissible inference, law enforcement should make every effort to document the whereabouts of the owner at the time in question, which may include verifying their work schedule, identifying any other vehicles registered in the owner's name to exclude other modes of transportation, and utilizing effective interview techniques and witness identification, which may include following up with other persons who may be familiar with the owner's schedule. Obviously, timeliness in initiating this type of investigation can make the difference between obtaining these details and having to compensate for faded memories.

Prosecutors will also benefit from speaking to the witnesses prior to trial in these matters, making sure all available evidence has been collected, such as video evidence, and preparing lay witnesses, especially the bus drivers, for trial. Educating judges about the permissible inference and requesting additional investigation by law enforcement is also essential. When a thorough investigation is conducted and demonstrated in court, judges may be more likely to rely upon the permissible inference barring no other reasonable explanation for the vehicle being at the location of the stop arm violation and being driven by the person cited. Prosecutors can also work with their local school districts to educate the public about the requirements of stopping for school buses, and general public education efforts should be supported throughout the state.

Bus drivers, law enforcement, prosecutors, and ultimately the courts help shape public perception of the importance and priority being placed upon keeping children safe while being transported to and from school. A continued effort by all involved will increase safety and help prevent future tragedies.

Take Advantage of Advanced OWI Training in Your Area

The Governor's Traffic Safety Bureau and the statewide Drug Recognition Program, divisions within the Iowa Department of Public Safety, together with the Prosecuting Attorney's Training Coordinator Division of the Iowa Attorney General's Office, regularly sponsor Advanced Roadside Impaired Driving Enforcement (A.R.I.D.E.) trainings across the state of Iowa. These trainings are designed to benefit law enforcement and prosecutors, and are led by a team of highly trained DRE instructors. These trainings typically last two days, and are packed with useful information. On the first day, attendees are exposed to topics ranging from alcohol, other drugs and impaired driving, an update and review of the proper methods for conducting standardized field sobriety testing, proficiency exams for officers, facts about drugs and the human body, and best practices in observing and documenting these effects. The day ends with a controlled drinking "wet lab" during which officers can put their impairment detection skills to the test, verify their observations with alcohol testing devices, and observers can witness firsthand the effects of alcohol on the body at different levels. These firsthand observations in particular are so much more valuable for the prosecutor than videotape evidence, as it gives a real life picture of what alcohol impairment looks like to the officer in the field. From the odor to the slurred speech to the eye movements seen in the horizontal gaze nystagmus, there is so much more that can be gleaned from this portion of the class alone than can be understood when limiting your subject matter knowledge to reports and videos. By attending and observing the wet lab, a prosecutor can also improve skills necessary to elicit effective testimony during trial, painting a much clearer picture for the jury and achieving justice in the courtroom.

On the second day of training, DRE instructors collaborate to cover each of the seven major drug categories including CNS depressants, CNS stimulants, hallucinogens, dissociative anesthetics, narcotic analgesics, inhalants, and cannabis. Videos of subjects under the influence of each of these substances are shown to the attendees, and attention is given to distinguishing each category from the other. Drugs in combination are also discussed,

as poly-drug use becomes more common. This is both educating for officers encountering impaired suspects in a variety of circumstances, and also useful to the prosecutor who must correlate performance on field sobriety tests and officer observations to the suspect's impairment for a judge or jury. Of particular importance to the prosecutor is being able to explain a lack of nystagmus in suspects impaired by certain classes of drugs, and how this fact, together with other observations, paints a clear picture of drug impairment, even absent a chemical test. It is this type of in-depth knowledge by the officer and the prosecutor that leads to solid convictions in OWI cases without chemical tests, such as in *State v. Truesdell*, 679 N.W.2d 611 (sufficient evidence of intoxication to sustain OWI conviction based upon admissions and officer observations, without chemical testing), and more recent Court of Appeals cases such as *State v. Owen Robert Gordon*, No. 15-2038, 2017 WL 5185401 (Iowa Ct.App, 11/08/17) (DRE evaluation, admissions, and driving behavior sufficient for OWI conviction absent a chemical test); and *State v. Levi Leonard Hamilton*, No. 16-1568, 2017 WL 5185429 (Iowa Ct.App., 11/08/17) (sufficient evidence of operation while intoxicated based upon observations, driving behavior, and test refusal).

To round out the second day of training, a legal update is presented which is useful to both officers and prosecutors, advising not only of the latest court rulings in the areas of OWI detection, SFSTs, implied consent, search and seizure including traffic stops, and the intricacies of the prescription drug defense, but also innovative methods of addressing common grounds for motions to suppress, strategic use of subpoenas and warrants, charging decisions and trial practice. Finally, the course is concluded with a final exam for officers and critiques. Attendees of the course are given comprehensive written course materials and case citations on each legal topic of discussion.

The experience is highly interactive, educational, and informative for officers and prosecutors alike, and best of all, this training is FREE!!!! As various dates and locations are scheduled, there will almost always be an A.R.I.D.E. in your area that fits into your schedule. Knowledge is power, and when it comes to OWI enforcement, there can be no doubt this training saves lives.

For information about an A.R.I.D.E. coming to your area, contact the Governor's Traffic Safety Bureau's State DRE Coordinator, Jim Meyerdirk, at 515-725-6125 or meyerdir@dps.state.is.us.

DCI Approves PBT Devices and Adds More Substances to Blood Confirmation Capabilities

The Iowa Department of Criminal Investigation, pursuant to Iowa Code Chapter 321J and in accordance with 661 Iowa Administrative Code Chapter 157.5(1), has approved the following devices for use in the State of Iowa as preliminary breath screening devices:

Device	Company	Company Location
Alco-Sensor III	Intoximeters, Inc.	St. Louis, MO
Alco-Sensor IV	Intoximeters, Inc.	St. Louis, MO
Alco-Sensor FST	Intoximeters, Inc.	St. Louis, MO
Alco-Sensor FST 200K	Intoximeters, Inc.	St. Louis, MO
Intoxilyzer 400/400PA	CMI, Inc.	Owensboro, KY
Intoxilyzer 500	CMI, Inc.	Owensboro, KY
Intoxilyzer 600	CMI, Inc.	Owensboro, KY
Intoxilyzer S-D2	CMI, Inc.	Owensboro, KY
Intoxilyzer S-D5	CMI, Inc.	Owensboro, KY
Lifeloc FC10/FC10 Plus	Lifeloc Technologies, Inc.	Wheat Ridge, CO
Lifeloc FC20/FC20 Plus	Lifeloc Technologies, Inc.	Wheat Ridge, CO
Alcotest 6820	Draeger Safety Diagnostics, Inc.	Irving, TX
Alert J5	Alcohol Countermeasures Systems Corp.	Toronto, Ontario Canada

Three PBTs were removed from the list: Alco-Sensor, Alco-Sensor II, and the Intoxilyzer 300. These early PBT devices, approved in the 1970s to early 1990s, are no longer in production and therefore no longer serviced by their respective companies. All law enforcement agencies and others using PBT devices should check their inventory to make sure these older devices are removed and replaced.

In addition, the DCI Toxicology Section can now confirm the presence of the following substances in blood:

Randox Screening Levels – DoA ULTRA WB		
Drug Group:	**2018**	**2017**
Oxycodone 1 (OXYC 1)	**≥10**	**≥10**
Oxycodone 2 (OXYC 2)	**≥10**	**≥10**
Dextromethorphan (DMP)	**≥20**	**≥20**
Meprobamate (MPB)	**≥500**	**≥500**
Methamphetamine (MAMP)	**≥20**	**≥20**
Barbiturates (BARB)	**≥200**	**≥200**
Benzodiazepine 1 (BENZ 1)	**≥20**	**≥10**
Benzodiazepine 2 (BENZ 2)	**≥10**	**≥10**
Methadone (MDONE)	**≥50**	**≥50**
Opiates (OPIAT)	**≥10**	**≥10**
Phencyclidine (PCP)	**≥10**	**≥10**
Benzoylecgonine (BZG)	**≥50**	**≥50**
Zolpedim (ZOL)	**≥10**	**≥10**
Tricyclic Antidepressants (TCA)	**≥50**	**≥50**
Cannabinoids (THC)	**≥10**	**≥10**
Tramadol (TRM)	**≥10**	**≥10**
Amphetamine (AMPH)	**≥20**	**≥20**
Fentanyl (FENT)	**≥2**	**≥2**
Buprenorphine (BUP)	**≥10**	**≥10**
Generic Opioids (OPDS)	**≥10**	**≥10**

Confirmation of Drug Categories (Confirmation):

Cannabinoids Confirmation (blood samples):	
delta9-tetrahydrocannabinol (THC)	11-hydroxy-delta9-tetrahydrocannabinol (a metabolite of THC)
11-nor-9-carboxy-delta9-tetrahydrocannabinol (a metabolite of THC)	

Amphetamines Confirmation (blood samples):	
Amphetamine	Methamphetamine
Phentermine	3,4-Methylenedioxymethamphetamine (MDMA)
3,4-Methylenedioxyamphetamine (MDA)	3,4-Methylenedioxyethylamphetamine (MDEA)

Cocaine Confirmation (blood samples):	
Cocaine	Benzoylecgonine
Ecgonine methyl ester	Cocaethylene

General Confirmation (blood samples):		
Morphine	6-MAM	Oxymorphone
Codeine	Methadone	Oxycodone
Hydrocodone	Fentanyl	Hydromorphone
Phenazepam	7-aminoclonazepam	Zolpidem
Midazolam	α-OH Alprazolam	Chlordiazepoxide
Nordiazepam	Lorazepam	Oxazepam
Clonazepam	Alprazolam	Triazolam
Temazepam	Diazepam	Phencyclidine (PCP)
Tramadol	Amitriptyline	Quetiapine
Doxepin	Imipramine	Nortriptyline
Cyclobenzaprine	Dextromethorphan	Buprenorphine
Norbuprenorphine		

More information about breath, blood, and urine testing can be found at http://www.dps.state.ia.us/DCI/lab/index.shtml

Opinions of the Iowa Supreme Court

No probable cause or reasonable suspicion for traffic stop where county park hours were not posted

Black Hawk County State v. Scheffert, ___ N.W.2d ___ (Iowa 11/17/2017) No. 16-0267. Defendant was stopped for being in a county park after hours, and consent to search was obtained, yielding paraphernalia and marijuana. Defendant argued that park hours were not posted, and the court of appeals held that city ordinances must be pled and proven and judicial notice could not be taken, therefore finding no probable cause for the stop. The Supreme Court disagreed with this logic, finding instead that failure to object gave the state no opportunity to lay the proper foundation and therefore the substance of the ordinance was satisfied with the testimony of the officer that the defendant was in the park after hours. However, the supreme court also held that Iowa Code §350.5 mandates posting the hours near each gate or principle entrance, and there was no testimony that the hours were posted. Therefore, no probable cause existed for the stop on that basis, motion to suppress sustained.

Failure to advise of surcharges results in remand

Floyd County State v. Weitzel, 905 N.W.2d 397 (Iowa 12/22/2017). Defendant pled guilty to domestic assault, possession of methamphetamine, carrying weapons, and OWI, and challenged the adequacy of his plea colloquy, alleging a failure to advise him of the statutory thirty-five percent surcharge. At the plea hearing, the court advised the defendant of the minimum and maximum fines applicable to each offense and some of the surcharges, but did not inform him of the surcharge pursuant to §911.1 nor determined whether he understood he would be subjected to these surcharges. The court sentenced the defendant to pay the fines and surcharges, but suspended all but the fine on the OWI, to which the thirty-five percent surcharge applied. Defendant was allowed to challenge his guilty pleas on direct appeal because he was not informed of his right to file a motion in arrest of judgment. In applying a substantial compliance standard under Rule 2.8(2)(b)(2), held that surcharges are a form of punishment that the district court must disclose before accepting a guilty plea in a colloquy or in a written waiver thereof, and the court's omission of the surcharges does not meet the substantial compliance standard; guilty pleas vacated and case remanded for further proceedings.

Published Opinion of the Iowa Court of Appeals

Implied consent statute not the exclusive means by which a chemical sample may be obtained

Polk County State v. Hunter Nathanial Frescoln, ___ N.W.2d ___, No. 16-2043 (Iowa Ct.App.12/5/17) Defendant was arrested for OWI following a traffic stop and performance of SFSTs indicating impairment. Implied consent was never invoked, and a warrant for a sample of defendant's blood was obtained showing a result over the legal limit. Held that implied consent statutes fall under the exceptions to the warrant requirement based upon consent, and are not a prerequisite to chemical testing. As long as a defendant is never presented with the opportunity to consent by invoking implied consent, nothing is refused and a general warrant is permitted pursuant to Iowa Code §321J.18 and State v. Oakley, 469 N.W.2d 681, 682 (Iowa 1991). The court also held that while a warrant to seize the sample, when construed in a commonsense manner, is valid to also test that sample, the best practice is to state in the warrant that the purpose for requesting the sample is for chemical testing. Further, a person loses a privacy expectation in blood after its lawful removal from the body, and therefore testing does not violate constitutional protections.

(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/).

TBD
tbd@ag.iowa.gov

Office of the Prosecuting Attorneys Training Coordinator

2nd Floor, Hoover Bldg.
Des Moines, Iowa 50319

Phone:
(515) 281-5428

Black Hawk County State v. Zachary Lynn Flippo, No. 16-0721 (Iowa Court of Appeals, filed November 8, 2017). **Passenger has standing to challenge expansion of traffic stop, change in demeanor after request to search is insufficient basis to expand scope.** A traffic stop was initiated for a malfunctioning taillight, and the defendant, who was a passenger in the vehicle, was found to have a warrant. The driver was asked for consent to search, and her demeanor changed although she did not answer. A canine sniff was conducted, during which the presence of narcotics was detected. A full search yielded drugs, and the defendant admitted to possession. Defendant challenged the lawfulness of prolonging the traffic stop to allow for the canine sniff. Held that to lawfully broaden a traffic stop, an officer must have reasonable suspicion of other wrongdoing, and that suspicion must have developed within the time reasonably necessary to execute the initial stop. Where an officer completes the tasks necessary for the stop and then asks about illegal substances in the vehicle, thereafter basing suspicion on a change in demeanor of the occupants, such is insufficient to support continued detention of any of the occupants of the vehicle.

Black Hawk County State v. Roy A. Halverson, No. 16-1614 (Iowa Court of Appeals, filed November 8, 2017). **Search incident to arrest must only be contemporaneous.** After receiving a report that the defendant tried to pull a girl into a secluded location while indicating he had a gun, and then sell drugs to her brother, officers located the defendant and pat searched him, locating a flashlight and pills. Officers arrested the defendant, and opened the flashlight, locating drugs. Held that while a search incident to arrest is limited in scope to circumstances in which the security of an arresting officer is implicated or when the arrested person is within reach of the contraband and thus able to destroy or conceal it, the search need not be made after a formal arrest if it is substantially contemporaneous with the arrest, provided probable cause for the arrest existed at the time of the search. Here, probable cause to arrest existed at the time of the pat search for the defendant's attempt to pull the girl to the secluded location while indicating he was armed with a gun, constituting the indictable offense of attempt to entice a minor. The court also declined to interpret the Iowa Constitution more strictly than the federal constitution and did not require that the arrest must precede the search.

Black Hawk County State v. William Earl Gray, No. 16-1808 (Iowa Court of Appeals, filed November 22, 2017). **Inventory is lawful as long as sole motivation is not subjective criminal investigation.** Defendant was convicted of possession with intent following discovery of drugs during an inventory search. Defendant alleged that sole purpose of the inventory was criminal investigation after he refused to consent to the search. While finding a subjective criminal investigatory purpose for the inventory did exist, the court held that because the standard is objective and the impound policy of the department was reasonable and was followed, the inventory was proper.

Boone County State v. Kohl M. Fisher, No. 16-1758 (Iowa Court of Appeals, filed January 10, 2018). **Automobile exception justifies search of parolee's vehicle.** Defendant on parole signed a standard agreement allowing searches without cause or warrant upon demand of a parole or peace officer. Defendant was placed on GPS monitoring and admitted to methamphetamine use. Confidential informant implicated him in methamphetamine manufacturing and distribution. The GPS bracelet was then used to monitor his movements, and he was stopped for speeding after visiting a house known for drug transactions and observed by police placing something under the hood of his vehicle. Defendant was asked by parole officer for consent to search the vehicle, but was not told he could leave or that he had the right to refuse. Defendant stated that he knew he had to consent because he was on parole. The search yielded methamphetamine under the hood of the car. Held that search was valid under the automobile exception to the warrant requirement, probable cause based upon confidential informant, corroboration with GPS monitoring device, admission to use, and act of placing something under the hood, parole search agreement not addressed.

Cerro Gordo County State v. Nicholas Dustin Horst, No. 17-1171 (Iowa Court of Appeals, filed January 24, 2018). **Unproven allegations in minutes of testimony not necessary for factual basis are deemed denied by defendant and must be disavowed by sentencing court.** Defendant pled guilty to serious injury by motor vehicle by reckless driving, and requested a suspended sentence. Defendant objected to portions of the presentence investigation report (PSI) that contained unadmitted allegations from the minutes of testimony concerning the defendant's drug use at the time of the collision. Defendant's objection was sustained and the court agreed not to consider those allegations. Defendant was sentenced to prison, and defendant appealed based upon an abuse of discretion, claiming the court considered the unadmitted allegations and impermissibly focused solely on community deterrence in imposing the prison term. Held that the record was clear that the court properly and effectively disavowed consideration of the unproven intoxication allegations in the PSI, and considered all factors relevant to the sentence prior to imposition.

Cerro Gordo County State v. Randin Michael Johnson, No. 17-1159 (Iowa Court of Appeals, filed January 24, 2018). **Consideration of minimization by defendant of his conduct is a permissible sentencing factor.** Defendant pled guilty to Driving While Barred and appealed his sentence, alleging that the court relied on impermissible sentencing factors. Held that where the record showed that court considered age, prior criminal history, driving history, nature of the offense, and the fact that the defendant minimized his conduct, there was no abuse of discretion, sentence affirmed.

Chickasaw County State v. Jessica Zoe Zeien Cox, No. 17-0428 (Iowa Court of Appeals, filed December 20, 2017). **Sentencing court may not rely on unproven social relationships as a sentencing factor.** Defendant pled guilty to serious injury by motor vehicle and requested a deferred judgment. In its explanation for denying the request for a deferred judgment, the court referred to a portion of the PSI that disclosed that defendant was pregnant by a man who had an outstanding warrant for his arrest on drug charges. Held that although it is not impermissible to consider the defendant's social history and relationships, in this particular case the defendant denied that she was aware of the man's arrest history and stated she was not currently in a relationship with him. Remanded for resentencing as the court considered information not supported by the sentencing record, constituting a defect in the sentencing procedure.

Clarke County State v. Cody Tyler Smith, No. 17-0317 (Iowa Court of Appeals, filed December 20, 2017). **Community caretaking function justifies stop of a vehicle near the scene of a single-vehicle collision.** Officers were dispatched to the scene of a single-vehicle collision with someone walking away from the scene, and upon arrival did not find the driver. They did locate the defendant's driver's license on the seat, and learned that the vehicle was registered to another man with the same last name, suggesting a familial relationship. A short time later, a van registered to a woman with the same last name, and the same address, drove by the accident scene and turned around in a driveway. Assuming the driver of the van had either found or was looking for the driver involved in the collision, officers stopped the van to provide assistance in locating the driver or provide medical assistance if the driver was in the van. The defendant was located in the van, and was intoxicated. He was arrested and charged with OWI. Held that the stop of the van was a valid community caretaking function under the emergency aid and public servant doctrines, interpreting the Iowa constitutional protections as being equal to, but not greater than the protections provided under the federal constitution.

Decatur County State v. Kristina Leighann Hellberg, No. 17-0278 (Iowa Court of Appeals, filed January 10, 2018). **Advisement of immigration consequences mandatory for all defendants.** Defendant pled guilty by written plea to Operation Without Owner's Consent. Neither the written plea nor colloquy informed her of immigration consequences under Rule 2.8(2)(b). Written plea advised of need to file motion in arrest of judgment to challenge guilty plea, but did not include appeal consequences for failure to do so. Record was silent as to defendant's immigration status. Held that direct appeal is allowed where defendant is not informed of both the necessity of filing a motion in arrest of judgment but also appeal consequences for failure to do so, and failure to advise of possible immigration consequences does not substantially comply with Rule 2.8(2)(b), remedy where record is silent as to immigration status is vacating guilty plea.

Floyd County State v. Jeffrey John Myers, No. 16-2177 (Iowa Court of Appeals, filed January 24, 2018). **Probable cause for traffic stop for no taillights.** Defendant was stopped for no taillights and ultimately convicted of OWI. Defendant appealed the denial of his motion to suppress, alleging that his taillights were illuminated. A dash camera video corroborated the officer's observation. Held that observation of a traffic violation, however minor, creates probable cause to stop a vehicle.

Floyd County State v. Jeffrey John Myers, No. 16-2177 (Iowa Court of Appeals, filed January 24, 2018). **Positive screen for drugs is sufficient for conviction without confirmation, and officer testimony concerning signs of impairment is sufficient for conviction for operating under the influence alternative.** Defendant was convicted for OWI based upon presence of a controlled substance and under the influence alternatives, following a bench trial on the minutes of testimony. The minutes included a toxicology report of a positive screen for drugs, but also stated that the screen indicates the possible presence of a controlled substance, and that confirmation for specific drugs would follow. No confirming reports were introduced. Defendant challenged the sufficiency of the evidence, claiming that state chose to marshal an offense only under "presence of controlled substance." Trial court evaluated the evidence under both the "presence of a controlled substance" 321J.2(1)(c), and "under the influence" 321J.2(1)(a). Held that under State v. Childs, 898 N.W.2d 177 (Iowa 2017), "any amount" includes a positive screen, and does not require confirmation and is sufficient for conviction under 321J.2(1)(c), and testimony from officer that defendant's voice was shaky, he was sweating profusely, his eyes were watery and bloodshot, his pupils dilated only slightly when a flashlight was near his eyes, the rear of his tongue was brownish green, he performed poorly on the SFSTs, he was sluggish and uncoordinated and sensitive to light all supported a finding of substantial evidence of impairment under 321J.2(1)(a).

Madison County State v. Brett Edward Jones, No. 17-0006 (Iowa Court of Appeals, filed January 10, 2018). **Refusal of PBT communicated by actions and silence, implied consent properly invoked.** After failing SFSTs, defendant was offered a PBT. Defendant was silent for 18 seconds, and then started to put chewing tobacco in his mouth as the officer told him to stop. Defendant continued to put chew in his mouth as officer explained that it, "messes with the test" and advised that he would consider his actions to be a refusal. The officer then placed handcuffs on defendant, transported him to the station, and invoked implied consent based upon the defendant's refusal of the PBT. Trial court ruled that implied consent was invoked based upon arrest, even though officer did not indicate that on the form. Held that officer did request PBT from the defendant, and PBT was refused based upon objective considerations of conduct of the defendant and surrounding circumstances, and a broad definition of "refusal" is appropriate.

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 elements of DWB; 1) operation of a motor vehicle; and 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.

Polk County State v. Eric Hernandez, No. 17-0398 (Iowa Court of Appeals, filed November 8, 2017). **Case set for sentencing is deemed proven for purposes of reliance on offense for sentencing purposes in unrelated case.** Defendant was sentenced to term of incarceration for theft of a motor vehicle. The PSI report included a new drug offense that was pending, but was scheduled for a sentencing hearing. Defendant argued that the record did not disclose whether he had pled guilty to the new drug offense or been found guilty by a jury, only that it was pending for sentencing, and was therefore improperly relied upon by the sentencing court as an unproven offense. Held that new drug offense was necessarily proved if a sentencing hearing was scheduled, and the PSI reporter's characterization of the new offense as a "pending offense" simply referred to the fact that sentence had not been imposed, and since defendant did not dispute that he had committed the new offense, it was considered proven and not improperly relied upon for sentencing.

Polk County David W. Dunham v. State, No. 16-0312 (Iowa Court of Appeals, filed November 22, 2017). **Defendant not arrested for purposes of speedy indictment when taken into custody to execute cooperation agreement.** Defendant pled guilty to PCS-intent to deliver, and claimed his right to speedy indictment was violated. Defendant was a passenger in a vehicle stopped for a traffic violation, and a search yielded methamphetamine. He agreed to cooperate with further drug investigations and asked officers to take him into custody and issue him a fake citation so that other people would not know he was cooperating and would believe he was being arrested. He was not charged with any offense at that time, but was charged over a month later after he failed to cooperate. Held that under these circumstances, arrest did not occur and counsel would not have prevailed in a motion to dismiss for speedy indictment violation, therefore ineffectiveness claim fails.

Polk County State v. Ryan Delmar Easter, No. 16-1612 (Iowa Court of Appeals, filed December 6, 2017). **Sufficient evidence of intoxication without SFSTs or chemical test, objection to test refusal reference not properly preserved for appeal.** Defendant was arrested for speeding and officers noted the odor of alcohol, slurred speech, and bloodshot watery eyes. Defendant admitted to drinking beer and whiskey at a bar, but refused all testing, and testified that he refused because he was stopped in his own driveway. Prosecutor made statements in closing argument that defendant refused testing because he knew he would fail. Defendant objected to statements of prosecutor on the basis that they shifted the burden to the defendant. A motion for directed verdict was denied based upon the testimony and opinion of intoxication of two officers and a video of the interaction. Giving the jury's inferred credibility finding the deference it is due, held that the motion was properly denied, and grounds for objection to prosecutor statements about refusals in closing argument was not specific, therefore not preserved for appeal.

Polk County State v. Monesha Lashay Broughton, No. 17-0016 (Iowa Court of Appeals, filed December 20, 2017). **Impermissible use of sentencing form where there is no guilty plea and plea agreement is not disclosed.** Defendant stipulated to a trial on the minutes, and was sentenced for OWI and child endangerment, and the court used checked boxes to indicate the reasons for the sentence imposed. Defendant appealed for abuse of discretion for failure to adequately state the reasons, and only referenced an undisclosed plea agreement. There was no pre-sentence report or inquiry regarding individual circumstances. Held that although the use of sentencing forms and check boxes is not improper, where the defendant did not plead guilty, but rather was found guilty, and plea agreement is not disclosed on the record, reference to a plea agreement without further details renders the judgment incapable of being reviewed for abuse of discretion, remanded for resentencing.

Polk County State v. Juan Carlos Nino Hernandez, No. 16-1350 (Iowa Court of Appeals, filed January 10, 2018). **State not required to choose lowest amount under "replace, repair, or restore" element of criminal mischief and not required to prove actual repair, replacement or restoration of the property.** Defendant was convicted of criminal mischief first degree for intentionally ramming a patrol vehicle. Defendant contended that the patrol vehicle cost more to repair than to replace, and challenged the sufficiency of the evidence as to the degree of criminal mischief, arguing it should be the lowest cost of "replaced, repairing, or restoring," the vehicle. The State opted to prove the cost of repairing the vehicle, which far exceeded the value of the vehicle. The vehicle was not actually repaired, but the State argued that the crime of criminal mischief was complete when the defendant rammed the vehicle, regardless of whether victim fixes the damage. Held that the crime of criminal mischief does not require that the property actually be repaired; the general rule that compensating for repairs should not exceed the value of the property does not apply to a criminal prosecution for criminal mischief; and the State was not required to offer a second option, such as replacement cost, to establish the level of offense.

Polk County State v. William Joseph Phipps, No. 17-0544 (Iowa Court of Appeals, filed January 24, 2018). **D.A.R.E. surcharge is applicable to vehicular homicide by OWI, but LEI and D.A.R.E. surcharges not applicable to leaving the scene of an accident.** Defendant challenged the imposition of the D.A.R.E. surcharge and law enforcement surcharge for vehicular homicide by OWI in violation of 707.6A(1) and Leaving the Scene of an Accident resulting in death under 321.261(4) and 321.263. Held that law enforcement surcharge is not applicable to either offense, but the D.A.R.E. surcharge is authorized for vehicular homicide by OWI because section 707.6A(1) incorporates an element under chapter 321J. Remanded for resentencing as to the surcharges.

Scott County State v. Quintin D. Clemons, No. 17-0380 (Iowa Court of Appeals, filed November 22, 2017). **Factual basis for felony eluding charge not found where defendant specifically denied an element at sentencing.** Defendant was asked during plea colloquy for felony eluding what he did to commit the offense. Defendant responded that the patrol car that pursued him was unmarked. The court asked whether he knew it was a police officer, and defendant responded in the affirmative, and added that he was under the influence at the time and exceeded the speed limit by 25 miles per hour or more. The prosecutor was given an opportunity to add to the factual basis, but did not make any statement regarding whether the patrol car was marked or refer to the minutes of testimony. Held that where the defendant contests a fact constituting an element and there are no facts that warrant a conclusion that the denial is unworthy of belief, and defendant does not adopt the minutes of testimony which may otherwise establish that element, there is no factual basis for the plea; remanded for establishment of factual basis.

Scott County State v. Darryl B. Shears, No. 16-1665 (Iowa Court of Appeals, filed December 6, 2017). **Restitution proper where patrol car was damaged in course of pursuit.** Defendant was convicted of eluding and criminal mischief. City filed a restitution claim for damages to patrol car following use of a PIT maneuver to end the pursuit. Held that when proximate cause standard is applied, causation burden is met if substantial evidence shows the damage to the police vehicle was a reasonably foreseeable consequence or within the range of harms of defendant's eluding and attempts to stop him, restitution awarded. Note: Dissent found that City did not qualify as a "victim" and did not suffer damages "as a result of" criminal activity; damages resulted from the officers' own enforcement decision to place the squad car in harm's way.

Scott County State v. Keith L. March, No. 16-2108 (Iowa Court of Appeals, filed January 10, 2018). **Reasons for sentence apply to both OWI and DWB, and placement in the OWI Continuum Program is at the discretion of the Department of Corrections, no special court order required.** Defendant challenged his sentences for OWI-3rd and DWB, claiming the court failed to set forth reasons and for orally advising him that he would be sentenced to the OWI Continuum Program, but failing to put this in the written order. Held that court's extensive comments about defendant's driving record, unsuccessful treatment, defendant's needs and the safety of the public applied to both the OWI and DWB sentences because they are both driving charges that involve public safety, and that placement in the Continuum Program is the function and at the discretion of the Department of Corrections and does not require a special court order.

Wapello County State v. Donald Dean Gridley, No. 17-0588 (Iowa Court of Appeals, filed January 24, 2018). **No abuse of discretion in denial of motion for new trial.** Defendant was convicted of vehicular homicide and appealed the denial of his motion for a new trial, claiming the court applied the wrong standard. The trial court made specific and expansive credibility findings in applying the "weight of the evidence" standard, but defendant claimed the court ignored evidence and testimony favorable to him. Held that where the trial court reasonably relied on the evidence contradicting defendant's testimony, made credibility findings, and reasonably relied on the facts before it as well as consideration of many other factors, no abuse of discretion occurred.

Woodbury County State v. Owen Robert Gordon, No. 15-2038 (Iowa Court of Appeals, filed November 8, 2017). **Conviction for drug possession using admission and corroboration despite not locating the drug.** After a pursuit, officers detected an odor of marijuana coming from the vehicle and the defendant. A canine sniff alerted on the vehicle and a bag in the vehicle. Officers located rolling papers but no drugs. Defendant driver admitted to smoking marijuana while driving and throwing the marijuana out the window during the pursuit. Defendant submitted to a DRE evaluation and was found to be under the influence, but refused to give a urine sample. Held that although a controlled substance was never located, defendant's admission to smoking marijuana was corroborated by odor, the canine sniff, the DRE evaluation showing impairment, and the manner of driving showing impairment sufficient to sustain the conviction of actual possession at one time during the pursuit.

Woodbury County State v. Owen Robert Gordon, No. 15-2038 (Iowa Court of Appeals, filed November 8, 2017). **Sufficient evidence of operation while intoxicated based upon DRE evaluation, admissions and driving behavior.** After a pursuit, officers detected an odor of marijuana coming from the vehicle and the defendant. A canine sniff alerted on the vehicle and a bag in the vehicle. Officers located rolling papers but no drugs. Defendant driver admitted to smoking marijuana while driving and throwing the marijuana out the window during the pursuit. Defendant submitted to a DRE evaluation and was found to be under the influence, but refused to give a urine sample. Held that admission to smoking marijuana during the pursuit, combined with impaired judgment in decision to elude police and drive erratically and with excessive speed constituted substantial evidence that defendant's reason or mental ability was affected.

Woodbury County State v. Levi Leonard Hamilton, No. 16-1568 (Iowa Court of Appeals, filed November 8, 2017). **Sufficient evidence of operation while intoxicated based upon observations, driving behavior, and test refusal.** Officers initiated a traffic stop after observing the defendant make a brief stop at a house known for drug activity. Defendant eluded police, first in the vehicle and then on foot. Defendant was eventually located and exhibited signs of impairment and odor of marijuana. Defendant did not cooperate with a DRE examination and refused a urine sample. Held that dangerous and erratic driving, decision to evade police, red eyes, unsteadiness, slurred speech, the odor of marijuana on his breath, test refusal and non-credible statement about being a daily marijuana user but not using on that particular day was sufficient to sustain finding of impairment by marijuana for purposes of OWI conviction and eluding while intoxicated.

Woodbury County State v. Kelly Bryan Malloy, No. 17-0171 (Iowa Court of Appeals, filed December 6, 2017). **Sufficient evidence of intoxication by drugs.** Defendant was arrested for OWI and eluding following a high-speed pursuit of his motorcycle that lasted forty minutes. The basis for the initial stop was an illegal u-turn, and the defendant did not yield to lights and sirens. During the pursuit, he wobbled the motorcycle, veered into oncoming traffic, and exceeded the speed limit by up to 65 miles per hour. Defendant eventually stopped and lost his balance while dismounting the motorcycle, falling down a ravine. During medical treatment, a drug-encrusted spoon fell out of his boot, which field-tested positive for methamphetamine. EMTs noticed red eyes and defendant fell asleep on the way to the hospital. Defendant scored all six clues on the HGN, but refused chemical testing. Held that impairment can be inferred from a driver's flight and erratic driving, as well as possession of drug paraphernalia and refusal to submit to chemical testing.

Woodbury County State v. Kelly Bryan Malloy, No. 17-0171 (Iowa Court of Appeals, filed December 6, 2017). **Successful attack of HGN testimony insufficient to overturn OWI verdict supported by other evidence.** Defendant was arrested for OWI and eluding following a high-speed pursuit of his motorcycle that lasted forty minutes. A spoon that tested positive for methamphetamine was found on his person, and the basis of the OWI was impairment by methamphetamine, although no chemical test was obtained. An officer testified regarding defendant's failure of the HGN test, but conceded on cross-examination that he was not a drug recognition expert, he did not understand DRE evaluations, the HGN is used to detect impairment by alcohol and other depressants and methamphetamine is not a depressant, and otherwise adequately attacked the probative value of the HGN testimony as to methamphetamine use. Held that although counsel did not object to the admissibility of the HGN testimony, no ineffective assistance where there was ample evidence supporting the conviction for OWI even absent the testimony concerning the HGN.

Time to Reorder Criminal Law Handbook

The newest edition of the Criminal Law Handbook will be released during the final week of March, 2018. Order forms for the Criminal Law Handbook and all other manuals are available by contacting PATC at Cindy.Glick@ag.iowa.gov or by calling 515-281-5428.

Farewell and Vacancy Announcement

Colleagues, it has been nothing short of a privilege and a pleasure to serve as the Traffic Safety Resource Prosecutor with the Attorney General's Office for the past sixteen months. I have been delighted to meet so many of you in prosecution, law enforcement, the judiciary, and many other allied professionals, all working towards the common goal of obtaining justice and making Iowa safer and better for our fellow citizens. I am resigning this position effective March 2, 2018, and am looking forward to once again joining the ranks of prosecutors as an Assistant Pottawattamie County Attorney. The vacancy created by my resignation has yet to be filled, so please consider this fantastic opportunity to serve in this extremely rewarding capacity and work with the wonderful staff here at PATC. – Christine Shockey

Prepared by the Prosecuting Attorneys Training Coordinator (PATC)

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Submissions and/or comments may be sent to:
Tom Ferguson
Iowa Department of Justice
2nd Floor, Hoover State Office Building
Des Moines, IA 50319
Phone: 515-281-5428 ~ Fax: 515-281-6771 *(Attn: PATC)*
E-mail: tom.ferguson@ag.iowa.gov