HIGHWAY SAFETY LAW UPDATE

October 18, 2016 Office of the Prosecuting Attorneys Training Coordinator Sept/October, 2016

Investigating and charging crashes where texting is suspected

Iowa crashes involving distracted driving, texting or suspected texting (and resulting in death or serious injuries to the victims) and media coverage of those crashes have highlighted the difficulty authorities face in determining whether criminal charges are appropriate in such cases and, if charges are deemed appropriate, identifying the appropriate charge.

Iowa does *not* have a "negligent homicide" law, or any criminal law which would permit charging an indictable offense when a death results from negligent behavior. Those cases are typically handled in civil court under the rubric of "wrongful death" actions. Similarly, there are no "negligent injury" criminal laws—injuries brought about by negligent action are handled as actions in tort rather than by the filing of criminal charges. In addition, Iowa's texting statute is drafted in such a way as to invite treatment of the offense as nothing more than negligent conduct: enforcement is possible only as a secondary offense, a conviction for the offense is not a "moving violation" for purposes of future license sanctions, and the statute contains a prohibition of "confiscation" of cell phones.

To charge a highway death or serious injury where the underlying violation was texting or other distracted driving, authorities must prove that the suspect acted "recklessly". This requirement of "recklessness" is inherent in a charge based on the vehicular homicide statute (Iowa Code section 707.6A), and also must be shown when charging involuntary manslaughter under Iowa Code section 707.5. (A reading of 707.5(1)(a) may suggest "recklessness" is not an element of involuntary manslaughter, but in State v. Conner, 292 N.W.2d 682 (Iowa, 1980) the Iowa Supreme Court held that "recklessness" is an essential element under either charging alternative under the involuntary manslaughter statute.)

To prove "recklessness" in Iowa the State must prove not only that the person acted with willful and wanton disregard for the safety or property of others, but must also prove that the defendant's action would *probably* result in death or serious injury. *Compare* Iowa Code section 702.16 (defining recklessness) with Iowa Uniform Jury Instruction 200.20 (2002) (providing in part that "For recklessness to exist, the act must be highly dangerous. In addition, the danger must be so obvious that the actor knows or should reasonably foresee that *harm will more likely than not result from the act.*" Emphasis added.)

Therefore, mere proof of texting while driving is not sufficient to prove recklessness and thereby serve as the basis for an involuntary manslaughter charge or vehicular homicide/serious injury by motor vehicle charge. The State must also prove that when texting, the driver was engaged in willful and wanton conduct which disregarded the safety of others, *and* that the driver knew or should have known that it was probable that harm would result from the texting.

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Investigators who are exploring whether texting may have caused a crash should consider several issues: 1) Has the driver or any witness indicated that texting was observed or suspected, and if suspected but not observed, what is the basis for that suspicion? 2) Was there a cell phone in possession of or in close proximity to the driver? 3) Should the cell phone be seized for evidentiary purposes and further investigation? (Note: the Iowa texting statute forbids "confiscation" of cell phones—see Iowa Code section 321.276(3)—but there is nothing to suggest that such phones do not qualify as seizable property—"property which is relevant in a criminal prosecutor or investigation" under Iowa Code section 809.1(1)(a).)

If a cell phone is seized, officers must then seek a search warrant to view the contents of the phone. And if law enforcement is successful in obtaining a search warrant and it is determined that texting occurred, it is important to not only view the contents of the phone but to also contact those person(s) who were texting with the driver. Finally, officers should review Facebook and other social media used by the driver and others to determine whether any discussion or admission to texting may have appeared as posts before or after the crash.

This type of thorough investigation will not guarantee a successful prosecution based upon texting, but should provide officers and prosecutors with sufficient information to determine whether charges are appropriate and if so, what charges should be filed.

Data suggests that Des Moines and Davenport are among the worst for alcohol impaired fatalities

A website called "AxleGeeks" examined 2015 alcohol-related fatality statistics from NHTSA, compared those statistics with census data, and compiled a list of the 100 cities with the highest percentage of alcohol-related deaths. (To be considered for the list, cities must have recorded at least 10 fatalities in 2015.) Two Iowa cities are on the list—Des Moines, which is ranked as the 6th highest percentage in the country, and Davenport, which is ranked as the 12th highest.

The list of cities is linked to an MSN article at http://www.msn.com/en-us/health/medical/cities-with-the-deadliest-drunken-drivers/ss-BBx39RD?li=BBnba9O The article mentions caveats regarding the data and the analysis, and contains the following footnote: "You can approximate per capita deaths by combining the NHTSA data with census population numbers, but mixing two data sources can be problematic, sometimes producing unreliable results."

The article begins its comparison of cities as follows: "Taking the nation as a whole, about 31 percent of vehicle deaths are alcohol-related. The cities on this list all have even higher percentages, ranging from the low-30s up to 70 percent. As a result, the list reflects cities where alcohol is more likely to be the root problem, as compared to causes like speeding and fatigue."

According to the list, Des Moines had the 6th highest percentage of alcohol-related fatalities. The city had 16 fatalities in 2015, and 9 of those were alcohol-related—or 56.3% of the total.

Davenport, ranked as the 12th highest percentage of alcohol-related fatalities, had 14 fatalities in 2016. Seven of those fatalities were alcohol-related, or 50% of the total.

The data can be manipulated and interpreted in many ways, however. For example, as a percentage of the total population, the risk of an alcohol-related fatality in Davenport is higher than in Des Moines. Davenport, with a population of 102,582 and 7 alcohol-related fatalities in 2015, had a per capita alcohol-related fatality rate of 0.682, whereas Des Moines, with a population of 210,330 and 9 alcohol-related fatalities in 2015, had lower a per capita alcohol-related fatality rate of 0.428.

The data, found at http://car-accident-fatalities.axlegeeks.com/ is searchable for 108 locations in Iowa alone, as well as locations throughout the rest of the country.

Lab can now analyze blood samples for methamphetamine and amphetamines, in addition to marijuana

The DCI Lab now analyzes blood samples for the presence amphetamines and methamphetamine, in addition to marijuana and marijuana metabolites.

The Lab is now confirming and quantifying the following substances:
Amphetamine
Methamphetamine
3,4-methylenedioxyamphetamine (MDA)
3,4-methylenedioxymethamphetamine (MDMA)
3,4-methylenedioxyethylamphetamine (MDEA)
Phentermine

The Lab previously announced that it is analyzing blood samples for the three most common marijuana compounds: delta9-tetrahydrocannabinol (THC), 11-hydroxy-delta9-tetrahydrocannabinol (a metabolite of THC), and 11-nor-9-carboxy-delta9-tetrahydrocannabinol (a metabolite of THC).

In addition, the Lab continues to analyze blood samples for the presence of alcohol. Information about blood toxicology is posted and updated on the Lab's website http://www.dps.state.ia.us/DCI/lab/toxicology/alcohol.shtml

If a submitting officer desires testing for drugs other than marijuana or the amphetamines noted above, it is still necessary to submit urine samples. In addition, if an officer requests testing a urine sample for both drugs and alcohol (or for alcohol only) the Lab still requires that urine samples be submitted in a gray stoppered tube which contains 100 mg of sodium fluoride, and 20 mg of potassium oxalate or other equivalent preservative.

Details and instructions for submission of samples are available on the Lab's website.
Questions may be sent to the DCI Laboratory Administrator Bruce Reeve at reeve@dps.state.ia.us or by calling 515-725-1500.

Time to renew/reorder OWI and Traffic Offenses in Iowa

The new edition of the OWI and Traffic Offenses in Iowa manual was released on September 30, 2016. The manual, which has been updated and published annually since 1984, is now published in digital format only. The manual uses software that makes outdated editions inaccessible, and therefore readers must be re-order a new copy of the manual every year.

This new edition includes a new case section on causation issues in vehicular homicide prosecutions, as well as the case annotations to those cases decided since the last publication.

The new edition of The Iowa Charging Manual was also released on September 30, 2016.

Order forms for OWI and Traffic Offenses in Iowa and the Iowa Charging Manual are attached to this issue of the *Highway Safety Law Update.*

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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(Recent Unpublished Decisions Arranged by County)

Black Hawk County State v. Myron D. Hanson IV, No. 15-0670 (Iowa Court of Appeals, filed September 14, 2016). **Sufficient grounds to stop car; OWI conviction affirmed.** An officer who, within one minute of receiving an anonymous tip that a pickup was "all over the road" located a pickup matching the received description; the officer then saw the pickup "touch the center line twice but not cross it", "take a wide right turn which entered the oncoming lane of traffic" and then, in town, the pickup "swayed into the oncoming lane of traffic"; "(b)ased on the totality of the circumstances and information facing (the officer) at the time of the stop, we conclude reasonable suspicion that criminal activity was occurring existed and the stop was valid under both the Fourth Amendment and article I, section 8."

Black Hawk County State v. Myron D. Hanson IV, No. 15-0670 (Iowa Court of Appeals, filed September 14, 2016). **Untimely motion to suppress.** Motion to suppress filed four months after the defendant's arrest was untimely, and trial court's ruling that the motion was untimely and that reasons proffered by counsel to excuse the late filing were insufficient affirmed on appeal; however, this ruling was ancillary to a ruling on the merits that the officer had grounds to stop the defendant's car; OWI conviction affirmed.

Black Hawk County State v. Brianna Danielle Martinez, No. 15-1206 (Iowa Court of Appeals, filed September 14, 2016). **Sufficient evidence of 'operating' for OWI.** Defendant's acknowledgement at the scene that she had operated the vehicle (which, when located by an officer who had received a report of an impaired driver, was parked with the owner/passenger trying to fix a flat tire) corroborated by defendant's presence in the driver's seat, by the passenger/owner's statement that he had been "backseat driving" and that the tire had hit a curb; this is sufficient corroboration of the defendant's admission and "substantial circumstantial evidence of (the defendant's) operation of the motor vehicle"; conviction affirmed.

Cerro Gordo County State v. Justin J. Zobel, No. 16-0333 (Iowa Court of Appeals, filed October 12, 2016). **Restitution is not a direct consequence of a guilty plea.** Defense counsel's failure to advise defendant of a restitution requirement does not make the plea invalid; restitution is not punishment and it is not a direct consequence of a guilty plea and therefore, where the defendant was not claiming that "but for" the information, he would not have entered the guilty plea, counsel was not ineffective by failing to file a motion in arrest of judgment; guilty plea and sentence for the offense of operating without owner's consent affirmed.

Clayton County State v. Terry A. Thomas, No. 15-1533 (Iowa Court of Appeals, filed October 12, 2016). **Sufficient evidence of intoxication.** Defendant's failure on three field sobriety tests and admission that he had consumed four beers, and the officer's observation of an odor of an alcoholic beverage supported the jury's OWI guilty verdict; the jury was free to reject the defendant's denials and excuses for poor performance on the tests.

Clayton County State v. Terry A. Thomas, No. 15-1533 (Iowa Court of Appeals, filed October 12, 2016). **Reasonable grounds to stop car.** Officer's observation of a front seat passenger drinking beer was sufficient grounds to stop and investigate a possible violation of Iowa Code section 321.284, which forbids possession of an open container by the driver of a vehicle.

Clayton County State v. Terry A. Thomas, No. 15-1533 (Iowa Court of Appeals, filed October 12, 2016). **Defense failure to list witnesses was a breach of duty, but in light of officer's testimony regarding SFSTs, no prejudice resulted.** Trial counsel's failure to notify the State of three medical witnesses (who would have testified that the defendant suffered from some medical issues, which would have buttressed a medical explanation for the defendant's performance on field sobriety tests) resulted in the trial court's ruling that the three could not testify; this failure of

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notification was a breach of counsel's duty, but no prejudice resulted where the evidence was cumulative of the defendant's testimony and the evidence of intoxication was "overwhelming"; the officer's testimony of the defendant's admission to consuming four beers and "exhaustive description of each field sobriety test he administered and the signs of intoxication they revealed" resulted in "no reasonable probability of a different outcome" if the witnesses had been allowed to testify.

Delaware County State v. Erik Milson Childs, No. 15-1578 (Iowa Court of Appeals, filed August 31, 2016). **Grounds to stop car.** Defendant, at suppression hearing, conceded that the officer "did observe the traffic violation and the failure to have up-to-date registration"; suppression motion properly denied and OWI conviction affirmed.

Delaware County State v. Erik Milson Childs, No. 15-1578 (Iowa Court of Appeals, filed August 31, 2016). **Per se controlled substances OWI charge valid; no requirement of an 'impairing' metabolite.** Per se controlled substance alternative of OWI statute does not require impairment or proof of an impairing metabolite. See State v. Comried, 693 N.W.2d 773 (Iowa, 3/18/05).

Des Moines County State v. Elizabeth Ann Cain-West, No. 15-0989 (Iowa Court of Appeals, filed August 31, 2016). **Trial counsel not ineffective for failing to challenge jury instructions.** Defendant convicted of driving while barred was not prejudiced by counsel's failure to challenge "operation" instruction or instruction which referred to her as "the defendant" rather than by her name; trial transcript included at least seven admissions that the defendant was driving the vehicle involved in the crash; the instructions were accurate statement of the law, and the record was such that even if the instructions were improper, the defendant did not "establish there is a reasonable probability the result would have been different if counsel had objected"; driving while barred conviction affirmed.

Polk County State v. Lorenzo James Oakley Sr., No. 14-1769 (Iowa Court of Appeals, filed September 28, 2016). **'Plain view' seizure after consensual search approved.** Officer who, during consensual pat down search, observed baggies and a "rock-like" substance in a pill bottle the defendant was holding over his heard, (and who recognized the material in the pill bottle as crack-cocaine) could seize the substance pursuant to the "plain view" exception to he warrant requirement; motion to suppress properly denied.

Polk County State v. Matthew August Thiel, No. 15-1333 (Iowa Court of Appeals, filed October 12, 2016). **Reasonable articulable suspicion to detain for OWI investigation.** Officers on foot patrol had sufficient grounds to detain the defendant pending the arrival of a patrol officer (who had the necessary paperwork and equipment to investigate the defendant for OWI) where the defendant smelled of alcohol, had bloodshot eyes, was unsteady, and was slurring his words; motion to suppress properly denied, and OWI 2nd conviction affirmed. (Note: defendant had waived the detention issue, but the court reached the merits on an alternative holding.)

Pottawattamie County State v. Jeffry Robert Jensen, No. 15-2172 (Iowa Court of Appeals, filed October 12, 2016). **Prosecutor followed plea agreement but judge did not explain consecutive sentences.** Convictions for operating without owner's consent and other offenses affirmed; prosecutor fulfilled the State's plea agreement but the court, in imposing consecutive sentences, did not articulate reasons for that decision; cases remanded for resentencing.

Scott County State v. Roosevelt Smith, Jr., No. 15-2226 (Iowa Court of Appeals, filed October 12, 2016). **Sufficient evidence that defendant was the driver; driving while barred and while revoked convictions affirmed.** Officer's testimony describing a driver's clothing, pursuit of the driver into a place where the defendant was the only male person present, as well as evidence showing that the defendant had half of the vehicle's key fob in his jacket and the other half was in the car, where the defendant's name was on the key fob, and where mail addressed to the defendant was

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found in the car supported the jury's verdict that the defendant was the driver; driving while barred and driving while suspended convictions affirmed.

Sioux County State v. Shelly Lee Snow, No. 15-0929 (Iowa Court of Appeals, filed September 14, 2016). **Detention for investigation (after mission of the 'brake light' stop had been concluded) justified by reasonable articulable suspicion.** Officer who stopped the defendant for a brake light violation had reasonable articulable suspicion to detain the defendant for a canine drug search and OWI investigation where the defendant was the subject of a months long drug trafficking investigation, had been observed at the home of a suspected drug user and trafficker shortly before the stop, had a passenger with prior convictions who was suspected to be a drug trafficker, and the officer had training in anti-drug training and in recognizing signs of operating under the influence; OWI and possession of methamphetamine convictions affirmed.

Story County State v. Aaron Lewis Bohl, No. 15-1546 (Iowa Court of Appeals, filed August 31, 2016). **Stop based on officer's knowledge, legitimate inferences from that knowledge, and officer's training and experience upheld.** Stop supported by reasonable articulable suspicion where ISU officer saw car where younger driver looked at the officer "in a manner which showed concern"; officer then learned the name and age of the owner of the car (a 60 year old man); learned that the car had been involved in "an OWI-related incident" 3-4 months earlier, and that a younger man with the same last name as the owner (and whose description matched the person observed by the officer as driving the car) had his license revoked from the earlier incident; this information, combined with the officer's training and experience that people in the Ames/ISU area often drove cars owned by their parents provided a basis for the officer to believe that the driver was the person whose license had been revoked; defendant's motion to suppress properly denied by the trial court, and defendant's conviction for driving while revoked affirmed.

Taylor County State v. Shaun Michael Savala, No. 15-1975 (Iowa Court of Appeals, filed September 14, 2016). **Son stole mother's car; sufficient evidence of specific intent to permanently deprive.** Facts of case indicate that the defendant, the son of the victim, had the intent to permanently deprive his mother of her car, where he took the car to evade police, he hid the car in a barn owned by another, where when recovered, the car had damage and had been "trashed", where the defendant refused to return the key to his mother and would not tell authorities who had the key because he was not "a snitch", where on the day he took the car, he arrived at his mother's house with "no prior arrangements for a ride afterwards"; and where he took the keys after having forcibly broken into his mother's home and assaulting her; although there was evidence that he had taken her car without permission on prior occasions, the facts from this incident "satisfy us that a rational jury could conclude (the defendant) possessed the necessary intent to permanently deprive his mother."

Union County State v. Erin Wallace, No. 15-0667 (Iowa Court of Appeals, filed October 12, 2016). **Attempting to elude conviction affirmed; lack of transcript could have been resolved through creation of a record.** Defendant's only appellate argument was that there was no transcript of the jury's verdict being returned; however, defendant did not contact "trial counsel, the prosecutor, and the presiding judge to have a record created to fill in the gap in the transcript that is now complained of on appeal" as is permitted by I.R.App. 6.806; conviction affirmed and issue not preserved for post conviction relief.

Wapello County State v. Donald Dean Gridley, No. 14-1773 (Iowa Court of Appeals, filed October 12, 2016). **Sufficient evidence that defendant was the driver in vehicular homicide case.** Jury could have found that the defendant was the driver of the truck in a crash where the defendant's father was killed, where 1) defendant's DNA was in the blood found on the driver's side; 2) defendant had a mark on his chest

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consistent with contact with a steering wheel; 3) the victim was pinned on the passenger side floorboard; 4) defendant asked, at the scene, "Did I kill my father?" and admitted (initially) to a paramedic that he had been the driver.

Wapello County State v. Donald Dean Gridley, No. 14-1773 (Iowa Court of Appeals, filed October 12, 2016). **No abuse of discretion in permitting officer to opine on certain matters.** "Our courts have consistently allowed law enforcement officers to opine on matters gleaned through the observations of other officers, whether or not the matters are within the personal knowledge of the testifying officer"; state trooper could opine that injury on the defendant's chest, observed by another officer, was consistent with an injury cause by contact with a steering wheel and such testimony was not vouching for the other officer's credibility nor an attempt to undermine the credibility of the defendant; further, although the trooper was not a forensic pathologist, his training and experience in crash investigation was sufficient to permit him to opine that "damage to the rear view mirror. . .was consistent with the mark on the face" of the victim.

Wapello County State v. Donald Dean Gridley, No. 14-1773 (Iowa Court of Appeals, filed October 12, 2016). **Lack of implied consent foundation does not convert a 'refusal' instruction into error.** Trial court did not err in giving a "refusal" jury instruction; "(a)lthough the deputy did not discuss an implied consent form or the implied consent procedures, he unequivocally testified that (the defendant) refused the urine test" which triggered application of Iowa Code section 321J.16 and its refusal inference jury instruction.

Wapello County State v. Donald Dean Gridley, No. 14-1773 (Iowa Court of Appeals, filed October 12, 2016). **Remand for application of proper test for motion for a new trial.** Vehicular homicide conviction affirmed but case remanded for trial court to apply proper test for ruling on motion for a new trial; trial court applied a "sufficiency of the evidence" test and should have applied a "weight of the evidence" test; conviction affirmed, but case remanded for trial court to rule on the motion for a new trial using the proper test.

Webster County State v. Kendra Kae Wessels, No. 15-1023 (Iowa Court of Appeals, filed August 31, 2016). **OWI and assault on a peace officer convictions affirmed.** Defendant's complaint that the judge should have instructed that "assault" is a specific intent crime was well taken, and the trial court erred in instructing it was a general intent crime, but the err did not prejudice the defendant, as "the marshalling instruction for assault on a peace officer required the State to prove specific intent" and given that language in the marshalling instruction, "there was scant likelihood the jury would import the general intent instruction in deciding whether the Sate proved the elements of assault on a peace officer."

Woodbury County State v. Lucas Kyle Daniels, No. 15-1601 (Iowa Court of Appeals, filed September 14, 2016). **Right of allocution not waived when 15 days between plea and sentencing are waived.** A defendant may waive the right to file a motion in arrest of judgment and may waive his/her right to be present at sentencing and right to allocution, but a waiver of the 15 days within which to file a motion in arrest of judgment does not operate, by itself, to waive the right to be present at sentencing and the right of allocution; conviction affirmed, sentence vacated, and case remanded for resentencing.

Wright County State v. Robin Rushelle DeWitt, No. 16-0479 (Iowa Court of Appeals, filed August 31, 2016). **Prison term for driving while barred affirmed.** District court did not abuse its discretion; in fashioning its sentence, court noted that the offense was the defendant's eighth driving while barred conviction and that it had occurred while on probation for a previous driving while barred conviction and that the defendant's "refusal to be law abiding" outweighed any "arguably mitigating circumstances"; sentence affirmed.

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Citations from previous issue of the Highway Safety Law Update

Birchfield v. North Dakota, _ U.S. _, 136 S.Ct. 2160 (6/23/16)
State v. Senn, 882 N.W.2d 1 (Iowa, 6/24/16)

Prepared by the

Prosecuting Attorneys Training Coordinator (PATC)

Under a project approved by the Governor's Traffic Safety Bureau (GTSB), in cooperation with the National Highway Traffic Safety Administration (NHTSA). The opinions, findings, and conclusions expressed in this publication are those of the author and not necessarily those of the PATC, GTSB, NHTSA, or the Iowa Department of Justice. In 2002, *TV Guide* ranked the show "My Mother the Car" as the second worst television program of all time. There is no reason for this little factoid, but the case of State v. Shaun Michael Savala brought that terrible TV show to mind, and so we just *had* to share!

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Note: The OWI Manual is included in both the Criminal Law Handbook and the Charging Manual

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This version (2016-09) of the OWI & Traffic Offenses in Iowa will expire (be inoperable) September 30, 2017, and a new, updated version (2017-09) will be available for purchase in September, 2017.

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