



HIGHWAY SAFETY

LAW UPDATE



July 24, 2008

Office of the Prosecuting Attorneys Training Coordinator

May, June, July, 2008

Point 08 on 08-08

Interested in joining a state-wide alcohol demonstration?

On Friday, August 8, law enforcement agencies will be conducting drinking demonstrations around the state to promote awareness that alcohol impairment does in fact exist at the state's per se "legal limit" of .08, and to demonstrate that actual impairment (and unsafe driving) occurs at even lower alcohol concentration levels.

Agencies wishing to participate are asked to recruit four drinkers and four observers who would be willing to participate in the demonstration and fill out brief surveys about their experience. The surveys are designed to gauge how drinkers view their own impairment, and how non-drinking observers view the drinkers' abilities (or inabilities) to safely operate motor vehicles.

Agencies will need to provide a safe place for the demonstration, the use of a properly calibrated PBT or a DataMaster for testing, locate donated alcohol (so that no government money is spent purchasing alcohol) and insure that all drinkers sign waivers of liability and promises to not operate a motor vehicle within 10 hours of the demonstration.

Anyone interested in participating in the event should contact Pete Grady at 515-281-5428 or via e-mail at pete.grady@iowa.gov ☞



DOT Records Admissible without DOT Testimony

On Friday, July 18, the Iowa Supreme Court ruled in State v. Shipley that "certified abstracts of operating records" prepared under Iowa Code section 321A.3 are admissible pursuant to Iowa Code section 321.10 in driving sanction cases, *without the testimony of a DOT official*. The case is discussed at page 4 of this issue. It is online at http://www.judicial.state.ia.us/Supreme_Court/Recent_Opinions/20080718/06-0051.pdf

As a result of this case, a prosecutor can prove license status without a DOT witness if the prosecutor has a certified abstract of an operating record *and* that record contains an affidavit of mailing (see State v. Green, 722 N.W.2d 650 (Iowa, 10/13/06), as discussed in State v. Ronald Joseph Wasko, No. 8-320 / 07-0956 (Iowa Court of Appeals, filed June 11, 2008).) ☞

INSIDE THIS ISSUE

1	Point 08 on 08-08
1	DOT Records Admissible without DOT Testimony
2	Motorcycle Safety Issues and Changing Demographics in Iowa
4	Have Training Will Travel
4	Iowa Supreme Court Published Opinions
6	Published Opinion of the Iowa Court of Appeals
7	Recent Unpublished Opinions Involving Alcohol & Traffic Safety
13	Citations for Published Case in Previous Newsletter

Motorcycle Safety Issues and Changing Demographics in Iowa

(Editor's note: Motorcycle safety is becoming a more significant issue in Iowa as motorcycle fatalities have been generally increasing while non-motorcycle fatalities have generally been declining or remaining constant over the past decade. Safety specialists now have new demographic concerns to address, as explained in the following guest article.)

By Scott R. Falb
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From the 1960's through the 1980's, Iowa traffic safety professionals who focused on motorcycle crashes, deaths and injuries always targeted teenagers and younger riders as the group most at risk. After 1980, however, data made it increasingly obvious that in Iowa motorcycle riders had aged as a *group*, and that these older riders had begun purchasing bigger and more powerful machines.

The Iowa motorcycle boom of the 1960's and 1970's featured mostly inexpensive Japanese imports with small engines: Honda, Yamaha, Kawasaki and Suzuki. These motorcycles were urban phenomena—they provided a means for young riders to get around their home towns at city street speeds. Indeed, in the 1970's, three-fourths of the licenses issued in Iowa went to riders under the age of 35, and the largest group of licensed motorcyclists was that group between the ages of fifteen and twenty-four.

Between 1980 and 1997, motorcycle *registrations* in Iowa declined from 205,000 registrations to 107,473 registrations. Motorcycle *fatalities* in Iowa also decreased from a high of 83 in 1979 to a thirty year low of 16 in 1996, and motorcycle *injury crashes* decreased from their highest number of 2,482 in 1980 to the lowest recent number of 561 in 1998. However, during this time, although registrations, deaths, and injuries were declining by large percentages (registrations declined almost fifty percent), the number of Iowa drivers with motorcycle licenses only dropped approximately nineteen percent—from 262,295 licenses in 1980 to 213,626 licenses in 1997. In other words, people who no longer owned or registered motorcycles maintained their motorcycle licenses.

By 1993 the percentage of Iowa motorcyclists between the ages of fifteen to twenty-four years old *decreased* 84% and the twenty-five to thirty-four year olds *decreased* by 36%--while *the two middle age groups (35-44 and 45-54) increased by around 250%*. These trends continued through 2006, and by 2007, the fifteen to twenty-four year age group dipped to an all time low number of 9,200. (See charts on page 3)

As riders aged, their choice of motorcycles and the type of riding they did changed as well. Riders "upgraded" from their first 125 cc engine bike to "350's", and then graduated to "750's" and continued until the present, when *the largest share of registered motorcycles registered in Iowa has an engine size over 1000 cc*. Older and more affluent riders have been seeking out larger, more powerful motorcycles like Harley Davidsons and Honda Gold Wings. Some riders from the 1960's and 1970's who "left" motorcycling to raise families are now (as "empty nesters") returning to motorcycling. These baby boomer-aged riders spend more time on road trips at highway speed than they did in their teens and twenties, when they used bikes only to get around town. These changes have been reflected in the crash data.

Both the *severity* and the *type* of crashes have been changing in Iowa. Motorcycle traffic fatalities in Iowa hit a modern low of 16 in 1996 but this number has grown steadily to 61 fatalities in 2007. The year 2007 also marked the first time more than 1,000 motorcycle injuries were recorded in Iowa since 1992.

In the 1990's forty percent of the fatal crashes were single vehicle crashes. In the early years of this decade, the percent of single vehicle fatal crashes rose to approximately fifty percent. In 2005 and 2006, sixty percent of the fatal motorcycle crashes were single vehicle crashes. In 2007, *seventy-four percent* of the fatal motorcycle crashes were single vehicle crashes.

Just as traffic safety specialists began to realize the need to focus on middle age and older motorcycle riders driving at high speeds on rural, non-urban roadways, a new demographic trend has appeared. High gas prices have made smaller motorcycles and motor scooters (which are within the price range of younger riders) both fashionable and economically practical. The number of older riders has begun to decline, but there has been an

Continued on page 3

increase in the number of younger riders. This new demographic shift has major implications for motorcycle rider safety issues which professionals are just now beginning to address.

This year, a 30 year trend of a declining number of younger riders in Iowa came to an end. In 2008, the number of the youngest age group of riders in Iowa grew by 2,600 drivers or 22%. The twenty-five to thirty-four age group grew 11% between 2006 and 2008. Although the largest group of drivers, age forty-five to fifty-four continues to grow, the rate of increase is much slower, and the number of riders over age fifty-five has decreased for the first time in thirty years. If this trend continues, safety specialists may need to rekindle old efforts which concentrated on younger riders, while continuing public education efforts aimed at older riders traveling at higher speeds in more powerful machines.

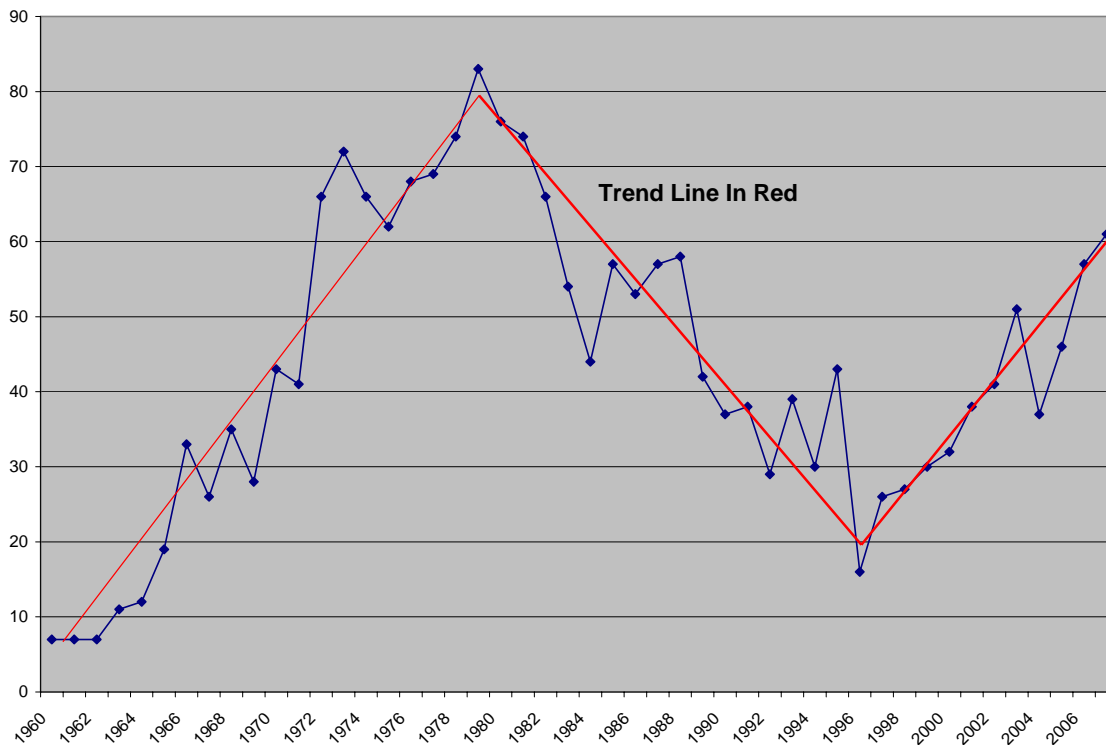
Licensed Motorcyclists by Age from 1977 to 2008

Age	1977	1993	2006	2007	2008
15-24	87,915	13,677	10,156	9,204	11,832
25-34	78,456	50,141	25,462	27,003	28,602
35-44	31,514	79,377	46,164	43,821	45,229
45-54	17,189	42,345	79,407	80,215	80,446
55-64	6,027	20,373	49,942	57,129	56,551
65-74	1,211	7,910	18,886	22,397	21,911
75+	105	1,108	5,395	6,761	6,064
Total	222,417	214,931	235,412	246,530	250,635

Blue indicates the younger age groups that grew between 2007 and 2008.

Red indicates the number of older age groups that declined between 2007 and 2008.

Motorcycle Fatalities between 1960 and 2007



Have Training, Will Travel



The Prosecuting Attorneys Training Coordinator has short training programs available at no charge for law enforcement officers and local prosecutors. Topics include vehicle stops and other search and seizure issues, OWI enforcement (including drugged driving), vehicular homicide, and youth alcohol issues (.02/zero tolerance, possession under the legal age, and supplying alcohol to persons under legal age.)

Departments or prosecutors interested in such a training program in their area should contact Pete Grady of PATC at 515-281-5428 or at pete.grady@iowa.gov

Iowa Supreme Court

DOT Records Admissible Without Testimony from DOT Officer

State v. Shipley, ___ N.W.2d ___ (Iowa, 7/18/08) (No. 111 / 06-0051, Iowa Supreme Court, filed July 18, 2008). Justice Appel. An officer saw the defendant driving and recognized him as someone whom the officer believed did not have a valid license. The officer contacted dispatch, confirmed his suspicions, stopped the defendant, and arrested him for driving while revoked in violation of Iowa Code section 321J.21. The defendant filed objections to the State's prosecution, alleging generally that the State could not prove the defendant's guilt through the use of driving records. The defendant argued that the State did not give him proper notice of the records to be used against him and that the records themselves did not comply with statutory requirements for DOT records and therefore, should be inadmissible. The defendant also argued that even if the records *did* comply with applicable statutes, introduction of the records violated rules barring admission of hearsay evidence and violated the defendant's Constitutional right to confront and cross-examine witnesses against him. The district court rejected the arguments and the defendant was convicted and appealed. The Court of Appeals ruled that use of the records violated the defendant's Constitutional right to confrontation and cross-examination and reversed the conviction. The State sought further review.

The Iowa Supreme Court reversed the Court of Appeals and affirmed the conviction. The minutes of testimony indicated that the State would offer a "certified driving record." Although the document actually offered was a "certified abstract of the operating record" prepared under Iowa Code section 321A.3 (rather than a "certified driving record"), the Court noted that the defendant knew the record would show his license was revoked, and he was not improperly surprised by the contents of the document. In addition, the document offered by the State was properly prepared in accordance with Iowa Code section 321A.3 and as such, it was properly admitted under the second paragraph of Iowa Code section 321.10 (which provides that such records are to be received in evidence without need of testimony if prepared "pursuant to . . .chapter 321A . . .if determined to be relevant. . .in the same manner and with the same force and effect as if the director or the director's designee had testified in person.")

The Court also rejected the defendant's hearsay and Constitutional arguments. The applicable Iowa hearsay rule (I.R.Ev. 5.803(8)(B), final, unnumbered paragraph) provides that "specific statutory provisions regarding the admissibility of particular public records and reports" override other hearsay rules. Iowa Code section 321.10 is such a "specific statutory provision" that governs admissibility in spite of any hearsay objection.

Most importantly, the Court reversed the Court of Appeals conclusion that admission of DOT records violated the defendant's Constitutional right to confrontation and cross-examination. The Court analyzed two recent United States Supreme Court decisions (Crawford v. Texas, 541 U.S. 36 (2004), and Davis v. Washington, 547 U.S. 813 (2006)) and determined that "the fighting Confrontation Clause issue with respect to admission of hearsay is whether the underlying statements (*the statements contained within the DOT records—i.e., that the defendant's operating privileges were revoked—ed.*) should be considered 'testimonial' or 'nontestimonial.'" The Court determined that the records in this case were *nontestimonial* and therefore, not admitted in violation of the defendant's rights. The record showing that the defendant was revoked "was created *prior to* the events leading to (the defendant's) conviction—so the record would exist even if there had been no prosecution. . .The government functionaries that entered the data establishing (the defendant's) driving record cannot be considered witnesses against him when no prosecution existed at the time of data entry. . .They were simply government workers with no axe to grind who performed their

Continued on page 5

routine, ministerial tasks in a nonadversarial setting pursuant to a statutory mandate.” (Emphasis in original.) Finally, the Court determined that even though the certification of this defendant’s driving record was, in fact, prepared for this criminal prosecution at the request of a prosecutor, that fact alone does not transform the certified record into a “testimonial” record. The purpose of the certification “is simply to confirm that a copy of a record is a true and accurate copy of a document that exists in a government data bank.”

‘Co-conspirator’ evidence may be used in simple and serious misdemeanors

State v. Tonelli et. al., ___ N.W.2d ___ (Iowa, 5/23/08) Justice Appel. Several adults planned a party at which (the State alleges) alcohol would be provided to people known to be under the legal age. The adults bought kegs of beer and made “Jello shots” and provided the location for the party. Partiers were charged admission. One of the partiers, a 20-year-old, became intoxicated at the party and then left to drive home. On her way home, she struck and killed a pedestrian. (*She later entered a guilty plea to vehicular homicide—editor.*) The State charged three adults—Tonelli, Jodi George, and Stephen Nolte—with supplying alcohol to persons under the legal age resulting in death, in violation of Iowa Code sections 123.47(1) and 123.47(6). The State notified the defendants that, at time of trial, the State intended to offer statements of two other people who helped plan the party on the theory that the statements of those other people were admissible as “co-conspirator statements” under Iowa R. Evidence 5.801(d)(2)(E). The defense resisted the use of the co-conspirator statements, arguing that in Iowa, in order to be used as *evidence*, a “co-conspirator statement” had to meet the definition of a *criminal* conspiracy provided in Iowa Code section 706.1 (agreement with another “with intent to promote or facilitate the commission of a crime which is an aggravated misdemeanor or a felony...”) The defense argued that this *criminal* definition of conspiracy limited the *evidentiary* use of “co-conspirator statements” to only those cases in which a felony or an aggravated misdemeanor was involved. The defense noted that the crime of supplying alcohol to persons under the legal age is generally a serious misdemeanor (although elevated to an aggravated misdemeanor or a felony if serious injury or death results) and therefore, the defense argued, the State could not use the proposed co-conspirator statements when the underlying crime was a serious misdemeanor.

The trial court agreed with the defense theory and entered a ruling denying the State the ability to use the co-conspirator statements. The State sought review in the Iowa Supreme Court.

The Supreme Court reversed and remanded. In Iowa, “co-conspirator statements” as defined by the rules of evidence may be admitted in civil cases or in criminal cases, and there is no requirement that the underlying conduct be an aggravated misdemeanor or a felony. For purposes of the rules of evidence, “co-conspirator statements” are admissible whenever there is an agreement to do an unlawful act, or whenever there is an agreement to do a lawful act using unlawful means. Therefore, whenever a “co-conspirator statement” is offered, “the trial court must make a preliminary finding, by a preponderance of evidence, that there was a conspiracy, that both the declarant (*the person who made the statement—editor*) and the party against whom the statement is offered were members of the conspiracy, and that the statements were made in the course and in furtherance of the conspiracy.” A co-conspirator statement cannot be offered in cases where no illegality was involved in either the plan or the proposed execution of the plan, but in those cases where co-conspirator statements may be offered, there is no requirement that an aggravated misdemeanor or felony be involved. The trial court ruling was reversed and the case remanded.

Probable cause which arises during an inventory search supports warrantless search of car

State v. Allensworth, ___ N.W.2d ___ (Iowa, 5/9/08) (Iowa Supreme Court, No. 118 / 06-1507, filed May 9, 2008.) Justice Hecht. The defendant was stopped for speeding and he informed the officer that there was a warrant out for his arrest. The officer confirmed the warrant, arrested the defendant, and had the car towed to an impound lot. After taking the defendant to the jail for booking, the officer received an anonymous call reporting that there were drugs in the defendant’s car. The officer went to the impound lot and began an inventory search of the car. He found a small bag of marijuana in the center console of the car. Then, because the officer knew that the steering column of a car was a “known place where people hide drugs” and because, with the discovery of the marijuana, the officer had probable cause to search the car, the officer removed the horn button and discovered a bag containing 25 grams of methamphetamine. The defendant moved to suppress all evidence (the stop, the marijuana, and the methamphetamine); the trial court determined that the stop was permitted under the Fourth Amendment and that the marijuana was properly seized during a permissible inventory search. The court suppressed the methamphetamine, however, “on the ground that the search of the steering column exceeded the proper scope of an inventory search.”

Continued on page 6

The State asked the court to reconsider its ruling, arguing that the “automobile exception” to the warrant requirement applied and that the officer’s search of the steering column was based upon probable cause (the finding of the marijuana during the inventory search.) The court rejected the State’s contention, finding that the “automobile exception did not apply under the circumstances of this case because probable cause for a warrantless search extending beyond an inventory search did not exist at the scene of the stop in this case, but arose only later after the vehicle was impounded when marijuana was discovered in the course of the inventory search.” The State sought review of the suppression order.

The Iowa Supreme Court reversed and remanded. The Court conducted a thorough review of Iowa and federal cases involving the automobile exception to the warrant requirement and characterized the “essential teaching” of the Iowa cases as demonstrating that “sufficient exigency exists to justify a warrantless search of a readily mobile vehicle even after the vehicle has been impounded and removed to another location.” If probable cause arises during an otherwise lawful inventory search, then a more thorough, “probable cause” search of the automobile may be conducted without a warrant. “The fact that the vehicle had been impounded and removed from the scene of the seizure before an inventory search was commenced and probable cause arose for the broader automobile exception search is of no constitutional moment.” The Court reversed the suppression order and remanded.

Warrant invalid where magistrate was not ‘neutral and detached’

State v. Fremont, ___ N.W.2d ___ (Iowa, 5/2/08) Justice Appel. A part time magistrate in Worth County was presented with an affidavit and application for a search warrant alleging that drugs could be found at a particular residence and naming a “Destiny Fremont” as a person living at the residence. The magistrate, in his role as a private attorney and on behalf of the father of a minor child, had previously filed an action against Destiny Fremont seeking custody and child support of the child. The magistrate realized that the warrant application identified the same “Destiny Fremont” who was adverse to his client’s interest, and recognized that he had a potential conflict of interest in signing the warrant. However, the magistrate reasoned that the warrant was supported by overwhelming objective evidence and that, in deciding whether probable cause existed for the warrant, he did not have to decide whether one or more witnesses was credible. The magistrate therefore signed the warrant. A subsequent search revealed evidence that led to charges of possession of marijuana with intent to deliver, failure to affix a drug stamp, and child endangerment against this defendant, Guy Edward Fremont. The defendant filed a motion to suppress, arguing that the warrant was flawed because it was issued by a magistrate who was not “neutral and detached.” The district court denied the motion, finding that probable cause was so firmly established that no constitutional violation occurred. The defendant was convicted of all charges and appealed.

The Iowa Supreme Court reversed. “The magistrate in this case was simultaneously representing the putative father against one of the targets of the search in a child custody proceeding. A successful search of the home, which sought to find evidence of drug offenses, could make the position of the mother more difficult in the child custody matter and advance the position of the father. There was therefore a clear nexus between the magistrate’s private representation and his official action in this case.” This personal interest in the case “cast doubt on (the magistrate’s) ability to hold the balance, nice, clear, and true, between the state and the accused. . .” and probable cause decisions “must be made by a person unfettered by other potentially conflicting professional commitments.” Although the defendant did not show that he was prejudiced by the magistrate’s actions, and although the court accepted for purposes of the decision that the warrant was supported by probable cause, “(t)he lack of a neutral and detached magistrate is a structural defect that defeats any application of the harmless error doctrine.” The Court vacated the convictions and reversed the suppression order. ☞

Published Opinion of the Iowa Court of Appeals

Insufficient evidence for stop: officer was 100 feet away

State v. Reisetter, 747 N.W.2d 792 (Iowa App., 3/14/08) No. 7-965 / 07-0764 (Iowa Court of Appeals, filed March 14, 2008, published by Order of April 28, 2008.) Judge Vogel. A Hardin County deputy observed a car approximately 100 feet in front of him. The deputy could not see a rear license plate bulb and as a result, he activated his lights and siren and stopped the car. The defendant was ultimately arrested for OWI 2nd offense and he filed a motion to suppress, alleging that the deputy had no grounds to stop him. The district court overruled the motion, and the defendant was convicted and appealed.

Continued on page 7

The Court of Appeals reversed the trial court and remanded the case. Iowa Code section 321.388 requires that a rear license bulb that makes the plate legible “fifty feet to the rear.” The deputy testified that he was “. . .you know, three—three or four car lengths, so probably under a hundred feet or close to it” behind the defendant’s car when he initiated the stop. “Because the State did not introduce any evidence that. . .(the deputy). . .observed the license plate from a distance that could reasonably approximate fifty feet prior to initiating the traffic stop, there was no reasonable basis to stop. . .(the defendant). . . The stop was therefore in violation of both the United States and Iowa constitutions which protect people from unreasonable searches and seizures.” ↵

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(Recent Unpublished Decisions Arranged by County)

No consent search when there is no consent

Adams County State v. Jackie Lynn Brandon, No. 8-243 / 07-1206 (Iowa Court of Appeals, filed May 29, 2008.) **No consent to search where physically present co-owner does not consent.** Physically present co-owner (defendant) who questioned the power of arresting deputies did not consent to subsequent search of his residence; in addition, where the defendant was present and did not consent to the search, a prior consent to search granted by the co-owner was invalid pursuant to the rule of Georgia v. Randolph, 547 U.S. 103 (2006).

Incriminating statements volunteered and not subject to Miranda

Black Hawk County State v. Ernest NMN Howard, No. 8-211 / 06-1975 (Iowa Court of Appeals, filed April 30, 2008.) **“You got me” and bribery attempt not result of interrogation.** Defendant’s pre-*Miranda* spontaneous statements to officer were admissible although defendant was in handcuffs; statements were not the result of interrogation.

Failure to raise section 804.20 claim

Black Hawk County State v. Randy John Voshell, No. 8-442 / 07-1408 (Iowa Court of Appeals, filed June 25, 2008.) **Claim of section 804.20 violation waived.** OWI 2nd defendant’s claim that a urine test should have been suppressed due to a claimed section 804.20 violation was waived for failure to raise the issue in the trial court; conviction affirmed.

‘Neglect of duty, misconduct and insubordination’

Clinton County Patrick J. Luckritz v. City of Comanche, Iowa, No. 8-240 / 07-1101 (Iowa Court of Appeals, filed July 16, 2008.) **Police officer’s firing affirmed.** Police officer’s firing affirmed where officer criticized a prosecutor’s delay in charging a case, then “confronted” the prosecutor, filed a written complaint with the Attorney General, and, when not satisfied with the response received from an assistant attorney general, filed an ethics complaint with the Iowa Supreme Court; and who, after being told by his chief to communicate with prosecutors only through the chief, sent an email to a prosecutor and attempted to contact a prosecutor directly; and who failed to appear for trial for a related case; and who, when asked to modify a complaint from a D felony to an aggravated misdemeanor, initially refused to amend the complaint and when he finally did so, “editorialized” on two affidavits, “essentially voiding the complaint”; the record demonstrated at least two instances of insubordination, his confrontation with the prosecutor was “unprofessional, disrespectful, and inappropriate”, his failure to appear as a witness was neglect of duty. (**Note:** the officer’s contact with the Attorney General’s office was *not* the basis for any action against the officer; however, his decision to ignore the information received from the assistant attorney general which advised him that the prosecutor’s conduct was not unethical, and instead to proceed with the filing of ethics

Continued on page 8

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complaints demonstrated that the officer did not act *reasonably* in filing the ethics complaints; therefore, his conduct was not protected by the Iowa Whistleblower Act. See Iowa Code section 70A.29.)

Pre and post-Miranda statements

Des Moines County State v. Jermaine Lavelle Carr, No. 8-441 / 07-1398 (Iowa Court of Appeals, filed June 25, 2008.) **Pre-Miranda statements v. post-Miranda statements.** Where defendant identified himself as a shooting victim (and therefore, was interviewed without *Miranda*) and officers learned only later that the defendant was the suspected shooter and *then* gave the defendant *Miranda* warnings, the defendant's post-*Miranda* statements were admissible; the police did *not* engage in a deliberate "interrogate-*Miranda*-interrogate" procedure condemned in Missouri v. Siebert, 542 U.S. 600 (2004) and the trial court properly admitted the defendant's post-*Miranda* statements after applying the criteria articulated in Siebert for the treatment of such statements.

Leaving the scene admissible in negligence case

Dubuque County Jamie Birch v. Michael D. Juehring, etc., No. 8-218 / 07-0417 (Iowa Court of Appeals, filed June 25, 2008.) **"Leaving the scene" is admissible in civil lawsuit.** Civil defendant's act of leaving the scene of a crash before police arrive is admissible in a lawsuit alleging the defendant's negligent operation of a car to show "consciousness of responsibility" for the crash; trial court's refusal to permit such evidence was error; jury verdict finding no negligence on the part of the defendant reversed and remanded for new trial.

Speedy indictment applies to 'greater' offenses as well as 'lesser' offense

Floyd County State v. Alexander Nelson Huffman, No. 8-108 / 07-0833 (Iowa Court of Appeals, filed May 14, 2008.) **Speedy indictment rule applies to greater offenses.** The speedy indictment rule of I.R.Crim.Pro. 2.33 applies not only to lesser included offenses of the charged offense (State v. Sunclades, 305 N.W.2d 491 (Iowa 1982)) but also to greater offenses than the charge filed; where defendant was arrested for simple misdemeanor harassment, State may not increase the charge to an indictable harassment charge more than 45 days after the arrest for the simple misdemeanor.

Test results admissible if 321J.15 is satisfied

Johnson County State v. Jeremy Thomas Pitz, No. 8-102 / 06-0795 (Iowa Court of Appeals, filed May 14, 2008.) **DataMaster test results admissible.** Test results from the DataMaster cdm are admissible if the State satisfies foundational requirements of Iowa Code section 321J.15; the instrument is approved by the commissioner of public safety, the officer administering the test was certified to do so, and the officer followed methods approved by the commissioner for operation of the instrument; defendant's complaints regarding the instrument go to weight, not admissibility; see State v. Stohr, 730 N.W.2d 674 (Iowa, 4/27/07).

Criminalist may extrapolate and express opinion on impairment caused by alcohol

Johnson County State v. Jeremy Thomas Pitz, No. 8-102 / 06-0795 (Iowa Court of Appeals, filed May 14, 2008.) **DCI criminalist may extrapolate alcohol concentration and opine as to impairment.** DCI criminalist who testified to alcohol absorption and dissipation formulas which were relied upon by the DCI and other agencies was qualified to estimate, based upon those formulas, the number of

Continued on page 9

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drinks needed to reach a particular alcohol concentration; further, the criminalist was qualified to provide an opinion as to impairment at a certain alcohol concentration.

Jury instructions allowing alternative findings do not undercut unanimity requirement

Johnson County State v. Jeremy Thomas Pitz, No. 8-102 / 06-0795 (Iowa Court of Appeals, filed May 14, 2008.) **Alternative uniform instructions not prejudicial.** Defendant not prejudiced by two uniform jury instructions, one of which discussed alternative OWI theories and a second instruction that included the language “the law does not require each juror to agree as to which theory or fact leads to his or her verdict. It is the verdict itself which must be unanimous, not the theory or facts upon which it is based”; these two instructions to the jury “did not unduly emphasize the need to reach a verdict unanimously or discourage jurors from exercising independent judgment”.

A personal ‘day of infamy’

Muscatine County State v. Duane Allen Plowman, No. 8-404 / 06-1985 (Iowa Court of Appeals, filed July 16, 2008.) **12 year look back defined.** An OWI defendant who was arrested on the 12th anniversary of his conviction for his first offense (Dec. 7, 1993 to Dec. 7, 2005) was properly charged with OWI 3rd offense as a result of including that 12 year old conviction as a prior; court construed the “lookback” language of Iowa Code sections 321.12(4) and 321J.2(4)(a) to determine that the older offense was properly used to enhance the pending offense.

No prejudice from Mom’s statements about daughter’s drinking

Plymouth County State v. Janet Christine Skogman, No. 8-322 / 07-1003 (Iowa Court of Appeals, filed June 25, 2008.) **Mom’s hearsay not prejudicial.** Hearsay statements from OWI defendant’s mother that the defendant had been drinking were not prejudicial where the statements were cumulative to the defendant’s testimony and to the testimony of two law enforcement officers; trial court did not commit reversible error by overruling hearsay objection.

Officer provided ‘reasonable opportunity for calls’ despite denial of last request

Polk County State v. Jaclyn Roz Keller, No. 8-446 / 07-1444 (Iowa Court of Appeals, filed July 16, 2008.) **Section 804.20 consultation rights not violated.** Where officer offered driver phone calls to her attorney, driver did call her parents and declined any further calls, and driver then had 40 minutes to “think about” whether to take the test during which time she did not request another call, officer reasonably denied her request for an additional call as they were preparing for the DataMaster test; driver had “a reasonable opportunity to make a reasonable number of calls.”

Improper jury waiver requires reversal of conviction

Polk County State v. Jaclyn Roz Keller, No. 8-446 / 07-1444 (Iowa Court of Appeals, filed July 16, 2008.) **Improper waiver of jury; conviction reversed.** Trial counsel ineffective for failing to insure an adequate waiver of jury; conviction based upon trial to the minutes reversed and remanded. See State v. Stallings, 658 N.W.2d 106 (Iowa, 1/23/03).

Continued on page 10

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No 4th Amendment seizure when speaking with pedestrian

Polk County State v. John Kibet Chesire, No. 8-457 / 07-1650 (Iowa Court of Appeals, filed July 16, 2008.) **Talking to driver/pedestrian after car stopped not a seizure.** Police did not “seize” the defendant by simply talking with him after watching the defendant drive a car around a parking lot of a recently closed store and then stop and get out of the car; defense counsel not ineffective for failing to file a motion; driving while barred conviction affirmed.

Driver ‘drunk all day’ and passenger guilty of child endangerment

Polk County State v. Tara Lynn Mickens Smith, No. 8-491 / 07-2151 (Iowa Court of Appeals, filed July 16, 2008.) **Child endangerment by passenger of drunk driver.** Passenger of drunk driver properly convicted of child endangerment where she was “one of two adults leading and controlling a . . . bowling outing”; knew the driver had been “. . . ‘drunk all day’ . . .”; she could have prevented the substantial risk to the children by “refusing to allow the children in the vehicle, by driving the vehicle herself, by calling a cab, or by calling a friend for transportation.”

Anonymous tip for OWI stop

Pottawattamie County State v. Guy Christofferson, No. 8-331 / 07-1271 (Iowa Court of Appeals, filed July 16, 2008.) **Quickly corroborated anonymous tip supports OWI stop.** Where officer received a dispatch that a possible drunk driver was in a blue GMC pickup at a parking lot six blocks away and, within 30 seconds, the officer arrived at the location and pulled his car behind the pickup, the resulting “stop” (*the defendant backed into the patrol car—a fact not important to the decision, but one which makes the case easier to remember—ed.*) was supported by reasonable articulable suspicion; see State v. Walshire, 634 N.W.2d 625 (Iowa, 10/10/01).

Revocation affirmed

Scott County Ryan Jon Bierle v. Iowa Dept. of Transportation, No. 8-278 / 07-1315 (Iowa Court of Appeals, filed May 29, 2008.) **Implied consent revocation affirmed.** DOT and trial court rulings that officer had reasonable grounds to believe that the plaintiff was the driver of a vehicle involved in a crash affirmed. See Pointer v. Iowa DOT, 546 N.W.2d 623 (Iowa 1996).

Officer’s irrelevant opinion did not prejudice the defendant

Scott County State v. Nathan Charles Ballou, No. 8-229 / 07-0796 (Iowa Court of Appeals, filed June 25, 2008.) **Irrelevant opinion evidence not prejudicial.** Officer’s testimony over objection that, over 50% of the time, OWI defendants testify that they had “a couple of beers” (the same statement attributed to the defendant in this case) not prejudicial where the defendant was driving “in an erratic manner” and lost control and crashed his car, was driving without a license, asserted he was not the driver although no one else was present at the scene of the crash, and had slurred speech and the odor of alcohol on his breath.

Failure to preserve challenge to procedure for prior convictions

Scott County State v. Nathan Charles Ballou, No. 8-229 / 07-0796 (Iowa Court of Appeals, filed June 25, 2008.) **Complaint regarding prior conviction procedure not preserved.** Defendant in OWI third offense did not preserve his complaint that the trial court used an improper procedure in determining whether he had two prior OWIs (see I.R.Crim.Pro. 2.19(9)); defendant’s complaint did not

Continued on page 11

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challenge the *legality* of the sentence but rather, a defect in the sentencing *procedure*, and procedural claims must be preserved to merit appellate review; sentence affirmed.

Third offense public intoxication

Story County *State v. Tony Mora*, No. 8-440 / 07-1393 (Iowa Court of Appeals, filed July 16, 2008.) **Third offense public intoxication conviction affirmed.** Trial court properly instructed jury on “public intoxication”; argument that trial counsel was ineffective for failing to request a “simulated intoxication” instruction (see Iowa Code section 123.46) preserved for post conviction relief.

Proof of foreign conviction sufficient

Wapello County *State v. John Russell Allard*, No. 8-325 / 07-1061 (Iowa Court of Appeals, filed May 29, 2008.) **Proof of prior foreign convictions; omission on document.** A California judge’s certification that a document was authentic (the document evidenced two California felony convictions) was admissible and sufficient proof of those convictions even though the judge did not identify the deputy clerk who had actually prepared the document; Iowa Code section 622.53 requires that the foreign judge certify that the foreign document is “in due form”, which occurred here; there is no requirement in Iowa law that the judge also identify the person who prepared the document.

Burning marijuana smell is probable cause and exigency for warrantless entry

Wapello County *State v. Lanette Kay Starr*, No. 8-213 / 06-2113 (Iowa Court of Appeals, filed May 29, 2008.) **Smell of burning marijuana is probable cause and an exigency for entry without a warrant.** The smell of burning marijuana is probable cause for possession of marijuana and the ease of destruction of marijuana while an officer would seek a warrant is a sufficient exigency to permit entry into a residence without a search warrant; compare *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (warrantless entry not permitted for non-criminal violation) with *Illinois v. McArthur*, 531 U.S. 321 (2001) and *State v. Legg*, 633 N.W.2d 763 (Iowa 2001) (warrantless entry permitted with probable cause and exigent circumstances in jailable offenses.)

Statute on DCI reports satisfied constitutional guarantees of confrontation and cross-examination

Wapello County *State v. Ronald Joseph Wasko*, No. 8-320 / 07-0956 (Iowa Court of Appeals, filed June 11, 2008.) **DCI reports received into evidence; procedure of Iowa Code section 691.2 satisfies right to confrontation and cross-examination.** Code provision which permits introduction of DCI results without a witness unless the defendant requests live testimony of DCI criminalists in a timely manner satisfies the constitutional right to confrontation and cross examination; failure of a defendant to timely request live testimony is a waiver of the right.

The guy in the car was probably the operator

Wapello County *State v. Ronald Joseph Wasko*, No. 8-320 / 07-0956 (Iowa Court of Appeals, filed June 11, 2008.) **Cloud of dust and unconscious body in a car—sufficient evidence of operation.** Evidence that a witness saw a cloud of dust on a gravel road and then “pulled over and scanned the ditch” and saw the defendant’s car upside down with a light flashing, that the witness saw no

Continued on page 12

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other cars on the road, and that the defendant was alone and unconscious in the car is sufficient evidence of "operation."

Test was timely after 'operation'; 'two hour rule' satisfied

Wapello County State v. Ronald Joseph Wasko, No. 8-320 / 07-0956 (Iowa Court of Appeals, filed June 11, 2008.) **"Two hour rule" of 321J.2 satisfied.** Evidence that an officer requested that blood be withdrawn from the defendant 1 hour and 13 minutes after a witness saw a cloud of dust on a gravel road and then "pulled over and scanned the ditch" and discovered the defendant unconscious in the car is sufficient evidence to determine that the defendant's blood sample was withdrawn within 2 hours of operation for purposes of Iowa Code section 321J.2(8)(a).

DOT affidavit of mailing and bulk mail certificate satisfy proof of notice requirement

Wapello County State v. Ronald Joseph Wasko, No. 8-320 / 07-0956 (Iowa Court of Appeals, filed June 11, 2008.) **DOT mailing proof sufficient.** Proof that the DOT mailed notice in a license status case satisfied where DOT provided a copy of the notice addressed to the defendant at the defendant's last known address with a certificate of bulk mailing showing the date that the notice was mailed. See State v. Green, 722 N.W.2d 650 (Iowa, 10/13/06).

Non-DRE drug intoxication opinions properly received

Winneshiek County State v. Mark Jerome Hackman, No. 8-359 / 07-0952 (Iowa Court of Appeals, filed June 11, 2008.) **Non-DRE officers testify to methamphetamine or other drug intoxication.** Three officers' testimony describing the defendant's behavior combined with their history in law enforcement and special training with drugs, alcohol, and recognizing impaired drivers sufficient to support their separate opinions that defendant was under the influence of methamphetamine or another drug and sufficient evidentiary basis for instruction on drug intoxication.

Gravel sounds support reasonable articulable suspicion to stop truck

Wright County State v. Scott Charles Etter, No. 8-485 / 07-2002 (Iowa Court of Appeals, filed June 25, 2008.) **Sound of gravel where shoulder is gravel supports stop.** When meeting a truck at 1:45 a.m., an officer observed the truck's right tires on the gravel shoulder and heard gravel strike the underbelly of the truck; after turning around, the officer's videotape and testimony supported conclusion that the truck crossed or got close to the fog line 3-4 times and veered toward the center line twice; these facts provided reasonable articulable suspicion to support OWI stop. ↵



**CITATIONS FOR PUBLISHED CASES IN THE
April 2008 *Highway Safety Law Update***

Begay v. United States, _ U.S. _, 128 S.Ct. 1581, 170 L.Ed.2d 490 (4/16/08)

Iowa Supreme Ct. Atty. Disciplinary Bd. v. Weaver, 750 N.W.2d 71 (Iowa, 3/28/08)

80



**PREPARED BY THE PROSECUTING ATTORNEYS TRAINING COORDINATOR
(PATC)**

Under a project approved by the Governor's Traffic Safety Bureau (GTSB), in cooperation with the National Highway Traffic Safety Administration (NHTSA). The opinions, findings, and conclusions expressed in this publication are those of the author and not necessarily those of the PATC, GTSB, NHTSA, or the Iowa Department of Justice. **The legend around Ames and Ankeny is that when State v. Shipley was handed down, DOT workers were seen dancing in their cubicles.**

Submissions and / or comments may be sent to: Peter Grady, PATC, Iowa Dept. of Justice, 1st Floor, Hoover State Office Building, Des Moines, IA 50319. Phone: 515-281-5428, Fax: 515-281-4313, E-mail: pete.grady@iowa.gov

Back to page 1 ▲