HIGHWAY SAFETY LAW UPDATE

September 16, 2013 Office of the Prosecuting Attorneys Training Coordinator July/August/Sept, 2013

Crimes against bicyclists in Chapter 321

Reports of driving behavior which endangers a bicyclist should be investigated as possible violations of current motor vehicle statutes.

Bicyclists are protected by current Iowa law from unsafe passes on Iowa streets, roads and highways. Iowa Code section 321.299 provides

> The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, exceptions, and special rules hereinafter stated:
>
> 1. The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left of the other vehicle at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.
> 2. Except when overtaking and passing on the right is permitted, the driver of an overtaken vehicle shall give way to the right in favor of the overtaking vehicle and shall not increase the speed of the overtaken vehicle until completely passed by the overtaking vehicle.

It is true that a "bicycle" is not a "vehicle" in Iowa (compare the definitions at section 321.1(40)(c) for "bicycle" and 321.1(90)(a), which provides that a "vehicle" does not include devices "moved by human power".)

However, *a bicyclist* "has all the rights and duties under this chapter applicable to the driver of a vehicle, except those provisions of this chapter which by their nature can have no application. . ." Iowa Code section 321.234(2). Therefore, *bicyclists* have the right to be protected from unsafe overtaking and unsafe passing by "the driver of a vehicle" overtaking or passing them. Bicyclists, as lawful users of the highways, may assume that others will keep a proper lookout for them. Vasconez v. Mills, 651 N.W.2d 48 (Iowa, 9/5/02).

In addition, Iowa Code section 321.281 (which became law in 2010) protects bicyclists from motor vehicle drivers who steer "unreasonably close to or toward a person riding a bicycle" or from anyone who knowingly throws "any object or substance at or against" a bicyclist on a highway. Violations of that statute have a scheduled fine of $250.00 (see Iowa Code section 805.8A(14)(k).)

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Opinion of the Iowa Supreme Court

Anonymous tip where tipster did not observe erratic driving does not support OWI stop

State v. Kooima, ___ N.W.2d ___ (Iowa, 6/28/13) (No. 11-0738, Iowa Supreme Court, filed June 28, 2013.) Justice Wiggins. An anonymous caller contacted 911 advising that a group of "huge money guys" who had been golfing were "loaded, leaving Doon, and they are still sitting on curbside, ready to leave to Rock Valley." The caller provided the license number and description of the vehicle. Shortly thereafter, two officers observed and followed the vehicle for a number of blocks. They noted no traffic or equipment violations, but one of the officers initiated a stop "(b)ased solely on the anonymous phone tip." The defendant was ultimately arrested and provided a breath test of .088. He filed a motion to suppress which was denied by the trial court. After unsuccessfully seeking discretionary review, the defendant was found guilty in a bench trial, and appealed.

The Iowa Supreme Court reversed the conviction. In an opinion relying solely on the Fourth Amendment the Court found the stop unconstitutional. The Court distinguished its earlier decision in State v. Walshire, 634 N.W.2d 625 (Iowa, 10/10/01) (anonymous tip supplied the basis for an OWI stop where the tipster had observed erratic driving but the erratic driving was not confirmed by the stopping officer) on the basis that in Walshire, the calling party was observing a crime in progress. In this case, the Court noted, the tipster did not relay "a personal observation of erratic driving, other facts to establish the driver (was) intoxicated, or details not available to the general public as to the defendant's future actions. . ." and therefore, the tip was insufficiently detailed to be considered reliable enough to support an investigatory stop. Case reversed and remanded.

Note: three members of the Court dissented, arguing that the facts of the case fit the standards articulated in Walshire. (The majority and dissenting opinions disagree over the inferences and conclusions which can be drawn from the 911 call. A transcript of the call is included in the majority opinion.)

Opinion of the Iowa Court of Appeals

A shrug is not consent to search

State v. Leaton, ___N.W.2d___ (Iowa App., 7/10/13) (No. 30444 / 12-1691, Iowa Court of Appeals, filed July 10, 2013, published by Order of September 10, 2013.) Judge Potterfield. An officer stopped the defendant for a broken taillight. During the stop, the officer asked if the defendant had been in trouble before. The defendant said he had previously been arrested for possession of marijuana but was not on probation. The officer returned to his patrol car, wrote out a warning ticket for the taillight, and when he returned to the defendant's car, he asked the defendant to get out of the car. The defendant asked 'why' and the officer replied that he wanted to show the defendant the broken taillight. As the defendant got out of the car, the officer asked if he could pat down the defendant. "According to the officer, (the defendant) did not give a verbal response." The officer stated, "I believe he shrugged his shoulders. He never—He never told me no, that I couldn't." During the pat-down, the officer found a marijuana pipe and a baggy of marijuana. The defendant was charged with possession of marijuana and filed a motion to suppress. The trial court denied the motion to suppress, the defendant was convicted at bench trial, and the defendant appealed.

The Court of Appeals reversed. The officer did not have reasonable articulable suspicion to believe the defendant was armed and therefore, the search could only be justified if the State proved that the defendant consented to the search. In cases from Delaware, Idaho, Illinois, and North Dakota, other courts which had considered the issue had determined that a "shrug" is not sufficient evidence to prove consent to search. "We stand with other courts that have considered the question and concluded that a shrug is not a sufficient gesture to consent to a search." Conviction reversed and case remanded.

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(Recent Unpublished Decisions Arranged by County)

Butler County State v. Kyle R. Stanley, No. 3-452 / 12-1855 (Iowa Court of Appeals, filed July 10, 2013.) **Improper stop; OWI conviction reversed.** Officer did not have grounds to stop defendant; "the possibility of speeding, the longer than-usual pause at (a) stop sign," and the officer's speculation that a turn was improper did not constitute probable cause or even reasonable suspicion necessary to justify a stop.

Black Hawk County State v. Montavious Kentrell Smith, No. 3-528 / 12-2121 (Iowa Court of Appeals, filed July 10, 2013.) **Reasons for sentence were sufficient; convictions affirmed.** Court's review of written plea agreements, receipt of joint sentencing recommendations and defendant's statements, the court's statements that the sentences were based upon the circumstances of the offenses, the defendant's characteristics and prior criminal record, were sufficient to show that the trial court exercised its discretion in sentencing the defendant in two OWI offenses.

Black Hawk County State v. Robert Campbell, No. 3-631 / 10-0117 (Iowa Court of Appeals, filed August 7, 2013.) **Forfeiture by wrongdoing permits introduction of otherwise inadmissible evidence.** Where State proved that defendant, in telephone calls to the victim, had encouraged victim to hide from process and not appear at trial, the trial court properly admitted tape recordings of the victim which provided evidence of the defendant's guilt, as the defendant had forfeited his right to confront the victim by wrongdoing; convictions for domestic abuse assault using a dangerous weapon, domestic abuse assault causing bodily injury, and driving while barred affirmed.

Black Hawk County State v. Jeffrey Paul Free, No. 3-750 / 12-1690 (Iowa Court of Appeals, filed August 21, 2013.) **Court articulated reasons for OWI prison sentence.** The district court provided "forthright but thorough" reasons for sentencing the defendant to prison, including noting "a relatively high chemical test" and that the defendant had seven prior OWIs and at least two prior OWI 3rd offenses; further, the Court did not abuse its discretion by declining a request for a delay of mittimus because "(w)e need to get you off the streets. . .to avoid another incident where you or others are going to be at serious risk."

Black Hawk County State v. Austin David Hansen, No. 3-755 / 12-1856 (Iowa Court of Appeals, filed September 5, 2013.) **Intoxication was a proximate cause of victim's death; vehicular homicide conviction affirmed.** Defendant's impaired driving behavior, as described by the district court, "affected his ability in recognizing his speed, believing he saw another car on the road when there was no other car in front of him contrary to his contention of seeing brake lights come on. His impairment and intoxication prevented him from steering the car properly and applying the brakes to prevent this collision."; Court of Appeals could "see no reason to disagree" with the district court's findings and reasoning and affirmed the defendant's conviction.

Cerro Gordo County State v. Michael Allen Jensen, No. 3-749 / 12-1675 (Iowa Court of Appeals, filed September 5, 2013.) **Obscured state name on license plate is valid basis for stop.** Officers had probable cause to stop car with a license plate frame which blocked the name of the issuing state ('Wisconsin') as a violation of Iowa Code section 321.37(3) ("(i)t is unlawful for the owner of a vehicle to place any frame around or over the registration plate which does not permit full view of all numerals and letters printed on the registration plate.")

Cerro Gordo County State v. Michael David Leer Jr., No. 3-674 / 12-1904 (Iowa Court of Appeals, filed September 5, 2013.) **Open container suspicion supports stop.** An officer observed the following: a car stopped beside the defendant's truck and a person went to the truck and was given a silver can by the defendant, and then,

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after noticing that the officer was watching, the person tried to hand the can back to the defendant (who refused to take it); the person then carefully placed the can in the bed of the truck and the defendant drove off; the officer had grounds to stop the defendant on suspicion that the defendant was operating with an open container of alcohol.

Cerro Gordo County State v. Michael David Leer Jr., No. 3-674 / 12-1904 (Iowa Court of Appeals, filed September 5, 2013.) **Legal standard for voluntariness of consent improper; remanded for reconsideration using correct standard.** Trial court's finding that the defendant voluntarily consented to a breath test viewed "the evidence in the light most favorable to the State"; this test is incorrect; Court of Appeals remanded to the trial court for reconsideration using a standard requiring the State to prove either that the defendant's consent to test was "freely made, uncoerced, reasoned, and informed" (and thereby not obtained as a result of a false threat of license revocation) or that the test was offered within two hours of the defendant's refusal of a PBT.

Chickasaw County State v. Robert Francis Marion, No. 3-645 / 12-1901 (Iowa Court of Appeals, filed August 7, 2013.) **No seizure until officer had grounds to seize.** OWI defendant was not seized by officer who did not turn on his emergency lights, parked behind the defendant but did not block the defendant's ability to exit, and approached the defendant's pickup (which was parked on a public access road leading to an old cemetery where there had been recent instances of vandalism) on foot; officer did not "seize" the defendant until there were grounds to do so.

Chickasaw County State v. Robert Francis Marion, No. 3-645 / 12-1901 (Iowa Court of Appeals, filed August 7, 2013.) **Sufficient evidence of operation.** Officer's testimony that he could hear defendant's vehicle's engine running when the officer approached the pickup truck, and that when the officer arrived at the truck, the engine was off but the radio was on and the keys were still in the ignition was "substantial evidence" which supported a finding that the defendant was operating the motor vehicle.

Des Moines County State v. Brian Michael Kennedy, No. 3-571 / 11-1685 (Iowa Court of Appeals, filed August 7, 2013.) **Driving records compiled by the DOT are non-testimonial and admissible over confrontation and cross-examination objections.** Court rejected defense argument that two recent decisions of the United States Supreme Court (Melendez-Diaz v. Massachusetts, 557 U.S. 305 (6/25/09) and Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)) undermined the Iowa Supreme Court's decision in State v. Shipley, 757 N.W.2d 228 (Iowa, 7/18/08); the Shipley rule that pre-existing driving records compiled by the DOT are not testimonial remains good law, unaffected by the subsequent rulings of the U.S. Supreme Court.

Fayette County Elmer Scheckel v. State of Iowa and City of Oelwein, No. 3-686 / 12-2295 (Iowa Court of Appeals, filed August 21, 2013.) **Challenge to motor vehicle regulations dismissed.** Plaintiff's challenge to State and City authority to regulate motor vehicles and driving dismissed for failure to state a claim upon which relief could be granted; "there is no constitutional right to drive, but rather driving is a privilege . . .(and). . .(t)here is a difference between the right to travel and the right to drive." (The trial court also imposed a $500 sanction on the pro se plaintiff pursuant I.R.Civ.Pro. 1.413 for the filing of a frivolous petition.)

Fayette County Elmer Scheckel v. State of Iowa and City of Oelwein, No. 3-686 / 12-2295 (Iowa Court of Appeals, filed August 21, 2013.) **No preferential treatment for pro se litigants.** Pro se litigant challenging the State and City's authority to regulate motor vehicles and driving is entitled to no preferential treatment by the courts; "(t)he law does not judge by two standards, one for lawyers and the other for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk." (Citation omitted.)

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Green County State v. Jose Manuel Lopez-Pena, No. 3-761 / 12-2130 (Iowa Court of Appeals, filed September 5, 2013.) **"Reasonable efforts" to convey warnings to Spanish-speaking driver; OWI 2nd conviction affirmed.** Officer made reasonable efforts to convey implied consent and *Miranda* warnings to a Spanish speaking driver/defendant where driver complied with requests for license, registration, and insurance, generally followed instructions for SFSTs and responded to the officer's questions, where the driver's passenger translated "the consequences of failing or refusing the test" (although not the advisory itself) and where the defendant continued to communicate with the officer in English until informed he was under arrest; officer's actions constituted "reasonable efforts" to convey the information; see State v. Garcia, 756 N.W.2d 216 (Iowa, 9/19/08). (A dissent argued that the evidence did not show the level of English proficiency found by the district court and the majority opinion and that the DataMaster test should have been suppressed, arguing the State did not prove that the defendant's consent to test was voluntary.)

Hardin County State v. Andre Michael Lafontaine, No. 3-539 / 12-0562 (Iowa Court of Appeals, filed September 5, 2013.) **Statutory presumption of alcohol concentration not rebutted; conviction affirmed.** Defendant did not overcome statutory presumption of Iowa Code section 321J.2(12)(a) (alcohol concentration within 2 hours of operation presumed to be the same as at time of operation); defendant's claim that the presumption was rebutted "relies entirely on speculation"; record contains sufficient evidence to support conviction for operation over .08.

Hardin County State v. Andre Michael Lafontaine, No. 3-539 / 12-0562 (Iowa Court of Appeals, filed September 5, 2013.) **Sufficient evidence of eluding.** Where defendant was followed by two marked police cars driven by uniformed officers with emergency lights flashing and with one car utilizing a siren (the second car's siren was disabled and the officer used an air horn instead) and the defendant still did not stop, there was sufficient evidence to support an eluding conviction.

Jefferson County State v. Steven Mark Scotton, No. 3-680 / 12-2111 (Iowa Court of Appeals, filed August 7, 2013.) **Credit for jail time applies once even if consecutive sentences are imposed.** Defendant who received consecutive sentences (operating without owners consent and criminal mischief) was not entitled to a doubling of credit for time served in jail; a consecutive sentence is one continuous term and Iowa Code section 903A.5 provides for credit "upon the term of the sentence"; therefore, credit for time served applies to "the sentence as a whole, regardless of the existence of consecutive sentences."

Lee County William Bowker v. City of Fort Madison, Iowa and Civil Service Commissionof City of Fort Madison, No. 3-248 / 12-0583 (Iowa Court of Appeals, filed August 21, 2013.) **Officer's termination affirmed.** Decision of city manager to terminate officer (affirmed by the city civil service commission and the district court) also affirmed by the Court of Appeals; officer whose misconduct included "sleeping on the job, missing calls to report to duty, and using the computer excessively for personal purposes" and, more importantly, having an affair with the chief's wife, was properly terminated; "(w)e recognize that other officers in the department were not disciplined for having affairs. The key difference in those cases was the absence of evidence that their affairs implicated the chain of command" which affects cohesiveness and effectiveness of a police force and therefore, is a valid distinction which makes the decision to terminate the officer "not arbitrary or capricious, as he contends."

Linn County Merle Andrew Shank v. State, No. 3-541 / 12-1041 (Iowa Court of Appeals, filed August 7, 2013.) **Vehicular homicide sentences merged.** Applicant's contention on post-conviction relief that he was sentenced for two counts of vehicular homicide was not supported by the record, which showed the trial court properly merged the two counts (representing one death based on different theories of the offense) at time of sentencing.

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Linn County Merle Andrew Shank v. State, No. 3-541 / 12-1041 (Iowa Court of Appeals, filed August 7, 2013.) **No prejudice for failure to file a motion for a new trial.** Applicant did not receive ineffective assistance of counsel where trial counsel failed to file a motion for a new trial on the basis that the evidence did not support a finding that the applicant was the driver in a fatality, as the applicant could show no prejudice for the failure, particularly in light of appellate court's finding (in the direct appeal of the conviction) that "the evidence identifying (the defendant/applicant) as the driver (was) not only properly in the record, but also overwhelming."

Linn County Merle Andrew Shank v. State, No. 3-541 / 12-1041 (Iowa Court of Appeals, filed August 7, 2013.) **No ineffective assistance for trial counsel's failure to request a spoliation instruction.** Applicant did not receive ineffective assistance of counsel where counsel testified that the failure to request a spoliation instruction was a strategic decision based upon investigation of the offense, testimony of the defense expert, and cross-examination of the State's expert; counsel did not breach a duty by deciding to request the instruction.

Linn County Merle Andrew Shank v. State, No. 3-541 / 12-1041 (Iowa Court of Appeals, filed August 7, 2013.) **Jury instruction on "recklessness" did not prejudice the applicant.** Fact that jury instruction on reckless did not include the following language *"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"* did not prejudice the defendant where defendant was also convicted on a theory of vehicular homicide by eluding in violation of Iowa Code section 707.6A(2)(b); as a result, applicant could not "show that even if the jury instructions were different he would not have been convicted of vehicular homicide."

Linn County Merle Andrew Shank v. State, No. 3-541 / 12-1041 (Iowa Court of Appeals, filed August 7, 2013.) **No prejudice shown for stipulation to prior felony offenses.** Applicant could not show prejudice for decision to stipulate to prior felonies where he made no claim or showing that he did not have the prior convictions, and where, at time of sentencing, the trial court outlined the defendant's convictions, including five prior felony convictions, and he did not object to the recitation; "(h)e has thus not shown the result of the proceeding would have been different if he had not stipulated, and on this ground he is unable to show he received ineffective assistance of counsel."

Plymouth County State v. Justin Dean Short, No. 3-667 / 12-1150 (Iowa Court of Appeals, filed September 5, 2013.) ***Probationer* search affirmed.** Probation agreement condition which allowed authorities to search if they possessed "reasonable grounds to believe contraband is present" provided the basis for a valid search (c.f. State v. Ochoa, 792 N.W.2d 260 (Iowa, 12/17/10), which was distinguished as prohibiting *suspicionless* searches of *parolees*.)

Polk County State v. Andrew William Thomas, No. 3-558 / 12-2112 (Iowa Court of Appeals, filed July 24, 2013.) **No grounds to stop; OWI conviction reversed.** Where video of defendant's car revealed "no unsafe lane changes" and where, although posted signs notified drivers that a lane was closed and defendant did not heed the signs immediately and such driving behavior might, "with 20/20 hindsight" give rise to suspicion, "mere suspicion, curiosity, or hunch of criminal activity is not enough" to support stop (quoting State v. Tague, 676 N.W.2d 197 (Iowa, 2/25/04)); denial of motion to suppress and resulting conviction reversed.

Polk County State v. Phillip Ray Griffieon, No. 3-619 / 12-2169 (Iowa Court of Appeals, filed July 24, 2013.) **Officer's testimony that defendant was traveling without lights supports stop.** Officer's testimony that the suspect pickup was

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travelling at night without headlights was sufficient to support a traffic stop; review of a video (made on outdated equipment and of very poor quality) did not offer "a clear contradiction" of the officer's testimony; further, even if the defendant turned on his lights before stopping, driving a vehicle without headlights at night for even a short period of time supports a stop (citing State v. Farrell, 242 N.W.2d 327 (Iowa 1976).)

Polk County State v. Loren Lee Bishop, No. 3-104 / 12-0538 (Iowa Court of Appeals, filed July 24, 2013.) **Prescription drug defense overcome; vehicular homicide conviction affirmed.** Defendant's prescription drug defense to vehicular homicide charge was properly rebutted by the State, which proved that pharmacy monographs for the prescriptions contained warnings against driving, where a physician testified that he had prescribed a drug to the defendant seven days earlier and "specifically ordered him not to operate a motor vehicle" (the physician had given the defendant a five day prescription yet the drug was in the defendant's system at the time of his crime); the defendant's "abuse of his prescriptions is the most reasonable and supported conclusion for (his) extreme condition and erratic behavior" on the day of the crime.

Polk County State v. Loren Lee Bishop, No. 3-104 / 12-0538 (Iowa Court of Appeals, filed July 24, 2013.) **Pharmacy records showing refilling of prescriptions properly admitted.** Trial court properly admitted "pharmacy record's showing (the defendant's) history of refilling his prescriptions on a schedule consistent with a pattern of abuse"; the evidence was relevant to show the defendant was abusing the drugs on the day of the crime; trial court properly rejected defendant's characterization of the evidence as inadmissible "bad acts" evidence.

Polk County Jerredd Elken v. State, No. 3-705 / 12-0933 (Iowa Court of Appeals, filed July 24, 2013.) **Trial counsel not ineffective for failure to challenge search of car.** Post conviction applicant's original trial and appellate counsel were not ineffective for failing to challenge an automobile search on the theory that the search was an improper search incident to arrest, prohibited by Arizona v. Gant, 556 U.S. 332 (4/21/09); "the vehicle-inventory-search exception to the warrant requirement applies here, regardless of Gant's limitation of the search-incident-to-arrest exception."

Polk County Brandon Dean Watson v. Iowa Department of Transportation, Motor Vehicle Division, No. 3-455 / 12-2054 (Iowa Court of Appeals, filed July 24, 2013.) **"Reasonable grounds" for CDL testing.** Officers who test commercial motor vehicle operators need reasonable grounds to believe that the operator has an alcohol concentration above .04, but there is no requirement that they have reasonable grounds to believe the operator is over .08; Iowa Code section 321.208 (which governs CDL .04 revocations) mentions the definitions of section 321J.1, but does not mention the implied consent provisions of section 321J.6, "which supports the conclusion that the legislature did not intend section 321J.6 implied consent to come into play." (See also Watson v. Iowa Dep't of Transp. Motor Vehicle Div., 829 N.W.2d 566 (Iowa, 4/12/13), which determined that the "margin of error" applied to OWI prosecutions under Chapter 321J does not apply to CDL alcohol testing.)

Polk County State v. Marten Daniel Huffey, Jr., No. 3-637 / 12-1269 (Iowa Court of Appeals, filed August 7, 2013.) **Jury instruction on 'manner of driving' not improper; conviction affirmed.** Uniform jury instruction which read "(t)he State does not need to prove how the defendant was driving. However, you may consider his manner of driving in deciding if he was under the influence of alcohol" did not improperly focus the jury's attention on specific evidence or facts, or "reference specifically the fact (that the defendant) crashed through three residential yards destroying trees and a mailbox."

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Polk County State v. Marten Daniel Huffey, Jr., No. 3-637 / 12-1269 (Iowa Court of Appeals, filed August 7, 2013.) **Jury instruction referred to intoxication, not operation, and therefore was not cumulative.** Court rejected defendant's claim that uniform jury instruction which read "(t)he State does not need to prove how the defendant was driving. However, you may consider his manner of driving in deciding if he was under the influence of alcohol" duplicated a jury instruction that defined "operation" as "the immediate actual physical control over a motor vehicle that is in motion and/or has its engine running"; the former instruction focused on intoxication, while the latter focused on operation; therefore, the two were not duplicative.

Polk County State v. Michael Richard Brown Jr., No. 3-589 / 12-2187 (Iowa Court of Appeals, filed August 21, 2013.) **Incorporated minutes of testimony supply factual basis for plea.** Where guilty plea specifically states "(i)n order to establish a factual basis I ask the court to adopt the minutes of testimony", the reference is sufficient to incorporate the minutes to establish a factual basis for a plea; eluding conviction affirmed.

Polk County State v. Denise Marie Vesey, No. 3-673 / 12-1753 (Iowa Court of Appeals, filed August 21, 2013.) **Advice to waive jury trial not ineffective where no prejudice shown.** OWI defendant who voluntarily waived jury trial telling the judge that "she understood all the rights she was giving up" is not entitled to a finding that of ineffective assistance of counsel unless she can show a reasonable probability that having a jury trial would have achieved a different result; defendant did not argue this on appeal, showed no prejudice, and is entitled to no relief on this ground. (The Court also rejected an ineffective assistance claim based upon cross-examination of a citizen witness.)

Polk County State v. Denise Marie Vesey, No. 3-673 / 12-1753 (Iowa Court of Appeals, filed August 21, 2013.) **Failure to present evidence of pharmacy labels not ineffective.** Trial counsel not ineffective in OWI prescribed drug case for failure to present pharmacy labels as part of the defense; defendant had taken Vicodin, which was not prescribed for her, and that admission "would have defeated" the prescription medicine defense.

Polk County State v. Denise Marie Vesey, No. 3-673 / 12-1753 (Iowa Court of Appeals, filed August 21, 2013.) **Defendant did not establish prescription medicine defense.** Defendant who "had not been following the doctor's directives" and who took a prescription medicine (Vicodin) without a prescription cannot establish a prescription medicine defense; "(t)aking a prescription drug outside the monitoring or instructions of a medical practitioner eliminates the possibility of the affirmative defense under section 321J.2(11)."

Polk County State v. Denise Marie Vesey, No. 3-673 / 12-1753 (Iowa Court of Appeals, filed August 21, 2013.) **Substantial evidence of drug impairment for OWI.** Defendant's erratic driving, swaying in her stance, watery and bloodshot eyes, slurred speech, statements that "weren't making sense", an irritated and hostile demeanor, and concession that she shouldn't have been driving are substantial evidence of intoxication which support defendant's OWI-drugged conviction.

Polk County Tina E. Diaz v. Iowa Employment Appeal Board, No. 3-765 / 12-2209 (Iowa Court of Appeals, filed September 5, 2013.) **Drug conviction is basis for discharge and denying unemployment benefits.** Employee who entered guilty pleas to delivery of a controlled substance committed misconduct within the meaning of the statute which denies unemployment benefits for misconduct discharges; the company's employment handbook prohibited illegal conduct; in addition, the business relied upon contracts with the FBI and the employee had access to FBI information and the employer was "in jeopardy of losing contracts by an employee who was simply charged with drug offenses (and). . .has a right to expect that an employee will not jeopardize the company's substantial contracts."

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Polk County State v. Spencer Lee Colvin, No. 3-748 / 12-1617 (Iowa Court of Appeals, filed September 5, 2013.) **No 804.20 violation where officer did not provide a personal number to the defendant.** Defendant's 804.20 rights were not violated where defendant, who claimed that an officer was his brother (although initially the defendant could not remember the officer's last name, and when he did "remember" it, the name was different than the defendant's own last name) and who wanted to call that officer, was given an opportunity to call family members for the "brother's" telephone number and was given an opportunity to look in a phone book; arresting officer was not obligated under 804.20 to access the "brother's" personal number from the police department's database and provide it to the defendant; conviction for OWI 3rd as an habitual offender affirmed.

Poweshiek County State v. Stephen Joseph Hanrahan, No. 3-337 / 12-0012 (Iowa Court of Appeals, filed August 7, 2013.) **No basis to detain for dog sniff.** Officer who had stopped motorist for speeding, written a warning ticket for the offense, returned the motorist's license and ended the traffic stop did not have sufficient suspicion to continue to detain the motorist for arrival of a drug dog; the Court reviewed video of the "motorist interview" conducted by the officer while the two were in the squad car and found it did not give rise to sufficient suspicion to support a detention and also discounted other factors relied upon by the State—the fact that a cooler, food, and maps were in the car, the defendant's failure to immediately turn off his turn signal and the defendant's nervousness—in determining that the detention violated the Fourth Amendment; conviction for possession of marijuana and order forfeiting property both reversed.

Scott County State v. Travis Dewayne Willett, No. 3-411 / 12-1628 (Iowa Court of Appeals, filed July 24, 2013.) **Records of prior convictions are non-testimonial.** Court rejected defendant's complaint that admission of records of his prior OWI convictions violated his right to confrontation and cross examination; "the records were created by governmental employees acting in purely ministerial functions creating records which would exist irrespective of subsequent prosecutions" and therefore, were non-testimonial.

Scott County State v. Travis Dewayne Willett, No. 3-411 / 12-1628 (Iowa Court of Appeals, filed July 24, 2013.) **Proof of identity for prior convictions.** The name of the defendant on prior OWI convictions (and the fact that the defendant's name was "unique"), and the fact that the records of the prior convictions contained an identical address and date of birth for the identically named defendant provided sufficient evidence of identity to support an OWI 3rd conviction.

Scott County State v. Tyesha Allen, No. 3-762 / 12-2171 (Iowa Court of Appeals, filed August 7, 2013.) Driving while barred conviction affirmed. Defendant's various complaints about counsel preserved for possible postconviction relief.

Tama County State v. Travis James Jordan, No. 3-403 / 12-0950 (Iowa Court of Appeals, filed July 24, 2013.) **Two counts of theft supported in the record; conviction affirmed.** Factual basis existed for charges of 1st and 2nd degree theft, where defendant stole over $10,000 in tools and radiators and then stole a truck to transport the tools and radiators; prosecutor was not required to combine the thefts for charging purposes (the theft aggregation statute, Iowa Code section 714.3, provides that thefts "may" be aggregated) and the court was not required to merge the two offenses for sentencing, as the two were distinct offenses although committed during the same incident.

Warren County State v. Harold Edwin Moffit, No. 3-509 / 12-1326 (Iowa Court of Appeals, filed July 24, 2013.) **Facts matching dispatch broadcast provided grounds to stop.** Where DNR officer observed motorcyclist damage a park shelter

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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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and caused a broadcast describing the defendant's dress, motorcycle, and direction of travel, a responding officer who observed the motorcycle was entitled to rely on the broadcast description; stop and OWI 2nd conviction affirmed.

Woodbury County State v. Jesse Legore, No. 3-469 / 12-1334 (Iowa Court of Appeals, filed July 10, 2013.) **Officer's mistake of law makes stop invalid; OWI conviction reversed.** Officer's mistaken belief that a speed limit was 25 mph (when in fact it was 45 mph) made the officer's stop of a car for traveling 34 mph a "mistake of law"; (where an officer mistakenly believes that a law prohibits certain conduct, and no such law exists, a stop based upon such mistaken belief is invalid; conviction reversed.)

Woodbury County State v. Kimberly Sue Van Cleave, No. 3-495 / 12-0041 (Iowa Court of Appeals, filed July 10, 2013.) **Test was timely; conviction affirmed.** Defendant's contention that the officer had failed to offer a DataMaster test within two hours of the PBT was not supported by the facts, nor was her contention that the test itself had not been administered within two hours; Court quoted the trial court's finding that the defendant's "'behavior was intentionally evasive, misleading, and done for the purpose of delay'" and found that "(t)he facts thus do not support, and are in fact contrary to, (the defendant's) assertion that the officer was the cause of any delay in the administration of the DataMaster test."

Woodbury County State v. Kimberly Sue Van Cleave, No. 3-495 / 12-0041 (Iowa Court of Appeals, filed July 10, 2013.) **Sufficient evidence to support intoxication.** Even if the DataMaster test of 0.172 is ignored, there was sufficient evidence to find the defendant intoxicated and therefore guilty of OWI where she could not remember digits of her social security number, she had been driving without her driver's license, going the wrong way on a one way street, was slow to respond to emergency lights, gave a false name, was visibly excited and cried at times, had poor performance on SFSTs and exhibited other signs of intoxication.

Woodbury County State v. Kendell Lamont McCoy, No. 3-516 / 12-1560 (Iowa Court of Appeals, filed July 24, 2013.) **Driving while barred conviction not challenged on appeal.** Court preserves defendant's claim of ineffective assistance of counsel with respect to a possession of marijuana charge; defendant did not challenge driving while barred conviction on appeal.

Woodbury County State v. Daniel Alois Johnson, No. 3-549 / 12-1620 (Iowa Court of Appeals, filed July 24, 2013.) **Driver stopped for equipment violation was not in custody for purposes of *Miranda*.** *Miranda* warnings not required for questioning of driver where there had been no arrest, the questioning occurred on a residential street, outside the car, and lasted less than one minute before the driver admitted to having drugs and drug paraphernalia in the car.

Citations from previous issue of the Highway Safety Law Update

Missouri v. McNeely, 569 U.S. __, 133 S.Ct. 1552 (4/17/13)
Florida v. Jardines, 569 U.S.__, 133 S.Ct. 1409 (3/26/13)
Watson v. Iowa Dept. of Transp., Motor Vehicle Div., 829 N.W.2d 566 (Iowa, 4/12/13)
State v. Tyler, 830 N.W.2d 288 (Iowa, 4/26/13)

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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. Words With Friends is a dangerous, addictive game, almost as destructive of efficiency in the workplace as the habitual reading of agate type in disclaimers.

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