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**DUI UPDATES – EYE MOVEMENT
SIGNS AS IMPAIRMENT**

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**2019 APAAC LA CONFERENCE
DUI IN THE 21ST CENTURY
“Honest Officer, My Car Was Driving Itself”**

Legal Updates, Reminders, Hot Topics
and Fun Facts

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ADVANCED DUI SEMINAR

- 21st Century Content
- New Content - we change it every year
- Let us know what topics you would like addressed
- September 16 - 19, 2019



Legislative Update



"Texting" While Driving

HB 2318

- Prohibits operating motor vehicles on a street or highway (unless parked or stopped) if the person:
 1. Physically holds or supports with any part of the body
 - a) a portable wireless communication device except with earpiece, headphone device or wrist-worn device to conduct voice-based communication;
 - b) or a stand-alone electronic device;

**Effective - Now - emergency clause
Amends ARS § 28-672; 28-963, 28-3164 & 28-3312; adds 28-914



"Texting" While Driving

HB 2318

2. Writes, sends or reads any text-based communication (text, instant message, e-mail or internet data) excluding:
 - a) voice-based communication to direct writing, sending, reading, etc. any text-based communication; &
 - b) hands free GPS; navigation or device used for obtaining motor vehicle information or information related to driving a motor vehicle.



"Texting" While Driving

HB 2318

The following are exempt:

- Hand-free devices embedded in motor vehicles
- Authorized emergency, law enforcement or probation vehicle operators if using the device while acting in an official capacity
- Licensed FCC operators.



"Texting" While Driving

HB 2318

Exemptions continued:

- Operators using 2 way radios or private land radio systems while performing work-related duties if operating fleet vehicles or possessing a CDL
- Operators using portable wireless communication devices
 1. To report illegal activity/summon help
 2. Affixed to vehicle to relay info during operator's job duties between operator & dispatcher or digital network or software application device.



"Texting" While Driving

HB 2318

An officer who stops a vehicle for a violation may not:

- Take possession or inspect the portable wireless communication device unless otherwise authorized by law; and
- Issue citations before Jan. 1, 2021. May only issue a warning

Voids all county, city, & local regulations beginning January 1, 2021.



REMINDER Teenage Drivers/Instruction Permits Cell Phones/Texting

SB 1080

- Prohibits drivers with
 - instruction permits
 - class G licenses for first 6 months or until 18th birthday
 From using wireless communication devices while driving.
- Can use in emergency. Can use GPS if not manually adjusting.
- Secondary offense.

**Effective date 7/1/2018 Amends A.R.S. § 28-3154; 28-3101



"Texting" While Driving - 28-693

HB 2318

Prohibits drivers from:

- Watching videos or movies except data related to navigation, vehicle info or driving info
- Recording or broadcasting videos except for continuously recording or broadcasting videos within or outside the vehicle

No delayed enforcement/citation date. [Violation code 28-693.]



"Texting" While Driving & 28-672

HB 2318

- Adds this section (28-914) to the violations included in 28-672 (causing serious physical injury or death by a moving violation).
- This section does not have the delayed enforcement/citation date.



State Highway Work Zones - Accidents

HB 2492

Adds volitions committed in highway work zones (28-710) to 28-672 (causing serious physical injury or death by a moving violation).

****Effective -August 27, 2019
Amends ARS § 28-672**



Motor Vehicle Accidents - restricted license

HB 2366

• Requires courts to direct ADOT to suspend/restrict driving privileges for first-time 28-672 offenses [causing serious physical injury or death by a moving violation].

- 90 - 180 days for serious physical injury; 180 days - one year for death.

****Effective - August 27, 2019
Amends ARS § 28-672**

28-672 CASE TO KEEP AN EYE ON

- *Patel* - Pending in the Court of Appeals
- Issue: is the restitution cap in 28-672 unconstitutional under victim's rights?
- COA will conference on June 25



Written Vehicle Accident Reports: threshold

SB 1223

- Increases damage threshold required for issuance of a written accident report from \$1,000, to \$2,000.
- Other requirements remain the same.

****Effective - August 27, 2019
Amends ARS § 28-667**



Class M Driver Licenses

SB 1258

- Provides a class M license is not necessary for operating a motorcycle if it:
 - a) Has at least three wheels;
 - b) Has a three-point safety belt;
 - c) Has bucket or bench seats; **and**
 - d) Is fully enclosed or uses a roll cage frame.

****Effective - August 27, 2019
Amends ARS § 28-3101**



Veteran Special Plates; Women Veteran; branch seal

**SB 1338
HB 2446**

- Directs ADOT to design 12 new veteran special plates:
 - Army seal;
 - Navy seal;
 - U.S. Marine Corps seal;
 - Air Force seal;
 - Coast Guard seal; and
 - Native American Code Talker seal.

****Effective - October 1, 2019
Amends ARS § 28-2414**

ADDITIONAL NEW SPECIAL PLATES

- ⊙ Share the Road - HB 2606
- ⊙ Affordable homeownership - SB 1453
- ⊙ Collegiate bowl game - HB 2006
- ⊙ Community services - HB 2442
- ⊙ Distinguished flying cross - HB 2589
- ⊙ Alzheimer's disease research - SB 1533



Clinical Nurse Specialists; Prescribing Authority

HB 2068

- Allows clinical nurse specialists (CNS) to prescribe & dispense pharmacological agents if the CNS meets requirements & is nationally certified;
- Prohibited from dispensing Schedule II opioids, except for implantable devices or for medication-assisted treatment for substance use disorders.

*** Effective date - August 27, 2019
Amends A.R.S. §§ 32-1601; 1606; 1631; 1635.01; 1636; 1663/ 1666 & 1921; Adds 32-1651*



"Miniature Scooters; electric standup scooters

SB 1398

- Defines electric standup scooter as a device that:
 - Weighs less than 75 lbs
 - Has 2 or 3 wheels
 - Has handlebars
 - Has a floorboard for standing while riding
 - Is powered by electric motor &/or human power
 - Has max speed not exceeding 20 MPH
 - Does not include electric miniature scooter
 - (less than 30 lbs, 2-3 wheels, handlebars, floorboard, human/motor powered)



"Miniature Scooters; electric standup scooters

SB 1398

- Grants electric standup scooter operators same rights, privileges & duties of bicyclists – “except . . . as otherwise regulated by a local authority”
- Exempts from title, registration, VLT, driver license or veh. insurance requirements
- May be used on bike & multiuse paths, unless prohibited by a local law
- Must meet unique identification requirements
- States motorized skateboard doesn't have handlebars



"Miniature Scooters; electric standup scooters

SB 1398

- Specifies definition of moped, motorcycle, motor driven cycle, motor vehicle and vehicle exclude electric standup scooters & electric miniature scooters
- Does not prohibit local authority "within reasonable exercise of the police power" from regulating electric bicycles & electric standup scooters. May consider environmental & traffic benefits of these devices when regulating.



Traffic Survival School (TSS); required completion

HB 2005

- ADOT will require TSS upon notice of convictions in other jurisdictions that would result in license suspension/revocation if committed in AZ.
- Requires, rather than allows, ADOT to suspend/revoke a license for TSS noncompliance.
- Requires ADOT to remove suspension from driving record if person completes all imposed requirements (except reinstatement \$) including successful TSS completion.

****Effective - general effective date
Amends ARS § 28-3303 & 28-3306**

CASE LAW UPDATES

FOURTH AMENDMENT OPINIONS

PROLONGED DETENTION

- ◉ Officer’s subjective intent to cite & release Green did not require him to release Green at that point.
- ◉ Because Green had been subjected to a valid arrest, actual release remained contingent on officer’s investigation & favorable exercise of discretion.

State v. Green, 245 Ariz. 529 (App. 2018).

CASE TO KEEP AN EYE ON

Kansas v. Glover, No. 18-556
US Supreme Ct.

- ◉ **Issue:** For an investigative stop under the 4th Amendment, is it reasonable for an officer to suspect the registered owner of a vehicle is the one driving absent any information to the contrary?
- ◉ Kansas argued officer had reasonable suspicion because he knew car’s owner lacked valid license & deputy could infer owner was the driver.

**STOP OF VEHICLE:
REVOKED LICENSE (REMINDER)**

- Reasonable suspicion exists to stop when an officer discovers owner of the vehicle has a suspended license.
- Does not matter if officer could not see driver clearly enough to identify him/her as owner.
- Officer need not rule out innocent explanations for the conduct.

State v. Turner, 243 Ariz. 608 (App. 2018).

STOP OF VEHICLE REMINDERS

- Include Safety Concerns in Reports, Motion Responses & Testimony (*Organ, Becerra, Mendoza-Ruiz*)
 - Most equipment violations pose safety concerns
- Always Include Suspected Impaired Driving if Applicable (*Blake, Gutierrez*)
 - Most moving violations could be signs & symptoms of impairment
- Objective basis (*Blake*)
 - *Whren v. United States*, 517 U.S., at 810.

4TH AMEND. REMINDERS

FIRST INQUIRY - DOES 4TH AMENDMENT APPLY?

- 1) Did defendant have an expectation of privacy?
- 2) Was there a search or seizure?
- 3) Was there State action?

If not - 4th Amendment does NOT apply
 If yes - was it reasonable? Is there a warrant exception?

4TH AMENDMENT REMINDERS

- o Good Faith
- o Exclusionary Rule (suppression) is NOT automatic
 - *Herring v. US*, 555 U.S. 135 (2009).
 - If relying on overturned precedent - *Davis v. US*, 564 U.S. ____ (2011)
- o Inevitable discovery. *State v. Rojers*, 216 Ariz. 555 (App. 2007)
- o Look for no stop/seizure - *Robles*
- o AZ no tougher than feds except for home searches

MEDICAL MARIJUANA



SMOKING MEDICAL MARIJUANA IN PUBLIC

- o In general, person may be arrested & prosecuted for smoking marijuana while in car, if car is in public, even with MM card.
- o Even though AMMA broadly immunizes qualifying patients from arrest or prosecution on marijuana offenses, MM patients may not smoke marijuana “in any public place”.
 - Public place = place frequented by general public.
 - Interior of vehicle is not separate/distinct from the location in which it found

State v. Tagge, CR2015-113021-001 (May 9, 2019).

HASHISH/EXTRACTS

- ◉ AMMA immunizes medical marijuana card holder from prosecution for use & possession of Hashish & other extracted resins.
- ◉ Qualified patients are allowed 2 ½ ounces of dried flowers, or mixtures or preparations made from 2 ½ ounces of dried flowers.

State v. Jones, CR-18-0370 (filed May 28, 2019).

ADMONITIONS

- ◉ Winning admonition cases.

Diaz v. Bernini, 246 Ariz. 114 (2019)[Implied consent statute does not require arrestee's agreement be voluntary].

State v. De Anda, 246 Ariz. 104 (2019)[Upheld interim admonition that advised of refusal consequences before asking to take test].

State v Weakland, 246 Ariz. 67 (2019)[Good-faith applies to cases after *Butler* but before *Valenzuela*].

Alsarraaf v. Bernini (State, RPI) 244 Ariz. 447 (App. 2018)- [Good faith applies to original admonitions in a pre-*Valenzuela* DOV case.]

HAVATONE REMAND

- ◉ Court of Appeals on remand
- ◉ Because Nevada law allowed a blood sample to be taken from an unconscious DUI suspect, the good faith exception to the exclusionary rule applied.

State v. Havatone, 1 CA-CR 17-0547 (App. filed June 6, 2019).

CASE TO KEEP AN EYE ON

- ◉ *Mitchell v. Wisconsin* - argued April 23, 2019.
- ◉ Issue: whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the 4th Amendment warrant requirement.

MARITAL PRIVILEGE & DUI

- ◉ Defendant was charged with criminal damage of spouse's property & DUI arising out of same event.
- ◉ Crime exception to the anti-marital fact privilege allowed victim-witness-spouse to testify against defendant.
- ◉ Victim/spouse can testify to any charges arising from the same unitary event.

Phoenix City Prosecutor v. Lowery (Craig, RPI) 805 Ariz. Adv. Rep. 25 (2018).

WHAT'S HAPPENING WITH DUI?

- ◉ Blood kit recall - contact Beth Barnes for updated information

REMEMBER OUR DISCOVERY OBLIGATIONS

POTENTIAL DEFENSE ARGUMENTS

- ◎ If not enough additive was present, this could result in:
 - Clotting
 - Micro clots
 - Fermentation
- ◎ Are you aware hundreds of blood kits were recalled in Arizona?
 - Speculation/relevance

RECALLED KIT - QUICK TIPS/REMINDERS

- ◎ Address with phlebotomist
- ◎ Phlebotomist should inspect the tube for chemicals prior to the blood draw

CLOTS

- ⦿ All forensic scientists inspect the tubes for clots - document
- ⦿ Blood not clotted = enough anticoagulant in tube (presumably enough potassium oxalate also?)
- ⦿ If it was clotted, the lab will address the issue:
 - Use the tissue grinder - possible lower alcohol concentration
 - Centrifuge method (spin it down) & test serum - a conversion would need to be made & disclosed

MICRO CLOTS

- ⦿ No peer reviewed studies support theory
 - Even defense expert will not support
- ⦿ Speculation/good faith basis
 - Motion *in limine*?

MICRO CLOTS

- ⦿ Meets NONE of the Rule 702 requirements
 - Not shown to affect tests - so not relevant
 - No facts or data support it
 - No studies support it - so can't show it is reliable principles & methods
 - The expert will not even support it - so will not apply the principles & methods to the facts

Challenge for a Good Faith Basis for Raising Issue

FERMENTATION/YEAST/CANDIDA ALBICANS

- ⦿ Blood not clotted - indicates enough preservative?
- ⦿ Even with no preservative - science/studies indicate alcohol will not form in tube
- ⦿ Blood was refrigerated - inhibits yeast growth
- ⦿ No sugar was added to the blood
- ⦿ May not have been enough time between collection and testing to happen
- ⦿ Yeast has to be present
 - Individual would be very ill

FERMENTATION/YEAST/CANDIDA ALBICANS

- ⦿ Analyst - inspects tubes and documents any unusual appearance/odor; rocks the blood
- ⦿ If blood had fermented:
 - Stinks
 - Stopper would likely pop off when tube was opened due to the gases
 - Blood would have unusual appearance

DEFENDANT'S IMPAIRMENT IS CONSISTENT WITH THE READINGS

- ⦿ Totality of the circumstances

**HGN/LOC DEMONSTRATES
IMPAIRMENT**

- ◉ Dr. Karl Citeck document in handout materials “Eye Movement Signs as Impairment”
 - Acquired nystagmus causes reduction of visual acuity
 - Lack of convergence can cause double vision
 - Lack of smooth pursuit can impair ability to see details, make accurate observations when there is relative motion between the observer and the target

**CURRENT DEFENSE ARGUMENT
THE SFSTS DO NOT APPLY TO DRUGS**

- ◉ Not a bases for suppression - *Blake* holds Rule 702 does not apply to W&T and OLS
 - Common sense observations - do not need scientific studies
 - That is how we use them in drug cases - do not need studies
- ◉ Remember what the alcohol validation studies looked at - can we correlate performance on W&T and OLS with a BAC
 - Need a study for that. Don't for observations
- ◉ Are part of DRE evaluation - implicit validated by those studies
- ◉ Used by agencies throughout the country for drugs
- ◉ Were used in alcohol cases long before validation studies
- ◉ Are a few studies for marijuana
- ◉ Clearly relevant to DUI case
- ◉ Etc., Etc., Etc.

COMING SOON!

Intoxilyzer 9000

INTOXILYZER 9000

- ⦿ Various agencies will start using 9000s soon
- ⦿ Will be phased in
- ⦿ Will still have Intoxilyzer 8000s also for about 5 years
 - Defense will likely try to use them against each other
 - Not too many differences
 - CMI states they are both accurate to within 3%
 - Still have calibrations, safeguards, other impairment, etc.

INTOXILYZER 9000 - DIFFERENCES

- ⦿ 90 Day and 31 Day Checks Will Be Combined
 - Conducted every 31 days
 - Will include calibration check
 - Will be a new form(I-2) - be sure to disclose
- ⦿ Extremely Automated for the Officer
- ⦿ Much easier to blow into
- ⦿ Will force officer to conduct a proper 15-minute deprivation period

DOCUMENTATION FOR INTOX 9000

- ⦿ Breath Test Print Card
- ⦿ Operator checklist [I-1]
- ⦿ 31- day check [I-2](no 90-day check)
- ⦿ May incorporate a yearly maintenance check
- ⦿ Other maintenance records will be available from the lab
- ⦿ Officer's card

- ⦿ Documentation for 8000s will stay the same

DUI HOT TOPICS

- ◉ Marijuana
- ◉ Prescriptions
- ◉ Heroin/opioids
- ◉ Meth use has increased
- ◉ Seeing Cocaine again
- ◉ APC - stationary shelter

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