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PROSECUTING A DUI CASE

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APAAC Fundamentals of Trial Advocacy

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Why So Much Focus?

- Difficult Cases
- Sympathetic Defendants
- Even more sympathetic victims
- Excellent Defense Attorneys (Often Former Prosecutors)
- Very Technical Procedures & Terms
- Constantly Changing Case Law
- High Case Loads
- Media Attention

Basic DUI Statute 28-1381(A)(1)

It is unlawful for a person to

- drive or be in actual physical control
- a vehicle
- within this state
- while under the influence of intoxicating liquor, any drug, a vapor releasing substance, or any combination thereof.

Impaired to the **slightest** degree.

State v. Miller, 226 Ariz. 190 (App. 2011)

- Only have to prove defendant is impaired
- Not "driving ability"

Remember for:

- *Voir dire* & jury instructions
- Rule 20 motions
- Objecting to defense arguments

ARS § 28-1381(A)(2) **&** 28-1382

Drive or APC, if within 2 hours one's alcohol concentration is:

- .08 or more
- .15 or more (extreme DUI)
- .20 or more (super extreme DUI)

& the alcohol was consumed before or while driving.

ARS 28-1381(A)(4)

It is unlawful to

- drive or be in actual physical control
- a commercial vehicle in this state
- with an alcohol concentration of .04 or more

Alcohol Concentration at Time of Driving/APC

Desmond v. Superior Court,
161 Ariz. 522 (1989).

DUI Drugs
28-1381(A)(3)

- drive or APC
- while there is any drug defined in 13-3401 or its metabolite in the person's body.

Establish is in 13-3401

DUI Drugs
28-1381(A)(3)

- *State v. Harris* (*Shilgevorkyan*, RPI)
- Must prove metabolites are capable of impairment.
- *Darrah*
  - Affirmative Defense
  - *If amount incapable of impairment*

Per se Laws

Impairment is NOT required!

Prescription Drug Defense 28-1381(D)

- Only a defense to (A)(3) charge
- Not a defense to (A)(1) [ARS 28-1381(B)]
- Must be valid on DOV
- Must be U.S. doctor (4 types if old case)
- Defendant's burden to prove

Consider a jury instruction & *voir dire*

Prescriptions

- Amendment to 28-1381(D)
  - Must take prescription as prescribed

Therapeutic dose does not = "as prescribed" or not impaired

A.R.S. § 1387(I)

Except for another violation of this article, the state **shall not** dismiss a charge of violating any provision of this article unless there is an **<u>insufficient legal or factual basis</u>** to pursue that charge.

DUI/APC is Strict Liability (move to preclude)

- Intent to drive not required (APC)
- Passive inhalation is not a defense
- Involuntary intoxication is not a defense
- Ignorance of intoxication
- Ignorance of drug effects not a defense

State v. Parker, 136 Ariz. 474; (App. 1983); *State v. Zaragoza,* CR-08-0286-PR (Ariz. 2009); *Whisler v. State,* 121 Nev. 401, 116 P.3d 59 (Nev. 2005).

Read the DR-- What kind of Case is this going to be?

- Driving or APC? (Both?)

Actual Physical Control
(Circumstantial Evidence of Driving)

A person can be convicted for either "driving" or "being in actual physical control".

Driving and APC are not mutually exclusive

The jury does not have to agree on theory, only on verdict.

State v. Rivera, 207 Ariz. 69, 72 (App. 2004);
State v. Love, 182 Ariz. 324, 328, (1995).

City of Phoenix Prosecutor's Office

Actual Physical Control

In determining whether the defendant was in actual physical control of the vehicle, you should consider the totality of the circumstances shown by the evidence and whether the defendant's current or imminent control of the vehicle presented a real danger to [himself] [herself] or others at the time alleged. Factors to be considered might include, but are not limited to:

1. **Whether the vehicle was running;**
2. **Whether the ignition was on;**
3. **Where the ignition key was located;**
4. **Where and in what position the driver was found in the vehicle;**
5. **Whether the person was awake or asleep;**
6. **Whether the vehicle's headlights were on;**
7. **Where the vehicle was stopped;**
8. **Whether the driver had voluntarily pulled off the road;**
9. **Time of day;**
10. **Weather conditions;**
11. **Whether the heater or air conditioner was on;**
12. **Whether the windows were up or down;**
13. **Any explanation of the circumstances shown by the evidence.**

This list is not meant to be all-inclusive. It is up to you to examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired.

Actual Physical Control

- Demonstrate defendant is in control
- Danger to self or others
  - present or imminent control
- No "safe harbor"
- *Voir Dire*
  - prepare & educate your jury
- Jury Instructions
  - *State v. Tarr*, says *Zaragoza* instruction is enough

Actual Physical Control

- Prepare for "stationary shelter" arguments
  - Motion in limine
  - Circumstantial evidence of driving
  - Danger (flick of the wrist starts the car)
  - Statements
- Jury Instructions
  - *State v. Tarr,* No. 1 CA-CR 12-0791 says *Zaragoza* instruction is enough
  - Prepare supplemental instruction

NHTSA Driving Clues

http://www.nhtsa.gov/people/injury/alcohol/dwi/dwihtml/index.htm

NHTSA Driving Clues

- Problems Maintaining Proper Lane Position (p = .50 - .75)
  - Weaving
  - Weaving across lane lines
  - Straddling a lane line
  - Swerving
  - Turning with a wide radius
  - Drifting
  - Almost striking a vehicle or other object

NHTSA Driving Clues

- Speed & Braking Problems (p = .45 - .70)
  - Stopping problems **(too far, too short, too jerky),**
  - Accelerating or decelerating for no apparent reason
  - Varying speed
  - Slow speed

NHTSA Driving Clues

- Vigilance Problems (p = .55 - .65)
  - Driving in opposing lanes or wrong way on one-way street
  - Slow response to traffic signals
  - Slow or failure to respond to officer's signals
  - Stopping in lane for no apparent reason
  - Driving without headlights at night
  - Failure to signal or signal inconsistent with action

NHTSA Driving Clues

- Judgment Problems (p = .35 - .90)
  - Following too closely
  - Improper or unsafe lane change
  - Illegal or improper turn
  - Driving on other than designated roadway
  - Stopping inappropriately in response to officer
  - Inappropriate or unusual behavior
  - Appearing to be impaired

Look For Clues That Are Not NHTSA Clues

Read the DR--

- Driving or APC? (Both?)
- Stop time
- Initial observations of the officer
- Statements of the defendant
- FSTs
- HGN (disclose the HGN log)
- Time of arrest, *Miranda, &* tests

Alcohol Influence Report

- **Go over in detail, sometimes can give you lots of gems for trial (theme)**
  - Scale of 0 to 10
  - Admissions to drinking – feeling effects
  - Great place to get a theme from defendant
  - Name of drink
  - Defendant's photo
  - Signs & symptoms

Driving

- Bring out **everything**
- **Do Not** be afraid to back the officer up
- Bring out that each behavior is a sign or symptom of impairment
- Did officer move the car? (mechanical difficulties)
- Did officer drive same path with no problem?
- Remember totality of the circumstances

Divided Attention

- The ability to do more than one task at the same time
- Combination of mental & physical tasks
- Good testimony for SFSTs and driving

FIELD SOBRIETY TESTS

FIELD SOBRIETY TESTS

- Horizontal Gaze Nystagmus
- Walk & Turn
- One Leg Stand
- Rhomberg-Modified
- Finger to Nose
- Finger Count
- Alphabet
- Hand Trace

HGN is the Most Reliable Field Sobriety Test

- Involuntary
- Coordination does not influence
- Tolerance does not influence
- Shoes & ground surface do not influence
- Highest validation

HGN Testimony - with a breath/blood test

- May testify
  - based on training & experience, 4 or more clues on HGN = BAC of .08 or more
  - may testify how accuracy rating is determined

State v. Superior Court (*Blake,* RPI) -1986; *State ex rel. McDougal v. Ricke* -1989

HGN Testimony – without a breath/blood test

- May not testify
  - based on training and experience, 4 or more clues on HGN = BAC of .08 or more
  - how accuracy rating is determined
- May testify
  - "neurological impairment one cause of which might be alcohol impairment"
  - each clue is a sign or symptom of impairment
  - HGN is the most accurate of the FSTs

•*State ex rel. Hamilton v. City Court* (*Lopresti,* RPI) -1990

What If There Are No FSTs?

- Defendant refused = consciousness of guilt
- FSTs not given - bring out why
  - Officer safety
  - Safety of the defendant
  - Bad location
  - Language barrier

Breath Test Statutory Method

28-1323(A)

1) DHS/DPS Approved Device
2) Certified Operator
3) Duplicate Tests (includes deprivation period)
4) DHS/DPS Approved Checklist
5) Device in Proper Operating Condition (calibrations are enough)

28-1323(B) - these are the <u>only</u> requirements for admissibility

Blood Draw Testimony

- Training & Experience
  - Emphasize course & clinical work
- Process
- Chain of custody
- Be proactive re: defense ploys
  - tube contained white powder
    - purpose
  - inverted tube 8 - 10 times
  - non-alcoholic swab

Daubert !

(Rule 702)

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Daubert !

(Rule 702)

- Qualify witness as an expert
- Chain of custody (prove it was defendant's blood)
- What method was used?
  - establish scientific reliability
- What did he/she do?
- Emphasize quality assurance/reliability

Key Language Judge May Look For:

- Was the method used accepted in the relevant scientific community ?
- Was the accepted technique properly used?
- Are the readings an accurate measurement & recording of defendant's alcohol concentration (or presence of drugs)?
- (Would the test results be accepted in relevant scientific community as valid test results?)

DUI Don'ts

- *#1 Fuenning:*
  - "Defendant was impaired to the slightest degree"
  - Defendant was Drunk
- But **READ** *Fuenning* & case law

DUI Don'ts

- PBT
- Quantify with general FSTs
- HGN – *Lopresti*
- 2,000 lb death machine arguments
- Invoked *Miranda*
- Asked for attorney
- Vouching

QUESTIONS?