

2020 APAAC Annual Lega Assistant Virtual Conference

October 2, 2020
Phoenix, Arizona



DUI UPDATE

Presented by:

Beth Barnes

Arizona GOHS Traffic Safety Resource Prosecutor (TSRP)

Distributed by:

ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL
3838 N. Central Ave., Suite 850
Phoenix, Arizona 85012

ELIZABETH BURTON ORTIZ
EXECUTIVE DIRECTOR

2019 APAAC LEGAL ASSISTANT CONFERENCE

DUI and Traffic Updates, Fun Facts & Reminders

This presentation may contain materials created by others. Such material is used under a claim of fair use pursuant to the Fair Use Guidelines for the purpose of engaging in face-to-face instructional education activities. Additional use or distribution of that material is prohibited.



SESSION CONTENT

- Legal Updates
- DUI/Traffic Hot Topics & Fun Facts
- A General COVID Update
- Interspersed With Trivia

CASE LAW UPDATES

**FOURTH AMENDMENT
OPINIONS**

UPDATE FROM LAST YEAR

Kansas v. Glover, 140 S.Ct. 1183 (2020).

- ⦿ A traffic stop conducted after police run a vehicle's plate and discover the registered owner has a revoked license is reasonable under the 4th Amendment
- ⦿ Unless officer has information indicating the owner is not the driver.

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

- ⦿ Reasonable suspicion exists to stop when an officer discovers owner of 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**

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

**REASONABLE SUSPICION FOR
A DUI INVESTIGATION**

- o Addressed the investigation, not the stop.
 - o Def. was speeding “early morning hours” on road with lots of bars, bloodshot watery eyes, odor of alcohol, admitted drinking alcohol, lack of smooth pursuit on one-pass HGN.
 - o Def. claimed officer did not have enough to begin a DUI investigation.
 - o Court of Appeals found totality of circumstances provided reasonable suspicion for DUI investigation.
- Devlin v. Browning*, 249 Ariz. 143 (App. 2020).

**ADDITIONAL REMINDERS FROM
DEVLIN**

- Officer’s considerations for the SFSTs are not limited to the defined NHTSA cues
 - Document & testify to everything
- Officer is not required to rule out innocent explanations for the conduct observed
 - As long as one explanation provides grounds
- Training & experience testimony matters
- Consent is a good thing

POSSESSION OF DRUG PARAPHERNALIA

- Defendants who simultaneously possess multiple objects of drug paraphernalia commit only one violation of A.R.S. 13-3415.
- Def. convicted of 4 counts PODP (one for baggies containing meth, one for baggies containing heroin, & two for a single scale - used to weigh both meth & heroin).
- The Court of Appeals vacated three of the four PODP convictions, and affirmed drug charges.

State v. Soza, 249 Ariz. 13 (App. 2020).

DETENTION AT A TRAFFIC STOP

- Because continuation of original civil traffic stop (speeding) was consensual & reasonable, there was no 4th Amendment violation.
 - After warning was issued, defendant was asked to answer additional questions & agreed.
 - No suggestion officer threatened, intimidated or coerced Defendant
- The resulting search was also consensual & lawful
 - Defendant orally agreed to search of his car & signed a Spanish-language DPS consent to search form.

State v. Angulo-Chavez, 1 CA-CR 18-0501 (App. 7/30/2019).

MEDICAL MARIJUANA



SMOKING MEDICAL MARIJUANA IN PUBLIC

- ⦿ In general, person may be arrested & prosecuted for smoking marijuana while in a car, if car is in public, even with MM card.
- ⦿ 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).

CURRENT DEFENSE ARGUMENT THE SFSTS DO NOT APPLY TO DRUGS

- Defense claims SFSTS are not admissible in a DUI trial
 - Only validated for alcohol - not drugs
 - Non-DRE Officer is not qualified on FSTS for drugs

CURRENT DEFENSE ARGUMENT THE SFSTS DO NOT APPLY TO DRUGS

- ⦿ Remember what the alcohol validation studies looked at - correlation of performance on W&T and OLS with a BAC
 - Need a study for that - but we do not use them that way in AZ
 - Makes sense Rule 702 would apply
 - We do not do that in a DUI drug case - no study does that either
 - Blake holds observations on W & T & OLS are more common sense type observations
 - We observe rather than correlate an amount in drug cases - do not need studies

⦿ HGN Rule 702 applies

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

- Be prepared to testify to training and experience
 - Your experience using SFSTs in drug cases - they work
 - Your training for SFSTs & drugs- HGN, ARIDE, DRE, Instructor, Etc.
- Prepare for your testimony
- Are part of DRE evaluation - implicit validated by those studies
- Used by agencies throughout the country for drugs
- OLS & W&T were used in alcohol cases long before validation studies
- Are a few studies for marijuana & some other drugs
 - Etc., Etc., Etc.

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 if impaired to the slightest degree.

LEGAL ISSUES FOR SELF-DRIVING CARS

- DUI - is this driving?
- Is the person in control for APC?
 - May be confusing for the juries
- Civil personal injury cases - who is at fault?
 - The "driver"
 - The car company
 - The person/vehicle hit
 - Someone/something else
- Insurance considerations



Legislative Update



General Effective Date August 25, 2020

Unless otherwise stated in the bill





"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.

WE DO NOT NEED RECORDS SHOWING PHONE WAS USED

Statute only requires physically holding or supporting it



"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.



Personal Delivery Devices

SB 1305

- Redefines personal delivery "device" (PDD)
- Treats/regulates them like pedestrians
- PDD must yield to, not obstruct right of way or unreasonable interfere with other traffic, including pedestrians; must display lights at night & markings
- Excluded from definition of "vehicle"

***Effective - August 31, 2020
Amends ARS § 28-667*



Personal Delivery Devices

SB 1305

- Limits device speed to a) up to 12 mph in pedestrian area; up to 20 miles per hour on the side or shoulder of a highway in a non-pedestrian area.
- Permits local authorities to establish a min/max speed of 7 – 17 mph in a pedestrian area.

***Effective - August 31, 2020
Amends ARS § 28-667*



Personal Delivery Devices

SB 1305

- When it is operated by an agent outside the scope of the office or employment, the agent is the operator of the device. If operated within the scope, the business entity is the operator.

****Effective - August 31, 2020
Amends ARS § 28-667**



Justice Court; Jurisdiction; Crimes

HB 2230

- Adjusts justice court jurisdictions to include misdemeanors + occurring on the boundary of 2 or more precincts or w/ 1 mile of the boundary.
- If a traffic ticket is filed in the wrong precinct that is on the boundary or 2 or more precincts, or within one mile of the boundary, the case may be transferred to the correct precinct if in same county.

****Effective - December 31, 2020
Amends ARS § 28-2414**

UPDATE

Intoxilyzer 9000

INTOXILYZER 9000

- ⦿ In use in several jurisdictions already
- ⦿ Will be phased in across AZ
- ⦿ We 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 Are Combined into one check
 - Will be conducted every 31 days
 - Will include the calibration check
 - Will be a new form(I-2) - be sure to disclose
- ⦿ Instrument is 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 [form I-1]
- ⦿ 31- day check [form I-2](no 90-day check)
- ⦿ Yearly maintenance check
- ⦿ Other maintenance records are available for defense inspection from the DPS lab
- ⦿ Officer's card

- ⦿ Documentation for 8000s will stay the same

BLOOD TUBE RECALL UPDATE

- Catalog number: 367001
- Lot number: 8187663
- Expiration Date: 7/31/2020

BLOOD TUBE RECALL UPDATE

- Manufacturer recalled a lot with 247,000 tubes
- Turns out only 300 of the tubes did not contain the chemicals
- 199 of these were received by one client & returned
- 73 were identified by a certain state lab & returned
- That left only 28 tubes unaccounted for

HOT TOPICS

COVID-19 AND TRAFFIC

- ⦿ Overall DUIs & Traffic citations are down
- ⦿ Some departments enforcing less traffic offenses
- ⦿ Per National Safety Council fatal crashes per million miles of driving are up dramatically
- ⦿ Different than other recessions where traffic was generally safer due to less traffic
 - Fatalities have double in some places
 - Many cases of excessive speeding
 - Average speeds more than double in some cities
 - Many drivers are flouting traffic laws
 - More drag racing
 - Phone usage while driving is up (more than 30%)

COVID-19 AND DUI

- ⦿ Fewer citations most places
 - Bars closed
 - More people staying home
 - Some patrol officers are avoiding making stops
- ⦿ Very few DUI checkpoints across the country
 - Saturation patrols instead
- ⦿ Breath vs. blood testing
- ⦿ Officer safety
 - Masks - odor of alcohol/drug; ID issues
 - DRE exams - IACP recommendations
 - Etc.
- ⦿ Many MVD and ignition interlock services are appointment only

**COVID-19 AND DUI
OTHER POTENTIAL LONG-TERM IMPACTS**

- ⦿ Folks are drinking & using drugs more
- ⦿ Results in more alcoholics & addicts
- ⦿ States are allowing more take-out alcohol at restaurants

- ⦿ May result in more DUIs after the pandemic

COVID-19 AND THE COURTS

- ⦿ Addressed Differently in Different Courts:
 - Most have suspended all or some trials
 - Some finished on-going trials others did not
 - Many are suspending deadlines
 - Video/phone proceedings
 - Increased pretrial release
 - Social distancing/screenings
 - Masks
- ⦿ Case Back-Logs
- ⦿ Speedy Trial Issues
- ⦿ Plea Bargains

WHAT ARE PROSECUTORS DOING

- ⦿ Many are relaxing pretrial release policies
- ⦿ Some are not charging certain low level offenses
- ⦿ Many are offering better plea bargains
- ⦿ Brooklyn's District Attorney is declining to prosecute low-level offenses that don't jeopardize public safety.
- ⦿ The Seattle District Attorney is only filing charges in exceptionally violent cases and continuing all other pending felonies.

A.R.S. § 28-1387(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 insufficient legal or factual basis to pursue that charge.

AZ SUPREME COURT ORDER

- ⦿ Rule 8 time excluded until November 1, 2020
- ⦿ No more than 30 allowed in a courtroom or other part of court at one time (some courts it is less)
- ⦿ Courts must implement CDC & US Dept. of Labor social distancing & sanitation measures
- ⦿ No notice change of judge and fewer juror peremptory strikes thru 12/30/2020
- ⦿ Extending time limits for prelim and probation hrgs.
- ⦿ Judges are to liberally grant COVID continuances
- ⦿ Must wear masks- can allow limited exceptions
- ⦿ More video conferencing allowed
- ⦿ May use recorded record of proceedings instead of court reporter - except grand juries

TRIALS DURING COVID-19

- ⦿ Masks:
 - ID issues
 - Will make jury selection more difficult
 - Be juror/record conscious
- ⦿ ASC Order - During in-courtroom proceedings, the judge may authorize removal of masks or face coverings for purposes of witness testimony, defendant identification, making a record, or other reasons deemed necessary by the judge provided that appropriate social distancing or other protective measures are followed.

TRIALS DURING COVID-19

- Will Jurors Respond to Juror Summons?
- Will Witnesses Cooperate?
- Jury Selection with Limited Numbers Allowed in Courtroom; May Employ Staggered Reporting Times
- Trials Will Likely Take Longer
- With Backlog, Will We Lose Witnesses
- Social Distancing Will Cause Logistical Issues
 - Communication with investigating officer
 - With jurors spread out, can they all see exhibits

A WORD ABOUT RULE 8/SPEEDY TRIAL

- ◉ Supreme Court order excludes for now - try to ensure time is excluded later
- ◉ Calculate Rule 8 in your cases - act accordingly
- ◉ Rule 8 dismissals should be without prejudice unless actual prejudice is found
- ◉ **Rule 8. 1(d) Duty of Defense Counsel.** Defense counsel must advise the court of an impending expiration of time limits. A court may sanction counsel for failing to do so, and should consider a failure to timely notify the court of an expiring time limit in determining whether to dismiss an action with prejudice under Rule 8.6.
- ◉ If within statute of limits/savings clause can usually refile

A WORD ABOUT RULE 8/SPEEDY TRIAL

- ◉ Speedy Trial: *Barker v. Wingo*
 - 1) length of delay
 - 2) is State or Defendant more to blame
 - 3) Did the defendant timely assert the right to speedy trial
 - 4) Has the defendant suffered actual prejudice

DUI HOT TOPICS/TRENDS

- ◉ Marijuana DUI cases
- ◉ Prescription DUI cases
- ◉ Heroin/Opioids/Fentanyl
- ◉ Meth use has increased
- ◉ Seeing cocaine again
 - Manufacture and use are up
- ◉ LSD & Ketamine

MARIJUANA

- ⦿ More states are legalizing
- ⦿ Emerging warnings
 - Lung cancer/disease
 - Pregnancy & adolescence
 - No amount is known to be safe
 - Addiction
- ⦿ Marijuana continues to get stronger
- ⦿ Vaping THC is leading to serious lung damage; FDA has issued warnings

Thank You!

Beth Barnes
AZ GOHS Traffic Safety Resource Prosecutor
beth.barnes@phoenix.gov


