

HIGHWAY TO JUSTICE

SPRING 2019

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DRUGGED DRIVING TRENDS

By Judge Brian L. Burgess
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Traffic safety officials can claim some hard-won successes in combatting drunk driving with alcohol-related fatalities cut in half since 1982, and the rate of recidivism reduced from 33% to 25% since 1995. A reduction in the *per se* limit to 0.08, enhanced law enforcement efforts, evidence-based sentencing practices, DWI Courts, and ignition interlock programs have all been effective countermeasures to reduce the incidence and impact of alcohol-impaired driving. At the same time, however, the campaign against drugged driving has not been as successful. Lack of uniform statistical comparisons makes precision difficult, but data reflects that incidents of driving under the influence of impairing drugs, legal and illegal, are clearly on the rise. This issue of *Highway to Justice* focuses on drug-impaired driving and just a few of the issues that law enforcement and the courts face in dealing with these cases.

Attempts to quantify statistics and identify trends regarding drug-impaired driving is extremely complex. Unlike alcohol-impaired driving, drug statistics are not always obtained in the course of an investigation, blood samples not gathered, or results maintained. Two sources, however, provide the best indicia of the scope of the problem—NHTSA's National Roadside Survey of Alcohol and Drug Use by Drivers, and NHTSA's Fatality Analysis Reporting System (FARS).

The most recent results from the National Roadside Survey of Alcohol and Drug Use by Drivers provides a comprehensive snapshot of drug and alcohol use on our highways. During these surveys, more than 10,000 drivers were interviewed at 300 roadside checkpoints and voluntarily submitted to interviews and alcohol and drug testing. When the most recent results are compared to prior years, certain trends can be discerned. For example, from 2007 to 2014, the incidence of drivers surveyed who had alcohol in their systems fell from 12.4% to 8.3%. During the same period of time, the incidence of drivers who had marijuana in their systems rose from 8.6% to 12.6%. In 2014, 22.5% of those surveyed and tested had drugs other than alcohol in their system at the time of testing. Additionally, "13.0% of daytime drivers and 9.4% of nighttime drivers tested positive for at least one potentially impairing prescription or OTC drug."¹

NHTSA's Fatality Analysis Reporting System (FARS) data for 2016 showed that where there was a known test result, drugs were present in 43% of fatally-injured drivers and alcohol was present in 38% of fatally-injured drivers. Fifty percent of the drug-positive drivers were positive for two or more drugs, and almost 41% were positive for alcohol.² It should be noted, however, that nationally only 57% of fatally-injured drivers were tested for drugs, and 71% of fatally-injured drivers were tested for alcohol.³ Although this figure may appear to be reasonable, testing rates vary State-to-State from as low as 2% to as high as 96%.⁴

The statistics from Roadside Surveys coupled with the FARS data strongly point to the dramatic increase in drug-impaired driving. Perhaps the increase in drug-impaired driving lies in part in the legalization of marijuana and the opioid crisis. According to the Governors Highway Safety Association, as of April 2017, nine states and the District of Columbia have legalized recreational marijuana, thirteen other states have decriminalized possession of marijuana, and in 29 states and the District of Columbia marijuana may be used for medical purposes.⁵

Since legalization of marijuana in 2013, Colorado reports marijuana related traffic deaths increased 151%, while all Colorado traffic deaths increased by 35%.⁶ Following legalization in 2016, Washington State's Traffic Safety Commission reported that poly-drug drivers are now the most common type of impaired driver involved in Washington State fatalities, and the most common poly-drug combination is alcohol and THC.⁷

In a more sinister development, forensic laboratory encounters with synthetic fentanyl spiked dramatically from 978 reports in 2013 to 4,697 in 2014 to 14,440 in 2015.⁸ Albeit not scientific, it is difficult to imagine that this surge in fentanyl is not generally reflective of the increased opioid presence.

In New Hampshire, for example, its forensic laboratory reports that common poly-drugged driver results are a mix of opioids (fentanyl, oxycodone, methadone) and either a central nervous system depressant or a central nervous system stimulant.⁹ Chemist Colleen Scarneo reports further that while cannabis was the most prevalent drug in New Hampshire drivers in 2017, if the left-over marijuana metabolite is excluded and only psychoactive THC is counted, marijuana drops to second place, and fentanyl—a notorious source of overdose death that

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We would like to hear from other judges. If you have an article that you would like to share with your colleagues, please feel free to submit it for inclusion in the next edition of *Highway to Justice*.

To submit an article, please send it to the editor, Hon. Neil E. Axel at neilaxel49@gmail.com with a copy to the staff liaison, Cheronne.Mayes@americanbar.org. Please contact Ms. Mayes for editorial guidelines.

The deadline for submission of articles for the Summer issue is May 29.

cannot bode well for highway safety—moves to first place.¹⁰ New Hampshire's forensic results may not exemplify drugged driving across the nation, but they fit within the reported uptick in the country's drugged driving.

The challenge for the criminal justice system in drug-impaired driving cases is to be able to determine when someone is unable to safely operate a motor vehicle because of their use of alcohol and/or drugs. The task may be considerably easier with one who is alcohol impaired, but significantly more difficult with the drug-impaired or poly-substance-impaired individual. The mere presence or quantity of a drug in one's system is not necessarily correlated to one's degree of impairment. One major challenge is that:

research is lacking on the specific effects of a number of drugs on driving performance. Furthermore, individual differences in the effects of a given drug make it even more challenging to systematically predict if a given drug or dosage will impair an individual (even more so with polydrug usage).¹¹

In the context of a prosecution for drug impaired driving, this presents many challenges for police, prosecutors, defense counsel and trial judges to contend with:

Whereas a BAC reading provides significant information about alcohol-impaired driving, no such meaningful number exists for drug-impaired driving. This results in the need to carefully collect information from a variety of legal personnel. This starts with a police officer who needs to carefully observe the signs of driving impairment that led to making the initial decision to pull a driver over. The officer must document signs of impairment and, if needed, receive support from an ARIDE-trained officer or DRE. A biological sample must quickly be taken and provided to a toxicologist for analysis. Unlike alcohol, the results of this drug test will not indicate any level of impairment. Yet, the combination of officer observations and toxicology results will begin to tell a story about the ability of an individual to operate a vehicle. The prosecutor must understand the strengths of available evidence as well as the weaknesses of available evidence (e.g., not asking the toxicologist to make observations about impairment from the drug test results). A judge must then be educated about the quality of the DRE process and how evidence fits together to show impaired driving. As can be seen from this example, prosecuting drugged driving offenses is about telling a coherent story from multiple sources of data.¹²

The upsurge in drugged driving, expanding marijuana legalization and continued intrusion of illicit drugs onto the highways emphasizes the need for scientific research, new reliable testing protocols, police training in drug recognition, and judicial education on the nature of drug-impaired driving.

1. *Countermeasures Against Prescription and Over-the-Counter Drug-Impaired Driving*, p. 4 (AAA Foundation for Traffic Safety, October 2018).
2. *Drug-Impaired Driving: Marijuana and Opioids Raise Critical Issues for States*, p. 7 (GHSA, May 2018).
3. *Drug Impaired Driving: A Guide for States*, p. 7 (GHSA, Updated April 2017).
4. *Drug-Impaired Driving: Marijuana and Opioids Raise Critical Issues for States*, p. 6 (GHSA, May 2018).
5. *Drug Impaired Driving: A Guide for States*, p. 2 (GHSA, Updated April 2017).
6. *The Legalization of Marijuana in Colorado: The Impact—Update Volume 5*, p. 1 (September 2018) available at: www.RMHIDTA.org.
7. *Marijuana Use, Alcohol Use, and Driving in Washington State*, p.1 (Washington Traffic Safety Commission, April 2018).
8. *Clinical Chemistry* 65:2 pp. 245-246 (2019), citing National Forensic Laboratory Information System (NFLIS).
9. New Hampshire Forensic Chemist Colleen Scarneo, Presentation to the NH Impaired Driving Summit (Dec. 2018).
10. *Id.*
11. *Countermeasures Against Prescription and Over-the-Counter Drug-Impaired Driving*, p. 2 (AAA Foundation for Traffic Safety, October 2018).
12. *Countermeasures Against Prescription and Over-the-Counter Drug-Impaired Driving*, p. 68 (AAA Foundation for Traffic Safety, October 2018).

LAW ENFORCEMENT'S TOOLS OF THE TRADE IN IMPAIRED DRIVING CASES

By Thomas H. Woodward
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Almost 40,000 people are killed on United States roadways each year and about 30 percent of those are the result of drivers being impaired by alcohol, drugs or both.¹ That's over 10,000 people every year; more people killed than died in 17 years of fighting two wars in the Middle East². To help law enforcement officers identify and remove impaired drivers from our roads, the National Highway Traffic Safety Administration (NHTSA) and the International Association of Chiefs of Police (IACP) developed, support and promote a number of training programs that assist law enforcement in detecting the impaired driver.

The earliest of these protocols involved Standardized Field Sobriety Tests (SFSTs) which were developed and validated from the mid-1970's through early 1980's to provide a reliable way to evaluate a driver's impairment. Prior to the development of the SFSTs, law enforcement officers used a variety of tests that were not uniformly administered, were not validated through research, and relied, in part, on each officer's subjective opinion. That meant many with responsibility for dealing with the impaired driver tended to look for only the "falling down drunk" yet research has long provided evidence that impairment exists long before a person has difficulty walking or standing up.

When developing the SFSTs, researchers used volunteers who were dosed to various blood alcohol concentration (BAC) levels to determine what tests, when administered in a carefully prescribed manner, could help a law enforcement officer evaluate if a driver was above or below a 0.10 BAC (0.10 was the lowest and most common illegal BAC for a driver in the United States at the time). A number of tests were evaluated but three were determined to provide the most reliable results for roadside testing: Horizontal Gaze Nystagmus, Walk and Turn, and One Leg Stand. The research and subsequent training provided standardized administrative procedures, standardized clues, and standardized criteria for establishing impairment.

As the legal BAC limit throughout the country was lowered to .08, it became necessary to determine if the SFSTs were still valid. Three research studies were conducted between 1995 and 1998. These studies concluded that officers, using the SFSTs properly, could very accurately determine if a person's BAC was .08 or more.

Since the widespread use of the SFSTs, impaired driving related fatalities in the United States have decreased from 21,113 in 1982³ to 10,874 in 2017¹. During that same time, however, we have seen an increase in drug impaired driving⁴. The ongoing opioid epidemic and the greater acceptance of marijuana for medical and recreational use has focused more attention on the problems associated with using both illicit and prescription drugs while driving a vehicle.

In the early 1970s, a traffic enforcement officer with the Los Angeles Police Department (LAPD) began talking with doctors, pharmacists, optometrists and a fellow officer who worked narcotics enforcement about drug impairment and what he was seeing in drivers arrested for impaired driving. That was the beginning of what has become the Drug Evaluation and Classification Program (DECP) that is now overseen internationally by the IACP.

Originating with the LAPD, the DECP was quickly identified by NHTSA as a potentially valuable tool for identifying drivers impaired by drugs. With input from medical and law enforcement professionals, a 12-step evaluation process was developed that enables a trained officer to identify (1) whether a suspect is impaired, (2) whether that

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Dates to Remember

May

Motorcycle Safety Awareness Month

Motorists: Share the Road with
Motorcyclists and Scooter Riders



Bicycle Safety Month Share the Road with Bicyclists

May 8
Bike to School Day

May 17
National Bike to Work Day

June 2 – 13
National Enforcement Mobilization

Occupant Protection
Click It or Ticket



LAW ENFORCEMENT'S TOOLS OF THE TRADE IN IMPAIRED DRIVING CASES continued from page 3

impairment is not likely caused by a medical condition, and (3) what kinds of drugs are causing the impairment. Research conducted in the early to mid-1980s confirmed the accuracy of the DECP evaluation for identifying drug impairment. The DECP evaluation incorporates the SFSTs with additional tests to identify psychophysical and clinical indicators of impairment and drug use for the purpose of determining if the suspect can operate a vehicle safely. The program is now operational in all 50 states, the District of Columbia, Canada and the United Kingdom.

Following a traffic stop, a police officer may observe indicia of drug impaired driving that includes not only erratic driving, but also the odor and presence of drugs, an admission by the driver of the use of drugs, and a low level of alcohol in the driver's system. When that occurs, a specially trained officer known as a Drug Recognition Expert (DRE) is called in to conduct an evaluation.

The DECP evaluation is standardized and systematic. The training is consistent throughout the country and each evaluation is conducted the same way, using the same procedures by all DREs. A DECP evaluation is not a roadside test. It is conducted in a controlled environment after a driver has already been arrested for impaired driving and it has been determined that alcohol is not the sole cause of the impairment. Nationally, about 1.5 percent of annual evaluations identify impairment being caused by a medical condition, and 7 percent of the evaluations identify that the suspect is not impaired by drugs at the time of their evaluation.⁵

To be certified as a DRE, a student must be proficient in the administration of the SFSTs, complete 72 hours of classroom instruction, participate in 12 evaluations where they use the skills learned in the classroom on actual drug impaired individuals, and pass three different exams with at least an 80 percent on each. DREs must be recertified every two years. To be recertified they must complete a minimum eight hours of refresher training, conduct at least four drug impaired driving evaluations with at least one observed by a DRE instructor and must satisfy a number of administrative requirements.

Most DECP evaluations are conducted on drivers who are initially arrested by officers who are not DREs. This requires an arresting officer be able to identify drug impairment that is sometimes different from that caused by alcohol. To address this gap in training, the Advanced Roadside Impaired Driving Enforcement (ARIDE) program was introduced in 2009.

ARIDE training is not a substitute for DECP training but is intended to augment SFST training by enabling the officer to observe, identify and clearly articulate the signs of impairment related to drugs, alcohol or a combination of drugs and alcohol. It is a 16-hour class with sessions covering SFST refresher, how and why drugs affect a person, how drugs are ingested, medical conditions that may mimic drug and alcohol impairment, indications of drug impairment and tests to help identify those indicators.

The skills that law enforcement officers learn during SFST, ARIDE and DRE training enable them to identify signs of impairment. This training provides officers with the specialized knowledge and experience that assists them in their investigations in impaired driving cases. These specially trained officers then can convey in the courtroom vital evidence that can assist the trier of fact in determining whether the driver was impaired by alcohol, drugs, or both. It is this articulated impairment that provides evidence a person cannot operate a vehicle safely, not the mere presence of a drug in a driver's breath sample or specimen of bodily fluid.

1. "Drunk Driving Deaths in 2017," <https://www.nhtsa.gov/>
2. "American War Deaths Throughout History," Military Factory, https://www.militaryfactory.com/american_war_deaths.asp
3. "Traffic Safety Facts 2009," U.S. Department of Transportation, NHTSA, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811402>, 32
4. "Fact Sheet: National Roadside Survey of Alcohol and Drug Use by Drivers," NHTSA, <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/11388d-roadsidesurvey-factsheet.pdf>
5. "National Sobriety Testing Resource Center and Drug Recognition Expert (DRE) Data System," NHTSA, <https://dredata.nhtsa.gov/main/login.cfm>

DON'T FORGET

Valuable resources can be found at:

- **National Highway Traffic Safety Administration**
<http://www.nhtsa.gov/Impaired>
- **American Bar Association/Judicial Division/NCSCJ**
http://www.americanbar.org/groups/judicial/conferences/specialized_court_judges/NHTSA.html
- **Highway to Justice - Archives**
http://www.americanbar.org/publications/judicial_division_record_home/judicial_division_record_archive.html
- **National Judicial College**
www.judges.org

- **Governors Highway Safety Association: Alcohol Impaired Driving**
<https://www.ghsa.org/issues/alcohol-impaired-driving>
- **AAA Foundation for Traffic Safety**
<https://www.aaafoundation.org/>
- **National Center for State Courts**
<http://www.ncsc.org/>
- **National Center for DWI Courts**
<http://www.dwicourts.org>

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CASE NOTE: ARIDE OFFICER QUALIFIED AS EXPERT WITNESS IN STATE OF IOWA V. SANCHEZ-CASCO

*By Honorable Neil Edward Axel
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Late last year, Iowa's intermediate appellate court decided the case of *State v. Sanchez-Casco* and affirmed the defendant's conviction for operating a motor vehicle while intoxicated.¹ On appeal the issue was whether the trial court abused its discretion in allowing Officer Brewer to testify as an expert witness and render an opinion that Sanchez-Casco was intoxicated by alcohol, other drugs or both.

By way of background, in the early morning hours of May 16, 2017, Mr. Sanchez-Casco drove to a convenience store where the clerk observed him displaying "odd and irritable behavior." After leaving this convenience store, and after the clerk called the police, Mr. Sanchez-Casco was observed by Sergeant Martin at a second convenience store. Sergeant Martin stopped to investigate the first clerk's call and noticed Sanchez-Casco walking out of the convenience store. She observed him to be swaying, and upon approach she detected the strong odor of alcohol coming from him. Additionally, he "had bloodshot eyes and was exhibiting erratic behavior." Another officer arrived and observed Sanchez-Casco "display erratic behavior, bloodshot eyes, slurred speech, impaired balance, odor of alcohol, dilated pupils, profuse sweating, and nervous tics."

As a result of these observations, Officer Jennifer Brewer was called to the scene because of her expertise in recognizing alcohol and drug intoxication. In addition to her standard law-enforcement training, she was certified in Advanced Roadside Impaired Driving Enforcement (ARIDE) and is a certified drug recognition expert.² Officer Brewer observed Sanchez-Casco while he was seated in the back of a police cruiser. She immediately detected the odor of alcohol, and testified as follows:

I couldn't understand [him] because his speech was slurred and he was, just, running words together. I couldn't understand what he was saying. He was very, very talkative, he spoke quickly, and his movements were exaggerated. He was irritable. His speech was the thick tongue and slurred. And then, the odor of alcohol was stronger when he was speaking to me.

Mr. Sanchez-Casco would not permit Officer Brewer to conduct the twelve-step DECP protocol and refused a breath, blood and urine testing. Based upon her observations, and the information provided her from the other officers on the scene, Officer Brewer was permitted to testify as an expert witness on the issue of intoxication and concluded that Sanchez-Casco was not only under the influence of alcohol, but also under the influence of a drug.

In Iowa as in many jurisdictions, an expert may testify in the form of an opinion if his or her "scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."

The court concluded that Officer Brewer was well-qualified to opine on intoxication from alcohol and other substances and the trial court did not abuse its discretion in admitting her as an expert witness.

This case demonstrates that even without conducting the full twelve-step DECP protocol, a police officer can have specialized training and knowledge regarding one's intoxication so to assist the trier of fact in determining whether one is intoxicated by alcohol, drugs, or both. It also demonstrates that the opinion of an expertly trained officer is part of a totality of the facts and circumstances considered by a judge or jury in determining guilt or innocence in impaired driving cases.

1. 2018 WL 6132282 (Ia. Ct. App. 2018).

2. Elsewhere in this issue, Thomas H. Woodward describes the differences between ARIDE and the DECP in his article, *Law Enforcement's Tools of the Trade in Impaired Driving Cases*.

U.S. SUPREME COURT TO RULE ON APPLICATION OF IMPLIED CONSENT LAW TO UNCONSCIOUS DRIVER

On January 11, 2019, the U.S. Supreme Court granted certiorari in a case that may extend or apply its prior holdings in *Missouri v. McNeely* and *Birchfield v. North Dakota*. In this case, Gerald Mitchell is appealing his convictions for operating while intoxicated and with a prohibited alcohol concentration, which were affirmed by the Supreme Court of Wisconsin in *State v. Gerald Mitchell*, 383 Wis.2d 192, 914 N.W.2d 151 (2018). The issue presented by the petitioner is: "Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement."

After being arrested for drunk driving and while in route to the police station for secondary chemical testing, Mitchell became "lethargic" so the officer transported him to the hospital. At the hospital, he became totally unconscious. The police officer requested hospital staff draw blood as evidence, which they did without a warrant. The Supreme Court of Wisconsin held that the warrantless blood draw was not an unreasonable search, and therefore no Fourth Amendment violation. The Court reasoned that "Mitchell voluntarily consented to a blood draw by his conduct of driving on Wisconsin's roads and drinking to a point evidencing probable cause of intoxication. Further, through drinking to the point of unconsciousness, Mitchell forfeited all opportunity, including the statutory opportunity to withdraw his consent previously given; and therefore, § 343.305(3)(b) applied, which under the totality of circumstances reasonably permitted drawing Mitchell's blood."

Oral argument is scheduled for April 23, 2019, and an opinion is expected before the end of the current Term.

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UPCOMING NATIONAL JUDICIAL COLLEGE COURSE



Impaired Driving in Indian Country

Wednesday, Apr 24, 2019 to Friday, Apr 26, 2019
Oklahoma City, OK

The National Judicial College (NJC), through funding from the National Highway Traffic Safety Administration (NHTSA), is pleased to offer a free course for tribal court judges: Impaired Driving in Indian Country. Included in the funding are the cost of tuition, all class materials, and up to \$750 in travel and lodging expenses.

Impaired Driving Case Essentials

Monday, May 20, 2019 to Thursday, May 23, 2019
Reno, NV

This course provides you with an overview of sentencing practices and evidence-based options for impaired driving traffic offenses including those committed by younger drivers, older drivers, and hardcore DUI defendants. After this course, you will be able to analyze circumstances providing a legal basis for stops, searches, seizures, arrests, and the admissibility of testimonial or physical evidence.

Whom should I contact for more information?

For more information, please contact the Registrar's Office at (800) 255-8343 or registrar@judges.org.

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