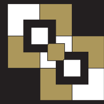

NC DD Journal

National College for DUI Defense

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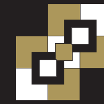
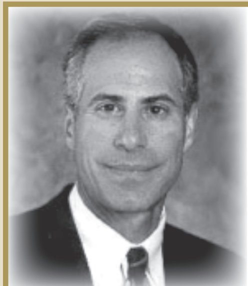


Winter 2009

A MESSAGE FROM THE DEAN



Defending those charged with the offense of Driving Under the Influence has become increasingly difficult with the advent of harsher penalties and the continuing efforts to apprehend those suspected of driving while impaired. While the United States Supreme Court has made note of "the carnage caused by drunk drivers… ,"[1] our society overlooks the carnage to our civil liberties by the overzealous prosecution of this crime.

In fact, our first Dean, Lawrence Taylor, has warned for decades that courts carve out exceptions to our federal and state constitutions when DUI cases are involved.[2] Few courts presently guard against the dilution of our constitutional rights when the case involves a DUI. However, to paraphrase the Tennessee Court of Criminal Appeals, "[t]he constitutional standards are not lessened, nor does a governmental officer have broader authority [in a] DUI investigation."[3]

Accordingly, the leadership and members of the NCDD must press on to better educate ourselves, our judges and the general public about the flaws in prosecutorial technology. We must learn to use more persuasive methods to rebut inaccurate chemical test results and opinions based on unsound and incorrectly administered field sobriety tests.

The NCDD is committed to helping our members achieve these goals. If you have ideas about how we can better help our members become more effective advocates for their clients, please contact Rhea Kirk, our Executive Director. I assure you that your suggestions will be carefully considered.

We look forward to seeing you at an upcoming seminar where we can learn about your innovative and ingenious methods of successfully defending your clients.

On behalf of the entire Board of Regents, we wish you and your families a happy, healthy and prosperous New Year.

E.D.'S CORNER

It's hard to believe that 2009 is drawing to a close! What a year we have had filled with great seminars and plenty of camaraderie. During such a tough economic year, the NCDD has added more new members than ever before. This is a true testimony to the strength of its membership.

We look forward to a fantastic cruise and Winter Session, January 17-24, with Dean Oberman at the helm! (I hope I don't mean that literally!) Next comes MSE, April 8-10, in New Orleans again! The Big Easy will never be the same! The Summer Session for 2010 has moved to July 29-31, which is a little later than usual. It will be back in Austin North and plans are already underway for a great learning experience. Make sure to mark your calendar!

We have lost some wonderful members this year that will be missed by so many of you. I know your thoughts and prayers are with their families. As we look toward 2010 and what this year will bring, I wish you all the best and hope to see you soon at our upcoming seminars!

Regards,
Rhea

[1] South Dakota v. Neville, 459 U.S. 553, 103 S.Ct. 916 (1983).
[2] *See generally*, www.duiblog.com.
[3] State v. Puckett, 2003 WL 21638048 (Tenn. Crim. App. 2003).

SURVIVING THE DOWNTURN
Survival Tips for Lawyers in Hard Times

by George Stein & Michael Hawkins

Everyone reading this has heard the expression: "desperate times call for desperate measures." Better adjectives than "desperate" exist to describe the present time, but the phrase's effectiveness has not lost anything in today's world with a new word substitution. Let's face it – hard times call for hard measures.

With the exception of bankruptcy, real estate foreclosures and divorce law, the legal industry has suffered hard times in the present recession. Lawyers who believe they can continue practicing law like they did during the boom years and not make any adjustments will either suffer eye-popping cash flow problems or go out of business entirely.

However, there are a number of adjustments that can be made which will effectively "recession-proof" a law practice. Some are easy to make, some are painful adjustments. What should be evident to everyone is that doing nothing is simply no longer an option.

It has been said that DUI defense is a "recession-proof" industry. At first glance, it might seem accurate. Folks are either out celebrating their promotions in good times or drowning their sorrows because they lost their job in bad times. So if the number of DUI cases the police make does not go down with an economic downturn, why is the number of clients dwindling? The answer, most likely, is that the number of people who are capable of hiring competent counsel goes down when the economy is bad, because people don't have the resources to spend money on lawyers. It is a bit of catch-22; having a DUI on one's record may prevent them from getting their next job! In that regard, making sure your own house is in healthy financial shape is a good place to start.

1. WATCH THOSE BOOKS!

Are the financial books in order? Have you seen them? Do you even know where they are located? If your answer to any of those questions is "no" or "I don't know," it is time to change tactics. Get to know your financial situation and how the cash moves through your firm.

If your practice has been in existence for longer than ten (10) years, do a brief study of the books on how the firm fared during the "dot-com / September 11th" recession in 2001. Try to recall what percentage your business fell off (if any), and any specific, successful steps you undertook to manage those times.

The next step is broken into two parts. First, you should find out what your monthly expenses are down to the penny. The second part of this step is to identify, as accurately as possible, what the income of the firm is for an average month. Using the monthly income average, start to compile budget plans for decreases in income for certain percentages (e.g. - ten percent drop in income, twenty-five percent

Continued on page 2

drop, etc.). Use the monthly expenses to analyze what items need to be reduced or eliminated entirely. Your analysis should go all the way out to a "worst case scenario" where any more decrease in money would equal business bankruptcy.

A third tactic is to scrutinize your invoices for outstanding balances. If your business level has dropped, this is an excellent time to catch up on those clients who owe the firm money. While you will likely encounter people who have also suffered during the hard times, you may also still generate a few more dollars income than you had planned. This step, if taken, will reinforce your new attitude that "every dollar counts."

A significant, and important, side effect of taking proactive steps to manage the books and cash flow is the appearance it creates among outside observers. In the event that finances get especially tough for a law firm and a bank loan is necessary, any creditworthy financial institution will want to examine the books. A lawyer who can demonstrate that he or she knows the contents thoroughly and has budgeted numbers for various contingencies will appear on top of his or her game, and will improve the chances of securing needed collateral.

2. TRIMMING THE FAT
(AND SOME MUSCLE, IF NECESSARY)

If you have already done the cash flow analysis identified above, then you have an excellent snapshot of where the money gets spent in a law office. While most of the expenses will be obvious and not very revealing (e.g. – office rent, paper and office supplies, etc.), you may actually discover some surprises. For example, in larger firms, break room expenses (such as free coffee or soda) may add up to significant monthly expenditures.

The managing partner in a law firm must then look at the expenses and decide what costs are essential and not subject to reduction versus those which can be reduced or eliminated entirely. Each firm is unique - thus, there is no "magic" template to cutting expenses. This is a judgment game, so the person charged with the duty has tough (and unenviable) choices to make.

Cutting expenses also gives rise to new opportunities as well. For example, if your firm expends a great deal of money on travel-related expenses, see if the work performed can be done via teleconferencing instead. Certain internet companies (such as www.gotomeeting.com) already host the software and capabilities to perform this function. If the firm expends significant amounts of money on courier fees for filings, see if the courts offer e-filing as an option. A large number of federal courts already require e-filing of documents, and Lexis has established an e-filing service for quite a few state courts (Lexis Nexis File & Serve).

While cutting expenses may be necessary for law firm survival, the managing partner should be cognizant about the perceived effect these cuts will have on staff. A perception, rightly or wrongly, may spread throughout the firm that the business is in trouble and the firm will squeeze employees as well. A prudent move is to announce ahead of time that certain expenses or perks may have to be reduced or cut on account of the economic downturn; however, once the economy improves, they will be restored.

Finally, a firm may be faced with the ultimate challenge – letting certain personnel go to ensure business survival. Again, this tactic will rely upon choices that are specific to each and every firm. Only an insider can determine who is essential, and what person is either redundant, outdated or serves a marginally necessary function. One thing to keep in mind is, again, technology can help fill gaps created by personnel reductions. For example, a new application on the world wide web called speakwrite.com allows users to dictate documents and other works by speaking into any telephone from anywhere in the world twenty-four hours a day, seven days a week. The finished products are returned to the user in about three hours via an email attachment or download from a website. Theoretically, this could replace a law firm's secretarial position, if necessary. The added benefit is that the service always works, never suffers from inconveniences encountered by human employees (e.g. – sick or vacation leave), and eliminates the added expenses of job benefits, such as health or dental insurance.

3. EVOLVE YOUR PRACTICE

A centerpiece of Charles Darwin's evolution theory is that organisms in new (and often hostile) environments must evolve or face extinction. During hard times, law firms must often change their practice areas or face possible extinction. The "survival of the fittest" theory of natural selection has a real application to the practice of law.

Any firm that practices in one area or considers itself a "boutique" will likely see its income suffer as both individuals and businesses cut expenses – including legal costs. In contrast, any firm that considers itself a general practice has a better chance of accepting whatever work comes into the law office.

Thus, the specialist must evaluate about expanding his or her practice into areas he or she may have not considered. During hard times, some law practice areas do increase business; however, these areas may involve material wherein the practitioner is not competent. Some of these will require little knowledge to become competent – for example, uncontested divorces are usually quick and involve relatively few forms. Some may involve rather intensive retraining, such as bankruptcy law. Each state's bar association provides continuing legal education courses that can provide the necessary foundation for attorneys to start new law practice areas.

If your practice is limited to DUI and related offenses, then this is the time to re-commit yourself to every aspect of your practice. Financial advisors keep referring to this downturn in the economy as a "reset" – perhaps we should look at it that way in our practice as well. When times are good and your calendar is busy, that next appointment with a potential client may seem like a burden and an obstacle to your other obligations. But when business is slow, you may find yourself waiting for the phone to ring, and worry when it does not. Now is the time to remind yourself that potential clients often may be "shopping" several lawyers, and that you must distinguish yourself from others lawyers who practice in your area.

4. CREATE AND INSTILL CUSTOMER LOYALTY

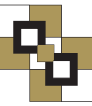
A law firm, like any other business, is dependent on the customers it serves. These individuals or businesses are the revenue sources that keep the lights on and people working. During hard times, it is incumbent on law firms to ensure that their already-existing customers are satisfied, and that new customers are imbued with confidence when they seek the firm's assistance.

The managing partner should make sure that all attorneys within the firm are performing up to a minimum (but high) standard. Attorneys also should be familiar with the clients' files, and should be prompt responding to client inquiries. Nothing alienates a client faster than the impression that his or her matter is being treated indifferently by a firm.

If your clients like your work, have them refer their family, friends and associates to you for assistance. Not only does this practice target people who are in actual need of assistance, but it is free as well. Advertising costs money whereas word of mouth is free. This strategy helps bring work into the firm while keeping advertising costs to a minimum.

Additionally, the lawyers in a firm should keep abreast of changes in the law that may affect legal work that has already been performed. While the Model Rules for attorney professionalism generally bar direct solicitation of individuals or businesses for law work, there exists an exception where lawyers can inform clients about changes in the law that may affect work that has been completed. This may generate new billable hours, and the client will appreciate your diligence.

Finally, if you are forced to advertise, do so intelligently. Re-



member that a lot of law firms advertise through common, and expensive, media – such as the Yellow Pages or via television. In lean times, a law firm needs to understand its client base and how to target advertising to those individuals. For example, a booth at a trade conference for a particular industry might be a better, and cheaper, way to generate business than taking out a quarter-page ad in the phone book. Additionally, the advertising should highlight how the firm separates itself from the competition. What does your firm do that is different from the others? Has your firm innovated any aspects of the law practice? Clients want to know that if they are spending big dollars for a lawyer, they are getting value for the money.

5. WATCH THE P'S & Q'S

All law firms must remember that, if times are tough for the law practice, most likely it is tough for everyone as well. Consequently, while the firm is looking for ways to save money, so is everyone else.

Law firms must check their prices and see if they are competitive in their respective markets. If the firm's prices are within the market limits and it does a good job of instilling customer loyalty, the law practice can reasonably deduce it will keep its current client base. However, if the firm is faced with either prices that exceed those of the competition or if it has to raise its rates, the firm must consider the possibility that it will lose customers or scare away prospective business.

6. USE AVAILABLE RESOURCES

While the practice of law can be a cut-throat business, there are resources available within the profession to help manage a recession. Just recently, the American Bar Association created the Economic Crisis on the Profession and Legal Needs Committee. It is designed as a clearinghouse for information and resources available to lawyers to weather the recession, and to match unemployed lawyers with people facing evictions, foreclosures, bankruptcies and other problems caused by the hard times. The ABA has also created an economic recovery portal on its home page, at www.abanet.org, that leads to resources including a job bank, recordings of an ABA teleconference series on recession recovery and articles with advice on finding jobs, marketing one's practice, stress management and other concerns. In the author's state of practice, the Bar Association has created an online page titled "Resources for Unemployed Lawyers" where attorneys can research current employment opportunities. While there are no guarantees that your state's bar association will have similar programs, the author was able to find similar programs in Colorado, Pennsylvania, and Oregon.

The National College for DUI Defense website (www.ncdd.com) has recently been updated and provides excellent resources for DUI defense attorneys. Members of the NCDD also have access to its member listserve, which allows lawyers from all over the country to share information and inquiries with its members by the exchange of email "posts" to which all members have access.

Julie A. Fleming, a lawyer who now who counsels other lawyers on professional and business development, career management and work-life integration issues, says that there are "Seven Secrets Every Lawyer Must Know to Thrive, Even in a Recession." Follow these seven simple steps, Fleming promises, and "you'll be able to build successful, satisfying and sustainable practices."

1. Don't dwell on bad economic news to the extent that you worry about problems that may not occur and miss opportunities right in front of you.
2. Be ruthless with time, not only with client matters but with career goals and professional development.
3. Listen carefully, not only to what others are saying, but to their tone of voice, speech patterns, choice of words and body language.
4. Network in the "right" way with the "right" people, and then follow up.
5. Be innovative about what you have to offer.
6. Educate yourself on the basics of business for yourself and for clients.
7. Build strong connections with other similarly situated lawyers

The current economic downturn should not be viewed as the death knell for a firm or as a period to be endured. With some effort, a firm can maintain its book of business or even increase its revenue stream. Taking these steps and recommitting yourself to the practice of law should pave the way for you to survive the downturn, and to prosper when better economic times return.

NCDD CREATES A FOUNDATION

It should be a matter of great pride to all members of NCDD to learn that we have formed the NCDD Foundation, Inc. Now, all gifts and contributions, made either as memorials, commendations, or donations will finance scholarships to seminars given to deserving attendees.

Thanks must be given to Regents Mike Hawkins and George Bianchi for the work done in establishing the new Foundation. Mike did the paperwork necessary to obtain our legal status and IRS approval. George's advice and counsel assisted substantially.

Those funds contributed previously to the NCDD Scholarship Fund have been moved into the NCDD Foundation account. From this point forward, all sums will fund those scholarships, given annually, in the names of our College members who have passed away. This past year, 2009, saw many deaths among our members and immediate families. Thus, take pride in our growth and the avenue now available for paying tribute to our fallen friends and loved ones. The Foundation will also accept donations given in the name of the "scholarship fund." Please make any future contributions payable to the "NCDD Foundation."

Daily operations will be conducted by Fellows Tommy Kirk, Flem Whited and Jess Paul. The Board, overseeing the entire operation, is comprised of all former Deans, now Fellows.

Any inquiries regarding the Foundation should be made to John T. Kirk, National College For DUI Defense Foundation, 445 S. Decatur St., Montgomery, AL 36104, 334-264-1498, jtkirk@montgomerydui.com.

Flem's Case Law Update

by Flem K. Whited III, Fellow

Trial counsel's failure to file a motion to suppress defendant's blood test results constituted deficient performance and ineffective assistance of counsel that warranted reversal of defendant DUI conviction.

Thrasher v. State,
2009 WL 2999167 (Ga.App.)

Larry Glenn Thrasher was convicted following a jury trial of driving under the influence of methamphetamine to the extent that he was a less safe driver, pursuant to OCGA 40-6-391(a)(2). Thrasher appealed, arguing ineffective assistance of counsel because his attorney failed to file a motion to suppress. He also argued that the trial court erred in allowing a police officer to testify as an expert, stating that facial discoloration is indicative of recent methamphetamine use. The court of appeals reversed his conviction, holding that

Thrasher was prejudiced by his trial counsel failure to file a motion to suppress.

An appellate court reviewing a trial court's ruling on a claim of ineffective assistance of counsel must accept the trial court's factual findings and credibility determinations unless clearly erroneous, but [will] independently apply the legal principles to the facts. (Citation and punctuation omitted.) *Wheat v. State,* 282 Ga.App. 655, 656, 639 S.E.2d 578 (2006). To prevail on a claim of ineffective assistance of trial counsel, a defendant bears the burden of showing both that trial counsel was deficient and that he was prejudiced by the deficiency. (Citation and punctuation omitted.) *Rogers v. State,* 285 Ga.App. 568, 569(1), 646 S.E.2d 751 (2007). A convicted criminal defendant must show that counsel's representation fell below an objective standard of reasonableness. *Strickland v. Washington,* 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The court of appeals viewed the evidence in the light most favorable to the jury's verdict. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The evidence showed that on June 9, 2009, Thrasher was involved in a car accident when a woman named Melody Harrison rear-ended his truck. A call was placed to 911 at approximately 3:50 p.m. Officer Andrew Dingle was the first officer to arrive on the scene. He arrested Thrasher's passenger, his son Matthew, upon discovering that an outstanding warrant existed for his arrest. The officer had also found methamphetamine where Matthew was seated. Initially, Thrasher fled the scene of the accident, but was picked up by police shortly thereafter. Sergeant Shawn Tucker, an accident investigator, arrived on scene at 4:26 p.m. and spoke to Thrasher when he was returned to the scene by the police at around 4:48 p.m. Ms. Harrison identified Thrasher as the driver of the truck. Sergeant Tucker briefly questioned Thrasher, who admitted to leaving the scene of the accident, but denied that he was the driver of the truck.

Upon making with Thrasher, Sergeant Tucker that he was sweating, talkative, excited, quick spoken, and evasive. The Sergeant also noted Thrasher had a blackish discoloration around his lips and inside his mouth. Based on his observations, the Sergeant concluded that Thrasher was under the influence of recently-smoked methamphetamine, which impaired his driving. Thrasher was placed under arrest for leaving the scene of an accident and transported to the county jail. Sergeant Tucker read Thrasher his implied consent rights at the jail and Thrasher agreed to submit to a blood test. The blood test revealed a positive result for the presence of methamphetamine.

On appeal, Thrasher asserted that his trial counsel was ineffective because he failed to file a motion to suppress the results of his blood test. Specifically, Thrasher argued that his blood test results should have been suppressed because Thrasher was not read his implied consent rights at the time of his arrest at the scene of the accident. For the reasons explained below, the court of appeals agreed.

Failure to file a motion to suppress will not constitute per se ineffective assistance of counsel. Given that Thrasher alleged that ineffectiveness was demonstrated by his trial counsel's failure to move for suppression of his blood test, Thrasher was required to make a strong showing that the evidence would have been suppressed had a motion to suppress been filed. *Stanley v. State,* 283 Ga. 36, 39(2)(a), 656 S.E.2d 806 (2008). When a showing is made that a motion to suppress would have been meritorious and when a reasonable likelihood exists that the outcome of the trial would have been different if evidence had been suppressed, reversal is required. *Jefferson v. State,* 217 Ga.App. 747, 753(1)(c), 459 S.E.2d 173 (1995). The court of appeals found that Thrasher had made the required showing warranting reversal of his conviction.

The court found the record showed only that Thrasher was arrested for leaving the scene of the accident around 4:48 p.m. when Sergeant Tucker began questioning him. His implied consent rights were read at 5:45 p.m., 57 minutes following his arrest. There is nothing in the record to indicate that Thrasher was ever formally arrested for driving under the influence. Pursuant to Georgia law, an arresting officer must read a person's implied consent rights contemporaneously with his/her arrest for driving under the influence involving an accident. OCGA 40-5-55 and 40-6-392(a)(4). As such, the threshold question for the court was whether Thrasher was ever placed under arrest for driving under the influence.

The Supreme Court of Georgia has held:

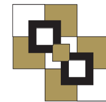
> The arrest necessary before the reading of implied consent ... does not have to be a normal arrest in which the officer explicitly states to the suspect that he or she has been arrested. To the contrary, an arrest is accomplished whenever the liberty of another to come and go as he pleases is restrained, no matter how slight such restraint may be. The defendant may voluntarily submit to being considered under arrest without any actual touching or show of force. Thus, implied consent is triggered at the point that the suspect is not free to leave and a reasonable person in his position would not believe that the detention is temporary, regardless of whether a normal arrest has occurred.

(Citations and punctuation omitted.) *Hough v. State,* 279 Ga. 711, 716(2)(a), 620 S.E.2d 380 (2005).

In the present case, the court found it clear that Sergeant Tucker, immediately after he questioned Thrasher at the scene of the accident, believed he had probable cause to arrest him for driving under the influence of methamphetamine. The Sergeant's initial probable cause determination did not change upon further investigation at the jail. As Thrasher was arrested for leaving the scene of the accident at or about 4:48 p.m., he was not free to leave at any time thereafter. There was no evidence indicating that Thrasher was ever formally arrested for driving under the influence, not at the scene of the accident nor later at the jail. Sergeant Tucker nonetheless read him his implied consent rights at the jail. The court determined that Thrasher was actually placed under arrest for driving under the influence at the time he was arrested at the scene of the accident. However, he was not read his implied consent rights until he was at the jail, nearly an hour after his arrest.

The court explained:

> [w]hile there are a number of exceptions to the rule that implied consent rights must be read at the time of arrest, none are applicable here. See, e.g. *Rogers v. State,* 163 Ga.App. 641, 643(1), 295 S.E.2d 140 (1982) (defendant unconscious or otherwise incapable of understanding implied consent rights); *Fore v. State,* 180 Ga.App. 196, 348 S.E.2d 579 (1986) (exigent circumstances as warranting implied consent rights warning as soon as practicable).
>
> The record before this Court, therefore, shows an unexcused delay of 57 minutes from the time of Thrasher's arrest to the time he was read his implied consent rights which, as a matter of law, rendered inadmissible the results of chemical testing on the blood sample he gave. See OCGA 40-6-392(a)(4); see *State v. Austell,* 285 Ga.App. 18, 20(2), 645 S.E.2d 550 (2007) (delay of 35-45 minutes between arrest and reading of implied consent rights justified grant of motion to suppress); *Dawson v. State,* 227 Ga.App. 38, 40(2), 488 S.E.2d 114 (1997) (delay of more than 45 minutes between arrest and reading of implied consent rights required exclusion); *Clapsaddle v. State,* 208 Ga.App. 840, 842(1), 432 S.E.2d 262 (1993) (delay of an hour between arrest and reading of implied consent rights required suppression).
>
> Trial counsel's failure to move to suppress the results of chemical testing in the instant circumstances constituted deficient performance as counsel. *Stanley,* supra, 283 Ga. at 39(2), 656 S.E.2d 806. Inasmuch as Thrasher's son pled guilty to the offense of possession of methamphetamine, the



State's case against Thrasher was substantially grounded upon Thrasher's blood sample, which tested positive for methamphetamine. Given the foregoing, we find that the outcome of Thrasher's trial would likely have been different had the results of chemical testing in this case been suppressed. See *Jefferson v. State,* 217 Ga.App. 747, 749-753(1)(a)-(c), 459 S.E.2d 173 (2001) (failure to file motion to suppress physical evidence required reversal based on ineffective assistance of counsel). Finding deficient performance of trial counsel and prejudice, as above, we must reverse. *Rogers,* supra, 285 Ga.App. at 569(1), 646 S.E.2d 751.

Conduct of shifting vehicle into all-wheel drive mode prior to directing driver to drive over log was sufficient assumption of control to place intoxicated passenger in violation of DUI statute, making his resulting debt to injured bystander payable on tenth-level priority basis

In Re Loader,
406 B.R. 72 (Bankr. D. Idaho 2009)

Creditor was seriously injured in a parking lot after a truck drove over a log that had been placed as a parking barricade. The accident was caused when Debtor, an intoxicated passenger of the truck, placed the vehicle into all-wheel drive and instructed the driver to accelerate over the log.

Creditor sued Debtor and the driver of the truck in state court for damages resulting from her injuries. The jury found both Debtor and driver to be negligent in causing Creditor's injuries, placing 95% of fault to Debtor, and 5% of fault to the driver. The jury found the conduct of Debtor and driver to be outrageous and determined Debtor and driver to be acting in concert in causing the accident. The jury awarded Creditor $50,000 of punitive damages against driver, and $180,000 against the Debtor. A formal judgment was later entered by the state court against Debtor and driver, adjudging them jointly and severally liable to Creditor in the amount of $167,784.48. In addition, Debtor and driver were adjudged individually liable to Creditor, driver for $55,425.20 and Debtor for $199,529.40.

Subsequent to the verdict, Debtor filed the Chapter 7 Bankruptcy petition commencing this case.

Creditor filed a proof of claim, asserting that her claim in the amount of $223,209.68 against Debtor was entitled to priority under 507(a)(10). *See* Bankruptcy Code, 11 U.S.C. 507(a)(10). Trustee objected, arguing the claim fell outside the scope of the bankruptcy statute which accords tenth-level priority to claims for personal injury or death that result from unlawful operation of a motor vehicle or vessel as a result of debtor intoxication. Trustee argued that it should be allowed only as a general, unsecured claim.

The Bankruptcy Court overruled the Trustee's objection, holding:

> [W]hile verbal encouragement that intoxicated passenger provided to driver of truck to attempt to drive over log that was being used as a parking barricade was insufficient, without more, to place him in actual physical control of vehicle, as that term was used in Idaho driving-under-the-influence (DUI) statute, his conduct in placing vehicle in all-wheel drive mode prior to directing driver to drive over log was sufficient assumption of control, under Idaho law as predicted by bankruptcy judge in that state, to place him in violation of DUI statute and to make his resulting debt to bystander struck by the dislodged log payable on tenth-level priority basis.

Creditor's claim for priority rested upon Section 507(a)(10), which accords a tenth-level priority to allowed claims for death or personal injury resulting from the operation of a motor vehicle or vessel if such operation was unlawful because the debtor was intoxicated from using alcohol, a drug, or another substance. 11 U.S.C. 507(a)(10).

Trustee reported that only $3,880.14 was available from Debtor estate to satisfy the claims of Debtor's creditors. If Creditor's claim was to be given priority, she would receive all of the money to be distributed by Trustee, leaving any other creditors to receive nothing. If Creditor's claim is not entitled to priority, then the money held by the Trustee for distribution would be shared by the unsecured creditors. See 726(a)(1) and (2) (allowed priority claims are generally paid prior to any distributions made to non-priority unsecured claims).

Creditor had the burden of proving, by a preponderance of the evidence, that her claim is entitled to priority. See *In re Prickett,* 00.3 I.B. C.R. 152, 152 (Bankr. D. Idaho 2000). Pursuant to 507(a)(10), to obtain priority, a claimant must show (1) that it holds a valid claim, (2) damages were incurred for death or personal injury, (3) the damages resulting from the operation of a motor vehicle or vessel, and (4) the operation was unlawful due to the debtor intoxication.

There was no dispute that Creditor's claim was valid and that Debtor was intoxicated. Trustee's objection was only in regards to Creditor's claim being treated with priority, which Trustee contended was improper because Debtor's conduct did not amount to unlawful operation of the motor vehicle. The issue for the Court was whether Debtor's conduct in placing the truck into all-wheel drive and instructing the driver to accelerate over the log amounted to unlawful operation of the motor vehicle.

Counsel for Creditor advanced that the unlawfulness required by 507(a)(10) could result from conduct separate and apart from operation of a vehicle while intoxicated. Creditor argued that Debtor conducted amounted to unlawfulness as it violated other statutes, such as those that prohibit assault and battery. The Court disagreed:

> Considering the language of 507(a)(10) as a whole, the term unlawful cannot be viewed in isolation; it is married to both the operation of the vehicle, and the debtor's state of intoxication. In the Court's view, 507(a)(10) does not simply require that debtor be engaged in some sort of unlawful conduct while intoxicated. The Code instead requires that the debtor's operation of the motor vehicle be unlawful because the debtor was intoxicated. Because intoxication is not a separate element in any of the crimes identified by counsel for [Creditor], whether Debtor's conduct may have qualified as criminal under those statutes is of no moment.

The Court discussed whether a debtor is required to suffer a criminal conviction in order for a claimant to receive priority for an injury claim under 507(a)(10). The Court noted that an actual criminal conviction is not required in order for a debt to be excepted from discharge under 523(a)(9). See *United Servs. Automobile Assn. v. Pair (In re Pair),* 264 B.R. 680, 684 (Bankr. D. Idaho 2001). Applying that same reasoning, the Court concluded, a criminal conviction is not necessary under 507(a)(10), so long as all the other elements of the statute are satisfied.

The next issue was whether Debtor's conduct in the present case amounted to the unlawful operation of a motor vehicle. The Court looked to state law in making its determination:

> In Idaho, i]t is unlawful for any person who is under the influence of alcohol ... to drive or be in actual physical control of a motor vehicle.... Idaho Code 18-8004(1)(a) (emphasis added). To be in actual physical control of a vehicle, the actor must be in the driver's position of the motor vehicle with the motor running or with the motor vehicle moving. Idaho Code 18-8004(5).

Trustee argued that Debtor, although intoxicated, was not unlawfully operating the vehicle because he was never in the driver seat and therefore not in actual physical control of the vehicle as defined by Idaho Code 18-8004(5). Trustee cited *State v. Adams,* 142 Idaho 305, 127 P.3d 208 (Ct. App. 2005) to support his argument.

The Court disagreed:

> [U]pon close reading, Adams is of little help to Trustee. In that case, it was undisputed that the defendant was sitting in the driver's seat of a car with the motor running. However, the court's decision did not hinge on the defendant's location within the vehicle, but rather on whether the vehicle was capable of moving or being controlled. It seems the vehicle was inoperable due to a problem with the transmission. Because of this fact, the court held i]f a vehicle cannot be moved it is not a motor vehicle capable of being controlled, and consequently, the statute is not violated when the vehicle is not in motion or susceptible of easily being placed in motion. Id. at 211. The facts here are much different than in Adams. It is undisputed that the truck was operable, and in fact moved.

The Court also noted that state courts have held a person location within the vehicle to not be the only inquiry when determining whether the person was in control of a vehicle. See *State v. Cheney,* 116 Idaho 917, 782 P.2d 40 (Ct. App. 1989)(the purpose of [the DUI statute] is not only to deter individuals who have been drinking from actually driving their vehicles, but also to deter them from exercising any control over their vehicles while in an intoxicated state.); *State v. Ghylin,* 250 N.W.2d 252 (N.D.1977) (noting that laws in other states prohibit acts in which the vehicle being driven was not moving. . The Court determined that the case law is not that clear on Trustee's argument that only an intoxicated driver of a vehicle can be guilty of its unlawful operation.

When determining whether Debtor, because he was intoxicated, unlawfully operated a motor vehicle resulting in Creditor's injuries, the Court noted that Debtor and driver were both sitting inside the truck with the vehicle's engine running. Furthermore, the truck was capable of moving and the actions of Debtor and driver caused it to move. As such, the Court concluded that it must respect the jury finding in state court that Debtor and driver were acting in concert.

> Although the vehicle was stationary at the time these events occurred, in the Court's opinion, Debtor's actions affected the mechanical functioning of the truck and rendered it susceptible of easily being placed in motion. *Adams,* 127 P.3d at 211.

The Court clarified that standing alone, the Debtor's verbal encouragement of the driver to run over the log would be insufficient to amount to actual physical control over the truck.

> As the jury found, it was the concerted acts of [driver] and Debtor that caused the truck to hit the log, and the log to strike [Creditor]. Debtor's comments in tandem with his act of shifting the vehicle into four-wheel drive certainly manifested his intent to exercise some control over the vehicle. That he was in the passenger seat at the time he engaged the truck's controls does not change the result-Debtor manipulated the vehicle with the intent to enable it to jump the log.
>
> [B]ecause Debtor's actions, when combined with those of [the driver], caused the truck to move as it did, Debtor was exercising sufficient actual, physical control of the motor vehicle. Because he was intoxicated, Debtor's conduct violated Idaho Code 18-8004(1)(a) and was unlawful.

Certain language should be used in jury instructions to allow the jury to properly determine whether a defendant was in actual physical control of a vehicle.

State v. Zaragoza,
221 Ariz. 49, 209 P.3d 629 (Ariz. 2009)

A jury convicted the Defendant in superior court of aggravated driving under the influence of an intoxicant (DUI) with a suspended or revoked license and aggravated driving with a blood alcohol concentration of .08 or more with a suspended or revoked license. Defendant appealed, arguing that the jury was improperly instructed by the court. The Court of Appeals agreed and reversed. The State then appealed to the Supreme Court of Arizona, who vacated the Court of Appeals opinion and affirmed the decision of the Superior Court, holding:

> (1) instruction charging jury to consider whether, based on totality of circumstances shown by the evidence, defendant's potential use of vehicle presented real danger to himself or others at the time alleged and then listing factors jury could consider or disregard when determining whether defendant controlled the vehicle was appropriate; and
> (2) certain language should be used in instruction to determine whether defendant was in actual physical control of vehicle.

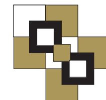
Arizona's DUI statute makes it unlawful for a person to drive or be in actual physical control of a vehicle ... [w]hile under the influence of intoxicating liquor. Ariz. Rev. Stat. (.R.S. 28-1381(A)(1) (Supp. 2005). The statute does not provide a definition of the term actual physical control and courts have been inconsistently instructing jurors on the meaning of the phrase. The Defendant argued that the instructions given by the superior court in the present case were improper. The Supreme Court disagreed, holding that the jury instruction given by the superior court correctly guided the jury. To resolve any inconsistencies, the Court set forth a recommended jury instruction for use in future cases.

When determining whether a jury instruction correctly states the law, the Court uses a de novo standard of review. However, when considering as a whole whether jury instructions were proper, they need only be substantially free from error. *State v. Cox,* 217 Ariz. 353, 356, 15, 174 P.3d 265, 268 (2007). The instructions must be considered in their entirety to ascertain whether they adequately reflect the law. *State v. Gallegos,* 178 Ariz. 1, 10, 870 P.2d 1097, 1106 (1994). If the instructions misled the jurors when taken as a whole, only then will the Court reverse a Defendant's conviction based on the instructions. Cox, 217 Ariz. at 356, 15, 174 P.3d at 268.

The superior court instructed the jury in the present case to consider whether, based on the totality of the circumstances shown by the evidence, [defendant] potential use of the vehicle presented a real danger to himself or others at the time alleged. The superior court also listed the factors set out in State v. Love, an Arizona Supreme Court case that adopted a totality approach which gives greater flexibility in determining actual physical control cases. See *State v. Love,* 182 Ariz. 32, 897 P.2d 626 (1995) (providing a list of factors a fact finder could consider in deciding if a person actually controlled the vehicle, including whether the vehicle was running or the ignition was on; the location of the key; the location and position the driver was found in the vehicle; whether the person was sleeping or awake; if the headlights on the vehicle were on; where the vehicle was stopped; whether the driver voluntarily pulled off the road; time of day and weather conditions; if heater or air conditioning was on; whether the windows were up or down; and any explanation given by the defense.).

The reason courts have struggled to consistently instruct jurors comes from the broad language in the holding of Love. In rejecting the decision by the court of appeals regarding the legality of the jury instruction given in the present case, the Supreme Court of Arizona stated:

> The court of appeals concluded that the potential use language in the instruction rendered it erroneous because it would broadly reach those impaired persons merely at risk to control a vehicle, observing that many impaired adults have ready access to a vehicle, and therefore the potential use of one, but retain the sound judgment not to drive. Zaragoza, 220 Ariz. at ----, 8, 202 P.3d at 492.



> But the instruction, taken as a whole, does not sweep as broadly as the court of appeals feared. Rather, the jury could only find [the Defendant] in actual physical control of the vehicle if, based on the totality of the circumstances shown by the evidence, his potential use of the vehicle presented a real danger to himself or others at the time alleged. (Emphasis added.) Thus, a conviction could not be premised on speculative potential use, but rather required proof that [the Defendant] presented a real danger to himself or others when confronted by the officer. The instruction does not raise the specter that any impaired person with access to a vehicle could be convicted for being in actual physical control of a vehicle. In addition, the instruction here closely tracks Love's conclusion that a person is in actual physical control when, under the totality of the facts, the person posed a threat to the public by the exercise of present or imminent control over a vehicle hile impaired. 182 Ariz. at 326-27, 897 P.2d at 628-29.

The Court went on to conclude:

> Therefore, even if describing actual physical control as potential use of the vehicle could technically be construed as over-broad, the trial court's inclusion of the language presented a real danger to himself or others at the time alleged, along with the list of the factors from Love, sufficiently narrowed the breadth of the instruction here. The instruction, read in its entirety, could not have led a reasonable jury to find [the Defendant] guilty based on control of his vehicle he might have hypothetically exercised but never did. Zaragoza, 220 Ariz. at ----, 10, 202 P.3d at 492.

Once the trial court jury instructions were determined to be proper, and the court of appeals proposed instructions held insufficient, the Court proffered a recommended jury instruction to be used in future cases in hopes of resolving the problem of inconsistent instructions in actual control cases. Pursuant to the Revised Arizona Jury Instruction (AJI (Standard Criminal) 28.1381(A)(1)(DUI) (3d ed.2008), provides:

> In determining the defendant was in actual physical control of the vehicle, you should consider the totality of 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 {listing the factors from Love, 182 Ariz. at 326, 897 P.2d at 628.} This list is not meant to be all-inclusive. It is up to you to examine all the available evidence in its totality and weigh its credibility in determining whether the defendant was simply using the vehicle as a stationery shelter or actually posed a threat to the public by the exercise of present or imminent control over it while impaired.

The court of appeals in the present case also attempted to formulate an appropriate instruction. The Court rejected the language of the instruction holding that it could create unnecessary ambiguity, as it stated:

> [a]t least under the facts presented here, any instruction defining the scope of the crime must focus on the totality of the circumstances and what they demonstrate about the defendant's purpose in exercising control of the vehicle. More specifically, we believe the legislature intended to criminalize an impaired person's control of a vehicle when the circumstances of such control-as actually physically exercised-demonstrate an ultimate purpose of placing the vehicle in motion or directing an influence over a vehicle in motion. Zaragoza, 220 Ariz. at ----, 14, 202 P.3d at 493 (emphases added).

Driving while intoxicated is a strict liability defense and the defendant's intent is not an element. See A.R.S. 13-202(B) (2001); A.R.S. 28-1381, -1382; see also *State ex rel. Romley v. Superior Court (Cunningham),* 184 Ariz. 409, 411, 909 P.2d 476, 478 (App.1995); *State v. Parker,* 136 Ariz. 474, 475, 666 P.2d 1083, 1084 (App.1983). The Supreme Court of Arizona concluded that the facts are to determine whether a defendant exercises physical control of a vehicle, and [t]herefore, any instruction on actual physical control that requires a jury to consider a defendant's purpose in exercising control of a vehicle incorrectly states the law.

The Court went on to state:

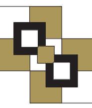
> Instead, we believe that the following modified form of the RAJI should be used in future actual physical control prosecutions. That instruction reads as follows:
> In determining whether the defendant was in actual physical control of the vehicle, you should consider the totality of the circumstances 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.
>
> This instruction captures Love's holding that actual physical control is a question for the fact finder and should be based upon consideration of all the circumstances. 182 Ariz. at 328, 897 P.2d at 630. It requires a fact finder, in determining if a person actually physically controlled a vehicle in violation of the statute, not only to consider all the circumstances, but also to decide if a defendant actually posed a threat to the public by the exercise of present or imminent control over [the vehicle] while impaired. Id. at 326-27, 897 P.2d at 628-29.

Statements made by public employee to police officers at hospital were immunized and deemed involuntary; statements made to police would not have occurred but for employee appearance at hospital for testing pursuant to his employment contract.

State v. Groszewski,
2009 WL 2477755 (Ohio App. 6 Dist.)

Appellant Groszewski was a city employee accused of drinking on the job while driving a city vehicle. In accordance with the terms of his employment contract, appellant was taken by his employer to the hospital to submit to a breath test. While at the hospital, a police officer there on unrelated matters received notice that a city employee had been drinking and driving. The officer (who is not very familiar with those types of cases) administered sobriety exercises and placed Groszewski under arrest for operating a vehicle while intoxicated (OVI), in violation of R.C. 4511.19(A)(1)(a) and (G)(1)(d). A blood test was later given.

Groszewski pled no contest and filed a motion to suppress his sobriety tests, the lay witness observations made of those tests, the results of his blood alcohol test, and his statements made while he was being tested at a hospital. The trial court granted the motion to suppress the field sobriety exercises because they were not performed according to appropriate standards. The court denied, however, Groszewski motion to suppress the lay witness observations of



the field sobriety tests and as his motion to suppress statements he made to police officers as a result of the employment testing, under *Garrity v. New Jersey,* 385 U.S. 493 (1967).

On appeal, Groszewski asserted three arguments:

> I. First Assignment of Error: The trial court erred by admitting evidence obtained in violation of Garrity v. State of New Jersey.
> II. Second Assignment of Error: The arresting officer lacked reasonable suspicion to question Mr. Groszewski, and lacked probable cause to arrest Mr. Groszewski.
> III. Third Assignment of Error: The blood test should have been suppressed because the state failed to comply with the three hour rule.

The court of appeals resolved the first two assignments of error together. Appellant first assertion was that the evidence obtained from his employer's request for drug/alcohol testing at the hospital violated his constitutional rights. His second assertion contended that the police lacked the requisite reasonable suspicion and probable cause necessary to support his arrest for OVI. The court of appeals agreed. The third assignment of error was thus considered moot.

Pursuant to the Fifth Amendment, persons are to be protected against compelled self-incrimination, and testimony that is given under compulsion invokes that constitutional right. See *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964), limited on other grounds by *U.S. v. Balsys,* 524 U.S. 666 (1998). A public employee who is forced by the state to choose between losing his job or answering incriminating questions cannot be said to have given statements voluntarily if he chooses to answer; therefore the state cannot use an employee statements against him in a subsequent criminal prosecution because they were not given voluntarily. See *Garrity v. New Jersey,* 385 U.S. 493 (1967). Accordingly, any statements made by a public employee under those conditions must be treated as immunized testimony. Id.

In the present case, the court noted that the appellant was taken by his employer to the hospital for a breathalyzer and blood test. Thus, the court concluded, any of his statements made while at the hospital for that testing are deemed involuntary under Garrity. Furthermore, because any statements made to the arresting officers would not have occurred but for his appearance at the hospital for testing, any statements made are considered immunized and should have been suppressed.

The court next considered whether the breathalyzer or blood test results should also have been suppressed. The trial court properly noted that breathalyzer and field sobriety tests have been deemed by the Supreme Court of Ohio to be on-testimonial and therefore not within the protection afforded by the constitutional privilege against self-incrimination. See City of *Piqua v. Hinger,* 15 Ohio St.2d 110, 238 N.E.2d 766 (1968). Garrity, which discusses incriminating statements, has not yet been applied to breath or blood tests. As such the court declined to extend application of that case to the appellant's test results.

Chemical testing of breath or urine conducted in a hospital setting to determine alcohol content for the purpose of proving a criminal offense is considered a search and seizure under the Fourth Amendment. *Schmerber v. California,* 384 U.S. 757, 767 (1966). Ohio's DUI statute, R.C. 4511.191, requires a driver suspected of driving while under the influence of alcohol or drugs to give his/her consent to a breath or blood test. Failure to comply will result in administrative penalties, but the statute does not force a person to submit to a test. *Maumee v. Anistik,* 69 Ohio St.3d 339 (1994). A person implied consent to the warrantless search of a breath or blood sample may be revoked upon hearing the consequences of refusal. Id. The Fourth Amendment prohibits placing people in a position of choosing between permitting a warrantless search or the implication of criminal penalties. *Wilson v. Cincinnati,* 46 Ohio St.2d 138, 145 (1976).

The court then determined whether the police had probable cause to arrest the Appellant:

> The legal standard for determining whether the police had probable cause to arrest an individual for OVI is whether, at the moment of arrest, the police had sufficient information, derived from a reasonably trustworthy source of facts and circumstances, sufficient to cause a prudent person to believe that the suspect was driving under the influence. See *Beck v. Ohio (1964),* 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142; *State v. Timson (1974),* 38 Ohio St.2d 122, 127, 311 N.E.2d 16.
> The arrest merely has to be supported by the arresting officer's observations of indicia of alcohol consumption and operation of a motor vehicle while under the influence of alcohol. *State v. Lloyd (1998),* 126 Ohio App.3d 95, 105, 709 N.E.2d 913. In making this determination, the trial court must examine the totality of facts and circumstances surrounding the arrest. See *State v. Miller (1997),* 117 Ohio App.3d 750, 761, 691 N.E.2d 703; *State v. Brandenburg (1987),* 41 Ohio App.3d 109, 111, 534 N.E.2d 906.

In the present case, appellant was compelled to choose between submitting to the breath and blood tests, or risk losing his job. Furthermore, his employment contract specifically limited his consent to the test and release of results to only the city of Toledo. No language in the contract refers to possible criminal prosecution or release of results to a law enforcement agency. The Appellant was not involved in an accident, nor was he ever observed by police to be driving in a manner which would indicate impairment. The court concluded that because Appellant submission to the test was not pursuant to a police investigation or court order, both tests would have been considered warrantless searches.

In regards to the sobriety exercises, the court determined that they too were not performed pursuant to an initial police investigation. Instead, they were performed after the Appellant agreed to go to the hospital for his employer's requested testing. Therefore, the court concluded, probable cause did not exist for police even to be present at the hospital for any type of investigation:

Although we do not condone appellant's actions, neither can we condone the ambush tactics that were employed to create a criminal offense from an employee's compliance with his employer's drug/alcohol testing requirement. Therefore, under the specific facts and circumstances of this case, we conclude that the police obtained the results of the breathalyzer and blood tests in violation of appellant's Fourth Amendment right against illegal search and seizure. As a result, we further conclude that the trial court erred in denying appellant's motion to suppress the blood and breathalyzer test results, as well as any observations of any sobriety tests, since appellant's consent to the testing was not voluntary as it related to any criminal charges.

Accordingly, appellant's first and second assignments of error are well-taken. Appellant's third assignment of error is deemed moot.

The judgment of the Lucas County Court of Common Pleas is reversed and remanded for proceedings consistent with this decision.

JUDGMENT REVERSED.

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