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NCDD Journal

National College for DUI Defense

Editor:Paul Burglin

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Dean's Message

Doug Murphy

Looking Back & Optimism for the Road Ahead

If a year ago, you would have made a prediction as to any of the events we have endured, I would have shrugged it off as if it were all not possible. Unfortunately, it was all real, and not so spectacular. Who could have predicted the pandemic of our lifetimes, a financial depression, hearings conducted via Zoom, civil and uncivil marches, deaths of loved ones and friends, fights over masks, food shortages, children engaging in virtual school, raging fires, floods, hurricanes, a contested election like no other, a riot on the capital, polar artic blasts, loss of electricity and water supply and scores of other difficulties? The good news is that there is hope. Hope in the form of someday soon seeing the light at the end of the tunnel and getting a degree of normalcy back into our lives. I'm not saying we are there now, but I believe it to be someday soon. Future "normalcy" will certainly remain subjective and open to interpretation.

The events of the past year have no doubt been stressful on everyone. One major impact of all this is the lack of human interaction we once enjoyed. We have been living in isolation that has prevented us from fulfilling our psychological and physiological needs as set forth by Abraham Maslow's in his hierarchy of needs. We, as human beings, were made for personal human interaction and communication—we were not made for texting, email, social media, etc. Solitary confinement is considered a last resort due to its harsh toll and deleterious effect on the human psyche. The toll this has taken on all of us has been vastly understated. It is also highlighted in the incredible amount of discord and lack of respect amongst our population pertaining to any disagreement.

Two weeks ago, an artic blast effected the majority of the country. In some parts of the country, many lost power and water. We were extremely fortunate that we had power via a generator. My family and I opened our home to all for warmth and safety. At one point, we had

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E.D.'S Corner

Rhea Kirk

Our 2021 Winter Session was a huge success! What fantastic speakers and great topics to help you try Serious Bodily Injury & DUI Death Cases! Our Serious Science Course is SOLD OUT in Arlington, TX in September, but, call the NCDD Office if you would like to be placed on the Waiting List!! If you haven't attended this course with Course Director Andrew Mishlove, don't miss the next one! Speaking of SOLD OUT, we just had our SFST Sell Out in February in Sarasota, FL. We will be announcing the date and location for our next SFST VI shortly along with some other new courses as well!! Our Summer Session is going to be Virtual again this year. Take a look at the NCDD Website for the exciting agenda!

Website Update:

Please make sure to watch for emails from individuals that have been charged with DUIs and DUI related matters. They should come to your email inbox and will contain the issue and contact information from the prospective client. Check your Junk or Spam Folders carefully. I hate for you to miss a business opportunity! Also, make sure your profile bio and picture are up to date! Speaking of the website…please take a look at the Virtual Forensic Library! It comprises the largest collection of scientific journals, articles and studies to assist in the defense of impaired drivers. The library's Brief and Motions Bank is the repository of the collective wisdom of our membership at your fingertips! You have access to transcripts of actual examinations of top experts and cross examinations of police officers by experienced DUI lawyers!

2021 Dues:

Don't forget to take care of your NCDD 2021 Dues! The deadline was January 31! If you are on Auto-Renew, don't worry, your dues will be paid automatically on your anniversary date. This reminder is just for those who aren't on Auto-Renew! Think about changing to Auto-Renew so you don't have to remember to pay next year!

Here's hoping for a safe and healthy 2021!! Hope to see you in person very soon! --- Rhea Kirk

DON'T MISS IT!

MASTERING SCIENTIFIC EVIDENCE (MSE)

March 25 - 26, 2021
VIRTUAL
Register Now!
www.ncdd.com

SAVE THE DATE!

SUMMER SESSION

July 15 - 16, 2021
VIRTUAL
Register Now!
www.ncdd.com

(Continued from cover - "Dean's Message")

28 people in our home. In this time of despair, hosting friends and family was one of my favorite memories over the 12 months because we were forced to abandon COVID protocols and welcome friends and family that we had not seen for way too long due to COVID. This SNOVID event brought about laughter and camaraderie we had not enjoyed in way too long. And even better news, no one tested positive for the virus after the power was turned back on.

I choose to believe and remain hopeful and excited that our future appears to be brighter than what we have endured over the past 12 months. I'm hopeful and excited that we will one day soon open up and enjoy human interaction in our personal and professional lives. Until that day comes, I look forward to seeing you all virtually at Mastering Scientific Evidence seminar on March 25-26, 2021 and at our newly reformatted 2021 Summer Session: DUI Talks: Defense Ideas Worth Spreading featuring 22 nationally renowned speakers on July 15-16, 2021.

I miss all of you and can't wait to be back together again in person when we can do so safely!

Yours truly, Doug

Case Law Update

By
Flem Whited

APPEALS

Commonwealth v. McKahan,
2021 WL 100573 (Pa.Super.) en banc

State waived appellate argument that lower court order should be reversed based on inevitable discover by failing to make that argument in the lower court; Further State made no argument on appeal that good-faith exception should apply; Thus, lower court order excluding evidence affirmed.

ARRESTS

Frazier v. Stire,
2020 WL 6624968 (W.Va.) not reported

Arrest of Defendant outside of officer's jurisdiction was not "lawful"; officer's mistaken belief that he had authority to arrest outside his jurisdiction cannot save the arrest; "an officer can gain no ... advantage through a sloppy study of the laws he is duty-boundto enforce." - However, Heien does offer some insight into the type of "mistake" which may provide relief—the area upon which the circuit court below focused. The Court concluded that "[t]he Fourth Amendment tolerates only reasonable mistakes, and those mistakes—whether of fact or of law—must be objectively reasonable. We do not examine the subjective understanding of the particular officer involved." Id. at 66 (some emphasis added). More pointedly, "an officer can gain no ... advantage through a sloppy study of the laws he is duty-bound to enforce." Id. at 67. We therefore conclude, as did the circuit court, that even if Heien were applicable, Officer Billie's purported belief about his ability to execute State-wide DUI arrests simply was not reasonable.

State v. Krause,
2021 WL 346439 (Mont.)

Parking space was a "way of the state open to the public"; Dissenting judge would reverse as no proof that it was "adapted and fitted for public travel that is in common use by the public"; Prosecutor's question to witness whether they know the penalties for perjury did not rise to the level of misconduct.

BLOOD TEST / OBTAINING THE SAMPLE / EXIGENCY / SEARCH WARRENTS

People v. Raider,
2021 WL 56538 (Colo.App.)

As a matter of first impression, if a driver refuses testing and an officer lacks probable cause that the driver has committed one of the four enumerated offenses, the officer may not require the driver to submit to testing by obtaining a search warrant; A forced test of the defendant, pursuant to a warrant but without probable cause that the defendant had committed one of the enumerated offenses, is illegal; The four enumerated offenses are criminally negligent homicide, vehicular homicide, third degree assault and vehicular assault; The remedy is suppression of the results.

State v. Kelly,
469 P.3d 851 (Or.App.2020)

No exigency existed to justify warrant less forensic blood draw where hospital had already drawn and tested the Defendant's blood.

Commonwealth v. Jones-Williams,
237 A.3d 528 (Pa.Super.2020)

Warrant affidavit alleging possible dissipation of alcohol as reason for exigency was dispelled where evidence showed that a sample had already been drawn for medical purposes; Appellate Court says that fact "literally stopped the clock on any concern that the further passage of time could result in dissipation of evidence."

Crider v. State,
607 S.W.3d 305 (Tex.Crim.App.2020)

Texas Court of Criminal Appeals finally holds that if blood is drawn pursuant to a valid warrant issued by an independent magistrate that no further warrant is required to test that sample.

State v. Key,
848 S.E.2d 315 (S.C.2020)

South Carolina Supreme Court remands case to lower court to make exigency determination pursuant to Mitchell v. Wisconsin; Supreme Court judges would not shift burden to Defendant to show absence of exigency; Case contains analysis of Supremacy Clause: U.S. Const. art. VI, cl. 2.

State v. Gilliam,
2021 WL 79181 (N.J. Super.)

Police-created exigency did not excuse the officers' obligation to obtain a warrant before drawing defendant's blood; Nothing about the crash or officer's obligations relating to the crash created any urgency.

BREATH TEST / OBTAINING THE SAMPLE / IC STATUTES V. BIRCHFIELD

City of Colby v. Foster,
471 P.3d 26 (Kan.App.2020)

Birchfield says breath tests may be administered as incident to arrest but States may impose additional requirements which they have done; Implied Consent statute requires police advise subject of "implied consent" advisories and that failure to comply with statute renders results inadmissible.

State v. Homolka,
466 P.3d 491 (Kan.App.2020)

Subject did not voluntarily consent to blood testing where Implied Consent advisory told him he was "required" to submit to blood testing; Good Faith exception did not apply because no "reasonable" officer would think that telling somebody they are "required" to submit was a mere "request."

People v. Raider,
2021 WL 56538 (Colo.App.)

As a matter of first impression, if a driver refuses testing and an officer lacks probable cause that the driver has committed one of the four enumerated offenses, the officer may not require the driver to submit to testing by obtaining a search warrant; A forced test of the defendant, pursuant to a warrant but without probable cause that the defendant had committed one of the enumerated offenses, is illegal; The four enumerated offenses are criminally negligent homicide, vehicular homicide, third degree assault and vehicular assault; The remedy is suppression of the results.

CONFRONTATION CLAUSE

Commonwealth v. Hajdarevic,
236 A.3d 87 (Pa.Super.2020)

Error to allow lab analyst to testify to the time of the blood draw where analyst was not present when blood drawn and only got information from labels on blood tube; confrontation clause violation results in reversal of conviction.

CONSENT TO SAMPLE

McCormick v. Commissioner of Public Safety,
945 N.E.2d 55 (Minn.App.2020)

Whether an officer gave breath test advisory that informed a person that refusal to submit to a breath test is a crime depends on whether the given advisory, considered in its context as a whole, is misleading or confusing; nothing inherently misleading where officer told driver "this is a breath test advisory … refusal to take a test is a crime."

Funes v. State,
469 A.3d 438 (Md.App.2020)

In giving advice of rights, officers must use methods that reasonably convey the warnings and rights in the implied consent statute; Breath test excluded where defendant did not understand the English language and the police did nothing in an attempt to convey his rights in his native language; Appellate Court mentions section in Drinking/Driving Litigation series covering this subject matter.

State v. Levanduski,
948 N.E.2d 411 (Wis.App.2020)

Officer telling driver that refusal could be used against her in court not enough to render her consent involuntary.

Commonwealth v. Veasy,
2020 WL 5846002 (Pa.Super.) slip copy

Advisement to driver that if he refuses to submit to blood test his driver's license "could" rather than "will" be suspended was inaccurate; officer also failed to notify driver that he had the statutory right to consult with an attorney prior to making his decision.

COVID HEARINGS

State v. Seale,
2020 WL 4045227 (Tenn.App.) slip copy

In order to allow anything other than in person cross examination of a witness the Court must articulate an important public interest showing why it is necessary as described in Maryland v. Craig, 497 U.S. 836 (1990); Justice Scalia expressed skepticism that two-way video technology was constitutionally distinct from the one-way system examined in Craig: "I cannot comprehend how one-way transmission (which Craig says does not ordinarily satisfy confrontation requirements) becomes transformed into full-fledged confrontation when reciprocal transmission is added."

DESTRUCTION OF EVIDENCE

State v. Stafford,
2020 WL 5494480 (Ala.Crim.App.) not yet released for publication

Destruction of blood alcohol kit containing samples of Defendant's blood drawn the night of the crash after two years pursuant to Alabama Dept of Forensic Science policy does not amount to due process violation sufficient to dismiss indictment.

DISCOVERY

People v. Hughes,
2020 WL 3071948 (Cal.App.); 50 Cal.App.5th 257; 263 Cal. Rptr.3d 794

Failure to disclose homicide investigator's new diagrams, calculations and opinion regarding cause of crash for the first time during his direct testimony results in reversal of conviction.

DRE

Bragaw v. State,

2021 WL 750291 (Alaska App.)

DRE protocol is scientific evidence subject to the Daubert/Coon standard - The trial court erred in admitting this evidence without first determining its scientific validity.

DUI - DRUGS

State v. Jensen,
477 P.3d 335 (Mont.2020)

Argument that 5 nanogram per milliliter does not correlate with impairment and has no scientific basis thus violating his substantive due process and equal protection rights rejected.

Rogers v. State,
2021 WL 386924 (Alaska App.)

Officer's testimony that impairments he observed were from Klonopin a type of benzodiazepine, a central nervous system depressant but never testified that Klonopin was a trade name for clonazepam.

State v. Fensler,
2020 WL 7689618 (Ohio App.)

Officer's testimony that Benadryl is a "drug of abuse" defined as any controlled substance or over-the-counter medication that, when taken in quantities exceeding the recommended dosage, can result in impairment of judgment or reflexes is insufficient to sustain conviction.

DUE PROCESS CLAUSE

State v. Stegall,
2020 WL 7511216 (Idaho)

Defendant's right to due process was violated where officers refused to allow him to use a phone to contact an attorney until the morning after his arrest.

HGN

People v. Marsden,
2021 WL 562355 (Colo.App.)

The weight of judicial authority favors admissibility of HGN test results without the need for additional evidence of scientific reliability on issue of impairment by a qualified witness.

MEDICAL RECORDS

State v. Kini,
473 P.3d 64 (Or.App.2020)

All observations and expressions of opinions in medical records other than actual amount of alcohol shown should be excluded.

MIRANDA

People v. Sternal,
2020 WL 4209680 (Ill.App.) not reported

Defendant in custody requiring Miranda when trooper told her to go sit in his car while he when back to accident scene.

PRIOR CONVICTIONS

Long v. State,
300 So.3d 231 (Fla.App.2020)

Prior Indiana conviction for felony DUI based on prior convictions could not be used as a prior conviction under Florida law as it was broader in scope that Florida's felony DUI law based on prior conviction; under Indiana law a second DUI conviction within a five-year period could result in a felony conviction while in Florida it takes a third conviction within ten years of the prior conviction.

Commonwealth v. Chichkin,
232 A.3d 959 (Pa.Super.2020)

Prior acceptances of ARD cannot be categorized as "prior convictions" exempt from the holding of Apprendi and Alleyne; further the acceptances of ARD cannot be used as a "sentencing factor" to increase punishment.

Linnebur v. People,
476 P.3d 734 (Colo.2020)

Prior convictions used to establish Felony DUI are elements of the offense and must be proved beyond a reasonable doubt to a jury - The fact that a felony DUI conviction, as compared to a misdemeanor DUI conviction, permits significantly more serious consequences counsels in favor of the conclusion that the legislature intended to treat the fact of prior convictions as an element, at least absent some clear indication to the contrary.

State v. Myers,
475 P.3d 1256 (Kan.App.2020)

Different panel of Kansas Court of Appeals would affirm Trial Court's striking of Defendant's prior Missouri conviction for DUI - We decline to follow the majority decision in State v. Mejia, 58 Kan. App. 2d 229, 241, 466 P.3d 1217 (2020) or the in Patton, 58 Kan. App. 2d ——, ——, – — P.3d —— (No. 120,434, filed September 11, 2020), slip op. at 13, 2020 WL 5491848 at —— panel and, instead, find the dissent in Mejia is persuasive and tracks with our analysis. See 58 Kan. App. 2d at 250-54, 465 P.3d 184 (Schroeder, J., dissenting). Following State v. Gensler, 308 Kan. 674, 681, 685, 423 P.3d 488 (2018), we find the district court did not err when it held Myers' Missouri DWI convictions could not be used to elevate her current charge to a felony DUI because the Missouri DWI statute criminalizes broader conduct than Kansas' DUI statute, K.S.A. 2019 Supp. 8-1567.

Ba nka v. State,
476 P.3d 1191 (Nev.2020)

Nevada Supreme Court says Defendant must be advised of mandatory minimum sanction in addition to mandatory maximum for plea to be voluntary - Where there is a range of punishments—by fine or by imprisonment—the defendant must be informed of both the floor and ceiling of that range in order to make a knowing and voluntary decision. Because Banka was not informed of the mandatory minimum statutory fine, we conclude that the district court abused its discretion in denying Banka's presentence motion to withdraw his guilty plea.

State v. Loveless,
467 P.3d 1189 (Mont.2020)

"Under the influence" requiring person's ability to operate be "diminished" sufficiently similar to statute requiring there be "appreciable impairment" of bodily or mental faculties.

Daniels v. State,
2021 WL 248232 (Del.)

Delaware Supreme Court says New Jersey prior DWI not sufficiently similar to Delaware's DUI law since the New Jersey statute was divisible into conduct that violated the law in Delaware and some portions did not.

State v. Vargas
2020 WL 5415322 (N.J. Super.) not reported

Plea colloque failed to establish factual basis for DWI where Defendant not asked to acknowledge or acquiesce to the accuracy of the hospital blood test Reasonable Suspicion.

State v. Colby,
604 S.W.3d 232 (Tex.App.-Austin 2020)

Trial Court not required to view stop based on view of the police where real-time video contradicts officer's live testimony; Totality of the Circumstances supports Trial Court's finding that stop was not justified.

People v. Araiza,
2020 WL 5053415 (Ill.App.) not yet released for publication

Green Arrow signal allows a driver to cautiously enter an intersection it does not require the driver to enter the intersection; eight (8) second delay from red light turning green arrow does not constitute a violation justifying stop.

Commonwealth v. Wilson,
237 A.3d 572 (Pa.Super.2020)

No reasonable suspicion to stop vehicle traveling in passing lane just because trooper was in hurry to get back to the station; driver was not speeding and was passing vehicles in the slow lane.

REFUSALS

Commonwealth v. Daigle,
2021 WL 232658 (Mass. App.)
Massachusetts Court says State must still prove Breath Test was admissible to admit Defendant refused to submit.

SEARCH / SEIZURE

Lange v. California,
SCOTUS 20-18

NCDD filed brief in support of driver. California allowed officer to enter the Defendant's garage without warrant based on commission of misdemeanor offenses. All briefs are in and oral argument has been completed. Awaiting a decision.

Caldwell v. Commissioner of Public Safety
2020 WL 5107304 (Minn.App.) not reported

Emergency aid exception to the warrant requirement cannot support entry into driver's garage based on driving that would indicate impairment.

State v. Malloy
2021 WL 209290 (Utah)

Utah Supreme Court repudiates prior holding that said there is no "functional" or constitutionally relevant distinction between an officer opening a car door and a driver being asked to do so; But exclusion of evidence denied under Davis.

City of Fargo v. Hofer,
952 N.W.2d 58 (N.D.2020)

Urine test suppressed where administered under the implied consent statute and the execution of the search warrant did not cure the defect in the implied consent advisory - Because the officer obtained a search warrant, the search is reasonable under the Fourth Amendment. But satisfying the Fourth Amendment is not sufficient to make any resulting evidence admissible. Evidence obtained by executing a search warrant remains subject to objection under the Rules of Evidence or statutory evidentiary requirements. Here, the omission in the officer's reading of the implied consent advisory implicates the statutory exclusionary provision in N.D.C.C. § 39-20-01(3)(b). Because the urine test was a test administered under N.D.C.C. § 39-20-01, the officer was required to inform Hofer as required under N.D.C.C. § 39-20-01(3)(a) for the test results to be admissible in a criminal proceeding. The implied consent advisory given did not convey all substantive information required by statute and as a result the test result is not admissible in a criminal proceeding. We conclude the district court erred in denying Hofer's motion to suppress.

VOIR DIRE

People v. Collins,
2021 WL 343935 (Cal.App.)

Homicide conviction reversed as Trial Court improperly allowed State to strike black juror; The Defense properly objected and preserved the issue for appeal; Conviction reversed to allow Trial Court to continue Batson hearing which unbelievably will allow the prosecution to justify the strike.

SCOTUS RADAR

Pending before the Court is review of a 1st Circuit Court of Appeal ruling which extended the "community care taking" exception to the Fourth Amendment's warrant requirement to the home. Oral argument is slated for March 24, 2021.

Caniglia v. Strom (No. 20-157)

LEGENDARY PASSINGS

NADINE TAUB (June 16, 2020)

Nadine Taub was not as well known as Ruth Bader Ginsburg but she was every bit as much of a glass ceiling breaker in the realm of fighting gender discrimination in the 1970's.

In 1974 Taub persuaded a New Jersey federal judge to restrict the Newark Police Department
from abusing the "material witness" statute after officers jailed a rape victim overnight because they believed she was a prostitute. The Court issued mandatory guidelines for invocation of the statute and commanded his Order be read by the city's police officers every day for a week and signed by desk officers and superiors, threatening them with contempt-of-court charges if the guidelines were violated.

In 1976 Taub won a landmark case before the New Jersey Supreme Court on behalf of the ACLU against three private New Jersey hospitals that had been denying women access to abortion procedures.

Taub was the founder and director of the Women's Rights Litigation Clinic at Rutgers, and along with one of her students she won a decade-long battle to force Princeton University to open up its all-male eating clubs to women.

Taub authored many books and publications on women's rights and gender discrimination and was instrumental in making the hostile work environment a part of sex discrimination law.

HANS A. LINDE (August 31, 2020)

A former law clerk to U.S. Supreme Court Justice William O. Douglas, Hans Linde ultimately served on the Oregon State Supreme Court where astutely demonstrated that state constitutions can be interpreted to provide greater protection to citizens than what the high Court determines under the Bill of Rights. Linde was credited with what became known as the "new judicial federalism." He, and those that followed his lead, were largely motivated by the conservative turn the high Court took when Chief Justice Earl Warren was replaced by Warren Burger in 1969.

Upon his death Harvard Law professor Lawrence Tribe said this about Linde: "Hans Linde was one of the giants of the American judiciary. His brilliant work both as a law professor, and for a little over a dozen years as a justice on Oregon's highest court, addressed not just important issues of state law but also unsettled questions of federal constitutional law in a series of opinions, articles and books that were justly influential throughout the nations and ultimately the world." Linde was a German Jewish American legal scholar who immigrated to Portland, Oregon, in 1939. He graduated from Reed College and U.C. Berkeley School of Law.