

THE TRAFFIC BEAT

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Inside This Issue:

Case Law Update	1-2
Legislative Update	3
SAMHSA Report	3
NTHSA Data	4
Retrograde Extrapolation	5
MADD Update	7

WELCOME to *The Traffic Beat*, a newsletter brought to you by the University of Wisconsin Law School's Resource Center on Impaired Driving. *The Traffic Beat* is distributed to key players in the traffic safety arena and is designed to provide readers with a variety of information relevant to traffic safety. If you have suggestions for future topics or would like further information on any of the featured articles, please contact Tara Jenswold-Schipper via e-mail at jenswold@wisc.edu or by telephone at (608)262-6882.

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In an effort to reduce costs, the Resource Center will stop printing paper copies of *The Traffic Beat* in the near future and will begin distributing electronic copies via e-mail. Please go to <http://law.wisc.edu/rcid/mailling-list.html> to subscribe to our electronic mailing list if you wish to continue to receive *The Traffic Beat*.

OWI-RELATED CASE LAW UPDATE

Below is a summary of recent OWI-related cases. For a more exhaustive case law summary, or to read the decisions in their entirety, visit our website at www.law.wisc.edu/rcid.

State v. Kramer, 2008 WI App 14

Decided: March 27, 2008

Kramer's vehicle was pulled off on the side of the road with its hazards flashing. A highway patrol officer pulled up behind Kramer's vehicle to see if he needed assistance. The officer observed nothing suggesting that a crime or traffic violation was being committed. When the officer made contact with Kramer, his first words to Kramer were something to the effect of "can I help you?" At that point, the officer noticed Kramer was slurring his speech and detected a strong odor of intoxicants. Kramer was arrested and convicted of OWI. Kramer moved to suppress the evidence, alleging he was unlawfully seized before the officer discovered Kramer was intoxicated.

The court of appeals upheld the circuit court's finding that the seizure was lawful, finding that the officer was acting as a community caretaker by stopping to inquire of Kramer's wellbeing. The court applied a two-part test for determining when a seizure is justified by an officer acting in a community caretaker function. The test, as set forth in *State v. Anderson*, 142 Wis. 2d 162, 417 N.W.2d 411 (Ct. App. 1987) requires that (1) the police activity be a bona fide community caretaker activity, and (2) the public need and interest outweigh the intrusion upon the privacy of the individual. Examining the circumstances in the present case, the court found that the officer's seizure of Kramer satisfied both prongs of the test.

State v. Straehler, 2008 WI App 14

Decided: December 19, 2007

Straehler ran a red light and her car was struck by a semi-trailer truck. As a result of the collision, Straehler suffered serious injury to her left eye and cheek and was transported by helicopter to the hospital for treatment. Officers did not detect an odor of intoxicants coming from Straehler at the scene. At the hospital, an officer attempted to interview Straehler and found she was incoherent. The officer made contact with the nurse that was treating Straehler and inquired whether her incoherent condition was the result of her injury. The nurse indicated that hospital staff had smelled an odor of intoxicants coming from Straehler and that Straehler had admitted that she consumed alcohol prior to the accident. With Straehler's consent, blood was drawn, revealing a blood alcohol content level of .119. Straehler was subsequently arrested and charged with OWI and OWI-PAC, second offense.

On appeal, Straehler argued that the release of her confidential health information by the nurse to the officer was illegal and therefore, that evidence should be suppressed. She additionally argued that without the release of medical information, the officer did not have probable cause for the blood draw. Straehler cited to both federal and state medical privacy law, HIPAA and WIS. STAT. § 146.82(1), to support her argument. Straehler contended that improper police conduct resulted in the gathering of her medical information, attempting to place "investigating authorities" under the purview of HIPAA and Wisconsin's medical privacy statute. She claimed that in relying on the nurse's statements for probable cause to draw her blood, the police violated the privacy laws, making the evidence collected in violation of the statutes suppressible.

The court rejected Straehler's claim, finding that her argument failed for a number of reasons. First, investigating authorities, i.e., police officers are not among the "covered entities" expressly subject to HIPAA. Second, even if the officer was somehow bound by HIPAA, the law does not provide for suppression of evidence as a remedy for a HIPAA violation. Suppression is warranted only when evidence has been obtained in violation of a defendant's constitutional rights or if a statute specifically provides for suppression as a remedy. Here, Straehler did not argue a constitutional violation and the statute does not specifically provide for suppression as a remedy.

Washburn County v. Smith, 2008 WI 23

Decided: March 28, 2008

The defendant was stopped for going 21 miles-per-hour over the speed limit. The officer observed that Smith had a delayed reaction once the emergency lights were activated. The officer also noticed that Smith's vehicle crossed the double-yellow centerline twice before stopping. The officer detected an odor of intoxicants and the defendant admitted he had "a couple of beers." The officer arrested Smith for OWI. Smith refused to submit to a chemical test. At the refusal hearing, the circuit court determined that the defendant improperly refused to submit to a chemical test under Wis. Stat. § 343.305 and ordered his

operating privileges revoked for twelve months. The court of appeals affirmed the circuit court's order revoking the defendant's operating privileges. Two issues were presented on appeal to the Wisconsin Supreme Court:

1. Did the circuit court err in determining at the refusal hearing that the law enforcement officer had probable cause to arrest the defendant for operating a motor vehicle while under the influence of an intoxicant?
2. Did the circuit court err in determining at the refusal hearing that the defendant improperly refused to submit to chemical testing?

In holding that the officer had probable cause to arrest Smith, the Wisconsin Supreme Court clarifies the holding of *Swanson*, stating that *Swanson* did not create a general rule requiring field sobriety tests as a prerequisite for establishing probable cause in all cases. It went on to conclude that under the circumstances, the officer's knowledge at the time of Smith's arrest, including Smith's statement that he had consumed an indeterminate number of alcoholic drinks prior to driving, would have led a reasonable officer to believe the defendant was operating his vehicle under the influence of an intoxicant. Therefore, the officer had probable cause to arrest Smith for OWI.

In deciding the second issue, the Wisconsin Supreme Court concluded that the defendant improperly refused to submit to chemical testing under the Implied Consent Law. Smith contended that because he was a licensed driver in the state of Louisiana and not Wisconsin, the officer made two misstatements when informing him of his rights. Applying the three-prong test set forth *County of Ozaukee v. Quelle*, 198 Wis. 2d 269, 542 N.W.2d 196 (Ct. App. 1995), the Court concluded that the officer read Smith the required statutory information under Wis. Stat. § 343.305(4). According to the Court, the evidence demonstrated that Smith's refusal was due to his unwillingness to follow the proper procedure for submit to a breath sample, not because he was improperly informed of his rights under the Implied Consent Law. As such, the circuit court did not err in holding that the defendant improperly refused to submit to chemical testing under the Implied Consent Law.

State v. Tecza, Recommended for Publication

Decided: April 23, 2008

Tecza moved to dismiss his second offense OWI charges, claiming that he was not operating a vehicle on premises "held out to the public for use of their motor vehicles" as required by Wis. Stat. s. 346.61. According to Tecza, he was operating his vehicle on a private roadway in a gated community that was designated for use by a defined limited portion of the citizenry. He argued that access was clearly not freely given or available and as such, the OWI laws were inapplicable. The trial court denied Tecza's motion to dismiss, holding that the roadways of a gated community were held open to the public for the use of their motor vehicles. The court of appeals affirmed the trial court, concluding that on any given day any licensed driver in a motor vehicle was free to use the roadways within the community. Therefore, the roadways within the gated community were "held out to the public for use of their motor vehicles."

LEGISLATIVE UPDATE

2007 Wisconsin Act 111

This act creates increased penalties for seventh and subsequent OWI offenses. A fifth or sixth offense is still a Class H felony, and a person may be fined not less than \$600 nor more than \$10,000 and imprisoned for not less than six months nor more than six years, or both. However, a person who commits his/her seventh, eighth, or ninth OWI-related offense is now guilty of a Class G felony and may be fined not more than \$25,000 and imprisoned for not more than ten years or both. A tenth or subsequent offense is now a Class F felony and a person may be fined not more than \$25,000 and imprisoned for not more than 12 years and six months or both.

This act also increased the driver improvement surcharge imposed under Wis. Stat. § 346.55(1) from \$355 to \$365.

This act applies to violations committed or refusals occurring on April 2, 2008, but does not preclude the counting of other convictions, suspensions, or revocations as prior convictions, suspensions, or revocations for purposes of administrative action by the department of transportation, sentencing by a court, or revocation or suspension of motor vehicle operating privileges.

Wisconsin ranks first in percentage of adults who report driving while under the influence of alcohol

Substance Abuse and Mental Health Services Administration (SAMHSA), reports that an estimated 30.5 million people, 15.1 percent, of the nation's drivers, age 18 and older, drove under the influence of alcohol at least once in the past year. The survey also reveals that 6-7 percent of adults in several states and the District of Columbia drove under the influence of illicit drugs at least once in the past year.

26.4 percent of Wisconsin adults 18 and older admitted to driving under the influence in the previous year. Wisconsin has the highest percentage of any state, roughly three times higher than the lowest ranking state, Utah, which reported only 9.5 percent

The national report also shows that nationwide nearly one in 20 adult drivers aged 18 or older drove under the influence of illicit drugs such as marijuana/hashish, cocaine/crack, inhalants, hallucinogens, heroin or prescription drugs used non-medically. The national average is 4.7 percent of drivers, with the District of Columbia reporting the highest percentage, with 7.0 percent, and among Wisconsin residents the rate was 5.3 percent.

The data represents the combined results of surveys conducted by SAMHSA in 2004, 2005, and 2006. SAMHSA is a public health agency within the Department of Health and Human Services.

The full report is available on the Web at <http://oas.samhsa.gov/2k8/stateDUI/stateDUI.cfm>. Copies may be obtained free of charge by calling SAMHSA's Health Information Network at 1-877-SAMHSA-7(1-877-726-4727). For related publications and information, visit <http://www.samhsa.gov>.

Fatal Crashes and Fatalities Involving Alcohol-Impaired Drivers

In 2006, 13,470 people were killed in alcohol-impaired-driving crashes. These alcohol-impaired-driving fatalities accounted for 32 percent of the total motor vehicle traffic fatalities in the United States. Traffic fatalities in alcohol-impaired-driving crashes fell by 0.8 percent, from 13,582 in 2005 to 13,470 in 2006. The 13,470 alcohol-impaired-driving fatalities in 2006 were almost the same as compared to 13,451 alcohol-impaired-driving fatalities reported in 1996.

Drivers are considered to be alcohol-impaired when their blood alcohol concentration (BAC) is .08 grams per deciliter (g/dL) or higher. Thus, any fatality occurring in a crash involving a driver with a BAC of .08 or higher is considered to be an alcohol-impaired-driving fatality. The term “driver” refers to the operator of any motor vehicle, including a motorcycle.

Estimates of alcohol-impaired driving are generated using BAC values reported to the Fatality Analysis Reporting System (FARS) and imputed BAC values when they are not reported. The term “alcohol-impaired” does not indicate that a crash or a fatality was caused by alcohol impairment.

The 13,470 fatalities in alcohol-impaired-driving crashes during 2006 represent an average of one alcohol-impaired-driving fatality every 39 minutes. In 2006, all 50 States, the District of Columbia, and Puerto Rico had by law created a threshold making it illegal per se to drive with a BAC of .08 or higher. Of the 13,470 people who died in alcohol-impaired-driving crashes in 2006, 8,615 (64%) were drivers with a BAC of .08 or higher. The remaining fatalities consisted of 4,030 (30%) motor vehicle occupants and 825 (6%) non-occupants.

This information originally appeared in Traffic Safety Facts, Alcohol Impaired Driving, a NHTSA publication, DOT HS 810 801 (updated March 2008).

Further information on traffic fatalities is available from the National Center for Statistics and Analysis, NVS-424, 1200 New Jersey Avenue SE., Washington, DC 20590. NCSA can be contacted on 800-934-8517. Fax messages should be sent to 202-366-7078. General information on highway traffic safety can be accessed by Internet users at www.nhtsa.gov/portal/site/nhtsa/ncsa.

Have Training, Will Travel

Are you up to speed on the impaired driving and traffic laws?

Is your agency or office in need of a legal update or refresher course?

Is there other OWI-related training you need?

If so, The Resource Center may be able to help. The Resource Center frequently conducts training as part of scheduled in-service or as stand-alone training sessions. Contact Tara Jenswold-Schipper at 608-262-6882, jenswold@wisc.edu, or Nina Emerson at 800-862-1048, ninaj@wisc.edu, for more information.

FROM THE WISCONSIN LABORATORY OF HYGIENE

The following is an excerpt from a chapter written by Patrick Harding, Toxicology Section Supervisor, WSLH, for *Alcohol Toxicology for Prosecutors*, published by the American Prosecutors Research Institute (APRI), July 2003.

Retrograde Extrapolation

Retrograde extrapolation is the process of estimating an alcohol concentration at an earlier time from a measured alcohol concentration at a later time. In most cases, this means providing an estimate AC at the time of the offense based on the measured AC at the time a sample of blood, breath, or urine was obtained. Your witness must be provided with as much information about the case as possible. Useful information includes: time of offense, time of test, test result, gender, weight, height, food consumption, and drinking history which includes number of drinks, size of drinks, concentration of alcohol in the drinks and timing of drinks.

An expert's estimation and testimony at trial will only be as good as information provided. When there is a delay between the time of the crash and the test, a thorough police investigation is paramount. The most important parts of the drinking history for purposes of retrograde extrapolation are alcohol consumption in the hour prior to the offense and any consumption after the offense but before the test. Knowing where the defendant last consumed alcohol and its distance to the place of arrest can provide a minimum estimate of time to last drink. Similarly, developing a time line and assessing the availability of alcohol from the time of a crash to the time that police contacted the defendant will help in determining the likelihood of post-crash alcohol consumption.

Calculating the Maximum AC

Remember that as long as alcohol is present in the body it is being eliminated. Therefore, the first step in a retrograde extrapolation is to estimate the amount of alcohol eliminated in the time between the offense and the test. Multiply the number of hours elapsed by the rate of elimination. An average rate (0.015) may be used, remembering that the actual rate may be higher or lower than the stated average. This calculated amount must be added to the test result since it represents alcohol that was present at the time of the offense but eliminated before the test was taken. ***Measured AC + [(Time of test – Time of driving) x 0.015] = Maximum AC.***

Calculating the Minimum AC

The minimum AC at the time of driving is obtained by subtracting the effect of unabsorbed alcohol from the maximum AC previously calculated. ***Maximum AC - (Effect of unabsorbed alcohol) = Minimum AC.*** To estimate the effect of unabsorbed alcohol, estimate the amount of alcohol and its effect on a person of the defendant's weight, gender and body build. Alcohol takes time to be absorbed after cessation of drinking. The amount of time it takes is highly variable, difficult to predict and impossible to determine after the fact. In spite of this, an expert can provide a useful estimate based on facts and assumptions that have a solid foundation in the scientific literature.

The fact that a large portion of an alcohol dose is absorbed within the first 30 minutes of consumption limits the extent that unabsorbed alcohol can after a calculation. This is true even if food is present in the stomach. Also, remember that in social and prolonged drinking situations a peak AC is reached shortly after, or even before, the last drink is finished. Studies have shown that in the majority of cases, the rise in AC following a drink is no greater than 0.02 under a variety of dosing conditions, including food in the stomach. This makes it unlikely, though not impossible, for a subject's drinking history to account for a large difference between an AC at the time of driving and the time of the test. If it can be determined that

Alcohol Extrapolation, Continued

the last alcohol consumption occurred an hour or more prior to the time of the offense, absorption would have essentially been completed and no significant effect would be expected.

The method that a given witness uses and the assumptions upon which the calculation is based may vary. Many experts simply subtract the effect of one drink from the maximum for every estimate. Others may provide a conservative estimate by subtracting the effect of all alcohol consumed 30-60 minutes prior to the offense. The prosecutor should discuss the details of the case and find out what the witness will be able to say on the stand prior to trial.

The Robustness of the Horizontal Gaze Nystagmus Test in Standard Field Sobriety Tests

Law enforcement officers are trained in accordance with NHTSA/IACP guidelines to administer Standard Field Sobriety Tests (SFSTs) to drivers suspected of alcohol impairment. The officer may later testify at a trial about the evidence that led to the arrest, including the driver's performance on the SFST. SFSTs consists of three tests: Horizontal Gaze Nystagmus (HGN), Walk and-Turn (WAT), and One-Leg Stand (OLS). Courts generally accept testimony about WAT and OLS, but may not admit testimony about HGN. During an HGN examination, the suspect stands with feet together and arms at the side. A suspect must then follow the movement of a stimulus with the eyes and the officer examines and scores each eye separately. Sometimes, minor procedural differences occur in the administration of an HGN test due to environment, weather, and the suspect's level of cooperation.

Courts have accepted arguments that variations from standard procedures in HGN administration may affect its validity and as a result render HGN testimony inadmissible. The effect of deviations from standard procedure on HGN scores has never been systematically studied. In addition, questions have been raised about the validity of the test when a suspect has functional vision in only one eye.

To ascertain whether minor variations in procedure affect the validity of HGN tests, NHTSA examined variations in HGN administration through laboratory experiments and field data collection. Under contract, the Southern California Research Institute conducted three experiments to examine the effects of procedural variations in the administration of an HGN test on the accuracy of the test.

Findings

Overall, the laboratory experiments revealed that the officer-examiners did not err when participant BACs were .10 grams per deciliter or greater and rarely erred when participants' BACs were .08 g/dL or greater regardless of variations in stimulus presentation, participant position, or when participants had monocular vision.

Implications

The results of this study reveal that HGN is a robust phenomenon. Minor procedural variations do not compromise the validity of the HGN examination.

How to Order

For a copy of *The Robustness of the Horizontal Gaze Nystagmus Test* (36 pages plus appendices), write to the Office of Behavioral Safety Research, NHTSA, NTI-130, 1200 New Jersey Avenue SE., Washington, DC 20590, send a fax to 202-366-7096, or download from www.nhtsa.dot.gov. James Frank, Ph.D., and Jenny Percer, Ph.D., were the project officers. The above is an excerpt of an article that appeared in NHTSA's *Traffic Tech*, Number 339, January 2008.

FROM MADD WISCONSIN

Mark your calendars for the 2008 Walk Like MADD Saturday, June 14, 2008

Mothers Against Drunk Driving is having its third annual 5k non-competitive walk in Wisconsin. Walkers from all over the state will participate in this important event on Saturday, June 14, 2008, at Veteran's Park in Milwaukee. **Sign up today to walk or register as a virtual walker at www.maddwisconsin.org.** MADD's signature walk, is a fun, community-driven 5K walk that raises funds and saves lives. Every step taken and pledge made will help raise funds and awareness for MADD's programs and services that will serve to make our communities safer.

The Walk Like MADD walk helps MADD support programs for both victims of drunk driving as well as programs to help prevent drunk driving and underage drinking. The funds raised will help people in our community by providing free victim survivor support, by teaching kids to be smart and safe passengers by reminding people to designate a sober driver.

Upcoming Events

Protecting Lives, Saving Futures

May 28-30, 2008, The Holiday Inn & Convention Center, Stevens Point, Wisconsin.

A multi-disciplinary training program for prosecutors and law enforcement officers sponsored by Mothers Against Drunk Driving (MADD) Wisconsin, in conjunction with the Resource Center on Impaired Driving and the Department of Justice's Statewide Education and Training Program (SPET).

10th Annual Wisconsin Prosecutors Seminar on OWI

October 30-31, 2008, The Osthoff Resort, Elkhart Lake, Wisconsin.

Legal Updates

May 27, 2008, Milwaukee County Sheriff's Department-Franklin (Anderson),

Contact: danderspm@milwcnty.com

Click it or Ticket High Visibility Enforcement May 19 – June 1, 2008

During this holiday period, Wisconsin law enforcement agencies will join forces with agencies across the country for a national seat belt enforcement campaign. The message is simple "Click It or Ticket."



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