



HOT SHEET

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Web Sites

West Virginia Prosecuting
Attorneys Institute
www.wvpai.org

National Highway Traffic
Safety Administration
www.nhtsa.dot

National District Attorneys
Association /
American Prosecutors
Research Institute
www.ndaa-apri.org

Governor's Highway
Safety Program
www.wvdot.com

WV State Police
www.wvstatepolice.com

WV Division of Criminal
Justice Services
www.wvdcjs.com

DOG SNIFF OKAY WITHOUT SUSPICION IF CONDUCTED DURING STOP

An Illinois state trooper stopped the defendant for speeding. A second trooper heard the radio communication concerning the stop, drove to the scene with his drug dog and walked the dog around the defendant's car while the first trooper was writing a warning ticket. When the dog alerted on the vehicle's trunk, the officers searched the trunk and found marijuana.

The lower court held that there were no specific and articulable facts to suggest drug activity and that use of the dog unjustifiably enlarged a routine traffic stop into a drug investigation.

The Supreme Court, in *Illinois v. Caballes*, ___ U. S. ___ (2005), held that a dog sniff conducted during a concededly lawful traffic stop that reveals no information other than the location of a substance that no individual has any right to possess does not violate the Fourth Amendment.

NO EXPUNGEMENT OF DMV RECORDS

Mullen v. State Division of Motor Vehicles, No 31740, Filed March 17, 2005.

West Virginia Code 61-11-25, as it pertains to West Virginia Division of Motor Vehicles (DMV) records, does not authorize the expungement of records of substantive determinations and actions by the DMV that did not result as a matter of law from the fact of a DUI criminal arrest, charge or conviction.

The DMV challenged portions of two orders entered by the Circuit Court of Ohio County which (1) expunged all criminal records relating to an arrest of the defendant for DUI and (2) expunged all administrative records of a driver's license suspension that was imposed by DMV for the conduct by the defendant that led to the DUI arrest.

No challenge was made regarding the criminal records, as the defendant's criminal charges were dismissed two days after his arrest. The issue was whether a court could expunge records of driver's license suspensions or other substantive administrative actions by DMV and, if so, to what degree and under what circumstances. The Court held that even though the license suspension proceedings were triggered by the defendant's arrest, the license suspension action itself was not based upon the fact of a criminal DUI arrest or conviction, but upon a separate (and uncontested) administrative charge and subsequent administrative findings by the DMV.

The Court also noted in a footnote that expungement does not ordinarily mean the actual physical destruction of records of an event. More commonly it means the limitation or negation of the legal relevance or effect of an event or determination, and the segregation, sealing or other alteration of the records.

CONVERSION RATES FOR ALCOHOL

Many of you run across DUI cases where the blood alcohol has been obtained and reported from a variety of sources. Here are some alcohol tissue to blood ratios provided by Tom Kimball, Traffic Safety Resource Prosecutor for Tennessee:

Plasma : Blood	1.18
(1.1 to 1.35)	
Serum : Blood	1.15
(1.12 to 1.17)	
Urine : Blood	1.4
(0.53 to 2.6)	
Vitreous : Blood	1.12
(0.09 to 1.38)	
Brain : Blood	0.94
(0.69 to 1.47)	
Saliva : Blood	1.10
(0.97 to 1.31)	

Check with the folks from Toxicology for specific information.

DRUNK DRIVER SUES BAR

A Florida man who injured himself and his passengers when he drove drunk is suing the bar that served him.

The suit alleges that the bar served him even though they knew he was a "habitual drunkard." The man once worked at the bar but had been fired because of drinking problems.

DUI TRIAL ADVOCACY TRAINING A SUCCESS

Twelve prosecutors successfully completed the *Prosecution of Driving While Under the Influence (Basic DUI Trial Advocacy)* held March 7 – 10, 2005 at Flatwoods. The training provided for the development of courtroom skills of new or inexperienced prosecutors trying alcohol-related impaired driving cases. Topics covered during the training included case review and preparation, opening statements, direct examination, cross-examination, closing arguments, blood alcohol toxicology, DUI enforcement, common defenses and ethics.

Those attending and completing the course were: Jim Samples, newly-elected Prosecuting Attorney of Clay County; Neil Boden, Assistant Prosecutor of Fayette County; Lora DeMark, Assistant Prosecutor of Harrison County; Thomas (T. J.) Drake, Assistant Prosecutor of Clay County; Brandon Flower, Assistant Prosecutor of Marion County; Richelle Garlow, Assistant Prosecutor of Jackson County; Jamella Lockwood, Assistant Prosecutor of Taylor County; William Means, Assistant Prosecutor of Preston County; Renata Newbill-Jallow, Assistant Prosecutor of McDowell County; Angela Ramsey, Assistant Prosecutor of Wood County; James Shay, Jr. Assistant Prosecutor of Preston County; and Heather Walker, Assistant Prosecutor of Kanawha County.

Basic funding for the course was provided by the National Association of Prosecutor Coordinators. Additional funds were provided by the West Virginia Governor's Highway Safety Program and the West Virginia Prosecuting Attorneys Association.

SOMETHING MUST BE WORKING

In the effort to save lives on West Virginia's highways, something must be working. Motor vehicle crash data has shown that fewer people are dying on our roads. 2002 saw fatality rates for West Virginia at those of nearly ten years ago after years of decline. Those numbers are going back down.

The total number of fatalities for the state in 2003, the most recent year for which statistics are available, was 394, down from 439 in 2002. This was a 10% decrease and third best in the country. 148 (37%) of those deaths in 2003 were alcohol-related. The death total was down to 1.96 fatalities per 100 Thousand vehicle miles traveled, or a rate of 0.74. 2002 totals were 2.19 fatalities per 100 Thousand vehicle miles traveled, or a rate of 0.90.

West Virginia is one of the original thirteen Strategic Evaluation States (SES) where enforcement and fatality reduction strategies have been studied recently. Of the overall reduction of fatalities across the country, the SES states were responsible for 75% of the reduction.

In simpler terms, fewer people were killed on the state's roads and highways. We're moving in the right direction.

HANDCUFFS DURING SEARCH OK

The handcuffing of the occupants during the execution of a search warrant of a residence was permitted by the U. S. Supreme Court. The case, *Muehler et al v. Mean*, ___ U. S. ___, No 03-1423, Decided March 22, 2005, held that officers executing a search warrant for contraband have the authority "to detain the occupants of the premises while a proper search is conducted." Minimizing the risk of harm to officers is a substantial justification for detaining an occupant during a search.

Inherent in the *Michigan v. Summers*, 453 U. S. 692 authorization to detain is the authority to use reasonable force to effectuate the detention.

DRUNK ON LISTERINE?

A Michigan woman was arrested and pleaded guilty to drunk driving after failing field sobriety tests and telling police that she drank Listerine.

The woman was pulled over after rear-ending another vehicle at a red light. Police found a bottle of Listerine in her car and she told them that she had drunk three glasses earlier in the day. Her blood alcohol level was over 0.24, more than three times the legal limit of 0.08.

According to the manufacturer, Phizer, Inc., original formula Listerine contains 26.9 percent alcohol. Other varieties contain 21.6 percent alcohol.

On a related note, Listerine PocketPaks contain no alcohol.

MAN WITH 'TIPSY' PLATE FACES DUI CHARGES

Having a vanity plate that reads "TIPSY" may not be such a great idea after all. Josiah Johnson, 23, said his license plate might have tipped off the sheriff's deputy who pulled him over after he left Coach's Sports Pub in Moorhead, MN.

Now he faces third-degree drunken driving charges after his blood-alcohol level allegedly registered twice the legal limit.

Johnson said he bought the personalized license plate for his Jeep to describe the way it rode then kept it as a joke because he likes to party. "It doesn't mean I drink and drive," he said. "It just means I like to have a good time. Johnson said he'll never drink and drive again. "I feel really stupid," he said.

SOBRIETY CHECKPOINT CASES

Driving under the influence charges and license revocation proceedings against drunk drivers arrested at sobriety checkpoints are being dismissed or reduced because of the officers' failure to follow departmental procedures.

Hidden traps and pitfalls are a concern in every criminal prosecution. Because of the hyper-technical aspect of DUI cases, particularly those arising out of a sobriety checkpoint, prosecutors need to make sure that checkpoints are being conducted properly and within approved guidelines. Federal and West Virginia case law dealing with sobriety checkpoints requires that procedure be followed. See *State v. Davis*, 195 W. Va. 79, 464 S.E.2d 598 (1995), *Carte v. Cline*, 194 W. Va. 233, 460 S.E.2d 48 (1995).

Some examples of procedures not being followed are: (1) approval of site location by the head of the police agency in consultation with the prosecutor; (2) notification of the media and prosecutor in advance of the checkpoint; and (3) inadequate description of the location of the checkpoint (such as using a route number rather than the common street name). It is hard enough to win these cases without giving them away. Prosecutors should make an effort to ensure that police agencies conducting sobriety checkpoints have a written policy that complies with federal and state requirements and that the policy is being followed. Training is available through the Governor's Highway Safety Program at no cost to officers. Prosecutors are welcome and urged to attend the training as well.

Copies of a sobriety checkpoint model policy were provided to each county in 2004. If you need an additional copy or want more information concerning the training, please contact the Traffic Safety Resource Prosecutor.

.2004 STANDARDIZED FIELD SOBRIETY TESTING (SFST) REVISIONS

A workgroup, at the request of the National Highway Traffic Safety Administration (NHTSA), has completed updates and revisions to the Standardized Field Sobriety Testing (SFST) curriculum. These revisions were approved by the International Association of Chiefs of Police (IACP) DRE Technical Advisory Panel in November of 2004. The revisions have been incorporated into the 2004 SFST curriculum, which includes the SFST student manual, SFST instructor manual and the SFST 8-hour refresher training materials.

Highlights of the revisions include changes to guidelines for controlled drinking practices (wet labs), updated FARS crash data, the 0.08 BAC level being adopted by all 50 states, updated research regarding HGN (can be performed on persons lying down), addition of recent research concerning HGN, and various commentary, editorial and stylistic matters.

For more information regarding these revisions, please contact the Traffic Safety Resource Prosecutor.

NEW INSTITUTE STAFF MEMBER

Andrea Darr has joined the Prosecuting Attorneys Institute staff. Andrea's concentration will be victim's rights and public education on crime victim issues. Formerly a victim witness coordinator in Kanawha County, she will be working on collaboration among the various disciplines within the criminal justice in the area of witness and victim services, including protocol development and information sharing.

For more information, please feel free to contact Andrea at the Institute office.

MARK YOUR CALENDAR

FINDING WORDS

May 2—6, 2005
Charleston

NHTSA Mid-Atlantic Region Impaired Driving Summit

June 15-17, 2005
Pittsburg, PA

SUMMER PA MEETING

June 16—19, 2005
Snowshoe Resort

LAW ENFORCEMENT TRAINING

To be determined

FALL PA MEETING

September 14—16, 2005
Stonewall Jackson Resort

FINDING WORDS

October 24— 28, 2005
Camp Dawson

TONGUE STUD CASE UPDATE

An Indiana court decision holding that a breath test given to a woman wearing a stainless steel stud in her pierced tongue is inadmissible in court because the stud is a “foreign” object has been overturned. The Indiana Supreme Court opinion, issued March 2, 2005 (Guy v. State, Case No. 49S04-0407-CR-00301), indicated that allowing a person to keep a tongue stud in his or her mouth during a breath test is acceptable. Putting the tongue stud in during the 20 minute waiting period would be another matter.

The Indiana rule provides that “...the person to be tested must have had nothing to eat or drink, must not have put any foreign substance in his or her mouth or respiratory tract, and must not smoke within twenty (20) minutes prior to the time a breath sample is taken.” Indiana’s Supreme Court had previously held that during the required waiting period the subject may not have had any foreign substance in his mouth.

West Virginia’s rules governing breath testing provide, in part, as follows: The individual being tested shall be under constant observation for a period of twenty minutes before the test is administered to insure that the individual has nothing in his or her mouth at the time of the test and that he or she has had no food or drink or foreign matter in his or her mouth during the observation period.

INMATE FURLOUGH PROGRAM

The Legislature has passed a furlough program for inmates being held at regional jails. The new law, §31-20-29, signed into law by Governor Manchin on April 14, 2005, provides for furloughs or special escorts for specified inmates under the control and custody of the regional jails for the purposes of attending funerals or to make hospital visits to terminally ill family members.

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