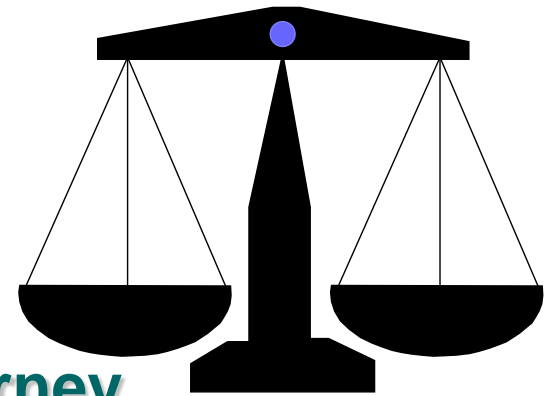


Prosecution of the Drug-Impaired Driver in Minnesota

Karen S. Mara

Assistant Minneapolis City Attorney

November 16, 2016

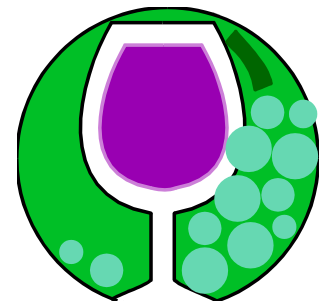
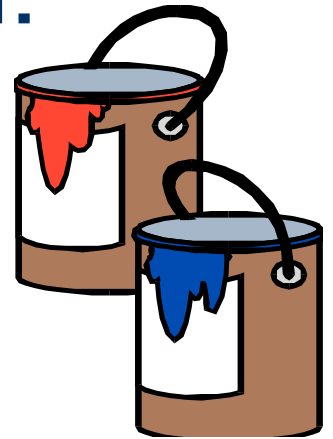


PART I: Statutory & Case Law Review: Minnesota Perspective



Applicable Statutes: What is a Crime? (Minn. Stat. § 169A.20)

- Driving while under the influence of:
 - (1) alcohol
 - (2) controlled substances
 - (3) hazardous substance
 - (4) combination of (1), (2) &/or (3)
 - (5) AC of over .08 or .08 within 2 hours of driving



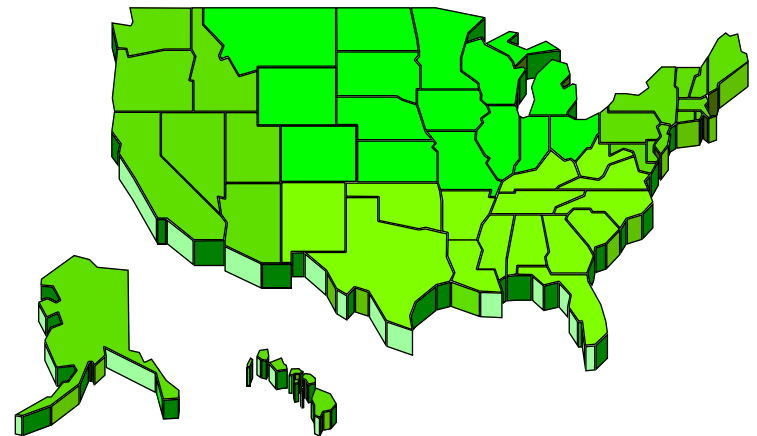
What is a crime? (cont.)

- (6) commercial vehicle and AC of .04 or more within 2 hours of driving
- (7) while schedule I or II controlled substance, **or its metabolite**, (except marijuana) is present in body



What is not a crime - Driving while under the influence of:

- Drugs that are not controlled substances
- Comparison to other states: about 35 plus DC cover all drugs, only about 15 limit to controlled substances





No Dakota

-
- **All of Minnesota's border states prohibit driving under the influence of ANY drug (not limited to controlled substances)**



So Dakota



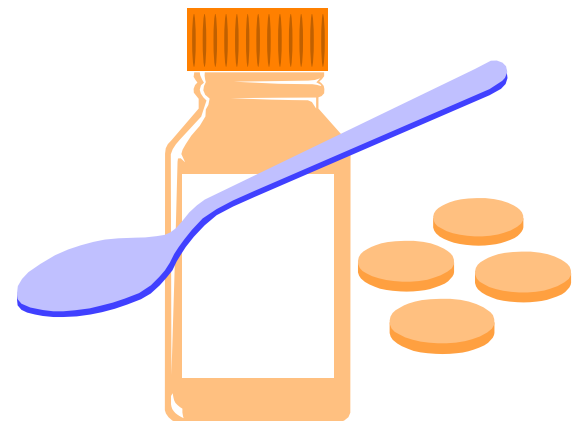
Iowa



Wisc

What is not a crime (cont.)

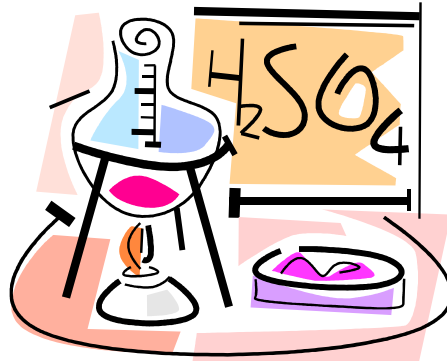
- driving while marijuana or a schedule III, IV or V drug is present in your body



Comparison to other states: per se DWI drugs laws

- 18 states have some form of per se controlled substance laws:

- Arizona
- Delaware (*limited*)
- Georgia
- Illinois
- Indiana
- Iowa (*limited*)
- Michigan
- Minnesota (*schedule I & II except pot*)
- Nevada (“*certain amounts of prohibited substances*”)



- North Carolina (*schedule I & all for under 21*)
- Ohio (*limited*)
- Pennsylvania
- Rhode Island
- South Dakota (*under 21*)
- Utah
- Virginia (*limited*)
- Wisconsin (*limited*)
- Washington (*only marijuana – 5.0 ng or higher in blood within 2 hours of driving*)

What is a controlled substance?



- **Minn. Stat. § 152.02 – five schedules.**
- **Minn. Stat. § 152.02, subd. 7 – Board of Pharmacy is authorized to regulate and define additional controlled substances.**
- **Minn. Rules § 6800.4210 *et. seq.***
- **Substances scheduled by rule are incorporated in the statutory schedules.**
State v. King, 257 N.W.2d 698 (Minn. 1977); State v. Vershelde, 595 N.W.2d 192 (Minn. 1999)

What is a hazardous substance?

- **Minn. Rules § 5206.0400, et seq.**

- **Website links for lists of controlled and hazardous substances:**

- **Chapter 152: www.revisor.mn.gov/statutes/**

- **Minnesota Rules: www.revisor.leg.state.mn.us/rules/**



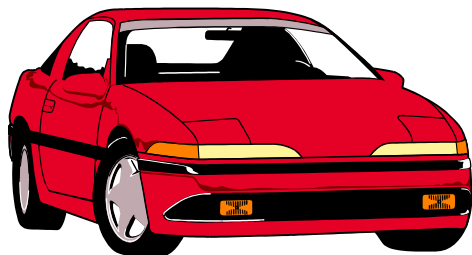
Prescription Use Affirmative Defense

- Under section **169A.46, subd. 2** it is an affirmative defense to the per se law if a driver used a controlled substance according to the terms of a prescription.
- Burden is on defense to prove by a preponderance of the evidence that the defendant used the controlled substance according to the terms of a prescription.
- Only a defense to the per se law (169A.20, subd. 1(7)), **not** to the under the influence law (169A.20, subd. 1(2)).
- Does not apply in implied consent proceedings.

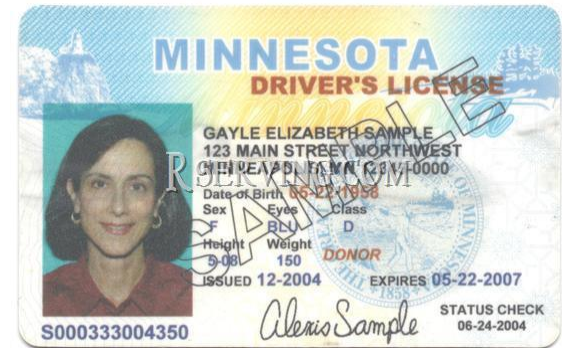


Effect of a DWI-controlled substance arrest or conviction on driver's license

- DL revocation upon conviction for DWI-controlled substance.
- Refusal to take blood or urine test will result in DL revocation, even after breath test is taken.
- Choice of blood should be offered if refuses urine and vice versa.



DL impact (cont.)



- DL revocation if tests positive for schedule I or II controlled substance or its metabolite, excluding marijuana – only if obtained pursuant to implied consent law, not pursuant to a search warrant.
- Officers should send in a “Request for Examination of Driver” form to DPS in all DRE cases (available on DVS website; Public Safety Form PS31924) - may result in request for interview, with failure to comply resulting in DL suspension

Birchfield v. North Dakota

(U.S. Supreme Court June 23, 2016)



- **Breath** tests are searches incident to arrest so a driver who refuses may be charged with the crime of refusal. (Bernard case from Minnesota)
- **Blood** tests are not searches incident to arrest so a driver who refuses may not be charged with the crime of refusal. (Birchfield case from ND)
- Officers need a search warrant or exception to warrant requirement (e.g., consent or exigent circumstances) to take a blood sample. (Beylund case from ND remanded to determine consent to blood test given partial inaccuracy of IC advisory)

Birchfield v. North Dakota

- Birchfield did not rule on:
 - DL revocation consequences pursuant to implied consent law, or
 - Refusal cases involving requests for urine samples.



Minnesota Supreme Court: State v. Trahan and State v. Thompson

- Decided October 12, 2016
- Trahan – State may not prosecute crime of refusing to take a **blood** test, absent exception to warrant requirement or exigent circumstances.
- Thompson – State may not prosecute crime of refusing to take **blood** or urine test . . .

Impact of Birchfield, Trahan and Thompson



illustrations of.com #61601

- In light of the holdings in Birchfield, Trahan and Thompson regarding criminal charges for blood & urine test refusals, Officers in Minnesota are generally being advised to obtain **search warrants** in DWI cases involving drugs other than alcohol.

Impact of Birchfield, Trahan and Thompson (cont.)



- **Drug related DWI's:**
- **Most jurisdictions are obtaining search warrants for a blood sample and not reading the implied consent advisory.**
- **Some jurisdictions are 1) obtaining search warrants, then 2) reading the implied consent advisory. If the driver refuses, the SW is not executed and the driver is charged with crime of refusal.**

General Law

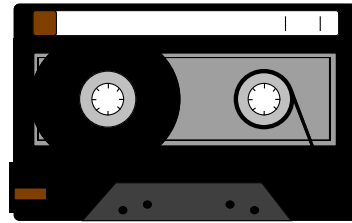


Miranda

- A Miranda warning must be given prior to any in custody interrogation of a suspect.
- Miranda need not be read before the implied consent advisory since it is not in custody interrogation.
- Miranda must be given prior to DRE evaluation as suspect is in custody and is being asked questions.



Scales



- **Must electronically record in custody interrogations, information about rights, and any waiver of those rights.**
- ***Scales* does not apply to implied consent advisory - Umphlett, 533 N.W.2d 636 (IC); Gilmartin, 535 N.W.2d 650 (crime).**
- **DREs should turn on audio or video recorder as soon as Miranda is read and record entire evaluation.**

Minnesota Drug Impaired Driving Case Law – Published Decisions



- There are approximately 2 dozen published and unpublished Minnesota appellate court decisions relevant to drug impaired driving case.
- Most important decision is:
- State v. Klawitter, 518 N.W.2d 577 (Minn. 1994) (admissibility of DRE testimony)

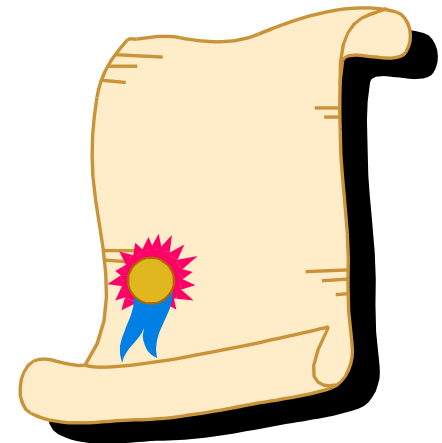
Klawitter case - holdings: DRE

- **An officer should be allowed to give an opinion based on the officer's training and experience and his or her observations following the 12-step drug recognition protocol, as long as:**



Klawitter DRE holdings (cont.)

- There is sufficient foundation for the opinion expressed,
- the State does not refer to the officer as a “Drug Recognition **Expert**”, and
- The evidence is relevant.



Klawitter case: holdings - HGN

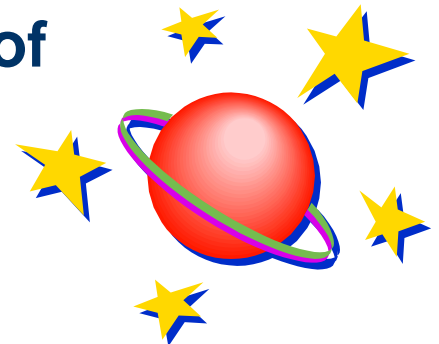
- HGN satisfies the Frye standard of admissibility: “nystagmus, when it is present, may be an element supportive of a conclusion of drug impairment based on the elements taken as a whole. And it may also support the identification of the drug category involved.”

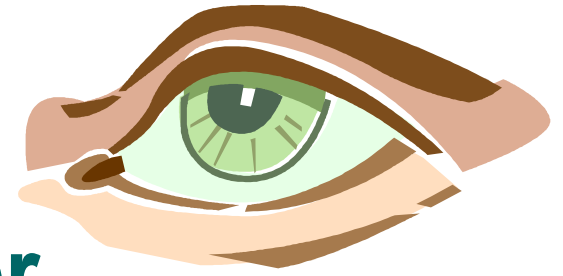




Why DRE is not Frye per Klawitter

- **Not scientific technique - list of things prudent, trained and experienced officer should consider before giving opinion whether person is under influence of a controlled substance(s).**
- **Few of steps require medical or scientific training or skill.**
- **DRE training refines and enhances skill of acute observation and focuses that power of observation.**





Nystagmus per Klawitter

- HGN and VN are not emerging scientific techniques.
- Trial court did not err in concluding that the Frye standard was met.
- Admissible as additional evidence of drug impairment and may support ID of a specific drug category.

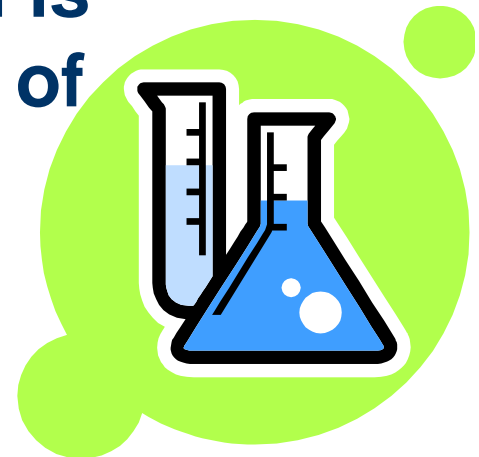
State v. Hegstrom



- State v. Hegstrom, 543 N.W.2d 698 (Minn. Ct. App 1996)
- State showed substantial evidence that defendant was under influence of controlled substance wherein after fatal accident caused by defendant he appeared:
- Distracted, drowsy, very spacey, aloof, out of it, constricted pupils, talked in low, slow voice, was unsure how he rear-ended victim vehicle and was inattentive before accident.

Hegstrom case (cont.)

- **Expert testimony not required to establish PC that defendant was under influence of controlled substance.**
- **There's no defined level of chemical concentration at which a person is presumed to be under influence of controlled substance.**



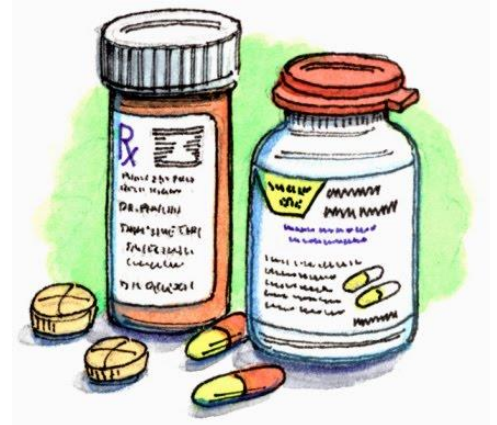
O'Connell v. State



- O'Connell v. State, 858 N.W.2d 161 (Minn. Ct. App. 2015)
- U.S. Supreme Court decision in Missouri v. McNeely (*dissipation of alcohol alone not exigent circumstances*) does not apply retroactively on collateral review of a final conviction (motion to reverse conviction and withdraw guilty plea based on McNeely).
- Defendant was weaving in traffic, under speed limit, dilated pupils, slow response to questions, poor SFST's.
- DRE evaluation with opinion of CNSS.
- Urine test result presence of amphetamines.
- District Court denied motions to suppress urine test and to dismiss for no probable cause.

Dornbusch v. Commissioner of Public Safety

- Dornbusch v. Commissioner of Public Safety, 860 N.W.2d 381 (Minn. Ct. App. 2015).
- There is no prescription defense in implied consent proceedings.



State v. Fawcett



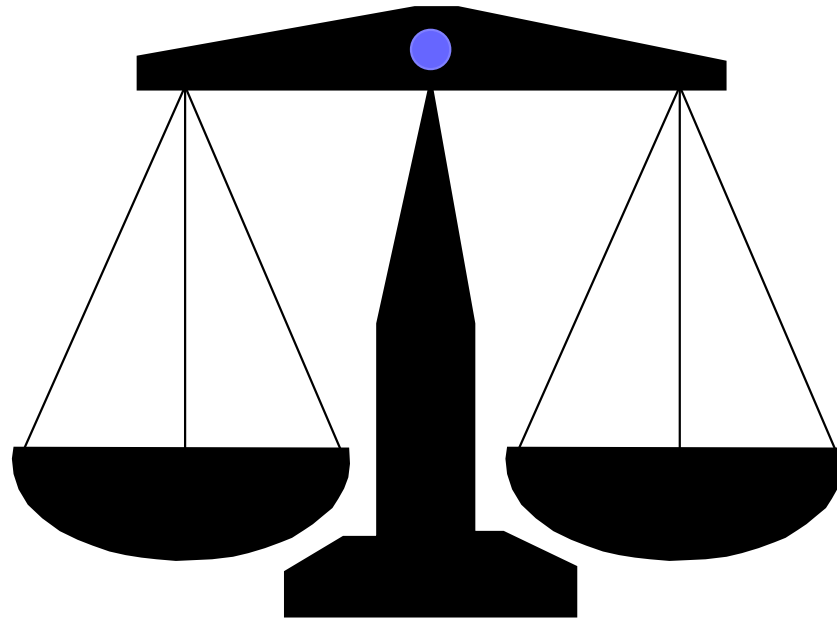
- State v. Fawcett, 884 N.W.2d 380 (Minn. 2016)
- Facts alleged in search warrant application provided probable cause to conclude evidence of CVO would be found in Fawcett's blood.
- Defendant did not retain privacy interests in her blood sample once lawfully seized such that a new search warrant was not needed for subsequent analysis.

State v. Carson

- State v. Carson, 884 N.W.2d 917 (Minn. Ct. App. 2016)
- 1,1-difluoroethane (DFE) or “dust-off” met the definition of hazardous substance so as to support Defendant’s DWI conviction.



Part II: Charging Decisions & Trial Tactics



Case Evaluation - Factors affecting a Charging Decision

- **Driving conduct**
- **Statements by suspect at scene & throughout**
- **Physical evidence of drug use**
- **Severity of impairment**



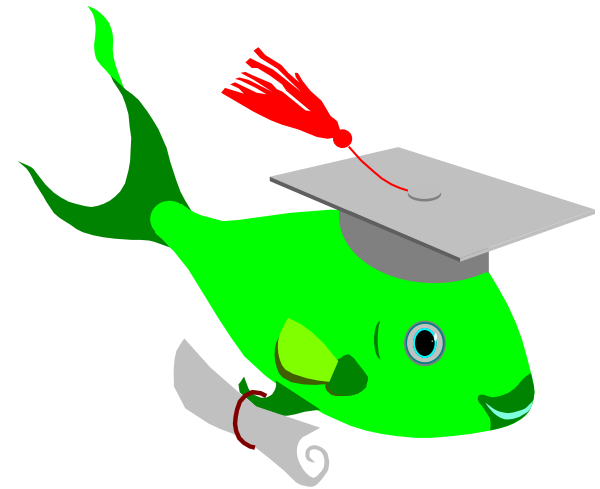
Charging Decision (cont.)

- **Whether opinion is corroborated by tox, and if not, whether it can be explained.**
- **Are there other credible explanations for suspect's behavior?**
- **Is behavior at scene consistent with behavior during evaluation & if not, can it be explained?**



Preparing for Court - Tips to Help your Prosecutor

- **Learn about DRE - attend all or part of a DRE school**
- **Read DRE manuals**
- **Attend SFST school**
- **Attend ARIDE School**
- **Police Ride-a-long**
- **Witness certification training**



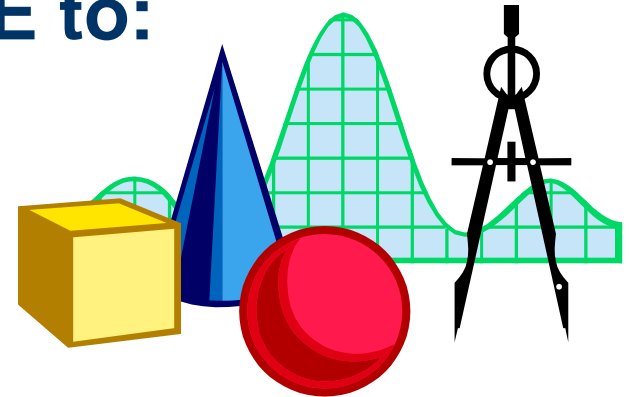
Preparing the Case - More Tips for the Prosecutor

- **Meet with DRE in advance to discuss case**
- **Read up on drugs involved**
- **Review DRE manual regarding drugs involved in your case**
- **Discuss testimony with BCA witness - learn their limitations regarding testimony**



Trying the Case

- **Prosecutor should ask DRE to:**
 - **Bring DRE rolling logs**
 - **Bring HGN log**
 - **Bring resume**
 - **Bring DRE manuals**
 - **DRE kit - including penlight & pupilometer**
 - **Be prepared to demonstrate divided attention tests**



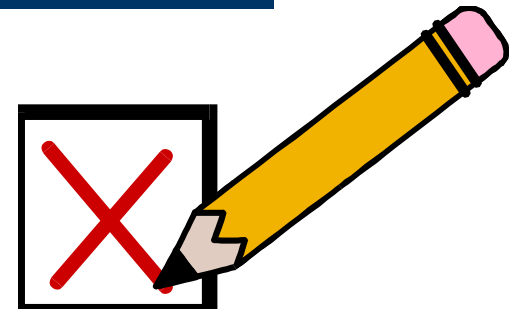
Testimony - Direct



- **Don't oversell DRE**
 - Jury impressed by driving conduct
 - DRE is a very good system of observation
- **Minimize foundation questions**
 - jury want to hear bottom line
- **Avoid scientific explanations**
 - don't open door to detailed cross
 - avoid jargon & technical/scientific terms
 - do not sound like a scientist

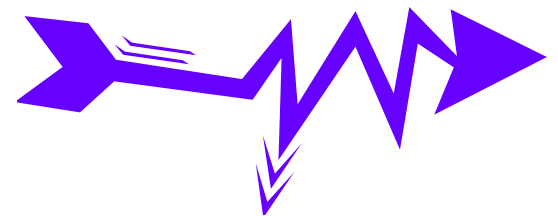
Testimony - Cross

- **Be consistent with DRE manual**
 - Defense will have copies
 - Review before testifying
- **Freely admit “other explanations”**
 - give defendant little points, or they become big points if witness fights with attorney
 - importance is in big picture - all observations taken together, not separately



Testimony - Cross (cont.)

- **Don't speculate in scientific questions**
 - **asking the wrong witness**
- **When decide under influence - preliminary opinion is acceptable, natural, human response**
- **Don't speculate on facts not in evidence - don't have to accept defense hypothetical**

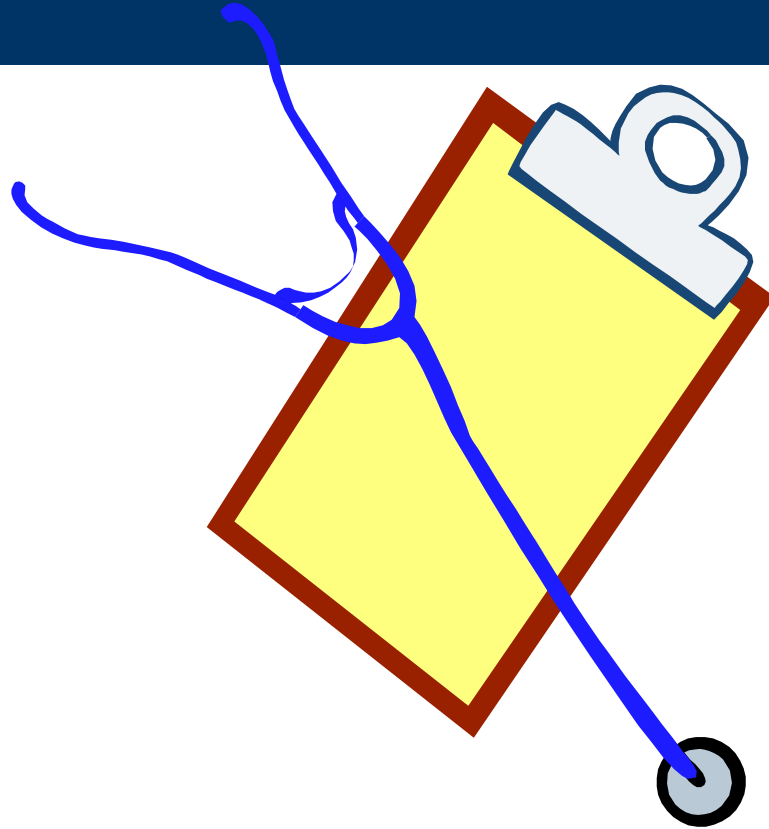


Common Defenses



- **Alternative explanations for behavior**
- **Defendant using drugs but not under the influence**
- **Not under influence at time of driving**
- **Defendant was using the drug legitimately**
- **Lack of bad driving behavior**
- **Alternative explanations for driving conduct**

Part III: Trends, Practice Tips & Observations



Status of DRE cases in Minneapolis



- Almost all cases result in a guilty plea to DWI controlled substance or DWI controlled substance per se.
- Very few trials - trials have been cases where marijuana was the only drug involved and one recent methadone trial.
- Back-log of DWI drugs cases with warrantless tests or refusal charges.
- Some recent Rasmussen hearings have involved Birchfield issues – Was there a search warrant and if not, was there consent or exigency?

Practice Tip

- **If Defendant is in an accident and goes to the hospital, ask hospital staff to tell you if any controlled substances are administered before you get a blood or urine test!!**
- **Some defendants may be given pain killers if injured!!**



Practice Tip



- There is some confusion about the interpretation of the implied consent advisory with arguments being made that marijuana is excluded.
- Please read the implied consent advisory as it pertains to controlled substances slowly and clearly, emphasizing the second “or”
- *“Minnesota law requires you to take a test to determine:if you are under the influence of hazardous or controlled substances or to determine the presence of a controlled substance listed in schedule I or II, other than marijuana or tetrahydrocannabinols.”*
- **Note: This issue is disappearing with use of search warrants.**

Practice Tip



- **Review tox results to see if BCA stopped testing after a schedule I or II controlled substance was found and request additional confirmatory testing if warranted.**

A breath test was previously administered on this subject. No blood or urine ethyl alcohol analysis will be performed on this sample.

A schedule I or II controlled substance was identified. No further toxicological analyses will be performed on this sample.



DL Revocations pre and post Birchfield

- Check to make sure that suspect's DL is revoked if positive blood or urine test for schedule I or II controlled substance (except marijuana).
- There is no DL revocation if suspect's blood or urine tests positive for schedule I or II controlled substance (except marijuana) when obtained with a search warrant – a conviction for DWI is needed or compliance with Implied Consent Law.

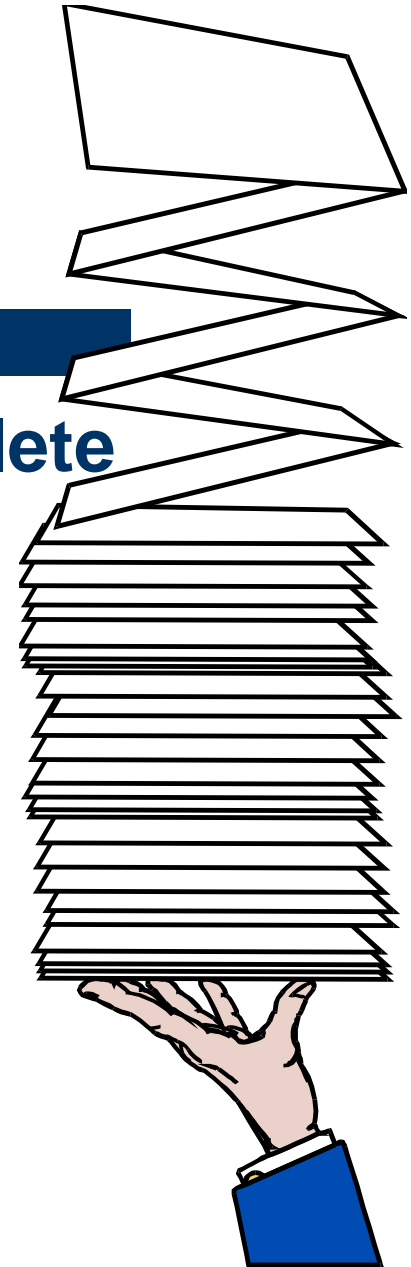
Areas of Confusion



- **Confusion as to what is a controlled substance – zolpidem, lorazepam.**
- **There is confusion regarding the applicability of the prescription defense – it only applies to the per se law, not to the under the influence law.**
- **There is also confusion about DWI marijuana – can charge if under the influence despite exception in per se law.**
- **Under the influence count, 169A.20, subd. 1(2) vs. per se count, 169A.20, subd. 1(7).**

DRE reports

- **Please make sure that your complete reports are promptly sent to your prosecutor**



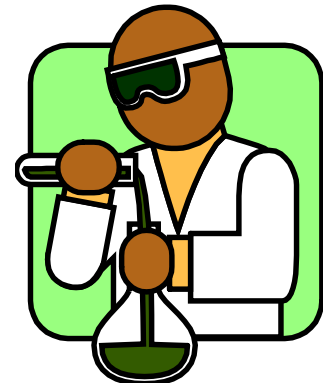
Impact of DWI controlled substance per se law on DRE program

- **The per se law is very helpful - Minn. Stat. § 169A.20, subd. 1(7) especially with amendment to include metabolites.**



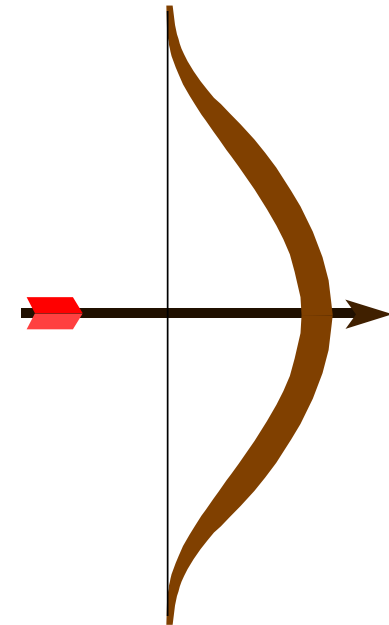
DWI per se controlled substance law

- Do such laws cause officers to be reluctant to use DREs?
- Do such laws cause officers to skip SFST's and evidence gathering?
- Are such laws confusing?
- Experience with per se alcohol laws:
 - Can not assume breath, blood or urine test will be admissible
 - Officers still seek SFST training



Per Se DWI Controlled Substance Laws . . .

- Are another arrow in the quiver DWI enforcement
- Icing on the cake for DWI controlled substances prosecutions
- *Prosecutors love this law!!*



Drugs that Mpls prosecutors see most often:

- **Narcotics, especially heroin (causes crashes)**
- **Prescription drug abuse**
 - **Pain Killers**
 - **Tranquilizers (eg, Xanax, Valium)**
 - **Antidepressants**
 - **Methadone**
 - **Adderall (amphetamine)**



What other drugs are being used? (cont.)

- **Methamphetamine**
- **PCP in marijuana cigarettes**
- **Cocaine and its metabolite**
- **Zolpidem (Ambien)**
- **Combinations**



Dust-Off



- Dust-off is being seen more often as being used by impaired drivers.
- Dust-off appears as 1, 1-difluoroethane in the tox sample, but it is not currently specifically listed as a hazardous substance in the Minnesota Rules.
- State v. Carson, 884 N.W.2d 917 (Minn. Ct. App. 2016) held that 1,1-difluoroethane (DFE) or “dust-off” met the definition of hazardous substance so as to support Defendant’s DWI conviction.

Marijuana remains common

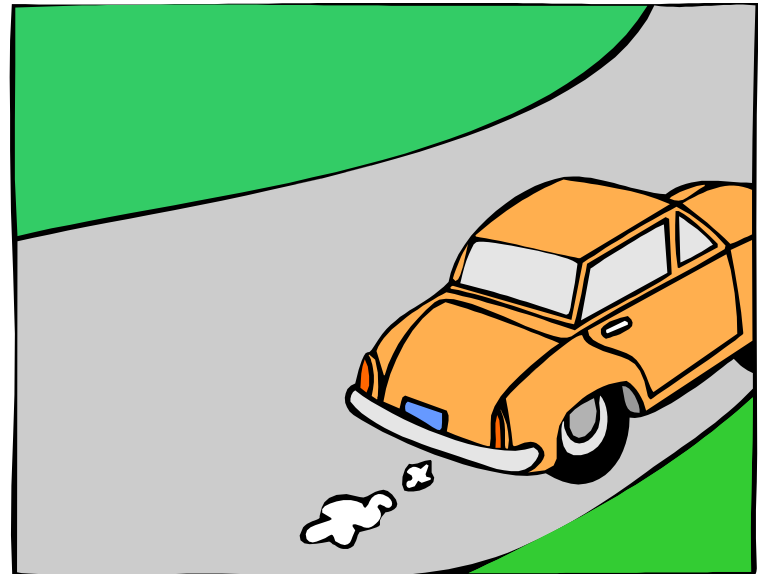


- **THC can not be found in urine - only THC metabolite is found**
- **THC will only be found in blood**
- **A level will be reported for blood, but not urine**
- ***Try to get a blood sample if cannabis is suspected.***



Marijuana DWI cases

- **Marijuana cases are difficult to prove especially if there are no other drugs involved and the driving conduct is not egregious.**



Useful web-sites with DRE-related information:

- **The International Drug Evaluation & Classification Program:** www.decp.org
- **Minnesota:** www.dwitaskforce.com
- **Minnesota State Patrol:** <https://dps.mn.gov/divisions/msp/about/dre/Pages/default.aspx>
- **NHTSA:** www.nhtsa.gov
- **National Traffic Law Center (National District Attorneys Association):** www.ndaa.org (under programs, go to traffic law)

44 Canal Center Plaza, Suite 110
Alexandria, VA 22314
703.549.9222
Fax: 703.836.3195



Minnesota Cases relevant to Drug-Impaired Driving



- *State v. Klawitter*, 518 N.W.2d 577 (Minn. 1994)
- *State v. Heibel*, 1995 WL 81395 (Minn. Ct. App. 1995)
- *State v. Hegstrom*, 543 N.W.2d 698 (Minn. Ct. App. 1996)
- *State v. Cammack*, 1997 WL 104913 (Minn. Ct. App. 1997)
- *Jenkins v. Commissioner of Public Safety*, 1997 WL 714740 (Minn. Ct. App. 1997)
- *State v. Bollin*, 2000 WL 1146293 (Minn. Ct. App. 2000)
- *State v. Miller*, 2002 WL 171933 (Minn. Ct. App. 2002)
- *Plocher v. Commissioner of Public Safety*, 2006 WL 91548 (Minn. Ct. App. 2006)
- *Lund v. Commissioner of Public Safety*, 2006 WL 2053046 (Minn. Ct. App. 2006)
- *State v. Alan*, 2007 WL 1248038 (Minn. Ct. App. 2007)
- *State v. Huffman*, 2007 WL 1412844 (Minn. Ct. App. 2007)
- *State v. Suber*, 2008 WL 942622 (Minn. Ct. App. 2008)

MN Drug-Impaired Driving Cases (cont.)



- *State v. Urban*, 2009 WL 2151130 (Minn. Ct. App. 2009)
- *State v. Selle*, 2011 WL 5829348 (Minn. Ct. App. 2011)
- *Peppin v. Commissioner of Public Safety*, 2012 WL 5990267 (Minn. Ct. App. 2012)
- *State v. Taylor*, 2014 WL 621322 (Minn. Ct. App. 2014)
- *State v. Sam*, 2014 WL 996492 (Minn. Ct. App. 2014)
- *State v. Scheffler*, 2014 WL 4957113 (Minn. Ct. App. 2014)
- *O'Connell v. State*, 858 N.W.2d 161 (Minn. Ct. App. 2015)
- *Dornbusch v. Commissioner of Public Safety*, 860 N.W.2d 381 (Minn. Ct. App. 2015)
- *State v. Bachman*, 2016 WL 1551660 (Minn. Ct. App. 2016)
- *State v. Gobligh*, 2016 WL 2615749 (Minn. Ct. App. 2016)
- *State v. Schlingmann*, 2016 WL 3461854 (Minn. Ct. App. 2016)
- *State v. Fawcett*, 884 N.W.2d 380 (Minn. 2016)
- *State v. Carson*, 884 N.W.2d 917 (Minn. Ct. App. 2016)

Questions?



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