volume 3, issue 1

GEORGIA traffic PROSECUTOR

A Publication of the Prosecuting Attorneys' Council of Georgia Traffic Safety Program

···> our mission

The goal of PAC's Traffic Safety Program is to effectively assist and be a resource to our fellow prosecutors in keeping our highways safe by helping to prevent deaths and accidents on the roads in Georgia.

···> contents

feature article >

Seizing property at traffic stops: a brief review of forfeiture law

Forfeitures can be extremely complex and involved. Our feature article provides a brief review of forfeiture law as it relates to traffic stops and will provide law enforcement officers with tips on how they can effectively assist prosecutors throughout the forfeiture process.

additional features

Traffic Stop Forfeitures

By Gary Bergman, Staff Attorney, Prosecuting Attorneys' Council of Georgia

Contrary to popular opinion, DUI's do not all result from the misuse of alcohol. Increasingly, DUI's result from the use of controlled substances alone or in combination with alcohol. In such cases, a traffic officer may often discover drugs, money and/or weapons in the vehicle of the suspect. Such a discovery may implicate our state's drug forfeiture law, O.C.G.A. § 16-13-49. This article is therefore designed to familiarize officers with its key provisions.

There are three main types of property that are defined as contraband and subject to forfeiture. The first and largest group is defined as "[a]ll property which is directly or indirectly, used or intended for use in any manner to facilitate a violation" of Georgia's controlled substances act or any proceeds derived or realized by such a violation.[1] The second group is any weapon "possessed, used, or available for use in any manner" to facilitate a drug offense.[2] The last group is defined as "[a]ll moneys,...or other things of value which are found in close proximity to any controlled substance or marijuana or other property which is subject to forfeiture."[3]

These definitions of contraband (i.e. forfeitable property) are very broad. Thus, in *Gearin v. State of Georgia*[4], a truck the defendant was driving was properly forfeited under a facilitation and close proximity theory when methamphetamine was found in the defendant's pocket. Money located in a cab of a truck was forfeitable because over an ounce of cocaine was discovered in the bed of the truck.[5] In *Manley v. State*[6], a rifle found in a cab of a truck was determined to be available for use by the defendant in protecting his nearby growing marijuana field and forfeited to the State.

Normally, our drug forfeiture laws are applicable whenever drugs are found. However, there is one notable exception to which traffic officers should be aware. The drug forfeiture statute specifically provides that no property shall be subject to forfeiture for any violation involving one gram or less of cocaine or four ounces or less of marijuana unless the property was used to facilitate a transaction in a controlled substance or marijuana.[7] Presumably, the intent of the legislature was to protect from forfeiture the property of those individuals caught with "user amounts" of cocaine and marijuana. Interestingly, the statute was enacted before the tidal wave of methamphetamine use swept over Georgia and has not been amended as to this controlled substance.

A traffic officer does not need a search warrant before he or she can seize property found in an automobile stop that he or she believes to be forfeitable. So long as the officer has probable cause to believe the property is subject to forfeiture, it may be seized immediately.[8] Thus, if an officer were to make a traffic arrest and in the process of doing an inventory of the vehicle, should discover a quantity of methamphetamine, the vehicle may be seized for forfeiture. If during the same inventory, money was found with the drugs and/or a weapon was also discovered, these too could be seized immediately for forfeiture.

But, what if a large amount of cash is found in the vehicle but no drugs are discovered. Are the vehicle and cash subject to forfeiture? Our courts have long held that the discovery of a large, unexplained sum of money, standing alone, does not constitute articulable suspicion of criminal activity which would justify its seizure.[9] However, while the presence of such currency is insufficient by itself to demonstrate a connection to illegal activity, such a discovery, when taken together with other evidence of criminal activity, may provide probable cause to believe it is substantially connected to an illegal exchange of drugs.[10] For example, a large sum found in a hidden compartment coupled with an alert on the cash by a drug dog may provide probable cause for seizure.

If property is seized, the seizing officer must report it to the district attorney. The report must be in writing and must be made within 20 days of the seizure.[11] The statute also requires that the seizing agency conduct an inventory of the seized property and estimate the value of each seized item within 30 days of seizure.[12]

This newsletter is a publication of the Prosecuting Attorneys' Council of Georgia. The "Georgia Traffic Prosecutor" encourages readers to share varying viewpoints on current topics of interest. The views expressed in this publication are those of the authors and not necessarily of the State of Georgia, PACOG or the Council staff. Please send comments, suggestions or articles to Fay McCormack at fmccormack@pacga.org or Patricia Hull at phull@pacga.org.

Traffic Stop Forfeitures
(continued)

Forfeitures are civil proceedings and very often involve claims from individuals not charged with any criminal offenses. While the rules regarding civil discovery are applicable to such proceedings, very often it is the information obtained at the time of arrest and seizure that is most valuable to the prosecution.

The traffic officer who seizes property in connection with a traffic stop can aid the prosecution of the forfeiture by asking a few simple questions. If the vehicle is seized, such questions as who owns the vehicle; who paid for the vehicle; and if financed, who makes the payments. If money is seized, questions relating to its ownership, source and purpose are extremely helpful.

Forfeitures are often complex, have rigid time constraints and may be vastly different from criminal proceedings. They usually require post-arrest investigation. This article is only a cursory review of forfeiture law. If questions arise, please contact the district attorney's office of that judicial circuit in which the seizure occurs.

Endnotes

[1] O.C.G.A. § 16-13-49(d)(2).
[2] O.C.G.A. § 16-13-49(d)(4).
[3] O.C.G.A. § 16-13-49(d)(6).
[4] 218 Ga.App. 390 (1995).
[5] *State of Georgia v. Tucker*, 242 Ga.App. 3 (2000).
[6]
[7] O.C.G.A. § 16-13-49(e)(2).
[8] O.C.G.A. § 16-13-49(g)(2).
[9] *Quinn v. State*, 268 Ga. 70 (1997).
[10] Id.
[11] O.C.G.A. § 16-13-49(h)(1).
[12] O.C.G.A. § 16-13-49(m).

Georgia Organizes Comprehensive Highway Safety Plan

Governor Sonny Perdue, the Governor's Office of Highway Safety, Department of Transportation, Department of Public Safety, Department of Driver Services and others have initiated the planning stages to create and implement the Governor's Strategic Highway Safety Plan (SHSP). While highway safety planning is not new to Georgia, an SHSP creates new partnerships and direction for all highway safety planning efforts to be combined into a comprehensive plan. The results are proving that collaborative interaction among highway safety advocates can leverage existing resources to achieve more together than any one effort can achieve alone.

In administering the new federal law, Safe; Accountable; Flexible; Efficient Transportation Equity Act: A Legacy to Users (SAFETEA-LU), the U. S. Department of Transportation promotes the creation of an SHSP to use in its Highway Safety Improvement Program. The Federal Highway Administration, National Highway Traffic Safety Administration, and Federal Motor Carrier Safety Administration are assisting and guiding states in developing a statewide plan. States are charged with significantly reducing highway fatalities and serious injuries by implementing SHSPs. The national goal is a highway fatality rate of 1.0 by 2008. The plans identify and analyze highway safety problems and opportunities, include projects or strategies to address them and evaluate the accuracy of data and the priority of proposed improvements. The strategies and efforts are concentrated in needed improvements known as the 4 E's: engineering, enforcement, education and emergency medical services.

The planning design implements the Integrated Safety Management Process (ISMP) recommended in the National Cooperative Highway Research Program, Report 501. The NCHRP and ISMP along with the American Association of State Highway and Transportation Officials (AASHTO) have identified 22 key emphasis areas to target most common, high risk and frequency crash characteristics. All SHSPs are "data driven" and require regular evaluation of implemented countermeasures for continued progress.

Governor Perdue is organizing the planning groups and all interested highway safety supporters to develop a comprehensive plan. Federal, state and local agencies are joining public and private organizations in uniting their individual efforts. Georgia can see the benefits of the comprehensive planning as early as 2007 when it begins to evaluate the newly implemented highway safety measures introduced later this year. For further information, please contact: Randy Clayton, Governor's Office of Highway Safety, 34 Peachtree Street, Suite 800, Atlanta, Georgia 30303. You may reach him at 404-651-8503 or rclayton@gohs.ga.gov.

Winning at Administrative License Suspension Hearings

**By Sgt. P.E. Lamb, DRE/SFST Instructor DUI Task Force,
H.E.A.T., Richmond County Sheriff's Office,
Augusta, Georgia**

A long time ago, I was taught that a good DUI prosecution begins with the arrest at roadside and ends when you, the arresting officer, testify in court. Far too often, officers make a great DUI case on the street but then fail to follow up during the prosecutorial process. This leaves an important job half-done and sends a strong message to violators: **they can beat us**. This is a message we simply cannot afford to send to suspected drunk drivers. As officers, we must leave a lasting and costly impression both with the initial arrest and the prosecution so that we minimize the chances of the violator repeating his crime. We can do this by addressing our single greatest failure: attendance of and preparation for Administrative License Suspension (ALS) hearings.

ALS hearings are poorly attended for several of reasons. Those most often cited include, "*I don't like going up against a defense attorney with no one in my corner*," "*…the state doesn't pay for my attendance.*" "*ALS is only a discovery hearing for the defense,*" and "*…his license will be suspended anyway for a DUI conviction.*" While I can't address the pay issue, I believe it is possible to turn the tables on the defense bar at these hearings and make the ALS process serve us instead of them.

The original intent of ALS was to provide an avenue for speedy resolution of DUI cases. By speeding up the suspension of the driving privileges, it was hoped that defense attorneys would be less likely to have the cases continued so long and continue to clog the system. This hope was based on the belief that officers would attend the hearings and force the issue. Unfortunately, the state was slow to pay for officers' appearances at these hearings, if they got paid at all, and often attorneys were able to use the hearings for discovery and run amok over the unrepresented officer. To make matters worse, ALS then devolved into a means by which the defense could virtually guarantee that the client's license would be quickly reinstated pending the criminal action. All the attorney had to do is show up for ALS, request dismissal of the suspension based on the officer's failure to appear, and then charge his client for a "court appearance."

I have had some success reversing this trend and turning ALS back into what it was intended to be. For those of you that may be in a position to effect some change in how your offices handle ALS, here are some things that worked for the Richmond County Sheriff's Office:

Give compensatory time for attending ALS

Even if they're only there for an hour, they get four. It is rare that we are there more than an hour.

Require attendance

When I first implemented this policy, you should have seen the looks on the defense attorney's faces when they saw the whole squad there. These attorneys had already promised their clients that they were going to get their licenses back based

on our failure to attend. Our attendance meant that they had to deal with us.

Waive the hearing only in exchange for any non-trial disposition of the case

I revised the ALS Withdrawal form to include this option. Defense attorneys jumped at this chance to be able to negotiate with the prosecutors and not have to promise a guilty plea to the DUI charge. If the attorney does not agree to a guilty plea, we're happy to have a hearing. Defense attorneys do not come to these hearings prepared to try the case. They are expecting you NOT to be there. If you tell them, "plead it or try it," they'll almost always agree to plea it out. There have been rare exceptions, but of the hundreds of ALS cases this year, we've only had one hearing. All the rest agreed to enter guilty pleas.

Make copies of the completed ALS withdrawals along with the Judge's decision

Keep a copy in your files and send the original to the prosecutor's office in case the defense "forgets" about your earlier agreement. Should this happen, you can easily file a Motion for Reconsideration to have the sworn report refiled.

Be prepared to have a hearing

One tactic that I find useful is to prepare a narrative which narrowly follows the scope of the hearing for each of my cases on the ALS docket. At a minimum, you should prepare shorthand notes outlining your case so you can testify intelligently as to the reason for the stop, probable cause for arrest and testing issues. In this file be sure to include the copy of the DUI Arrest report, a copy of the Intox printout, a copy of your intox permit or a certified copy of the operator's permit if you didn't run the test. It is also a good idea to include a blank ALS Withdrawal already filled out with the driver's name, docket number and the appropriate blocks checked for the defense attorney to expedite. Being prepared in this manner will almost certainly decrease the likelihood of the defense wanting to try the case at ALS.

If you have a hearing, OBJECT! OBJECT! OBJECT!

If you end up having a hearing, be sure that the testimony narrowly tracks the scope of the hearing. If the defense attorney tries to get you off on some tangent, object every time and argue that it is outside the scope of the hearing. ALS was not intended to be a discovery hearing for the defense. It was intended to deal only with issues of probable cause for arrest and whether you complied with the driver's rights relevant to testing. You may not win every time you object, but do it enough and the defense will get the message.

File motions if necessary

This is the scary part. One of our local attorneys has a habit of sending out a "Notice to Produce" to every officer at every ALS hearing for which he has a client. I thought I could get by with ignoring the Notice, but was told by the ALS judge that I could not. I did some research and found that I could also file motions objecting to the Notice to Produce. I prepared and submitted a Motion to Quash based on statutory and case law and was successful in having all the items on the Notice to Produce quashed, with the exception of the DUI Arrest Report. The motion is generic in form and is easy to produce. If you find that either the driver or his attorney has disregarded your ALS agreement, drafting a "Motion for Reconsideration" is relatively easy.

Remember that the defense attorney usually does not want to try the case at ALS. He is hoping for your non-appearance or your being unprepared for a hearing. When you arrive at the hearing, prepared for trial, the defense attorney will probably play ball and promise a guilty plea in exchange for your waiving the suspension. This is especially true in cases of refusals, where the one-year suspension is a "hard" suspension and cannot be reduced; in these cases you will find that the defense attorney is even more anxious to work with you.

Here are some facts to consider:

After you have made the arrest, the defense has to act quickly to bring the case before an ALS judge. That means that they have a only a short time to prepare for any hearing with you. They must advise their client that, in order to avoid an imminent license suspension, they must either prevail at ALS or strike a deal with you.

I have reviewed two books written by defense attorneys in Georgia and seminar material dealing specifically with defense handling of ALS hearings. All three sources recommend forging a deal with the officer at ALS in exchange for a guilty plea in criminal court, especially in cases where the client has refused testing. Remember that the suspension for a refusal is a "hard" one-year suspension. It's actually longer than one year for a first-offense DUI conviction which can be shortened to 4 months.

A per-se administrative suspension is also for one year, but the driver can get his license back after 30 days and after paying a reinstatement fee and submitting proof of completing a Risk Reduction course.

If the defense doesn't deal with you at ALS, their client will almost certainly face a license suspension, unless they prevail at a hearing

One final note, you can now access the monthly ALS docket for your area on the internet at: http://www.osah.ga.gov/

Go to the "My Hearing" section, select the calendar date and then the particular judge and the docket for that date will appear.

DUI Training Programs

Above: *Faculty for the Burke County Joint Training held in Waynesboro on December 15, 2005 from left: Sgt. Pete Lamb, Richmond County Sheriff Dept.; Jackson Cox, Burke County Solicitor-General, Fay McCormack; Nancy Johnson, Richmond County Sr. Asst. Solicitor-General and in front:, Judge Jerry Daniel, Burke County State Court.*

Below: *David Dunn, Lookout Mountain Public Defender cross-examines Sgt. Lamb at the Dade County Joint Training held in Trenton on January 23, 2006.*

Funded by the Governor's Office of Highway Safety, the Traffic Resource Prosecutors have been traveling to jurisdictions around the State to conduct a four-hour training program on investigating and prosecuting DUI cases. These sessions have been well attended by law enforcement officers and prosecutors. The topics covered are ***Effective Report Writing, Standardized Field Sobriety Tests Refresher, Case Law Update*** and ***Courtroom Testimony***.

This training is especially relevant when statistics show that from 1996 to 2003, alcohol and drug-impaired drivers were involved in 84,113 automobile crashes, causing 43,108 injuries and 2,907 fatalities in Georgia. According to the Governor's Office of Highway Safety, during 2004 and 2005 Georgia experienced an unexpected deadly climb in DUI fatalities.

Successfully investigating and prosecuting DUI and vehicular homicide cases require that all law enforcement work, train, and learn together. This free program is specifically designed to bring together police officers and prosecutors in the same jurisdiction to learn and discuss the latest strategies and techniques for investigating and prosecuting DUI and related offenses.

Presenters consist of PAC's Traffic Resource Prosecutors, law enforcement trainers, local prosecutors and defense attorneys. This training is aimed at the counties or jurisdictions with the highest number of impaired driving and speeding related crashes and fatalities.

So far these classes have been held in Waynesboro, Trenton, Carrollton, Statesboro, Douglasville, Sylvester and McCrae.

For more information regarding DUI training programs offered by the Prosecuting Attorneys' Council of Georgia, please contact Fay McCormack in Atlanta at 404-969-4001 or Patricia Hull in Macon at 478-751-6645. They may also be contacted at the following e-mail addresses:

fmccormack@pacga.org ***phull@pacga.org***

MADD Honors Georgia's Traffic Safety Resource Prosecutors

Fay McCormack and Patricia Hull, Traffic Safety Resource Prosecutors for the Prosecuting Attorneys' Council, were recently honored for their contributions to highway safety in Georgia and for being a statewide resource to law enforcement and Georgia's prosecutors. On March 24, 2006, at their 2006 Law Enforcement Recognition Luncheon, Mothers Against Drunk Drivers Georgia awarded Fay and Patricia the Jerry Thompson Law Enforcement Partnership Award. This first time award will be given annually to a non-law enforcement group or individual who makes a substantial impact on highway safety in this state.

INTERNATIONAL DRIVER'S LICENCES

Reprinted with permission from the West Virginia Prosecuting Attorneys Institute's Traffic Safety Resource Prosecutor, "Hot Sheet"

If you have defendants claiming that they are driving legally because of an international driving permit in place of a state-issued driver's license, they're running on empty.

An international driving permit (sometimes incorrectly referred to as an international driver's license), while a real document, is not a legal alternative to the state-issued license. It is a whole different thing.

An international driving permit (IDP) is the result of a United Nations treaty that gives residents of one country the right to drive in other countries using the driver's license issued by the government where they live. The IDP translates the state-issued driver's license into 10 languages so you can show it to officials in foreign countries to help them interpret your driver's license.

Only two organizations are authorized to issue IDPs in the United States: the American Automobile Association and the American Automobile Touring Alliance. Fake IDPs are sold on websites and through storefront operations. Marketers falsely claim that the IDPS authorize buyers to drive legally in the US, can be used to avoid points or fines and can be used as photo ID.

Information for this article was obtained from the Federal Trade Commission, Bureau of Consumer Protection

Road Check Primer

By Fay McCormack, Traffic Safety Resource Coordinator, Prosecuting Attorneys' Council of Georgia

Many states, including Georgia, regularly hold sobriety checkpoints where drivers are required to stop for a brief visual inspection and questioning by police officers. These checkpoints or roadblocks are usually implemented with traffic safety in mind as officers check for various violations including impaired driving.

Since a roadblock constitutes a seizure under the Fourth Amendment of the U.S. Constitution, its reasonableness depends on a "balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Brown v. Texas, 443 U.S. 47 (1979).* The Georgia Court of Appeals set out the requirements of a constitutionally valid roadblock in *Baker v. State, 252 Ga. App 695 (2001)* and *Perdue v. State, 256 Ga. App. 765 (2002).*

The following procedure must be followed in order for a roadblock to be valid:

(1) The record has to reflect that the decision to implement the checkpoint in question is made by supervisory officers and not officers in the field, and that the supervisors had a legitimate primary purpose. The phrase "decision to implement" includes deciding to have this roadblock, and where and when to have it.

(2) The evidence must show that all vehicles are stopped as opposed to random stops.

(3) Delay to motorists must be minimal.

(4) The roadblock operation needs to be well-identified as a police checkpoint.

(5) The screening officer's training and experience must be sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication.

(6) The supervisor must testify that the checkpoint had a "legitimate primary purpose".

Approved legitimate purposes for checkpoints include: verification of drivers licenses and vehicle registration, sobriety, interception of illegal aliens, emergency checkpoints to prevent an imminent terrorist attack, or to catch a dangerous criminal thought to be in a particular area. *City of Indianapolis v. Edmond, 531 U.S. 32 (2000); Baker v. State, 252 Ga. App 695 (2001); State v. Ayers, 257 Ga. App. 117 (2002).*

"The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making overall decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops." United States v. Martinez-Fuerten, 428 U. S. 543, 559 (1976); Perdue v. State, 256 Ga. App. 765 (2002).

The above factors are not absolute criteria which must be satisfied before a roadblock is legitimate. Rather, the appellate court looks to the totality of the circumstances surrounding the roadblock to determine whether the factors were satisfied. *Loney v. State, 245 Ga. App. 376 (2000).*

Traffic Safety Case Law Update

Naik v. State, 277 Ga. App. 418; 626 S.E.2d 608 (2006)

On the early morning of April 9, 2004, an Atlanta DUI task force officer initially stopped Naik out of concern for her safety because she was driving with a flat tire. Upon approaching the vehicle, the officer detected a strong odor of alcoholic beverage coming from the car and noticed that Naik's eyes were glassy. The officer proceeded to conduct several field sobriety tests on Naik and concluded that she was under the influence of alcohol. He placed her under arrest in the back of his patrol car, where she got very upset and began crying. Naik spent the next 18 minutes in the patrol car before the officer read her the implied consent rights pursuant to *OCGA § 40-6-392(a)(4)* and obtained her consent to perform a breath test. The test confirmed that Naik was under the influence of alcohol.

Naik challenged her convictions for driving under the influence of alcohol with an alcohol concentration of 0.08 grams or more, and driving under the influence of alcohol less safe to drive. She contends that the results of the State-administered breath test should have been excluded because she was not timely notified of her implied consent rights as required by *OCGA § 40-6-392(a)(4)*: [***"Upon the request of the person who shall submit to a chemical test or tests at the request of a law enforcement officer, full information concerning the test or tests shall be made available to him or his attorney. The arresting officer at the time of arrest shall advise the person arrested of his rights to a chemical test or tests according to this Code section."***] Instead, she was held in the patrol car for 18 minutes before receiving such notification. The arresting officer testified at trial that he did not believe that he could effectively deliver the appellant's implied consent rights until the vehicle's passenger was attended to, the vehicle was removed from the turn lane, and possession of the vehicle was transferred. The officer also wanted to wait until the appellant had stopped crying and was calm enough to listen to her rights, and make a reasonable decision.

The Court of Appeals held that given the circumstances of this case, the officer's delay in delivering the appellant's implied consent rights was timely. The trial court did not err in denying the appellant's motion to suppress the results of the breath test.

McGrath v. State, A05A2067 (03/01/06), 06 FCDR 693

McGrath, who was under the influence of methamphetamine, drove the wrong way on a highway, injuring a motorist. Another person assisting the motorist was killed by another oncoming vehicle, resulting in defendant's vehicular homicide charge. **McGrath** was convicted of Count 2, causing the death of Amy Burroughs-Brown by a violation of *OCGA § 40-6-390* (reckless driving) by driving after having used methamphetamine and driving on the wrong side of the interstate and failing to pull off the road to avoid a collision; Count 9, reckless driving in reckless disregard of the safety of other motorists by driving south in the northbound lanes of Interstate 85 (I-85) after having used methamphetamine; and Count 10, driving on the wrong side of a divided highway. Counts 9 and 10 were merged with Count 2 at sentencing.

The appellant challenged his conviction for first degree vehicular homicide. Appellant argued that the trial court erred in admitting a statement, which he made at the hospital following a blood test, into evidence. Appellant complained that the statement was the fruit of the poisonous tree, that is, the allegedly invalid implied consent warning. The trial court initially denied the appellant's motion to suppress the results of his blood test. Later, after reconsideration, the trial court granted the motion in light of *Cooper v. State*, 277 Ga. 282, 587 S.E.2d 605, (2003). **McGrath** also argued that **his** actions were not the direct cause of Burroughs-Brown's death and that there were intervening causes.

The evidence showed that an officer followed the appellant to the hospital after the accident, read the appellant the implied consent warning, and obtained a blood sample before making a formal arrest and interviewing the appellant later that same day. Following the Georgia Supreme Court's decision in *Hough v. State*, 279 Ga. 711, 620 S.E.2d 380, (2005), decided after *Cooper*, the Court of Appeals found that the trial court was correct in initially denying the appellant's motion to suppress the blood test results. In *Hough*, the Supreme Court held that where an individual has been involved in a traffic accident resulting in serious injuries or fatalities and the officer has probable cause to believe that the person was driving under the influence of alcohol or drugs; the ensuing search is warranted and constitutional. In this case, there was probable cause to believe that the appellant was driving under the influence when he was involved in the accident, which resulted in a fatality. Therefore, the Court of Appeals found that there was no initial "poisonous tree," and the trial court did not err in admitting the appellant's statement into evidence.

The Court acknowledged that McGrath was correct that, in order to be convicted of vehicular homicide by recklessly driving in violation of *OCGA § 40-6-390*, his conduct must have caused the death of Burroughs-Brown. This requires showing that 'the defendant's conduct was the "legal" or "proximate" cause, as well as the cause in fact, of the death. In ruling against McGrath, the Court of Appeals held that as long as the defendant's negligence proximately caused the injury of another, the crime has been committed, even if there are other factors which also are proximate causes of the injury. ***Unlike the civil context, in the criminal context it simply is not relevant that the victim was negligent unless the defendant's conduct did not substantially contribute to the cause of the injury.***

Webb v. State, 277 Ga. App. 355, 626 S.E.2d 545 (2006)

After a Hall County deputy stopped Webb for speeding, he detected signs of intoxication and she agreed to take field sobriety tests. The officer performed a horizontal gaze nystagmus (HGN) test on which Webb exhibited six out of six possible clues. He omitted the walk and turn and one leg stand tests due to weather conditions. She blew into an alco-sensor, which showed positive for the presence of alcohol. Webb was arrested and read the implied consent warning but refused to take a state-administered chemical test of her blood alcohol level.

Webb argued that evidence of her numerical blood alcohol level was irrelevant because it was insufficient to show that she was less safe to drive. The Court of appeals reiterated that the admission of evidence is within the sound discretion of the trial court, and that it will not disturb the trial court's evidentiary decisions on appeal absent an abuse of discretion, and, unless the potential for prejudice substantially outweighs the probative value, Georgia law favors the admission of relevant evidence, no matter how slight its probative value.

The crime of driving while under the influence to the extent that it is less safe to drive requires showing three elements: (1) driving, (2) under the influence of alcohol, (3) to the extent that it is less safe for the person to drive. The Court found that the numerical evidence of Webb's blood alcohol level was probative of the latter two elements because the evidence directly addressed whether Webb was "under the influence," and her blood alcohol level shed light on whether she was less safe to drive. The Court explained that field sobriety tests are not designed to detect the mere presence of alcohol in a person's system, but to produce information on the question whether alcohol is present at an impairing level such that the driver is less safe within the meaning of ***O.C.G.A. § 40-6-391 (a)(1)***. Mere presence of alcohol is not the issue; the quantity is needed because the issue is effect.

The Court found nothing inherently inflammatory about the blood alcohol evidence and could discern no reason why the jury was not capable of evaluating the evidence in the context of the "less safe" DUI accusation. They concluded that the trial court did not abuse its discretion by failing to exclude the numerical blood alcohol evidence because the evidence was probative and its probative value was not outweighed by the possibility of undue prejudice.

The Court of appeals warned that by addressing Webb's argument, that Court did not wish to intimate that Webb's HGN test was a chemical analysis of her blood for purposes of ***OCGA § 40-6-392***.

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····> fact:

Drunk driving is the nation's most frequently committed violent crime, killing someone every 31 minutes. Because drunk driving is so prevalent, about three in every ten Americans will be involved in an alcohol-related crash at some time in their lives. In 2003, an estimated 17,013 people died in alcohol-related traffic crashes in the USA. These deaths constituted 40 percent of the nation's 42,643 total traffic fatalities.

-Statistics courtesy MADD

The "Georgia Traffic Prosecutor" addresses a variety of matters affecting prosecution of traffic-related cases and is available to prosecutors and others involved in traffic safety. Upcoming issues will provide information on a variety of matters, such as ideas for presenting a DUI/Vehicular Homicide case, new strategies being used by the DUI defense bar, case law alerts and other traffic-related matters. If you have suggestions or comments, please contact Editors Fay McCormack or Patricia Hull at PAC.