Volume 8, Issue 4, November 2011

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 prosecutors and law enforcement in keeping our highways safe by helping to prevent injury and death on Georgia roads.

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Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

A NHTSA report found that, in 1999, one-third of the drivers killed in motor vehicle crashes in the United States tested positive for drugs. Although the Georgia Legislature passed per se drug impaired driving laws, the prosecution of these cases have been somewhat stymied by decisions of our appellate courts. It does not mean we have to dismiss cases against drug impaired drivers. It means it will take more effort on the part of law enforcement and prosecutors to prove that these drivers are "less safe."

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'Per Se' Impaired Driving in Georgia

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

Per se is a Latin phrase that translates into the following English phrases: by itself; in itself; taken alone; unconnected with other matters; in isolation—you get the drift. Georgia is one of the states that passed per se impaired driving laws. It is illegal to operate a motor vehicle in this state with a blood alcohol concentration (BAC) of .08 grams per deciliter or greater. This law is based on evidence that shows that all drivers are impaired at a BAC of .08.

The legislature of Georgia also passed drug per se laws making it illegal to drive with any amount of certain drugs in the motorist's system. However, the appellate courts in Georgia have curtailed the implementation of per se drug laws. The result is that we are no longer able to successfully prosecute drivers for per se drug violation if the substance is legally prescribed anywhere.

To pass the scrutiny of our appellate courts, prosecutors in Georgia should now charge anyone driving under the influence of a drug legally prescribed anywhere with violating *O.C.G.A. § 40-6-391(a) (2)* with DUI–Less Safe. Proof that the substance was ingested is no longer enough. The state must now prove that a defendant was a less safe driver as a result of being under the influence of the drugs. *Head v. State, 303 Ga. App. 475 (2010).* Charges under *O.C.G.A. § 40-6-391(a) (6)* should be limited to drugs, such as cocaine, which are not legally prescribed. See *Keenum v. State, 248 Ga. App. 474 (2001),* where the Court of Appeals categorically stated that, although there can be instances where a driver is a legal marijuana user, there will never be an instance of a legal cocaine user so as to make *O.C.G.A. § 40-6-391(a) (6)* unconstitutional as a denial of equal protection.

Relevant sections of the statue and two important cases on this issue are set out below.

O.C.G.A. § 40-6-391

(a) A person shall not drive or be in actual physical control of any moving vehicle while:

(1) Under the influence of alcohol to the extent that it is less safe for the person to drive;

(2) Under the influence of any drug to the extent that it is less safe for the person to drive;

(3) Under the intentional influence of any glue, aerosol, or other toxic vapor to the extent that it is less safe for the person to drive;

(4) Under the combined influence of any two or more of the substances specified in paragraphs (1) through (3) of this subsection to the extent that it is less safe for the person to drive;

(5) The person's alcohol concentration is 0.08 grams or more at any time within three hours after such driving or being in actual physical control from alcohol consumed before such driving or being in actual physical control ended; or

(6) Subject to the provisions of subsection (b) of this Code section, there is any amount of marijuana or a controlled substance, as defined in Code Section 16-13-21, present in the person's blood or urine, or both, including the metabolites and derivatives of each or both without regard to whether or not any alcohol is present in the person's breath or blood.

Love v. State, 271 Ga. 398 (1999):

Love was stopped on I-85 in Gwinnett County for speeding at 11:30 p.m. on May 31, 1996. After approaching Love's stopped vehicle, the officer arrested him for driving under the influence based on the odor of marijuana emanating from his car. Samples of Love's blood and urine were taken and sent to the Crime Lab for analysis, which revealed the presence of marijuana metabolites in both blood and urine. Love was charged with driving under the influence of drugs to the extent he was a less safe driver (O.C.G.A. § 40-6-391 (a) (2)), and driving with marijuana in his blood or urine. (O.C.G.A. § 40-6-391(a) (6)). The trial court denied his motion to quash which was based, in part, on the assertion that O.C.G.A. § 40-

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6-391 (a) (6) was unconstitutional. Love was convicted of driving with unlawful drugs present in his blood or urine, but the jury was unable to reach a verdict on the charge that appellant was driving under the influence of drugs to the extent it made him a less safe driver.

On appeal to the Georgia Supreme Court, one of Love's contentions was that O.C.G.A. § 40-6-391 (a) (6) violates equal protection "by arbitrarily changing the burden of proof of guilt for 'legal' marijuana users," pointing out that a person legally entitled to use marijuana who is driving with marijuana metabolites in his body fluids may only be convicted of violating § 40-6-391 (a) (6) if "such person is rendered incapable of driving safely as a result of using [the] drug. . . ." O.C.G.A. § 40-6-39 (b). Thus, the statute allows a person with metabolites of legally used marijuana in his body fluids to be convicted of driving with marijuana in his system only if it is established that he was "rendered incapable of driving safely," while a person with metabolites of illegally used marijuana can be found guilty of driving with marijuana in his system without evidence of impairment. Inasmuch as the expert testimony given in this case stated that the pharmacological effects of legally used marijuana are no different from the effect of illegally used marijuana, the statute's disparate treatment of users of legal and illegal marijuana is predicated on the purpose for which the marijuana is used. Legal marijuana users are not subject to prosecution for the per se prohibition, while illegal users of marijuana are. Thus, those whose marijuana use is legally sanctioned cannot be convicted merely for having metabolites of marijuana in their body fluids, while those whose marijuana use is not legally sanctioned can be.

The Supreme Court of Georgia stated that, under the rational basis test, a legislative classification does not deny equal protection if the classification bears a direct relation to the purpose of the legislation. In light of the rational relationship between the statute and the legitimate state purpose of public safety, and the fact that the effects of legally used marijuana are indistinguishable from the effects of illegally used marijuana, the Court said it was unable to hold that the legislative distinction between users of legal and illegal marijuana is directly related to the public safety purpose of the legislation. Accordingly, the Court concluded that the distinction is arbitrarily drawn, and the statute is an unconstitutional denial of equal protection.

Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

Sandlin v. State, 307 Ga. App. 573 (2011):

A jury acquitted Sandlin of driving under the influence of a controlled substance (alprazolam) and failure to maintain lane. Sandlin entered a nolo contendere plea to possession of marijuana. A forensic toxicologist employed by the Georgia Bureau of Investigation testified that Sandlin's blood contained metabolites of marijuana and alprazolam, which is commonly referred to as Xanax™. The toxicologist testified that alprazolam, a Schedule IV drug, is a controlled substance that acts as a central nervous system depressant, and is only available through prescription. On appeal, Sandlin pointed out that O.C.G.A. § 40-6-391 (a) (6) provides that a person with any amount of marijuana or a controlled substance in his or her urine or blood can be convicted of driving under the influence. Under O.C.G.A. § 40-6-391 (b), however, a person who legally uses a controlled substance can only be convicted of DUI if that person "is rendered incapable of driving safely as a result of using a drug other than alcohol which such person is legally entitled to use." Therefore, Sandlin argued, the statute denied him equal protection under the law because it disparately treats legal and illegal users of alprazolam.

The Court of Appeals found that the same argument was made in *Love*, in which the Supreme Court held that O.C.G.A. § 40-6-391 (a) (6) was unconstitutional as it pertained to persons with detectable levels of marijuana in their systems and that the Supreme Court had explained that the legislative distinction between users of legal and illegal marijuana was not directly related to the public safety purpose of the legislation. Therefore, it concluded that the statute was arbitrarily drawn and was an unconstitutional denial of equal protection. The Court reversed the defendant's conviction.

The Court of Appeals found that the same result was warranted in this case because alprazolam is also a controlled substance that can be legally prescribed. The Court ruled against the state's argument that Sandlin was required to show that he was legally authorized to use the alprazolam, pointing out that *Love* does not require such a showing to assert an equal protection challenge to the statute. Sandlin's conviction of violating O.C.G.A. § 40-6-391 (a) (6) was reversed. GTP

Drugged Driving: Frequently Asked Questions

Courtesy: National Institute on Drug Abuse (NIDA), National Institutes of Health–U.S. Department of Health & Human Services

What is Drugged Driving?

"Have one [drink] for the road," was once a commonly used phrase in American culture. It has only been within the past 25 years that, as a Nation, we have begun to recognize the dangers associated with drunk driving. And through a multi-pronged and concerted effort involving many stakeholders—including educators, media, legislators, law enforcement, and community organizations such as Mothers Against Drunk Driving—the Nation has seen a decline in the numbers of people killed or injured as a result of drunk driving. But it is now time that we recognize and address the similar dangers that can occur with drugged driving.

The principal concern regarding drugged driving is that driving under the influence of any drug that acts on the brain could impair one's motor skills, reaction time, and judgment. Drugged driving is a public health concern because it puts not only the driver at risk but also passengers and others who share the road.

However, despite the knowledge about a drug's potentially lethal effects on driving performance and other concerns that have been acknowledged by some public health officials, policy officials, and constituent groups, drugged driving laws have lagged behind alcohol-related driving legislation, in part because of limitations in the current technology for determining drug levels and resulting impairment. For alcohol, detection of its blood concentration (BAC) is relatively simple, and concentrations greater than 0.08 percent have been shown to impair driving performance; thus, 0.08 percent is the legal limit in this country. But for illicit drugs, there is no agreed-upon limit for which impairment has been reliably demonstrated. Furthermore, determining current drug levels can be difficult, since some drugs linger in the body for a period of days or weeks after initial ingestion.

Some states (Arizona, Delaware, Georgia, Indiana, Illinois, Iowa, Michigan, Minnesota, Nevada, North Carolina, Ohio, Pennsylvania, Rhode Island, South Dakota, Utah, Virginia and Wisconsin) have passed "per se" laws, in which it is illegal to operate a motor vehicle if there is any detectable level of a prohibited drug, or its metabolites, in the driver's blood. Other

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state laws define "drugged driving" as driving when a drug "renders the driver incapable of driving safely" or "causes the driver to be impaired." In addition, 44 States and the District of Columbia have implemented Drug Evaluation and Classification Programs, designed to train police officers as Drug Recognition Experts. Officers learn to detect characteristics in a person's behavior and appearance that may be associated with drug intoxication. If the officer suspects drug intoxication, a blood or urine sample is submitted to a laboratory for confirmation.

How Many People Take Drugs and Drive?

According to the National Highway Traffic Safety Administration's (NHTSA) 2007 National Roadside Survey, more than 16 percent of weekend, nighttime drivers tested positive for illegal, prescription, or over-the-counter medications. More than 11 percent tested positive for illicit drugs.[1] Another NHTSA study found that in 2009, among fatally injured drivers, 18 percent tested positive for at least one drug (e.g., illicit, prescription, or over-the-counter), an increase from 13 percent in 2005.[2] Together, these indicators are a sign that continued substance abuse education, prevention, and law enforcement efforts are critical to public health and safety.

According to the 2009 National Survey on Drug Use and Health (NSDUH), an estimated 10.5 million people aged 12 or older reported driving under the influence of illicit drugs during the year prior to being surveyed.[3] This corresponds to 4.2 percent of the population aged 12 or older, similar to the rate in 2008 (4 percent) and not significantly different from the rate in 2002 (4.7 percent). In 2009, the rate was highest among young adults aged 18 to 25 (12.8 percent). In addition, NSDUH reported the following:

In 2009, an estimated 12 percent of persons aged 12 or older (30.2 million persons) drove under the influence of alcohol at least once in the past year. This percentage has dropped since 2002, when it was 14.2 percent.
Driving under the influence of an illicit drug or alcohol was associated with age. In 2009, an estimated 6.3 percent of youth aged 16 or 17 drove under the influence. This percentage steadily increased with age to reach a peak of 24.8 percent among young adults aged 21 to 25. Beyond the age of 25, these rates showed a general decline with increasing age.

Also in 2009, among persons aged 12 or older, males were more likely than females (16.9 percent versus 9.2 percent, respectively) to drive under the influence of an illicit drug or alcohol in the past year.

In recent years, more attention has been given to drugs other than alcohol that have increasingly been recognized as hazards to road traffic safety. Some of this research has been done in other countries or in specific regions within the United States, and the prevalence rates for different drugs used vary accordingly. Overall, marijuana is the most prevalent illegal drug detected in impaired drivers, fatally injured drivers, and motor vehicle crash victims. Other drugs also implicated include benzodiazepines, cocaine, opiates, and amphetamines.[4]

A number of studies have examined illicit drug use in drivers involved in motor vehicle crashes, reckless driving, or fatal accidents. For example, one study found that about 34 percent of motor vehicle crash victims admitted to a Maryland trauma center tested positive for "drugs only;" about 16 percent tested positive for "alcohol only." Approximately 9.9 percent (or 1 in 10) tested positive for alcohol and drugs, and, within this group, 50 percent were younger than age 18.[5] Although it is interesting that more people in this study tested positive for "drugs only" compared with "alcohol only," it should be noted that this represents one geographic location, so findings cannot be generalized. In fact, the majority of studies among similar populations have found higher prevalence rates of alcohol use compared with drug use.[6]

Studies conducted in several localities have found that approximately 4 to 14 percent of drivers who sustained injury or died in traffic accidents tested positive for delta-9-tetrahydrocannabinol (THC), the active ingredient in marijuana.[7]

In a large study of almost 3,400 fatally injured drivers from three Australian states (Victoria, New South Wales and Western Australia) between 1990 and 1999, drugs other than alcohol were present in 26.7 percent of the cases.[8] These included cannabis (13.5 percent), opioids (4.9 percent), stimulants (4.1 percent), benzodiazepines (4.1 percent), and other psychotropic drugs (2.7 percent). Almost 10 percent of the cases involved both alcohol and other drugs.

Teens and Drugged Driving

According to the Centers for Disease Control and Prevention, vehicle accidents are the leading cause of death among young people aged 16 to 19.[9] It is generally accepted that, because teens are the least experienced drivers as a group, they have a higher risk of being involved in an accident compared with more experienced drivers. When this lack of experience is combined with the use of marijuana or other substances that impact cognitive and motor abilities, the results can be tragic.

Results from NIDA's Monitoring the Future survey indicate that, in 2007, more than 12 percent of high school seniors admitted to driving under the influence of marijuana in the 2 weeks prior to the survey.[10]

The 2007 State of Maryland Adolescent Survey indicates that 11.1 percent of the State's licensed adolescent drivers reported driving under the influence of marijuana on three or more occasions, and 10 percent reported driving while using a drug other than marijuana (not including alcohol).[11]

Why is Drugged Driving Hazardous?

Drugs acting on the brain can alter perception, cognition, attention, balance, coordination, reaction time, and other faculties required for safe driving. The effects of specific drugs of abuse differ depending on their mechanisms of action, the amount consumed, the history of the user, and other factors.

Marijuana

THC affects areas of the brain that control the body's movements, balance, coordination, memory and judgment, as well as sensations. Because these effects are multifaceted, more research is required to understand marijuana's impact on the ability of drivers to react to complex and unpredictable situations. However, we do know the following:

A meta-analysis of approximately 60 experimental studies—including laboratory, driving simulator, and on-road experiments—found that behavioral and cognitive skills related to driving performance were impaired in a dose-dependent fashion with increasing THC blood levels.[12]

Evidence from both real and simulated driving studies indicates that marijuana can negatively

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Photo courtesy: Middle Georgia Traffic Enforcement Network (www.wehuntatnight.com)

affect a driver's attentiveness, perception of time and speed, and ability to draw on information obtained from past experiences.

A study of over 3,000 fatally injured drivers in Australia showed that, when marijuana was present in the blood of the driver, he or she was much more likely to be at fault for the accident. Additionally, the higher the THC concentration, the more likely the driver was to be culpable.[13]

Research shows that impairment increases significantly when marijuana use is combined with alcohol.[14] Studies have found that many drivers who test positive for alcohol also test positive for THC, making it clear that drinking and drugged driving are often linked behaviors.

Other Drugs

Prescription drugs: Many medications (e.g., benzodiazepines and opiate analgesics) act on systems in the brain that could impair driving ability. In fact, many prescription drugs come with warnings against the operation of machinery—including motor vehicles—for a specified period of time after use. When prescription drugs are taken without medical supervision (i.e., when abused), impaired driving and other harmful reactions can also result. In short, drugged driving is a dangerous activity that puts us all at risk. GTP

ENDNOTES

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[2] *National Highway Traffic Safety Administration. Drug Involvement of Fatally Injured Drivers. U.S. Department of Transportation Report No. DOT HS 811 415. Washington, DC: National Highway Traffic Safety Administration, 2010.*

[3] *Substance Abuse and Mental Health Services Administration. 2009 National Survey on Drug Use and Health. Rockville, MD: Office of Applied Studies, 2010.*

[4] *Soderstrom CA, Dischinger PC, Kerns TJ, Kufera JA, Scalea TM. Epidemic increases in cocaine and opiate use by trauma center patients: Documentation with a large clinical toxicology database. J Trauma 51:557–564, 2001.*

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[8] *Drummer OH, Gerostamoulos J, Batziris H, et al. The incidence of drugs in drivers killed in Australian road traffic crashes. Forensic Sci Int 134:154–162, 2003.*

[9] *Centers for Disease Control and Prevention. Web-based Injury Statistics Query and Reporting System (WISQARS). Atlanta, GA: National Center for Injury Prevention and Control, 2008. Available at: http://www.cdc.gov/injury/wisqars/index.html.*

[10] *Personal communication with Monitoring the Future staff. August 31, 2009.*

[11] *Maryland State Department of Education. 2007 Maryland Adolescent Survey. Available at: http://www.marylandpublicschools.org/MSDE/newsroom/special_reports/adolescent_survey.htm.*

[12] *Berghaus G, Sheer N, Schmidt P. Effects of cannabis on psychomotor skills and driving performance–A meta-analysis of experimental studies. In CN Kloeden and AJ McLean (eds.), Proceedings of the 13th International Conference on Alcohol, Drugs and Traffic Safety. Adelaide, Australia: The University of Adelaide, NHMRC Road Accident Research Unit, pp. 403–409, 1995.*

[13] *Drummer OH, Gerostamoulos J, Batziris H, Chu M, Caplehorn J, Robertson MD, Swann P. The involvement of drugs in drivers of motor vehicles killed in Australian road traffic crashes. Accid Anal Prev 36(2):239–248, 2004.*

[14] *National Highway Traffic Safety Administration. Marijuana and alcohol combined severely impede driving performance. Ann Emer Med 35(4):398–399, 2000.*

Case Law Update

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

DiMauro v. State, 310 Ga. App. 526, (2011)
Decided 7/6/11

DiMauro challenged his conviction for driving under the influence of alcohol in violation of O.C.G.A. § 40-6-391(a) (5). He argued that the trial court erred in denying his motion to suppress evidence of the results of field sobriety tests and in refusing to issue a certificate under the Uniform Act to Secure the Attendance of Witnesses from Without the State, O.C.G.A. § 24-10-90 et seq.

DiMauro argued that the field sobriety tests were administered without his having the benefit of the *Miranda* warning provided to him prior to those tests. The Court of Appeals held that the trial court's determination that defendant was not in custody until after the field sobriety tests were complete was not clearly erroneous. DiMauro was allowed to walk around and was not put into handcuffs or a patrol car while he and the first officer awaited the arrival of the second officer. He had been informed that he was suspected of driving under the influence and that the second officer had been called to further investigate that suspicion. A reasonable person in DiMauro's position could conclude that his freedom of action was only temporarily curtailed and that a final determination of his status was simply delayed.

The Court of Appeals held, however, that the trial court applied the wrong standard when it refused to issue a certificate under the Act. The trial court concluded that DiMauro failed to show that the witness was necessary and material, but it simply had to determine whether a witness was "material." The Court of Appeals followed the Supreme Court's holding in *Davenport v. State*, 289 Ga. 399 (2011) that "necessary and material" is not the standard that a trial court should apply when it considers whether to issue a certificate under the Uniform Act. Instead, the trial court simply must determine whether a witness is "material," as that term is defined in the *Davenport* decision. According to the Supreme Court, if a witness is material, the trial court "'may issue a certificate under . . . seal' that is then presented to a judge of a court of record in the out-of-state county in which the witness is found." *Davenport*, 289 Ga. at 401. It is for the out-of-state judge to then determine whether to issue a subpoena directing the witness to attend and testify in the Georgia criminal proceeding. Id.

Because the court below did not apply the standard adopted by the Supreme Court in *Davenport*, the Court of Appeals remanded for the court to apply the correct standard and revisit the request in this case for a certificate under the Uniform Act. If the court below determines that the witness for whom a certificate was requested is a "material" witness, it then must consider whether it ought to have issued a certificate in this case and, if so, whether DiMauro is entitled to a new trial or a new trial conditioned on the issuance by the appropriate out-of-state court of a subpoena to compel the appearance of the witness in Georgia. If the court below determines that no new trial is warranted, the judgment of conviction will stand affirmed, provided that DiMauro may file a timely appeal of that determination. The Court of Appeals affirmed the judgment on condition and remanded the case for the trial court to apply the correct standard for issuing a certificate under the Act.

State v. Padidham, A11A0678, Decided 7/13/11

Padidham was charged with DUI and Speeding. He moved to suppress certain evidence, including the result of an alco-sensor test administered during a traffic stop and the results of an Intoxilyzer 5000 test administered in jail. The trial court granted the motion, and the state appealed. The state contended that the

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alco-sensor test result was suppressed in error because Padidham was not in custody when the test was administered. The Court of Appeals agreed, based on the following facts: (1) Padidham was permitted to wait in his own car rather than a police car, (2) Padidham was not handcuffed, and (3) Padidham was told by the officer that he had been stopped for speeding and was going to be given a ticket. The officer told Padidham that he thought he was too intoxicated to drive, but that he was going to verify this suspicion. He did not tell Padidham that he would be arrested. Padidham may not have been free to leave during the eight to 10 minutes that elapsed before the alco-sensor test was administered, but not every detention is an arrest.

The Court of Appeals reiterated that an individual must be advised of his *Miranda* rights, including his right against self-incrimination, only after being taken into custody or otherwise deprived of his freedom of action in any significant way. alco-sensor tests and other field sobriety tests given to a person under custodial arrest are inadmissible where administration of the tests has not been preceded by a *Miranda* warning. Although a motorist is deprived of his freedom of action during a traffic stop, such a deprivation does not always trigger the rights set forth in *Miranda*. Instead, the test for determining whether a person is "in custody" at a traffic stop is if a reasonable person in the suspect's position would have thought the detention would not be temporary. Whether one is in custody for *Miranda* purposes is a mixed question of law and fact, and the trial court's determination will not be disturbed unless it is clearly erroneous. The Court of Appeals held that the trial court's determination that Padidham was in custody prior to taking the alco-sensor test was erroneous because a reasonable person in defendant's position would not have believed that his detention was more than temporary.

The Court of Appeals found that the trial court also erred in suppressing the results of an alcohol test given at the jail on the grounds that the results were not given to Padidham immediately after they were printed. There was no requirement in the procedural rules enacted pursuant to O.C.G.A. § 40-6-392(a) (1) (A) by the Division of Forensic Sciences that the results be given to a defendant at any particular time. The court reversed the trial court's grant of Padidham's motion to suppress.

Spann v. State, 310 Ga. App. 575 (2011) Decided 7/6/11

Teresa Jean Spann was convicted in Douglas County State Court of driving under the influence. Spann challenged the trial court's denial of her motion for issuance of an out-of-state subpoena to the CEO of Kentucky-based CMI, Inc., the company that manufactures the Intoxilyzer 5000, so that she could obtain the source code for that machine. The record shows that the trial court originally granted Spann's request for the issuance of the out-of-state subpoena, based on a finding that production of the code was both necessary and material for Spann to challenge the accuracy of the results of the state-administered breath test. However, citing the Court of Appeal's decisions in *Davenport v. State*, 303 Ga. App. 401 (693 SE2d 510) (2010) and *Yeary v. State*, 302 Ga. App. 535 (690 SE2d 901) (2010), the trial court subsequently vacated that order and denied Spann's motion for issuance of the out-of-state subpoena, finding that Spann had failed to show that either the witness or the source code was necessary and material to the case.

However, based on the Georgia Supreme Court's decision in *Davenport v. State*, 289 Ga. 399 (2011), which overturned the Court of Appeals decision (stated above), the Court of Appeals remanded this case to the trial court for reconsideration. The Court stated that if the trial court determines that the witness for whom a certificate was requested is a "material witness," it then must consider whether it ought to have issued a certificate in this case and, if so, whether Spann is entitled to a new trial or a new trial conditioned on the issuance by the appropriate out-of-state court of a subpoena to compel the appearance of the witness in Georgia. If the court below determines that no new trial is warranted, the judgment of conviction will stand affirmed, provided that Spann may file a timely appeal from that determination.

See article in the ***Georgia Traffic Prosecutor*** *on the Davenport and Yeary decisions at http://www.pacga.org/downloads/newsletters/new_GTP/gtp_volume8_issue_3.pdf.*

Avery v. State, A11A1340, Decided 9/7/11

Avery was convicted in probate court of per se driving under the influence pursuant to O.C.G.A. § 40-6-391(a)(5) after his motion in limine to exclude the results of an Intoxilyzer 5000 test based on the state's alleged failure to comply with his request for additional testing. He appealed to the Superior Court, which affirmed the conviction. Avery again appealed.

Avery was stopped for failure to maintain lane, and the officer observed signs of intoxication. The officer had Avery perform several field sobriety tests and then arrested him for DUI. DAvery pleaded with the officer to give him "more tests." He argued that the state failed to give him an independent test of his choosing as required by statute. The court held that this request was for the officer to give him more tests, not for an independent test. Further, Avery had just mentioned the field sobriety tests, which he believed did not indicate impairment. Therefore, his statement that he wanted "more tests" could not reasonably be construed as a request for an independent chemical test of his own choosing, and the result of the state-administered test were properly admitted at trial. The Court of Appeals affirmed Avery's conviction

Williams v. State, A11A1446, Decided 9/8/11

Williams was charged with Speeding (O.C.G.A. § 40-6-181(b) (5)), Open Container Violation (O.C.G.A. § 40-6-253(b) (1)), and DUI (O.C.G.A. § 40-6-391(a) (1), (5)). During closing arguments, the prosecutor incorrectly stated that Williams had consumed margaritas, which misstated the evidence that had been presented at trial. In fact, Williams had admitted to having two and a half bottles of beer. When defense counsel raised the issue, the prosecutor acknowledged his mistake and moved for a mistrial. Defense counsel initially opposed the mistrial and stated that the prosecution deliberately made the error to goad the defense into moving for mistrial. However, when the trial court refused to let the jury review a videotape that cleared up the error, defense counsel joined in the state's motion for a mistrial. On retrial, defendant filed a plea in bar, contending that double jeopardy barred further prosecution. The trial court denied the motion. Williams appealed. The court held that, to the extent that Williams had consented to and joined in the state's motion for a mistrial, he could not later use the mistrial as the basis for a plea of double jeopardy. Further, the prosecutor's mistake was neither blatant, deliberate, nor made in bad faith, and was made in an attempt to obtain a conviction, rather than to force a mistrial.

Wagner v. State, A11A0895, Decided 9/7/11

A jury convicted Wagner of DUI−Less Safe and DUI−Child Endangerment, in violation of O.C.G.A. § 40-6-391(a) (1), (l). Wagner appealed.

The trial court charged the jury that Wagner's refusal to submit to a blood alcohol test could be considered as positive evidence, creating an inference that the test would show the presence of alcohol or other prohibited substances which impaired his driving. The Court of Appeals noted that this instruction had previously been disapproved because it substantially affected the state's burden of proof by shifting it to Wagner, requiring him to rebut the inference that he was an impaired driver because he refused to submit to the breath test. The court held that the giving of the challenged jury instruction constituted plain error and thus was not waived by Wagner's failure to raise a specific objection in the trial court. The court reversed both convictions and remanded the case for a new trial.

Tunali v. State, A11A1158, Decided 10/4/11

The State charged Tunali with driving a commercial vehicle with a detectable presence of alcohol about his person and operating a commercial vehicle without functioning lights. Defendant moved to suppress any evidence from the traffic stop, and, following an evidentiary hearing, the trial court denied the motion and certified the ruling for immediate review.

Defendant was driving on an interstate highway in a pickup truck that displayed a hazardous materials placard. An officer from the Department of Public Safety (DPS) saw Tunali drive past an inspection station without stopping. He stopped Tunali and, based on observing an odor of alcohol, asked Tunali to blow into an alco-sensor, which showed the presence of alcohol. Tunali argued that, because the DPS

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rules relied upon by the officer were not made a part of the record, there was no evidence of authority for the stop. The Georgia Public Service Commission has formally adopted motor carrier safety regulations, issued by the Federal Motor Carrier Safety Administration, as codified in the Rules and Regulations of the State of Georgia, which is the official compilation made by the Georgia Secretary of State under the Administrative Procedures Act. Therefore, the court took judicial notice of the rules. Regarding implied consent warnings, O.C.G.A. § 40-5-153(c) does not apply to alco-sensor tests, which merely detected the presence, not concentration, of alcohol.

The Court of Appeals affirmed the denial of Tunali's motion to suppress.

Mayberry v. State, A11A1886, Decided 10/19/11

On October 3, 2009, at approximately 11:00 p.m., a police sergeant was driving eastbound in his patrol car on Atlanta Highway in Oconee County. As the sergeant negotiated a curved section of the highway, a vehicle driving westbound approached the curve and veered towards his lane of travel. The driver and sole occupant of the vehicle was Mayberry. After the sergeant passed Mayberry's vehicle, he looked in his rearview mirror and observed the left-side tires of the vehicle cross over the double yellow lines in the center of the highway by at least one foot. The sergeant then turned his patrol car around and initiated a traffic stop of Mayberry's vehicle.

After initiating the traffic stop, the sergeant approached the vehicle and spoke with Mayberry, who had a strong odor of alcoholic beverage on her breath. Mayberry admitted to the sergeant that she had consumed a "couple" of alcoholic beverages, and she submitted to an alco-sensor test, which was positive for the presence of alcohol. The sergeant did not perform any field sobriety tests because of safety concerns "due to location and conditions." The sergeant then placed Mayberry under arrest for driving under the influence of alcohol. He read the implied consent notice to Mayberry, and she agreed to take a state-administered breath test. The test result showed that Mayberry had a blood alcohol concentration over the legal limit.

Mayberry filed a motion in limine and motion to suppress in which she alleged that the police lacked probable cause to arrest her for driving under the influence of alcohol. She sought the exclusion of any testimony or other evidence regarding the state-administered breath test administered after her arrest. Following an evidentiary hearing, the trial court denied the motions, and Mayberry thereafter was convicted of driving with an alcohol concentration of .08 grams or more within three hours of driving.

On appeal, Mayberry contends that the trial court should have granted her motion in limine and motion to suppress, arguing that the only determination made by the police sergeant was that she had consumed some amount of alcohol, and she maintains that the sergeant had no knowledge or no reasonable trustworthy information available to him that her level of consumption rendered her less safe to drive. She also points out his failure to perform any field sobriety tests or observe any manifestations of impairment, such as slurred speech, bloodshot eyes or unsteadiness on her feet. The Court of Appeals was unpersuaded by Mayberry's argument. The Court found that the undisputed evidence that Mayberry veered toward the opposing lane of traffic and failed to maintain her lane, combined with the undisputed evidence that she had consumed alcohol, was sufficient to create probable cause for her arrest.

The Court of Appeals confirmed the conviction. GTP

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···> fact:

Each day, 32 people in the United States die in motor vehicle crashes that involve an alcohol-impaired driver. This amounts to one death every 45 minutes. The annual cost of alcohol-related crashes totals more than $51 billion.

-Statistics courtesy NHTSA (www.nhtsa.gov)

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 Todd Hayes at PAC.