



DRIVEN

to successfully prosecute DUI cases in Mississippi



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DRUGGED DRIVING - A MODERN EPIDEMIC

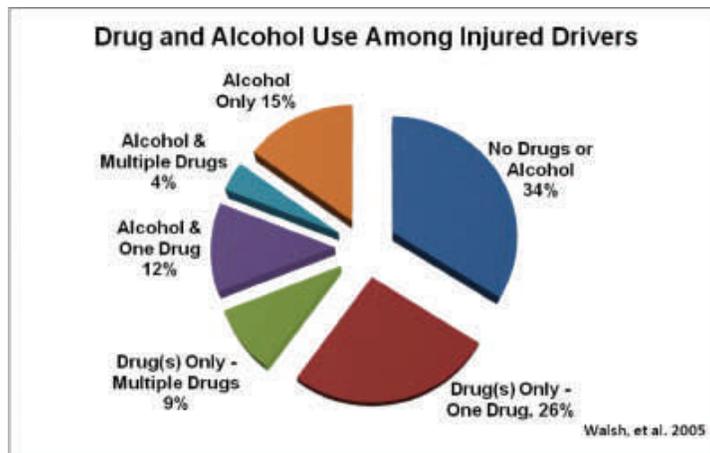
The Institute for Behavior and Health, Inc. estimates show that 20% of crashes in the U.S. are caused by drugged driving. This translates into about 8,600 deaths, 580,000 injuries and \$33 billion in damages each year. In the 2007 National Survey of Alcohol and Drug Use By Drivers, drugs were present more than 7 times as frequently as alcohol among weekend nighttime drivers in the U.S., with 16% testing positive for drugs, compared to 2% testing at or above the legal limit for alcohol. In addition, a recent study of seriously injured drivers at the Maryland Shock Trauma Center showed that 51% of the samples tested positive for illegal drugs, compared

to 34% who tested positive for alcohol. In 2007, nearly 10 million people drove under the influence of drugs according to a study by the Substance Abuse and Mental Health Services

percentages are far higher than those detected among drivers in the 2007 NHTSA National Roadside Survey (NRS) which found 8.6% of weekend nighttime drivers positive for mari-

safety.

Federal legislation does not directly address the problem of drugged driving; however, all 50 states and the District of Columbia have adopted new laws or amended their laws to include sanctions that specifically target drugged drivers. Almost one-third of states have adopted the *per se* standard which may be the single most effective policy tool for dealing with drugged drivers. Any detectable amount of a controlled substance in a driver's bodily fluids constitutes *per se* evidence of a violation or "drugged driving." This has been the standard for commercial drivers in the U.S. since 1988. It is also the standard widely used in the developed world outside the U.S., including Western European nations, Canada, Australia and New Zealand.



Administration.

In a Walsh study of seriously injured drivers, 26.9% tested positive for marijuana while 11.6% tested positive for cocaine, and 5.6% tested positive for either methamphetamine or amphetamine. These

juana, 3.9% positive for cocaine, and 1.3% positive for methamphetamine. The higher statistics from the crash study compared to the NRS random driver sample are clear evidence that drugged driving is a serious threat to highway



Please remember we all are susceptible to becoming a victim of an impaired driver. While it is easy to get caught up in the excitement of the holiday, it is important that people be responsible and encourage others to always follow these tips for a safe Labor Day weekend:

- Whenever you plan on consuming alcohol, designate a sober driver before going out and give that person your keys;
- If you're impaired, call a taxi, use mass transit or call a sober friend or family member to get you home safely;
- Promptly report drunk drivers you see on the roadways to law enforcement;
- Wearing your safety belt while in a car or using a helmet and protective gear when on a motorcycle is your best defense against an impaired driver.

And remember, **Friends Don't Let Friends Drive Drunk**. If you know someone who is about to drive or ride while impaired, take their keys and help them make other arrangements to get to where they are going safely.

Introducing A.R.I.D.E.—A Training Option Bridging the Gap between SFST & DRE

A.R.I.D.E: Giving Officers the Tools they Need to Recognize Drug-Impaired Drivers

By Susan Glass, Missouri Traffic Safety
Resource Prosecutor

A police officer on routine patrol at night passes a car that does not have its headlights on. After he turns around, intending to alert the driver to this fact, he observes the car weaving in its lane and traveling below the posted



speed limit. The car then pulls up to a stop sign. Despite no other traffic being at the intersection, the car sits there for several seconds before proceeding. Based on unusual driving behavior, the officer initiates a traffic stop. Because he is trained in DWI detection, the officer already suspects he may have a drunk driver on his hands.

The officer then approaches the car to make contact with the driver. As the driver rolls down his window, the officer immediately notices that his eyes are bloodshot and glassy. When the officer asks where he is headed, the driver stares at him blankly before finally mumbling that he can't remember. The officer notices that his speech is thick and slurred. When the officer asks to see his license and proof of insurance, the driver fumbles around to retrieve his wallet. Despite it being in plain view in the front of the wallet, the driver looks for his license for several seconds before finally telling the officer he can't find it. He seems to forget that the officer also asked to see his proof of insurance. Becoming even more convinced that he has a drunk driver on his hands, the officer asks the driver to step out of the car to perform some field sobriety tests.

As the driver walks to the back of the car, he stumbles and has to hold on to the car for balance. When the officer administers the Horizontal Gaze Nystagmus test,

he observes that the driver has all six clues. When the officer administers the Walk and Turn, the driver can't maintain the starting position and almost falls. Because he is concerned for the driver's safety, the officer decides not to complete the Walk and Turn or to attempt the One Leg Stand.

Based on all these observations, the officer suspects that he has a drunk driver on his hands. But, he's not sure. Usually, people who are impaired smell strongly of alcohol. This driver has no odor of alcohol on his breath. Moreover, there were no empty beer cans or liquor bottles in the car. When asked if he had been drinking, the driver says no. Most confusing of all – the driver blows triple zeros on the PBT. The officer doesn't know what to do. Despite the fact that driver seems very drunk, the PBT says he isn't.

What should the officer do in this situation? How many officers would simply let the guy go, hoping he makes it home safe? How many officers have been in this situation before and done exactly that? What's really going on here?

The most likely explanation for the driver's impairment is one that many officers may not think about. With so much focus and attention paid to drunk driving and with all the training officers receive on the detection of drunk drivers, the officer may be so focused on impairment by alcohol that he does not consider the obvious explanation for this situation. This driver is impaired, most likely by drugs.

Driving while impaired by a drug other than alcohol is an increasingly serious and prevalent problem on our nation's highways. Based on SAMHSA's 2006 National Survey on Drug Use and Health, an estimated 10.2 million persons aged 12 or older reported driving under the influence of illicit drugs at least once during the preceding year. Illicit drugs in this study included marijuana, cocaine, inhalants, hallucinogens, heroin, or prescription-type drugs used non-medically. Based on the combined data from 2004 to 2006, 4.7% of drivers aged 18 or older drove under the influence of illicit drugs. According to the Centers for Disease Control, 18% of motor vehicle driver deaths involve a drug other than alcohol. In one study of reckless drivers, over half who were not intoxicated by alcohol were found to be impaired by cocaine and/or marijuana. While drunk driving remains a very serious issue, it is clear that more attention needs to be paid to those who drive under the influence of

drugs.

Driving under the influence of drugs is illegal in every state. Only a handful of states, however, have laws that make it illegal for a person to drive with any amount of certain substances in his bloodstream. In these *per se* drug states, all that is needed to prove guilt is a toxicology test that is positive for drugs. In most other states, it is necessary to show that the driver was impaired by whatever substance he had ingested. Despite the nature of these laws, few police officers receive training on drug impairment and driving. Unless they undergo the specialized training required to become a drug recognition expert, officers may not receive any training on how to recognize and respond to a drug-impaired driver. And, as described above, an officer who is not familiar with drug impairment may simply decide not to arrest an obviously impaired driver.

Recognizing the need for training on drug impairment, the National Highway Traffic Safety Administration developed "ARIDE - Advanced Roadside Impaired Driving Enforcement." This curriculum focuses on drugged driving and is intended to bridge the gap between traditional law enforcement training that focuses on the detection and apprehension of drunk drivers and the full blown Drug Evaluation and Classification Program (DEC). It is a two-day (16 hour) course that can be presented in any state.

The curriculum includes a detailed review of the standardized field sobriety tests, which remain vital to the detection of drug-impaired drivers. The course also includes information on: the physiology of the human body and how driving is affected by drugs, various methods of ingestion of drugs, and medical conditions that may mimic drug or alcohol impairment. Most importantly, the ARIDE course introduces the seven drug categories from the DEC program and describes the general indicators of impairment that are associated with each category. This course, when successfully presented, will give officers the knowledge and tools they need to recognize a drug-impaired driver. An officer who has attended an ARIDE class will know exactly how to proceed in a scenario like that described above and will not run the risk of simply letting an impaired driver go because he doesn't know what else to do.

It is important to note that successful completion of the ARIDE class *will not* qualify an officer as a drug recognition

expert. The course does not teach the 12-step drug evaluation protocol. The course does not teach officers to conduct vital sign examinations. ARIDE is not a substitute for the DEC program. For this reason, ARIDE-trained officers should not assume that they do not need to call a DRE when they are faced with a drug-impaired driver. More importantly, law enforcement administrators should not assume that they can send officers to ARIDE instead of the full Drug Evaluation and Classification Program training. The testimony of a trained drug recognition expert remains vital to successfully prosecute a drug-impaired driver, particularly in the majority of states where impairment must be tied to the substance ingested.

In DEC states, ARIDE will give law enforcement officers the information they need to determine when to call a DRE to conduct a full evaluation. ARIDE will give officers in the few states that have not yet adopted the DEC program the ability to more completely and effectively document impairment caused by drugs. In every state, officers that complete the ARIDE course will be able to recognize and respond to drivers impaired by a drug other than alcohol and will have the confidence they need to make appropriate arrest decisions in any impaired driving case.

Missouri has been active in presenting the ARIDE course to law enforcement officers and prosecutors. Several agencies, including the Missouri Office of Prosecution Services, the Missouri State Highway Patrol and various law enforcement academics have hosted classes, training a total of approximately 200 officers to date. Because the curriculum is relatively new, it is too soon to tell whether there has been any significant impact on drug-impaired driving in this state. Officers who have attended the class, however, have been enthusiastic in their response and eager to put their new found knowledge and skills to the test on the road. These officers, armed with the ability to recognize and respond to drug-impaired drivers, will never again release an obviously impaired driver simply because there was no alcohol on board. This will clearly result in better enforcement and safer roads. For this reason alone, the ARIDE class is worthwhile training that should be offered in every state.

**A.R.I.D.E training in Mississippi will begin in early 2010. Please refer to the S.T.O.R.M website at www.msstorm.net for exact dates and locations.*

Caselaw Update

Lepine v. State,
No. 2007-KA-02197-COA
(Miss.App. February 17, 2009)

FACTS:

Lepine was convicted of aggravated DUI and sentenced to twenty years in the custody of the Mississippi Department of Corrections with five years suspended, and ordered to pay restitution in the amount of \$8,326.

On February 22, 2003, Lepine was driving nine family members and friends to and from a Mardi Gras parade in Louisiana. On the way back, Lepine's vehicle left the road, hit a culvert and flipped killing four passengers. Lepine said that he had lost control of the car after swerving to miss an approaching car that had crossed the center line. However, a witness testified that there were no other cars on the road at the time. Lepine admitted to drinking earlier that afternoon, but stated he had stopped 2 hours prior to driving. Lepine's BAC 2 hours after the crash was .09%.

HELD:

The Court of Appeals held that there was no error in the trial court permitting the indictment to be amended to reflect the law that was in existence at the time of the crime and charge Lepine with one count of aggravated DUI for the deaths of all 4 victims. The crash had occurred prior to the 2004 amendment to §63-11-30(5) which allowed for a separate conviction for each death caused by the drunk driving. The amendment is permissible because it did not materially alter

facts which were the essence of the offense on the face of the indictment as it originally stood. Nor did the amendment materially alter Lepine's defense.

The Court held that there was no merit to Lepine's argument that he received late discovery - he had 3 months before the actual trial to consult a toxicologist and prepare for cross examination.

The Court held that the 3 part evidentiary predicate is only required when the intoxilyzer is used—it is not required for the admission into evidence of Lepine's blood alcohol content test results. The only requirement is proof that the procedure was reasonable. In this case, the results were admitted through the forensic toxicologist, and there was extensive testimony as to her qualifications to perform the tests and about the lab's policies and procedures.

The Court further held there was no abuse of discretion in the admission of the state's expert witness testimony that Lepine was "possibly" in the elimination phase—this did not render the testimony irrelevant & unreliable. The expert's testimony assisted the trier of fact and there was evidence that her testimony was based on sufficient facts or data.

The Court held that although the trial court erred in failing to qualify the defense expert, this was harmless error since the expert was only going to attack the credibility of the State's expert. The defense expert was not going to testify that Lepine's BAC was below .08 at the time of the crash.

Additionally, the Court held that the State presented sufficient evidence as to all the elements of aggravated DUI, and that the jury instructions fairly and adequately stated the law of negligence.

Harness v. State,
No. 2007-KA-01415-COA
(Miss.App. May 19, 2009)



FACTS:

Harness was convicted in Hinds County Circuit Court on Aggravated DUI and sentenced to twenty-five years in the Mississippi Department of Corrections, with ten years suspended & five years supervised probation.

Harness was driving and his vehicle drifted over the centerline. Another driver, Moore, was in front of the victim's car and saw Harness come into her lane. Moore swerved to avoid Harness' vehicle and looked into her rearview mirror to see a head-on collision between Harness and the victim. Harness admitted to being at a social function & to drinking although he stated he was not drunk. An unopened liquor bottle was found in Harness' passenger floorboard. Both the victim and Harness were taken to the hospital and blood tests were ordered. The victim's BAC was .03% and Harness' BAC was .11%.

HELD:

The Court of Appeals held that there was no error in admitting the testimony of the accident reconstructionist even though he was not certified at the time of the crash. The AR had completed 2 of the 3 levels needed and completed the 3rd level after the crash but prior to trial. He could testify as an expert because of his experience and education.

The Court held admission of a diagram even though "not to scale" was properly admitted since it was used for demonstrative purposes only.

The Court further held that even though Harness had requested the State to produce his blood sample for independent testing and the crime lab had destroyed the sample, Harness was not deprived of his due process rights since

he was unable to show that the evidence was apparently exculpatory.

Allowing a nurse to testify even when she had no independent recollection of the events was proper according to the Court since she read from the written report that she had signed the night of the wreck.

Harness was not denied a fair trial by not being allowed to present testimony of an insurance settlement from the victim's insurance company.

Teston v. State,
No. 2007-KA-00353-COA
(Miss.App. , November 18, 2008)

FACTS:

Teston was convicted of three counts of driving under the influence of hydrocodone and negligently causing the death of three students and one count of driving under the influence and negligently causing serious injury to another. Teston was sentenced to fifteen years for each count to run consecutively with thirty years suspended and five years post release supervision.

Five college students in an SUV were traveling east on Interstate 10. The driver of a black Honda, later identified as Teston, veered in front of the SUV causing the driver to lose control and crash into the concrete median. Three of the passengers were killed and one was severely injured.

An officer arrived at the scene and spoke to Teston and the other witnesses. Teston failed to mention she had caused the crash. Upon speaking to Teston a second time, the officer noticed that her speech was slurred, she was mumbling and confused, and her eyes were dilated and glassy. The officer discovered that Teston had a suspended license for failure to pay a ticket. While being placed under arrest, Teston asked the officer to retrieve her medication from the console of her vehicle. The officer testified that he found a bottle of Lorcet in the console which was not prescribed to Teston. Teston was advised of her *Miranda* rights and asked her how many Lorcets

she had taken that day. Teston responded that she had taken two Lorcets. The officer asked Teston if she had taken any other medication and Teston stated that she had taken a Xanax and a Goody's PM right after the accident to calm down.

Teston consented to a blood test and was transported the hospital approximately three hours after the crash. The blood test revealed Teston had 110 nanograms per milliliter (ng/ml) of hydrocodone in her system.

HELD:

The Court of Appeals held that Teston was not subjected to double jeopardy by allowing the State to proceed on Counts V-VIII of the indictment (Cts. I-IV alleged DUI under the influence of hydrocodone and Cts. V-VIII alleged general DUI). Given the language of the statute, the State was not required to specifically list the substance(s). Furthermore, the trial court properly granted Teston's directed verdict on Cts. V-VIII.

The blood test results were properly admitted even though taken three hours after the crash—§63-11-8 states that the blood shall be tested within two hours *if possible*. Here, the Court found no evidence of deliberate delay. The delay was caused by waiting on a tow truck, travel time to the station and then to the hospital.

The Court held the expert was properly allowed to give opinion testimony at to Teston's level of impairment.

There was a full Daubert hearing where the expert was qualified in the field of toxicology & pharmacology.

The Court held there was ample evidence that Teston was impaired – driving aggressively, officer noticed she was visibly impaired, and state expert testified she was impaired.

Teston was not allowed to admit into evidence her recorded statement at



the police station because it was self-serving since she did not testify.

Introduction of Teston's arrest for driving with a suspended license was properly admitted into evidence to explain why the officer did not perform any field sobriety tests. Furthermore, the Court held the jury was given a limiting instruction, and the arrest was relevant because it explained a sequence of events leading up to Teston's blood test.

The Court held that there were no improper statements by the State when viewed in context and the State did not comment on Teston's right to not testify.

The Court also held that Teston was properly denied a circumstantial evidence instruction since Teston was identified as the driver, and that her sentence was not grossly disproportionate as it was within the statutory guidelines.

Tate v. State,
No. 2007-KA-
00670-COA
(Miss.App. De-
cember 16, 2008)

FACTS:

*T*ate was

convicted in Holmes County Circuit Court of culpable negligence manslaughter and sentenced to twenty years in the custody of the Mississippi Department of Corrections.

On October 9, 2005, Tate was driving his 2004 Ford F-150 truck, and veered across the center line colliding with the victim's vehicle causing her immediate death. Witnesses told the officer they heard a loud thud in the bushes by the roadside after the crash. A cooler with five unopened cans of beer inside and two empty bottles of beer in huggies were recovered on the side of the road. Tate was not given a blood test until 24 hours later which revealed no alcohol in his system.

At trial, witnesses testified that

Tate's truck was in the proper lane except when taking the curve where the impact occurred. Another witness and an ambulance driver both testified that Tate did not appear to be intoxicated. Although the deputy stated he smelled alcohol in truck, and that Tate looked "slurry," he did not smell the odor of an alcoholic beverage on Tate.

HELD:

The Court of Appeals held the evidence was insufficient to establish negligence so gross as to be tantamount to wanton disregard of, or utter indifference to, the safety of human life to support a conviction for culpable negligence manslaughter. The court stated there was no evidence presented at trial that Tate was speeding or driving recklessly, nor was it found that he was impaired or had been drinking on the

day of crash. All the evidence showed was that Tate, who may have had the cooler of beer and two open beers in his vehicle, lost control of his vehicle while driving around a curve and crossed into the victim's lane causing her death.

The Court discussed in prior cases the MS Supreme Court has held that culpable negligence requires a higher degree of negligence. While

many of the MS culpable negligence cases have involved the use of alcohol by the Defendant, operating an automobile "while under the influence" is only a factor "indicating criminally culpable negligence if the influence of intoxicants proximately contributed both to the negligence of the Defendant and to the resulting death."

Hudspeth v. State
No. 2008-KA-00097-COA
(Miss.App. May 5, 2009)

FACTS:

*H*udspeth was convicted of DUI manslaughter in Kemper County and sentenced to twenty years in the cus-

tody of the Mississippi Department of Corrections with fourteen years suspended and five years supervised probation. He was also ordered to pay a \$2,000 fine and \$7,650 in restitution.

Hudspeth was driving when her car crossed the center line and struck a vehicle driven by Edwards who was killed as a result of the accident. A deputy arrived at the scene, approached Hudspeth for her driver's license, and noticed a strong odor of alcohol and had to assist her to his patrol car. At trial, the deputy testified that he arrived at the scene of the accident at 10:26 p.m. and ran Hudspeth's tag at 10:31 p.m. He left the scene at 10:40 p.m. with Hudspeth and a deputy fire chief who rode in the back with Hudspeth, who was instructed not to allow her to smoke or put anything in her mouth. The deputy turned on the Intoxilyzer at 10:46 p.m. and typed 10:31 p.m. in the machine as the beginning of the observation period. Hudspeth gave breath samples at 11:00 p.m. and 11:02 p.m. Hudspeth's BAC after the wreck was 0.24 %.

HELD:

The Court of Appeals held the twenty minute observation period does not require a single officer to observe the person being tested only that the person being tested has been observed for twenty minutes immediately prior to the collection of a breath sample. In addition, the deputy's testimony that he is certified to perform a breath test is the same as the deputy presenting a certified copy to the court when they are subjected to cross-examination on their knowledge and experience on the matter.

The Court held that an autopsy is not required and the jury could determine that the wreck caused the victim's death. When there are no other facts to base an alternative reasonable hypothesis, it is proper for the jury to determine whether the injuries suffered in the crash is the cause of death.

The Court held the evidence was legally sufficient to support Hudspeth's conviction.



The 2009 *Drunk Driving. Over the Limit. Under Arrest. Crackdown*

The Labor Day holiday is one of the deadliest and most dangerous times of the year on America's Roadways due to an increase in impaired driving .

During the holidays, far too many people forget that alcohol, drugs, and driving do not mix. Specifically, drinking and driving accidents occur with more frequency during holidays due to "acceptable" drinking at parties and family functions. However, drunk driving is *not* acceptable and is still one of America's deadliest problems.

For all Americans between 5 and 35 years of age, motor vehicle accidents are the number one cause of death. Over fifty percent of these deaths are caused by an impaired driver. In addition, alcohol related crashes are still the leading cause of death for Americans between 16 and 24 years of age.

In 2008, an estimated 37,313 individuals were killed in crashes on America's roadways. Of these, **3,243** occurred in **September** and involved a drunk driver or motorcycle rider.



To help combat these statistics, Mississippi is taking preventive action this Labor Day to ensure the safety of you and your family while traveling on Mississippi's roads. State and local law enforcement will be out in full force cracking down on drunk driving, and we are asking the entire law enforcement community – including prosecutors - to show zero tolerance to violators this Labor Day holiday.

By strictly enforcing our laws and prosecuting offenders, we will be saving lives and making sure those traveling on Mississippi's roads know that no matter what they drive – a passenger car, pickup, sport utility vehicle or motorcycle – they will be arrested if they are caught driving while impaired. Without your help, citations issued during this time are meaningless if they are not zealously prosecuted. We want drivers to know that driving while impaired is wrong and not worth the risk of killing themselves or someone else.

Remember - *Drunk Driving. Over the Limit. Under Arrest.*

For an up-to-the-minute approximation of deaths so far this year in the U.S. visit <http://www.alcoholalert.com/deathclock.html>

MARK YOUR CALENDAR!



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August 25-27	CTS (Complete Traffic Stops) in Natchez
Sept. 8-10	SFST Training in Starkville
Sept. 15-17	CTS in Meridian
Sept. 22-24	SFST Training in Gulfport
Sept 29-30	CTS in Vicksburg
Sept. 28-Oct. 2	Justice Court Judges Conference
Oct. 21-23	Fall Prosecutors Conference
Nov. 3-5	S.T.O.R.M. Conference

