**Oklahoma Criminal Defense Lawyers Association**

**Criminal Defense Institute**

Virtual Presentation

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**DUI Legal Update**

 Brian K. Morton

 Hunsucker Legal Group

 Edge Law Firm

 (405) 231-5600

 brian@okdui.com

**Statutory Changes**

**HB 2877**

Increased the cost of the Victim Impact Panel (VIP) to $75.00

Did away with the exemption that allowed Certified Assessment Agencies, Certified Assessors, and Alcohol and Drug Substance Abuse Courses to conduct VIP. Those entities are now prohibited from conducting VIP. Additionally, none of those entities can have a proprietary or pecuniary interest in a VIP program.

Beginning October 1, 2020, and each year thereafter VIP providers shall provide to the District Attorneys Council in addition to the previous requirements:

 $1,000 registration fee deposited in the DAC Revolving Fund, and

 Statement certifying compliance with all the requirement of the paragraph.

Amended 47 O.S. 11-902 to change that the court “may” require VIP, to the court “SHALL” require the VIP.

**Criminal Case Law**

***Stewart v. State*, 2019 OK CR 6 (Decided May 16, 2019)**

**Facts:** Stewart was charged with two counts of First-Degree Manslaughter and Possession of Meth as a result of an automobile accident. Stewart sustained critical injuries and was flown to Oklahoma City where he remained in a coma. Three hours after the accident, a nurse, at the direction of a State Trooper without a search warrant or Stewart’s consent, drew a sample of blood. The blood was drawn in reliance of the case of *Cripps v. State*, 2016 OK CR 14, which interpreted 47 O.S. §10-104.

**Held:** Title 47 O.S. §10-104 substituted one per se rule of exigency for another and is at odds with the McNeely decision. *Cripps* and *Bemo* are overruled in so far as they are inconsistent with *Stewart*.

However, ruled against Stewart because purpose of exclusionary rule is to deter police misconduct and in this case the police relied upon *Cripps* in good faith.

***Mitchell v. Wisconsin,* 139 S. Ct. 2525 (2019) (Decided June 27, 2019)**

**Facts:** Officer arrests Mitchell for DUI, and takes him to the police station for a breath test. By the time they reach the station Mitchell is to lethargic for the breath test so the officer takes him for a blood test. Mitchell was unconscious at the time they reach the hospital. Wisconsin law presumes an unconscious person has not withdrawn consent, so Mitchell’s blood was drawn without a warrant.

**Held:** When a driver is unconscious and cannot give a breath test, the exigent-circumstances doctrine generally permits a blood draw without a warrant. Because the officer is having to seek medical attention for the unconscious person it interferes with the officer’s ability to timely obtain a search warrant.

***State v. Hodges*, 2020 OK CR 2**

**Facts:** Hodges was charged in Grant County with Misdemeanor Manslaughter. Hodges was transported to a hospital in Kansas for medical care. A Kansas State Trooper performed a blood draw at the request of an Oklahoma State Trooper. The blood draw was done by a Registered Nurse, who was licensed in Kansas, utilizing a Kansas blood draw kit. The Kansas Trooper then transported the kit to the state line where it was given to an Oklahoma State Trooper. The trial court granted Hodge’s Motion to Suppress as the blood draw did not comply with Oklahoma law and Oklahoma Board of Tests Administrative Rules. The State appealed.

**Held:** A blood draw is not admissible where it was not taken in accordance with Oklahoma Law. However, Title 47 O.S. §757 allows the admission of “other competent evidence” of intoxication. A blood test taken in accordance with another state’s law and admissible in a comparable court proceeding in that state, would be competent evidence under Section 757. Reversed and Remanded for further proceedings.

On remand, the Judge denied the Motion to Suppress. The case is currently set for trial in November 2020.

***State v. Silas*, 2020 OK CR 10**

**Fact:** Silas was charged with First-Degree misdemeanor manslaughter in Pottawatomie County. After a day of drinking with her husband and a friend, Silas hit her husband with a motor vehicle in the driveway of their home killing him. Silas argued she could not be convicted of the underlying misdemeanor of DUI because the accident occurred in her driveway. Trial court granted demur because in 47 OS §11-404 the Legislature referenced both “private road” and “driveway” but the word “driveway” is absent from Section 11-902. The decision was upheld by another Judge of the District Court. The state appealed.

**Held:** Court found nothing in the plain language of 11-902 that the Legislature intended to excluded “driveways” from the statutes’ reach. The Legislature defined “private road” and “driveway” synonymously in Section 1-148. Furthermore, in *Haws* and *Fenimore* the Court advised that broadening the language to prohibit DUI anywhere in the State would have to be done by the Legislature. The Legislature did that very thing the year after the 2003 Fenimore decision by including “private road, street, alley or lane . . .” OCCA presumes the Legislature was aware of these decisions when it contemplated amending the statute.

**Dissent by Judge Lewis:** “Had the legislature intended driveways to be included in this statute they would have done so. The majority’s reach to include driveway in this statute fails the common rules of statutory construction.”

Note: While the Court acknowledged that Silas argued to the lower court that Section 11-404 included both terms of “private road” and “driveway” OCCA never addresses this in its opinion.

**DPS Case Law**

***Vess vs. DPS* and *Catlin vs. DPS*:** In both cases the trial courts allowed in the BOT maintenance packets over the objection of defense attorney’s arguments that the packets contained inadmissible hearsay. In both cases COCA upheld the lower courts and issued the decision to be for publication. Petitions for Certiorari were made to the Oklahoma Supreme Court. Sup. Ct. denied cert in both cases, but issued orders that the COCA decision were stricken from publication.

***Simpson* v. DPS, 2020 OK CIV APP 34**

**Facts:** Simpson was arrested in Texas County and charged with felony count of possession of marijuana. Simpson plead no contest to the charge. Abstract of Court Record was sent to DPS reflected Simpson committed crime of passion of marijuana while using a motor vehicle. DPS issued order of revocation based upon the abstract. Simpson filed Petition in District Court arguing that nothing in the Judgment and Sentence or in the Plea indicated he committed his crime while using a motor vehicle. District Court sustained the revocation and denied Simpson’s request for modified driving privileges.

**Held:** Court has authority to review the correlation between a person challenging a revocation and conviction necessitating the revocation. Regardless of preliminary documents, such as dismissed charges, nothing in the Plea or J&S support the description that the conviction involved a motor vehicle. District Court reversed and the revocation set aside.

***Cole* v. DPS, 2020 OK 67**

**Facts:** Cole is arrested for DUI on February 18, 2018. Cole’s attorney made a request for an administrative hearing within the 15 day time period. However, the request was made by fax. DPS called Cole’s attorney and advised DPS no longer accepted fax requests, and to either mail in the request or bring it in person. On March 27, 2018 DPS sent a follow up letter to Cole’s attorney advising about faxes and the need to mail in the request or present in person. On March 31, 2018 DPS issued a revocation order. Cole appealed to the District Court.

At the District Court hearing the Court held that Cole had made a timely request for hearing and remanded the case for administrative hearing. Cole appealed arguing the Court did not have the authority to remand the case back to DPS. The Court of Civil Appeals agreed that DPS had violated Cole’s due process rights by not giving him a hearing, but determine that the Court should have set aside the revocation. DPS filed a Petition for Cert to the Oklahoma Supreme Court.

**Held:** DPS had changed its administrative rules to reflect that it no longer accepted hearing requests by fax, and that it only accepted requests by mail or in person. Rules have the force and effect of law. Cole’s request by fax was deemed insufficient by DPS. The Supreme Court vacated the Court of Appeals opinion, reversed the District Court, and order the revocation sustained.

**Erin Swezey Act**

November 1, 2019 the law changed doing away with the Erin Swezey Act. There was no longer an 18 month, 4 year, and 5 year additional interlock requirement after the period of revocation. However, DPS was still requiring people that were revoked prior to the law change to still do the additional interlock as a condition of reinstatement.

Several challenges were filed across the State. In each of those challenges the District Courts ruled that it is the law that is in effect at the time the person seeks reinstatement that controls. In February 2020, DPS announced that it was not going to appeal the decisions, and would no longer enforce the Erin Swezey Act, including people that were currently doing the additional interlock.

**BRIAN K. MORTON**

Oklahoma City attorney, Brian Morton is a 2000 graduate of the University of Oklahoma College of Law. Mr. Morton served as an Assistant District Attorney in Sequoyah County, Oklahoma, a criminal defense attorney, and he also spent the over five years as an attorney for Oklahoma Department of Public Safety (DPS) handling driver’s license revocation and motor carrier safety matters before the District Courts. In July 2014, Mr. Morton left DPS and now handles all driver’s license matters for the Edge Law Firm in Tulsa and the Hunsucker Legal Group in Oklahoma City. Mr. Morton is a member of the Oklahoma Criminal Defense Lawyers Association; a member and the Oklahoma State Delegate to the National College of DUI Defense, and serves as a Governor-at-Large for the Oklahoma Bar Association Board of Governors for the 2018-2020 term.