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Traffic Laws & Courts

The newsletter of the Illinois State Bar Association's Section on Traffic Laws & Courts

People v. Aronson: Missing video results in rescission due to inferences drawn in favor of the defendant

By Sean D. Brady

In a recent second district case, *People v. Aronson*, 2011 WL 941306, 2nd Dist., 2011, the appellate court affirmed the trial court's rescission of a statutory summary suspension when the State could not produce a video of the stop. Although the *Aronson* case has not been released yet for publication, it still offers attorneys a good discussion of some of the issues surrounding a case involving missing evidence in a summary suspension hearing.

In *Aronson*, the defendant was arrested on November 15, 2009 and charged with DUI, speeding, and improper lane usage. The defendant filed a petition to rescind on December 11, 2009. The petition included a challenge based on no reasonable grounds to believe that the defendant was driving under the influence of alcohol. The hearing on the petition was set for January 8, 2010. On December 30, 2009, the defendant subpoenaed "any videos" of her case from the Oak Brook police department. On January 8, 2010, the date set for the summary suspension hearing, the defendant was informed by the Oak Brook police department's court liaison officer that the video was "not viewable." The defendant filed a motion for sanctions against the State arguing that "the State's failure to produce the video was tantamount to the loss or destruction of evidence and, therefore, the trial court had the discretion to sanction the State's unreasonable noncompliance with discovery." The defendant argued that the court should rescind the statutory summary suspension as a sanction.

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People v. Martin: Trace of drugs and death sufficient for aggravated DUI conviction

By J. Brick Van Der Snick

Defendant was convicted by a jury of Aggravated Driving Under the Influence (DUI) based on presence of methamphetamine in Defendant's urine. Defendant appealed, the appellate court reversed. The State petitioned for and was granted leave to appeal. The Supreme Court reversed the appellate court and reinstated the circuit court.

Holding

Supreme Court held: (1) Defendant operated a motor vehicle while there was an amount of drug in Defendant's urine from unlawful use of methamphetamine, as required to support a conviction and (2) Aggravated DUI based on the presence of methamphetamine in Defendant's urine did not require the State to prove that impairment was the approximate cause of victims' deaths.

Facts

On December 25, 2004 at 10:00 p.m. the Defendant left a bar in Peoria. As he was driv-

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On January 8, 2010, a hearing was held on the defendant's motion for sanctions. At the hearing, the State informed the court that there was a download problem with the squad car's video camera and therefore a video was not available. The court denied the motion for sanctions because there was "no intentional or willful destruction of any evidence."

Immediately after the motion for sanctions was denied, a hearing on the petition to rescind the statutory summary suspension occurred. The officer testified at the summary suspension hearing to the following: Defendant's car was initially observed "slightly " straddling a lane at a stop light. Then the officer observed the car change lanes without signaling in a construction zone. The officer smelled an odor of alcohol coming from the vehicle. The defendant did not have any problems exiting the vehicle and the officer did not notice anything unusual about the defendant's speech. The defendant did not use the vehicle for support. The officer did notice an odor of alcohol on defendant's breath when she was out of the vehicle. The officer gave her field sobriety tests. The officer testified that the defendant failed three field sobriety tests. On the walk and turn test, the officer testified that she did not touch heel to toe, she raised arms more than six inches, and she did not turn properly. On the one leg stand test, the testimony was that she put her foot down before she was told to stop. She submitted to a breath test but failed because she did not blow properly as instructed. The officer testified that the defendant admitted to drinking one glass of wine. The officer did not testify about any video recording of the incident.

The defendant, a home health care nurse, testified that she did believe that she failed the field sobriety tests. She testified that she performed the walk and turn as instructed, that she touched heel to toe, and that she had her hands at her sides. The defendant denied that she had made any admissions to the officer about drinking alcohol.

The court granted the petition to rescind the statutory summary suspension. The court found that the officer was "very credible" but the court had a problem with the fact that "there was a tape that the defense can't have, through no fault of theirs." The trial court went on to say, "[B]ut because of the absence of the tape, that it was inadvertently not recorded or destroyed, I am going to rescind the summary suspension." The written order filled out by defense counsel on a preprinted form reflected that the "Officer Failed to Answer Defendant's Subpoena (Code 4250)."

On appeal, the State argued that the trial court sanctioned the State " based on a video that was never created." The appellate court stated that there was sufficient evidence to support the trial court's position that a video was made of the incident "but that the recording could not be produced because of a technical problem…." The appellate court was not persuaded by the State's argument that the trial court's decision basically called for recession whenever there not a recording of a stop. Furthermore, the appellate court concluded that the trial court's ruling was not a sanction. The appellate court stated that even though the written order appeared to reflect a sanction for not answering a subpoena, the trial court's oral findings supported a finding for recession based on no reasonable grounds.

The State also argued that the trial court's decision was based solely on the lack of a video. The appellate court disagreed and found that the record reflected that the trial court weighed the evidence. The trial court commented that "when evidence in one party's control is missing or destroyed, an inference may be drawn that the evidence was detrimental to that party." The trial court "factored into its decision that the video would have spoken to the credibility of the testimony and presumptively would have weighed against the State. So the trial court "implicitly determined that defendant's testimony … when bolstered by the presumption that the video would have been detrimental to the State, outweighed" the officer's testimony and rescission was warranted. "Giving deference to the court's findings that [the officer's] testimony was outweighed by the evidence in defendant's favor and, accordingly, that there were no reasonable grounds to believe that defendant was driving under the influence of alcohol, we agree that recession was warranted." The appellate court said that the trial court "did not dismiss charges or rescind because a video was missing, but rather, applied a presumption to its weighing of the evidence."

The court concluded that a video was made on the very issue disputed by the parties. "That video, which might have held exculpatory value for defendant, was unavailable. The [trial] court did not rescind the suspension as a sanction to the State, but it did inherently find that the information presumed to be in the video, coupled with the defendant's testimony, outweighed the evidence in the State's favor." The Appellate Court affirmed the trial court's ruling.

Attorneys should consider reading the *Aronson* case whenever they are encounter a missing video in the context of a DUI / summary suspension hearing. However, keep in mind that until *Aronson* is released for publication, it should not be cited as precedent. ■

People v. Martin: Trace of drugs and death sufficient for aggravated DUI conviction

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ing home on a two-lane highway, his car crossed the center line, missed the curb, and struck another oncoming car. The driver and the passenger of that car were killed in the accident. After being placed under arrest, Defendant consented to requests for two blood and urine samples. Subsequent tests revealed that Defendant's blood contained no alcohol or controlled substance, but his urine contained methamphetamine and amphetamine. Defendant was then indicted on one Count of Aggravated DUI.

At trial, the State presented testimony from two eye witnesses to the accident that stated they saw the Defendant's truck traveling north bound, miss the curb, veer into southbound traffic, and collide head on with another car.

Defendant's friend testified for the State. Defendant's friend stated that after Defendant was released from the hospital, she had organized a benefit to help Defendant pay his medical bills. The friend received an anonymous telephone call shortly before the benefit, asking her how she could raise money for "somebody who killed two people while on crystal meth." Later the friend confronted the Defendant with this information. According to the friend, she asked Defendant why she has received the telephone call, and he responded, "His drug test came back positive." Defendant told his friend that he had done crystal meth before but that he was not on crystal meth that night. Further, the Defendant did not indicate to the friend when he had last used methamphetamine.

An Illinois State Police Forensic Scientist testified that she tested the Defendant's blood sample for alcohol and drugs. She found none. She also tested the Defendant's urine samples for drugs. The Forensic Scientist performed three tests; the first two looking for a wide range of drugs with her finding nothing significant. The Forensic Scientist then performed a more specific spectrometry test, looking for drugs in the amphetamine class. That test revealed the presence of methamphetamine, though it did not indicate how much.

Furthermore, the Defendant presented testimony from a single witness, an expert in the field. The expert testified that he had reviewed the ISP Forensic Scientists report and he discussed her findings. According to the expert, Dr. Staubus, the amount of methamphetamine in the Defendant's urine was so small that the test result should have been negative. He asserted, "It is my opinion to a reasonable degree of scientific certainty that the urine sample of the Defendant does not contain detectable amounts, realistic amounts of methamphetamine." Dr. Staubus did not dispute that there was any amount, even a trace, of methamphetamine in the Defendant's urine.

Legal Analysis and Reasoning

After review of the appropriate statutory provisions, i.e., Section 11-501 (Illinois Motor Vehicle Codes 625 ILCS 5/11-501 etseq.), the Supreme Court noted that, "Aggravated DUI occurs when an individual commits some form of Misdemeanor, DUI in violation of paragraph (a) and other circumstances are present." The legislative added aggravating factors that changed the Misdemeanor DUI to a Class 4 Felony, *People v. Quigley*, 183 Ill.2d 1 (1998).

In Defendant's cross relief petition, the Defendant argued that the State failed to prove that he had initially committed a misdemeanor DUI. Specifically, Defendant further contended that the State failed to prove that the trace amount of methamphetamine in his urine was due to unlawful use or consumption of a controlled substance.

The Supreme Court found that the State was required to prove that the Defendant operated a motor vehicle while there was any amount of drug, substance, or compound in his breath, blood, or urine resulting from the unlawful use or consumption of methamphetamine. Because possession of a controlled substance is unlawful per say, the State must establish simply that the Defendant used or consumed a controlled substance before driving. See *People v. Rodriguez*, 398 Ill.App.3d 436 (2009), "Unlawfulness is not a separate element of the offense."

Further, Defendant claimed that the State was required to prove that the substance in his urine was actually methamphetamine and not methamphetamine precursor, such as ephedrine or pseudoephedrine, which

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broke down into a metabolite of methamphetamine. The court in response states, "This is pure conjecture. The fact that other substances may give a positive test result for the presence of methamphetamine is irrelevant without some evidence that the Defendant had used such a substance. There was none. There was evidence; however, that he used methamphetamine, and evidence that no other substances in his urine could have yielded a false positive result."

The Supreme Court found that the law does not require the State to prove that the drugs caused or contributed to the accident in order for the Defendant to be guilty of the felony charge. Rather, all that is required is that the Defendant's driving must be a cause of the accident and there was some trace of a controlled substance in his system. The court cited, *People v. Fate*, 159 Ill.2d 267 (1994), which found, "There is no dispute that the statute is intended to keep drug-impaired drivers off of the road." The flat prohibition against driving with any amount of a controlled substance in one's system, was considered necessary because 'there is no standard that one can come up with by which, unlike alcohol in the bloodstream, one can determine whether on is *** driving under the influence.' *Id. at 269-70.*

Further, in concluding that the statute was a reasonable exercise of the State's police power, we noted that it creates an absolute bar to driving after ingesting a controlled substance, "without regard to physical impairment." *Id. at 271*… Indeed, while it is possible to determine scientifically the amount of alcohol that renders a driver impaired, it is not possible to do the same for drugs, *Rodriguez*, 398 Ill.App.3d 439 (2009). The Supreme Court cited an Arizona case, *State v. Phillips*, 178 Ariz. 368 (Ariz.Ct.App.1994) held that, "Unlike the blood alcohol concentration tests used to measure alcohol impairment, there is no useful indicator of impairment from such drugs because they are fundamentally different from alcohol. Essentially, there can be no meaningful quantification because of the dangers of inherent in the drugs themselves and in the lack of potency predictability."

Conclusion

A driver with controlled substances in his body violates Section 11-501(a)(6) simply by driving. When an Aggravated DUI charge is based on a violation of that Section, Section 11-501(d)(1)(f) requires a cause of link only between the physical act of driving and another person's death. In such a case, the central issue at trial will be proximate cause, not impairment. A Defendant who is involved in a fatal motor vehicle accident while violating Section 11-501(a)(6) is guilty of only misdemeanor DUI where his driving was no an approximate cause of the death.

The State proved the Defendant guilty of misdemeanor DUI beyond a reasonable doubt. It also proved beyond a reasonable doubt that Defendant's driving was a proximate cause of the victims' deaths. Therefore, the State proved the Defendant guilty of Aggravated DUI.

People v. Martin, 2011 W.L. 149909 (Released April 21, 2011). ■

New summary suspension law hits Illinois

By Edward M. Maloney

Effective July 1, 2011, there will be a new hammer in a never-ending battle to impose more and more penalties on persons suspected of driving while under the influence of alcohol in Illinois.

A new statutory summary suspension revocation of driving privileges (Statute 625 ILCS 5/1-197.6) will become effective. The basis for this revocation of driving privileges shall be a person's refusal to submit to or failure to complete a chemical test or tests following an arrest for the offense of driving while under the influence of alcohol, drugs, intoxicating compounds or any combination thereof involving a motor vehicle accident that caused personal injury or death to another.

This is a new revocation being added to Illinois Law. This is not a suspension of driving privileges. This means that even if you were ultimately found not guilty of the DUI offense your driving privileges will be revoked by the Secretary of State under this statute.

A suspension is for set period of time (625 ILCS 5/1-204). Once a suspension is over, a person's driving privileges are automatically reinstated upon payment of a reinstatement fee if they are otherwise valid.

A revocation is forever (625 ILCS 5/1-176). The only way a person can obtain reinstatement of driving privileges after a revocation is entered is to apply to the Secretary of State through the administrative hearing process. This process can often be a very lengthy and costly procedure (625 ILCS 5/6-208(b)).

The new statute also amends Section 2-118.1 of the Illinois Vehicle Code (625 ILCS 5/2-118.1) by adding this new revocation.

Currently under Illinois law upon an arrest for driving while under the influence charge a person will be served with a notice of statutory summary suspension by the arresting officer. Within 90 days after the notice of suspension is served a person may make a written request for a judicial hearing through the Circuit Court of venue. The scope of the hearing is somewhat limited :

1. Whether the person was properly placed under arrest for the offense as defined in 625 ILCS 5/11-501;
2. If the officer had reasonable grounds to believe that the person was driving or in actual physical control of a motor vehicle upon a highway while under the influence of alcohol or drugs or a combination of both; and
3. Whether the person, after being advised by the officer their privileges to operate a motor vehicle would be suspended for refusing to submit and complete the test or tests; or
4. Whether the person after being advised by the officer that their privileges to operate a motor vehicle would be suspended submitted to a test that showed an alcohol concentration of .08 or more or the existence of a controlled substance.

Upon the conclusion of a judicial hearing, the circuit court will either sustain or rescind the summary suspension and notify the Secretary of State of such.

Currently under Illinois law, if a person is

otherwise eligible and considered a first offender then the individual would be able to apply for a Monitoring Device Driving Permit (MDDP). If serious personal injury or death occurred as a result of the DUI arrest then the MDDP would not be available to this particular individual (625 ILCS 6-206).

The difference with this new statute is that it creates a new revocation. Further, this statute only requires a Type A injury to trigger the revocation. A Type A injury is defined as any injury that requires immediate medical attention at a hospital or injuries that require a person to be carried from a scene. It also includes severely bleeding wounds and distorted extremities.

In addition, the new statute adds a new penalty to the existing summary suspension law. 625 ILCS 5/6-208.1(a) states that any person whose driving privileges have been revoked under this new law may not make application for a license or permit until the expiration of one year from the effective date of the summary suspension. Any person caught driving a motor vehicle during the time of a summary suspension/revocation will be guilty of a Class A misdemeanor (625 ILCS 5/6-303(c)(3)) and a conviction for subsequent violation would be a Class 4 Felony (625 ILCS 5/6-303(d)). Any motor vehicle used is subject to seizure and forfeiture as provided in Section 36-1 and 36-2 of the Criminal Code.

The only way to avoid a disqualification for a CDL is to win the statutory summary suspension/revocation hearing in the court of venue.

This statute also has also amended Section 11-401 regarding motor vehicle accidents involving death or personal injury (625 ILCS 5/11-401). In the past, a driver of a vehicle involved in a motor vehicle accident resulting in personal injury or death of any person was to immediately stop such vehicle at the scene or as close thereto as possible and return to the scene and remain there. A person who has failed to stop, shall as soon as possible under no case later than one half hour after the accident report it to a police station nearby. If, as a result of the accident the person is hospitalized and incapacitated and unable to report the accident then within one-half hour of release from the hospital the person must report it to the police. A person arrested for violating 11-401 is subject to chemical testing if the testing occurs within twelve hours of the time of the occurrence of the accident that led to his or her arrest.

Under the new statute, if the person then refuses to submit to chemical testing, a statutory summary revocation will go into effect.

Well what about the situation where there is an accident with an injury but there is no arrest for DUI. What happens? The driver is still subject to a possible suspension for refusing to submit to a blood, breath or urine test if you have been given a ticket for a violation of the Illinois Vehicle Code with the exception of equipment violations (625 ILCS 5/11-501.6).

What does all this mean actually? If you have been reading this far, you probably do this kind of work or you are wondering what the big change is. Well this is a big change and it is very scary one to boot.

Currently, if you are arrested for a DUI and there is a personal injury or death, upon a conviction for the DUI arrest, the Secretary of State has the authority to revoke your driving privileges under 625 ILCS 5/6-205 (mandatory revocation of license or permit for reckless homicide or conviction for a violation of 11-501).

The Secretary of State also has the authority for a discretionary revocation under the Illinois Vehicle Code upon a conviction for any violation under the Motor Vehicle Code that results in a death (625 ILCS 5/6-206(4)).

But, the difference here is that under these statutes you need to be convicted. A conviction after a trial or plea based on evidence beyond a reasonable doubt of your guilt in a reckless homicide or DUI offense or the preponderance of evidence on a minor motor vehicle charge.

As of July 1, 2011 this will no longer be the case. People who are found not guilty of the reckless homicide or the DUI offense where there was an injury (Type A) will be punished anyway. The person's license will be revoked for one year with no opportunity to obtain driving relief for the entire year.

Furthermore, this summary suspension revocation for one year can occur even if there was no arrest for DUI. If you have been charged under 625 ILCS 5/11-401 for leaving the scene of an accident and you refuse to submit to testing a person would incur the same penalty. During that time, a person could not obtain any driving relief from the Secretary of State.

At the end of the one-year summary suspension revocation, your license will not be automatically returned. You will need to go through the Secretary of State hearing process which means a person would have to obtain an alcohol evaluation and complete any counseling may be deemed necessary by the evaluation. A person would then need to appear before the Office of the Secretary of State for an administrative hearing. Historically the Secretary of State does not grant full driving privileges back to any petitioner after a one year revocation for any reason. At best, a petitioner would most likely be granted a restricted driving permit and if a person successfully drove on that permit for a required time the person could then reapply to obtain full reinstatement of driving privileges. All of this has occurred without a conviction for a criminal offense. 92 Ill.Admin.Code §1001.420(i), §1001.430(i)

Obviously the intent of the statute is to encourage drivers arrested for DUI that have been involved in personal injury/death collisions to submit to chemical testing; however, police officers already have the authority to require such drivers to submit to chemical tests. Under 625 ILCS 5/11-501.2(c)(2), if a police officer has probable cause to believe a defendant charged with DUI has caused death or personal injury to another, the person shall submit to chemical testing at the request of a police officer which means that the police officer can take the defendant to the hospital, strap the defendant to a gurney and withdraw blood. The Supreme Court of the United States has already approved such blood draws in *Schmerber v. California*, 384 U.S. 757, 16 L.Ed.2d 908, 86 S.Ct. 1826 (1966)

So why create this new statute when the police already have the authority to require chemical testing in personal injury accidents and the Secretary of State has the authority to suspend driving privileges even without a DUI arrest or to revoke upon receiving notice of a conviction?

The constitutionality of this statutory summary suspension/revocation will most likely be challenged in the courts under the double jeopardy argument. The constitutional protections against double jeopardy contained in both the 5th Amendment to the U.S. Constitution and in Article 1, Section 10 of the Illinois Constitution safeguard a defendant against multiple punishments for the same offense. *United States v. Wilson*, 420 U.S. 332, 43 L.Ed.2d 332, 95 S.Ct. 1013 (1975).

When the current summary suspension statute was first passed in Illinois many defense lawyers presented motions to dismiss

the DUI charge based upon double jeopardy. The claims of double jeopardy were based on several decisions of the US Supreme Court, including the *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 128 L.Ed.2d 767, 114 S.Ct. 1937 (1994), and *Austin v. United States*, 509 U.S. 602, 125 L.Ed.2d 488, 113 S.Ct. 2801 (1993). Various appellate courts rejected the claim to double jeopardy and the matter finally reached the Illinois Supreme Court in *People v. Lavariega*, 175 Ill.2d 153, 676 N.E.2d 643, 221 Ill.Dec. 840 (1997). In this case, Defendant was arrested for DUI and following the arrest refused to submit to a chemical test and as such, Defendant's license was suspended. The defendant filed a petition to rescind, but the circuit court refused to rescind the suspension at a subsequent rescission hearing. The defendant then moved to dismiss the DUI prosecution arguing that it constituted an attempt to subject him to an additional punishment for the same offense in violation of the double jeopardy clause of the Fifth Amendment to the US Constitution and in Article 1, Section 10 of the Illinois Constitution. The trial court denied the double jeopardy motion and the appellate court affirmed.

The Supreme Court upheld the position that a summary suspension proceeding is a civil proceeding and not a criminal proceeding and the summary suspension of a driver's license is not so punitive as to make it equivalent to a criminal proceeding. A summary suspension is primarily non punitive with the remedial goal of making the road safer by removing drunk drivers so said the Court.

However, this new summary suspension revocation is a separate punishment not connected to the punishment provisions of the Illinois Vehicle Code for a violation of 11-501. (625 ILCS 5/11-501) A person who has been convicted of DUI for the first time is guilty of a Class A misdemeanor. The court is authorized to impose any of the following penalties:

1. A fine of up to $2,500.00 (730 ILCS 5/5-9-1(a)(2);
2. Imprisonment for any term less than one year (730 ILCS 5/5-8-3(a)(1);
3. Probation or conditional discharge, 2 years (730 ILCS 5/5-6-2(b)(3);

However, the Illinois General Assembly enacted legislation authorizing courts to use supervision under 730 ILCS 5/5-6-1(c) as a method of disposing of a crime other than a felony. An order of supervision is not an uncommon disposition for a first offender when aggravating factors such as an accident causing injury are not present. As such, even where there is a Type A injury but the court determines that the injuries are relatively minor despite the person needing immediate medical assistance or having to be transported from the scene, the judge still has the authority to impose an order of supervision.

More importantly though is that an order of supervision will not trigger a revocation of driving privileges as does a conviction for a DUI offense. If there is a very serious personal injury or death involved, the defendant will most likely be charged with a felony and if found guilty, supervision would not be available.

Now we have a circumstance where a defendant is placed on court supervision for a violation of a DUI offense, but then receives a one year revocation for a violation of the new statutory summary suspension revocation statute. As stated above, the defendant would be revoked for one year without any driving privileges available. At the end of year the defendant would need to apply to the Secretary of State to obtain the return of his or her driving privileges as reinstatement is not automatic. This could occur even if you had been found not guilty of a DUI or the reckless homicide case. You will still be punished for one year. This certainly is not fair.

But, with the statutory summary suspension in effect the court has no authority to rescind the suspension. As stated above, the defendant would be revoked for one year and at the end of the year the defendant will need to apply to the Secretary of State to obtain the return of his/her driving privileges. Such an application is not automatic. The defendant would need to produce an alcohol evaluation and most likely complete some type of alcohol counseling. Even if the defendant were to be lucky enough to obtain driving relief after the one year revocation, it is usually the practice of the Secretary of State to start everyone out with a restricted driving permit for one year. If the person successfully drives on the permit for one year without any violations then the person can reapply to the Secretary of State seeking full reinstatement of driving privileges. All of this could occur even if you were granted court supervision on the DUI or found not guilty on the DUI.

Furthermore, this will occur if the injury caused by the DUI collision is relatively minor. If a person demands to be transported from the scene in an ambulance to a hospital, the police officer or paramedic may not find visible signs of injury, but will always transport a person by ambulance if the person so requests. This person could then be taken to the hospital and released after a cursory examination in the emergency room. However, under the statutory summary suspension revocation this is considered a Type A injury and will trigger the one year revocation. Is this fair? ■

Inventory searches: Before you may search you must have the right to seize

By the Honorable John McAdams

On March 24, 2011, and March 31, 2011, the First District Appellate Court and the Second District Appellate Court, respectively, decided two cases involving police authority to conduct inventory searches.[1] Both cases relied on the Illinois Supreme Court's criteria for Inventory Searches set forth in *People v. Hundley,*[2] and hinged on the police authority to seize/impound the vehicles in the first place.[3]

People v. Michael Spencer

On January 4, 2006, the Rolling Meadows Police Department had an active warrant for Michael Spencer.[4] Detective Pistorius from the Rolling Meadows Police Department followed the Defendant's vehicle and conducted a traffic stop upon the Defendant.[5] The Defendant parked his vehicle in the Fremd High School parking lot and exited his vehicle.[6] Detective Pistorius arrested the Defendant and he was transported to the Police Department by another Officer.[7] The Officers on the scene conducted an inventory search of the Defendant's vehicle and found a metal lock box in the trunk of the car which contained cocaine.[8]

The Defendant filed a Motion to Quash Arrest and Suppress Evidence alleging the search of his vehicle did not meet the necessary criteria of a valid inventory search.[9] The trial court denied the motion, finding the search of the vehicle was "a proper inventory search conducted pursuant to Rolling Meadows Police Department procedures."[10] The Defendant was subsequently found guilty of possession of a controlled substance with the intent to deliver and sentenced to 15 years in the Illinois Department of Corrections.[11] The First District Appellate Court reversed his conviction and sentence outright.[12]

The court in *Spencer,* restated the requirements for a valid inventory search pursuant to *People v. Hundley.*[13]

1. The impoundment of the vehicle must be lawful;
2. The purpose of the search must be to protect the owner's property and to protect the police from claims of lost, stolen, or vandalized property and to guard against police danger;
3. The search must be conducted in good faith pursuant to reasonable standardized police procedures and not as a pretext for an investigatory search.

The State argued the impoundment was valid because it complied with the Rolling Meadows Police Department procedures.[14] The court agreed Detective Pistorius did not violate the Rolling Meadows Police Department procedures by impounding the Defendant's vehicle.[15] However, the court found the impoundment was not rendered valid simply by the fact the Officer followed the Police Department procedures.[16] "To hold otherwise would grant the police an unlimited ability to evade the requirements of the fourth amendment by promulgating regulations that authorize the use of inventory searches following every arrest."[17]

Next, the State argued the impoundment of the vehicle was valid because it was located on public property, Defendant was the lone occupant, and it was not legally parked.[18] The court agreed the vehicle was on public property,[19] and the police have the right to seize and remove vehicles that are impeding traffic or threatening public safety and convenience,[20] however, impoundment is not justified simply because the vehicle would be left unattended unless the vehicle was illegally parked.[21]

The court found there was no evidence presented which established the vehicle was impeding traffic or threatening public safety or endangering any of the school's students.[22] Also, the court found there was no evidence showing the vehicle was illegally parked or prohibited from parking in the Fremd High School parking lot.[23] Finally, the court found no evidence anyone from Fremd High School requested the vehicle towed or that the Defendant had consented to the seizure.[24]

Therefore, the court found the impoundment of the Defendant's vehicle was unlawful, and subsequent inventory search invalid.[25]

People v. Ashley Nash

On June 10, 2009, the Defendant was driving her vehicle with a teenager and a small child riding as passengers, when she was stopped by an Officer from the Zion Police Department, because she was not wearing a seat belt.[26] The Defendant was unable to produce valid automobile insurance for the vehicle and was driving on a suspended driver's license.[27] The Defendant was arrested and placed in the Officer's squad car.[28] The Officer decided to tow the vehicle, and while awaiting the tow truck, the Officer completed an inventory search of the vehicle which revealed one-half (1/2) of a pill of controlled substance.[29]

On June 19, 2009, the Defendant filed a Motion to Suppress Evidence alleging the officer did not have a reasonable suspicion that there was evidence that needed to be preserved in connection with the offense of Driving with a Suspended License.[30] The State argued that the Defendant's suspended license and her inability to show proof of insurance at the time of the stop meant the vehicle could not be legally driven, thus impoundment of the vehicle was necessary and reasonable under the Fourth Amendment.[31]

The Defendant responded that the vehicle did not need to be impounded because the Officer never asked the teenage passenger if she had a valid license, could produce valid insurance, and was willing to take possession of the vehicle.[32] The trial court agreed with the Defendant and granted her Motion, finding: (1) the vehicle was legally parked and was, in fact, insured, although the Defendant could not provide proof of the same; (2) there was "no evidence" of a written policy to impound by the Zion Police Department; and (3) the Officer failed to ask the teenage passenger if she was licensed to drive.[33]

The trial court held there were reasonable alternatives the Officer could have taken which would not have violated the Fourth Amendment, and the Officer should have inquired of the teenage passenger whether she had a valid driver's license and if she had "readily obtainable proof of insurance."[34]

The Second District Appellate Court, analyzed the distinction between a police impoundment and an inventory search, noting impoundment may be in furtherance of "public safety" or "community caretaking functions", while the objectives of an inventory search are: (1) protection of the owner's

property; (2) protection of the police against claims of lost or stolen property; and (3) protection of the police from potential danger.[35]

The *Nash* court recognized the three criteria for a valid warrantless inventory search of a vehicle as found in *People v. Hundley,* as set forth above, and determined the threshold question was whether the impoundment of the vehicle was proper.[36]

The court found the Zion Police Department Tow Policy was consistent with Section 6-303(e) of the Illinois Vehicle Code, which both state when an individual is driving on a suspended or revoked driver's license and cannot produce valid automobile insurance the vehicle shall be immediately impounded by the arresting law enforcement officer.[37] The court went on to find the impoundment as mandated by Section 6-303(e), furthered the police "community caretaking functions" and was reasonable under the Fourth Amendment, noting a vehicle, without proof of liability insurance, was tantamount to a disabled vehicle, because Section 6-303(e) prohibits it from being operated.[38]

The court went on to find the inventory search met the three criteria for a valid warrantless inventory search of a vehicle.[39] First, Section 6-303(e) and the Zion Police guidelines mandated the original impoundment.[40] Second, the trial court heard unrebutted testimony the purpose of the search was to protect the owner's property and to protect the police from claims of lost, stolen, or vandalized property.[41] Third, the trial court found the Officer conducted the inventory search in good faith and was not a pretext.[42]

Therefore, the court found the impoundment and inventory search of the Defendant's vehicle was lawful, and reversed and remanded the judgment of the Circuit Court of Lake County.[43]

Conclusion

The threshold question in any inventory search is the validity of the original seizure of the vehicle. If the original impound was invalid, even if pursuant to a written or oral standardized police policy, the subsequent inventory search is unconstitutional. In other words, before the police may conduct an inventory search of a vehicle, they must first have the right to seize the vehicle. ■

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1. *People v. Spencer*, 2011 Ill.App.LEXIS 265 (1st Dist. 2011); *People v. Nash*, 2011 Ill.App.LEXIS 311 (2nd Dist. 2011).
2. 156 Ill.2d 135, 619 N.E.2d 744, 189 Ill.Dec. 43 (1993)
3. *Spencer*, 2011 Ill.App.LEXIS 265, at *15-*16 (*citing People v. Clark,* 394 Ill.App.3d 344, 348, 914 N.E.2d 734, 333 Ill.Dec. 315 (1st Dist. 2009); *Nash*, 2011 Ill.App.LEXIS 311, at *13 *citing People v. Mason,* 403 Ill.App.3d 1048, 1054, 935 N.E.2d 130, 343 Ill.Dec. 490 (3rd Dist. 2010) and *Clark*
4. *Spencer*, 2011 Ill.App.LEXIS 265, at *2.
5. *Id.*
6. *Id.*
7. *Spencer*, 2011 Ill.App.LEXIS 265, at *2-*3.
8. *Spencer*, 2011 Ill.App.LEXIS 265, at *3.
9. *Spencer*, 2011 Ill.App.LEXIS 265, at *1-*2.
10. *Spencer*, 2011 Ill.App.LEXIS 265, at *6. The trial court also found the search was a valid search incident to arrest, however, on appeal the State did not rely on that justification, presumably based on *Arizona v. Gant, __ U.S. __, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009)*.
11. *Spencer*, 2011 Ill.App.LEXIS 265, at *8.
12. *Spencer*, 2011 Ill.App.LEXIS 265, at *24.
13. 156 Ill.2d 135, 619 N.E.2d 744, 189 Ill.Dec. 43 (1993)
14. *Spencer*, 2011 Ill.App.LEXIS 265, at *15.
15. *Spencer*, 2011 Ill.App.LEXIS 265, at *16.
16. *Spencer*, 2011 Ill.App.LEXIS 265, at *17.
17. *Spencer*, 2011 Ill.App.LEXIS 265, at *17 (*citing People v. Shultz,* 93 Ill.App.3d 1071, 1076, 418 N.E.2d 6, 49 Ill.Dec. 362 (1st Dist. 1981).
18. *Spencer*, 2011 Ill.App.LEXIS 265, at *17.
19. *Spencer*, 2011 Ill.App.LEXIS 265, at *20.
20. *Spencer*, 2011 Ill.App.LEXIS 265, at *18 (*citing People v. Clark,* 394 Ill.App.3d at 348).
21. *Spencer*, 2011 Ill.App.LEXIS 265, at *18 (*citing People v. Ursini*, 245 Ill.App.3d 480, 483, 614 N.E.2d 869, 185 Ill.Dec. 428 (2nd Dist. 1993) .
22. *Spencer*, 2011 Ill.App.LEXIS 265, at *21-*22.
23. *Spencer*, 2011 Ill.App.LEXIS 265, at *21.
24. *Spencer*, 2011 Ill.App.LEXIS 265, at *22 (*citing Shultz,* 93 Ill.App.3d at 1076).
25. *Spencer*, 2011 Ill.App.LEXIS 265, at *21.
26. *Nash*, 2011 Ill.App.LEXIS 311, at *1-*2.
27. *Id.*
28. *Id.*
29. *Nash*, 2011 Ill.App.LEXIS 311, at *1.
30. *Nash*, 2011 Ill.App.LEXIS 311, at *3.
31. *Nash*, 2011 Ill.App.LEXIS 311, at *2.
32. *Id.* The parties at the hearing before the Trial Court stipulated the Defendant did have valid automobile insurance, however, she did not have the proof of the insurance in her vehicle.
33. *Nash*, 2011 Ill.App.LEXIS 311, at *7.
34. *Nash*, 2011 Ill.App.LEXIS 311, at *8.
35. *Nash*, 2011 Ill.App.LEXIS 311, at *11 *(citing South Dakota v. Opperman, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)*
36. *Nash*, 2011 Ill.App.LEXIS 311, at *12.
37. *Nash*, 2011 Ill.App.LEXIS 311, at *16; 625 ILCS 5/6-303(e) (West 2008).
38. *Nash*, 2011 Ill.App.LEXIS 311, at *18.
39. *Nash*, 2011 Ill.App.LEXIS 311, at *33.
40. *Nash*, 2011 Ill.App.LEXIS 311, at *33-*34.
41. *Nash*, 2011 Ill.App.LEXIS 311, at *34.
42. *Nash*, 2011 Ill.App.LEXIS 311, at *34.
43. *Nash*, 2011 Ill.App.LEXIS 311, at *35. Justice Bowman filed a written dissent.

A modest proposal for changes to rules and statutes governing Secretary of State Hearings

By Tom Speedie

Consider this a wish list from a former Secretary of State Hearing Officer and current solo practitioner concentrating in practice before Secretary of State, as well as some of his colleagues. As in any area of the law, the experienced practitioner may see certain parts of the process which could use some improvement. Some of these reforms have been proposed, and others may be in the works.

For those who are not familiar with Secretary of State practice, Helen Gunnarsson's cover story in the November 2009 *Illinois Bar Journal* offers a helpful primer. The purpose of the Secretary of State Hearing process for driving relief is to ensure the safety of the roadways. 625 ILCS 5/6-208(b). Some of these suggestions would, I believe, help the hearing process this goal, others are benign to that goal and would assist petitioners in moving forward with their life. Keep in mind that assisting petitioners through improvements (or even liberalization) of the hearing process and the relief available, is not inconsistent with traffic safety. One need only look at the number of arrests for Driving While Revoked to understand that the alternative to driving legally is not always not driving.

1. Modify the Criteria for Everybody's Least Favorite Classification – Level III Non-Dependent

A person who has two prior arrests for DUI within the 10-year period leading up to his last DUI arrest, and who exhibits two or fewer symptoms of chemical dependence, will be classified "High Risk – Non-Dependent." 77 Ill Admin Code Section 2060.503(g). This classification requires 75 hours of treatment, and 3 letters documenting either abstinence or a non-problematic drinking pattern. 77 Ill Admin Code Section 2060.503(h), 92 Ill Admin Code Section 1001.440(f). The glitch here is that a petitioner may (and in fact sometimes do) reduce their classification to Significant Risk by adding an additional DUI arrest.

Consider who seems to pose more of a risk:

- Jim is arrested for DUI in 1992, 1995, and 2000. Jim admits he experienced an increase in tolerance to alcohol, but denies any other dependency symptoms. He quits drinking after his 3rd arrest, and his driving history has been clean since then.
- Jack has the same arrest history as Jim, but continued to drink and is arrested once more in 2009. He admits that his tolerance had increased, and that he has been fired from jobs and his marriage failed due to his alcohol use.

If you answered Jim, you would be correct under the current classification scheme. He will be classified as High Risk – Non-Dependent, and, will have to fulfill the requirements outlined above (although his treatment might be waived). Jack will be classified Significant Risk. 77 Ill Admin Code Section 2060.503(g). His treatment requirement would be 20 hours, plus 10 hours of Driver Risk Education. 77 Ill Admin Code Section 2060.503(h). Jack will not have to document his current drinking or lack thereof, aside from a chronological history of substance use submitted by his evaluator.

Does this make sense? No, not really. I am clearly not alone among attorneys, evaluators/treatment providers, and maybe even some Secretary of State personnel in that opinion. Most of us would agree that the gap between Jack's 3rd and 4th arrest was more a matter of luck than the lack of a risk posed to those of us who share the roads with him. The High Risk – Non-Dependent classification would make much more sense if it was based on some combination of symptomatology, recent arrest record, and/or total substance related arrest record.

2. Permits, Permits . . .

Currently, the Secretary of State can issue restricted driving permits for employment, medical, educational, and daycare purposes. 625 ILCS 5/6-205(c)(1). I posit that this reflects a bias in the rules towards the geographically small portion of the state where public transportation and essential goods and services within walking distance of home are taken for granted. Down at the other end of the state, where I practice, a great number of initial telephone calls from potential clients include the phrase "I just need a permit to get back and forth to work and Wal-Mart." On a hierarchy of needs, the ability to buy groceries and toilet paper ranks well above finding a way to get to the doctor every other month.

Another frequent request is for a permit to look for a job. Naturally, the inability to drive leads to a number of hardships (I will discuss hardships in another context later) with regards to employment. Some lines of work require the ability to drive (either in the absolute or the de facto sense), creating something of a "chicken or the egg" problem with regards to get a permit for employment. I have advised clients in these lines of work to get some job, any job, so they can get a permit, then, once issued, they can seek more suitable employment.

The problem with both the proposal for a permit to run household errands and to seek employment seems to be that it work to give the holder of the permit carte blanche to drive anywhere at any time, since he or she could explain to an inquiring officer at any time "I was driving around looking for a place to put in an application" or "I was on my way to a different grocery store." Proposed solution? Limit the days and times the permit is valid. A reasonable approach may be to allow people to pick eight hours a week to look for a job, and/or five hours a week to run household errands.

Finally, and not posing the sorts of concerns raised by the previously mentioned proposed permits, I suggest a permit for child visitation. This could easily be verified with a judgment of dissolution and any modifications, and only seems humane.

3. Ease (or eliminate) the Hardship Requirement

Currently, if a petitioner is eligible for a hearing, but not reinstatement (for example on a second conviction resulting in a five year revocation, after the six-, 12-, or 36-month Summary Suspension period has run), he or she has to prove a "hardship" for any purpose for which a permit is sought. 92 Ill Admin Code Section 1001.420(d). The hardship is generally proven by showing that the petitioner is losing significant opportunities to make money, is paying substantial amounts for transportation, has been late for

work, had his or her continued employment threatened, or has missed school, medical appointments, or support group meetings. The petitioner also must testify about with the lack of suitable alternative transportation. 92 Ill Admin Code Section 1001.420(d).

Here we have a situation where a petitioner is attempting to drive legally and can be put on the road in a controlled, often monitored, fashion, but may be thwarted because, in the Hearing Officer's opinion, there is no hardship. It would seem reasonable for the legislature to consider eliminating the hardship requirement for those petitioners not yet eligible for full reinstatement. The petitioner would, of course, only be eligible for a restricted driving permit, but would be able to maintain employment rather than finding him- or herself in a catch-22 situation of having to jeopardize employment in order to show a hardship. It may also be reasonable to accept, as a compromise, legislation officially recognizing RDPs as probationary devices, as there is currently no statutory authority to issue probationary permits, although they are issued as a matter of course.

4. Reasonable Treatment of Illinois Residents Who Receive their First DUI in Another State

Consider the following:

- Johnnie is arrested for DUI in Illinois. This is his first DUI arrest. He refuses chemical testing. The state offers court supervision. After the first 30 days of his summary suspension, he receives an MDDP. He can drive anytime, and for any reason, as long as he is driving a BAIID equipped vehicle. 625 ILCS 5/6-206.1 At the end of his 12 month suspension, he pays a reinstatement fee, and gets his driver's license back. 625 ILCS 5/6-209.
- Jose, who has no prior DUIs, is arrested for DUI in Wisconsin after a golf outing. He pleads guilty. Wisconsin reports the conviction to Illinois. Illinois revokes Jose's driver's license for one year. 625 ILCS 5/5-206(a)(6). Jose may go to a hearing immediately, but he is only eligible for an RDP. 625 ILCS 5/5-206(c)(3). He must demonstrate a hardship in order to receive an RDP. 92 Ill Admin Code Section 1001.420(d). After he drives on the RDP for 9 months, or when he is eligible for full reinstatement (whichever comes second), he will have another hearing to consider full reinstatement of his driving privileges. 92 Ill Admin Code Section 1001.430(i).

I have contemplated this disparity a number of times, generally while trying to explain it to clients. I cannot think of a good policy reason for it, aside from maybe encouraging people to drink and drive closer to home.

I would suggest that the following approach would better serve the interest of traffic safety, and would go some way towards treating people in similar circumstances equally. A one year revocation is still entered after a first time DUI arrest from another state is reported to the Secretary of State. The Secretary gives the driver 45 days notice that his license will be revoked. At any time after receiving notice, the driver may have a hearing. The hearing is generally the same as now, except that the a petitioner classified as Level III – Dependent need only document abstinence and support involvement since completion of treatment. Otherwise, the goal of the hearing is to ensure that the petitioner's evaluation is substantially accurate, and that he or she has received appropriate treatment. The petitioner should not be denied solely because his arrest is recent. Instead of an RDP, the Secretary would issue an MDDP. After the petitioner drives on the MDDP for nine months, or when he or she is eligible for full reinstatement (again, whichever comes second), a non-dependent petitioner who has had no MDDP violations would be automatically reinstated. Petitioner's classified Level Iii – Dependent, would be required to have a second hearing where they would be required to document continued abstinence and support group involvement in order to obtain full reinstatement.

5. Make some reasonable exceptions to lifetime revocations of non-Illinois residents

At the other end of the spectrum from first offenders, we have the "lifers." Currently, any person who has 4 convictions for DUI, any one of which is for an arrest after January 1, 1999, is revoked forever, and is barred from ever obtaining any kind of driving relief. 625ILCS 5/6-208(b)(4), 92 Ill Admin Code Section 1001.460(c). Earlier this year, there was a legislative proposal to allow Illinois residents who fall into this category to apply for an RDP. In order to obtain relief under this proposed legislation, the petitioner would have to meet extended abstinence and support requirements. HB 2862 97th General Assembly. This proposal indicates that the issue of lifetime license revocations of Illinois residents is at least on the political radar, while a related issue remains entirely unaddressed.

I regularly receive telephone calls from potential clients in other states who have four convictions, one of which resulted from an arrest after January 1, 1999. In some cases they have not held a valid license since their revocation. In others, the person was licensed in their home state, went in to renew his or her license, and was told that Illinois had a "hold" on their license. The Illinois "hold" may be because they were once licensed here and were revoked, or they might have never held an Illinois driver's license, but were convicted of a DUI here. In these cases, there is no way to get the stop cleared so they can be licensed in their home state.

I do not have a specific recommendation for the parameters of situations where the statute could be changed to allow clearance. I would suggest, though, that there are at least some situations (for example, a resident of another state with a single DUI conviction in Illinois, long ago) where Illinois should not forever bar the person's home state from issuing a driver's license. Never again drive in Illinois, or never be able to apply for an Illinois driver's license, perhaps.

6. Fix the medical review system.

This is at the bottom of my wish list, and is merely a nuisance compared to larger issues above, but . . .

I have had two situations in the last couple of months which demonstrate specific problems with the Secretary of State's medical review system. The first was a client who submitted a medical form at the time of his hearing. The form was recently completed by his physician. My client was seeking full reinstatement, with immediate plans to move out of state (he wanted an Illinois driver's license, rather than clearance, to take care of the logistics of his move). He was granted full reinstatement, but was required to submit another medical report form. Why? By the time the hearing officer wrote the order, the order was reviewed in Springfield, and the report was forwarded to medical review, it was more than three months old. I cannot fathom why the medical report would not be accepted as current when submitted to the Secretary of State (at the hearing) rather than disregarded as not current after it winds its way through the Secretary of State's various offices. I was told that this only comes up in situations where the petitioner is granted

full reinstatement, but I could not, from the explanation provided, figure out exactly why that is. I also cannot understand why, if the Secretary of State is willing to accept a medical report to issue a driver's license, which will be valid for four years, they are splitting hairs over its being a few days out of date when it arrives in medical review.

The second situation arose a couple weeks ago. A client who was granted an RDP went to drivers' services to take his test. When he got there, he was told that he could not take the test unless he had a medical report. Generally, the medical report is among the requirements submitted to the Secretary of State in Springfield prior to the issuance of an RDP. The requirement that my client submit the report prior to his exam arose from the fact that he had submitted a medical report in the past. 92 Ill Admin Code Section 1030.16(s) (if that is the authority, it is a rather over-broad reading thereof). In this case, the Post Hearings Department omitted language advising my client that he would need the report in order to take the test. Apparently, a first time medical report (for example, where a petitioner testifies in his hearing that he is taking medication) is a prerequisite to issuing a permit, but a second or subsequent medical report is a prerequisite to examination. Id., (although as it is actually a prerequisite to renewal of a driver's license). This is a silly "form over function" situation. The local drivers' services office is not issuing him a license, or even a permit. They are merely performing the examination upon which the permit will be issued. If the person granted the permit is allowed to submit the report after testing, medical review will still have the opportunity to review it prior to issuing the permit. The system should be changed to allow this.

Finally, it is worth considering whether it would be appropriate, given changes in the way health care is delivered, to allow physicians' assistants and nurse practitioners to sign medical reports. Often they are writing the prescriptions and actually speaking with the patient/petitioner, and should be better positioned to know whether the petitioner is impaired by the medication).

Note that Medical Examinations related to the issuance of driver's licenses is regulated by 625 ILCS 5/6-103(8), 625 ILCS 5/6-201(a)(5), and 92 Ill Admin Code Section 1030.16. I largely omitted end notes to the above discussion of timeliness of reports and submission of a medical report at the time of examination for an RDP, as neither of the complained of situations seem to actually be addressed by statute or code. Nor does there seem to be a basis for requiring a medical report in every situation where a petitioner testifies that he is taking any medication whatsoever, regardless of how benign the effects of the condition or medication may be on that petitioner's ability to drive. Requiring a medical report when there is a condition which may lead to loss of consciousness, or a controlled substance is prescribed is completely understandable. Requiring a visit to a doctor to sign off on the fact that an antihypertensive or a medication for hypercholesterolemia is much less so.

(At least) one person's opinion. ■

So your client has given you physical evidence of a crime...

By Randy Cox

What do you do? Where do you look? In short, there is no unequivocal answer. The following describes what authority does exist, and suggests what may govern.

Suppose a current client delivers to you physical evidence of a crime, or what you suspect to be evidence of a criminal act. This could be illegal drugs, a stolen piece of property, or a weapon used in a violent crime. One variation of this scenario is the recovery or retrieval by the attorney directly, or through an agent.

The situation presents a conflict between the various ethical duties of the attorney. On the one hand, the delivery to the attorney is a communication which the attorney is required to protect. (Rule 1.6) However, an attorney is not to unlawfully obstruct another party's access to evidence. (Rule 3.4) How is this conflict resolved? The courts of Illinois do not appear to have directly addressed this. However, there is an unreported U.S. District Court opinion arising from events in Illinois. In *U.S. v. Hunter, et al.*, 1995 WL 12513, 93 CR 318 (N.D. Ill. Jan. 6, 1995) the government charged a father and son with the armed robbery of numerous banks throughout seven mid-western states. After his arrest, the son advised his attorney about the existence of currency and ammunition at his residence. Subsequently, the son's attorney with his secretary, and the father's attorney, went to the home and discovered significant amounts of cash, which one of the attorneys took with him. During a later proffer interview, with the son and his attorney, the attorney advised the government about the foregoing, and that the other attorney had it in his possession. Upon the issuance of a search warrant, the other attorney surrendered the containers of cash. The son then moved to exclude this evidence, as well as any testimony by either attorney, or their secretary, regarding the retrieval, based on both the attorney-client privilege and the attorney work product doctrine. The government offered to stipulate the boxes came from the son's attic, and to limit the testimony regarding how the government gained possession of the evidence. The son rejected the offer.

Initially, the court cites what appears to be the seminal case in these matters, *State ex rel. Sowers v. Olwell*, 394 P. 2d. 681 (Wash. 1964), holding generally, that an attorney is not required to disclose information obtained during the attorney-client relationship. There is a clear distinction, however, between communications with the attorney, and the existence of the evidence. In short, the attorney-client privilege only protects disclosure of communications. See *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981). The delivery of evidence to the attorney seems to be such a communication.

Therefore, Judge Aspen noted that had the boxes remained in the son's home, and the government learned that fact solely through protected communications, the son might have had a valid argument. However, the Defendants' attorneys had removed the evidence. This, of course, prevented law enforcement from recovering the boxes at any later date. By doing so, the attorneys likely violated the other obligation referenced above, that as an officer of the court, an attorney cannot unlawfully obstruct another party's access to evidence. In short then, because the attorneys moved the evidence, the son's attorney-client privilege argument to suppress the evidence failed.

Judge Aspen cited a Ninth Circuit case, where certiorari was denied, for the proposition that once the attorney makes a "strategic choice" to accept evidence, there is a legal and ethical obligation to provide it to law enforcement. *Clutchette v. Rushen*, 770 F. 2d 1469 (9th Cir. 1985), *cert. denied* 475 U.S. 1088 (1986). Note, however, that as discussed below, this is not the universal conclusion.

Judge Aspen also found that the son could not prevent the introduction of evidence that the boxes were found in his home, because the evidence was also altered by its removal. For this proposition, the court cited a California case, *People v. Meredith*, 631 P.2d 46 (Cal. 1981) which provides for such a conclusion "whenever defense counsel removes or alters evidence." The *Meredith* court limited the testimony from the defense investigator, that located and removed the evidence, to merely testifying as to the location.

Judge Aspen concluded the government's interest in discovering incriminating evidence is then protected, while simultaneously protecting the defendant's interest in attorney-client privileged communications. Therefore, Judge Aspen held that if defense counsel, or an agent, removes incriminating evidence, the government may introduce testimony which establishes the original location and condition of the evidence. In doing so, the government must not disclose any information regarding attorney-client privileged communications.

Returning to the original inquiries above, if the attorney seeks to recover the evidence, it must be provided to law enforcement. Alternatively, if the client, unsolicited, provides the evidence to the attorney, the communication is protected, but the obligation may still exist to advise the government. If an attorney has the opportunity to discuss any such delivery prior to receiving the evidence, the attorney should certainly consider discussing the consequences with the client. In some instances, an attorney could obtain the client's consent to disclose, depending upon the purpose of the communication. If so, the client presumably waives any attorney-client privilege. In other instances, it might be appropriate to deliver the evidence to the government without referencing the source whatsoever.

In other authorities from other jurisdictions, there is also a dichotomy between tangible evidence turned over to an attorney, and simply information. Information falls within the traditional analysis, and generally is protected from disclosure. The tangible evidence question, however, is not as clear. Some decisions suggest tangible evidence should be turned over, but the government cannot then implicate the client as the source of the evidence. In addition to the foregoing cases, for results consistent with those see: *Rubin v. State*, 602 A.2d 677 (Md. 1992); *People v. Nash*, 313 N.W.2d 307 (Mich. Ct. App. 1981); *Anderson v. State*, 297 So.2d 875 (Fla. Dist. Ct. App. 2d Dist. 1974); *State v. Green*, 493 So. 2d 1178 (La. 1986). ■

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Thursday, 6/9/10- Chicago, ISBA Regional Office—ISBA's Reel MCLE Series. Presented by the Illinois State Bar Association. 1-4.

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Friday, 6/10/11- Chicago, ISBA Regional Office—Third Annual Animal Law Conference—Presented by the ISBA Animal Law Section. 9-5.

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Thursday, 6/16/11-Friday, 6/17/11- Fontana, WI, The Abbey Resort—135th ISBA Annual Meeting.

Thursday, 2-3pm: FastCase CLE Training Session.

Thursday, 3:15-4:15pm: Advanced FastCase CLE Training Session.

Friday, 9:00-11:45am: Legal Writing: Improve Your Ultimate Work Product.

Friday, 2:00-4:15pm: A Roadmap to the Illinois Civil Union Act.

Thursday, 6/16/11- Webcast—Trial. Presented by the ISBA Family Law Section. 12-1.

Monday, 6/20/11- Chicago, ISBA Regional Office—Hot Topics in Disability Law. Presented by the Disability Law Committee. TBD.

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Friday, 6/24/11- Bloomington, Holiday Inn and Suites—Issues in Illinois Public Construction Contracting. Presented by the ISBA Construction Law Section. 8:55-4:30.

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September

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October

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