

## DRUG - DUI INVESTIGATION AND LITIGATION

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*Philadelphia, Pennsylvania*  
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## The Scope of the Problem

2007 NHTSA Roadside  
Surveys

Drivers stopped at  
random and asked  
to provide anonymous  
samples of  
blood and saliva



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## Results of the Survey

Weekend Night-time  
Drivers w/BAC over .08

2.2%

Weekend Night-time  
Drivers with Drugs  
in Bloodstream

13.8%



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## Results of the Survey

Combination of blood  
and saliva drug  
positives even higher

16.3%



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## DIRECT QUOTE

“The most commonly detected  
drugs were Marijuana (THC)  
at 8.6%, Cocaine at 3.9%,  
and Methamphetamine  
at 1.3% of nighttime drivers.”

NHTSA Traffic Safety Facts  
July 2009, p. 3



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## Investigating DUI-D

The first step is **awareness**

There's a reason the officer  
stopped this car...

All prior training and  
experience are relevant, up to  
the personal contact w/driver



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## Investigating DUI-D

Drug impairment is not as widely-understood or recognized as alcohol impairment

Specialized training can help detect DUI-D

ARIDE, DRE



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## Basic Principles

- ❑ Drugs cause readily observable signs and symptoms
- ❑ Drugs can be categorized according to the signs and symptoms they cause

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## SEVEN Drug Categories

- ❑ CNS Depressants (alcohol, valium, GHB...)
- ❑ CNS Stimulants (cocaine, amphetamines...)
- ❑ Hallucinogens (LSD, peyote, ecstasy...)
- ❑ Dissociative Anesthetics (PCP, ketamine...)
- ❑ Narcotic Analgesics (heroin, oxycontin...)
- ❑ Inhalants (paint, gasoline, solvents...)
- ❑ Cannabis (marijuana, hashish, marinol...)

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## The ARIDE Program

SFST Practitioner Status is required

Instruction on types of drugs and their effects

Helps officers identify potential causes of impairment



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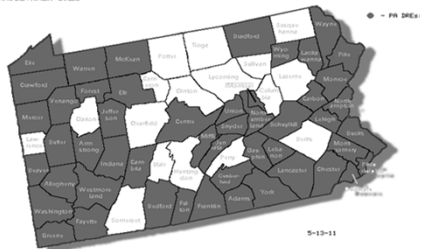
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## THE DRE PROGRAM

PENNSYLVANIA DREs



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## Why is DUI-D Different?

Testing is more complicated

Drugs may have a synergistic effect when combined

The therapeutic dose defense persists, despite 75 Pa.C.S. 3810...



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## Other DUI-D Defenses

"I took the drugs after  
I got stopped"

Involuntary Intoxication...  
the "spiked" punch  
or "hash brownie" defense

Refusal...



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## Intoxication Defenses...

Examine invol/intox defenses  
w/prescription drugs

Complete investigatory  
and discovery process  
required...

Burden of Proof?



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## Intoxication Defenses...

- ☐ DUI charges are strict or absolute liability offenses that are exempt from voluntary requirements, or proof of intentional, knowing or willful conduct. *Commonwealth v. Collins*, 810 A.2d 698 (Pa. Super. 2002).
- ☐ A defendant has the burden of proof to establish an affirmative defense of involuntary intoxication. *Commonwealth v. Smith*, 831 A.2d 636 (Pa. Super. 2003).

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### DUI-D History

75 Pa.C.S. 3731 (*repealed*)

(a)(2) ...under the influence of any controlled substance...to a degree which renders a person incapable of safe driving.

(a)(3) ...under the influence of the combination of alcohol and any controlled substance...to a degree which renders a person incapable of safe driving.

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### DUI-D History

Two elements:

(1) Defendant drove, operated or was in actual physical control of the movement of vehicle;

(2) While under the influence of a controlled substance which rendered Def. Incapable of safe driving.

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### DUI-D History

Evidence typically presented at trial:

Unsafe Driving and SFSTs

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*Neiswonger* Lay Opinion of Officer

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Presence of Drugs in Urine

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### DUI-D History

Two Landmark Cases:

*Commonwealth v. Yedinak*, 676 A.2d 1217  
(Pa. Super. 1996)

*Commonwealth v. Dunne*, 690 A.2d 1233  
(Pa. Super. 1997)

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### 3802(d): A Sea Change

More sophisticated statute presents the police officer and prosecutor with numerous additional charging options...

Different types of proof depending upon which subsection charged

AT THE TIME OF DRIVING  
(No Two-hour Rule)

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### General Impairment

(d)(2) The individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.

(d)(3) ...under the combined influence of alcohol and a drug or combination of drugs...

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### General Impairment

Now DRUGS, not "controlled substances"

"[D]rugs' are 'any substance, other than food, that is intended to affect the function of the human body.'" see 35 Pa.C.S. 780-102

*Commonwealth v. Roser*, 914 A.2d 447 (Pa. Super. 2006)

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### Per Se Offenses

75 Pa.C.S.A. 3802(d)(1)

(d)(1) There is in the individual's blood any amount of a:

- (i) Schedule I controlled substance...
- (ii) Schedule II or Schedule III controlled substance...which has not been medically prescribed for the individual; or
- (iii) Metabolite of a substance under (i) or (ii)

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### Per Se Offenses

3802(d)(1): Blood Only, Not Urine

"...does not require that a driver be impaired; rather, it prohibits the operation of a motor vehicle by *any* driver who has *any* amount of specifically enumerated controlled substances in his blood, regardless of impairment."

*Commonwealth v. Etchison*, 916 A.2d 1169 (Pa. Super. 2007)

**41 Pa.B. 2295**  
**Saturday, April 30, 2011**

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### Modern DUI-D

3802(d)(4) The individual is under the influence of a solvent or noxious substance in violation of 18 Pa.C.S. 7303 (relating to sale or illegal use of certain solvents and noxious substances).

“Huffing” statute: Would solvents and noxious substances also constitute “drugs” under *Roser*?

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### Modern DUI-D

75 Pa.C.S.A. 3802(f)  
Commercial or School Vehicles

(3) While the individual is under the influence of a controlled substance... as defined in section 1603

(4) While the individual is under the combined influence of alcohol and a controlled substance as defined in section 1603

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### Section 1603

“Controlled substance.” Any substance so defined or classified under:

(1) The act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act.

(2) Section 102(6) of the Controlled Substance Act (Public Law 91-513, 21 U.S.C. § 802(6)).

(3) Schedules I through V of 21 CFR Part 1308.

(4) Any revisions to paragraphs (2) or (3) which are published by the Department of Transportation as notices in the Pennsylvania Bulletin.

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### The DRE at Trial

*Commonwealth v. Tiche*, CP-10-CR-0000718-2007,  
*Butler County*

DRE qualified as an expert, after  
several days of pre-trial litigation

No appellate authority on DRE  
Expert testimony in PA to date...

Implications beyond Drug-DUI

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### Melendez-Diaz v. Massachusetts

129 S.Ct. 2527 (2009)

Defense has 6<sup>th</sup> Amendment right to confront  
testing technician...

Out-of-state labs?  
Numerous Scientists?  
Hospitals?

Applied in Pennsylvania in:  
*Com. v. Barton-Martin*, 5 A.2d 363  
(Pa. Super. 2010)

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### Melendez-Diaz Footnote No. 1

Not all chain of custody witnesses may  
require confrontation at trial...  
Maintenance logs "may well  
qualify as non-testimonial records..."

*Com. v. Dyarnan*, --- A.3d --- (Pa. Super. 2011)  
2011 Pa. Super. 245  
Breath test calibration records  
admissible without testimony of  
maintenance officer...

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### Recent 6A Developments

*Bullcoming v. New Mexico*,  
131 S.Ct. 2705 (2011)

Lab Supervisor cannot introduce  
test results as “surrogate”  
for testing technician...

*Williams v. Illinois*  
Argued Dec. 6, 2011...  
What about Rule 703?

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### Specific DUI-D Decisions

*Com. v. Williamson*,  
962 A.2d 1200 (Pa. Super. 2008)

Trial court suppressed “positive” urine test, finding  
that 75 Pa.C.S. 1547(c) *requires* a test  
to show an *amount* in order to be admissible

Superior Court reversed...urine amount not an  
element of 3802(d)(2), only *part* of  
Commonwealth’s case...

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### Sufficiency of Evidence

*Com. v. DiPanfilo*  
993 A.2d 1262 (Pa. Super. 2010)

Officer gave opinion of  
impairment based upon  
training and experience...cocaine  
and opiates showed  
in a hospital urine screen...

No expert needed



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### Sufficiency of Evidence

*Commonwealth v. LaBenne*,  
21 A.3d 1287 (Pa. Super. 2011)

"The Commonwealth offered the expert testimony of a forensic toxicologist, Dr. Laura Labay, who testified that Appellant's symptoms were consistent with an individual under the influence of opiates. Given Appellant's symptoms and the concentrations of morphine and hydrocodone in her blood, Dr. Labay opined that the drugs could be responsible for Appellant's impairment in the absence of a more competent cause."

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### Sufficiency of Evidence

*Commonwealth v. Griffith*, --- A.3d --- (Pa. 2011)  
No. 56 MAP 2010

Officer responded to report of bad driving, thought Def. was extremely impaired, Def. admission to Soma, Blood test showed 220 ng/ml Nordiazepam...no DRE

Superior Court held expert testimony necessary to link impairment with drugs...Supreme Court REVERSED

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### QUESTIONS?

Thank You!

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