

The Dirt On Digital

When analyzing crash scene evidence, prosecutors often deal with poor quality photographs. The images are blurred, too dark, or not close enough to bring out important details from the crash scene. Because a vehicular fatality case may hinge on these photographs, clear and detailed images are a must for a prosecutor to build a solid case. Consequently, jurisdictions are turning to digital imaging as an effective way to produce accurate and quality images of crash scenes. Some prosecutors are hesitant to embrace this technology because of potential defense challenges to its admissibility. Don't let the science scare you away from using this powerful tool at the crash scene and in the courtroom.

Digital images are pictures processed through a computer. After a file is downloaded or scanned into a computer, an image can be enlarged or enhanced by using one of several software programs available. By using software, photographs can be enhanced to bring out fine points that may not be visible to the unaided eye.

Skeptics view the enhancement ability of digital imaging as a possible means to invalidate the technology in the courtroom. An unbiased expert would agree that any media can be manipulated whether in a dark room or in a computer. Manipulation arguments are not new and, as always, can be overcome through the credible testimony of your expert witness.

A preventive measure to counter these arguments is to ensure your law enforcement agency has a standard operating procedure for taking and handling digital images. These procedures should be in a written format and cover all aspects of the digital imaging process. The police photographer at trial should be able to articulate these procedures and state that these procedures were followed in preparing images in this case. If any enhancements were done to the original, a witness must be able to explain how the adjustments or enhancements were accomplished.

Several jurisdictions have used digital imaging for years without any challenges to its admissibility. Many other jurisdictions are just getting the digital systems and have yet to face any challenges. Consequently, case law on challenges to digital imaging is limited. Cases involving digitally-enhanced photographs have survived Frye hearings in California, Ohio, Virginia and Washington. Only one of these cases, *State v. Hayden*, 950 P.2d 1024 (Wash. Ct. App. 1998), resulted in a published appellate opinion.

Bloody hand prints were found on a bed sheet where the victim was discovered. A forensic specialist and digital imaging expert photographed digital images of the sheet and enhanced the images by filtering out background patterns and colors. The trial court and appellate court held the Frye test was inapplicable to the digital imaging process. Moreover, the court stated that even if Frye applied, the process passed the test.

At trial, prosecutors should focus on the image and the witness: not the technology unless challenged. Presenting the photograph in a fair and professional manner adds to the credibility of your witness and will serve as a solid foundation with the jury if the witness is needed later to refute any defense challenges.

HGN - The Science and the Law

The HGN Guide is here! For your free copy of ***Horizontal Gaze Nystagmus - The Science and the Law: A Resource Guide for Judges, Prosecutors and Law Enforcement*** write or fax your request to: Media and Marketing, National Highway Traffic Safety Administration (NHTSA), NTS-21, 400 Seventh Street, S.W., Washington, DC 20590. Fax: 202-493-2062. You can also order your HGN guide(s) through the NHTSA website. The address is www.nhtsa.dot.gov. Select "Safety Materials Catalogue" under Topics. Then select "Impaired Driving" from the next "Topic" drop down menu. A list of publications will appear. Scroll down to find the HGN Guide and click on the order number to submit your request.

Felony DUI Statutes

Thirty-seven states have DUI statutes that incorporate a felony charge if the driver has prior DUI convictions. Although these statutes differ among states, there are some similarities. Generally, states use two major factors to determine if the DUI will result in a felony.

The first factor, used by all of the felony DUI states, is the number of prior DUI convictions at the time of the offense. The number required to raise a DUI to a felony ranges from the second to the fifth conviction, with the majority of states setting the limit at the third or fourth DUI conviction.

The second factor, required by thirty states, is the DUI offender must have a specific number of prior convictions within a certain period of years before the current DUI conviction will be a felony. These time periods range from three to twelve years with the majority of states having either a five or ten year limit.

Two states, Idaho and Kentucky, incorporate a third factor in the felony DUI determination. Both states use the BAC level of the driver at the time of the offense to define a felony threshold.

The punishment for a felony DUI conviction varies significantly throughout the states. Twenty-seven states have mandatory minimum terms of incarceration ranging from forty-eight hours to three years. In addition to the prison terms, the fines imposed for a felony DUI conviction vary from \$390 to \$150,000.

If you would like a detailed chart on this issue, please fax NTLC at 703-836-3195.

DWI Manual for Prosecutors

Prosecution of Driving While Under the Influence is a comprehensive manual written by prosecutors for prosecutors. The contents include an overview of field sobriety testing, an explanation of the physiology of alcohol (with examples and hypotheticals to understand retrograde extrapolation) and a discussion of common DWI defenses and how to respond to each of them. In addition, the manual contains a special trial advocacy section that covers every part of a trial from jury selection through closing argument, all specifically geared to trying DWI cases. The extensive appendices provide citations and summaries of leading research studies pertaining to the standardized field sobriety tests, a case law chart and summary of HGN court decisions, a state-by-state listing citing the authority for sobriety checkpoints, and much more.

And if all this is too good to be true, so is the price. The development and distribution of the DWI manual is made possible by funding from the Department of Transportation's National Highway Traffic Safety Administration. To order your free manual, please fax requests to the National Traffic Law Center at 703-836-3195.

Arresting Developments

Bellevue, Nebraska After arresting a woman for DUI, Officer Mark Elbert placed her in the back of his cruiser. The woman slipped out of her handcuffs and found a double-A battery on the floor. Believing the acid from the battery would assist her in beating the impending breath test, the woman put it in her mouth and began chewing on it. Despite her electrifying attempt, she was still charged with DUI.

Memphis, Tennessee Donald Branch was on his way to serve a weekend sentence for his second DUI conviction when he slammed his vehicle into an oncoming car killing the pregnant driver and her six-month-old daughter. Branch's blood-alcohol level was .22. He was convicted of aggravated vehicular homicide and driving on a revoked license. Judge Chris Craft sentenced Branch to forty-nine years in prison adding, "I believe when he's out, he'll start drinking and driving again."

Sandusky, Ohio Paul Herriott was driving a golf cart near the putting green when he crashed into a sign post. The golfer admitted to drinking both before going to the course and while playing, and asked how much he owed for the damage. Police responded by arresting Herriott for DUI.

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Law Center. Please provide copies to *Between the Lines*. Direct inquiries and news article suggestions to Patricia Gould at 703-549-4253.