

INSIDE THE MINDS™

# NAVIGATING DUI DRUG CASES

LEADING LAWYERS ON UNDERSTANDING  
RECENT TRENDS IN DUIDs AND DEVELOPING  
EFFECTIVE DEFENSE STRATEGIES



ASPATORE

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I N S I D E   T H E   M I N D S

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Recent Trends in DUIs and Developing Effective  
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# Defending the Indefensible: The Drug DUI

Steven W. Hernandez

*Chief Executive Officer*

The Law Office of Steven W. Hernandez PC



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## Introduction

In eight years of defending those charged with DUI, I have noticed a consistent trend in this practice area, and that is that political pressure will continue to be placed upon legislators to enact tougher DUI laws, officers to be more vigilant, and courts to give out harsher punishments when it comes to drug-related DUI. This chapter is based upon my own experience and observations in successfully defending those charged with drug-related DUI. This chapter will explore legislative and law enforcement techniques that are implemented to curb them, the discovery needed to defend them, and why experts are needed to win them.

## An Overview of Drug-Related DUI

When we think about DUI, we usually think of impaired driving based on alcohol. However, DUI also includes operating a motor vehicle while under the influence of drugs (narcotic, hallucinogenic, or habit-producing drugs). In New Jersey, one is considered under the influence of a drug “if the drug produced a narcotic effect ‘so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway.’”<sup>1</sup> As such, even though marijuana does not scientifically fall under the definition of a narcotic, it is nevertheless considered a narcotic for prosecution purposes.

### *The Trap of Legal Drugs under DUI*

Driving under the influence includes illegal and legal. Often a person charged with a drug-related DUI does not understand how he or she can be prosecuted because they had a prescription for whatever substance they were taking. It is not the legality of the drug that is being prosecuted, but rather the effect the drug has on a driver of a motor vehicle. In New Jersey, the growing trend in drug use tends to be toward the abuse of prescription medicines, in particular pain relievers, rather than traditional illegal substances. Pain reliever abuse is very common because almost every medicine cabinet has some sort of prescription pain killer in it. In fact, a

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<sup>1</sup> *State v. DiCarlo*, 67 N.J. 321, 328 (1975).

recent report out of Mesa, Arizona, indicates that over one-half of DUI arrests are drug related.<sup>2</sup>

## **Combating Drug-Related DUI Convictions**

### *Legislation Makes Defense More Difficult*

In an attempt to curtail drugged driving, legislatures around the country have been enacting tougher DUI laws to address this issue. This comes in the form of a *per se* DUI drug statute. A *per se* drug statute stands for the proposition that a person who drives with a controlled dangerous substance in their system is guilty of DUI regardless of when they actually ingested the drug. However, many states, like Ohio and Utah, have a rebuttable presumption for those with a verifiable prescription for the medication. This would then require the state to actually establish impairment. Therefore, while the growing trend appears to be prescription medications, the real target of *per se* drug statutes are those who take illegal drugs, that is, drugs you cannot get a prescription for or legal drugs without a prescription.

Second, law enforcement officials have also developed techniques for combating drug-related DUI through the adoption of new detection methods. In an effort to help police officers better detect those under the influence, the National Highway Traffic Safety Administration and the International Chiefs of Police have adopted a detection system known as the Drug Influence Evaluation. The Drug Influence Evaluation is conducted by an officer who has undergone special training to detect those believed to be impaired by drugs.

To be qualified to participate in the program, the officer must have taken the DUI Detection and Standardized Field Sobriety Testing Student Course, and must be a certified breath test operator in his or her state. The training is conducted in two parts. The first is a twenty-four-hour (three-day) program known as Preliminary Training for Drug Evaluation and Classification Program, also known as “the pre-school course.” Here the

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<sup>2</sup>Peter Busch, *Drug DUI's on the Rise* (Sept. 6, 2011), [www.kpho.com/story/15398553/drugrelatedduisonetherise](http://www.kpho.com/story/15398553/drugrelatedduisonetherise).

officer will be introduced to the Drug Influence Evaluation curriculum and the steps for identifying those impaired by drugs.

### *Drug Recognition Expert Certification for Officers*

After successfully passing pre-school, the officer must then take a seven-day certification course, known as Drug Evaluation and Classification Training, or Drug Recognition Expert School. During this course, the student-officer will evaluate various people believed to be under the influence of drugs and will be required to “reach reasonably accurate conclusions concerning the category or categories of drugs, or medical conditions, causing the impairment observed in a subject.”<sup>3</sup> These categories are: central nervous system depressants (such as alcohol and antidepressants); central nervous system stimulants (such as cocaine); hallucinogens (such as LSD, ecstasy, etc.); dissociative anesthetics (PCP); narcotic analgesics (such as heroin); inhalants (such as glue, aerosols, etc.); or cannabis. The evaluator is not trained to identify the exact drug, just the category. During Drug Recognition Expert School, the student-officer must evaluate enough subjects (minimum of four) to identify at least four different categories of drugs. He or she will not pass the course until he or she does so. Therefore, what is conceivably a seven-day course can easily exceed a hundred to two hundred hours because a student may see the same type of drug category repeatedly. Once the officer has completed the requisite number of evaluations, he or she must take a written test and have his or her prior evaluations reviewed by a supervisor. The student must maintain an 80 percent success rate. If the officer passes the test and maintains the requisite success rate, he or she will be classified as a drug recognition expert (DRE). It is very important to understand that this is not a legal distinction, but rather a professional one.

When a subject is arrested for DUI and drugs are suspected, that person is taken back to the police station where a DRE will conduct the twelve-step

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<sup>3</sup> Department of Transportation, National Highway Traffic Safety Administration, *Drug Evaluation and Classification Training*, Student Manual, (2010).

Drug Influence Evaluation examination. The examination consists of the following:

1. A breath test examination
2. An interview of the arresting officer by the DRE (if they are not one and the same)
3. A preliminary examination consisting of checking the subject's pulse rate, initial estimation of pupil size, and a check for the onset of nystagmus (an involuntary jerking of the eyes)
4. A more thorough examination of the eyes, consisting of a check for horizontal gaze nystagmus, vertical gaze nystagmus, and a lack of convergence (whether the eyes cross)
5. Divided attention tests, such as the walk-and-turn, one-leg stand, Romberg balance test, and finger-to-nose (none of which fit into the DRE's determination of what category of drugs the subject is under)
6. A vital sign check, consisting of a second pulse check, blood pressure check, and body temperature check
7. A dark room examination during which the DRE will check the subject's eyes and how they react to room light, near-total darkness, and direct light
8. An ingestion examination during which the DRE checks the oral, nasal cavities, and arms for injection sites
9. A check of muscle tone to determine whether the subject's muscles are rigid, normal, or flaccid (loose)
10. An interrogation of the subject to determine what medications or drugs the subject may have taken
11. The rendering of the opinion, at which time the DRE makes a determination as to what category of drug(s) the subject is under
12. The taking of a toxicological sample (usually urine, but sometimes blood)

During the examination, the DRE will fill out a form called the Drug Influence Evaluation, also known as the "face sheet," which contains a section for each part of the test. The examination should take forty-five to fifty minutes to complete. Upon completion of the test, the DRE will take the urine sample, put it in an evidence bag, and place the bag in the evidence locker. Once the examination is complete, the DRE will prepare a Drug Influence Evaluation narrative containing his or her observations and opinion.



### *The Processing of Urine Samples in DUI Cases*

Once the sample reaches the laboratory, it is signed in by a receiving clerk. The clerk enters the subject's information (name, date, and location of arrest) into a computer. The computer then prints out a tracking number, which is affixed to the sample to be analyzed. The sample is then placed in a storage vault or refrigerator until it is analyzed. When it is time for the analysis, the analyst will take the sample from the evidence locker to a work station. In New Jersey, the analyst, who is usually a forensic scientist, will take the substance and create a laboratory report describing the sample to be analyzed. He or she will then analyze the urine specimen using a machine called a gas chromatograph mass spectrometer (GS/MS or mass spec), which is connected to a computer. Pre-installed software, called a spectra library, contains every chemical known and compares the substance to those contained in the software. If the computer finds a match, it will produce a document, called a chromatogram, evidencing the match. The analyst produces an official document to be used at court with the subject's results. He or she will also handwrite those results in his or her laboratory report. The official document is then provided to law enforcement officials for use in the prosecution.

### **Strategies for Defending DUI Drug Cases**

As with any DUI, successfully defending a drug DUI starts with a proper client consult. By using a client contact sheet, a defense attorney can obtain a profile of the client, including a complete criminal background and driving history. The client intake sheet should include all of the client's vital statistics, his or her version of the events, and a list of any prescription and non-prescription drugs he or she may have taken with the approximate times they were ingested. This information will leave very little room for surprises. An example of a client intake form has been included as Appendix A.

#### *A Crucial Step: Discovery*

The next step in proper representation of a drug DUI is to know what discovery to request from the prosecutor. More importantly, it is important to know why it is needed. Too often, I have had to appear in court and