

NORTH DAKOTA IMPAIRED DRIVING Newsletter

from the desk of the **TSRP** Kristi Pettit Venhuizen
Traffic Safety Resource Prosecutor

Now We Know – DUI and Refusal are Two Charges: The Impact of State v. Tompkins

The never-ending debate of which came first – the chicken or the egg – may not yet be resolved. But the equally popular question of whether DUI Refusal is a separate charge has been answered. The North Dakota Supreme Court decided this question in [State v. Tompkins](#), 2023 ND 61, and determined Refusal is a separate and distinct charge from DUI.

Here are the basic facts: Tompkins was arrested for DUI and refused a chemical test. The state's attorney charged it out as one count of "being under the influence of an intoxicating liquor; and/or refused to submit to a chemical test." Tompkins appealed his conviction arguing the jury instructions didn't have the jury indicate whether they unanimously agreed he was under the influence or unanimously agreed he refused chemical testing.

The North Dakota Supreme Court determined that N.D.C.C. § 39-08-01 unambiguously provides they are two separate offenses and not alternative methods of committing DUI/APC. "Driving or being in actual physical control while under the influence of an intoxicating liquor requires a party to be under the influence of alcohol. Refusal to submit to a chemical test requires only a refusal to take a test when asked and does not require the party to be under the influence of alcohol." The Court also found that N.D.C.C. § 39-08-01(1)(f) supports this conclusion where it states "for the purpose of suspension or revocation on an operator's license, the violations are deemed a single violation and the court shall forward to the department of transportation only the conviction for driving under the influence or actual physical control."

In simple terms, this means it is appropriate to issue two citations. Remember, you cannot ask someone to submit to a chemical test until after they have been placed under arrest for DUI/APC. Then, once you ask them to submit to a blood/breath/urine test, if they refuse, you now have additional facts that support the crime of Refusal, and a second citation would be issued.

Volume 2, Issue 2

Welcome to the Quarterly North Dakota Impaired Driving Newsletter.

This resource will provide training information, drug and alcohol trends, legal updates, toxicology, and more to keep you informed.

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“A Crime has Occurred, but the Evidence is in the Driver’s Body: Why We Need a DRE”

Trooper Tarek Chase
DRE/SFST State Coordinator



The Drug Recognition Expert (DRE) is a highly trained law enforcement officer with skills specifically designed to identify drug ingestion and/or impairment in the human body. We can relate the DRE’s expertise to that of a crime scene investigator or crash reconstructionist where evidence is collected and analyzed, then an opinion is formed. The evidence of the crime for an individual arrested for Driving Under the Influence is located inside of their body. This is where a DRE’s standardized and systematic 12-step drug influence evaluation is used to answer four main questions:

- Is the person impaired?
- Is the impairment due to an injury, illness, or other medical condition?
- Is the impairment drug-related?
- Which category or combination of categories of drugs is the cause?

In North Dakota, there are no “per se” laws for drug impairment and State Toxicology does not provide a quantitative value for drugs found in the individual’s toxicological sample. This poses a unique situation when officers are required to testify in court. It could also create

a more difficult case for the prosecution. The arresting officer has the tools and knowledge to make the arrest of the drug-impaired driver, especially if the officer has attended an Advanced Roadside Impaired Driving Enforcement (ARIDE) course. However, the DRE can testify to the drug impairment on a physiological level, basically explaining how the drug or drugs impact the body based on signs, symptoms, and general indicators observed from the individual. Then, using the evidence collected, the DRE can provide an opinion to identify the drug category or categories responsible for the impaired driving.

Since the DRE program adopted many of its procedures from the medical field, courts have found time and time again that the evidence collected during a drug influence evaluation, by a certified DRE, is based on solid scientific principles. The combination of a well-trained arresting officer and a DRE during a drug-impaired driving trial are key elements to the successful prosecution of a drug-impaired driver. ■

DRE/SFST Advisory Board Update

Shannon Wellen, Advisory Board Chair

A DRE/SFST Advisory Board was recently created to provide more oversight and review of the DRE program and SFST training in North Dakota. The primary role of the DRE/SFST Advisory Board is to maintain the integrity of the North Dakota Drug Evaluation and Classification (DEC) and Standardized Field Sobriety Test (SFST) and ensure that all DRE and SFST practitioners and instructors maintain the highest level of proficiency and professionalism.

Since its inception, the Advisory Board has developed a North Dakota DRE/SFST Strategic Plan, worked with NDDOT to require that all agencies who receive impaired driving overtime funding receive an SFST refresher every three years, and increased ARIDE training from four courses to eight courses each year. The Advisory Board will also assist in the coordination of annual in-service training for DRE and SFST Instructors.

The Advisory Board tries to meet every quarter. The Board will continue to strategize in an effort to promote the Vision Zero goal, provide ongoing training, streamline callout procedures, and recognize certified DREs and SFST instructors.



Detective Jennifer Freeman Grand Forks Police Department

Please explain your position and work history.

I work for the Grand Forks Police Department and am a police detective assigned to the Criminal Investigations Bureau.

I do computer forensics, cell phone forensics, and am assigned mostly internet crimes, crimes against people, crimes against children.

I am also certified to do child forensic interviews and am a drug recognition expert. I am the North Dakota Drug Recognition Expert course manager and manage the coursework and instructors during the classroom and field certification phases to ensure the students are provided the best possible instruction and complete their certifications to be qualified as a drug recognition expert.

What is your favorite book or podcast?

I enjoy listening to The Huberman Lab podcast and am kind of a nerd when it comes to health and science.

What are the values that drive you?

I value time with family and making memories through travel and outdoor activity.

I am also in the North Dakota Army National Guard and have been since 2000. I am currently working on my masters degree and also enrolled in the Sergeants Major Academy online for my promotion next year to Sergeant Major.

I work part time as a CrossFit and nutrition coach at CrossFit Tundra.

What do you enjoy doing when you are not working?

As you can see, I do not have any free time, but I don't mind. I like to stay busy. When I have a chance, I love reading and walking my dog.

Upcoming Training and Events

DRE/SFST Advisory Board Meeting

June 21, 2023 • 11:00 a.m.
Ramada Inn, Fargo, ND

[NDSAA/DRE Joint Conference 2023](#)

June 21-23, 2023
Ramada Inn, Fargo, ND
Keynote Speaker:
Jermaine Galloway "Tall Cop"

[IACP Impaired Driving & Traffic Safety Conference](#)

August 9-11, 2023
Anaheim, CA

[Governors Highway Safety Association Annual Meeting](#)

August 12-16, 2023
New York, NY

[IACP Annual Conference and Exposition](#)

October 14-17, 2023
San Diego, CA

Training Resources

TSRP Webpage • www.ndsaa.org

User Name: tsrp • Password: tsrp

This website was developed to provide those invested in traffic safety with a warehouse for current information, training opportunities, case law updates, related resources, interesting and relevant news articles, etc., so we can continue to focus on our goal of making North Dakota's roadways safe. Following is a list of items available.

- Impaired Driving Training Materials & Manuals
- Memo Library
- Impaired Driving Training Video Library
- SFST Training Videos
- The Two Beer Manual and latest case law updates
- Webinars

Is a DRE helpful from the perspective of understanding evidence in a trial?

When admitted into evidence, DRE testimony is one piece of evidence to be considered by the trier of fact along with all other evidence of impairment or lack of impairment. This would include observations made of the defendant's driving, any post-stop observations, statements made by, and evidence seized from, the defendant or his/ her vehicle, and any blood and breath test results. Unlike drunk driving cases with breathalyzer evidence that confirms a blood alcohol level that the law and medicine establish as legally drunk, drugged driving typically involves law enforcement evaluation, by a drug recognition expert (DRE) to determine impairment.

A DRE's assessment is far more subjective than a blood or breath test, even though the protocol they use is established in the law enforcement and court community and devised in conjunction with medical professionals. Though DRE's are specially trained officers, they are not medical experts. Despite this, the state's best evidence in many driving under the influence of drug cases is DRE testimonial evidence, especially considering that blood and urine tests cannot confirm how long the drugs have been in the defendant's system, nor when they were first ingested.¹ If drug use is suspected or the subject may have multiple substances on board, a DRE should be contacted to assist in the investigation. It is also important to remember that the DRE testimony can play a vital role in strengthening other parts of the case such as the stop and roadside SFSTs.

The DRE is recognized as an expert witness. The fundamental paradox of the use of expert evidence in litigation is that those with the power and duty to evaluate expert testimony possess less knowledge of the specialized subject matter at issue than do the experts whose testimony they are evaluating. Judges and jurors need help with matters beyond their understanding. As factfinders, judges and jurors both might have difficulty comprehending expert evidence and applying the scientific and technological evidence they hear to the larger dispute before them. It is vital to drugged driving cases that a DRE is able to help the decision makers understand, by presenting the evidence in the most effective and easily understandable way.² Trials are inherently educational forums. The whole exercise is about communicating relevant information to factfinders for decision-making.

While North Dakota does not have any appellate level case law (North Dakota Supreme Court Decisions), at least that I could find, some of our state trial courts have taken up the issue of DRE testimony. I spoke with fellow Retired Judge Debbie Kleven who presided over an impaired driving case involving DRE testimony. Judge Kleven indicated how important the DRE testimony was to the understanding of impairment in *City of Grand Forks v. Brett Michael Lofthus*.³ She noted that the prosecuting attorney did an excellent job of walking through the officer's training and experience, which built credibility and that going through the step by step analysis was very helpful. Judge Kleven indicated that, "it was like the DRE was teaching a class on impairment."

She indicated that while at first, she might have been hesitant to allow the testimony, she knew that getting impaired drivers off the road was important. She decided that having an open mind after hearing about DREs during a training, and knowing that impaired driving can mean more than alcohol. Judge Kleven's decision in that case is worth reading. It is complete and I would submit that it would withstand any appellate review. Ask your hesitant prosecutor to give it a read if they are unsure about putting you on the stand.

I'll leave you with this, participants evaluated expert evidence presented within a trial and then outside of a trial context. Those who reviewed evidence they believed had successfully passed through a judicial filter within a trial regarded the evidence as being of higher quality and more persuasive than participants who evaluated evidence presented outside the trial context. One could conclude, participants assumed that evidence that survives the law's seemingly rigorous gatekeeping of evidence can be regarded as sound science.⁴

Until next time, be safe out there!

¹[DRE Evidence is Sufficiently Reliable for Admissibility, According to Special Master \(criminallawyerinnj.com\)](#)

²[Improving Judge & Jury Evaluation of Scientific Evidence | Daedalus | MIT Press](#)

³*City of Grand Forks v. Brett Michael Lofthus*, In District Court, Grand Forks County, 2011 (18-2011-CR-2545).

⁴[Improving Judge & Jury Evaluation of Scientific Evidence | Daedalus | MIT Press](#)



General Drug Use Statistics

According to [SAMHSA](#) (Substance Abuse and Mental Health Services Administration), drug use and substance abuse are on the rise in the United States among adults, young adults, and adolescents. Substance abuse includes illicit drug use (such as cocaine use and marijuana use), as well as prescription drug (including opioid) misuse. Drug use impacts not just the person using but their loved ones and the nation as a whole. The [National Center for Drug Abuse Statistics](#) (NCDAS) compiled results of its annual national survey about substance use in the United States which includes demographics by age, gender, race, ethnicity and more:

GENERAL DRUG USE STATISTICS:

- 53 million or 19.4% of Americans in the over-12 age group have used an illegal drug in the last year.
- 11.7% of Americans in the over-12 age group are regular users of illegal drugs.
- 39% of Americans between the ages of 18 and 25 years have used drugs in the last year.
- 70% of people who try drugs before the age of 13 will develop an addiction within seven years.
- 47% of youth in the U.S. have used a drug by the time they graduate high school.
- More than 70,000 drug overdose deaths occur in the U.S. annually.
- Overdose deaths increased by 30% from 2019 to 2020.
- 20 million Americans over the age of 12 have a substance use disorder.

OPIOID-RELATED STATISTICS:

- Taking opioids for a period longer than three months increases the chances of developing an addiction by 15 times.
- In 2015, there were so many opioids prescribed it could medicate every American round the clock for three weeks.
- In 2018, 51.3% of opioid users got their drugs from a friend or relative.
- Between 2016 and 2017 the global production of opium increased by 65%.
- Between 2012 and 2015, there was a 264% increase in opioid overdose deaths from synthetic opioids.
- In 2017, 67.8% of drug overdose deaths were from opioids.
 - o 28,466 fentanyl-related
 - o 17,029 prescription opioid-related
 - o 15,482 heroin-related

STIMULANT-RELATED STATISTICS:

- In 2018, 1.8 million people in the U.S. over the age of 12 reported using meth methamphetamines in the last year.
- In 2018, 5.5 million people in the U.S. over the age of 12 reported using cocaine in the last year.
- In 2017, almost one in five overdose deaths were cocaine-related.

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MARIJUANA-RELATED STATISTICS:

- In 2019, 43% of college students reported using marijuana—the highest rate since 1983.
- In states where marijuana has been legalized:
 - o Marijuana-related ER visits increased by 54%
 - o Suicides in which marijuana was found present in toxicology reports increased from 7.6% in 2006 to 23% in 2017

GENERAL DEMOGRAPHICS ON DRUG USE:

- 505,000 veterans misuse prescription pain relievers.
- 59,000 veterans use heroin.
- Individuals who have previously abused drugs recently released from prisons have the highest risk for overdose from drugs.
- Ecstasy, cocaine, meth, LSD, ketamine, and other ‘club drugs’ are most frequently used by higher-income youth.

- Among lower-income groups, inhalants are most commonly abused and these include gasoline, glue, paint, and paint thinner.
- 6.3 million individuals in the LGBTQ+ community have substance abuse issues, mental health problems, or both.
- 75% of drug overdose deaths in Americans over the age of 50 years is from opioids
- Amongst college students who use illegal drugs:
 - o 93% use marijuana
 - o 37% use cocaine
 - o 36% use hallucinogens
- **States with the highest overdose deaths are:**
 - o West Virginia leads the U.S with the highest rate of overdose deaths; 51.5 deaths per 100,000
 - o Delaware has 43.8 overdose deaths per 100,000
 - o Maryland has 37.2 overdose deaths per 100,000
 - o Pennsylvania has 36.1 overdose deaths per 100,000
 - o Ohio has 35.9 overdose deaths per 100,000

Information found at: https://www.caron.org/addiction-101/drug-use/statistics-and-demographics?gad=1&gclid=CjwKCAjwvdajBhBEEiwAeMh1U_Xdg8urdicewxhpBvtiISCPrcY1TxyraSiErgbhGkmzev7h6G4PjhoCgJQQAvD_BwE

SFST Curriculum Revision Updates

As many of you know, the International Association of Chiefs of Police (IACP), spent the last few years reviewing data for purposes of improving the SFST, ARIDE, and DRE curricula. The revisions are the work of three Technical Assistance Panels which reviewed standards, science, and the curricula itself to make improvements. The groups incorporated new drug information, added videos for illustration, and cited new sources and references. The revised versions were published in March 2023. Trooper Tarek Chase, the SFST/DRE State Coordinator, will have a presentation at the June 2023 NDSAA/DRE Joint Conference to discuss the changes. Links to the revision updates are provided here: training from four courses to eight courses each year. The Advisory Board will also assist in the coordination of annual in-service training for DRE and SFST Instructors.

The Advisory Board tries to meet every quarter. The Board will continue to strategize in an effort to promote the Vision Zero goal, provide ongoing training, streamline callout procedures, and recognize certified DREs and SFST instructors.

2023 SFST Curriculum Updates:

<http://www.ndsaa.org/image/cache/SFST - Curriculum Revisions 3-7-2023 .pdf>

2023 ARIDE Curriculum Revisions:

<http://www.ndsaa.org/image/cache/2023 ARIDE Curriculum Revisions 3-7-2023.pdf>

2023 DRE Curriculum Revisions:

<http://www.ndsaa.org/image/cache/2023 DRE Curriculum Revisions 3-7-2023.pdf>

Kyle Clark, National DEC Program Manager, PowerPoint addressing curriculum changes:

<http://www.ndsaa.org/image/cache/2022 Curricula Update.pdf>

NDSAA/DRE Joint Conference

In 2018, a Drug Recognition Expert (DRE) inquired about having a joint training with prosecutors. The idea was brought to the attention of the North Dakota States Attorney Association (NDSAA) Executive Director who suggested DREs be invited to the state's attorney's summer conference and the annual joint NDSAA/DRE Conference was born. This collaboration proved to be beneficial for prosecutors and DREs alike, providing an opportunity to learn from each other so we can successfully prosecute impaired drivers and keep our roads and citizens safe.

Our fifth joint conference is scheduled for June 21-23 at the Ramada Inn in Fargo, North Dakota. We have an excellent agenda scheduled with a number of outstanding speakers lined up. The keynote speaker is Officer Jermaine Galloway – “The Tall Cop.” If any of you have had the opportunity to hear him speak, you know you are going to be entertained throughout his presentation. He uses his experience, training, and ongoing education to train others on alcohol and drug topics such as drug trends, alcohol and energy drinks, substance abuse, fake IDs, marijuana concentrates, and popular culture. His knowledge will help all of us realize what we need to be looking for and what those signs mean.

Jim Camp, Senior Attorney with the National Traffic Law Center, will be teaching us all about Masking – the dos and don'ts of federal law as it relates to commercial motor vehicles/commercial drivers licenses. This presentation will be followed by a panel discussion to explore how we can do better in North Dakota.

The DRE breakout session is titled “Mellanby Effect, Retrograde Extrapolation and Homeostasis” presented by Seattle Police Detective Tom Heller. Detective Heller will use his training to discuss how we can use our knowledge of the absorption and elimination phases of alcohol to our advantage in impaired driving cases.

Day three will include a presentation by Jake Nelson, Director of Traffic Safety Advocacy & Research with AAA. As an epidemiologist, Jake considers traffic injuries and deaths to be an overlooked public health threat in this country. He applies rigorous research and the sciences of public health to AAA's public policy development, governmental advocacy, and consumer education activities.

This is just the tip of the iceberg for all of the fascinating information packed into this conference. There will be ample opportunity for the DREs and prosecutors to interact and get to know one another better, while still learning valuable information and improving our skill sets. The conference has been approved for 13.25 hours of CLE credit and 14 hours of POST credit.

The registration link is here: <https://visionzero.nd.gov/events/NDSAADRE/>

We hope to see you in attendance!



The Lighter Side

A policeman came up to me with a sniffer dog and said, “This dog tells me you're on drugs”

I said, “I'm on drugs? You're the one talking to dogs.”

Vision Zero Awards



The annual Vision Zero Partner Conference was held on May 16-17 at the new National Energy Center of Excellence on the Bismarck State College campus. In addition to hearing from a number of exceptional speakers, both local and national, the Vision Zero Awards were announced and the recipients were recognized during the awards luncheon. The following law enforcement officers were acknowledged for their hard work and dedication to impaired driving and traffic safety. Thank you, officers, and well done!

BEYOND THE TRAFFIC STOP AWARD

The **Beyond the Traffic Stop Award** honors officers who used outstanding investigative skills that led to multiple arrests for narcotics, stolen property, or outstanding warrants from a single routine traffic stop.

The first award goes to **Officer James Opp** of the Grand Forks Police Department. On September 8, 2022, Officer Opp responded to a possible impaired driver. Among other charges, the driver was arrested for DUI, simple assault on a police officer, child neglect and resisting arrest.

The second award goes to **Officer Jacob Zach** of the West Fargo Police Department. On April 20, 2022, Officer Zach initiated a stop after observing a vehicle with an inoperable license plate light. The stop resulted in arresting both the driver and passenger for possession of methamphetamine, intent to deliver and possession of drug paraphernalia.

DRE OFFICER OF THE YEAR

The **Drug Recognition Expert Officer of the Year** is awarded to the DRE officer who excels in conducting drug evaluations, is active in promoting the DRE program within their agency and provides education and awareness to their peers and community about the dangers of drug use and drugged driving.

The DRE Officer of the Year is **Corporal Shane Rothenberger** of the Grand Forks Sheriff's Office. Corporal Rothenberger has been an invaluable asset to the DRE program. He goes above and beyond to increase his knowledge and ability when it comes to impaired driving and is always willing to help others. Corporal Rothenberger has completed 12 enforcement drug evaluations, is a Standardized Field Sobriety Testing Instructor, and plays an active role in the oral fluid testing pilot program for North Dakota.

TRAFFIC SAFETY OFFICER OF THE YEAR

The final award is **Traffic Safety Officer of the Year**. The nominations are reviewed to determine the single officer who has displayed a well-rounded effort for traffic safety through enforcement, community education and training.

This year's Traffic Safety Officer of the Year is **Sergeant Keenan Zundel** of the Cass County Sheriff's Office. Sergeant Zundel has 13 years of law enforcement experience with an impressive record of an estimated 7,000 vehicle stops. After being promoted to Sergeant, his role shifted from road traffic enforcement to supervisor where he holds deputies to a high standard and provides resources for them to be successful.

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OUTREACH AWARD

The **Outreach Award** is also new to the program. This award is for individuals that have gone above and beyond to promote Vision Zero through outreach and education.

One recipient of the Outreach Award is **Sergeant Sam Mahoney** of the Ward County Sheriff's Department. Sergeant Mahoney is the SRO for several elementary schools and the Minot Air Force Base. She is an excellent educator, an asset at community events and played an essential role when establishing Des-Lacs Burlington as a Vision Zero School.

Another recipient is **Deputy David Tomlinson**, or Deputy Tommy. Deputy Tommy played a crucial role in establishing Flasher as a Vision Zero School. He also took the lead in planning Vision Zero Day for the students of Flasher.

HONOR ROLL AWARD

The **Honor Roll Award** recognizes outstanding service to the community, information technology, safety, public affairs and consumer education programs throughout the state in the area of traffic safety.

Sergeant Timothy Bleth of the Bismarck Police Department is one of the Honor Roll recipients. Sergeant Bleth encourages his officers to enforce laws within the city, especially in troubled areas where speed, texting and non-seat belt use is commonly observed. He also shares traffic safety education with high school students.

VISION ZERO APPRECIATION AWARD

The **Vision Zero Appreciation Awards** are selected by the NDDOT Highway Safety Division to recognize individuals who play an active role in decreasing fatalities and serious injuries on North Dakota roadways.

The first Appreciation Award goes to Burleigh County **Sheriff Kelly Leben**. Sheriff Leben has always expressed his support of Vision Zero but made a larger commitment by housing a Vision Zero Outreach Coordinator position within his department. He has supported Vision Zero through community and school events, as well as participating in legislative session.

The second Appreciation Award recipient is **Sheriff Andrew Schneider** of Grand Forks County. Sheriff Schneider shares the goal of reaching zero fatalities on North Dakota roadways and is working to achieve that through participating in traffic safety enforcement campaigns, sharing education and building a skilled and comprehensive agency.

The final Appreciation Award goes to **Sergeant Wade Kadrmas**, Safety and Education Officer for the North Dakota Highway Patrol. Sergeant Kadrmas is a strong advocate for Vision Zero and worked to advance two Vision Zero bills to deter speed and aggressive driving during the 2023 legislative session. His professionalism, advocacy and leadership contributed to advancing the visibility and goal of Vision Zero.

Thank you to all of our award recipients for your dedication to traffic safety and your commitment to keeping our roadways and citizens safe!