New Cases, New Laws, New Mexico!

Legal Update for Law Enforcement

2011-2012

Presented by:

NMDPS – Santa Fe, New Mexico

DATE: ____________________

Note:

Legal outlines and newsletters (legal cartoons) of New Mexico cases can be found on the DPS website: nmlea.dps.nm.us.
Note:
This class has been approved for NMDPS Accreditation.

INTRODUCTION
Most classes have one topic or theme. Not so with Legal Update. We have a number of topics, based upon new cases and laws. At times it may seem we are “jumping” from one topic to another.

But it’s not our intent to simply look at new cases and leave it at that. We want to improve New Mexico law enforcement. As we discuss new cases or new laws, we will be looking at the “big picture” for possible solutions.

To do this, to improve, we will address concerns that affect all who serve in New Mexico law enforcement: (1) field officers, (2) detectives, and (3) policy makers.

We will first look at the 2011-2012 State legislative sessions, followed by a review of recent cases.

2011-2012 State Legislature

On odd years (2011) the state legislature has a 60 day session. This is the time to introduce bills on almost any subject (long session).

On even years (2012) the state legislature is generally limited to budget issues (short session).
State Legislature - 2012

The 2012 legislature passed 77 bills during the 30-day session, the fewest for a short session since 1976. Albuquerque Journal, February 21, 2012.

Public Corruption Bill is Signed Into Law

A public official convicted of felony corruption-related crimes may be required to repay his or her salary and forfeit state pension benefits.

A number of bills didn’t pass

- Driver’s licenses for illegal (undocumented) immigrants.

- Children who can’t read by the third grade will still be promoted to the fourth grade. This is known as social promotion.

- A bill to remove time limits for prosecuting second degree murder. The bill was prompted by the case of an Albuquerque woman whose husband’s body was discovered eight years after she killed him. The statute of limitations for second degree murder, six years, had expired.

News item: Gov. Vetoes Records Expungement Measure

Gov. Martinez vetoed a bill that would have allowed most misdemeanor criminal records to be expunged five years after conviction. It would also have allowed felony charges to be deleted from public view if an individual was not convicted of the charges.

An exception would have been for DWI. Also, domestic violence offenders would have to wait at least 10 years to expunge their records. Albuquerque Journal, March 3, 2012.
Note:

New Mexico courts are increasingly using a conditional discharge to avoid a criminal conviction.

**State Legislature - 2011**

Some of the bills that affected law enforcement were:

*More identification from Suspects*

**DNA testing for people arrested for felonies**

This amended NMSA 1978, Section 29-3-10. Previously, DNA testing was only taken for certain kinds of felony arrests. This expanded testing to all felonies.

**News item: Gov. Touts Success of Expanded Katie’s Law**


**Palm prints will be taken from people arrested**

NMSA 1978, Section 29-3-8 was amended to take palm prints in addition to fingerprints.

*No More Corporal Punishment*

**Hey teacher! Leave those school kids alone!**

Spanking is no longer permitted as part of school discipline. NMSA 1978, Section 22-5-4.3.
And now even phony marijuana is illegal

Prohibiting synthetic marijuana
Make it a crime to possess and distribute synthetic marijuana.
NMSA 1978, Section 30-31-6.

A number of bills didn’t pass

- State wide vehicle forfeiture.
- State wide texting law.
- Making killing a fetus a separate felony.
- Selling or giving alcohol to minors – felony to misdemeanor.

Legislation planned for 2013: PERA

News item: Pension Plan Proposal Goes to Legislature
The PERA Board proposal includes:

- Trimming the annual cost-of-living (COLA) increases retired workers get from 3 percent to 2 percent.

- Future retirees under age 65 would have to wait seven years after retirement, instead of the current two years, to begin receiving the annual cost-of-living increases. However, workers would be able to earn a bigger pension than is currently allowed by staying on the job longer.

- An increase in the amount of money that both employees and employers pay into the retirement fund.

- Reduced benefits, stricter retirement eligibility and other changes that would apply only to future workers. This would create a new tier of PERA members. Albuquerque Journal, June 23, 2012.
NEW CASES AND TRENDS  (in alphabetical order)

- Caregiver - Neglect
- Criminal Sexual Penetration - Lawsuits
- Domestic Violence
- DWI
- Driving without insurance
- Drugs & Gangs
- Ethics, Police Officers, and Lawsuits
- Firearms
- Gangs
- Handcuffing Children
- Hate Crimes
- Human trafficking
- Immigration Reform
- Miranda rights
- Profiling
- Property Crimes
- Robbery
- Search & Seizure

A dramatic new trend: Field Officers and Cameras

A number of police departments have been using cameras on their vehicles for years. Albuquerque Police Department went one step further: each uniformed officer is required (May, 2012) to carry a pen or label camera on their person.
News item: APD to Expand Use of Cameras

APD’s cameras will be rolling every time an officer encounters a citizen. Police Chief Ray Schultz said the change was recommended by the Police Oversight Commission.

Each officer has been issued a camera and may face disciplinary action for failing to use it. *Albuquerque Journal* (May 2, 2012).

**Implication #1**

Many officers support the policy because a camera will back up their version of events.

**Implication #2**

It can, however, be an administrative headache as defense attorneys begin to demand copies of videos. The news media also has a right to the videos.

**EDITORIAL: POLICE VIDEOS COULD BE GAME-CHANGING TOOL**

APD should recognize that the recordings are public documents and expect to provide them in a timely fashion when presented with a public records request. Keeping the videos away will only compound the department’s problems. *Albuquerque Journal*, May 5, 2002.

**Implication #3**

In Albuquerque, the camera must be on when an officer is seeking consent for a vehicle search or doing a pat down. There will be a lot of interest at motion hearings to see that officers follow case law.

This means, more than ever, officers need to be aware of recent case law. One of the purposes of this outline is to help you do just that.
News item: Video Captures SWAT Frustration

An Albuquerque Police Department SWAT officer has been removed from his position as a team leader after comments were captured on a police lapel camera during a standoff.

The video shows officers increasingly frustrated during a 15-hour standoff, upset with APD policies governing use of force. Inappropriate remarks were also made. *Albuquerque Journal*, July 20, 2012.

New trends at the Police Academy

News item: Albuquerque Police Department Trainer Named

A civilian, Joe Wolf, is the new training director for the APD Academy.

He advised he plans to phase out paramilitary training such as marching in formation, uniform inspections, singing songs on the drill field and lecture –based instruction in the classroom.  *Albuquerque Journal*, July 20, 2012.

New trends from the NM Law Enforcement Academy Board

News item: Police Certification Reviewed

LEA Board will consider in October a measure that would suspend the certification of any police officer charged with a felony crime.

The proposal is aimed at officers who get in trouble at one police agency but are able to pick up work at another because no action was taken against their certification.

If passed, the LEA Director will immediately suspend an officer’s certification after a felony arrest, then set up a hearing.  *Albuquerque Journal*, August 30, 2012.
Caregiver – Neglect

In San Juan County, a mother took care of her severely disabled (adult) son. He was totally dependent upon her. Due to her gross negligence, and under shocking, horrific circumstances, he died.

One possible charge was Involuntary Manslaughter, a fourth degree felony (18 months). Another possible charge was the Resident Abuse and Neglect Act. Under this Act, neglect of a resident resulting in death is a second degree felony (fifteen years).

Court of Appeals held the Resident Abuse and Neglect Act was appropriate. It includes people in a private residence who act as caregivers for severely disabled adults. _State v. Greenwood_ (2011).

Crimes against Children

News item: Homicide 2nd leading cause of death for children

Albuquerque, N.M. A new study reveals the second leading cause of death for NM children is homicide. “. . . you don’t think of that as a cause of death,” said NM Secretary of Health Catherine Torres. “I think that to me was the most shocking thing.” _KOAT News_, April 13, 2012.

Criminal Sexual Penetration – Lawsuits

A number of years ago, Southern New Mexico Correction Facility (Las Cruces) paid nearly one million dollars to a female inmate who had consensual sex with a corrections officer. Numerous reform measures were taken, including cameras everywhere and restricting male officer access to female inmates. But no one told Albuquerque . . .
New item: Former Inmates Awarded over $3M

Corrections officer Anthony Townes is serving sixteen-years for having sex with female inmates. The relationships initially were on a consensual basis. Some of the females sued. The result:

A federal jury ordered over $3 million in damages to three former inmates raped by a prison guard at Camino Nuevo Women’s Correctional Facility in Albuquerque. Albuquerque Journal, February 17, 2012.

New trends in Domestic Violence

Introduction

Many officers believe their efforts to reduce domestic violence have not been successful. They note the many misdemeanor DV cases, regardless of their efforts, dismissed in court. They also sense that domestic violence seems to be increasing.

News item: Domestic Violence Cases up 50 Percent

According to the District Attorney’s office in Bernalillo County, felony domestic violence cases – those involving violent and even deadly attacks – have jumped 50 percent in the past two years (2009-2011). Albuquerque Journal, November 11, 2011.

News item: One in Four Women Victims of Domestic Violence

It’s a startling number: 1 in 4 women surveyed by the federal government say they were violently attacked by their husbands or boyfriends. A government official who oversaw the research said it was “astounding.” Albuquerque Journal, December 15, 2011.

News item: Jail Rare for Domestic Violence

People involved in domestic violence have a pretty good chance of escaping jail time. A study in Santa Fe found that out of 174 domestic
violence reports (from January through March of 2010), only two people spent more than a week in jail.

The study also found that if police show up at a domestic violence scene and the offender is no longer there, the chances of that person being picked up is about 50-50. Deputy Chief Gillian Alessio said “it’s pretty disturbing.”

The study found there was a lot of frustration among officers. One said, “I’ve been doing this for years, but I’ve never been called to court for a domestic.”  Albuquerque Journal, January 19, 2012.

Misdemeanor DV Arrest Authority

The statute on arrest authority for misdemeanor domestic violence is confusing. The statute states:

NMSA 1978, Section 31-1-7: Arrest without warrant; liability.
A. Notwithstanding the provisions of any other law to the contrary, a peace officer may arrest a person and take that person into custody without a warrant when the officer is at the scene of a domestic disturbance and has probable cause to believe that person has committed an assault or a battery upon a household member.

What if the suspect has left?

Court of Appeals decided to address this:

FACTS:
Defendant kicked his girlfriend at the State Fair parking lot. Albuquerque police arrested him within seven minutes at a nearby convenience store. A pat down was done and drugs were found.
Court of Appeals looked at the wording of the statute and held an officer cannot arrest someone (without a warrant) unless the officer is at the scene of the domestic disturbance. Evidence suppressed. Officers can take a victim to a safe environment. State v. Almanzar (2012).

Note:
Case may be appealed by the Attorney General’s Office to the Supreme Court.

Note:
It’s time for new ideas to reduce domestic violence. Some suggest focusing on misdemeanor DV cases in a different way. For example, have a victim advocate meet with a DV victim as soon as possible after the incident and on a continuous basis.

Another suggestion is to treat some misdemeanor cases in a non judicial way, outside the court system. The stunning increase in DV cases – up 50 percent – indicates a need for new ideas.

New trends for DWI

DWI – still an extraordinary dismissal rate!

**DWI DISMISSAL RATE**

<table>
<thead>
<tr>
<th>County</th>
<th>Rate</th>
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<tbody>
<tr>
<td>Bernalillo County</td>
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<tr>
<td>Santa Fe County</td>
<td>37%</td>
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<tr>
<td>Rio Arriba County</td>
<td>46%</td>
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<tr>
<td>Valencia County</td>
<td>48%</td>
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<tr>
<td>Sandoval County</td>
<td>50%</td>
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</table>
Source: New Mexico Administrative Office of the Court, as noted on KRQE Television News, May 18, 2011.

Video: “They Drink, They Drive, They go Free”
   --www.youtube.com

   In the courtroom, progress has been – well – slow. Year by year, step by step, there have been changes and new ideas.

   One idea has been vehicle forfeiture. First tried, with great success in Albuquerque, it has now moved to Santa Fe:

   **DWI – Vehicle Forfeiture**

**News item: Wheels in lockup**
   Santa Fe is now seizing vehicles for DWI offenses. Generally a seizure is done after two convictions. The forfeiture program began in Albuquerque which has an auction about every three months. The proceeds go to DWI education and enforcement.

   Legislation for a state-wide forfeiture program passed the House in 2011, but died in the Senate. *Santa Fe New Mexican*, May 2, 2011.

**News item: Bernalillo County gets tougher against Repeat DWI’s**
   The county ordinance will mirror the city ordinance. If you have one conviction and get a second arrest, deputies will seize your vehicle. The program initially will cost $2 million to run but vehicles auctioned will help pay for it. KRQE TV News, September 26, 2012.

**Note:**
   There are options short of seizing a vehicle. For example, some departments may “boot” a vehicle for a certain amount of time.
News item: Allocation of Fault at Issue in DWI Case

A Las Vegas, N.M. jury has awarded $7.5 million to the family of a bicyclist killed by a drunken driver in Albuquerque.

The jury felt the bar knew the driver was intoxicated when he was served alcohol. The driver drank doubles at the bar until 1:00 a.m. He then opened an account and bought 16 drinks in a short time – all verified by cash register receipts. Albuquerque Journal, August 25, 2011.

News item: Liquor Server Liability Ruling ‘Win for Public’

People harmed by those who over-serve drunken drivers will have an easier time holding the liquor establishment accountable under a new ruling by the New Mexico Supreme Court.

The ruling was based upon $14.5 million jury verdict. A motorcyclist in Albuquerque was killed by a drunk driver. The driver did odd jobs at a Conoco gas station and spent much of the day drinking beers purchased at the station. Tested five hours after the crash, the driver had a .09.

The driver pled guilty to vehicular homicide and was sentenced to 10 years in prison. Albuquerque Journal, February 28, 2012.

Recommendation:

- Some vehicular homicide cases go to civil court. The jury will want to know if Defendant made admissions as to where he or she had been drinking.

- Officers typically ask, “Have you been drinking? How much?” Another question to ask, “Where was your last drink?”
• This will also assist DPS SID (Special Investigations Division) in holding the server of alcohol responsible.

What about the person sitting in a vehicle, intoxicated?

**DWI - Inference of Past Driving**

**Facts:**

An officer in San Juan County saw a vehicle in the parking lot of a convenience store. Defendant was inside the vehicle, intoxicated. He admitted consuming five cans of a six-pack and throwing the cans out the window while driving to the store. He was arrested for felony DWI.

While there was no direct evidence of Defendant’s driving or that he was in actual control (there was no intent to drive), Supreme Court noted substantial evidence existed – his admissions alone – for a jury to infer Defendant drove while intoxicated before the officer arrived. *State v. Mailman* (2010).

**A different result in Hobbs, New Mexico**

**Facts:**

Lea County Sheriff’s deputies were dispatched to a possible domestic incident occurring in a van parked on a roadside in Hobbs, New Mexico. Defendant was in the driver’s seat and his girlfriend was in the passenger seat, both intoxicated. The keys were not in the ignition.

Defendant admitted consuming twenty-four ounces of beer about an hour earlier. He failed the field tests. At trial, he was convicted after the state argued the jury could infer Defendant drove to the roadside location while intoxicated.

Court of Appeals disagreed, reversing Defendant’s DWI conviction. Defendant did admit consuming alcohol one hour before
speaking to the Deputy. But there was no evidence when he parked the van or if he drove after consuming alcohol. State v. Cotton (2011).

Recommendation:
- We can learn from cases like this. Had the deputy asked a few more questions (where did you have your last drink?), there might have been a different outcome.

Child Abuse – DWI – Non Moving Vehicle
State police officers in Farmington approached a pickup truck outside of a residence. Sitting in the driver’s seat was the Defendant, his wife in the middle, and his four-year-old child on the other end. The vehicle was not running but Defendant held the keys in his hand. He said they had just stepped out of the house and he was getting ready to drive. His breath alcohol test was .15.

His conviction for DWI was upheld. What about child abuse? Court of Appeals said no. Stopped a few moments later, a conviction for child abuse probably would have been upheld. But the child was simply sitting in a non moving vehicle. The child could have been in danger but that’s not the standard. State v. Etsitty (2012).

Note:
In this case we could not show past driving. However, by showing the driver had the intent to drive, the DWI conviction was upheld. Child abuse dismissed because vehicle wasn’t moving.

Liquor Control Act

Administrative Hearing
Another tool against DWI is an admin hearing. Agents of the Special Investigations Division, NMDPS, did a sting operation at two
stores in Clovis, New Mexico. A minor successfully purchased beer. Both stores and clerks were issued citations for violating the Liquor Control Act. NMSA 1978, Section 60-3A-1.

The NM Regulation & Licensing Department imposed a $1,000 fine and a one day suspension of alcohol sales. There has been no conviction but the Court of Appeals held a criminal conviction isn’t required to impose an administrative fine. Town & Country Food Stores v. NM Regulation & Licensing Dept (2012).

Note:

Admin hearings also include people served too much alcohol at a licensed liquor establishment.

Some ideas to reduce DWI:
• Make DWI a felony on the third arrest, after two convictions.
• State-wide vehicle forfeiture.

Driving without Insurance

Editorial: It’s Up to Lawmakers to Fix License Problem
The impact of the 2003 law giving driver’s licenses to illegal immigrants was revealed in a New Mexico State University study.

NM is second in the nation in uninsured drivers at 25.7 percent, and according to the Insurance Research Council, NM’s number of uninsured drivers was between 25 and 30 percent from 2002-2008 despite the law. Albuquerque Journal, September 6, 2011.

Note:
• Uninsured drivers include citizens and non-citizens. It had been hoped that giving driver’s licenses to illegal (undocumented)
immigrants would lower the number of people driving without insurance.

Impoundment of Vehicles

The following case is an unpublished opinion. While not binding, it has some interesting observations regarding impoundment of vehicles.

Albuquerque Police officers stopped a vehicle and determined the driver did not have insurance. NMSA 1978, Section 66-5-205 prohibits operation of an uninsured motor vehicle. Court of Appeals noted, however, the state statute does not permit towing of an uninsured vehicle.

An Albuquerque ordinance permits impoundment of a vehicle for failure to have insurance. If proper procedures are followed, the city ordinance can be used. *State v. Cunningham* (2010) (unpublished)

- NM has been #1 or #2 for people who drive without insurance for a number of years. Some people who want to change this believe officers should have the ability to tow vehicles for those who drive without insurance.

Recommendation for law enforcement:
- To amend the state statute to provide for impoundment of vehicles of uninsured drivers, or
- A city or county ordinance should have a provision for towing of uninsured vehicles.

Drugs & Gangs

New Mexico #1 for Drug Overdose . . .
News item: Doped-Up New Mexico is Overdose Champ
By Leslie Linthicum: The latest drug abuse data show New Mexico still leading the nation in deaths due to drug overdoses as we have for all but two of the past 20 years. We now die of drug ODs at a rate twice the national average. Albuquerque Journal, June 10, 2012.
Note:
Efforts to reduce illegal drug use in New Mexico do not appear to be making progress.

The impact is felt in other countries . . .

News item: The Mexican Drug War
Even though violence in Mexico’s drug war appears to be slowing in the first half of 2012, marking the first decline in eight years, some 55,000 people have died since Mr. Calderon took office in December, 2006.

A conservative, Mr. Calderon added his voice to a growing group of Latin Americans calling for the U.S. to seriously consider legalizing some drugs like marijuana. Both the presidents of Guatemala and Columbia have made a similar plea. The Wall Street Journal, June 14th, 2012.

• The motive of much of the drug related violence in Mexico and other countries is to control trafficking to the United States. New Mexico is a major route to introduce drugs to the rest of the U.S.

Are the cartels in New Mexico? . . .

News item: Cartel Had Hooks in Racing
Federal agents arrested seven people they allege were using the U.S. quarter horse racing industry to launder millions of dollars for
Mexico’s powerful Zetas drug cartel. One of those arrests occurred at Ruidoso Downs Race Track.


**Gangs**

**District Attorney Warns of Gang Activity**

District Attorney Diana Martwick from Alamogordo, New Mexico, said Mexican cartels are moving into rural areas of New Mexico to recruit young people to sell drugs. Most of the street gangs are affiliated with one of the three Mexican cartels.

Most of the offenses juveniles commit – even drug trafficking – will get two years probation. The DA’s office recently filed more than 100 drug cases stemming from an undercover operation. Alamogordo Daily News, July 2, 2012.

Note:

As cartels use local gangs to distribute drugs, the relationship of drugs and gangs becomes more evident.

**A New Approach for New Mexico Sheriffs**

**News item: Sheriffs Working to Modernize Operations**

N.M. Group Eyes Cartels, Gangs. Sheriffs from New Mexico’s 33 counties organized themselves under a new group aimed at offering
deputies advanced training and building a lobbying force to help change state law.

Chief among the challenges is the influx of dangerous drug cartels using rural NM to transport drugs to other parts of the country.

San Juan County Sheriff Ken Christensen, whose territory covers most of the state’s Four Corners region, said that in just a few years three drug cartels have begun operating in his area. “We need training and infrastructure to fight them.” Albuquerque Journal, July 25, 2012.

News item: Activists, Officers Take On N.M.’s Gang Problem

Organized by the New Mexico Gang Task Force, hundreds of community activists, social workers, tribal officers and police officers met to develop a plan for attacking New Mexico’s growing gang problem.

According to the FBI, New Mexico has one of the highest rates of gang members per 1,000 residents in the country. The ratio of gang members per law enforcement officers is third in the nation, behind California and Illinois.

Tamera Marcantel, with the New Mexico Gang Task Force, noted a shift that for years mainly focused on law enforcement to attack gangs. Marcantel said state officials now believe New Mexico needs to start creating more prevention programs.

“We haven’t done this before and we need to come up with a multi-purpose strategy,” said Marcantel. Before, we had no clear direction on how to address gang activity. Now we do.” Albuquerque Journal, May 11, 2012.
Note:
After years of trying, still no approval for anti-gang legislation. Gang membership continues to increase.

**Ethics, Police Officers, and Lawsuits**

Note:
When a police department loses a case, other departments can learn from that. Much work, as you will see, still needs to be done on communication between police departments.

**News item: Ex-Deputy Loses Conviction Appeal**
Santa Fe – The state Court of Appeals upheld a former Dona Ana County sheriff’s deputy conviction for asking women to expose their breasts in exchange for not ticketing them. Carlos Solano of Santa Teresa pled guilty to two counts of bribery and was sentenced to six years in prison (there were two victims). *Albuquerque Journal*, November 3, 2005.

But no one told Las Cruces . . .

**News item: Ex-police officer guilty of tampering with records**
Las Cruces, N.M. A former Las Cruces police officer who tore up a woman’s traffic citation in exchange for a kiss has been convicted of tampering with public records. Anthony Coble told the woman who ran a stop sign that he wanted “what every man wants” in exchange for tearing up the citation. There was a hung jury on the bribery charge but prosecutor Susan Riedel said he would be retried on that charge. *Channel 13 (KRQE)*, Albuquerque, NM, January 23, 2006.
News item: Cruces Settles Police Suit
The city has settled a lawsuit with a woman who alleged a former police officer (Anthony Coble) asked for a kiss and a phone number in exchange for tearing up a traffic citation.


But no one told Mora County . . .

News item: Ex-Deputy Accepts Plea Deal
Las Vegas, N.M. A Mora County sheriff’s deputy was dispatched to a domestic situation. The female asked, “What can be done to make this go away?” The deputy pointed to his penis. She performed oral sex and he left.

As part of a plea agreement, the criminal sexual penetration charge was dismissed. He pled guilty to one count of accepting a bribe by a witness, a fourth degree felony. Mora County paid $104,000 to the female. The deputy was given eighteen months probation. Albuquerque Journal, May 6, 2008.

But no one told Socorro County . . .

News item: Deputy Sentenced to Six Years for Extortion
A former Socorro County deputy accused of asking women to flash him to get rid of traffic tickets pled guilty to two counts of extortion (bribery). There was also criminal sexual contact of a minor.

Shawn Baca was sentenced to six years in prison. Baca, fighting back tears, apologized to the victims and their families. Albuquerque Journal, April 19, 2012.
Note:
Some people think bribery of a police officer is giving money to a police officer. These cases show that bribery can occur in different ways.

**New Trends on Firearms**

Firearms and Open Carry

- Nothing in NMSA 1978, Section 30-7-2 prevents the carrying of any unloaded firearm.

This statute allows people to “open carry” handguns in New Mexico.

Facts:
Around 2008, a man in Alamogordo went into a theater with a handgun on his belt. Some patrons were concerned and the manager called police. An officer, holding the man by the arm, escorted him outside and had the man put the handgun into the trunk of his vehicle.

Holding the man by the arm was held to be an illegal seizure. The man sued the Alamogordo Department of Public Safety and won approximately $20,000.

Recommendation:
An officer in this situation should contact the manager. The manager can tell the person he or she can stay only if the handgun is taken elsewhere. If the person doesn’t get the message, he or she can be cited or arrested for trespassing.
News item: 30 Defy Ruidoso Gun Ban

As many as 30 people carrying guns were allowed inside Ruidoso Village Council chambers in defiance of the Mayor’s ban on weapons inside city buildings. The Mayor said the ban was aimed at protecting the public and village employees.

At least half a dozen local police officers were present inside and outside of council chambers. One of the residents, previously ordered to leave council chambers because he had a handgun, has a pending lawsuit against the Mayor. *Albuquerque Journal*, September 15, 2011.

There also have been reports of citizens (with handguns on their hip) filming officers at routine traffic stops in New Mexico. Some states, including California, have reacted in ways that may surprise advocates of the Second Amendment.

News item: California Gov. Enacts Ban on Open Handgun Carrying

Governor Jerry Brown signed a measure that bans the open carrying of handguns in California. Top California law enforcement officials supported the legislation. Governor Brown, according to the *Los Angeles Times*, said he “listened to the police chiefs." *Fox News*, October 10, 2011.

Note:

The state legislature created “open carry” in New Mexico. “Open carry” is a statutory right, not a constitutional right.

**Trends in Handcuffing Children**

Using Police for School Disciplinary Problems

Handcuffing juveniles who commit delinquent acts is similar to handcuffing adults. But handcuffing children who have not
committed delinquent acts, especially those in elementary school, is a different story.

**News item: Espanola Settles Jailed-Boy Suit**

The city of Espanola has agreed to pay $221,000 to settle a federal lawsuit on behalf of an eight-year-old boy who was hauled to jail in handcuffs after misbehaving at James H. Rodriguez elementary school.

A teacher had accused Jerry of maliciously throwing a ball at another student. The other child was bleeding. Police handcuffed Jerry and took him to jail (with the approval of his mother). He was placed in a holding cell for 30 minutes while other inmates taunted him.

He will receive up to $136,000 immediately. He will get $2,000 every six months between 2006 and 2014 for his private school fund. Between 2014 and 2017, Jerry will receive annual payments of $20,000 for his college fund. In 2018, monthly payments of $400 until 2023.


But no one told the folks in Albuquerque, New Mexico . . .

**News item: Mom: APD Put Cuffs on 7-year-old Son**

School officials called a mother of a 7-year-old son because he was “out of control.” When she arrived, she saw her son sitting in a chair with hands cuffed behind his back, crying. Two teachers and two police officers were present.

She took pictures of her 4-foot, 50-pound autistic child who had handcuff marks on his wrists. *Albuquerque Journal*, November 16, 2011.
News item: APS Superintendent: No Cuffing Elementary Students

Albuquerque Public Schools Superintendent sent a clear message to his staff: It is never OK to handcuff an elementary student. The officer who cuffed the student has been placed on paid leave pending an investigation. The Bernalillo County Sheriff’s office is doing an investigation. Albuquerque Journal, November 17, 2011

News item: Parents of Autistic Boy Sue Officer

The boy’s mother said she gave school personnel permission to restrain her son, but she did not expect them to use handcuffs. Her lawsuit claims this was an unlawful seizure that violated her son’s civil rights. Albuquerque Journal, December 1, 2011.

The Debate on Calling Police for School Problems . . .

There is a national debate about using police for school disciplinary problems. An article by the Associated Press frequently referred to Albuquerque, New Mexico.

News item: Georgia Handcuff Case Renews School Policy Debate

“A New Mexico teacher asked a 13-year-old girl to stop talking with her friend and move to another seat. The girl refused. The teacher called police.”

The case is among thousands fueling a long-simmering debate about whether educators should bring in police to deal with disruptive students.

“Kids are being arrested for being kids,” said Shannon Kennedy, an attorney who has filed a class-action lawsuit against Albuquerque’s public school district and its police department on behalf of hundreds of kids arrested for minor offenses.
Civil rights advocates say frustrated teachers and principals are calling in the police too often to deal with minor disturbances.

In Albuquerque, which started tracking arrests after noting more minor cases coming from schools, nearly a thousand students were referred to the criminal justice system in 2009-2010. Preliminary numbers indicate arrests have fallen 53 percent since the class-action lawsuit was filed in 2010, prompting law enforcement officers to use more caution. *Albuquerque Journal*, April 18, 2012.

**Lesson learned:**

Police agencies need a policy on handcuffing elementary school children.

**Hate Crimes**

Was it a Hate Crime?

**FACTS:**

In February, 2012, a seventeen-year-old African American (Trayvon Martin) was walking in a gated community near Orlando, Florida. It was raining and he was wearing a “hoodie.” He was followed by a community watchman. A confrontation occurred and the watchman (named George Zimmerman) shot and killed Martin.

The news media repeatedly called it a hate crime or profiling.

**News item:** Zimmerman not Racist, Reports say

New records released by prosecutors in Zimmerman murder case show federal civil rights investigators investigated dozens of his friends, neighbors and co-workers, but found no one who said Zimmerman was a racist. *Albuquerque Journal*, July, 2012.
New trends on Human Trafficking

More and more, people who promote prostitution or accept the earnings of prostitution are being charged with trafficking.

The two charges are similar. Human trafficking targets those “recruiting, soliciting, enticing, transporting . . . another person with the . . . knowledge that force, fraud or coercion will be used to subject the person to . . . commercial sexual activity.”

It also targets a person “benefiting, financially or by receiving anything of value, from the . . . commercial sexual activity of another person with the knowledge that force, fraud or coercion was used to obtain . . . commercial sexual activity.” NMSA 1978, Section 30-52-1.

New item: Man Indicted in Sting

On the internet, Defendant agreed to pay $300 to have sex with a 15-year-old girl. The “girl” was an APD detective. Defendant was charged with sexual exploitation of children by prostitution and attempted Human Trafficking. Albuquerque Journal, November 25, 2011.

News item: ABQ pimp gets one year

A man who forced a 17-year-old girl into prostitution has been sentenced to one year behind bars. Dante McKay pled guilty to human trafficking and will serve his time at the Metro Detention Center. KOB News, January 13, 2012.

News item: Albuquerque man pleads guilty to human trafficking

An Albuquerque man who forced a 17-year-old girl into prostitution pled guilty to human trafficking. Kendell Morrel was
sentenced to three years in prison and two years probation when he is released. KOB News, January 19, 2012.

Lesson to be learned

It’s a new approach to prostitution. The “pimp” is charged with trafficking and the prostitute is treated as a victim. Efforts are made to assist the victim.

Immigration Reform

Police officers in New Mexico who come in contact with people who are here illegally should not detain people on that basis alone. To detain someone, there must be reasonable suspicion a person is involved in a crime. Being here illegally is a civil violation.

However, a few occasions exist where additional questions may be necessary: the person has previously been deported, the offense has cross-border implications, may need a translator and ICE is nearby, or there is an identity issue.

On a traffic stop, even when someone is in the country illegally, ICE may choose not to get involved:

News item: Immigration eases up on minor traffic offenses

Immigration officials say they will no longer immediately detain suspected illegal immigrants who are arrested only on minor traffic violations and have no criminal history. Albuquerque Journal, April 28, 2012.

For immigration, the ideal situation is to have a detention center, not an officer, make inquires as to a person’s immigration status.

According to ICE, as of 2012, only one detention center in New Mexico is not cooperative: Santa Fe.
News item: Santa Fe Should Treat All Inmates the Same

Editorial

“The solution for the Santa Fe detention center is no big mystery. In fact, there’s one just a short drive south, in Albuquerque.

In Albuquerque, the immigration status of anyone arrested is checked by ICE, regardless of race or surname. The computerized identification is quick and thorough, and an inmate’s immigration status is completely in the hands of federal officers, as it should be.

Expressed fears of driving crime victims underground or deporting family members pulled over for minor traffic infractions are unfounded in this system. And treating immigrants and natives alike is respectful and immigrant friendly.

Santa Fe should quit setting up road blocks and let ICE do its job.”

News item: Immigration Checks Begins at Colorado Jails

A program that automatically checks the immigration status of all jail inmates in Colorado quietly went into effect after years of opposition.

The Department of Homeland Security’s “Secure Communities” program took effect across all 64 Colorado counties. Under the program, sheriff’s departments and jail officials submit fingerprints of all inmates taken at the time of booking to federal officials for a check of immigration status. Albuquerque Journal, May 25, 2012.
NOTE:
The NM Model Immigration & Consular Notification Policy can be found on the DPS website:  nmlea.dps.state.nm.us

**New cases and trends for Miranda**

Miranda – APD lost two Miranda cases, paid out three million!
   Beware the false confession:

**News item:  DA Drops Murder Charges Against 2**
   Two men were released after spending fifteen months in jail. One had confessed to the murder of an elderly Korean couple (Mr. and Mrs. Yi) in Albuquerque. DNA collected from under the victim’s fingernails was matched to a career criminal in prison for another homicide.  

**News item:  Albuquerque to Pay $950K in Yi Murders**
   The city of Albuquerque has agreed to pay $950,000 to a door-to-door salesman who once faced a potential death penalty prosecution for a murder committed by another man.
   A false confession by a co-worker helped put both in jail for 15 months.  

**News item:  Slaying Suspect Freed, DNA matches to Another Man**
   In Albuquerque, a mentally retarded young man (Robert Gonzales) falsely confessed to the brutal rape and murder of a young girl. She was eleven-years-old. He spent thirty-two months in jail when DNA pointed to another person.  
News item: Lawyer says it never had to happen
The city of Albuquerque is paying $1.3 million to Robert Gonzales. Another person confessed to the crime. The new confession was corroborated.


Lesson learned:
For two false confession cases, Albuquerque will pay a little over three million dollars. Mistakes were made; other police departments need to learn from those mistakes.

How officers can set up a non-custodial situation

Introduction:
For adults, Miranda warnings are required when there is an interrogation and a person is in custody. Custody means an arrest or the functional equivalent of an arrest. In non-custodial situations – and sometimes it is beneficial to have a non-custodial situation – Miranda is not required.

Facts:
A two year old boy in Farmington was having trouble breathing. His foster father called 911 but rescue was unable to save him. Two days later a detective interviewed him at the police station. He was told he was not under arrest, had no obligation to speak, and could stop the interview at any time. Miranda warnings were not given.

During the interview, lasting between two and three hours, he confessed to murder. Supreme Court found he was not in custody and upheld his conviction for murder. *State v. Wilson* (2010).
Facts:

A male and female were killed in a cabin near Torreon, New Mexico. The female’s two sons (ages two and four) were left in the cabin and eventually died of dehydration and starvation.

An Albuquerque police detective interviewed defendant. The office was small, the door closed, and the detective was between Defendant and the doorway. No Miranda warnings were given.

Defendant was asked and agreed to accompany police officers to the station, was free to leave or terminate the interview, and was provided transportation to and from the station. He gave a statement and was convicted of four counts of first degree murder.

Supreme Court said interview was non-custodial and thus Miranda did not apply. Convictions upheld. State v. Nieto (2000).

Lesson learned:

Had Miranda been read, most likely there would not have been a confession. By setting up a non-custodial situation, Miranda was not required.

Officers thought the following was non-custodial. . .

Miranda – Reasonable Person

State Police investigated a murder near Clayton, New Mexico. Suspect, a person of interest, contacted officers to talk with them. When officers met him, he got into their car, was handcuffed for officer safety, and driven to the District Attorney’s Office.

He was escorted at all times. In a room with two officers, confronted with accusatory questions, he made a statement that led to a murder conviction. No Miranda warnings were given.
Custody isn’t determined by what the questioning officer or suspect may think. Instead, the courts ask: would a reasonable person in the suspect’s position believe he or she is restrained to the point associated with a formal arrest?

Here, a reasonable person would believe he or she was being arrested or close to it. Court of Appeals held suspect was in custody and Miranda warnings should have been given. Conviction overturned. State v. Olivas (2011).

**Lesson learned:**

He didn’t have to be custody. He could have driven to the police station by himself. He could have been told, prior to questioning, that he was not under arrest, was free to leave, and could terminate the interview at any time.

Miranda and Juveniles

Child-Waiver – Parents

Defendant, sixteen years old, knocked on a door in Farmington, New Mexico. When the door opened, he killed the person inside and stole his vehicle. He was apprehended in Las Vegas, Nevada.

Two San Juan County Sheriff’s detectives interviewed him. He waived his Miranda rights. His mother was present but he asked her to leave. Will the confession be admissible?

Supreme Court noted the presence of an attorney, friends or relatives is a factor when considering if a statement is voluntary but it is not required. His confession was admissible. State v. Gutierrez (2011).

Miranda – Child – Waiver

Honor among thieves? In Carlsbad, New Mexico, a juvenile was upset with a fellow burglar. Believing “friends don’t rat on friends,” he
killed him. After killing him, he poured gasoline over his (ex) friend to hide the body.

In addition to regular Miranda warnings, Child was informed he could have a parent present. He didn’t ask for anyone and confessed to murder. Supreme Court held confession was admissible. Child’s sentence, sixty years, also upheld. State v. Gamble (2012).

Lesson learned:
• Although helpful, the presence of a parent is not required when interviewing a juvenile.

Miranda – Child (DWI)

In San Juan County, a sixteen-year-old was stopped for running a stop sign. Detecting the odor of marijuana, the Child was given field tests which he failed. The Child was read the Implied Consent Act, given a blood test, and arrested for DWI. No Miranda warnings were given.

The first two Miranda rights must be read to a Child as soon as he or she is detained. Failure to read Miranda can mean testimony (a statement or confession) is inadmissible. Miranda, however, does not apply to physical evidence.

Court of Appeals held evidence was physical, not testimonial. A field test is evidence of lack of motor coordination. Counting backwards or reading the alphabet is evidence of a person’s physical condition. Consent to the Implied Consent Act is a simple yes or no answer and not testimonial. Evidence, being physical, was admissible. State v. Randy J. (2011).
Voluntary Statement – Promises

In Eddy County, Defendant had sexual images of children on his computer. Officer told Defendant that no matter what he said, he would not be arrested that night. Evidence of an express promise of leniency will render a confession involuntary as a matter of law. Incriminating statements were made but he wasn’t arrested that night.

This was an express promise but Court of Appeals noted it was not a promise of long-term leniency, only avoidance of jail that night. Since he wasn’t going to be arrested, there was no incentive to make a statement. Statements were admissible. State v. Leeson (2011)

Profiling

In 2012 a civil rights group complained that many New Mexico towns and cities didn’t have a profiling policy.

The NM Model Profiling Policy can be found on the DPS website: nmlea.dps.state.nm.us.

New trends in Property Crimes

Burglary of a Vehicle

For many years entry of any part of a vehicle in New Mexico was treated as entry of the vehicle itself and therefore was a burglary. This included taking tools from the open bed of a pickup truck or reaching under an engine to take a starter.

In Albuquerque, a police officer heard loud banging noises coming from a dark alley. Quietly approaching, he saw Defendant lying
underneath a van. Next to Defendant was a red plastic container, positioned to catch fuel dropping from a tank. Stealing gas! Defendant admitted using a nail to create a hole to get gas.

Supreme Court, overturning thirty years of case law, said this wasn’t entry of a vehicle. They felt if the legislature wanted the burglary statute to say entering “part” of a vehicle is the same as entry of the vehicle itself, it could do so. Conviction reversed. State v. Muggdin (mugh-DEEN). (2012).

Note:
A more appropriate charge for siphoning gas is Tampering with a Motor Vehicle. NMSA 1978, Section 30-16D-5.

Burglary
Albuquerque, New Mexico:

Santa Fe, New Mexico: Police to Amp Up Property Crime Fight
With residential burglaries in Santa Fe up 65 percent from this time last year, city police have a new program to target property crimes. More detectives will be assigned to property crimes and more focus will be placed on suspicious activity calls. Albuquerque Journal, June 12, 2012.

News item: Fingerprint leads to wrong man
Albuquerque Police arrested Justin Guzman for a burglary he didn’t commit.
Someone stole $1,000 worth of tools from a plumbing truck parked at an Albuquerque hospital. A fingerprint came back to Justin Guzman. The officer asked the company if they knew of him and they said no. A warrant was issued for Justin Guzman.

The officer never asked the driver. Guzman is a friend of the driver, assists him at work, and has often been in the truck. A Deputy Chief said he spoke to the officer and his supervisor to prevent this from happening again. KRQE.Com (Channel 13), May 1, 2012.

**Breaking & Entering**

In San Juan County, Defendant knocked on a door and asked for cigarettes. The resident told him to leave. Defendant became angry and kicked and pushed the door as the resident struggled to keep him out. Defendant pushed the resident about a foot back, stepping into his apartment, before he left. What charge?

Was there a breaking of the door? Yes, Defendant’s intent was to enter the apartment by physical force. In pushing the door open, in using physical force, he was “breaking” the door. Was there entry? Once his foot entered the door, entry was obtained; only the slightest penetration is needed to obtain entry. Court of Appeals upheld conviction for Breaking & Entering. *State v. Sorrelhorse* (2011).

**White Collar Crimes: Debit Cards**

Victim’s house was burglarized in Clovis, New Mexico. Her purse and debit card were among items stolen. That same morning, Defendant used her debit card to make $83 worth of purchases at two convenience stores and a Lowe’s Hardware store. A fourth attempt at Walgreens was unsuccessful.
Defendant argued a debit card is a credit card and he should be charged with fraudulent use of a credit card, a petty misdemeanor. But there is another, more appropriate charge.

Remote Financial Service Unit Act (RFSUA) – where do they come up with these names? - NMSA 1978, Section 58-16-16-(B), a fourth degree felony, applies when a debit card, an ATM card, or a credit card with a pre-approved credit line, is used.

Court of Appeals upheld four convictions of violation of RFSUA and identity theft, also a felony. State v. Castillo (2011).

Lesson learned:
- For debit cards or ATM cards use RFSUA, a fourth degree felony.
- In such cases, also recommend charging identity theft, a fourth degree felony.
- A violation of RFSUA does not require an offender be successful or to obtain something.

New trends on Robbery

Note:
A suspect points a gun at a victim and takes his/her vehicle. Since car-jacking doesn’t exist in New Mexico, we have two possible charges: armed robbery and unlawful taking of a vehicle. But we need to be careful how we charge.

Problems in charging that led to double jeopardy

Defendant went to victim’s home in Farmington, New Mexico. When the resident opened his door, Defendant killed him and took his vehicle. He was charged with armed robbery (taking the keys and the
vehicle) and unlawful taking of a vehicle. In other words, in both statutes, he was charged with taking a vehicle.

Supreme Court held this was double jeopardy (being charged twice with the same crime) and vacated the unlawful taking of a vehicle charge. State v. Gutierrez (2011).

How to avoid double jeopardy in charging

Defendant went to an apartment, pointed a gun at victim, and stole her truck. Armed robbery was based upon taking her keys, not the truck. Robbery is taking anything of value and keys have value.

Supreme Court concluded defendant’s act of taking the keys (robbery) and then using the keys to drive the truck away (unlawful taking) supported two convictions. State v. McGruder (1997).

**SEARCH & SEIZURE**

Most motions to suppress evidence are made in drug cases. If the defense attorney is successful, drugs will be suppressed and the prosecution will not have evidence to go to trial. That’s why so many search & seizure cases are drug-related.

Consent & Juveniles

**Consent – Juvenile**

Farmington Police officer stopped a vehicle for a traffic violation. Upon making contact with a juvenile, he noticed a strong odor of marijuana. After getting consent to search, he found bags of marijuana.

Should an officer be required to advise juveniles (something they don’t have to do for adults) that they can refuse to give consent? (no)
Under the Fifth Amendment (interrogation), a juvenile does have more rights. But the Court of Appeals declined to give more rights under the Fourth Amendment to juveniles. State v. Carlos A. (2012).

Stop & Frisk

Stop & Frisk – Plain Touch

An officer in Bloomfield, New Mexico (near Farmington) felt a hard object in Defendant’s pocket but was uncertain what the object was. After more feeling and touching, he was able to determine the object was a crack pipe.

If an officer feels an object and it is immediately apparent the object is contraband, the object will be admissible.

If, however, the officer knows or should know the object is not a weapon, and it is not immediately apparent the object is contraband, the officer cannot continue exploring or manipulating to determine if the object is contraband or not.

By continuing to touch and feel the object, the officer went beyond the scope of a pat down. Court of Appeals held the crack pipe was inadmissible. State v. Johnson (2010).

Note:

A pat down is to look for weapons only. If an officer touches something and it is immediately apparent that it’s contraband, the contraband will be admissible.

New cases on strip searches
Note:
A strip search is very intrusive and should be used with caution. The following lawsuits were against detention centers doing illegal strip searches in New Mexico.

2006 – Santa Fe County. Paid approximately eight million dollars.
2007 - Dona Ana County has agreed to pay $5 million dollars.
2009 - January. Hidalgo County to Settle Suit for $1 Million.
2009 - March. Valencia Co. Strip-Search Settled for $3.3 Million
2010 – 2.99M Deal Brokered in Strip Search Lawsuit (Guadalupe County – Santa Rosa.

Bob Rothstein, whose Santa Fe-based firm filed five of the strip-search lawsuits, said a memo surfaced after the first one was filed in Santa Fe. It was from the NM Association of Counties, warning counties to review their strip-search policies to prevent the kind of litigation Santa Fe was then facing. “They didn’t,” he said. Albuquerque Journal, July 20, 2010.

Note:
There was clearly no communication between detention centers in New Mexico.

It is possible to justify a strip search . . .

Stop & Frisk – Underclothing
On a traffic stop, an Albuquerque police officer observed Defendant appear to be “fumbling around” with an object. When Defendant got out of his vehicle, his pants were unzipped and his belt was unbuckled. He was arrested.
Upon arrest, an officer can do a search incident to arrest. But this officer did more. Believing he was hiding something, he pulled the waistband of suspect’s pants and underpants outward six to eight inches. Looking down, he saw, among other things, a plastic bag.

To do an under-clothing search, an officer has to have a particularized reasonable suspicion an arrestee is concealing a weapon or contraband under his or her clothing. Supreme Court held the search was justified. State v. Williams (2011).

Note:
In this case, based upon reasonable suspicion, the officer limited the search to where a weapon or contraband could be found.
But need to be cautious . . .

News item: Women Sue Over Strip Search
Two Santa Fe women are suing State Police for a strip search. Their lawsuit noted all criminal charges were immediately dismissed by a Santa Fe County Magistrate Judge and the DA’s office never refilled charges. Albuquerque Journal, December 22, 2011.

Vehicle Stop and Forfeiture
Another vehicle stop but the person has thousands of dollars in cash. Most likely, it’s drug money.

The logical thing to do would be to seize the cash for forfeiture. But it helps to know the rules.

Win some, lose some . . .
FACTS:

Tucumcari police stopped a vehicle for speeding. After receiving conflicting answers, the officer asked for consent to search. He found $104,999 in the trunk.

The seizure of money was based upon NMSA 1978, Section 30-31-34 which allows for forfeiture of money related to the commission of drug offenses. Since that couldn’t be proven here, the Court of Appeals ordered the money returned to Defendant. State v. $104,999 (2000).

APD & BCSO lose lawsuits regarding forfeiture

News item: Judge Rules against Bernalillo County

A state district court judge said Bernalillo County Sheriff’s Office did an end-run around state law by using more lenient federal forfeiture procedures to seize money, especially at traffic stops. The deputies were part of an interagency task force that included federal and state officers.

The City of Albuquerque settled a similar lawsuit for $882,000 in 2009. A hearing will decide damages against the County of Bernalillo. Albuquerque Journal, September 8, 2010.

News item: County to pay $3 million

A state Judge has ordered Bernalillo County to pay more than $3 million in damages to individuals whose cash was seized by law enforcement officers.

Cash seizures were referred to federal court, which has less stringent forfeiture requirements than NM courts. In many cases, charges were never filed. Albuquerque Journal, March 5, 2011.
• If money is seized, need to show a relationship with illegal drugs.

• If charges are not filed, money must be returned to the suspect.

• If there is a federal-state task force, need to be careful of giving the appearance of using less lenient federal forfeiture laws to circumvent state forfeiture laws.

An unfortunate reality of 2012 . . .

Many officers, aware of lawsuits, no longer seize large amounts of cash.

Note:
• In 2011, The NM AG’s office assigned attorneys in Las Cruces and Albuquerque/Santa Fe to focus on money laundering/forfeiture full-time.
• The AG’s Forfeiture Unit is working with DA’s office to make forfeitures procedures more consistent.

Recommendation:
• Need a state-wide law enforcement effort to lobby for more effective state forfeiture laws.

Vehicle stop – guns

An officer walked up to a vehicle on a routine stop. A quick glance revealed a handgun on the back seat floorboard. It could be anywhere but this was Hobbs, New Mexico. The officer knew a person had a right to carry a firearm in their vehicle. Nothing had happened but the officer was concerned.
The driver and passenger were asked to step out of the vehicle. Neither was handcuffed or restrained. The firearm was seized and the ammunition unloaded. Only one issue: did the officer have a right to seize the firearm? (yes) State v. Ketelson (2011).

Answer:
Supreme Court held an officer can remove a visible gun from a vehicle to prevent immediate access by an occupant during the short duration of a traffic stop.

Lesson learned:
The decision was a result of Supreme Court’s concern for officers on traffic stops. This is a rare case where an officer does not need to articulate or justify their action – the very brief, temporary removal of a firearm. Such seizures do not interfere with legitimate use of a firearm.

- Recommend (unless there are other factors) not running the firearm or expanding the traffic stop into an investigation.

Vehicle stop - Questions

Note:
On the federal level and in many states, an officer can ask any question as long as it doesn’t unreasonably prolong the vehicle stop.

New Mexico is more restrictive: an officer has to articulate or justify reasons for asking unrelated questions on a traffic stop.

In the following cases, the courts look to see if an officer’s follow up questions are related to the original purpose of the stop.
Traffic stop – questions

A Quay County (Tucumcari) deputy stopped Defendant for driving without a seat belt. It was a routine traffic stop. When Defendant handed his driver’s license to him, his hands were shaking. He was extremely nervous and did not make eye contact with the deputy, even at the beginning of the stop. The deputy asked some questions, did a pat down, and found drugs.

Court of Appeals upheld the deputy’s action and the evidence was admissible. The deputy noted the reasons for doing a pat down (extreme nervousness, hands shaking, and no eye contact) in the complaint. These reasons justified the pat down and additional questions. State v. Chapman (1999).

Vehicle stop – scope

A state police officer stopped a car on the Deming-Hatch bypass for improper display of a temporary tag. He noticed several things: a cell phone, a two ton car jack, an overnight bag, and the odor of gasoline. Driver was very nervous.

Driver and passenger had conflicting stories of where they had been and where they were going. Officer asked if there were any drugs in the car. Consent was given and numerous bags of marijuana (in the gas tank) were found. Were these questions appropriate? (Yes, appropriate because the officer noted all observations he had prior to asking for consent to search). State v. Duran (2005).

Lesson learned:

• This case illustrates how closely questions that are asked by officers on a traffic stop are reviewed by Judges in New Mexico.
**Vehicle stop – questions**

A Ruidoso Downs police officer stopped a vehicle involved in a possible forgery. A passenger in the front seat was the suspect. He was asked to get out of the vehicle. While being questioned, the officer found drugs on him, and he was arrested.

It’s what happened next – two questions – that attracted the attention of the Supreme Court. The officer asked the driver if there was anything in the vehicle he needed to know about. Driver said no. The officer then asked for consent to search the vehicle. Defendant agreed and the officer found meth.

Supreme Court held the questions were appropriate. From drugs found on the passenger, one could infer there were more drugs in the vehicle. *State v. Funderburg* (2008).

- To ask for consent to search a vehicle, an officer must clearly articulate (write in the complaint or statement of probable cause) what led him or her to ask for consent to search.

**Vehicle stop – an example of when unrelated questions are permitted**

Prior to stopping Defendant for speeding, a Mesilla Deputy Marshal (near Las Cruces) observed Defendant lean to the right, as if to hide something. Defendant had a suspended license. Officer said, “Before I turn this vehicle over to someone else, is there anything in it I need to know about? Any knives, needles, guns, or drugs?”

Upon getting consent to search, the deputy found marijuana and meth. Federal courts permit any questions as long as they don’t prolong the stop. NM has a more restrictive standard; questions must be related to the initial reason for the stop.
Unrelated questions are permitted when:

- Supported by independent reasonable suspicion,
- Officer safety, or
- If the interaction becomes a consensual encounter.

Questions appropriate; the officer had reasonable suspicion (furtive movements) that Defendant hid something. State v. Leyva (2011).

Note:

Note #3: if the interaction becomes a consensual encounter.

An officer issues a citation and tells a driver he or she is free to go. In other words, the person is not being detained. Because of the actions of the officer, a consensual encounter now exists.

To make sure it’s a consensual encounter, the officer might add, “Sir, you’re free to go. May I ask you some questions? May I search your car?”

Caution:

Even in – “Sir, you’re free to go” – situations there can be difficulties.

In Dona Ana County, a driver was stopped for speeding. The driver was told he was free to go and gave consent to search his vehicle. Drugs were found which belonged to his passenger.

Court of Appeals noted passenger was detained (without reasonable suspicion) because he wasn’t told he was free to go. Evidence suppressed. State v. Portillo (2011).
Traffic Stop – Questions (Prostitution)

In Albuquerque, around midnight, an officer sat parked in an alley behind a convenience store doing paperwork. As he looked up, he saw a vehicle drive into the alley, appear to recognize his vehicle, and leave. He stopped the vehicle for expired temporary tags and immediately recognized a known prostitute in the passenger’s seat.

Investigation was expanded and drugs were found. Officer gave following reasons for expanding investigation:

- Recognized prostitute wearing working clothes and heavy makeup,
- Defendant’s evasive driving,
- Defendant made no eye contact with officer,
- Incident occurred in an area officer previously saw prostitutes working.

Supreme Court held motion to suppress drugs properly denied. State v. Olson (2012).

Recommendation:

- Police departments should have a system to monitor which of their cases are being lost at suppression motions. This can be used in training to help prepare better cases in the future.

Vehicle Stop – Uniform

An arrest of a person for a traffic violation can only be done by a commissioned, salaried peace officer in uniform. NMSA 1978, Section 66-8-124.

Near Chimayo, New Mexico, two state police officers were in an unmarked vehicle, wearing BDU’s (Basic Duty Uniform). On their
clothing were the words “STATE POLICE” and “POLICE.” They also had an equipment belt with a holster and gun and a metal police badge hanging from a pocket.

They made a vehicle stop, arrested Defendant on a felony warrant, and found drugs. Court of Appeals held a reasonable person would believe an individual wearing a BDU with police equipment was a police officer. Evidence was admissible. State v. Maes (2011).

Search Warrants

When doing a search warrant, we need to ask: Why is evidence at the particular place to be searched?

Facts:
A fifteen-year-old girl told a Bernalillo County Sheriff’s Detective that a family member, nineteen-year-old Jerry Trujillo, Jr., who lived in the same house, had molested her. Her cousin told the detective she also had been molested and stopped going to the Trujillo house because of what Defendant did to her.

A search warrant was drawn up: State of New Mexico v. 1208 Junita SW, Albuquerque, New Mexico. The residence was described in great detail and the detective often referred to “the residence” or “the Trujillo home.” It concluded by requesting a warrant to search “this residence for evidence . . .”

Letters and pornography were seized which confirmed what the two victims had told the detective. But there was something missing in the affidavit: it did not clearly establish that the residence to be searched and 1208 Juanita SW were one and the same.
The Supreme Court, noting they easily could have ruled the other way, held the evidence was admissible. *State v. Trujillo* (2011).

Reminder:

*An officer or detective should always include the address of the location to be searched in the affidavit and state why he or she believes evidence will be found at that location.*

**Search Warrant – Nighttime Search**

A district judge signed a search warrant for Albuquerque Police at 8:54 p.m. Nighttime authorization (10:00 p.m. to 0600) was not given. Entry was made prior to 10:00 p.m. but the search began after 10:00 p.m. A shell casing linked Defendant to a homicide.

The focus is on *when* officers first entered, not what happens afterwards. Supreme Court of New Mexico held the search was proper. *State v. Santiago* (2010).

**Search Warrant – Convenient & Quick**

An emergency has occurred and a judge’s approval is needed quickly. What is an officer to do? Fortunately, the same courts that encourage warrants believe in technology.

In **2012**, Supreme Court approved a convenient method to get a warrant. An officer may transmit an affidavit and proposed search warrant to a judge by telephone, fax, electronic mail, or other electronic means. Rules of Criminal Procedure for *District Court*, Rule 5-211 (F).

**Conclusion**

As the New Mexico Legal Update outline is revised and updated, it will be posted on the DPS website: [nmlea.dps.state.nm.us](http://nmlea.dps.state.nm.us)