

Alabama Law Weekly

A weekly summary of Alabama law developments

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Distracted driving campaign gains national momentum

U.S. Transportation Secretary Ray LaHood released a “Blueprint for Ending Distracted Driving” last month that offers a comprehensive strategy to address the growing practice of using handheld cell phones behind the wheel. The plan outlines concrete steps that stakeholders around the country—from lawmakers and safety organizations to families and younger drivers—can take to reduce the risk posed by distracted driving. While unveiling the plan, LaHood also announced \$2.4 million in federal support for California and Delaware that will expand the U.S. Department of Transportation’s (Department’s) “Phone in One Hand, Ticket in the Other” pilot enforcement campaign to reduce distracted driving.

The problem. With more than 300 million wireless subscriptions in America—and a growing number of devices and services designed to keep people constantly connected—technology is playing an increasing role in enhancing the quality of life. Yet using these technologies while driving can have devastating consequences.

The U.S. Department of Transportation National Highway Traffic Safety Administration (NHTSA) estimates that there are at least 3,000 deaths annually from distraction-affected crashes—crashes in which drivers lost focus on the safe control of their vehicles due to manual, visual, or cognitive distraction.

Studies show that texting simultaneously involves all three types of distractions—manual (taking your hands off the wheel), visual (taking your eyes off the road), and cognitive (taking your mind off what you are doing)—and is among the worst of all driver distractions. Sending or receiving a text takes a driver’s eyes from the road for an average of four to six seconds, the equivalent—at 55 mph—of driving the length of an entire football field, blind. Observational surveys show that more than 100,000 drivers are texting at any given daylight moment and that more than 600,000 drivers are holding phones to their ears while driving.

Young drivers are at greatest risk. A nationally representative survey of distracted driving attitudes and behavior published in 2011 shows that a young driver is most likely to have been involved in a crash or a near-crash. Drivers under 25 are two to three times more likely than older drivers to send text messages or e-mails while driving.

History. For the past three years, the Department has been working to highlight the issue of distracted driving.

In October 2009, President Barack Obama issued an Executive Order prohibiting federal employees from texting while driving government vehicles or while using government-supplied cell phones while driving any vehicle. The Department hosted two “Distracted Driving Summits”—one in September 2009 and another in September 2010—and engaged in numerous public activities both to bring focus to the issue of distraction and to identify strategies to combat the problem.

In 2010, the NHTSA published a “Driver Distraction Program Plan” that serves as the Department’s guiding framework in its efforts to eliminate crashes related to distraction. The plan laid out strategies for better understanding the problem, reducing distraction from in-vehicle devices, avoiding crashes that might be caused by distraction, and improving driver behavior.

In February, the NHTSA proposed voluntary guidelines for vehicle manufacturers to discourage the introduction of excessively distracting devices that are integrated into vehicles. The NHTSA expects to finalize these Phase 1 Distraction Guidelines sometime this year.

2012 Blueprint. The Department’s 2012 “Blueprint for Ending Distracted Driving” sets out six areas in which progress needs to be made in order to curb distracted driving in the United States.

(continued on page 2)

Highlights

- Supreme Court upholds suspension of an attorney’s license to practice law where it was alleged that she forged her clients’ signatures to affidavits and fraudulently billed for appointed criminal work, page 2.
- Court of Criminal Appeals reverses a defendant’s DUI conviction and renders judgment, holding that State failed to establish that a traffic checkpoint was carried out pursuant to a previously established neutral and objective plan, page 3.
- Court of Criminal Appeals rejects defendant’s argument that he was entitled to be appointed counsel for an appeal even though he had fled the jurisdiction of the State prior to his sentencing hearing, page 3.

Supreme Court — Civil

First, the report recommends enacting and enforcing tougher state laws. Currently 39 states, the District of Columbia, the Virgin Islands, and Guam ban texting behind the wheel, with only 10 states, the District of Columbia, the Virgin Islands, and Guam prohibiting all handheld cell phone use while driving. The report encourages the 11 remaining states to join the majority and pass “anti-texting” laws.

The report notes that the NHTSA’s high-visibility enforcement pilot programs in Hartford, Connecticut, and Syracuse, New York, showed that drivers do change their cell phone use when faced with good laws, tough enforcement, and public education campaigns. The 2011 pilot projects found dramatic declines in distracted driving in the two communities tested—with texting dropping 72 percent in Hartford and 32 percent in Syracuse. The NHTSA will expand its pilot enforcement programs by initiating two enforcement campaigns in California and Delaware later this year.

In addition, “The Motor Vehicle and Highway Safety Act,” which was passed by the Senate this year, includes \$39 million for grants to states that enact laws prohibiting texting while driving.

Second, the report suggests addressing technology as a way to cut down on distracted drivers. Following up on the proposed Phase 1 Distraction Guidelines for devices integrated into vehicles, the NHTSA is considering Phase 2 guidelines to address portable devices not built into a vehicle, including aftermarket GPS navigation systems, smartphones, electronic tablets and pads, and other mobile communications devices. Phase 3 guidelines may address voice-activated controls to further minimize distraction in factory-installed, aftermarket, and portable devices.

The NHTSA is also looking at advanced crash warning and driver monitoring technologies to help avoid crashes caused by distraction.

Third, the report notes that young drivers need to be better educated on distracted driving. In April, the Department announced the “Distracted Driving Design Challenge” to encourage high school students to spread the word about distracted driving by designing a creative icon that can be shared on Facebook, Twitter, Tumblr, and other social networks.

The final three report recommendations focus on involvement, responsibility, and advocacy. The report recommends that every driver visit Distraction.gov and take the pledge to drive distraction-free.

Alabama. On May 8, 2012, Governor Robert Bentley signed into law House Bill 2, a measure that prohibits texting while driving. Alabama’s new law prohibits using a wireless device to write, send, or read a text message, instant message, or e-mail while operating a motor vehicle. It provides exceptions for contacting emergency services and for using global position services. The fine for violating the law is \$25 for a first-time offense, \$50 for a second offense, and \$75 for a third or subsequent offense. Also, for each offense, a two-point violation would be placed on the offender’s driving record. The law goes into effect August 1, 2012.

▼ **Supreme Court upholds suspension of an attorney’s license to practice law where it was alleged that she forged her clients’ signatures to affidavits and fraudulently billed for appointed criminal work.**

LEGAL PROFESSION: Disciplinary Procedure. The Office of General Counsel for the Alabama State Bar filed charges against Tessie Clements relating to two separate complaints that had been filed against her. In the first, Gerald and Maxine Ingram alleged that Clements failed to inform them of the outcome of their case and forged their signatures on affidavits filed in court. The second complaint alleged that Clements had fraudulently billed and received money from the State arising out of her appointed representation of Willie Banks. A panel of the Disciplinary Board of the Alabama State Bar (“the Board”) held a hearing. The Ingrams admitted that the information in their affidavits was accurate but denied Clements’ contention that they authorized her to sign them on their behalf. Banks’ subsequent attorney stated she did not find Clements’ name in the visitor log of the jail on the days Clements billed for going. The Board found Clements guilty and suspended her law license for five years. Clements appealed. **Affirmed.** The Court rejected Clements’ claim that the Bar violated her due process rights by failing to bifurcate the hearing on the two unrelated charges. The Court explained that Clements did not provide any particular argument as to how the Board’s failure to conduct separate hearings violated the general principles she cited. The Court also noted that Rule 42(b), Ala. R. Civ. P., which gives a trial court the authority to order separate trials of claims or issues, is permissive, not mandatory. The Court also rejected Clements’ argument that the Board violated her due process rights by failing to conduct a hearing on her motions to quash certain witness subpoenas, in violation of Rule 17(c), Ala. R. Disc. P. The Court stated that the language of the Rule only requires that the Board “consider and rule upon the issues” raised in such motions, not conduct a hearing. The Court also held that the hearing before a four-member panel instead of five did not violate Clements’ due process rights. Rule 4(d), Ala. R. Disc. P., provides that a panel shall only act with the concurrence of a majority of its five members, “notwithstanding that fewer than all members are present to conduct the proceeding.” The Court explained that the rule explicitly anticipates a hearing in which fewer than five members of the panel participate. “In light of the foregoing, we cannot conclude that the Board’s findings of fact were clearly erroneous or that its decision was not supported by clear and convincing evidence.” **Clements v. Alabama State Bar**, 21 ALW 28-1 (1101167), 7/6/12, Woodall; Stuart, Bolin, Parker, Murdock, Shaw, Main, and Wise concur; Malone recuses himself, 23 pages. [Appt: Prose; Apee: Tony McLain, Montgomery]

Court of Civil Appeals

No decisions were released by the Alabama Court of Civil Appeals on July 6, 2012.

Court of Criminal Appeals


- ▼ **Court of Criminal Appeals reverses a defendant's DUI conviction and renders judgment, holding that State failed to establish that a traffic checkpoint was carried out pursuant to a previously established neutral and objective plan.**

CRIMINAL LAW: Driving Under the Influence. CONSTITUTIONAL LAW: Search & Seizure. Charles Ogburn was stopped at a traffic checkpoint in Elmore County. He was approached by Alabama State Trooper Eric Salvador. Trooper Salvador noticed the smell of alcohol coming from Ogburn's vehicle. He also noticed unopened beer containers in the extended cab of Ogburn's truck. Ogburn admitted that he had consumed "a couple" of beers. Ogburn was directed to pull into a nearby parking lot. He was approached by another Alabama State Trooper, Kenneth Day. Trooper Day also smelled alcohol and noted that Ogburn's eyes were red. He told Ogburn to get out of the vehicle and after performing four field sobriety tests, he determined that Ogburn was under the influence of alcohol. A breath-alcohol-analysis test revealed that Ogburn's blood-alcohol level was .14. Ogburn was found guilty of driving under the influence of alcohol ("DUI"). He appealed. **Reversed and judgment rendered.** Ogburn asserted that the evidence in this case should have been suppressed because the checkpoint stop violated his constitutional rights under the Fourth Amendment. In *Brown v. Texas*, 443 U.S. 47, 51 (1979), the

Court held that a checkpoint must be "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." In this case, the State did not carry its burden of proving the reasonableness of the checkpoint stop. Written guidelines are not a mandatory requirement of a constitutional checkpoint but are advisable. However, "to satisfy the reasonableness requirement of the Fourth Amendment, the State must present evidence showing that the checkpoint was carried out pursuant to a previously established objective and neutral plan that was designed by higher ranking personnel to limit the conduct of the officers in the field." In this case, there was no evidence of a plan that placed explicit, neutral limitations on the conduct of the officers. The judgment of the trial court is due to be reversed. *Ogburn v. State of Alabama*, 21 ALW 28-2 (CR-11-0085), 6/29/12, Elmore Cty., Burke; Windom and Welch concur; Joiner dissents, with opinion, Kellum joins in dissent, 35 pages. [ATTY: Appt: Keith Howard, Wetumpka; Apee: Michael Dean, Asst. Atty. Gen.]

- ▼ **Court of Criminal Appeals rejects defendant's argument that he was entitled to be appointed counsel for an appeal even though he had fled the jurisdiction of the State prior to his sentencing hearing.**

CRIMINAL PROCEDURE: Sentencing. Anthony Baggett petitioned for postconviction relief pursuant to Rule 32, Ala. R. Crim. P., alleging that although he was absent from his sentencing hearing because he fled the jurisdiction, this did not constitute a waiver of counsel. He alleged that because his claim concerned the denial of counsel rather than



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the ineffectiveness of his counsel, it was jurisdictional. Baggett stated that he was in South Carolina at the time of his sentencing and was not apprehended until after his 42 days to appeal had expired. The circuit court summarily dismissed the petition and Baggett appealed. **Affirmed.** The Court held that because Baggett voluntarily absented himself from the sentencing proceedings by escaping from the jurisdiction, he could not now profit from that action by claiming that the trial court should have appointed him counsel for an appeal. *Thompson v. State*, 12 So.3d 723 (Ala. Crim. App. 2008)[17 ALW 37-14]. The Court held that Baggett, through his actions, voluntarily forfeited any information the trial court was to impart during the sentencing hearing and that he could not now complain that he was not informed of his rights. *Baggett v. State*, 21 ALW 28-3 (CR-11-0873), 7/6/12, Dale Cty., Burke; Windom, Welch, and Kellum concur; Joiner concurs in the result, 7 pages. [ATTY: Appt: Pro se; Apee: Kristi Wilkerson, Asst. Atty. Gen.]

CRIMINAL PROCEDURE: Postconviction Relief. Michael Oliver sought postconviction relief from his guilty plea conviction to second degree assault and his 20-year sentence. Among other things, Oliver alleged that the sentence did not comply with the plea agreement that he would receive a split sentence and serve only three years, that the prosecution and his counsel withheld newly discovered facts favorable to his case until after sentencing, that his counsel was ineffective, and he was denied his right to appeal because his attorney did not come to the jail to see him. The State filed a response and the circuit court entered a written order denying Oliver's petition. Oliver appealed. **Remanded.** First, the Court held that to the extent the circuit court dismissed the petition because there was no evidence to support Oliver's claims, it did so in error because Oliver had no burden of proof at the pleading stage. *See Ford v. State*, 831 So.2d 641 (Ala. Crim. App. 2001)[10 ALW 40-14]. The Court also pointed out that neither the State nor the circuit court addressed all of Oliver's claims, and that undisputed claims "must be taken as true." *Lee v. State*, 723 So.2d 774 (Ala. Crim. App. 1998)[6 ALW 28-43]. Among the claims not addressed were that Oliver was sentenced contrary to his plea agreement, and that his counsel withheld exculpatory evidence from him until after his sentencing. The case was thus remanded to provide Oliver an opportunity to present evidence to support those claims. "After receiving and considering the evidence presented, the circuit court shall issue specific written findings of fact regarding Oliver's claims and may grant whatever relief it deems necessary." *Oliver v. State of Alabama*, 21 ALW 28-4 (CR-10-1605), 6/29/12, Montgomery Cty., Welch; Kellum, Burke, and Joiner concur; Windom concurs in the result, 16 pages. [ATTY: Appt: Not listed; Apee: Cecil Brendle, Jr., Asst. Atty. Gen.]

CRIMINAL LAW: Drug Offenses. Emmett Wallace was convicted of the chemical endangerment of a child and the unlawful manufacture of a controlled substance. He was sentenced to 10 years' imprisonment on each conviction, the sentences to be served concurrently. He appealed. **Affirmed.** (1) Wallace argued that the State failed to present sufficient evidence that the substance was in fact methamphetamine

or that he possessed any precursor chemical. Specifically, he argued that the evidence was insufficient because the State failed to present the testimony of a forensic or scientific expert that the substance was methamphetamine or that he possessed a precursor chemical. Evidence was adduced indicating that Officer Christopher Owenby was investigating a theft when he learned that property from the theft had been pawned at a pawnshop in Montgomery. The pawn ticket had been signed by M.T. and listed a Plum Street address in Montgomery. The house was occupied by Wallace, M.T., and M.T.'s six-year-old daughter, E.T. M.T. gave consent for the officers to search the residence. One of the officers found a box in a closet in a bedroom that was occupied by M.T. and Wallace. Inside the box was a duffel bag and inside the duffel bag was a plastic drink bottle. The substance inside the bottle was bubbling. The officer cleared the home. Detective Benjamin Schlemmer, a narcotics officer, was called to the site. He had over 150 hours of training that focused on the manufacture of methamphetamine. He testified that it was impossible to send methamphetamine to the Department of Forensic Science for evaluation because the chemicals involved were so volatile. Detective Schlemmer further opined that the device discovered in the home was a "one-pot methamphetamine lab." "Alabama has never required direct proof that a substance is a controlled substance to sustain a drug conviction." Chemical tests are not necessary to obtain a drug-related conviction; circumstantial evidence can be used. Here, Detective Schlemmer testified that the plastic bottle and its components were consistent with the materials necessary to build a meth lab. E.T. testified that she had seen Wallace put "medicine" in the bottle and then smoke it. "The State's evidence established beyond a reasonable doubt that Wallace was guilty of the unlawful manufacture of a controlled substance." (2) Wallace next argued that the State failed to prove that he was a "responsible person" as defined in the statute regarding chemical endangerment, Ala. Code 1975, § 26-15-3.2(a). A "responsible person" is defined as "a child's natural parent, stepparent, adoptive parent, legal guardian, custodian, or any other person who has the permanent or temporary care or custody or responsibility for the supervision of a child." In this case, E.T. testified that Wallace was her stepdad. Wallace told police officers that he had lived at the residence for 5 years. "The jury could have inferred that E.T. was under the supervision of her mother and Wallace." (3) Wallace contended that the court erred by failing to give the statutory definition of precursor chemical that is contained in Ala. Code 1975, § 20-2-181. That Code section lists 17 precursor chemicals. The trial court noted that no pattern jury instruction existed for the offense and that the list of precursor chemicals was not exclusive. Wallace was charged with possession pseudoephedrine. The court's instructions were consistent with the indictment and the judgment of the trial court is due to be affirmed. *Wallace v. State of Alabama*, 21 ALW 28-5 (CR-10-1464), 6/29/12, Montgomery Cty., Per curiam; Windom, Kellum, Burke, and Joiner concur; Welch concurs in part and dissents in part, with opinion, 37 pages. [ATTY: Appt: Charles Barfoot, Montgomery; Apee: Not listed]