

## MONTANA CRIMINAL LAW UPDATE

Montana and U.S. Supreme Court Cases  
Decided Between July 1, 2015 and October 1, 2016  
of Importance to City Prosecutors

Presented on October 7, 2016

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### 24/7 Sobriety Program Act

*State v. Spady*, 2015 MT 218 (state appeal; rev'd; oral argument)

- Rejected multiple constitutional challenges to 24/7
- Breath test is a search, but 24/7 Program's pretrial testing regime not per se unconstitutional because State's compelling interest outweighs privacy concerns, which are minimal.
- Court fees associated with 24/7 are not pretrial punishment.
- But state law and due process require that courts conduct an individual assessment of the appropriateness of the condition for each defendant.

### SCOTUS – BAC Testing

*Birchfield v. ND, Bernard v. MN, Beylund v. ND*, 136 S. Ct. 2160

- **Held:** 4<sup>th</sup> A permits warrantless **breath** tests incident to arrest for drunk driving. But warrantless **blood** tests are not permissible incident to arrest.
- Doesn't prohibit civil penalties or evidentiary consequences imposed based on refusal to take blood test, but does prohibit criminal punishment for refusal.
- If breath test isn't available, need warrant or must demonstrate exigent circumstances based on case-specific circumstances (*Schmerber v. CA*).
- *Beylund*-remanded to determine whether his consent was voluntary when it was given with threat of criminal punishment

### Aggravated DUI

#### **State v. Hislop, 2016 MT 130**

- Agg DUI law was passed in 2011. Hislop had license suspended in 2007 for refusal. In 2013, committed new DUI and refused test.
- Agg DUI conviction didn't violate prohibition on ex post facto laws. She was put on notice by passage of law in 2011, and was punished for her 2013 conduct.

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### Breath Test Operator

#### **State v. Poitras, 2015 MT 287**

- Held: The district court correctly reversed the justice court's order excluding the breathalyzer results based on uncontroverted evidence presented by the State, which provided sufficient foundation that the Senior Operators were certified pursuant to the administrative rules when defendant submitted to a breath test
- Relied on statutory presumption that an official duty has been regularly performed

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### DUI's: Blood and BAC Evidence

#### **State v. Hala, 2015 MT 300**

- Held: A blood draw, taken over eight hours after the act of driving, was taken within a reasonable time to give rise to evidentiary inferences at trial for per se DUI under Mont. Code Ann. § 61-8-401(4). Look to totality of circumstances to determine if test was taken in reasonable time.

#### **State v. Allport, 2015 MT 349**

Held: The State presented sufficient foundation for the phlebotomist to testify at trial because the phlebotomist was a qualified individual with offsite supervision, thus, meeting the requirements of Mont. Code Ann. § 61-8-405(1).

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### SCOTUS: Investigative Stops

#### **Utah v. Strieff, 136 S. Ct. 2056**

- This case involved evidence seized incident to a lawful arrest on an outstanding arrest warrant where the warrant was discovered during an investigatory stop later found to be unlawful because the officer lacked reasonable suspicion to conduct the stop.
- The Court held that the evidence did not need to be suppressed "because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest." It was significant that the officer, in initiating the unlawful stop, "was at most negligent"; "there is no evidence that [the] illegal stop reflected flagrantly unlawful police misconduct."

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### Search & Seizure: Terry Stop

#### **State v. Ballinger, 2016 MT 30**

- **Held:** no seizure occurred when an officer "intercepted" a person on the sidewalk and advised he was conducting an investigation. Once the person initially refused to provide identification and the officer demanded that he produce it, a seizure did occur, and the event ripened into a Terry stop.
- Officer had particularized suspicion to support Terry stop b/c Ballinger was walking toward vacant house officer was investigating and Ballinger's explanation for where he was going seemed to be false.

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### Search & Seizure: Consent

#### **State v. Emerson, 2015 MT 254 (Reversed)**

- Emerson went to the sheriff's office to ask a question, and then left. While she was still outside, the sheriff's office received a notice that there was an attempt to locate the car she was driving because the owner had loaned it to a man who the sheriff's office had just arrested, and the owner wanted the car back. Officers asked her to lock the car, give them the keys, and come back into the station to wait until they sorted things out. An officer eventually asked to search her purse and located drugs.
- **Held:** The district court erred by denying Emerson's motion to suppress because Emerson's confession that there was contraband in her purse and her consent to search her purse were obtained as the result of an illegal seizure.

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**PC for Search Warrant;  
Citizen Informant  
State v. Kant, 2016 MT 42**

- Held: Search warrant application contained sufficient probable cause based on a known confidential source (CS) intelligence even though it was unknown if the CS had personal knowledge of the information because the affiant officer corroborated the information through personal surveillance and review of police records.
- **Trial Court correctly applied 3-prong test from State v. Reesman, 2000 MT 243 to determine if PC exists to issue search warrant:**
  - (1) Was informant anonymous or information provided was hearsay? If so, independent corroboration of info. is required;
  - (2) If the informant is not anonymous, was the information provided based upon personal observation of criminal activity or was the information hearsay? If hearsay, independent corroboration is required; and
  - (3) If the information from a non-anonymous informant was gathered by personal observation of criminal activity, is the informant reliable?

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**Particularized Suspicion  
Citizen Informant  
City of Missoula v. Tye, 2016 MT 153**

- Even if some of citizen's report to 911 was later determined false, officer can establish particularized suspicion when report contained sufficient indicia of reliability under *State v. Pratt, 286 Mont. 156, 951 P.2d 37 (1997)*.
- **1) reporter gave name and phone number; 2) report was timely, based on personal observations, & contained a detailed vehicle description; and 3) officer corroborated the information when he saw a vehicle matching the description in the location where reporter described**

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**Particularized Suspicion  
Citizen Informant  
City of Missoula v. Sharp, 2015 MT 289**

- Held: Sharp's rapid acceleration in downtown area at nighttime where pedestrians were present constituted particularized suspicion; officer believed Sharp was speeding (no radar confirmation)
- **§ 46-5-401(1); particularized suspicion:**
  - (1) objective data and articulable facts from which an experienced officer can make certain inferences; and
  - (2) a resulting suspicion that the occupant of the vehicle is or has been engaged in wrongdoing.
- Law does not require certainty that offense committed to justify investigative stop

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Reasonable Grounds;  
License Reinstatement Proceeding

**Brunette v. State, 2016 MT 128**

- **Held:** Officer possessed sufficient reasonable grounds (aka, particularized suspicion) to believe Brunette was driving while impaired + the stop was not pre-textual.
- **The Court rejected claim that the court's findings were infirm and failed to sufficiently consider the factors set forth at M§ 61-8-403(4)(a), MCA.**
- **The Court relied on the doctrine of implied findings to affirm.**

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Statute of Limitations

**State v. 2nd Jud. Dist. Court, 2015 MT 294 [State Appeal; Writ of Sup. Ctl.]**

- **Held:** Statute of Limitations for POSSESSION offense is triggered when possession ceases (i.e., possession of drugs)
- **For purposes of SoL, possession offenses are "continuing offenses"**
- **Holding is specific to illegal possession of wildlife, but similar to drug possession**

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Vehicle Insurance:  
"In Effect" vs. "Has Proof"

**State v. S. Davis, 2016 MT 206**

- **Held:** Sufficient evidence to convict Davis for failing to have insurance based on statement ("I don't have insurance") + act (failing to produce any docs)
- **Def's statement was an admission, not confession (i.e., all elements admitted) so it did not require independent corroboration.**

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### Driving While Suspended

#### **State v. Omyer, 2016 MT 63**

- **Held:** Motor Vehicle Division letters of suspension are admissible under the Rules of Evidence as public records and are not "testimonial hearsay" in violation of the Confrontation Clause.
- **Held:** Driving While Suspended is a strict liability offense; does not require State establish defendant knew their license was suspended

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### DUI; Miscellaneous

#### **State v. Krenning, 2016 MT 202**

- **Held:** Court did not abuse its discretion allowing arresting officer to also testify as Expert Witness on HGN
  - **§ 46-15-322, MCA does not obligate State to designate which of its proposed witnesses are experts (only must disclose names of persons it intends to call).**
- **Held:** Court did not err in rejecting Def proposed instruction (i.e., that refusal does not prove person under the influence) because instructions as a whole fully and fairly instructed the jury.

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### Commenting on Refusal

#### **State v. Favel, 2015 MT 336**

- **Held:** Prosecutor's comments--that Favel's refusal to give breath sample was the equivalent to failing to prove her innocence--were improper and effectively shifted the burden to defendant.
- **Held:** Improper comments deemed harmless because proper jury instructions on burden of proof (def. not required to prove innocence); State repeatedly averred it had burden of proof and relied on other evidence of impairment
- **NOTE:** Without a contemporaneous objection, a motion in limine will sufficiently preserve an issue for appeal only if the moving party obtains a definitive ruling on the issue from the trial court

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### DUI's – Sentence Enhancement

#### **State v. Hancock, 2015 MT 98**

- **Held:** A presumption of validity attached to Hancock's prior conviction; Hancock failed to produce direct evidence that his conviction was invalid; Self-serving statements are insufficient.

#### **State v. Barrett, 2015 MT 303**

- **Held:** Although prior had been reduced from 3<sup>rd</sup> to 2<sup>nd</sup> offense for sentencing, defendant had at least three prior convictions; How an offense is titled is immaterial to calculating number of prior convictions

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### DUI's – Sentence Enhancement

#### **State v. Johnson, 2015 MT 221**

- **Held:** Felony DUI defendant could not just submit an affidavit to establish a prior DUI conviction was infirm and not be subjected to cross-examination as to the affidavit's contents.
- **A DUI Defendant's submission of an affidavit constitutes a waiver of State and Federal right to remain silent as to contents of that affidavit.**

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### Discovery

#### **State v. Crawford, 2016 MT 96**

- **Held:** The district court did not abuse its discretion when it denied Crawford's discovery request.
- **Crawford failed to show that the State suppressed exculpatory or otherwise relevant evidence as required under *Brady*.**

#### **State v. Given, 2015 MT 273**

- **Held:** State complied with discovery requirements [§ 46-15-322(I), MCA] by providing curriculum vitae of expert witness and making her available for deposition.
- **No report created by expert; therefore nothing to disclose.**

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### Discovery

#### **State v. Colvin, 2016 MT 129 (State Appeal; Affirmed)**

- Held: State violated *Brady* when it released victim's vehicle prior to defense inspection when vehicle listed in discovery order
- State did not act in bad faith, but return of the jeep was "reckless"
- State failed to explain in response or attach affidavit explaining WHY jeep may not have contained exculpatory evidence or that evidence may not actually be "lost"

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### Courts of Limited Jurisdiction

#### **State v. Davis, 2016 MT 102**

- Allowing a Non-Lawyer Judge to preside over a court of record from which there is no trial de novo does not violate a defendant's right to due process of law or right to effective assistance of counsel under the state and federal constitutions.
- Petition for certiorari has been filed in the SCOTUS; SCOTUS has requested a response.

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### Misdemeanor Speedy Trial Statute

#### **State v. Thompson, 2015 MT 279**

- Thompson's failure to appear at a court-ordered pretrial conference constituted good cause for vacating the jury trial and rescheduling as a bench trial on the trial court's next available date, which was after the 6-month deadline.

Reminder: MSC clarified in *State v. Heppner*, 2015 MT 15, that a defendant may raise a speedy trial claim under the 6<sup>th</sup> Am. in a misdemeanor case.

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### Misdemeanor Speedy Trial Statute

#### **State v. Krenning, 2016 MT 202**

- **Held:** Good Cause under § 46-13-401, MCA was established when officer "unavailable" to testify when on paid administrative leave
- § 46-13-401(2), MCA is NOT an "absolute right" to trial within 6 months
- Absent "foot-dragging" by the State, the unavailability of a State witness constitutes valid reason for trial delay
- NOTE SHEA, J. dissent

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### Speedy Trial - Length of Delay

#### **State v. Butterfly, 2016 MT 195**

- Escape charge was dismissed in one county. After gap in time, he was charged with escape in a different county. Court held both periods of time count, but gap in the middle does not count.
- Court declined to rule on whether *State v. Topp*, 2003 MT 209 and *State v. Case*, 2013 MT 192, are still good law. Both cases reset the speedy trial clock when charges were dismissed in one court and refiled in another. Could be the rule under statute, but not correct for constitutional analysis.

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### Speedy Trial – crime lab delay

#### **State v. Velasquez, 2016 MT 216**

- **Held:** Defendant's right to speedy trial was violated when the trial was continued three times over defense objections on the State's motions which were all based on a 9-month backlog at crime lab for testing suspected methamphetamine and the State failed to seek alternative testing options.

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### Skype Testimony

#### ***City of Missoula v. Duane, 2015 MT 232***

- In cruelty to animals case, Municipal court allowed testimony of veterinarian via Skype.
- Court held that it was not a Confrontation Clause violation under the circumstances of this case. Requiring witness to travel from CA to MT for three separate trials of codefendants would be prohibitively expensive.
- Also, hallmarks of confrontation were fully met because the proceeding was adversary, witness was present in real time and under oath, and the jury was able to observe her demeanor as she was subject to direct and cross-examination.
- Does not mean Confrontation Clause is always satisfied by Skype testimony. Must demonstrate personal appearance of the witness is impossible/impracticable.

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### Evidence - Transaction Rule and Leading Questions

#### ***State v. Saylor, 2016 MT 226***

- Held: court properly allowed testimony that D yelled at victim during the PFMA and took her car immediately afterwards. It was admissible under § 26-1-103, the transaction rule, because it was inextricably linked and was part of a continuing series of events.
- Held: court didn't abuse its discretion when it allowed the State to lead the witness because she had communication problems.

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### Search Warrant Application

#### ***State v. Kasperek, 2016 MT 163***

- Held: search warrant was supported by probable cause. D argued that his mere presence at the scene of the burglary was not sufficient. But his presence at scene of home when it was burglarized established a "fair probability" that evidence would be found at his home.
- Reiterated that "[a] judge's assessment of the existence of probable cause must be based solely on the statements and facts included in the application." Overruled *Worrall*.

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## Confession

### **State v. Kasperek, 2016 MT 163**

- Officer asked Kasperek whether he wanted to talk about the offense, and he declined. 5 hours later officer in jail talked to him to advise him of the charges, and asked him whether he wanted to talk. D began rapidly talking about offense. Officer stopped him and gave Miranda warnings.
- Held: Wasn't subjected to improper custodial interrogation. Invitation to speak wasn't reasonably likely to elicit an incriminating response, and officer stopped him to provide Miranda warnings. 2<sup>nd</sup> invitation to talk 5 hours later did not fail to honor his constitutional rights.
- Lack of recording didn't require suppression because statements were voluntary and reliable.

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## Multiple Counts

### **State v. Strong, 2015 MT 251**

- Held: Order denying motion to dismiss 3 of 4 counts of Viol. Ord. Protec. affirmed.
- § 46-11-404(1) MCA: multiple counts can be charged
- § 46-11-404(3) MCA: do not have to select between multiple charged counts
- HOWEVER, if offenses are part of a same transaction and one of the exceptions at § 46-11-410(2) MCA apply, then cannot convict defendant of those multiple counts
- § 46-1-201(23), MCA: "same transaction" is conduct consisting of series of acts motivated by common purpose or plan that result in the repeated commission of that same offense.

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## Multiple Counts

- Strong's motive for calls was divorce/custody; t/f same transaction
- Since deemed "same transaction" to prohibit multiple convictions must meet an exception at § 46-11-410(2)(a) – (e)
- § 46-11-410(2)(e) precludes multiple convictions of an offense "defined to prohibit continuing course of conduct."
- § 45-5-626(1), MCA, states that an order of protection is violated when a person violates a provision, which is a *discrete act*, and not continuing course of conduct.
- Strong's argument that 4 calls was merely 1 conversation, was rejected.

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### Multiple Counts

#### **State v. Allen, 2016 MT 185**

- Court did not err in denying motion to dismiss 34/35 counts of VoP.
- **Noted Strong's holding: VoP does not come within multiple conviction prohibitions at § 46-11-410(2)(e) MCA ("continuing course conduct")**
- Court noted distinction between § 46-11-410(1) MCA which permits multiple charges, while § -410(2) prohibits conviction of multiple counts under some circumstances
- **Issue was actually MOOT because defendant pled to once count felony Stalking and was not subject to multiple convictions.**

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### Costs of Appointed Counsel

#### **State v. Gable, 2015 MT 200**

- The district court adequately inquired as to Gable's ability to pay the costs of appointed counsel.
- **Gable's status as indigent, determined only by the OPD, does not bind a court in its statutory obligation to consider a defendant's ability to pay.**
- The record supports court's consideration of ability despite lack of what specific assets available.

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### Restitution; Sufficiency of Proof

#### **State v. McClelland, 2015 MT 281 (Rvrs'd)**

- **Crime Victims Comp. sought restitution for amount the program paid to victim's counselor. Court denied defendant's request to examine the form submitted by the counselor allocating 100% to defendant.**
- **Held: The municipal court erred when it categorically denied Def's request to examine victim's treatment plan form.**
- **"A court faced with an issue of a document that may contain matters of individual privacy must determine the contents of the document and balance the competing interests of privacy and disclosure."**

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### Restitution; Sufficiency of Proof *State v. Hill, 2016 MT 219*

- **Held:** In felony theft of motor vehicle case, the court correctly imposed restitution based on victim's affidavit which stated the "replacement value" was \$2500 relying on the "NADA Guide" and defendant's admission the value was over \$1500 when he pled.
- Court may award restitution even if actual loss is not certain, as long as the loss was derived by use of reasonable methods and best evidence available under the circumstances

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### Guilty Pleas

#### *State v. Langley, 2016 MT 67*

- **Held:** Ambiguities or inconsistencies in plea agreements should be construed in the defendant's favor.
- Because it was ambiguous whether the plea agreement was a (1)(b) agreement allowing the defendant to withdraw his plea or a (1)(c) agreement, the district court erred by not following the required procedures allowing the defendant to withdraw from the plea agreement when the court chose to impose a greater sentence.

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### Guilty Pleas

#### *State v. Warner, 2015 MT 230*

- Warner plead nolo contendere pursuant to a (1)(c) plea agreement (could not withdraw). Plea agreement was contingent upon Warner not committing new offenses. Court allowed State to recommend greater sentence b/c Warner breached plea when he was charged with SIWOC in separate case.
- **Held:** The district court did not err in denying Warner's motion to withdraw his plea when it allowed the State to deviate from its sentencing recommendation after Warner breached the plea agreement. Warner was warned before entering the plea that he could receive the sentence he ultimately received and that he could not withdraw his plea.

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