

# ALBUQUERQUE CRIMINAL LAWYER BLOG

PUBLISHED BY  
**COLLINS & COLLINS, P.C.**  
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February 3, 2010

## The Problem With Under the Limits DWI Arrests in New Mexico

A recent article on KOB.com of Albuquerque addresses an important question, why would Albuquerque police officers arrest drivers for DWI/DUI at a breath alcohol level (BAC) of .04 when the legal limit is .08.

The answer that the writer provides is that "It's all about your performance, and it's up to the cops." You would hope as a citizen that the first part of the explanation is correct, that it is about your performance on the field sobriety tests. The problem is that the second part of the explanation is exactly right, it is entirely up to the cop.

The article also rightly points out that the law states that you may be arrested for DWI/DUI when your ability to drive is impaired to the slightest degree by alcohol. It is yet to be determined what precisely this means, "impaired to the slightest degree." The reality is that it is as the writer suggests up to the cop.

This is the problem and it is very serious problem. It is left to the police officer to determine or opine whether a driver's ability to drive is impaired to the slightest degree. The fact is that the field sobriety tests are susceptible to interpretation at best and outright falsification at worst. The turn on the walk and turn test is not performed just right. The heel and toe did not meet on the 5th, 7th and 9th step of the walk and turn. The driver could not keep his hands at his side during the one leg stand. The driver did not appear to understand or follow one of the many directions given during the fields sobriety tests. And the horizontal gaze nystagmus (HGN) test has potential for abuse at every single step of the process. There simply is no way to prove that the cop misconstrued or falsified the test results.

So what's the problem? Perhaps, the officer is under stress to meet DWI/DUI quotas. This is the most innocent offense. Worst case is that the level of subjectivity in these tests allows the officer to target particular kinds or races of people. There is no check on the officer's discretion. It is entirely up to the officer. And judges are under too much pressure to question the credibility of an officer. The prosecutor cannot dismiss a case that lacks merit. The same news outlet, and probably several others, that printed the article on why under the limits DWI/DUI might occur will print an article the morning following a dismissal of a DWI/DUI that attacks the judge, the prosecutor, and even the cop for not being tough enough on DWI/DUI offenders.

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Impaired to the slightest degree has too much potential for abuse. There are far too many pressures on judges, prosecutors and police to get these convictions. Impaired to the slightest degree is not standard. What does it mean? It means whatever the cop says it means and that is it. The fact is that most are very surprised to hear that .08 is not the true standard. Citizens have a right to expect laws that are precisely drafted so that they can stay within the bounds of the law. The law should set forth a precise standard for DWI. It should not be left to the cop on the street. It is not fair to the cop and it is not fair to the citizen. There simply is no way to predict or plan for such a vaguely written law.

So why doesn't New Mexico just pass a law outlawing drinking and driving, period? What would happen to restaurants and bars? What would happen to tax revenue for the State? There is your answer. It is more cost effective to pass the burden on to the unlucky driver caught in the vagaries of New Mexico's DWI/DUI laws than to risk the loss of tax revenue with drafting a law that reflects the reality of DWI/DUI enforcement in New Mexico and particularly in Albuquerque where it may or may not be a crime to drink even a sip of alcohol and get behind the wheel.

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