

April 5, 2011

DWI Without Driving: Passenger Liability for DWI!

The Albuquerque Police and the Albuquerque District Attorney are getting more and more creative in their charges of DWI. This is nothing new.

In the past, they have charged and convicted individuals for DWI for sleeping off a drunk in their car. They regularly prosecute individuals at breath alcohol levels below, sometimes well below, the .08 legal limits. They have charged at least one driver with DWI for driving while on prescription medication designed to enhance attention and concentration. So it should come as no surprise that they are prosecuting a person of DWI for allegedly allowing another to drive drunk.

In the case of *State v. Janet O'Dell*, Ms. Odell is charged for DWI for allowing her friend to drive drunk. According to news reports, Ms. O'Dell was not even in the car with her friend at the time of his arrest. She was in another car. But she allegedly had given her friend her keys knowing that he was intoxicated. Allegedly she told the officer that she allowed her friend to drive because she was drunker than he was.

The new and creative approach is based upon the 2009 case of *State v. Marquez* where a passenger was charged and convicted for vehicular homicide. The facts of that case were unique and extreme where both the passenger and driver were on a very dangerous binge of drinking and driving that ended in the death of 2 and severe injuries to 5 more in a van that they struck.

In O'Dell's case, she simply handed over the keys. She was according to the report so drunk that she could not figure out how to get out of the second car in which she was found by police. It appears from the news reports that she was neither complicit in getting her friend drunk, nor did she encourage him to drive.

Several questions arise with the O'Dell case. Will this case set precedent allowing all passengers to be charged in a DWI case? How are the passengers to know if the driver was drunk? This is particularly problematic in light of New Mexico's DWI standard of "impaired to the slightest degree." With this standard, a driver may have a breath alcohol level of well below .08 but be impaired under New Mexico law. This is difficult enough but what if the driver is on

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Ritalin or Adderall which is now charged as DWI as in the Ron Bell case? How will a passenger judge impairment in these situations?

Simply put, how is one to know that the driver is impaired by New Mexico's vague, loose and ill-defined standards. In fact, how are they to know if the person is over .08? Should we now all be held to account for failure to measure blood alcohol before entering a vehicle?

What about spouses, girlfriends/boyfriends, business associates, employees? How about an employee who gets in the car with his or her boss after the boss has had a few? What if the boss is known to drink regularly but the employee did not see him drink today? The fact is if the Albuquerque District Attorney is allowed to proceed on this new and incredibly broad theory, then each and every one could be charged with DWI. There is in fact no limit to the hypothetical situations that might lead to a passenger charge of DWI.

DWI is a serious problem. DWI drivers should be punished. But should their friend, family and associates all be taken down with them?

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