

March 24, 2011

The Common Cold and DWI in New Mexico

The recent New Mexico Court of Appeals of *State v. Gurule* once again expands the scope of DWI and DUI. The Court made clear that DWI is a strict liability crime meaning no intent is required. The Court also expanded the strict liability of DWI to "impaired to the slightest degree" cases.

The defendant, Bertha Gurule, was suffering from a cold. She stayed home from work going to her mother's home to be with her mom and sister. Her mother gave her a homebrewed cold remedy which included a shot of bourbon. Ms. Gurule also took some cold medicine. Her sister received a phone call alerting them that a granddaughter was in the hospital. Not realizing that the cold remedy had bourbon or that the cold medicine contained alcohol as many common cold formulas do, Ms. Gurule drove to the hospital. Upon leaving the hospital hours after consumption of the home remedy and the cold medicine, she was stopped and charged with DWI.

There was no breath alcohol score even mentioned in the case suggesting a breath alcohol score below the .08 limits. Ms. Gurule was prosecuted on the "impaired to the slightest degree" standard.

Remarkably, the court determined that DWI, even under the "impaired to the slightest degree" standard, is a strict liability offense. The court made clear that it does not matter whether Ms. Gurule knew that the cold medicine or home remedy contained alcohol. It does not matter that she had no intention of consuming alcohol. And of course under the impaired to the slightest degree standard, it does not matter what her breath or blood alcohol level was at the time of driving.

In this case, there was some liquor involved. However, might it be possible to get a DWI strictly through the use of cold medicine. As the law stands now, sure it is. Recall that drivers are now being convicted of DWI under the same vague and meaningless "impaired to the slightest degree" standard for prescription Ritalin or Adderall, drugs formulated to increase focus and concentration. So was it even necessary to mention the home remedy with bourbon? Why not prosecute drivers for taking cold medicine? After all, many common cold formulas contains alcohol and they can cause drowsiness, as indicated on the label.

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House Bill 392 which would have gotten rid of the "impaired to the slightest degree" standard failed to pass for the third year running. As the law now stands, any alcohol, no matter the source and no matter the level, may lead to a DWI conviction. Worse yet is the very long list of prescription drugs that arguably would impair a driver to the "slightest degree." To this list, one would be prudent to add cold medicine.

Hopefully, House Bill 392 or its equivalent will pass next year. To encourage correction of this legal anomaly, you can contact your legislator. In the alternative, don't get sick or get a home based job, and don't have kids, one might get sick as happened in *State v. Gurule*.

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