LEXSTAT CA VEH 23152

DEERING'S CALIFORNIA CODES ANNOTATED
Copyright (c) 2008 by Matthew Bender & Company, Inc.
a member of the LexisNexis Group.
All rights reserved.

*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
THROUGH 2007-2008 THIRD EXTRAORDINARY SESSION CH. 6 AND
CH. 12 OF THE 2008 REGULAR SESSION APPROVED 4/29/08

VEHICLE CODE
Division 11. Rules of the Road
Chapter 12. Public Offenses
Article 2. Offenses Involving Alcohol and Drugs

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Veh Code § 23152 (2008)

First of 2 versions of this section

§ 23152. (First of two; Operative term contingent) Driving under the influence; Drivers of commercial vehicles

(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle.

(b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.

For purposes of this article and Section 34501.16, percent, by weight, of alcohol in a person's blood is based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.08 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(c) It is unlawful for any person who is addicted to the use of any drug to drive a vehicle. This subdivision shall not apply to a person who is participating in a narcotic treatment program approved pursuant to Article 3 (commencing with *Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code.*

(d) It is unlawful for any person who has 0.04 percent or more, by weight, of alcohol in his or her blood to drive a commercial motor vehicle, as defined in Section 15210.

In any prosecution under this subdivision, it is a rebuttable presumption that the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of driving the vehicle if the person had 0.04 percent or more, by weight, of alcohol in his or her blood at the time of the performance of a chemical test within three hours after the driving.

(e) This section shall become operative on January 1, 1992, and shall remain operative until the director determines that federal regulations adopted pursuant to the Commercial Motor Vehicle Safety Act of 1986 *(49 U.S.C. § 2701* et seq.) contained in *Section 383.51* or *391.15 of Title 49 of the Code of Federal R*egulations do not require the state to prohibit operation of commercial vehicles when the operator has a concentration of alcohol in his or her blood of 0.04 percent by weight or more.

(f) The director shall submit a notice of the determination under subdivision (e) to the Secretary of State, and this section shall be repealed upon the receipt of that notice by the Secretary of State.

HISTORY:

Added Stats 1989 ch 1114 § 25, operative January 1, 1992. Amended Stats 1992 ch ch 974 § 16 (SB 1600), effective September 26, 1992; Stats 1995 ch 455 § 31 (AB 1113), operative term contingent.

NOTES:

Former Sections:

Former § 23152, similar to the present section, was added Stats 1978 ch 790 § 4.5, as *Veh C § 23102*, effective September 18, 1978, operative July 1, 1980, amended Stats 1980 ch 276 § 4, effective June 30, 1980, operative July 1, 1980, ch 661 § 6, ch 1004 § 4, amended and renumbered by Stats 1981 ch 940 § 12, amended Stats 1981 ch 940 § 33, Stats 1982 ch 53 § 26, effective February 18, 1982, ch 1337 § 1, Stats 1989 ch 479 § 3, Stats 1990 ch 708 § 1, and repealed, operative January 1, 1992, by its own terms.

Amendments:

1992 Amendment:

In addition to making technical changes, substituted **(1)** "article and Section 34501.16" for "subdivision, subdivision (d), and Section 34501.1" after "purposes of this" in the first paragraph of subd (b); and **(2)** "*Section 11875) of Chapter 1 of Part 3 of Division 10.5 of the Health and Safety Code*" for "*Section 4350) of Chapter 1 of Part 1 of Division 4 of the Welfare and Institutions Code*" in subd (c).

1995 Amendment:

Substituted "narcotic" for "methadone maintenance" in subd (c).

Historical Derivation:

(a) Former Veh C § 502, as added Stats 1935 ch 764, amended Stats 1947 ch 1452 § 4, Stats 1949 ch 807 § 3, Stats 1951 ch 1676 § 6, Stats 1959 ch 109 § 1, Stats 1957 ch 532 § 2.

(b) Former Veh C § 23102, as enacted Stats 1959 ch 3, amended Stats 1959 ch 1282 § 1, Stats 1963 ch 177 § 1, ch 1990 § 2, Stats 1965 ch 1662 § 1, Stats 1972 ch 92 § 6, Stats 1973 ch 1128 § 2, Stats 1975 ch 385 § 1, Stats 1977 ch 592

§ 2, Stats 1978 ch 790 § 4.

(c) Former Veh C § 23105, as added Stats 1978 ch 790 § 7.5, amended Stats 1980 ch 276 § 12, ch 1004 § 8.

(d) Former Veh C § 23105, as added Stats 1971 ch 1530 § 16, amended Stats 1972 ch 92 § 7, Stats 1973 ch 1128 § 5, Stats 1974 ch 545 § 217, Stats 1977 ch 592 § 3, Stats 1978 ch 790 § 7.

(e) Former Veh C § 23105, as enacted Stats 1959 ch 3, amended Stats 1971 ch 363 § 4.

(f) Stats 1923 ch 266 § 112, as amended Stats 1927 ch 752 § 29, Stats 1929 ch 253 § 44.

(g) Stats 1915 ch 188 § 17, as amended Stats 1917 ch 218 § 13, Stats 1921 ch 147 § 11.

(h) Stats 1913 ch 326 § 17.

Collateral References:

Witkin & Epstein, Criminal Law (3d ed), Defenses § 143,

Witkin & Epstein, Criminal Law (3d ed), Crimes Against the Person § 236, 237, 238, 239, 240.

Note

Stats 1989 ch 1460 provides:

SECTION 1. The Legislature finds and declares that the purpose of this act is to do all of the following:

(a) To provide safety for all persons using the highways of this state by quickly suspending the driving privilege of those persons who have shown themselves to be safety hazards by driving with an excessive concentration of alcohol in their bodies.

(b) To guard against the potential for any erroneous deprivation of the driving privilege by providing an opportunity for administrative review prior to the effective date of the suspension and an opportunity for a full hearing as quickly as possible after the suspension becomes effective.

(c) To place no restriction on the existing ability of a prosecutor to pursue criminal actions pursuant to *Section 23152 or 23153 of the Vehicle Code*.

Stats 2006 ch 832 provides:

SECTION 1. (a) It is the intent of the Legislature that the Commissioner of the California Highway Patrol should amend *Section 1141 of Title 13 of the California Code of Regulations* regarding distinctively painted motor vehicles, including patrol vehicles and motorcycles, used by police and traffic officers to accomplish the enforcement of *Sections 23152 and 23153 of the Vehicle Code*. There is a current emergency in the County of Alameda regarding the use of distinctively marked patrol vehicles and motorcycles. The dark blue painted patrol vehicles and motorcycles currently used by the Alameda County Sheriff's Office do not meet the specifications of *Section 1141 of Title 13 of the California Code of Regulations.* Local courts have indicated that they will consider dismissing driving under the influence charges if the defense raises the issue regarding the color of these motor vehicles. It is the intent of the Legislature to ensure that all distinctively painted patrol vehicles and motorcycles used by police and traffic officers in Alameda County, as well as other jurisdictions, are authorized to enforce *Sections 23152 and 23153 of the Vehicle Code*. Nothing in this section

is intended to diminish the ability of the public to identify these vehicles as law enforcement patrol vehicles and motorcycles.

(b) Regulations to address the concerns expressed in subdivision (a) should be adopted by the Commissioner of the California Highway Patrol in accordance with Chapter 3.5 (commencing with *Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.* The adoption of an amendment to *Section 1141 of Title 13 of the California Code of Regulations*, as an emergency regulation, is necessary to address an emergency and shall be considered by the Office of Administrative Law to be necessary for the immediate preservation of the public peace, health, safety, and general welfare.

Cross References:

Abstract of court record: *Veh C § 1804*.

System to evaluate efficacy of intervention programs for violators: *Veh C § 1821*.

Combined vehicle inspection and sobriety checkpoint: *Veh C § 2814.1*.

Revocation or suspension of license of driving school or instructor: *Veh C § 11110*.

Traffic violation point count: *Veh C § 12810*.

Suspension of license on conviction of drunk or reckless driving or failure to stop: *Veh C § 13201*.

Surrender of license on conviction of drunk driving: *Veh C § 13207*.

Revocation or suspension of license on conviction of drunk driving: *Veh C §§ 13350* et seq.

Restriction of driving privilege: *Veh C § 13352.5*.

Denial or revocation of driver certificates for section violation: *Veh C § 13369*.

Liability for personal injury to or death of owner riding as passenger: *Veh C § 17158*.

Section applicable to trolley coaches: *Veh C § 21051*.

Prohibition against persons under twenty-one driving with specified blood-alcohol concentration: *Veh C § 23136*.

Convictions under former version of this section: *Veh C § 23216*.

Drinking while driving: *Veh C § 23220*.

Drinking in motor vehicle: *Veh C § 23221*.

Possession of opened container in motor vehicle: *Veh C §§ 23222* et seq.

Participation in alcohol education program: *Veh C §§ 23504*, *23520* et seq, *23640*, *23647*, *23655*.

Impoundment of vehicle: *Veh C § 23524*.

Penalties for violations: *Veh C §§ 23536* et seq.

Conditions of probation: *Veh C §§ 23538* et seq, *23600* et seq.

Ignition interlock devices: *Veh C § 23575*.

Procedural provisions: *Veh C §§ 23610* et seq.

Violations as separate offenses: *Veh C § 23620*.

Dismissal of charges: *Veh C §§ 23635*, *23640*.

Alcohol education and prevention penalty assessment: *Veh C §§ 23645* et seq.

Presentence investigation: *Veh C § 23655*.

Surrender of driver's license: *Veh C §§ 23660* et seq.

Violation as misdemeanor: *Veh C § 40000.15*.

Taking arrested person before magistrate: *Veh C § 40302*.

Increased fine for violation of this section committed when highway construction or maintenance actually being performed: *Veh C § 42009*.

Violations by commercial drivers as affecting premiums on private insurance policies: *Ins C § 488*.

Allocation of portion of fine to county alcoholism program: *Pen C § 1463.16*.

Collateral References:

Judicial Council of California Civil Jury Instructions, *CACI No. 709* (Matthew Bender).

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 590, Gross Vehicular Manslaughter While Intoxicated.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2131, Refusal--Enhancement.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2110, Driving Under the Influence.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2100, Driving Under the Influence Causing Injury.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2101, Driving With 0.08 Percent Blood Alcohol Causing Injury.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2111, Driving With 0.08 Percent Blood Alcohol.

Judicial Council of California Criminal Jury Instructions (LexisNexis Matthew Bender), CALCRIM No. 2112, Driving While Addicted to Drug.

Cal Criminal Defense Practice (Matthew Bender) ch 145 "Narcotics and Alcohol Offenses" § 145.02.

1 Witkin Cal. Evidence (4th ed) Introduction § 62.

1 Witkin Cal. Evidence (4th ed) Burden of Proof and Presumptions § 109.

2 Witkin Cal. Evidence (4th ed) Demonstrative, Experimental, and Scientific Evidence §§ 51, 52, 54, 55.

2 Witkin Cal. Evidence (4th ed) Witnesses § 427.

Cal Jur 3d (Rev) Constitutional Law § 324; Criminal Law §§ 55, 1649, 1654, 1655, 1658, 1663, 1675, 2356.

Cal. Legal Forms, (Matthew Bender) § 47.34[3][b].

Law Review Articles:

Control of the drinking driver. *54 ABAJ 555.*

Problem of the drinking driver. *54 ABAJ 995.*

Administration of justice in drunk driving cases. *58 ABAJ 950.*

Homicide committed through operation of motor vehicle while intoxicated. *24 Cal LR 555.*

"Driving" under the influence in California: Mercer v. Department of Motor Vehicles. 28 Cal Western LR 123.

Admissibility of compulsory blood alcohol tests. *6 Hast LJ 212.*

Procedural due process as to drunk driving prosecution. *14 Hast LJ 399.*

Drunk driving problem, and the courts. *25 LA Bar B 163.*

California's new drunk driving laws. *5 LA Law 34.*

Search incident to arrest for traffic violation. 7 Loyola U of LA LR 516.

In vino veritas: The truth about blood alcohol presumptions in state drunk driving law. *64 NYU LR 141.*

A disappearing trace: California's blood alcohol search doctrine. 6 Southwestern U LR 640.

Report of law revision commission--overlapping provisions of Penal and Vehicle Codes relating to taking of vehicles and drunk driving. 1 St BJ 91.

Use of chemical tests for determining intoxication. *1 UCLA LR 610.*

The talisman of In re Tahl: Effects on misdemeanor drunk driving convictions. *7 USF LR 437.*

The Blood Alcohol Breath Test: A Look at Its Admissibility. 6 UWLA 11.

Attorney General's Opinions:

Sobriety test cost as chargeable to counties where arrests made. *2 Ops. Cal. Atty. Gen. 69.*

Change of venue in cases involving violation of section. *4 Ops. Cal. Atty. Gen. 5.*

Authority of Department of Motor Vehicles with respect to revocation, suspension, issue or renewal of operator's license of person convicted a third time of offense of driving motor vehicle while intoxicated. *4 Ops. Cal. Atty. Gen. 34.*

Forfeiture of bail as prior conviction. *7 Ops. Cal. Atty. Gen. 143.*

Respective powers and duties of court and department when more than seven years have intervened between first and second conviction of licensee. *32 Ops. Cal. Atty. Gen. 179.*

Expenses of sheriff in detection of misdemeanor under this section as proper county charge. *36 Ops. Cal. Atty. Gen. 271.*

Absence of requirement of sentencing to less than five days when no prior conviction under this section charged and proved; district attorney's duty to allege prior convictions; absence of time limit as to when prior conviction must have occurred. *39 Ops. Cal. Atty. Gen. 13.*

Lawfulness of arrest after accident for misdemeanor drunk driving and drunkenness in public place, where officer making arrest arrives at scene some time after accident, and suspect is identified as driver by witnesses at scene. *52 Ops. Cal. Atty. Gen. 250.*

Defendants convicted of violating *Veh C, § 23102* in counties which do not elect to provide post-conviction programs have not been denied equal protection of the law. *61 Ops. Cal. Atty. Gen. 550.*

Legislature has preempted the area of law dealing with the punishment and treatment of the drinking driver. No local programs with respect thereto are permissible except those approved pursuant to state law by the State Department of Alcohol and Drug Abuse. Because state law provides for only post-conviction programs, pre-conviction programs are unlawful, and it is the responsibility of the State Department of Alcohol and Drug Abuse not to approve any program having such a component. *61 Ops. Cal. Atty. Gen. 550.*

Preconviction diversion in a first offense misdemeanor "drunk driving" case is currently authorized by state law if the requirements of *Pen. Code, §§ 1001* through *1001.11* are followed. *64 Ops. Cal. Atty. Gen. 179.*

A person sentenced to jail for drunk driving may, if authorized by the county under *Penal Code section 4024.2*, perform 10 hours of labor on public works in lieu of one day of confinement. A person sentenced to a term of 48 hours or of 96 hours for drunk driving may satisfy his or her sentence by performing public labor of 20 or 40 hours, respectively. *66 Ops. Cal. Atty. Gen. 27.*

Riding bicycle on highway while under influence of alcohol, drugs, or both, is infraction which should be charged as violation of *Vehicle Code § 21200(b). 67 Ops. Cal. Atty. Gen. 398.*

Medically qualified person may lawfully refuse to take blood sample from person arrested for drunk driving when directed to do so by arresting officer and subject (a) is unconscious, (b) refuses consent to procedure but indicates that he will not resist it, or (c) indicates that he will forcibly resist it. *68 Ops. Cal. Atty. Gen. 189.*

Peace officer has authority to release person arrested for driving under influence of alcohol by issuing notice to appear in court and accepting written promise to appear; officer is not liable for injury caused by person after such a release. *71 Ops. Cal. Atty. Gen. 46.*

California peace officer may not lawfully use breath testing devices determining concentration of ethyl alcohol in subject's blood prior to subject's arrest unless equipment and procedures used comply with regulations of State Department of Health Services. California peace officer may lawfully use breath testing device determining existence but not concentration of ethyl alcohol in person's blood in making preliminary determinations of sobriety prior to arrest

in enforcement of drunk driving laws. *72 Ops. Cal. Atty. Gen. 226.*

Annotations:

What is a "motor vehicle" within statutes making it an offense to drive while intoxicated. 66 ALR2d 1146.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood. 77 ALR2d 971.

What amounts to violation of drunken driving statute in officer's "presence" or "view" so as to permit warrantless arrest. 74 ALR3d 1138.

What constitutes driving, operating, or being in control of motor vehicle for purposes of driving while intoxicated statutes. 93 ALR3d 7.

Evidence of automobile passenger's blood alcohol level as admissible in support of defense that passenger was contributorily negligent or assumed risk of automobile accident. 5 ALR4th 1194.

Reckless driving as lesser included offense of driving while intoxicated or similar charge. 10 ALR4th 1252.

Destruction of ampoule used in alcohol breath test as warranting suppression of result of test. 19 ALR4th 509.

Drunk driving: motorist's right to private sobriety test. 45 ALR4th 11.

Snowmobile operation as DWI or DUI. 56 ALR4th 1092.

Horizontal gaze nystagmus test: use in impaired driving prosecution. 60 ALR4th 1129.

Driving while intoxicated: "choice of evils" defense that driving was necessary to protect life or property. 64 ALR4th 298.

Cough medicine as "intoxicating liquor" under DUI statute. 65 ALR4th 1238.

Operation of bicycle as within drunk driving statutes. 73 ALR4th 1139.

Challenges to use of breath tests for drunk drivers based on claim that partition or conversion ratio between measured breath alcohol and actual blood alcohol is inaccurate. 90 ALR4th 155.

Driving while intoxicated: subsequent consent to sobriety test as affecting initial refusal. 28 ALR5th 459.

Operation of mopeds and motorized recreational two-, three-, and four-wheeled vehicles as within scope of driving while intoxicated statutes. 32 ALR5th 659.

Applicability, to operation of motor vehicle on private property, of legislation making drunken driving a criminal offense. 52 ALR5th 655.

Assimilation, under assimilative crimes act *(18 U.S.C.A. § 13),* of state statutes relating to driving while intoxicated or under influence of alcohol. 175 ALR Fed 293.

Hierarchy Notes:

Div. 11, Ch. 12 Note

Div. 11, Ch. 12, Art. 2 Note

NOTES OF DECISIONS I. DECISIONS UNDER PRESENT SECTION A. GENERALLY 1. In General 2. Validity; Constitutional Issues 3. Statutory Purpose, Application, and Effect 3.5. Construction with Other Law 4. Revocation of License 5. Search and Seizure; Arrest 6. Sobriety Checkpoints 7. Separate and Included Offenses; Related Offenses 8. Elements of Offense 9. "Driving" Motor Vehicle 10. Intoxication B. PROSECUTION 11. In General 11.5. Sufficiency of Allegations in Petition 12. Evidence, Generally; Burden of Proof 13. Admissibility, Generally 14. Scientific Tests; Blood Tests 14.5. --Partition Ratio 15. Constitutional Rights 16. Weight and Sufficiency of Evidence 17. Evidence of Intoxication 18. Trial, Generally 19. Jury Instructions 20. Verdict, Judgment and Sentence II. DECISIONS UNDER FORMER VEH C § 23102 A. GENERALLY 21. In General 22. Validity 23. Statutory Purpose, Application, and Effect 24. Revocation of License 25. Search and Seizure and Arrest B. FORMS, ELEMENTS, AND SUBJECTS OF OFFENSE 26. In General 27. Separate and Included Offenses; Related Offenses 28. Elements of Offense 29. "Driving" Motor Vehicle 30. Intoxication 14. Scientific Tests; Blood Tests C. PROSECUTION 1. GENERALLY 31. In General 32. Jurisdiction 33. Indictment, Information, or Complaint 34. Election 2. EVIDENCE 35. In General 36. Admissibility, Generally 37. Scientific Tests; Blood Tests 38. Constitutional Rights 39. Weight and Sufficiency 40. Intoxication 41. "Driving" Automobile 3. TRIAL 42. In General 43. Jury Instructions 44. Verdict, Judgment, and Sentence 4. REVIEW 45. In General 46. Appellate Review 47. Prejudicial Error 48. Harmless Error D. CIVIL ACTIONS AND PROCEDURE 49. In General 50. Procedure 51. Weight and Sufficiency of Evidence 52. Questions of Law and Fact 53. Jury Instructions 54. Contributory Negligence of Rider in Vehicle 55. Appeal III. DECISIONS UNDER FORMER VEH C § 23105 A. GENERALLY 56. In General 57. Constitutionality 58. Statutory Purpose 59. Elements of Offense 60. Being Under the Influence of, or Addicted to, a Narcotic Drug B. PROSECUTION 61. In General 62. Burden of Proof 63. Judicial Notice 64. Admissibility of Evidence 65. Weight and Sufficiency of Evidence 66. Appellate Review

I. DECISIONS UNDER PRESENT SECTION

A. GENERALLY

1. In General

The driver of an automobile stopped on a freeway who had driven it to the location in which it was found and who was intoxicated, was properly convicted of attempted driving under the influence (*Pen. Code, § 664*; *Veh. Code, § 23152*, subd. (a)), as against the contention there was no such offense under California law. The attempt statute (*Pen. Code, § 664*) refers to "any crime," and is not limited in its application to crimes made punishable by the Penal Code. Also, *Pen. Code, § 1159*, providing a defendant may be found guilty of an attempt to commit an offense, is not limited to crimes made punishable by the Penal Code. The purpose of the law of attempt is both to penalize conduct which would have been harmful if not fortuitously prevented, and to permit intervention by law enforcement personnel before the harm has occurred. *People v. Garcia (1989, Cal App Dep't Super Ct) 214 Cal App 3d Supp 1, 262 Cal Rptr 915, 1989 Cal App LEXIS 1244.*

Defendant's military driving privileges were suspended for safety-related, civil and remedial purposes. The suspension was not so punitive in form and effect as to qualify as a criminal punishment despite its civil purpose. Double jeopardy did not bar defendant's subsequent prosecution for drunk driving (*Veh C § 23152*, subd. (a)). *United States v. Schiller (1997, 9th Cir Cal) 120 F3d 192, 1997 US App LEXIS 18871.*

Driving under the influence is not a nonviolent drug possession offense. *People v. Campbell (2003, Cal App 6th*

Dist) 106 Cal App 4th 808, 131 Cal Rptr 2d 221, 2003 Cal App LEXIS 297, review gr, depublished *(2003) 134 Cal Rptr 2d 222, 68 P3d 1190, 2003 Cal LEXIS 3357,* review dismissed (2004, Cal) *19 Cal Rptr 3d 827, 99 P3d 5, 2004 Cal LEXIS 9690.*

Two-year administrative license suspension could be enforced, even though the driver pled guilty and received less stringent criminal sanctions for the offenses under *Veh C §§ 23103(a)*, *23103.5* and *23152(b)*. The imposition of the more stringent administrative sanction did not mean that the sanction violated the separation of powers doctrine. *Brierton v. Department of Motor Vehicles (2006, Cal App 4th Dist) 140 Cal App 4th 427, 44 Cal Rptr 3d 480, 2006 Cal App LEXIS 863,* modified, rehearing denied *Brierton v. Department of Motor Vehicles (2006) 2006 Cal. App. LEXIS 1033.*

2. Validity; Constitutional Issues

Enactment of *Veh. Code, § 23152*, subd. (b), which makes it unlawful for any person who has 0.10 percent or more, by weight, of alcohol, in his or her blood to drive a motor vehicle, was a valid exercise of the state's police power. The regulation of drinking drivers in California, a state that experienced 338,344 arrests for "drunk driving" in 1982, was well within the legitimate police power of the Legislature. Scientific evidence and sad experience demonstrate that any driver with a 0.10 percent blood alcohol is a threat to the safety of the public and to himself. Section 23152, subd. (b), represents a legislative determination to that effect, and the 0.10 percent figure fixed by § 23152, subd. (b), is rationally related to the exercise of the state's legitimate police power. *Burg v. Municipal Court (1983) 35 Cal 3d 257, 198 Cal Rptr 145, 673 P2d 732, 1983 Cal LEXIS 269,* cert. denied and appeal dismissed *(1984) 466 US 967, 80 L Ed 2, 104 S Ct 2337, 1984 US LEXIS 2104.*

Under both the federal and state Constitutions, *Veh. Code, § 23152*, subd. (b), which makes it unlawful for any person to drive a vehicle with a blood-alcohol level of 0.10 percent or more, provides adequate notice of the conduct proscribed, and is not void for vagueness. The statute provides a precise standard for law enforcement. Although it is impossible for a person to determine by means of his senses whether his blood-alcohol has reached the "illegal" level of 0.10 percent, the statute provides "fair notice" of the conduct proscribed. The very fact that a person has consumed a quantity of alcohol should notify him that he is in jeopardy of violating the statute. Furthermore, charts are readily available to the public that show with reasonable certainty the number of different alcoholic beverages necessary to reach a blood-alcohol level of 0.10 percent. Accordingly, in a prosecution for violation of § 23152, subd. (b), the trial court properly overruled defendant's demurrer based on the claim the statute failed to give constitutionally adequate notice of the conduct it prohibits. *Burg v. Municipal Court (1983) 35 Cal 3d 257, 198 Cal Rptr 145, 673 P2d 732, 1983 Cal LEXIS 269,* cert. denied and appeal dismissed *(1984) 466 US 967, 80 L Ed 2, 104 S Ct 2337, 1984 US LEXIS 2104.*

Veh. Code, § 23152, subd. (b) (driving with blood alcohol content of 0.10 percent or greater), is not void for vagueness and is not a denial of due process in not providing fair notice of the conduct prohibited. The statute does not require that every person be aware of very specific formulas. There is no showing, nor could there be, that a driver cannot tell when his or her sobriety has been affected to such an extent as to significantly impair driving ability. *People v. Woodard (1983, Cal App Dep't Super Ct) 143 Cal App 3d Supp 1, 192 Cal Rptr 229, 1983 Cal App LEXIS 1840.*

Veh. Code, § 23152, subd. (b) (driving with blood alcohol content of 0.10 percent or greater), is not unconstitutional as a strict liability criminal statute which impermissibly eliminates the element of intent or knowledge. The statute is one of those enacted for the protection of the public health and safety, e.g., traffic and food and drug regulations, in which criminal sanctions are relied upon even if there is no wrongful intent. The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement. Thus, the statute was within the legitimate police power of the state and was directed towards the legislative concern of protection of the public from the consequences of the drinking driver. *People v. Woodard (1983, Cal App Dep't Super Ct) 143 Cal App 3d Supp 1, 192 Cal Rptr 229, 1983 Cal App LEXIS 1840.*

Veh. Code, § 23152, subd. (b) (driving with blood alcohol content of 0.10 percent or greater), when read in

conjunction with *Veh. Code, § 13353* (implied consent law) does not violate the Fifth Amendment rights of an arrestee. The results of a chemical test administered pursuant to § 13353 are not conclusive evidence of guilt for violation of *Veh. Code, § 23152*, subd. (b). It is incumbent upon the prosecution in such a proceeding to prove beyond a reasonable doubt that the defendant had 0.10 percent or more, by weight, of alcohol in his or her blood while driving a motor vehicle upon a highway or upon other than a highway in areas open to the general public. No presumption exists in favor of the validity of the test results. Reasonable doubt may be established in the minds of the trier of fact by the defense attacking the skill, experience and technique of the technician who administered the test, and reliability of the test itself, the dependability of the equipment used, and other trial tactics available to competent counsel. *People v. Woodard (1983, Cal App Dep't Super Ct) 143 Cal App 3d Supp 1, 192 Cal Rptr 229, 1983 Cal App LEXIS 1840.*

Veh. Code, § 23152, which makes it unlawful for any person to drive with a blood alcohol level of 0.10 percent or more, is not void for vagueness. It is grounded on the same well established premise as § 23152, subd. (a) (driving under the influence of alcohol), which assumes the imbiber knows when he or she is under the influence, and thus the statutes can be viewed as proscriptions of the same conduct with different elements of proof. Subdivision (b) gives fair warning of the conduct proscribed, because it is not beyond the ken of the average motorist to conform to the statute by voluntarily acquiring a breath testing device, or by using readily available charts and controlling ingestion. *People v. Lewis (1983, Cal App 4th Dist) 148 Cal App 3d 614, 196 Cal Rptr 161, 1983 Cal App LEXIS 2331.*

Veh. Code, § 23152, subd. (b), which makes it unlawful to drive with a blood alcohol level of 0.10 percent or more, does not create an impermissible conclusive or irrebutable presumption. Although § 23152, subd. (b), proscribes the same conduct as subdivision (a), making it unlawful to drive under the influence of alcohol, when the blood alcohol level is 0.10 percent or higher, subdivision (b) is not merely subdivision (a) in disguise, with a conclusive presumption grafted on. The problems of proof will differ with each offense and so will the jury's verdict on occasion. Subdivision (b) requires no evidence of impairment; subdivision (a) does. Nothing prevents the defendant from challenging the test result under subdivision (b); it is not presumed to be correct or to reflect the actual blood alcohol level at the time of driving. *People v. Lewis (1983, Cal App 4th Dist) 148 Cal App 3d 614, 196 Cal Rptr 161, 1983 Cal App LEXIS 2331.*

Veh. Code, § 23152, subd. (b), prohibiting driving a motor vehicle while having a blood alcohol content of 0.10 percent or more by weight, does not constitute a conclusive presumption, and is therefore not unconstitutional on that ground. The statute defines and proscribes an offense by making it unlawful to drive a motor vehicle with a blood alcohol level of0.10 percent or more, by weight, "by weight" being based on grams of alcohol per 100 milliliters of blood. *Ostrow v. Municipal Court (1983, Cal App 4th Dist) 149 Cal App 3d 668, 197 Cal Rptr 40, 1983 Cal App LEXIS 2418.*

Veh. Code, § 23152, subd. (b), prohibiting driving a motor vehicle while having a blood alcohol content of 0.10 percent or more by weight, is not unconstitutionally vague or uncertain, despite the contention that a person might have difficulty in knowing or determining whether or not his blood level is 0.10 percent of more. The statute specifies with mathematical precision the conduct that is proscribed and there is no uncertainty in the language of the statute. *Ostrow v. Municipal Court (1983, Cal App 4th Dist) 149 Cal App 3d 668, 197 Cal Rptr 40, 1983 Cal App LEXIS 2418.*

Veh. Code, § 23152, subd. (b), prohibiting driving a motor vehicle while having a blood alcohol content of 0.10 percent or more by weight, is a public welfare offense and is therefore not invalid by being punishable despite the absence of criminal intent. The purpose of the statute is to eliminate the danger to the public from a person driving a motor vehicle while having 0.10 percent or higher blood alcohol level, and the danger is the same whether the driver knows or does not know that his blood level is at or above 0.10 percent. *Ostrow v. Municipal Court (1983, Cal App 4th Dist) 149 Cal App 3d 668, 197 Cal Rptr 40, 1983 Cal App LEXIS 2418.*

A highway patrol officer did not violate the Fourth Amendment by requiring a suspected drunk driver to take a blood test at a hospital after he frustrated the officer's attempts to conduct a breath analyzer test. Regardless of whether the terms of the implied consent statute (*Veh C § 23152*) were met, chemical testing without a warrant could occur where, as here, the circumstances required prompt testing, the arresting officer had reasonable cause to believe the

arrestee was intoxicated, and the test was conducted in a medically approved manner incident to a lawful arrest. *People v. Sugarman (2002, Cal App 2d Dist) 96 Cal App 4th 210, 116 Cal Rptr 2d 689, 2002 Cal App LEXIS 745.*

The omission of kava by its name did not render *Veh C § 23152(a)* unconstitutionally vague, as applied to a driver whose blood alcohol was 0.00 but who admitted to drinking 23 cups of kava and whose performance on physical sobriety tests was flawed. Section 23152 described conduct; it did not purport to identify particular drugs, and it was not required constitutionally in this case to do so. Because defendant failed to sustain the burden of proof created by his due process motion to dismiss and because § 23152(a), in conjunction with *Pen C § 312*, conveyed legally sufficient warning about the prohibited conduct, the trial court erred in entering an order of dismissal. *People v. Olive (2001, Cal App) 92 Cal App 4th Supp 21, 112 Cal Rptr 2d 687, 2001 Cal App LEXIS 813.*

Prosecution's use of a prior conviction that occurred approximately nine years before the current offense to enhance defendant's sentence for driving under the influence of alcohol in violation of *Veh C § 23152* did not violate ex post facto principles; although the prior offense period had been extended from seven years to ten years pursuant to *Veh C §§ 23540*, *23546*, defendant was not being punished for the prior conviction but for the subsequent offense. *People v. Forrester (2007, 2d Dist) 156 Cal App 4th 1021, 2007 Cal App LEXIS 1833.*

3. Statutory Purpose, Application, and Effect

The legislative intent underlying the drunk driving statutes (*Veh. Code, §§ 23152*, *23153*) is to deter the intoxicated driver and thus reduce the life threatening hazards caused by such drivers. *Henslee v. Department of Motor Vehicles (1985, Cal App 6th Dist) 168 Cal App 3d 445, 214 Cal Rptr 249, 1985 Cal App LEXIS 2107.*

The object of *Veh. Code, § 23152* (driving while under the influence of controlled substance) is to protect members of the public who use the highways from those who have impaired their ability to drive as the result of substance abuse. result of substance abuse. *People v. Davalos (1987, Cal App Dep't Super Ct) 192 Cal App 3d Supp 10, 238 Cal Rptr 50, 1987 Cal App LEXIS 1760.*

In enacting *Veh. Code, § 23152*, subd. (b) (rebuttable presumption regarding driver's blood-alcohol concentration (BAC) when test performed within three hours of driving), the Legislature intended to diminish the arguments that had arisen when extrapolating the BAC at the time of a test back to the time of the driving. The Legislature intended to close a potential loophole in the current law, whereby a person could claim that he or she had consumed alcohol which had not yet been absorbed into the bloodstream while the person was operating the vehicle, but which later raised the BAC. The statute was intended to recognize that alcohol concentrations dissipate over time, so that a person whose BAC exceeded the permissible concentrations at the time of the test was likely to have had unlawfully high blood-alcohol levels when driving. *Bell v. Department of Motor Vehicles (1992, Cal App 1st Dist) 11 Cal App 4th 304, 13 Cal Rptr 2d 830, 1992 Cal App LEXIS 1389,* rehearing denied (1992, Cal App 1st Dist) *1992 Cal App LEXIS 1486,* review denied (1993, Cal) *1993 Cal LEXIS 1538.*

Assimilative Crimes Act, which is used to conform criminal law of federal enclaves to that of local law where a specific federal crime has not been set forth, was improperly invoked as means of applying state statute enhancing penalty for repeated violation of state drunk driving statute, where such punishment exceeded that authorized under existing federal penal law. *United States v. Palmer (1992, 9th Cir Cal) 956 F2d 189, 1992 US App LEXIS 1063.*

Evidence of a victim's intoxication under the .08 blood-alcohol standard contained in *Veh. Code, § 23152(b)*, was properly excluded at both the guilt and penalty phases of a first-degree sodomy murder trial. The proffered evidence would have had little impact on lay jurors, who presumably know as well as any expert how to assess the effect of alcohol on impulse and inhibitions. *People v. Stitely (2005) 35 Cal 4th 514, 26 Cal Rptr 3d 1, 108 P3d 182, 2005 Cal LEXIS 2827,* cert den *(2005) 126 S. Ct. 164, 163 L. Ed. 2d 151, 2005 U.S. LEXIS 5667, 74 U.S.L.W. 3206.*

3.5. Construction with Other Law

Under former Veh C § 23158.2(a), if a peace officer arrests any person for a violation of *Veh C §§ 23152* or *23153*, the peace officer shall immediately forward to the Department of Motor Vehicles a sworn report of all information relevant to the enforcement action, including information which adequately identifies the arrested person, a statement of the officer's grounds for belief that the person violated §§ 23152 or 23153, and a report of the results of any chemical tests which were conducted on the person. *Wheeler v. Department of Motor Vehicles (1994, 4th Dist) 34 Cal App 4th 228, 45 Cal Rptr 2d 462,* disapproved on other grounds *Lake v. Reed (1997) 16 Cal 4th 448, 65 Cal Rptr 2d 860, 940 P2d 311, 1997 Cal LEXIS 4413.*

Trial court properly declined an evaluation for commitment to the California Rehabilitation Center (CRC) for a defendant who was convicted of driving under the influence of alcohol because, as defined in *H & S C § 11019*, a "narcotic drug" did not include alcohol. *People v. Chavez (2004, Cal App 4th Dist) 116 Cal App 4th 1, 10 Cal Rptr 3d 556, 2004 Cal App LEXIS 222,* review denied (2004, Cal) *2004 Cal LEXIS 4136.*

Conviction of misdemeanor driving while under the influence of drugs constitutes a misdemeanor not related to the use of drugs that, pursuant to *Pen C § 1210.1(b)(2)*, disqualifies a defendant from receiving the alternative disposition provided in *Pen C § 1210.1(a)*. *People v. Canty (2004) 32 Cal 4th 1266, 14 Cal Rptr 3d 1, 90 P3d 1168, 2004 Cal LEXIS 4668.*

Misdemeanor conviction for driving with a blood-alcohol level of 0.08 percent or higher in violation of *Veh C § 23152(b)* is a misdemeanor conviction involving the threat of physical injury to another person within the meaning of *Pen C § 1210.1(b)(1)* and precludes probation for a nonviolent drug possession offense, even without any additional evidentiary showing. *People v. Eribarne (2004, Cal App 5th Dist) 124 Cal App 4th 1463, 22 Cal Rptr 3d 417, 2004 Cal App LEXIS 2158,* review denied (2005, Cal) *2005 Cal LEXIS 3495.*

Previous misdemeanor conviction for driving with a blood-alcohol level of 0.08 percent or higher in violation of *Veh C § 23152(b)* rendered defendant ineligible under *Pen C § 1210.1(b)(1)* for probation on a methamphetamine possession charge; no additional evidentiary showing was required to demonstrate that defendant endangered others while driving under the influence. *People v. Eribarne (2004, Cal App 5th Dist) 124 Cal App 4th 1463, 22 Cal Rptr 3d 417, 2004 Cal App LEXIS 2158,* review denied (2005, Cal) *2005 Cal LEXIS 3495.*

4. Revocation of License

Veh C § 23102 subd (a), misdemeanor drunk driving, and *Veh C § 13353* the implied consent statute, are independent. While both are aimed at preventing drunk driving, both statutes punish the violator for a different illegal activity. Thus, a conviction for drunk driving in violation of § 23102 subd (a), does not prevent the sanction of § 13353. *Covington v. Department of Motor Vehicles (1980, Cal App 2d Dist) 102 Cal App 3d 54, 162 Cal Rptr 150, 1980 Cal App LEXIS 1464.*

A revocation order would be set aside despite the fact that it was based on refusal to submit to chemical testing, where the officer who arrested the driver did not see the driver's vehicle move. The driver was not lawfully arrested for a violation of *Veh. Code, § 23152*, subd. (a), and thus could not be subjected to the license revocation provisions of *Veh. Code, §§ 13353*, *23157*. *Mercer v. Department of Motor Vehicles (1991) 53 Cal 3d 753, 280 Cal Rptr 745, 809 P2d 404, 1991 Cal LEXIS 1722.*

The Department of Motor Vehicles is required to immediately suspend or revoke, or record the court-administered suspension or revocation of, the privilege of any person to operate a motor vehicle upon receipt of a duly certified abstract of the record of any court showing that the person has been convicted of a violation of *Veh C § 23152*, pursuant to *Veh C § 13352(a)*. *Baldwin v. Department of Motor Vehicles (1995, Cal App 1st Dist) 35 Cal App 4th 1630, 42 Cal Rptr 2d 422, 1995 Cal App LEXIS 573,* rehearing denied (1995, Cal App 1st Dist) *36 Cal App 4th 454, 42 Cal Rptr 2d 422, 1995 Cal App LEXIS 629.*

The Department of Motor Vehicles can suspend a person's driving privilege pursuant to *Veh C § 13353.2* for a breath-alcohol result expressed as grams of alcohol per 210 liters of breath instead of blood-alcohol concentration. The criminal provisions of *Veh C § 23152* are intertwined with the suspension of driving privilege provisions of § 13353.2. It is the violation of § 23152 that triggers the obligation of the DMV to suspend a person's driving privilege. The relationship between the two statutes thus dictates that they be harmonized so as to promote their common purpose of combating drunk driving. Notwithstanding the literal words of § 23152(b), the amended definition, which permits expression of breath-alcohol results in terms of either grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath, applies to administrative hearings. *Kerollis v. Department of Motor Vehicles (1999, Cal App 1st Dist) 75 Cal App 4th 1299, 89 Cal Rptr 2d 826, 1999 Cal App LEXIS 956,* review denied (2000, Cal) *2000 Cal LEXIS 1013.*

In an administrative proceeding involving a driver who was convicted in Colorado of driving while ability impaired and who was later convicted in California of driving while intoxicated (*Veh C § 23152*), the prior Colorado conviction was properly used to enhance the driver's license suspension to one year (*Veh C § 13353.3(b)(2)*), since there was substantial similarity between the California and Colorado statutes (*Veh C §§ 15023*, *13363(b)*). *McDonald v. Department of Motor Vehicles (2000, Cal App 4th Dist) 77 Cal App 4th 677, 91 Cal Rptr 2d 826, 2000 Cal App LEXIS 25.*

The trial court properly ordered the DMV to revoke the suspension of plaintiff's driver's license, which action was taken after he was arrested for driving under the influence of alcohol (*Veh C § 23152*), where the county sheriff's Scientific Investigation Division (SID) report was the only evidence of plaintiff's blood-alcohol level and where authentication was lacking because the document bore neither a signature nor a seal (*Ev C § 1452*). Although an emblem was stamped on the SID report, it did not meet the statutory definition of a seal, since there can be no seal of a document that has not been subscribed. *Jacobson v. Gourley (2000, Cal App 4th Dist) 83 Cal App 4th 1331, 100 Cal Rptr 2d 349, 2000 Cal App LEXIS 771.*

In a license revocation hearing following a driver's arrest for driving under the influence of alcohol, the driver failed to rebut the presumption set forth in *Cal. Veh. Code § 23152*; a report taken within three hours of his arrest showed his blood alcohol concentration was 0.13 percent. *Komizu v. Gourley (2002, Cal App 1st Dist) 103 Cal App 4th 1001, 127 Cal Rptr 2d 229, 2002 Cal App LEXIS 5017.*

5. Search and Seizure; Arrest

An arrest for driving with a 0.10 percent or more blood alcohol level under *Veh. Code, § 23152*, subd. (b), requires a showing of probable cause neither greater nor less than that which must be demonstrated in order to effect a valid arrest for any other public offense. With respect to legislative intent, the enactment of § 23152, subd. (b) was not accompanied by any indicia of intent to repeal the "reasonable cause" requirement for arrest under *Pen. Code, § 836.1*. Further, if a lesser degree of probable cause were permitted for arrests under *Veh. Code, § 23152*, subd. (b), constitutional questions would inevitably arise. For example, effective prosecution under the statute would be jeopardized by the possibility of exclusion of evidence, under *U.S. Const., Fourth Amend.*, that was the fruit of an illegal arrest. Arrest on less than reasonable cause would contravene the elementary rule of constitutional law that a state may not exercise its power in a manner which is incompatible with the federal Constitution and the basic rights of its citizens. Finally, it is doubtful that such discriminatory treatment would be able to meet an equal protection challenge. *People v. Trevisanut (1984, Cal App Dep't Super Ct) 160 Cal App 3d Supp 12, 207 Cal Rptr 921, 1984 Cal App LEXIS 2631.*

In a proceeding for a writ of mandamus to overturn the suspension of plaintiff's driver's license pursuant to *Veh. Code, § 13353* (refusal to submit to chemical test), the trial court erred in determining that plaintiff had not been lawfully arrested for a violation of *Veh. Code, § 23152* (driving under the influence). Plaintiff had tried to exit a parking facility the wrong way and had damaged the facility's entrance gate. When a police officer was called to the scene, the parking attendant signed a citizen's arrest form that indicated he was arresting plaintiff for malicious mischief and

vandalism. The misdemeanor of driving under the influence occurred in the attendant's presence, and he could have lawfully arrested plaintiff for that offense. Although the attendant did not expressly arrest plaintiff for driving under the influence, he impliedly delegated his authority to do so to the police officer. The citizen's arrest form was not dispositive, nor was the attendant's statement to the officer that he wanted plaintiff arrested for vandalism. He witnessed the offense, summoned the officer, reported his observations, and pointed out the suspect. While he did not utter or write the "magic words," the substance of his actions constituted a valid citizen's arrest. Further, given plaintiff's conduct, there was probable cause to arrest him. Also, the arrest was not unlawful for failure to inform plaintiff of the reason therefor (*Pen. Code, § 841*), since the circumstances justifying the arrest and the arrest itself constituted one brief and continuous course of events. *Johanson v. Department of Motor Vehicles (1995, Cal App 1st Dist) 36 Cal App 4th 1209, 43 Cal Rptr 2d 42, 1995 Cal App LEXIS 669,* rehearing denied (1995, Cal App 1st Dist) *37 Cal App 4th 641, 1995 Cal App LEXIS 777.*

The Department of Motor Vehicles may not suspend or revoke a driving privilege under *Veh. Code, § 13353* (refusal to submit to chemical test), unless the driver was lawfully arrested for a violation of *Veh. Code, § 23152* (driving under the influence). Since a warrantless arrest by a peace officer for a misdemeanor is lawful only if the officer has reasonable cause to believe the misdemeanor was committed in the officer's presence, the officer must see the vehicle move. *Johanson v. Department of Motor Vehicles (1995, Cal App 1st Dist) 36 Cal App 4th 1209, 43 Cal Rptr 2d 42, 1995 Cal App LEXIS 669,* rehearing denied (1995, Cal App 1st Dist) *37 Cal App 4th 641, 1995 Cal App LEXIS 777.*

Police officer did not have a reasonable suspicion to stop defendants' vehicle for driving under the influence in violation of *Veh Code § 23152*, and therefore the methamphetamine found in the vehicle should have been suppressed, because the vehicle did not demonstrate pronounced weaving, the officer observed the vehicle for only 35 to 45 seconds, and the officer did not conduct a sobriety field test or ask if defendant had been drinking. *United States v. Colin (2002, 9th Cir Cal) 314 F3d 439, 2002 US App LEXIS 27180.*

Because a city did not have exclusive traffic enforcement powers, neither the authorization of statewide enforcement power for campus police officers under *Pen C § 830.2(c)* nor the limitation of the primary exercise of this power under *Ed C § 89560* to areas within one mile of campuses conflicted with the city's law enforcement powers; as a result, a campus police officer had the statutory authority to stop and to subsequently arrest a driver for driving under the influence of alcohol in violation of *Veh C § 23152*. *Brierton v. Department of Motor Vehicles (2005, Cal App 4th Dist) 130 Cal App 4th 499, 30 Cal Rptr 3d 275, 2005 Cal App LEXIS 985,* rehearing denied (2005, Cal App 4th Dist) *2005 Cal App LEXIS 1040,* review denied (2005, Cal) *2005 Cal LEXIS 11339.*

Police officer acted reasonably by briefly stopping defendant's vehicle to investigate whether defendant was impaired, and thus the court rejected defendant's claim that the trial court erred in denying a motion to suppress evidence in connection with defendant's trial for possession of heroin and misdemeanor driving under the influence of a controlled substance in violation of *H & S C § 11350(a)* and *Veh C § 23152*; under the totality of the circumstances, an anonymous tip, as corroborated, was sufficiently reliable to justify the investigatory stop of defendant's vehicle because (1) the quantity of the information included in the tip, coupled with the officer's stopping of the vehicle within two or three minutes at the location it would have been expected to be based on the tip, was sufficiently precise, (2) the driving violation reported, a possibly under the influence driver, was the sort of traffic violation that compelled an immediate stop to protect both the driver and the public, and (3) the information provided to dispatch indicated, by inference, that the caller was reporting a contemporaneous eyewitness observation and the officer was able to corroborate its innocent details within minutes of the report. *People v. Wells (2004, Cal App 5th Dist) 122 Cal App 4th 155, 18 Cal Rptr 3d 605, 2004 Cal App LEXIS 1507,* review gr, depublished (2004, Cal) *22 Cal Rptr 3d 516, 102 P3d 903, 2004 Cal LEXIS 11894,* aff'd, superseded *(2006) 38 Cal 4th 1078, 45 Cal Rptr 3d 8, 136 P3d 810, 2006 Cal LEXIS 7815.*

In California, driving under the influence (DUI) is not an extremely minor offense. The Supreme Court of California believes that *Welsh v. Wisconsin, 80 L Ed 2d 732, 104 S Ct 2091, 466 U.S. 740, 1984 US LEXIS 82 (1984)* was limited to Wisconsin's decision to classify DUI as a civil nonjailable offense and not as a categorical bar on

warrantless arrests in the home for DUI in the vast majority of states that, like California, classify it as a crime with the possibility of imprisonment. *People v. Thompson (2006) 38 Cal 4th 811, 43 Cal Rptr 3d 750, 135 P3d 3, 2006 Cal LEXIS 6515,* cert den (2006, US) *166 L Ed 2d 317, 127 S Ct 446, 2006 US LEXIS 7886.*

6. Sobriety Checkpoints

The detention incident to the operation of sobriety checkpoints or sobriety roadblocks constitutes a "seizure" within the meaning of *U.S. Const., 4th Amend.*, prohibiting unreasonable searches and seizures. *People v. Banks (1993) 6 Cal 4th 926, 25 Cal Rptr 2d 524, 863 P2d 769, 1993 Cal LEXIS 6373.*

In a prosecution for driving under the influence of alcohol (Veh. Code, former § 23152, subds. (a) & (b)), the trial court properly denied defendant's motion to suppress evidence obtained at a sobriety checkpoint, even though the establishment of the checkpoint was not preceded by advance publicity. The United States Supreme Court has determined that, under the federal Constitution, advance publicity is not an essential element of a valid sobriety checkpoint. The presence or absence of advance publicity is irrelevant to the objective intrusion occasioned by a sobriety checkpoint, and, although advance publicity of the location of a checkpoint may serve to minimize the surprise or inconvenience of motorists alerted by the publicity, advance publicity is not a constitutional prerequisite to ensuring that the subjective intrusion involved is confined to a reasonable level. Moreover, although a court may be persuaded that advance publicity will increase the deterrent value of a checkpoint and thereby increase the procedure's effectiveness, the constitutionality of the checkpoint does not depend on such judicial evaluation of its effectiveness. *People v. Banks (1993) 6 Cal 4th 926, 25 Cal Rptr 2d 524, 863 P2d 769, 1993 Cal LEXIS 6373.*

The primary purpose of a sobriety checkpoint is to prevent and deter conduct injurious to persons and property. The validity of such checkpoints is determined by a constitutional test of reasonableness, under which the public interest served by the checkpoints and the degree to which they advance the public interest are balanced with the intrusiveness on individual liberties that they engender. Deterring drunk driving and identifying and removing drunk drivers from the roadways undeniably serve a highly important governmental interest, and sobriety checkpoints advance this interest. *People v. Banks (1993) 6 Cal 4th 926, 25 Cal Rptr 2d 524, 863 P2d 769, 1993 Cal LEXIS 6373.*

For purposes of determining the validity of sobriety checkpoints under the constitutional test balancing the public interest served by the checkpoints and the degree to which they advance the public interest with the intrusiveness on individual liberties that they engender, there are eight factors important in assessing intrusiveness: whether the decisions with respect to the establishment of a sobriety checkpoint are made by supervisory law enforcement personnel; whether motorists are stopped according to a neutral formula; whether adequate safety precautions are taken; whether the location of the checkpoint is determined by a policymaking official, and is reasonable; whether the time the checkpoint is conducted and its duration reflect "good judgment" on the part of law enforcement officials; whether the checkpoint exhibits sufficient indicia of its official nature; whether the average length and nature of the detention is minimized; and whether the checkpoint is preceded by publicity. *People v. Banks (1993) 6 Cal 4th 926, 25 Cal Rptr 2d 524, 863 P2d 769, 1993 Cal LEXIS 6373.*

Under the three-prong constitutional test of the reasonableness of a sobriety checkpoint, which requires that the public interest served by the checkpoint and the degree to which it advances the public interest be balanced with the intrusiveness on individual liberties that it engenders, the second prong need not be applied in accordance with a judicial determination as to the effectiveness of the checkpoint program. The test, as established by the United States Supreme Court, was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. For purposes of analysis under *U.S. Const., 4th Amend.*, the choice among reasonable alternative methods of apprehending drunk drivers remains with the governmental officials who have a unique understanding of, and responsibility for, limited public resources. *People v. Banks (1993) 6 Cal 4th 926, 25 Cal Rptr 2d 524, 863 P2d 769, 1993 Cal LEXIS 6373.*

Language contained in a judicial opinion is to be understood in the light of the facts and issue then before the court, and an opinion is not authority for a proposition not therein considered. Thus, although the statement of facts in a United States Supreme Court decision, upholding the validity of sobriety checkpoints, indicated the sobriety checkpoint at issue was established under guidelines providing for some publicity, since the court's opinion placed no reliance on, and indeed made no reference to, any advance publicity that might have been provided regarding the checkpoint, the opinion reasonably must be understood to hold that advance publicity is not a prerequisite to a constitutionally valid sobriety checkpoint program. *People v. Banks (1993) 6 Cal 4th 926, 25 Cal Rptr 2d 524, 863 P2d 769, 1993 Cal LEXIS 6373.*

7. Separate and Included Offenses; Related Offenses

Veh. Code, § 23152, subd. (b) which makes it unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a motor vehicle, establishes a new offense, separate from the offense of driving while under the influence of alcohol (*Veh. Code, § 23152*, subd. (a)). *Burg v. Municipal Court (1983) 35 Cal 3d 257, 198 Cal Rptr 145, 673 P2d 732, 1983 Cal LEXIS 269,* cert. denied and appeal dismissed *(1984) 466 US 967, 80 L Ed 2, 104 S Ct 2337, 1984 US LEXIS 2104.*

On defendant's motion under *Pen. Code, § 853.6*, subd. (e)(3), which provides that the failure of the prosecutor to file the notice to appear or a formal complaint in the municipal or justice court within 25 days of a misdemeanor arrest shall bar prosecution of the misdemeanor, the trial court properly refused to dismiss a charge of driving with a blood-alcohol level of 0.10 percent or more (*Veh. Code, § 23152*, subd. (b)), where the police arrested defendant for driving under the influence of an alcoholic beverage or any drug (*Veh. Code, § 23152*, subd. (a)), the arresting officer specified that offense in the notice to appear, and the prosecutor subsequently amended the notice to appear by adding the charge for driving with a blood-alcohol level of 0.10 percent or more, even though the prosecutor did not file the amended notice to appear until 39 days after defendant's arrest. The offense of driving with a blood-alcohol level 0.10 percent or more is not the same offense as driving under the influence of an alcoholic beverage or any drug, since a driver with a blood-alcohol level of 0.10 percent or more commits an offense under *Veh. Code, § 23152*, subd. (b), even though he may have the ability to drive his vehicle with caution characteristic of a sober person of ordinary prudence, under the same or similar circumstances, and thus not be guilty of driving under the influence of an alcoholic beverage or any drug (*Veh. Code, § 23152*, subd. (a)). Thus the essence of the two offenses is different and the failure to prosecute one offense timely does not bar the later prosecution of the uncited offense. *Wallace v. Municipal Court (1983, Cal App 3d Dist) 140 Cal App 3d 100, 189 Cal Rptr 886, 1983 Cal App LEXIS 1419.*

Veh. Code, § 23152, subd. (b), making it unlawful for a person with 0.10 percent or more of alcohol to drive a vehicle establishes a new and separate offense, does not provide a mere alternative definition of "driving under the influence," and does not constitute a lesser included offense of that proscribed in *Veh. Code, § 23152*, subd. (a), making it unlawful for a person to drive a vehicle under the influence of an alcoholic beverage. Accordingly, it remains a prosecutorial function to determine whether a defendant is to be charged with violating one or both subdivisions, and dual convictions are both possible and proper. *People v. Duarte (1984, Cal App 5th Dist) 161 Cal App 3d 438, 207 Cal Rptr 615, 1984 Cal App LEXIS 2672.*

8. Elements of Offense

The corpus delicti of the offense of driving under the influence of alcohol (*Veh. Code, § 23152*, or former Veh. Code, § 23102, subd. (a)) is established by a prima facie showing that an individual, while under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, drove a vehicle on a highway. Thus, where the only witness to an automobile accident saw two men thrown from the automobile and was unable to identify defendant as the driver, and where other than defendant's own statements there was no proof whatsoever that defendant was the driver of the vehicle, the prosecution did not establish the corpus delicti of the crime of driving under the influence. Consequently, the trial court erred in permitting testimony regarding defendant's admission that he was the driver of the vehicle. *People v. Nelson (1983, Cal App Dep't Super Ct) 140 Cal App 3d Supp 1, 189 Cal Rptr 845,*

1983 Cal App LEXIS 1481.

Department of Motor Vehicles exceeded its jurisdiction by imposing a one-year suspension of a driver's commercial operator license pursuant to *Cal. Veh. Code § 15300*, subd. (a)(1) based on his conviction of *Cal. Veh. Code § 23152*, subd. (b) of driving a vehicle with an .08 percent blood alcohol concentration; the offense for which the driver pled no contest lacked the element that the driver be under the influence of alcohol at the time of the violation necessary to authorize the one-year suspension. *Hamilton v. Gourley (2002, Cal App 3d Dist) 103 Cal App 4th 351, 126 Cal Rptr 2d 652, 2002 Cal App LEXIS 4901,* review denied (2003, Cal) *2003 Cal LEXIS 1141.*

Corpus delicti of the crime of driving under the influence was established by the evidence because an inference that the car was driven was supported by its running engine and lighted headlights, and because an inference that the driver was under the influence was supported by the stipulation that defendant was under the influence and the fact that the only other person in the vicinity was sitting in the passenger seat with her seatbelt buckled. *People v. Martinez (2007, 2d Dist) 156 Cal App 4th 851, 2007 Cal App LEXIS 1820.*

9. "Driving" Motor Vehicle

Veh C § 23152 was not an invalid strict liability criminal statute even though it described only the prohibited act without reference to any intent to do a further act or to achieve a future consequence; the legislative omission of an express intent requirement in § 23152(b) meant that the statute was a general criminal intent statute requiring a general intent to drive, not a specific intent to drive a vehicle while knowingly under the influence. *People v. Lujan (1983, Cal App Dep't Super Ct) 141 Cal App 3d Supp 15, 192 Cal Rptr 109, 1983 Cal App LEXIS 1587.*

The term "drive" within the meaning of *Veh. Code, § 23152*, subd. (a) (driving under the influence) includes the situation where an intoxicated individual actively asserts control over a vehicle and takes every step necessary to resume travel along the public road. Thus as a matter of law, a woman "drove" her vehicle in the presence of an arresting officer and her arrest for driving while intoxicated was lawful, where the evidence was undisputed that the officer found the woman sleeping in the driver's seat of her vehicle with the motor running and lights on, the vehicle was parked facing the wrong direction in a traffic lane, and when the woman awoke she briefly spoke to the officer and then affirmatively placed the vehicle's transmission into drive, which caused the car to move forward several inches. *Henslee v. Department of Motor Vehicles (1985, Cal App 6th Dist) 168 Cal App 3d 445, 214 Cal Rptr 249, 1985 Cal App LEXIS 2107.*

The word "drive" as used in *Veh. Code, § 23152*, subd. (a), prohibiting drunken driving, is not impermissibly vague. A reasonable person would construe the phrase "to drive a vehicle" in the statute as encompassing any act or action which is necessary to operate the mechanism and controls and direct the course of a motor vehicle. *People v. Wilson (1985, Cal App Dep't Super Ct) 176 Cal App 3d Supp 1, 222 Cal Rptr 540, 1985 Cal App LEXIS 2951.*

Observed movement of a vehicle is not necessary to support a conviction for "drunk driving" under *Veh. Code, § 23152*. *Mercer v. Department of Motor Vehicles (1991) 53 Cal 3d 753, 280 Cal Rptr 745, 809 P2d 404, 1991 Cal LEXIS 1722.*

The trial court did not err in issuing a writ of mandate directing the Department of Motor Vehicles to set aside its order revoking a driver's license. A police officer had found the driver slumped over the steering wheel of his car; the engine was running and the car was legally parked. The officer arrested the driver for driving under the influence of alcohol (*Veh. Code, § 23152*, subd. (a)) and advised that he was obligated to submit to chemical testing. The revocation order was based on his refusal to submit. Under *Pen. Code, § 836*, subd. 1, a misdemeanor arrest without warrant is permissible only if a public offense occurs in the officer's presence. Because the officer who arrested the driver did not see the driver's vehicle move, the driver was not lawfully arrested for a violation of *Veh. Code, § 23152*, subd. (a), and thus could not be subjected to the license revocation provisions of *Veh. Code, §§ 13353*, *23157*. *Mercer v. Department of Motor Vehicles (1991) 53 Cal 3d 753, 280 Cal Rptr 745, 809 P2d 404, 1991 Cal LEXIS 1722.*

Because *Veh. Code, § 23152* (driving under the influence), is a penal statute, it should be strictly rather than broadly construed. Thus the phrase, "to drive vehicle," which in everyday usage is understood as requiring evidence of volitional movement of a vehicle, must be so construed, and not in the wider sense of "to operate a vehicle." *Mercer v. Department of Motor Vehicles (1991) 53 Cal 3d 753, 280 Cal Rptr 745, 809 P2d 404, 1991 Cal LEXIS 1722.*

Misdemeanor "drunk driving" (*Veh. Code, § 23152*) occurs in an officer's presence if the officer personally observes the arrestee driving a vehicle while under the influence of intoxicants, or having 0.08 percent alcohol in the blood. Driving means any volitional movement of the vehicle. However, if the officer does not personally observe the driving element of the offense, an arrest made without a warrant for drunk driving is invalid. *People v. Lively (1992, Cal App 6th Dist) 10 Cal App 4th 1364, 13 Cal Rptr 2d 368, 1992 Cal App LEXIS 1306,* review denied (1993, Cal) *1993 Cal LEXIS 862.*

The Department of Motor Vehicles suspended petitioner's driver's license pursuant to *Veh C § 13352(a)(3)* following two drunk driving convictions, one in California and one in Florida. Petitioner filed a petition for writ of mandate against the director of the DMV for correction of his driving record, alleging the Florida statute was not comparable to *Veh C § 23152*, California's drunk driving statute. The trial court properly granted the writ and ordered the elimination of the Florida drunk driving conviction from petitioner's record, and set aside the order suspending his driver's license. The DMV failed to provide sufficient admissible evidence that petitioner was convicted of drunk driving in Florida. The Florida statute also covers a person who is in actual physical control of a vehicle and is under the influence of alcoholic beverages. In California, such conduct is generally prosecuted as public drunkenness. The documents produced by the DMV with regard to the Florida offense, a police report and the traffic citation, were insufficient to show that petitioner was convicted of drunk driving in Florida. The Compact requires that the report of a party state "describe the violation specifying the section of the statute, code, or ordinance violated" (*Veh C § 15022*). *Draeger v. Reed (1999, Cal App 3d Dist) 69 Cal App 4th 1511, 82 Cal Rptr 2d 378, 1999 Cal App LEXIS 133,* review denied (1999, Cal) *1999 Cal LEXIS 3701.*

In a prosecution for violations of *Veh. Code, § 23152*, subds. (a) and (b) (driving under influence of drugs or alcohol or with specified blood-alcohol level), the trial court did not err in denying defendant's motion to suppress evidence pursuant to *Pen. Code, § 1538.5*, on the ground that defendant's misdemeanor arrest failed to comply with *Pen. Code, § 836*, subd. 1 (arrest without warrant on basis of reasonable cause to believe person arrested has committed public offense in officer's presence). At the time of her arrest, defendant was seated in the driver's seat, the hood was hot, the engine and lights were on, the keys were in the ignition, and defendant exhibited objective signs of intoxication. The officer did not observe defendant driving. However, Proposition 8 provides only for suppression of evidence obtained in violation of federal constitutional rights, and the federal standard for an arrest without warrant depends upon whether, at the moment the arrest was made, the officer had probable cause to make it. There was probable cause for the arresting officer to believe that defendant had driven a vehicle while under the influence of alcohol. the influence of alcohol. *People v. Trapane (1991, Cal App Dep't Super Ct) 1 Cal App 4th Supp 10, 3 Cal Rptr 2d 423, 1991 Cal App LEXIS 1531.*

10. Intoxication

In a prosecution for driving under the influence of alcohol (*Veh. Code, § 23152*, subd. (a)) and driving with a blood alcohol level of 0.10 percent or more (*Veh. Code, § 23152*, subd. (b)), the trial court did not err in instructing the jury that a person is under the influence of alcohol when, as a result of drinking, his physical or mental abilities are impaired to such a degree that he no longer has the ability to drive a vehicle with the caution characteristic of a sober person, and in refusing to instruct the jury further that "sober" means moderate in, or abstinent from, the use of intoxicating liquor. Contrary to defendant's contention, a person who has not consumed alcohol and therefore is not impaired by alcohol is the proper standard for comparison. *People v. Cortes (1989, Cal App Dep't Super Ct) 214 Cal App 3d Supp 12, 263 Cal Rptr 113, 1989 Cal App LEXIS 1246.*

The term "under the influence" differs for the purposes of *Veh. Code, § 23152*, subd. (a), which proscribes driving

under the influence of a drug, and *Health and Saf. Code, § 11550*, which proscribes use of a controlled substance. To be "under the influence" within the meaning of the Vehicle Code, the drug must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his or her faculties. In contrast, being "under the influence" within the meaning of *Health and Saf. Code, § 11550*, merely requires that the person be under the influence in any detectable manner. The symptoms of being under the influence within the meaning of that statute are not confined to those commensurate with misbehavior, nor to those which demonstrate impairment of physical or mental ability. *People v. Enriquez (1996, Cal App 6th Dist) 42 Cal App 4th 661, 49 Cal Rptr 2d 710, 1996 Cal App LEXIS 106,* rehearing denied (1996, Cal App 6th Dist) *1996 Cal App LEXIS 145,* review denied (1996, Cal) *1996 Cal LEXIS 2186.*

B. PROSECUTION

11. In General

In a prosecution for violating *Veh. Code, § 23152* (driving under the influence of alcohol), an allegation in the complaint that defendant "wilfully" violated both subdivisions of the section was a sufficient pleading of criminal intent. *People v. Lewis (1983, Cal App 4th Dist) 148 Cal App 3d 614, 196 Cal Rptr 161, 1983 Cal App LEXIS 2331.*

In a prosecution for driving while under the influence of alcohol or drugs (DUI) (*Veh. Code, § 23152*, subd. (a)), and driving while having a .08 percent or more blood-alcohol content (*Veh. Code, § 23152*, subd. (b)), the trial court properly found that defendant's admission of three other DUI convictions within seven years of the charged offenses elevated those offenses from misdemeanors to felonies (*Veh. Code, § 23175*), even though the prior convictions were for conduct that occurred after the conduct leading to the charged felony offenses. The Legislature's substitution of "separate violations" for "prior offenses" in Veh. Code, former § 23175, together with other legislative materials, amply reflect the Legislature's goal of preventing the DUI offender from escaping an enhanced penalty for multiple offenses, regardless of the order in which offenses and convictions have occurred. Hence, *Veh. Code, § 23175*, must be read to permit imposition of an enhanced penalty on conviction of a violation of *Veh. Code, § 23152*, if that offense was committed within seven years of three or more separate DUI violations resulting in convictions, regardless of the order in which the three separate DUI offenses occurred or their convictions were obtained. *People v. Snook (1997) 16 Cal 4th 1210, 69 Cal Rptr 2d 615, 947 P2d 808, 1997 Cal LEXIS 7906,* transferred (1999, Cal) *1999 Cal LEXIS 19.*

11.5. Sufficiency of Allegations in Petition

Notwithstanding the conservator's failure to allege disqualification in the petition for substituted-judgment, the beneficiary had sufficient notice that the conservator intended to rely on that theory. The conservator's failure to include allegations in the petition was not prejudicial, particularly where the "care custodian" issue involved application of the law to essentially undisputed facts. *Conservatorship of McDowell (2004, Cal App 6th Dist) 125 Cal App 4th 659, 23 Cal Rptr 3d 10, 2004 Cal App LEXIS 2292,* overruled in part *Bernard v. Foley (2006) 39 Cal 4th 794, 47 Cal Rptr 3d 248, 139 P3d 1196, 2006 Cal LEXIS 9861,* overruled in part as stated *Estate of Odian (2006, Cal App 4th Dist) 145 Cal App 4th 152, 51 Cal Rptr 3d 390, 2006 Cal App LEXIS 1865.*

12. Evidence, Generally; Burden of Proof

Veh. Code, § 23152, subd. (b), which makes it unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a motor vehicle, does not create a conclusive presumption of intoxication, nor does it eliminate the prosecutor's burden of proof when an accused is found to have 0.10 percent, by weight, of alcohol in his blood. Instead, the statute defines in precise terms the conduct proscribed. Although it is no longer necessary in a prosecution under § 23152, subd. (b), to prove that the defendant was in fact under the influence, the People must still prove beyond a reasonable doubt that at the time he was driving his blood-alcohol exceeded 0.10 percent. *Burg v. Municipal Court (1983) 35 Cal 3d 257, 198 Cal Rptr 145, 673 P2d 732, 1983 Cal LEXIS 269,* cert. denied and appeal dismissed *(1984) 466 US 967, 80 L Ed 2, 104 S Ct 2337, 1984 US LEXIS 2104.*

In order to support a conviction for violation of *Veh. Code, § 23152*, subd. (b), the People must prove beyond a reasonable doubt that at the time a defendant was driving, his blood alcohol exceeded 0.10 percent. Generally this will have to be established by circumstantial evidence. The People must present sufficient evidence from which it can reasonably be deduced that a defendant's blood alcohol level was 0.10 percent or more. *People v. Pritchard (1984, Cal App Dep't Super Ct) 162 Cal App 3d Supp 13, 209 Cal Rptr 314, 1984 Cal App LEXIS 2863.*

In order to establish a violation of driving with a blood-alcohol level of 0.10 percent or more (*Veh. Code, § 23152*, subd. (b)), the People must prove beyond a reasonable doubt that at the time the defendant was driving his blood alcohol exceeded the percentage limit. Thus, although defendant may refute the accuracy of test results, the People must first meet their burden of proof by presenting substantial evidence of the defendant's blood-alcohol level at the time of driving. They must present sufficient evidence from which it could reasonably be deduced that defendant's blood-alcohol level was beyond the limit. *People v. Gineris (1984, Cal App Dep't Super Ct) 162 Cal App 3d Supp 18, 209 Cal Rptr 317, 1984 Cal App LEXIS 2864.*

In a prosecution for driving under the influence of alcohol (*Veh. Code, § 23152*, subd. (a)) and driving with a blood alcohol level of 0.10 percent or more (*Veh. Code, § 23152*, subd. (b)), the trial court erred in instructing the jury that defendant had the burden of raising a reasonable doubt as to whether his breath-blood partition ratio was in the normal range. A defendant's personal partition ratio is not an element of the crime, but that does not automatically convert it to an affirmative defense on which the defendant has the burden of proof. The error was prejudicial since under the circumstances in which the instruction was given, it was susceptible to the interpretation that if defendant failed to raise a reasonable doubt as to whether his personal blood-breath ratio was average, then he should be convicted. *People v. Cortes (1989, Cal App Dep't Super Ct) 214 Cal App 3d Supp 12, 263 Cal Rptr 113, 1989 Cal App LEXIS 1246.*

Veh. Code, § 23152, proscribing driving under the influence of alcohol, requires a showing that the defendant's physical or mental abilities are impaired to such a degree that he or she no longer has the ability to drive a vehicle with the caution characteristic of a sober person of ordinary prudence under the same or similar circumstances. *People v. Weathington (1991, Cal App 6th Dist) 231 Cal App 3d 69, 282 Cal Rptr 170, 1991 Cal App LEXIS 616,* review denied (1991, Cal) *1991 Cal LEXIS 4258.*

13. Admissibility, Generally

In a prosecution in which defendant pleaded guilty to driving while having 0.08 percent or higher blood alcohol (*Veh. Code, § 23152*, subd. (b)), and driving with a suspended license (*Veh. Code, § 14601.2*, subd. (a)), after his motion to suppress evidence was denied, the trial court properly determined that defendant's breathalyzer test results were admissible, and thus the court did not err in denying the suppression motion, even though defendant was improperly arrested for driving under the influence of alcohol. Although defendant was not properly arrested, since the officer who arrested defendant for driving under the influence did not see him drive, defendant committed the offense of public intoxication (*Pen. Code, § 647*, subd. (f)) in the officer's presence, and could have been arrested and forced to submit to a chemical test regardless of whether he was lawfully arrested for a violation of *Veh. Code, § 23152*. *People v. Lively (1992, Cal App 6th Dist) 10 Cal App 4th 1364, 13 Cal Rptr 2d 368, 1992 Cal App LEXIS 1306,* review denied (1993, Cal) *1993 Cal LEXIS 862.*

The trial court erred in setting aside an information charging defendant with driving under the influence while having suffered three separate prior convictions for the same offense, and charging defendant with driving with a blood-alcohol level of .08 or more having suffered three separate prior convictions for the same offense. Two law enforcement officers testified that enroute to a desolate location where they encountered defendant, they saw no other pedestrians and no other vehicles. No other possible driver of the car was seen by either of them anywhere near the car. Further, there were multiple circumstances establishing the requisite demonstrable connection between defendant and the car: (1) the marsh mud that covered both him and the left front panel of the car; (2) the keys to the car that were in his pocket; (3) the lug nuts to the detached wheel, also in his pocket; and (4) the fact that the car was registered to a person living at his address. These circumstances, in combination, were clearly sufficient to permit the reasonable

inference to be drawn that defendant was the likely driver of the car. That established the necessary corpus delicti that would permit the admission of defendant's extrajudicial statement to the officer that he was, indeed, the driver. *People v. Scott (1999, Cal App 1st Dist) 76 Cal App 4th 411, 90 Cal Rptr 2d 435, 1999 Cal App LEXIS 1014.*

14. Scientific Tests; Blood Tests

The Legislature did not limit evidence to prove a violation of *Veh. Code, § 23152*, subd. (b) (driving with blood-alcohol level of 0.10 percent or more), solely to chemical tests with results so far above 0.10 percent that the range of the margin of error cannot extend below 0.10 percent. *People v. Strub (1975, Cal App Dep't Super Ct) 49 Cal App 3d Supp 1, 122 Cal Rptr 374, 1975 Cal App LEXIS 1273.*

At a Department of Motor Vehicles administrative hearing on the suspension of a driver's license for driving while intoxicated, the failure of the report on the laboratory test of the driver's blood to show when the blood sample was taken precluded application of the rebuttable presumption stated in *Veh. Code, § 23152*, subd. (b), that a driver exceeded the limit on blood-alcohol levels at the time of driving if the limit was exceeded "at the time of performance of a chemical test within three hours after the driving." Even assuming that the presumption applies in administrative proceedings as well as in the criminal prosecutions to which it expressly applies, there was no evidence that the driver's blood was drawn within three hours of her driving. The proximity of the place of arrest and the hospital where the blood was drawn are only seven miles apart provided no information as to factors such as how long after her arrest the driver arrived at the hospital, or how long a wait preceded the drawing of her blood. *Santos v. Department of Motor Vehicles (1992, Cal App 1st Dist) 5 Cal App 4th 537, 7 Cal Rptr 2d 10, 1992 Cal App LEXIS 496,* rehearing denied (1992, Cal App 1st Dist) *1992 Cal App LEXIS 621,* review denied (1992, Cal) *1992 Cal LEXIS 3354.*

In a prosecution for driving under the influence of alcohol and driving with a blood-alcohol level in excess of 0.08 percent (*Veh. Code, § 23152*, subds. (a), (b)), the testimony of the police officer who administered a horizontal gaze nystagmus test to defendant was insufficient to establish the necessary general acceptance in the particular field required of a new scientific technique. Testimony by police officers regarding the mere administration of the test is insufficient to meet the general acceptance standard. Judicial notice could not be taken of general acceptance since the test was not currently a settled proposition in the scientific community. The trial court first should have an opportunity to examine, weigh, and decide disputed facts to determine whether the test was sufficiently reliable to be admissible. *People v. Leahy (1994) 8 Cal 4th 587, 34 Cal Rptr 2d 663, 882 P2d 321, 1994 Cal LEXIS 5373.*

In a prosecution for driving under the influence of alcohol and with a blood-alcohol level in excess of 0.08 percent (*Veh. Code, § 23152*, subds. (a), (b)), the trial court's error in admitting evidence of a horizontal gaze nystagmus test against defendant was prejudicial. It was reasonably probable a different result would have been achieved on both counts but for the test evidence. Defendant passed the other field sobriety test, his blood-alcohol level was said to be 0.10, only 0.02 over the statutory maximum, and the time between arrest and the test could account for even more than that. *People v. Leahy (1994) 8 Cal 4th 587, 34 Cal Rptr 2d 663, 882 P2d 321, 1994 Cal LEXIS 5373.*

In prosecutions for driving with 0.08 percent or more of blood alcohol (Veh. Code, former § 23152, subd. (b)), based on breath tests, the trial court properly excluded defendants' evidence of the variability of the partition ratio used to convert breath-alcohol findings to their blood-alcohol equivalents. Although such evidence was allowed under the predecessor statute to Veh. Code, former § 23152, subd. (b), the statute under which defendants were convicted was amended so that the percent of alcohol in a person's blood would be based on grams of alcohol per 100 milliliters of blood "or grams of alcohol per 210 liters of breath." The only reasonable construction of the amendment was that the Legislature intended to criminalize the act of driving either with the specified blood-alcohol level or with the specified breath-alcohol level. Thus, the amended statute prohibited driving with 0.08 percent or more of blood alcohol as defined by grams of alcohol in 210 liters of breath. Such a conclusion was supported by the legislative history, and increased the likelihood of conviction, in part because the prosecution need not prove actual impairment. It also promoted the statute's interest in reducing the danger to the public. *People v. Bransford (1994) 8 Cal 4th 885, 35 Cal Rptr 2d 613, 884 P2d 70, 1994 Cal LEXIS 5884,* rehearing denied (1995, Cal) *1995 Cal LEXIS 236,* cert den *(1995) 514 US 1130, 131 L Ed 2,*

115 S Ct 2005, 1995 US LEXIS 3535.

In a prosecution for vehicular manslaughter while under the influence of methamphetamine (*Veh C § 23152*), the trial court properly admitted expert testimony that use of the drug in greater than therapeutic dosages resulted in impaired driving, since it was based on a method of research that was generally accepted in the scientific community. So, too, was the expert's opinion that a person with the concentration of methamphetamine in his blood that defendant had, and who demonstrated symptoms like defendant's, would not have the ability to drive safely. That defendant's expert disagreed with the prosecution expert's conclusions went only to the weight to be afforded his opinion, not its admissibility. *People v. Thang Van Bui (2001, Cal App 3d Dist) 86 Cal App 4th 1187, 103 Cal Rptr 2d 908, 2001 Cal App LEXIS 93,* review denied (2001, Cal) *2001 Cal LEXIS 3174.*

The partition ratio used to convert a urine-alcohol measurement into a blood-alcohol equivalent was relevant evidence in a prosecution under *Veh C § 23152*, and the trial court prejudicially erred when it precluded cross-examination on the subject. Not only was the jury precluded from hearing all evidence related to the variability of partition ratios, but the court, the prosecutor and the expert separately emphasized that the partition ratio used was that mandated by the state. The jury was clearly led to believe that the partition ratios were cast in stone with no variations allowed. *People v. Acevedo (2001, Cal App 5th Dist) 93 Cal App 4th 757, 113 Cal Rptr 2d 437, 2001 Cal App LEXIS 1509.*

School peace officer, on his way home from work, had the power to stop a driver who sped past him and then engaged in a high speed chase because the offense posed an immediate danger. *People v. McHugh (2004, Cal App 4th Dist) 119 Cal App 4th 202, 14 Cal Rptr 3d 142, 2004 Cal App LEXIS 862,* review denied (2004, Cal) *2004 Cal LEXIS 9084.*

In reversing a driver's license suspension, the trial court properly found that a forensic report recorded one week after a blood test was not timely recorded for purposes of *Ev C § 1280(b)*. The driver had been tested at the time of his arrest under *Veh C § 23152(a)*. *Glatman v. Valverde (2006, Cal App 4th Dist) 146 Cal App 4th 700, 53 Cal Rptr 3d 319, 2006 Cal App LEXIS 2113.*

14.5. --Partition Ratio

On a charge of generic driving under the influence, evidence of a defendant's personal partition ratio bears on the question of whether the defendant was under the influence of alcohol, for purposes of *Veh C § 23152(a)*, and is therefore relevant under *Ev C § 210* and admissible under *Ev C § 351* and *Veh C § 23610(c)*; however, general partition ratio evidence is irrelevant. Defendant failed to demonstrate error in the exclusion of partition ratio evidence because the record on appeal did not establish whether defendant sought to admit personal or general evidence; further, any error was harmless error because there was strong evidence that, regardless of blood alcohol level, defendant was under the influence of alcohol. *People v. McNeal (2007, 4th Dist) 2007 Cal App LEXIS 1590.*

15. Constitutional Rights

Where both former Veh C § 23102(a) and *Veh C § 23152(b)* were in force before defendants' respective convictions under them occurred, absent defendants' acts after the passage of *Veh C § 23152(b)*, former Veh C § 23170 would not have come into play; thus, enhancing the penalty between the time of defendants' prior felony commissions and the commissions of the subsequent offenses did not violate the prohibition against ex post facto laws. *People v. Lujan (1983, Cal App Dep't Super Ct) 141 Cal App 3d Supp 15, 192 Cal Rptr 109, 1983 Cal App LEXIS 1587.*

A state may force a person suspected of driving while intoxicated to submit to a blood-alcohol test, there being no violation of the Fifth Amendment right against self-incrimination. *South Dakota v. Neville (1983) 459 US 553, 74 L Ed 2, 103 S Ct 916, 1983 US LEXIS 129.*

In prosecutions for driving with 0.08 percent or more of blood alcohol (Veh. Code, former § 23152, subd. (b)), based on breath tests, the trial court's exclusion of defendants' evidence of the variability of the partition ratio used to convert breath-alcohol findings to their blood-alcohol equivalents did not violate *Cal. Const., art. I, § 28*, subd. (d) ("relevant evidence" shall not be excluded except as provided by statute). The evidence was not relevant since Veh. Code, former § 23152, subd. (b), defined the offense without regard to such ratios ("alcohol in a person's blood shall be based upon grams of alcohol per 100 milliliters of blood or grams of alcohol per 210 liters of breath"). Nor did the statute unconstitutionally create an irrebuttable conclusive presumption that the amount of alcohol in 210 liters of breath was equal to the amount of alcohol in 100 milliliters of blood. The statute did not presume a driver was intoxicated, but instead defined the offense of driving with a specified level of alcohol in the body. Further, defendants were not denied their rights to confrontation and counsel under *U.S. Const., 6th Amend.*; an accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible. *People v. Bransford (1994) 8 Cal 4th 885, 35 Cal Rptr 2d 613, 884 P2d 70, 1994 Cal LEXIS 5884,* rehearing denied (1995, Cal) *1995 Cal LEXIS 236,* cert den *(1995) 514 US 1130, 131 L Ed 2, 115 S Ct 2005, 1995 US LEXIS 3535.*

In a prosecution for driving while under the influence of alcohol or drugs (DUI) (*Veh. Code, § 23152*, subd. (a)), and driving while having a .08 percent or more blood-alcohol content (*Veh. Code, § 23152*, subd. (b)), the trial court's elevation of those offenses from misdemeanors to felonies (*Veh. Code, § 23175*) upon defendant's admission of three other convictions of DUI within seven years of the charged offenses did not contravene the constitutional proscription against ex post facto laws (*Cal. Const., art. I, § 9*, U.S. Const; .; art. I, § 10, cl. 1), even though the prior convictions were for conduct that occurred after the conduct leading to the charged felony offenses. *Veh. Code, § 23175*, subd. (a), was effective at the time defendant committed the instant offenses; thus, the increase in defendant's penalty was not attributable to any change in law, but rather to his own conduct. A self-inflicted change in a defendant's status as a repeat offender does not constitute an ex post facto violation. The mere fact that conviction of the offense that was first in time was obtained after defendant had committed the offenses triggering the enhanced penalty did not contravene the prohibition of the ex post facto laws. *People v. Snook (1997) 16 Cal 4th 1210, 69 Cal Rptr 2d 615, 947 P2d 808, 1997 Cal LEXIS 7906,* transferred (1999, Cal) *1999 Cal LEXIS 19.*

Presumption of driving under the influence provided by *Veh C § 23610* for purposes of a generic driving under the influence charge under *Veh C § 23152(a)* does not violate due process. *People v. McNeal (2007, 4th Dist) 2007 Cal App LEXIS 1590.*

Trial court violated defendant's federal double jeopardy rights when, on retrial of a charge under *Veh C § 23152(a)* of DUI after defendant had been acquitted under *Veh C § 23152(b)*, it instructed the jury with CALCRIM No. 2110 regarding the permissive presumption of impairment authorized by *Veh C § 23610* arising from a blood alcohol level of .08 or more; a special instruction advising the jury that the first jury had found defendant's blood alcohol level to be less than .08 was necessary to ensure that the second jury did not improperly rest its verdict on a finding expressly rejected by the first jury. *People v. Smith (2008, 4th Dist) 2008 Cal App LEXIS 427.*

16. Weight and Sufficiency of Evidence

Veh. Code, § 23152, subd. (b), prohibits driving a vehicle with a blood-alcohol level of 0.10 percent or higher; it does not prohibit driving a vehicle when a subsequent test shows a level of 0.10 percent or more. Circumstantial evidence will generally be necessary to establish the requisite blood-alcohol level called for by the statute. A test for the proportion of alcohol in the blood will, obviously, be the usual type of circumstantial evidence, but of course the test is not conclusive: The defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom. Both parties may adduce other circumstantial evidence tending to establish that the defendant did or did not have a 0.10 blood-alcohol level while driving. *People v. Strub (1975, Cal App Dep't Super Ct) 49 Cal App 3d Supp 1, 122 Cal Rptr 374, 1975 Cal App LEXIS 1273.*

Veh. Code, § 23152, subd. (b), prohibits driving a vehicle with a blood-alcohol level of 0.10 percent or higher; it does not prohibit driving a vehicle when a subsequent test shows a level of 0.10 percent or more. Circumstantial

evidence will generally be necessary to establish the requisite blood-alcohol level called for by the statute. A test for the proportion of alcohol in the blood will obviously be the usual type of circumstantial evidence, but the test is not conclusive: the defendant remains free to challenge the accuracy of the test result, the manner in which it was administered, and by whom. Both parties may also adduce other circumstantial evidence tending to establish that the defendant did or did not have a 0.10 percent blood-alcohol level while driving. *Burg v. Municipal Court (1983) 35 Cal 3d 257, 198 Cal Rptr 145, 673 P2d 732, 1983 Cal LEXIS 269,* cert. denied and appeal dismissed *(1984) 466 US 967, 80 L Ed 2, 104 S Ct 2337, 1984 US LEXIS 2104.*

At a Department of Motor Vehicles administrative hearing on the suspension of a driver's license for driving while intoxicated, the result of the laboratory test of the driver's blood was properly admitted under the public employee records exception to the hearsay rule (*Ev C § 1280*), even though it did not indicate the time it was prepared so as to demonstrate that it was made "at or near the time of the act, condition, or event" as required by § 1280, subd. (b). The presumption of duty regularly performed (*Ev C § 664*) shifted the burden to the driver to show that the report was not properly prepared. In the absence of evidence that the report was not properly prepared, the department was entitled to rely upon it. *Santos v. Department of Motor Vehicles (1992, Cal App 1st Dist) 5 Cal App 4th 537, 7 Cal Rptr 2d 10, 1992 Cal App LEXIS 496,* rehearing denied (1992, Cal App 1st Dist) *1992 Cal App LEXIS 621,* review denied (1992, Cal) *1992 Cal LEXIS 3354.*

In a proceeding by a driver for a writ of administrative mandate to compel the Department of Motor Vehicles to reverse its suspension of his license for driving under the influence of alcohol, the evidence was sufficient to establish that, while driving, the driver had a blood-alcohol level of 0.08 percent or more. The arresting officer's report indicated that the breath test, with results of 0.08 percent, was performed less than two hours after the officer received a radio call about the accident in which the driver was involved, and the department's hearing officer could reasonably infer that the breath test was performed within three hours of the time of driving. Such evidence established a rebuttable presumption that the driver's blood-alcohol content was 0.08 percent or more at the time of driving (*Veh. Code, § 23152*, subd. (b)), and the driver presented no evidence rebutting the presumption. Further, circumstantial evidence other than chemical test results may properly be admitted to establish a driver had the proscribed level of blood alcohol at the time of the offense, and the arresting officer personally observed the driver's symptoms of intoxication. *Jackson v. Department of Motor Vehicles (1994, Cal App 4th Dist) 22 Cal App 4th 730, 27 Cal Rptr 2d 712, 1994 Cal App LEXIS 119.*

17. Evidence of Intoxication

Although the implied-consent law (*Veh C § 23157*) may impose on an officer a duty to administer a blood alcohol test or have it administered by another, it does not impose any particular time requirement that can be assumed to have been met pursuant to the evidentiary presumption that an official duty has been regularly performed (*Ev C § 664*). *Yordamlis v. Zolin (1992, Cal App 1st Dist) 11 Cal App 4th 655, 14 Cal Rptr 2d 225, 1992 Cal App LEXIS 1418,* rehearing denied (1993, Cal App 1st Dist) *1993 Cal App LEXIS 52.*

In a mandate proceeding in which a driver challenged the suspension by the Department of Motor Vehicles (DMV) of her license for driving under the influence of alcohol, the DMV met its burden of proving the driver's illegal blood-alcohol level. When a chemical test shows a driver has a blood-alcohol level of .08 percent or more within three hours of driving, *Veh. Code, § 23152*, subd. (b), establishes a rebuttable presumption that the driver also exceeded the permissible blood-alcohol level when driving. This presumption applies in administrative license suspension proceedings. In this case, the driver was tested barely within the three-hour period following the accident. Further, the driver did not rebut the presumption by her testimony that she drank after the accident occurred. Substantial evidence supported the trial court's finding that this testimony was insufficient to rebut the presumption in light of "credibility problems." An officer testified that the driver told him she had not been drinking after the accident, and this statement was recorded in his contemporaneous investigation report. The driver, while denying this statement was made, did not testify she told the officer that she had been drinking after the accident, either when she was arrested or when she was tested. The fact that she first made this claim in the DMV administrative hearing weakened it considerably. *Corrigan v. Zolin (1996, Cal App 1st Dist) 47 Cal App 4th 230, 54 Cal Rptr 2d 634, 1996 Cal App LEXIS 655.*

Court rejected a motorist's contention that a police officer's sworn statement issued to the Department of Motor Vehicles in connection with the motorist's license suspension hearing was insufficient to support the trial court's finding that the officer had probable cause to believe that the motorist was driving in violation of *Veh C § 23152*; the report stated that the motorist left the scene of an accident, had the odor of an alcoholic beverage, and had bloodshot eyes, slurred speech, and an unsteady gait, and thus the suspension of the motorist's license was proper. *Dibble v. Gourley (2002, Cal App 2d Dist) 103 Cal App 4th 496, 126 Cal Rptr 2d 709, 2002 Cal App LEXIS 4918,* overruled in part *MacDonald v. Gutierrez (2004) 32 Cal 4th 150, 8 Cal Rptr 3d 48, 81 P3d 975, 2004 Cal LEXIS 6.*

Weight of the evidence in the administrative record established that the arresting officer had probable cause to arrest the driver for driving under the influence where the sworn report stated that a witness watched the driver try to leave her car after she was involved in an accident, and when the officer arrived at the scene, the driver had bloodshot and watery eyes and smelled of alcohol; the facts contained in the sworn report established probable cause for her arrest, even before considering the witness's testimony at the hearing or the unsworn reports. *Grundy v. Gourley (2003, Cal App 2d Dist) 110 Cal App 4th 20, 1 Cal Rptr 3d 104, 2003 Cal App LEXIS 988.*

Exigent circumstances justified the warrantless entry into defendant's house where the police conduct, taking into account all of the circumstances, was reasonable because there was strong evidence that defendant had committed the dangerous act of driving under the influence, a jailable offense, based on a witness's report and police officers' ample justification for suspecting that defendant had been the driver of a vehicle that the witness had observed driving erratically and too fast, and where an officer's suspicions that evidence of the crime was in imminent danger of destruction were justified because defendant had attempted to flee. The State's intrusion into defendant's home was the minimum necessary to effect his arrest and extended only to areas already exposed to public view, and because it was reasonable for the police to enter defendant's home without a warrant in order to arrest him and thereby prevent the imminent destruction of evidence of his crime, suppression of all the evidence seized during and after the warrantless entry was improper. *People v. Thompson (2006) 38 Cal 4th 811, 43 Cal Rptr 3d 750, 135 P3d 3, 2006 Cal LEXIS 6515,* cert den (2006, US) *166 L Ed 2d 317, 127 S Ct 446, 2006 US LEXIS 7886.*

18. Trial, Generally

In a drunk driving prosecution, the trial court properly determined that defendant's detention by a police officer in a private parking lot for driving without lights was valid. Even if the trial court erred in finding driving without lighted headlamps in the parking lot was a citeable traffic infraction (*Veh C § 24400*), the detention was still valid. The police officer had activated the overhead lights and stopped defendant to remind him to turn on his headlamps, not to cite him for a traffic violation. Stopping defendant was the most effective means to assure that he would turn on his lights before driving on the street. The officer was not required to wait until defendant actually drove on a public street to stop him. Just as a decision to detain need not be supported by the actual belief in guilt required to arrest, it need not be supported by the actual belief in guilt required to cite on a named violation of the Vehicle Code. Defendant's driving without his lights on was activity relating to a violation of *Veh C § 24400*, and it was about to occur on a public street. *People v. Ellis (1993, Cal App 2d Dist) 14 Cal App 4th 1198, 18 Cal Rptr 2d 284, 1993 Cal App LEXIS 368.*

Where the defendant pled guilty to driving under the influence of alcohol (DUI) and admitted having three prior DUI convictions (*Veh C § 23152*, subd. (a)), the trial court properly imposed a jail booking fee and a jail classification fee (*Gov C § 29550.2*, subd. (a)), although the defendant claimed that imposition of the fees violated the prohibition against ex post facto laws because she committed the DUI violation before *Gov C § 29550.2* was enacted. *Gov C § 29550.2* was enacted not as a punitive measure, but to help address the state's fiscal crisis by allowing a county to recover costs incurred in booking or otherwise processing an arrested person who is later convicted. The fees are limited to actual administrative costs and are assessed against all convicted offenders who have the ability to pay, without regard to the nature or severity of their respective offenses. Because the fees are not punitive in purpose or effect, they do not run afoul of the prohibition against ex post facto laws (*U.S. Const., Art. I, § 10, cl.1*; *Cal. Const., Art. I, § 9*). *People v. Rivera (1998, Cal App 3d Dist) 65 Cal App 4th 705, 76 Cal Rptr 2d 703, 1998 Cal App LEXIS 638,* review denied (1998, Cal) *1998 Cal LEXIS 7526.*

There was no abuse of discretion in a trial court's determination that a prosecutor had demonstrated good cause justifying a short continuance beyond *Pen C § 1382*' s statutory time frame for trying misdemeanor charges against defendant for DUI and driving with a blood alcohol content of above 0.08 percent in violation of *Veh C § 23152(a)*, (b), with the allegation pursuant to *Veh C § 23578* that her blood alcohol content exceeded 0.15 percent, where the prosecutor had fulfilled her responsibilities with respect to a subpoena for the arresting officer and had ensured that the officer was served within the language of *Pen C § 1328(c)* by causing the subpoena to be transmitted to the police department, where it was accepted, because the officer's failure to appear at trial was not attributable to the prosecutor. Due diligence required exactly what was present in the case, a genuine attempt to secure a witness's attendance in court on the date set for trial, notwithstanding the witness's plans to be on vacation. *Jensen v. Superior Court (2008, 2d Dist) 2008 Cal App LEXIS 240.*

19. Jury Instructions

In a prosecution for driving with a blood alcohol level of 0.10 percent or more in violation of *Veh. Code, § 23152*, subd. (b), although the statute must be construed to require proof of scienter to survive constitutional challenge, a general intent instruction is all that is required. *People v. Lewis (1983, Cal App 4th Dist) 148 Cal App 3d 614, 196 Cal Rptr 161, 1983 Cal App LEXIS 2331.*

In a prosecution for driving under the influence (*Veh. Code, § 23152*, subd. (a)), in which it was alleged that defendant was under the influence of phencyclidine (PCP), the trial court erred in failing sua sponte to instruct the jury regarding the definition of "under the influence" as set forth in *CALJIC No. 16.831*. The court instructed the jury on the charge of driving under the influence according to *CALJIC No. 12.65*, which defined "drug" as any substance other than alcohol that "could so affect the nervous system, brain, or muscles of a person as to impair, to an appreciable degree, his or her ability to drive a vehicle." That definition merely stated that a drug may have the potential to affect driving; a jury must be instructed that the defendant's ability to drive must actually be impaired. *CALJIC No. 12.65*, standing alone, does not fully apprise the jury of the technical definition of an element of the offense. As the court's instructional error was not harmless beyond a reasonable doubt, reversal was mandated. *People v. Enriquez (1996, Cal App 6th Dist) 42 Cal App 4th 661, 49 Cal Rptr 2d 710, 1996 Cal App LEXIS 106,* rehearing denied (1996, Cal App 6th Dist) *1996 Cal App LEXIS 145,* review denied (1996, Cal) *1996 Cal LEXIS 2186.*

In a murder trial arising from a high speed chase, the jury was improperly instructed on felony murder with a predicate offence of evading an officer with willful or wanton disregard for safety. The court noted that methamphetamine was present at a level of 50 nanograms per million in a sample of blood taken from defendant, who was also charged with driving under and being under the influence of drugs; at that level, defendant was under the influence of methamphetamine for purposes of safety-sensitive operations such as driving a car. *People v. Calderon (2005, Cal App 5th Dist) 129 Cal App 4th 1301, 29 Cal Rptr 3d 277, 2005 Cal App LEXIS 891,* modified (2005, Cal App 5th Dist) *2005 Cal App LEXIS 1016.*

20. Verdict, Judgment and Sentence

In a writ proceeding by a licensee challenging the suspension of his driver's license by the Department of Motor Vehicles after he pled guilty to driving with a blood-alcohol level exceeding 0.08 percent (*Veh. Code, § 23152*, subd. (b)), on the ground that it was unconstitutional that he faced a four-month suspension for his first drunk driving offense when he would have faced a shorter suspension if he had a commercial rather than a regular driver's license, the trial court erred in finding that the legislative distinction was a denial of equal protection in that it lacked a rational basis. Apart from the fact that commercial drivers are a separate class of more regulated drivers, driving different types of vehicles requiring different driving skills, an obvious explanation for the differential treatment is that the employment of commercial drivers is more likely to depend on their ability to drive. The Legislature may reasonably have concluded that despite certain exceptions, the holders of commercial licenses as a group depend more upon those licenses for their employment and economic survival than do the holders of noncommercial licenses. *Murphy v. Pierce (1991, Cal App 6th Dist) 1 Cal App 4th 690, 2 Cal Rptr 2d 18, 1991 Cal App LEXIS 1407.*

In general, the punishment that a criminal court may impose for a conviction of driving under the influence of alcohol in violation of *Veh C § 23152* depends on how many other convictions the driver has for that same offense. *Baldwin v. Department of Motor Vehicles (1995, Cal App 1st Dist) 35 Cal App 4th 1630, 42 Cal Rptr 2d 422, 1995 Cal App LEXIS 573,* rehearing denied (1995, Cal App 1st Dist) *36 Cal App 4th 454, 42 Cal Rptr 2d 422, 1995 Cal App LEXIS 629.*

Because the crime of driving under the influence in violation of *Cal. Veh. Code § 23152* disqualifies a defendant from treatment under *Cal. Penal Code § 1210.1(b)(2)* of the Substance Abuse and Crime Prevention Act of 2000, *Cal. Penal Code § 1210* et seq., given that the gravamen of the crime makes the crime different from those to which the Act intended to apply, the Act applies to all defendants equally, and there can be no equal protection violation. *People v. Cantu (2003, Cal App 6th Dist) 112 Cal App 4th 729, 5 Cal Rptr 3d 389, 2003 Cal App LEXIS 1534,* rehearing denied (2003, Cal App 6th Dist) *2003 Cal App LEXIS 1680,* review gr, depublished (2004, Cal) *8 Cal Rptr 3d 539, 82 P3d 746, 2004 Cal LEXIS 9,* review dismissed (2004, Cal) *19 Cal Rptr 3d 828, 99 P3d 5, 2004 Cal LEXIS 10130.*

Plain language of *Cal. Penal Code § 1210.1(b)(2)* of the Substance Abuse and Crime Prevention Act of 2000, *Cal. Penal Code § 1210* et seq., excludes from its purview a defendant who, in addition to being convicted of a nonviolent drug possession offense, is also convicted of a misdemeanor that does not involve the simple possession or use of drugs; granting persons treatment under the Act when they have been convicted of both a nonviolent drug possession offense and of driving under the influence in violation of *Cal. Veh. Code § 23152(b)* is contrary to the intent and purpose of the Act. *People v. Cantu (2003, Cal App 6th Dist) 112 Cal App 4th 729, 5 Cal Rptr 3d 389, 2003 Cal App LEXIS 1534,* rehearing denied (2003, Cal App 6th Dist) *2003 Cal App LEXIS 1680,* review gr, depublished (2004, Cal) *8 Cal Rptr 3d 539, 82 P3d 746, 2004 Cal LEXIS 9,* review dismissed (2004, Cal) *19 Cal Rptr 3d 828, 99 P3d 5, 2004 Cal LEXIS 10130.*

Although defendant's conviction of possession of methamphetamine qualified as a nonviolent drug possession offense under *Cal. Penal Code § 1210(a)* of the Substance Abuse and Crime Prevention Act of 2000, *Cal. Penal Code § 1210* et seq., because defendant was also convicted of driving under the influence in violation of *Cal. Veh. Code § 23152(b)*, defendant was ineligible for sentencing under the Act. *People v. Cantu (2003, Cal App 6th Dist) 112 Cal App 4th 729, 5 Cal Rptr 3d 389, 2003 Cal App LEXIS 1534,* rehearing denied (2003, Cal App 6th Dist) *2003 Cal App LEXIS 1680,* review gr, depublished (2004, Cal) *8 Cal Rptr 3d 539, 82 P3d 746, 2004 Cal LEXIS 9,* review dismissed (2004, Cal) *19 Cal Rptr 3d 828, 99 P3d 5, 2004 Cal LEXIS 10130.*

Officer noticed that defendant straddled the road's center line as she drove; defendant was convicted of driving under the influence of drugs, and she was convicted of possession of methamphetamine. Defendant's conviction for driving under the influence of drugs made her ineligible to receive probation and to participate in a diversion program with drug treatment. *People v. Canty (2004) 32 Cal 4th 1266, 14 Cal Rptr 3d 1, 90 P3d 1168, 2004 Cal LEXIS 4668.*

Trial court did not err in ruling that defendant was not eligible for drug treatment diversion pursuant to *Pen C § 1210.1(a)* in connection with defendant's conviction of driving under the influence of a controlled substance in violation of *Veh C § 23152* because driving a vehicle while under the influence of a controlled substance was a misdemeanor not related to the use of drugs; it therefore followed that counsel was not required to object to the prison term imposed and did not render ineffective assistance of counsel. *People v. Wells (2004, Cal App 5th Dist) 122 Cal App 4th 155, 18 Cal Rptr 3d 605, 2004 Cal App LEXIS 1507,* review gr, depublished (2004, Cal) *22 Cal Rptr 3d 516, 102 P3d 903, 2004 Cal LEXIS 11894,* aff'd, superseded *(2006) 38 Cal 4th 1078, 45 Cal Rptr 3d 8, 136 P3d 810, 2006 Cal LEXIS 7815.*

In a case in which the record of defendant's prior conviction in Colorado under *Colo. Rev. Stat. § 42-4-1301(1)(b)* for driving while ability impaired was never offered or admitted into evidence at trial but, rather, after being convicted by the jury of the pending charges of driving under the influence of alcohol and driving with blood alcohol level of 0.08 percent or greater, in violation of *Veh C §§ 23152(a)*, (b), defendant admitted only the fact of his prior conviction for violation of the Colorado statute, the facts underlying the Colorado offense were not before the trial court, which required it to presume that the Colorado conviction was for the least offense punishable under Colorado law, i.e.,

driving while impaired "to the slightest degree." Because that standard did not violate § 23152, the trial court's imposition of an enhanced sentence under the provisions of *Veh C § 23540* based upon the prior Colorado conviction was error. *People v. Crane (2006, Cal App 2d Dist) 142 Cal App 4th 425, 48 Cal Rptr 3d 334, 2006 Cal App LEXIS 1310.*

Because the Colorado driving while ability impaired statute, *Colo. Rev. Stat. § 42-4-1301(1)(b)*, punishes "the slightest degree" of impairment, and because *Veh C § 23152* requires impairment to an appreciable degree, the Colorado statute punishes conduct which would not violate § 23152. It therefore does not meet the test set forth in *Veh C § 23626. People v. Crane (2006, Cal App 2d Dist) 142 Cal App 4th 425, 48 Cal Rptr 3d 334, 2006 Cal App LEXIS 1310.*

Where a trial judge erroneously sentenced defendant on a charge of driving under the influence for which defendant was not convicted, defendant's sentence on that charge was vacated on appeal. *People v. Zackery (2006, Cal App 3d Dist) 146 Cal App 4th 122, 52 Cal Rptr 3d 736, 2006 Cal App LEXIS 2054,* rehearing granted, depublished *(2007) 2007 Cal. App. LEXIS 128.*

Trial court clerk erred in including in the minutes and the abstract of judgment some provisions that were not in the trial judge's pronouncement of sentence, and this error was compounded by the fact the trial judge erroneously sentenced defendant on a driving under the influence charge for which defendant was not convicted. *People v. Zackery (2006, Cal App 3d Dist) 146 Cal App 4th 122, 52 Cal Rptr 3d 736, 2006 Cal App LEXIS 2054,* rehearing granted, depublished *(2007) 2007 Cal. App. LEXIS 128.*

Where a trial judge erroneously sentenced defendant on a charge of driving under the influence for which defendant was not convicted, defendant's sentence on that charge was vacated on appeal. *People v. Zackery (2007, Cal App 3d Dist) 147 Cal App 4th 380, 54 Cal Rptr 3d 198, 2007 Cal App LEXIS 131.*

Trial court clerk erred in including in the minutes and the abstract of judgment some provisions that were not in the trial judge's pronouncement of sentence, and this error was compounded by the fact the trial judge erroneously sentenced defendant on a driving under the influence charge for which defendant was not convicted. *People v. Zackery (2007, Cal App 3d Dist) 147 Cal App 4th 380, 54 Cal Rptr 3d 198, 2007 Cal App LEXIS 131.*

In a case in which defendant was convicted of driving under the influence (DUI) with a prior felony DUI conviction under *Veh C §§ 23550.5*, *23152(a)* (count 1), driving with a blood alcohol content of 0.08 or more with a prior felony DUI conviction under §§ 23550.5, 23152(b) (count 2), two counts of driving under the influence with three or more prior DUI convictions under Veh C § 23550 (counts 3 and 4), and driving on a suspended license under Veh C § 14601.2(b) (count 5), and in which the trial court issued concurrent sentences on counts 2 through 5 pursuant to *Pen. Code, § 667.5(b)*, the sentences on counts 2 through 4 had to be stayed pursuant to *Pen C § 654* because those counts, related to driving under the influence, arose from a single act, as the evidence presented at trial was sufficient only to establish that defendant drove the vehicle once while intoxicated, when he parked the car. However, the sentence on count 5 remained because multiple convictions for driving under the influence and driving on a suspended license were not precluded by § 654, and defendant was not being penalized twice for one act, but, rather, was being penalized once for his act of driving with an invalid license and once for his independent act of driving while intoxicated. *People v. Martinez (2007, 2d Dist) 156 Cal App 4th 851, 2007 Cal App LEXIS 1820.*

II. DECISIONS UNDER FORMER VEH C § 23102

A. GENERALLY

21. In General

Repeal of the various laws and of the constitutional prohibition of sale of intoxicating liquor had no effect to alter the meaning or construction of Vehicle Act of 1923, § 112. *People v. Fellows (1934, Cal App) 139 Cal App 337, 34 P2d*

177, 1934 Cal App LEXIS 522.

Prevalence of general laws over conflicting municipal "home rule," in matters of state-wide concern, is illustrated by reference to the drunken driving provision in the former *Cunningham v. Hart (1947, Cal App) 80 Cal App 2d 902, 183 P2d 75, 1947 Cal App LEXIS 1411.*

Public policy and the criminal law of California are dead set against the operation of a motor vehicle by a drunken person (*Veh Code, §§ 23101*, *23102*). *Brockett v. Kitchen Boyd Motor Co. (1968, Cal App 5th Dist) 264 Cal App 2d 69, 70 Cal Rptr 136, 1968 Cal App LEXIS 2049.*

In a prosecution under *Veh. Code, § 23102*, federal and state proscriptions of double jeopardy were violated by the court, where, without defendant's consent and on its own motion, the court set aside a guilty plea on which an alleged prior conviction was based, vacated the judgment on that conviction, on which he had been sentenced and punished, and set the identical charge for a second trial. *Gonzalez v. Municipal Court (1973, Cal App 1st Dist) 32 Cal App 3d 706, 108 Cal Rptr 612, 1973 Cal App LEXIS 1009.*

An order by the court, entered after defendant failed to personally appear on the date set for his trial on misdemeanor charges of driving under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), and following defendant's counsel's objection to trying defendant in absentia, forfeiting defendant's bail and ordering that it not be reset unless defendant paid witness fees for two officers who had appeared to testify, was in excess of the court's power and was illegal and void. *Beasley v. Municipal Court (1973, Cal App 5th Dist) 32 Cal App 3d 1020, 108 Cal Rptr 637, 1973 Cal App LEXIS 1036.*

An order by the court, entered after defendant failed to appear on the date set for his trial on misdemeanor charges of driving under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), and following defendant's counsel's objection to trying defendant in absentia, which order was predicated on defendant's failure to personally appear for a jury trial and which forfeited his bail, increased the bond, and authorized the issuance of a bench warrant for defendant's arrest, was void and illegal since defendant was not required to personally appear. *Beasley v. Municipal Court (1973, Cal App 5th Dist) 32 Cal App 3d 1020, 108 Cal Rptr 637, 1973 Cal App LEXIS 1036.*

In an action against the state by persons who had or will have their drunk driving convictions (*Veh. Code, § 23102*, subd. (a)), declared unconstitutional and void, seeking to establish and enforce a constructive trust with respect to the fines paid pursuant to the convictions, the trial court properly sustained defendant's special demurrer for uncertainty on the ground plaintiffs failed to plead that the prior convictions were vacated or set aside in the court in which the prior conviction was obtained and the fines imposed, or to set forth when the alleged causes of action arose and when the setting aside of the previous convictions occurred, which matters were material to the plaintiffs' cause of action. Accordingly, the trial court properly dismissed the action after plaintiffs were given the opportunity to amend the complaint and elected not to do so. *Gonzales v. State of California (1977, Cal App 1st Dist) 68 Cal App 3d 621, 137 Cal Rptr 681, 1977 Cal App LEXIS 1351.*

A complaint in an action against the state alleging that plaintiffs were persons who had or will have their drunk driving convictions declared unconstitutional, and seeking to establish and enforce a constructive trust with respect to the fines paid pursuant to the convictions, and to recover such fines, stated a cause of action, and defendant's general demurrer on the ground that the fact that a prior conviction is unconstitutionally invalid does not require a refund of the fines and penalties assessments, should have been overruled. When a criminal conviction is set aside with the effect of finally disposing of the action, the defendant in that action is entitled to a return of any fine imposed and there is a duty on the public entity to which the fine was paid to return the fine on the basis that the retention of such money will result in unjust enrichment. *Gonzales v. State of California (1977, Cal App 1st Dist) 68 Cal App 3d 621, 137 Cal Rptr 681, 1977 Cal App LEXIS 1351.*

In a proceeding in superior court for a writ of mandate directing a municipal court to declare a prior conviction for

driving under the influence of alcohol (*Veh. Code, § 23101*, subd. (a)) invalid, the superior court erred in rendering a determination on the merits and granting the writ, where the petitioner had an adequate remedy at law in the form of an appeal from his conviction on a second charge of violation of *Veh. Code, § 23102*, subd. (a). *Zimmerman v. Municipal Court (1980, Cal App 2d Dist) 111 Cal App 3d 174, 168 Cal Rptr 434, 1980 Cal App LEXIS 2303.*

In criminal proceedings in which defendant was convicted of violating *Veh. Code, § 23102*, subd. (a), with a prior conviction for the same offense, the trial court did not err in denying defendant's motions to have his prior conviction declared invalid, even though in the previous prosecution, defendant was part of a "mass arraignment" in which a videotape by the trial judge was used to advise arraignees of their constitutional rights. There is no requirement that advisements of rights be in writing, and the validity of collective advisements is well established. Defendant made no attempt to show prejudice from claimed defects in the prior arraignment and the reporter's transcripts of the previous proceeding and orders filed therein showed that defendant was duly arraigned and adequately advised of his constitutional rights. Abundant evidence showed that defendant had been present at the mass arraignment and thus he was presumed to have heard and understood his constitutional rights. *People v. Shannon (1981, Cal App Dep't Super Ct) 121 Cal App 3d Supp 1, 175 Cal Rptr 331, 1981 Cal App LEXIS 1956.*

22. Validity

Notwithstanding that *Pen C § 19* declares that misdemeanors generally may be punished by fines up to $500, Legislature may provide different scale of punishment for violations of Vehicle Code, including minimum fine that must be imposed under certain circumstances, as it is done in this section. *Sawyer v. Barbour (1956, Cal App 2d Dist) 142 Cal App 2d 827, 300 P2d 187, 1956 Cal App LEXIS 2057,* overruled *McDermott v. Superior Court of San Francisco (1972) 6 Cal 3d 693, 100 Cal Rptr 297, 493 P2d 1161, 1972 Cal LEXIS 158.*

Section was not unconstitutional as applied to defendant, who was convicted under this section for driving after having taken accidental overdose of insulin and two drinks of intoxicating liquor, despite fact that insulin is beneficial rather than harmful. *People v. Keith (1960, Cal App Dep't Super Ct) 184 Cal App 2d Supp 884, 7 Cal Rptr 613, 1960 Cal App LEXIS 1950,* superseded by statute as stated in *People v. Alfaro (1983, Cal App 1st Dist) 143 Cal App 3d 528, 192 Cal Rptr 178, 1983 Cal App LEXIS 1782.*

Giving to Department of Motor Vehicles power to count number of convictions on which revocation or suspension of operator's license depends without counting by court does not violate Const Art III § 1, relating to distribution of power, or Const Art VI § 1, vesting judicial power in senate and courts. *Cook v. Bright (1962, Cal App 2d Dist) 208 Cal App 2d 98, 25 Cal Rptr 116, 1962 Cal App LEXIS 1763.*

The administrative remedy of 6 months' license suspension authorized by *Veh. Code, § 13353*, for refusal to take a sobriety test, may be imposed notwithstanding a prosecution under *Veh. Code, § 23102*, subd. (a), for misdemeanor drunk driving. *People v. Brannon (1973, Cal App 5th Dist) 32 Cal App 3d 971, 108 Cal Rptr 620, 1973 Cal App LEXIS 1032.*

23. Statutory Purpose, Application, and Effect

Section 112 of Vehicle Act of 1923 is an amendment of § 17 of the act of 1919, and added provisions declaring certain further acts to be criminal. The 1919 provision, applicable to the crime in question, was not intended to supersede and repeal *Pen C § 367d*, *367e*, defining the crimes of driving while intoxicated and of killing or injuring any person by reason of so driving. *People v. Collins (1925) 195 Cal 325, 233 P 97, 1925 Cal LEXIS 375.*

Vehicle Act of 1923, § 112, as related to intoxication as an offense, was the same substantially as the 1919 act, § 17, but was amended in 1929. All vehicle acts on this subject postdate *Pen C § 367d*, and therefore supersede it as regards motor vehicles driven on highways, because a different penalty is prescribed. As regards those not driven on highways *Pen C § 367* applied in 1934, but a complaint must have alleged that the act was not on a public highway.

People v. Lewis (1934, Cal App Dep't Super Ct) 4 Cal App 2d Supp 775, 37 P2d 752, 1934 Cal App LEXIS 1217.

State's law against driving while under influence of intoxicating liquor is applicable to federal roads. *United States v. Barner (1961, ND Cal) 195 F Supp 103, 1961 US Dist LEXIS 6072.*

In initiating the experimental statewide program allowing a person convicted of drunk driving to participate in an alcohol treatment program as an alternative to license suspension (*Veh. Code, §§ 13201.5*, *13352.5*, *23102.1*, and *Welf. & Inst. Code, § 19975.01* et seq.), for the purpose of lessening recidivist and dangerous behavior, the Legislature rationally concluded that prospective operation was necessary in order to avoid the risk of a flood of applicants and the potential resulting chaos. Thus, defendants who were charged, before the effective date of the program, with violations of *Veh. Code, § 23102*, subd. (a) (drunk driving), with one prior, were not denied equal protection of the laws by the trial court's refusal to allow participation in the program even though they were convicted after the program's effective date. *Talley v. Municipal Court (1978, Cal App 1st Dist) 87 Cal App 3d 109, 150 Cal Rptr 743, 1978 Cal App LEXIS 2162.*

It is well established that the California scheme for suspending driver's licenses of those who are convicted of drunk driving is regulatory and not penal. Thus, suspension of a driver's license upon a first conviction of drunk driving does not constitute punishment under *California law. United States v. Best (1978, 9th Cir Cal) 573 F2d 1095, 1978 US App LEXIS 11922.*

24. Revocation of License

Fact that automobile operator, whose license was mandatorily revoked by Department of Motor Vehicles because of three convictions within 10 years for violations of this section had not been adjudged as having prior convictions when convicted of third violation was not prejudicial to automobile operator since, as result of this circumstance, he was apparently spared payment of minimum fine and five-days' incarceration required by section, when person has prior conviction thereunder. *Cook v. Bright (1962, Cal App 2d Dist) 208 Cal App 2d 98, 25 Cal Rptr 116, 1962 Cal App LEXIS 1763.*

Circumstance that prosecuting officer failed to plead and court failed to adjudicate facts concerning automobile operator's prior convictions for misdemeanor drunk driving did not preclude Department of Motor Vehicles from following mandatory statute, § 13352, that governed its revocation of automobile operator's license after his latest conviction because of three convictions for drunk driving within 10 years. *Cook v. Bright (1962, Cal App 2d Dist) 208 Cal App 2d 98, 25 Cal Rptr 116, 1962 Cal App LEXIS 1763.*

Whatever "right," as distinguished from "privilege," automobile operator may have had to vehicular use of public highways because of occupational necessity ended when he was thrice convicted within 10 years for misdemeanor drunk driving. *Cook v. Bright (1962, Cal App 2d Dist) 208 Cal App 2d 98, 25 Cal Rptr 116, 1962 Cal App LEXIS 1763.*

The Department of Motor Vehicles properly suspended the driver's license of a person who refused to submit to a chemical sobriety test under *Veh Code, § 13353*, although she subsequently pleaded guilty to driving while intoxicated and even though the court, in connection with her sentencing, made a recommendation pursuant to *Veh Code, § 13352*, that her driving privilege should not be suspended; *Veh Code, § 13353* is mandatory and requires suspension of the driving privilege, not for driving while intoxicated, but for refusing to submit to a chemical test for intoxication after arrest. *Serenko v. Bright (1968, Cal App 2d Dist) 263 Cal App 2d 682, 70 Cal Rptr 1, 1968 Cal App LEXIS 2257.*

In a mandamus proceeding, the trial court properly vacated an order of the Department of Motor Vehicles suspending a licensee's driving privileges, where such suspension was grounded on the licensee's having suffered two drunk driving convictions within seven years, where the licensee's plea of guilty to the second charge was entered after the prosecutor and defense counsel had stipulated that she did not waive her right to an attorney at the prior conviction and after the court had ordered such conviction stricken, where the court further recommended no license suspension,

where there was nothing improper in the manner in which the issue of the validity of the prior conviction was raised and determined, and where the prosecutor took no action indicating any dissatisfaction with such determination. *De La Vigne v. Department of Motor Vehicles (1969, Cal App 2d Dist) 272 Cal App 2d 820, 77 Cal Rptr 675, 1969 Cal App LEXIS 2339.*

One who had had his driver's license suspended for a second conviction of drunk driving within seven years (*Veh Code, § 13352*, subd (c)) was not entitled to challenge the constitutionality of the first conviction by a petition for writ of mandate in the superior court directing the Department of Motor Vehicles to restore his driving privilege, where, though petitioner alleged that at the time of his first conviction in a municipal court he had not been represented by counsel on entering his plea of guilty, no attempt had been made to have the validity of that conviction determined by the municipal court that convicted him of the second offense. *Houlihan v. Department of Motor Vehicles (1970, Cal App 1st Dist) 3 Cal App 3d 915, 83 Cal Rptr 885, 1970 Cal App LEXIS 1186.*

To permit the trial court to merely strike a prior conviction for driving while under the influence of intoxicating liquor or drugs which it has not expressly found to be invalid and effectively order that there be no suspension of operating privileges pursuant to *Veh. Code, § 13352*, relating to the powers of the courts and the Department of Motor Vehicles to suspend for driving under such influence, would violate legislative intent by allowing the court, in effect, to decide whether or not suspension should be imposed on a second conviction for misdemeanor drunk driving, under *Veh. Code, § 23102*. *Nicolino v. Cozens (1973, Cal App 1st Dist) 33 Cal App 3d 1024, 109 Cal Rptr 498, 1973 Cal App LEXIS 959.*

The Department of Motor Vehicles properly revoked the driving privileges of a motorist for a period of three years pursuant to *Veh. Code, § 13352*, subd. (e), on the basis that he had suffered three previous convictions of driving a motor vehicle under the influence of intoxicating liquor, where the motorist had twice been convicted of violations of *Veh. Code, § 23102* (misdemeanor drunk driving on a highway) and once of violating *Pen. Code, § 367d*, making it a misdemeanor to drive a motor vehicle while under the influence of intoxicating liquor. Though *Pen. Code, § 367d*, was repealed in 1972, *Veh. Code, § 23102*, was amended by the same legislation so as to make it applicable to driving off as well as on highways, and such repeal therefore did not indicate a legislative intent that a previous violation of the statute was not to be regarded as a prior conviction for revocation purposes. *Plomteaux v. Department of Motor Vehicles (1975, Cal App 2d Dist) 51 Cal App 3d 177, 123 Cal Rptr 889, 1975 Cal App LEXIS 1366.*

At a hearing by the Department of Motor Vehicles, held at a motorist's request pursuant to *Veh. Code, § 13353*, after the department had notified him that his driver's license would be suspended for his failure to submit to a chemical test of his blood, breath or urine following his arrest for drunk driving, the department was not collaterally estopped from asserting failure to take the test by a stipulation of a deputy district attorney in municipal court that the motorist had given "a sample of urine and did not refuse to abide with implied consent law," where the motorist pleaded guilty in the municipal court case to the charge of driving a motor vehicle under the influence of alcohol in violation of *Veh. Code, § 23102*. A conviction of that charge could have been obtained without a chemical test determining the amount of alcohol in the blood, and the stipulation, even if legally sustainable, therefore was not necessary to the judgment. *Skinner v. Sillas (1976, Cal App 2d Dist) 58 Cal App 3d 591, 130 Cal Rptr 91, 1976 Cal App LEXIS 1543.*

The Department of Motor Vehicles properly revoked defendant's driver's license, after he pled guilty to a violation of *Veh. Code, § 23102*, subd. (a) (driving under the influence of intoxicating liquor), where defendant had two prior convictions for the same offense within ten years, but more than seven years, from his latest conviction, where he pled guilty to the offense before the effective date of an amendment to *Veh. Code, § 13352*, subd. (e), changing the time for automatic revocation on a third conviction from within ten years to seven years, and where defendant failed to produce any evidence to overcome the presumption against retroactivity in the application of the amended statute. Furthermore, defendant's plea of guilty was a "conviction" within the meaning of *Veh. Code, § 13352*, requiring suspension of a license on a third or subsequent conviction. *Callahan v. Department of Motor Vehicles (1976, Cal App 2d Dist) 61 Cal App 3d 704, 132 Cal Rptr 625, 1976 Cal App LEXIS 1851.*

25. Search and Seizure and Arrest

Where this section has been violated, gathering of accused's breath in balloon of an intoximeter in reasonable manner does not constitute unlawful search or seizure under Const Art I § 19. *People v. Conterno (1959, App Dep't Super Ct) 170 Cal App 2d Supp 817, People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

Where both defendant and driver of car with whom he was riding were intoxicated, their arrests without warrant were lawful. *People v. Robinson (1964) 61 Cal 2d 373, 38 Cal Rptr 890, 392 P2d 970, 1964 Cal LEXIS 211.*

A county deputy sheriff legally effected the arrest of a motorist whom he had followed from county territory into city limits where, after stopping the motorist for erratic driving, the motorist staggered back toward the sheriff's car and had a strong odor of alcohol on his breath, bloodshot eyes, and dilated pupils, there being probable cause to believe that he was guilty of having driven a motor vehicle upon a highway while under the influence of intoxicating liquor, both in the county territory and in the city limits. *People v. Tennessee (1970, Cal App 2d Dist) 4 Cal App 3d 788, 84 Cal Rptr 697, 1970 Cal App LEXIS 1579.*

When there is a valid arrest for driving while under the influence of intoxicating liquor (*Veh Code, § 23102*), or because the driver or passenger of a vehicle is found to be under the influence of intoxicating liquor in any public place (*Pen Code, § 647*, subd f), an officer, as an incident to such arrest for the purpose of discovering evidence of the crime, may search the offender and the car in which he was observed. *People v. Superior Court (1971, Cal App 1st Dist) 14 Cal App 3d 935, 92 Cal Rptr 545, 1971 Cal App LEXIS 1043.*

Under *Veh Code, §§ 40302* and *23102*, requiring a defendant arrested for driving an automobile under the influence of alcohol to be taken before a magistrate and admitted to bail without unnecessary delay, the police properly detained defendant in jail and did not violate the "unnecessary delay" requirement, where it appeared to the officer in charge that defendant, due to his bloodshot eyes and high blood alcohol content, could not then be released with safety to himself and to the public. *People v. Yniguez (1971, Cal App 2d Dist) 15 Cal App 3d 669, 93 Cal Rptr 444, 1971 Cal App LEXIS 936.*

In a drunk driving case, the accused was lawfully arrested by a police officer without warrant, where, although the officer himself could not have identified the accused as the driver of the car, cadet officers in a different vehicle had actively participated in a continuing process of arrest, initiated by them but broken by the accused's flight without permission; where, furthermore, at the scene of the eventual arrest the accused, looking and behaving as if he were drunk, admitted that he had been driving the car identified by the cadet officers as the one they had stopped; and where, therefore, the observation of the cadet officers coupled with the accused's self-identification met the requirement that the offense be in the arresting officer's presence within the meaning of *Pen Code, § 836*, subd (1), providing that an officer may make an arrest without a warrant whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence. *Packer v. Sillas (1976, Cal App 5th Dist) 57 Cal App 3d 206, 128 Cal Rptr 907, 1976 Cal App LEXIS 1445.*

A private citizen's arrest of a motorist for driving under the influence of intoxicating liquor (*Veh. Code, § 23102*, subd. (a)), was valid where the citizen, who had observed the motorist driving in an unlawful and erratic manner and followed her to a private driveway, left the scene and located a police officer who contacted an investigating unit, where the investigating officers, after arriving at the scene and observing the motorist, had the private citizen brought to the scene to make the arrest, which he did, and where the arrest occurred within 35 to 40 minutes of the time the private citizen had observed the motorist enter her driveway. The fact the private citizen had left the driveway did not render the arrest invalid, as there is no requirement that a citizen keep the offender within view throughout the time intervening between observation of the offense and arrest. *Green v. Department of Motor Vehicles (1977, Cal App 2d Dist) 68 Cal App 3d 536, 137 Cal Rptr 368, 1977 Cal App LEXIS 1343.*

B. FORMS, ELEMENTS, AND SUBJECTS OF OFFENSE

26. In General

Where a defendant is charged under § 501 he may be convicted under this section, even though he has not been charged with the latter section, since drunken driving is the basis of both sections. *People v. Gossman (1949, Cal App) 95 Cal App 2d 293, 212 P2d 585, 1949 Cal App LEXIS 1110,* appeal dismissed *(1950) 340 US 801, 71 S Ct 50, 95 L Ed 589, 1950 US LEXIS 1569,* rehearing denied *(1951) 340 US 916, 71 S Ct 289, 95 L Ed 661, 1951 US LEXIS 2346.*

In a prosecution for driving a motor vehicle while under the influence of drugs (*Veh. Code, § 23105*, subd. (a)), the omission from the complaint of any specification of the particular drug or family of drugs relied upon as the basis of the offense did not deny defendant his due process right to notice of the charge against him. Since the statute prohibits driving under the influence of any drug, it would have been of no use to defendant to show that his actual symptoms or unusual behavior influencing driving were actually indicative of symptoms produced by a drug other than the drug on which defendant may have thought the prosecution would rely to prove the charge. Moreover, under the statute, it would have been no defense that defendant was driving under a drug lawfully prescribed. *Ulloa v. Municipal Court (1981, Cal App 2d Dist) 126 Cal App 3d 1073, 179 Cal Rptr 332, 1981 Cal App LEXIS 2498.*

27. Separate and Included Offenses; Related Offenses

Crimes of driving automobile while under influence of intoxicating liquor and reckless driving are separate, distinct offenses, established by different evidence. *People v. Clenney (1958, Cal App 1st Dist) 165 Cal App 2d 241, 331 P2d 696, 1958 Cal App LEXIS 1283,* superseded by statute as stated in *People v. Oyaas (1985, Cal App 6th Dist) 173 Cal App 3d 663, 219 Cal Rptr 243, 1985 Cal App LEXIS 2658.*

Charge of felony drunk driving necessarily includes misdemeanor offense of driving vehicle while under influence of intoxicating liquor. *People v. Thurston (1963, Cal App 4th Dist) 212 Cal App 2d 713, 28 Cal Rptr 254, 1963 Cal App LEXIS 2902.*

Physical act of driving motor vehicle is essential factor to both offense of driving while intoxicated and driving while operator's license is revoked; it is single act of operating motor vehicle at particular time and place, and prosecution thereof is limited to single proceeding. (*Pen C § 654*.) *People v. Morris (1965, Cal App 4th Dist) 237 Cal App 2d 773, 47 Cal Rptr 253, 1965 Cal App LEXIS 1318.*

One who drove a vehicle while under the influence of intoxicating liquor and with the knowledge that his license had been suspended was guilty of two criminal acts, namely violation of *Veh Code, § 23102*, and violation of *Veh Code, § 14601*, respectively, and it was immaterial that both criminal acts were committed simultaneously or that they shared the single act, and the single intent and objective, of driving from one place to another, conduct that in and of itself is neutral and noncriminal. *In re Hayes (1969) 70 Cal 2d 604, 75 Cal Rptr 790, 451 P2d 430, 1969 Cal LEXIS 356.*

Defendant's prior conviction on a plea of guilty to misdemeanor drunk driving was constitutionally valid and could properly be charged as a prior in a subsequent prosecution for another such violation, where the record clearly showed that collective advice regarding their constitutional rights was given to the assembled defendants prior to the entry of their pleas, where defendant was fully advised of his constitutional rights, and was informed that by entering a plea of guilty he waived them, and where the record further revealed that he was aware of the possible criminal penalties for a first conviction of the offense when he entered his plea. Inasmuch as it was his first offense, and increased penalties would be imposed only if he were charged with and convicted of a second offense within seven years, advice as to penalties for a second conviction would have been premature. *Hartman v. Municipal Court (1973, Cal App 1st Dist) 35 Cal App 3d 891, 111 Cal Rptr 126, 1973 Cal App LEXIS 764.*

The provision of *Pen. Code, § 192*, subd. (3)(b), which requires, for a conviction of vehicular manslaughter, either

a showing that the defendant committed an unlawful act, or a lawful act which might produce death in an unlawful manner, but without gross negligence, was satisfied where ample and substantial evidence supported a verdict of guilty to the charge of driving while under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)). *People v. French (1978, Cal App 1st Dist) 77 Cal App 3d 511, 143 Cal Rptr 782, 1978 Cal App LEXIS 1235.*

Following a felony drunk driving prosecution (*Veh. Code, § 23101*), in which the jury acquitted defendant of the charged offense and was unable to agree on the lesser included offense of misdemeanor drunk driving (*Veh. Code, § 23102*, subd. (a)), the trial court erred in rejecting defendant's plea of former jeopardy to an amended information, filed after discharge of the jury, charging him with misdemeanor drunk driving. A jury finding of not guilty of the crime charged includes a determination that the defendant is not guilty of any included uncharged offenses. *Sylvia v. Superior Court (1982, Cal App 3d Dist) 128 Cal App 3d 309, 180 Cal Rptr 251, 1982 Cal App LEXIS 1231.*

28. Elements of Offense

The mere act of driving a vehicle upon a public highway while intoxicated is an unlawful act. *People v. Levens (1938, Cal App) 28 Cal App 2d 455, 82 P2d 698, 1938 Cal App LEXIS 561.*

To drive automobile while under influence of intoxicating liquor is not, per se, wilful and wanton disregard of safety of persons and property. *People v. Clenney (1958, Cal App 1st Dist) 165 Cal App 2d 241, 331 P2d 696, 1958 Cal App LEXIS 1283,* superseded by statute as stated in *People v. Oyaas (1985, Cal App 6th Dist) 173 Cal App 3d 663, 219 Cal Rptr 243, 1985 Cal App LEXIS 2658.*

Insulin is "drug" as matter of law, though taken for diabetes. *People v. Keith (1960, Cal App Dep't Super Ct) 184 Cal App 2d Supp 884, 7 Cal Rptr 613, 1960 Cal App LEXIS 1950,* superseded by statute as stated in *People v. Alfaro (1983, Cal App 1st Dist) 143 Cal App 3d 528, 192 Cal Rptr 178, 1983 Cal App LEXIS 1782.*

Words "under the influence" have been judicially limited by words equivalent to "to a degree which renders him incapable of safely driving a vehicle," thus placing penalty on driving rather than on use of drug itself. *People v. Keith (1960, Cal App Dep't Super Ct) 184 Cal App 2d Supp 884, 7 Cal Rptr 613, 1960 Cal App LEXIS 1950,* superseded by statute as stated in *People v. Alfaro (1983, Cal App 1st Dist) 143 Cal App 3d 528, 192 Cal Rptr 178, 1983 Cal App LEXIS 1782.*

Defendants could not be prosecuted under *Veh. Code, § 23102*, for driving bicycles while under the influence of alcohol; the Vehicle Code does not give fair warning that driving a bicycle while under the influence of alcohol is prohibited and punishable. *Veh. Code, § 21200*, the sole basis for the claim that it was a public offense to drive a bicycle while intoxicated, only provides that every person riding a bicycle has all the rights and is subject to all the duties applicable to the driver of a vehicle, but it characterizes no conduct as criminal and invokes no criminal penalty. Accordingly, the Legislature has not made the driving of bicycles while under the influence of intoxicants subject to criminal sanctions. *Clingenpeel v. Municipal Court (1980, Cal App 2d Dist) 108 Cal App 3d 394, 166 Cal Rptr 573, 1980 Cal App LEXIS 2063.*

29. "Driving" Motor Vehicle

The word "drive" as used in the section is not broad enough to cover the many acts of operating, moving or propelling motor vehicles which cannot properly be called driving. *People v. Kelley (1937, Cal App Dep't Super Ct) 27 Cal App 2d Supp 771, 70 P2d 276, 1937 Cal App LEXIS 7.*

Where defendant entered a disabled car which had collided with parked cars, started the motor and, while others shoved, aided in disengaging the cars and in parking the first car at the curb, it being moved only some four or five feet away and in its disabled condition it could not be driven or moved under its own power for any considerable distance, defendant, in so moving said car, was not "driving" within the meaning of section. *People v. Kelley (1937, Cal App*

Dep't Super Ct) 27 Cal App 2d Supp 771, 70 P2d 276, 1937 Cal App LEXIS 7.

Veh. Code, § 23102, subd. (a) (making it unlawful to drive a vehicle while under the influence of intoxicating liquor) evidences an intent on the part of the Legislature to prohibit any intoxicated person from being in control of a vehicle. Therefore, if a vehicle, equipped with a motor, is being steered or controlled by an intoxicated person, and the vehicle is in motion, the driver is subject to prosecution even if the motor is not running at that time. *People v. Jordan (1977, Cal App Dep't Super Ct) 75 Cal App 3d Supp 1, 142 Cal Rptr 401, 1977 Cal App LEXIS 2044.*

30. Intoxication

Where intoxicating liquor so far affects the nerves, brain, or muscles of the driver as to impair in an appreciable degree his ability to operate his car in the manner that a prudent and cautious man in possession of his faculties would do in the same circumstances, then such driver is under the influence of intoxicating liquor. *People v. Ekstromer (1925, Cal App) 71 Cal App 239, 235 P 69, 1925 Cal App LEXIS 439.*

A driver need not have to be "drunk" to be "under the influence of intoxicating liquor" and within Vehicle Act of 1923, § 112; that section applied when his normal faculties were impaired so as to prevent driving with the care and caution of a sober and prudent person. *Jones v. Pacific Gas & Electric Co. (1930, Cal App) 104 Cal App 47, 285 P 709, 1930 Cal App LEXIS 960.*

The phrase "under the influence of intoxicating liquor" as used in the Vehicle Act, was synonymous with the word "intoxicated" as used in *Pen C § 367d*. *People v. Lewis (1934, Cal App Dep't Super Ct) 4 Cal App 2d Supp 775, 37 P2d 752, 1934 Cal App LEXIS 1217.*

A person is under influence of intoxicating liquor within this section if liquor has so far affected his nervous system, brain or muscles as to impair to an appreciable degree his ability to operate vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties, using reasonable care under like conditions. *People v. Mead (1954, Cal App) 126 Cal App 2d 164, 271 P2d 619, 1954 Cal App LEXIS 2001.*

There is no analogy between phrase "under the influence," used in this section and in *H & S C § 11721*; object of *H & S C § 11721*, is to control taking of narcotic by individual, which is deemed harmful to human body, and does not prohibit any act or conduct while under influence of narcotic, whereas clear purpose of this section is not to prohibit or control drinking, but to prevent operation of motor vehicle by one who is under influence of intoxicating liquor. *People v. Culberson (1956, Cal App Dep't Super Ct) 140 Cal App 2d Supp 959, 295 P2d 598, 1956 Cal App LEXIS 2350.*

Driver was under influence of intoxicating liquor at time of collision where his blood-alcohol content was.16 percent. *Taylor v. Rosiak (1965, Cal App 4th Dist) 236 Cal App 2d 68, 45 Cal Rptr 759, 1965 Cal App LEXIS 803.*

Person with blood-alcohol content of.16 per cent is under influence of intoxicating liquor so as to affect his ability to drive in manner of reasonably prudent person is intoxicated, though it may not be apparent to others. *Taylor v. Rosiak (1965, Cal App 4th Dist) 236 Cal App 2d 68, 45 Cal Rptr 759, 1965 Cal App LEXIS 803.*

Person having blood-alcohol content of.02 per cent is not by reason thereof under influence of intoxicating liquor. *Taylor v. Rosiak (1965, Cal App 4th Dist) 236 Cal App 2d 68, 45 Cal Rptr 759, 1965 Cal App LEXIS 803.*

Blood-alcohol content varies according not only to amount and potency of beverage consumed, but with rate of consumption, as there is reduction in blood-alcohol content of approximately.015 or.02 per cent per hour; maximum effect of consumption of alcoholic beverage on blood-alcohol content is within one-half to three-quarters of hour after consumption, if person does not have food in his stomach; otherwise, period is longer. *Taylor v. Rosiak (1965, Cal App 4th Dist) 236 Cal App 2d 68, 45 Cal Rptr 759, 1965 Cal App LEXIS 803.*

An arresting officer validly concluded that a motorist was driving a vehicle while intoxicated where, after

observing him weaving from lane to lane for some time on a highway, the officer stopped the motorist and asked him to get out of his car which he did with difficulty, where the motorist had an odor of alcohol on his breath and was unable to perform simple roadside balance tests, and where his speech was slurred. *Funke v. Department of Motor Vehicles (1969, Cal App 3d Dist) 1 Cal App 3d 449, 81 Cal Rptr 662, 1969 Cal App LEXIS 1289.*

14. Scientific Tests; Blood Tests

In a trial for driving with a blood-alcohol content (BAC) of 0.08 percent under *Veh C § 23152(b)*, it was error to instruct the jury that it could infer BAC at the time of driving from two tests administered within three hours. In isolation either of two tests--the sole evidence upon which the jury could have concluded that defendant had a BAC of 0.08 percent or greater when driving--were sufficient to allow for the inference permitted by *CALJIC No. 12.61.1*; however, together they showed that defendant's BAC was rising from the time of the stop until the tests were administered and did not support the inferred fact. *People v. Beltran (2007, 1st Dist) 2007 Cal App LEXIS 1947.*

CALJIC No. 12.61.1 may be given regardless of whether there is other evidence admitted at trial rebutting the inference that blood-alcohol content at the time of driving may be inferred from tests given within three hours. However, the use of permissive inferences is not permitted in all cases. *People v. Beltran (2007, 1st Dist) 2007 Cal App LEXIS 1947.*

C. PROSECUTION

1. GENERALLY

31. In General

Prosecution for driving under the influence of intoxicants contrary to Vehicle Act of 1923, § 112, was not barred by a former conviction under a county ordinance for being drunk in a public highway, even if the complaint in the former prosecution did unnecessarily charge that the offense was "in an automobile." *People v. Burkhart (1936) 5 Cal 2d 641, 55 P2d 846, 1936 Cal LEXIS 444.*

Where a complaint charging violation of this statute, filed in a Class B justice's court is dismissed under *Pen C § 1385*, "on account of the filing of another action" based on the same offense but charging a prior conviction, thus placing the offense outside the jurisdiction of such court, and defendant is bound over to the superior court, such court properly grants a motion to dismiss under *Pen C § 1387*, since the dismissal in the justice's court was not explicitly made for the purpose of amending the complaint in the action, and hence, under *Pen C § 1387*, operates as a bar to another prosecution for the same offense. *People v. Aiken (1951, Cal App) 108 Cal App 2d 343, 238 P2d 1019, 1951 Cal App LEXIS 2053.*

Unexplained delay of approximately 140 days between filing of misdemeanor complaint and defendant's arrest for violation of this section deprived him of his constitutional right to speedy trial where he was at all times available for service. *Rost v. Municipal Court of Southern Judicial Dist. (1960, Cal App 1st Dist) 184 Cal App 2d 507, 7 Cal Rptr 869, 1960 Cal App LEXIS 1898,* 85 ALR2d 974.

Alleged want of arraignment and plea on charge of drunk driving was not ground for defendant's discharge on habeas corpus where court docket showed that he was arrested and charged with drunk driving, informed of his rights and charge against him and pleaded guilty, where his deposition showed that he was under impression that he was charged with being drunk though he asserted that he did not imbibe liquor until after he had parked his car on side of highway, and where it appeared from deposition of court clerk that clerk heard court inform defendant on charge of drunk driving against him, heard judge inform him of his rights and ask him for plea, and heard defendant plead guilty to charge. *In re Smith (1960, Cal App 3d Dist) 184 Cal App 2d 818, 7 Cal Rptr 723, 1960 Cal App LEXIS 1939.*

Defendant in a prosecution for violation of *Veh Code, § 23102*, subd (a), in which there was no showing of prejudice by him as resulting from a delay in his arraignment, other than his confinement in custody due to the present charge, was not entitled to an order of dismissal for the delay, even assuming the delay was unreasonable; there is no compelling reason why a delay in arraignment should relieve a defendant from prosecution, there is no statutory requirement for dismissal because of such delay, and it is not one of the grounds for dismissal set forth in *Pen Code, § 1382*. *People v. Morse (1970, Cal App Dep't Super Ct) 4 Cal App 3d Supp 7, 84 Cal Rptr 703, 1970 Cal App LEXIS 1601.*

Failure to expressly advise a motorist who is requested to take a sobriety test pursuant to *Veh. Code, § 13353*, that, as declared in the statute, he has a choice of tests among blood, breath, and urine, involves no violation of any constitutionally protected interest. Accordingly, in the absence of any express statutory provision making the evidence obtained as a result of such statutory violation inadmissible, it may be properly admitted in a prosecution under *Veh. Code, § 23102*. *People v. Brannon (1973, Cal App 5th Dist) 32 Cal App 3d 971, 108 Cal Rptr 620, 1973 Cal App LEXIS 1032.*

A defendant charged with misdemeanor drunk driving and driving without a license, whose trial date was set within 45 days of the date he first appeared in court with an attorney and entered a plea to the charge, was not denied his right to a speedy trial pursuant to *Pen. Code, § 1382*, subd. 3, requiring a defendant in such case be brought to trial within 45 days of his arraignment. Although defendant had made two prior appearances without an attorney more than 45 days before the trial date, he had not entered a plea to the charge at those times, and his arraignment was not complete until the date he entered his plea. Accordingly, his petition for a writ of mandate to dismiss the charges was properly denied, and would not be disturbed on appeal even though the trial court's decision was based on a purported waiver of defendant's speedy trial rights by his attorney. *Valdes v. Municipal Court for Los Angeles Judicial Dist. (1977, Cal App 2d Dist) 69 Cal App 3d 434, 138 Cal Rptr 50, 1977 Cal App LEXIS 1433.*

The rules that the identify of the perpetrator of a crime is not a part of the corpus delecti, and that an individual may be charged under a fictitious name apply to violations of *Veh. Code, § 23102*. *Ernst v. Municipal Court (1980, Cal App 2d Dist) 104 Cal App 3d 710, 163 Cal Rptr 861, 1980 Cal App LEXIS 1718.*

In a prosecution for driving under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), in which defendant entered a plea of guilty and admitted a prior conviction, the docket entry satisfied the test that the defendant be given express and specific admonitions as to the constitutional rights he was waiving before accepting an admission of priors, even though it did not explicitly show what the advice of the consequences of the admission of the prior actually was, where the docket reflected that defendant was advised of and understood the consequences of such an admission. Additionally, defendant did not assert any prejudice from a failure to advise of the consequences of the admission and the record showed the imposition of a minimum sentence. *Worsley v. Municipal Court (1981, Cal App 2d Dist) 122 Cal App 3d 409, 176 Cal Rptr 324, 1981 Cal App LEXIS 2036.*

A finding by the Department of Motor Vehicles that a motorist whose driver's license had been suspended for refusing to submit to a blood alcohol test pursuant to the implied consent law (*Veh. Code, § 13353*) after his arrest for driving under the influence of alcohol in violation of *Veh. Code, § 23102*, subd. (a), was lawfully arrested as required by the statute, was well supported by the law and the evidence, even though the arrest was made by a police officer of one city inside the boundary of another city and the motorist was taken to the police station in the officer's own city, where the motorist's driving, conduct, and appearance at the time of arrest would have led any reasonable person to conclude that the motorist had violated *Veh. Code, § 23102*, subd. (a), in his presence. Viewed as an arrest by a private citizen, there was compliance with *Pen. Code, § 847*, which requires only that a private citizen who makes an arrest deliver the arrestee to a peace officer or a magistrate. Moreover, the officer's authority as a peace officer extended to any place in the state as to any public offense which he had probable cause to believe was committed in his presence, if there existed an immediate danger to persons or property or of the escape of the perpetrator (*Pen. Code, § 830.1*). The motorist constituted a threat to the safety or property of others and would have escaped apprehension had he been permitted to proceed on his way. *Lofthouse v. Department of Motor Vehicles (1981, Cal App 2d Dist) 124 Cal App 3d 730, 177 Cal*

Rptr 601, 1981 Cal App LEXIS 2259.

At a hearing on the suspension of a motorist's driver's license for refusing to submit to a blood alcohol test pursuant to the implied consent law (*Veh. Code, § 13353*) after his arrest for driving under the influence of alcohol in violation of *Veh. Code, § 23102*, subd. (a), the Department of Motor Vehicles was not precluded by the doctrine of collateral estoppel from making an independent determination of the validity of the motorist's arrest for driving while intoxicated. Though the municipal court had dismissed a drunk driving prosecution against the motorist pursuant to *Pen. Code, § 1385* (furtherance of justice) for "lack of jurisdiction," no mention was made of the arrest and it appeared that the court had had subject matter jurisdiction and jurisdiction over the person. Moreover, the doctrine of collateral estoppel does not apply to proceedings under *Veh. Code, § 13353*. The department in its role of controlling the licensing of drivers is not in privity with the prosecutor in a criminal proceeding growing out of the driving of a motor vehicle, and it has no power to control the criminal proceedings or to intervene therein. Proceedings for suspension of a license for refusal to submit to a chemical blood test are unaffected by the fact of the commencement of a criminal prosecution for driving under the influence of intoxicating liquor or by the result of such prosecution. *Lofthouse v. Department of Motor Vehicles (1981, Cal App 2d Dist) 124 Cal App 3d 730, 177 Cal Rptr 601, 1981 Cal App LEXIS 2259.*

A juvenile offender who was alleged to come within the provisions of *Welf. & Inst. Code, § 602*, in that he was under 18 years of age and had committed drunk driving (*Veh. Code, § 23102*, subd. (a)), was not denied equal protection of the law under the federal or state Constitutions, even though it was the district attorney's policy to refuse to plea bargain in cases involving drunk driving charges prosecuted in juvenile court whereas adult offenders in a similar situation (first drunk driving charge and blood alcohol level under.15 percent) were usually offered an opportunity to plead guilty to reckless driving. In order to sustain his equal protection claim, the juvenile was required to show that the state had adopted a classification which treated persons similarly situated in an unequal manner. In view of the qualitative difference in the liberty interest of a minor, who is subject both to parental control and to reasonable regulation by the state to an extent not permissible with adults, minors and adults are not similarly situated and the practice complained of does not deny juveniles equal protection of the law. *In re Steven R. (1982, Cal App 1st Dist) 131 Cal App 3d 95, 182 Cal Rptr 384, 1982 Cal App LEXIS 1539.*

32. Jurisdiction

A charge of driving while intoxicated and a prior conviction under former Veh Act § 112, which is substantially identical with this section, is triable in the superior court, since the violation of this section would not be a first offense. *People v. Atkinson (1953, Cal App) 115 Cal App 2d 425, 252 P2d 67, 1953 Cal App LEXIS 1678.*

Where justice court docket of prosecution for violation of this section shows that court had been informed that defendant had suffered prior conviction and that prosecutor was preparing to file amended complaint to allege such conviction, legal effect of such amendment would be to oust justice court of jurisdiction and render nugatory proceedings following filing of original complaint, and it would require preliminary hearing to determine whether or not defendant should be held for superior court action. *Muns v. Superior Court of Sutter County (1955, Cal App 3d Dist) 137 Cal App 2d 728, 290 P2d 951, 1955 Cal App LEXIS 1253.*

Further prosecution of defendant in the Municipal Court of the Citrus Judicial District on the charge of violating *Veh Code, § 23102*, subd (a) (misdemeanor drunk driving) was not barred under the multiple prosecution prohibitions of *Pen Code, § 654*, by his being charged, convicted, and sentenced for violations of *Veh Code, § 20002*, subd (a) (hit and run) in the Municipal Court of the Santa Anita Judicial District, where, though the driving was continuous, the first violation occurred during the first part of the journey and the drunken driving violation occurred during the subsequent part. It was not a single act case which prohibited multiple prosecution, or a continuous course of conduct case that was indivisible. *People v. Howell (1966, Cal App 2d Dist) 245 Cal App 2d 787, 54 Cal Rptr 92, 1966 Cal App LEXIS 1521.*

Plaintiffs, whose petition in mandamus to compel a determination of the validity of prior convictions before trial on separate complaints charging violations of *Veh Code, § 23102* (misdemeanor drunk driving) was denied, were not

thereby denied opportunity to attack the validity of prior convictions not charged in the complaint where, at the time of arraignment for judgment, the trial court's jurisdiction would not be limited by the contents of the complaint but would include consideration of prior convictions, whether charged or not. (*Veh Code, § 13209*.) *Stenback v. Municipal Court for San Jose-Milpitas-Alviso Judicial Dist. (1969, Cal App 1st Dist) 272 Cal App 2d 27, 76 Cal Rptr 917, 1969 Cal App LEXIS 2240.*

In a prosecution for misdemeanor drunk driving, in violation of *Veh. Code, § 23102*, in which defendant's motion to strike alleged priors, arising out of guilty pleas, was granted on the ground of failure to advise him of his constitutional rights prior to entry of those pleas, the court exceeded its jurisdiction in setting aside one of those pleas, vacating the judgment, and rearraigning defendant on the prior charge, all without his consent. *Gonzalez v. Municipal Court (1973, Cal App 1st Dist) 32 Cal App 3d 706, 108 Cal Rptr 612, 1973 Cal App LEXIS 1009.*

33. Indictment, Information, or Complaint

An information is not objectionable merely because it fails to allege that the act complained of occurred upon a public as distinguished from a private highway. *People v. Knight (1939, Cal App) 35 Cal App 2d 472, 96 P2d 173, 1939 Cal App LEXIS 446.*

Complaint before magistrate for violation of this section was erroneously dismissed for noncompliance with § 40306, subd (a), which provides that when person is arrested for misdemeanor, "arresting officer shall file with the magistrate a complaint," since code provisions, though they may have been intended to be made exclusive as to matters of arrest, were not meant to be made exclusive as to any matter subsequent to arrest, by § 40300, which provides that code provisions shall govern all peace officers in making arrests without warrants for violations of that code for offenses committed in their presence, but that procedure prescribed therein shall not otherwise be exclusive of any other method prescribed by law for arrest and prosecution of person for offenses of like grade. *People v. Maggiora (1962, Cal App Dep't Super Ct) 207 Cal App 2d Supp 908, 24 Cal Rptr 630, 1962 Cal App LEXIS 1987.*

Complaint for violation of this section should not have been dismissed because it was signed and filed by chief of police, instead of arresting officer under § 40306, subd (a), which provides that when person is arrested for misdemeanor and is taken before magistrate, arresting officer shall file with magistrate complaint, where, because arrest was made during early hours of morning, magistrate was not available and defendant was released on bail; § 40306, was inapplicable in such case, since it applies only when defendant is taken before magistrate. *People v. Maggiora (1962, Cal App Dep't Super Ct) 207 Cal App 2d Supp 908, 24 Cal Rptr 630, 1962 Cal App LEXIS 1987.*

The charge of driving "under the influence of intoxicating liquor and under the combined influence of intoxicating liquor and drugs," in violation of *Veh. Code, § 23102*, subd. (a), gave constitutionally adequate notice to defendants, each of whom was charged with violation of the statute, of the unlawful conduct with which they were charged, even though the prosecution did not specifically indicate any class of drugs allegedly consumed in combination with liquor. The complaint unequivocally notified defendants that their ability to operate a vehicle was the conduct at issue. *Byrd v. Municipal Court (1981, Cal App 1st Dist) 125 Cal App 3d 1054, 178 Cal Rptr 480, 1981 Cal App LEXIS 2393.*

34. Election

Driving while intoxicated is a continuing offense, and evidence of its commission at different times within the general charge does not demand an election. *People v. Knight (1939, Cal App) 35 Cal App 2d 472, 96 P2d 173, 1939 Cal App LEXIS 446.*

In a prosecution for violation of section, the facts in evidence did not reveal more than a continuing offense of driving while intoxicated which required no election, where there was no evidence that defendant was driving at any time, except at a service station where he tried to buy some gas, and shortly thereafter when he was seen by an officer and subsequently taken into custody. *People v. Knight (1939, Cal App) 35 Cal App 2d 472, 96 P2d 173, 1939 Cal App*

LEXIS 446.

2. EVIDENCE

35. In General

In prosecution for driving automobile while intoxicated a witness, who was in the car with defendant at time of accident, testified that defendant's conversation was intelligible and that he was not intoxicated, it was not error to refuse to permit witness to narrate particular subject of conversation. *People v. McHugh (1923, Cal App) 62 Cal App 17, 216 P 76, 1923 Cal App LEXIS 306.*

It is within scope of judicial notice to determine that particular substance is a drug; and trial judge should do so and remove issue entirely from jury. *People v. Keith (1960, Cal App Dep't Super Ct) 184 Cal App 2d Supp 884, 7 Cal Rptr 613, 1960 Cal App LEXIS 1950,* superseded by statute as stated in *People v. Alfaro (1983, Cal App 1st Dist) 143 Cal App 3d 528, 192 Cal Rptr 178, 1983 Cal App LEXIS 1782.*

In a prosecution for drunk driving in which defendant seeks to compel production of an ampoule used at his arrest in a "breathalyzer" sobriety test, he has the initial burden of demonstrating a reasonable possibility that a scientific analysis of the contents of the ampoule might result in evidence tending to exonerate him; on failure to produce after such demonstration, the prosecution has a burden to establish that it was unable, through reasonable efforts in good faith, to preserve the ampoule. *People v. Noonan (1971, Cal App 2d Dist) 20 Cal App 3d 862, 98 Cal Rptr 125, 1971 Cal App LEXIS 1227.*

In a prosecution involving the accused's possession of amphetamine pills, it was improper to suppress the evidence and dismiss the case, where, although the pills had been found during a search of his person, without a warrant, following his arrest for a traffic offense, the offense was that of drunk driving (*Veh. Code, § 23102*), and the search followed his failing a breathalyzer test at the police station. *People v. Wilken (1971, Cal App 2d Dist) 20 Cal App 3d 872, 97 Cal Rptr 925, 1971 Cal App LEXIS 1229.*

In a prosecution for driving while under the influence of intoxicating liquor, it was not error to admit in evidence the results of an intoxilyzer test of defendant's breath which showed an alcohol blood content of.16 percent, even though an intoxilyzer does not produce test material which can be preserved and retested as does a breathalyzer, but only produces a printout card showing the results of the testing of the subject's breath and of tests conducted with pure air before and after his test. While the law requires that preservable evidence be retained, it does not require that all evidence which can be reduced to preservable form by any means must be so transformed and then retained. *People v. Miller (1975, Cal App 1st Dist) 52 Cal App 3d 666, 125 Cal Rptr 341, 1975 Cal App LEXIS 1496.*

36. Admissibility, Generally

The corpus delicti under this statute was established by proof that someone was driving his automobile on a public street who was then and there drunk, that defendant and another were in the front seat and both under the influence of liquor, and that four others in the front seat were all intoxicated; and an admission made by defendant that he was driving completed proof even though received while proof of the corpus delicti was not yet completed. *People v. Ellena (1924, Cal App) 67 Cal App 683, 228 P 389, 1924 Cal App LEXIS 408.*

Evidence of drinking at other times inadmissible except as bearing on some other fact in the case. *People v. Dryden (1926, Cal App) 76 Cal App 525, 245 P 436, 1926 Cal App LEXIS 507.*

Where defendant was charged with driving automobile while under influence of intoxicating liquor, with prior conviction of same offense, and, in a second count, with operating motor vehicle while his operator's license was suspended, court did not err in admitting in evidence certified copy of an order issued by Director of Department of

Motor Vehicles suspending operator's license which previously had been issued to defendant appellant, where such evidence was material to charge set forth in second count and sufficiency of certification was not attacked. *People v. Sanders (1938, Cal App) 28 Cal App 2d 746, 83 P2d 720, 1938 Cal App LEXIS 621.*

On prosecution for "hit and run" driving, admission of evidence of prior violations of this section in order to prove motive to avoid detection was not improper notwithstanding provisions of *Pen C § 1025*, prohibiting allusion to prior convictions during trial. *People v. Smylie (1963, Cal App 3d Dist) 217 Cal App 2d 118, 31 Cal Rptr 360, 1963 Cal App LEXIS 1880.*

In a prosecution for driving while under the influence of intoxicating liquor (*Veh Code, § 23102*), the admission in evidence of a recording, which was made at the police station, to demonstrate the quality of defendant's voice was not erroneous under the rule that the corpus delicti must be established by evidence other than declarations or statements of defendant, where the statements recorded contained no admissions or confessions regarding the crime charged, and where other evidence in the case was clearly sufficient to establish the corpus. *People v. Hanggi (1968, Cal App Dep't Super Ct) 265 Cal App 2d Supp 969, 70 Cal Rptr 540, 1968 Cal App LEXIS 1706.*

The superior court properly dismissed the People's petition for a writ of mandate or prohibition directing the municipal court to vacate its order, made on defendant's motion in prosecutions for driving while under the influence of intoxicating liquor, declaring that on the People's failure to produce breathalyzer test ampoules and their contents, all evidence with respect to the tests should be excluded, where, in view of the People's stipulation that the items sought had been destroyed, defendant's motion had raised merely a question of admissibility of evidence such as is not reviewable by mandamus or prohibition. *People v. Municipal Court for Cent. Judicial Dist. (1974) 12 Cal 3d 658, 117 Cal Rptr 20, 527 P2d 372, 1974 Cal LEXIS 253.*

When a police agency acquires a test ampoule of a drunken driver suspect's breath or blood, it is under a duty to take reasonable measures to preserve the ampoule and to make the ampoule available to the suspect. The prosecution has the burden of showing that this duty has been met. The results of the test are admissible in evidence only if the prosecution meets this burden. *People v. Bally (1981, Cal App 1st Dist) 125 Cal App 3d 584, 178 Cal Rptr 96, 1981 Cal App LEXIS 2341.*

37. Scientific Tests; Blood Tests

Defendant charged with operating a motor vehicle while intoxicated was not prejudiced by testimony of experienced chemist with respect to degree of intoxication as evidenced by percentage of alcohol in blood, where defendant's counsel examined chemist at length regarding a chart showing relation between alcohol in blood and degree of intoxication, displayed chart to jury and offered it in evidence. *People v. Ravey (1954, Cal App) 122 Cal App 2d 699, 265 P2d 154, 1954 Cal App LEXIS 1103.*

In prosecution for manslaughter and for driving while under influence of intoxicating liquor, involving results of alcohol blood test made on defendant in which People seek to introduce evidence of result of experiment concerning the effect, in such test on third person, of fact that hypodermic needle and skin were wiped with alcohol, People have burden to show that experiment was performed under conditions substantially similar to those existing when test was made on defendant. *People v. Modell (1956, Cal App 2d Dist) 143 Cal App 2d 724, 300 P2d 204, 1956 Cal App LEXIS 1658.*

Until quantitative analysis of blood alcohol test is made and results are interpreted by experts, it cannot be known whether person from whom blood or other sample was taken was or was not under the influence of intoxicating liquor within terms of this section. *People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

In prosecution for driving automobile while intoxicated, court properly denied motion to bar receipt of evidence

relating to defendant's refusal to take blood alcohol test. *People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

In prosecution for driving automobile while intoxicated, defendant is entitled to explain why he refused to take intoximeter test. *People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

In prosecution for driving automobile while intoxicated, any inference arising from defendant's refusal to submit to blood alcohol test may not be used to supply a lacuna in prosecution's proof. *People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

In prosecution for driving automobile while intoxicated, where there is other prima facie evidence of defendant's intoxication, his refusal to take blood alcohol test, in absence of explanation legally sufficient or satisfactory to jury, may be considered by jury as tending to indicate truth of other evidence in case on subject of his intoxication, and as indicating among inferences that may reasonably be drawn therefrom that those unfavorable to defendant are the more probable. *People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

Rights of person accused of drunk driving were not violated when arresting officer denied accused's request to be taken to hospital two and one-half blocks from scene of the arrest to be given a blood test prior to being taken to police station. *In re Martin (1962) 58 Cal 2d 509, 24 Cal Rptr 833, 374 P2d 801, 1962 Cal LEXIS 281.*

Defendant in a municipal court prosecution for misdemeanor drunk driving was not entitled to a writ prohibiting the further prosecution of the charge against him on the ground that he was denied due process of law by the intentional (though non-malicious) destruction of a breathalyzer test ampoule and its contents relative to a breath sample taken from defendant at the time of his arrest, where, if the evidence of the breathalyzer test were to be excluded at the trial, the People could go forward with other available proof, and where defendant could object at trial to the introduction of the breathalyzer test results and appeal in the event of an adverse ruling. *Van Halen v. Municipal Court for Pasadena Judicial Dist. (1969, Cal App 2d Dist) 3 Cal App 3d 233, 83 Cal Rptr 140, 1969 Cal App LEXIS 1375.*

Evidence of a breathalyzer or other chemical test is not a necessary element of a prosecution for drunk driving. *Van Halen v. Municipal Court for Pasadena Judicial Dist. (1969, Cal App 2d Dist) 3 Cal App 3d 233, 83 Cal Rptr 140, 1969 Cal App LEXIS 1375.*

In a prosecution for driving under the influence of intoxicating liquor, the municipal court erred in ruling that the results of a blood alcohol test were inadmissible in that the police officer who had administered the test had not been trained in the use of the instruments involved in accordance with the provisions of Cal. Admin. Code, tit. 17, § 1221.4, where the prosecution had offered to prove that the officer was acting under the direct supervision of another officer who had been so trained. The training regulation in question requires "practical experience," thereby clearly envisioning training such as was apparently being performed, and, in any event, neither the regulation nor *Health & Saf. Code, § 436.52*, requiring adoption of such regulations, refer to the admissibility in evidence of any tests which fail to follow the regulations. Thus, statutory compliance or noncompliance, in the absence of any constitutional question, merely goes to the weight of the evidence, not its admissibility. (*Disapproving People v. Foulger (1972) 26 Cal App 3d Supp 1, 103 Cal Rptr 156, 1972 Cal App LEXIS 1003.) People v. Rawlings (1974, Cal App 2d Dist) 42 Cal App 3d 952, 117 Cal Rptr 651, 1974 Cal App LEXIS 1281,* overruled in part *People v. Chacon (2007) 40 Cal 4th 558, 53 Cal Rptr 3d 876, 150 P3d 755, 2007 Cal LEXIS 1112.*

The results of breath tests to determine blood alcohol concentration were admissible in evidence in a prosecution of defendants charged with violation of *Veh Code, § 23102*, subd (a), even though there was not strict compliance with regulations providing certain procedures for maintenance of the breath testing instruments (Cal Admin Code, tit 17, § 1221.4, subd (b)), where an expert witness testified that the machine was in good working order, and that he had

ascertained its reliability by certain procedures which he stated served essentially the same function as those called for by the regulation. Noncompliance with the regulation went only to the weight of the blood alcohol concentration evidence, while the validity of the test itself was to be determined in accordance with general scientific standards as to the foundational elements of properly functioning equipment, properly administered tests, and qualified operator. *People v. Adams (1976, Cal App 1st Dist) 59 Cal App 3d 559, 131 Cal Rptr 190, 1976 Cal App LEXIS 1632.*

In a prosecution of defendant for violation of *Veh. Code, § 23102*, subd. (a), in which two of the three samples of simulated solutions used to test the accuracy of an intoxilyzer machine, which had been used to test the alcoholic content of defendant's blood following his arrest, were intentionally, but nonmaliciously destroyed prior to trial, the results of the tests were admissible, where the overwhelming weight of the evidence showed no reasonable possibility that the destroyed solutions could have constituted favorable evidence to the defendant, as there was no evidence of a reasonable possibility that the solutions, had they survived, could have impeached the accuracy and credibility of the results of the test. *People v. Files (1977, Cal App Dep't Super Ct) 72 Cal App 3d Supp 66, 140 Cal Rptr 439, 1977 Cal App LEXIS 1766.*

In a prosecution for driving while under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), and vehicular manslaughter (*Pen. Code, § 192*, subd. (3)(b)), results of the last two of three successive intoxilyzer breath tests administered to defendant were not made inadmissible by the fact that, during the purge of air samples between the first and second intoxilyzer readings the intoxilyzer registered a reading of.01, where, though pertinent rules in the Department of Justice operator's manual or checklist required the intoxilyzer operator to purge the breath-collection chamber of alcohol after each breath sample to obtain a reading of.00, any error committed in the test was harmless in view of the fact that the readings were.01 lower than the actual amount of alcohol in defendant's breath, and where all three readings were well above the.10 level which raises the presumption of being under the influence of alcohol (*Veh. Code, § 23126*, subd. (a)(3)). *People v. French (1978, Cal App 1st Dist) 77 Cal App 3d 511, 143 Cal Rptr 782, 1978 Cal App LEXIS 1235.*

The Department of Justice checklist requiring the operator of an intoxilyzer to purge the breath-collection chamber of alcohol after each breath sample in order to obtain a reading of.00 does not constitute an "agency regulation" within the definition of such term pursuant to *Gov. Code, § 11371*, subd. (b). A regulation, as defined by *Gov. Code, § 11371*, can be adopted only where there has been a statutory grant of authority (*Gov. Code, § 11373*); the checklist was not adopted pursuant to a statute enforced or administered by the department, but the exclusive statutory authority to promulgate regulations concerning breath testing has been delegated to the Department of Health by *Health & Saf. Code, § 436.50*. Therefore, failure of an intoxilyzer operator to obtain a reading of.00 after a first breath sample did not constitute a violation of an agency regulation which rendered the second and third readings inadmissible in a prosecution for driving while under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), and vehicular manslaughter (*Pen. Code, § 192*, subd. (3)(b)). *People v. French (1978, Cal App 1st Dist) 77 Cal App 3d 511, 143 Cal Rptr 782, 1978 Cal App LEXIS 1235.*

In a prosecution for driving while under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), and vehicular manslaughter (*Pen. Code, § 192*, subd. (3)(b)), the operator of an intoxilyzer did not violate the purpose and intent of a Department of Health regulation requiring two breath samples to be taken that are within a reading of.02 of each other (Cal. Admin. Code, tit. 17, § 1221.4, subd. (a)(1)), notwithstanding the fact that three readings were taken of defendant's breath registering.19, (by the single-breath method), and.16 and.17 (by the multi-breath method), where a judicially noticed department memorandum and testimony by an expert witness for the state supported the view that the regulation was satisfied if any two test values were within.02 of each other, regardless of the number of samples taken, and where such expert witness testified that the test procedure used was consistent with the regulation. *People v. French (1978, Cal App 1st Dist) 77 Cal App 3d 511, 143 Cal Rptr 782, 1978 Cal App LEXIS 1235.*

In a mandamus proceeding by a motorist to compel the Department of Motor Vehicles to vacate its order suspending his driver's license pursuant to *Veh. Code, § 13353*, for the refusal to complete a chemical alcohol test following his arrest for drunk driving (*Veh. Code, § 23102*, subd. (a)), the trial court properly determined that the

motorist had failed and refused to complete any of the three prescribed tests without legal excuse. The motorist, who had been uncooperative and combative, requiring physical constraint, refused any test except the urine test, but the officers had been unwilling to remove his handcuffs at the medical center, to which he had originally been taken, to allow such test to be taken there. The motorist had been told that the urine test would have to be given at the jail, and that he would not be given another opportunity to take the blood or breath tests at the medical center should he fail to complete the urine test. Thus, after the motorist was unable to complete the urine test at the jail, the officers were not required to offer another opportunity to choose one of the two tests that had been categorically refused, when it would have meant transporting the motorist back to the medical center, particularly when there was little reason to believe he would submit to either of those tests if the opportunity were renewed, despite a warning about the consequences of the failure to do so. *Noli v. Department of Motor Vehicles (1981, Cal App 5th Dist) 125 Cal App 3d 446, 178 Cal Rptr 5, 1981 Cal App LEXIS 2331.*

In a prosecution for driving a motor vehicle while under the combined influence of intoxicating liquor and a drug, in violation of *Veh. Code, § 23102*, the trial court properly denied defendant's motion to suppress the results of a blood test, even though the blood sample, sent by the police to a laboratory chosen by defendant, was never received by the laboratory. Substantial evidence supported the trial court's determination that the police took reasonable measures to preserve the blood sample for defendant's use by sending it to the laboratory by regular first class mail. Failure to use registered return receipt mail did not constitute negligent failure to comply with required procedures. *People v. Bally (1981, Cal App 1st Dist) 125 Cal App 3d 584, 178 Cal Rptr 96, 1981 Cal App LEXIS 2341.*

The fact that the police department did not retain printouts from quality control samples in forensic alcohol laboratory tests did not require that a complaint against defendant accused of driving under the influence of alcohol be dismissed or that the test results of his blood sample be suppressed, where defendant offered no evidence to establish that the printouts would have had any bearing on the test results or could have an effect on the proof of his guilt or innocence, and where defendant did not show that there were or that there should have been any such records available, that the particular records he sought were records required to be kept by state regulation, or that they were among the records required by the department of health. *People v. Perkins (1981, Cal App Dep't Super Ct) 126 Cal App 3d Supp 12, 179 Cal Rptr 431, 1981 Cal App LEXIS 2476.*

In a prosecution for driving under the influence of alcohol, the trial court did not err in refusing to instruct the jury to disregard blood alcohol test results if they found the police department destroyed records pertaining to the repair, maintenance or adjustment of the test machine. Even if the failure to keep printouts amounted to a violation of Cal. Admin. Code, tit. 17, § 1222.1, which requires the retention for three years of quality control program records by the laboratory, *Evid. Code, § 403* regarding the relevancy of proffered evidence was not applicable since there was no question whether the blood tested was actually defendant's blood. The alleged failure to comply with the regulation was not of constitutional dimension, and lack of compliance went only to the weight of the evidence. *People v. Perkins (1981, Cal App Dep't Super Ct) 126 Cal App 3d Supp 12, 179 Cal Rptr 431, 1981 Cal App LEXIS 2476.*

In a prosecution for driving under the influence of alcohol under former Veh. Code, § 23102, subd. (a), the trial court committed prejudicial error requiring reversal in instructing the jury that if the evidence established beyond a reasonable doubt that the amount by weight of alcohol in defendant's blood was 0.10 percent or more at the time of the test, defendant was presumed to have been under the influence of alcohol, where under former Veh. Code, § 23126, the fact giving rise to the presumption that a person was under the influence of intoxicants and which required proof beyond a reasonable doubt, was that the amount of alcohol in the person's blood at the time of the test as shown by chemical analysis was at that time 0.10 percent or more by weight of alcohol in the person's blood, where the test administered to defendant indicated an alcohol content of 0.10 percent, and where the test had a margin of error of.005 percent. Therefore, the inherent inaccuracies of the test prevented a determination of defendant's blood alcohol content more precisely than that it was at some level between.095 and .105 percent, and the evidence was insufficient to permit the jury to make a rational decision in accordance with the instruction given. Furthermore, it could not be said that had the erroneous instruction not been given it was not reasonably probable that a result more favorable to the defendant would have been reached, where the evidence concerning whether defendant was under the influence of alcohol was closely

balanced. *People v. Campos (1982, Cal App Dep't Super Ct) 138 Cal App 3d Supp 1, 188 Cal Rptr 366, 1982 Cal App LEXIS 2291.*

38. Constitutional Rights

In prosecution for driving automobile while intoxicated and causing bodily injury to other persons, admission of medical testimony concerning alcoholic content of blood specimen taken from defendant without his consent and knowledge and while he was suffering from shock and cerebral concussion following accident, did not constitute violation of his constitutional privilege against self-crimination. *People v. Tucker (1948, Cal App) 88 Cal App 2d 333, 198 P2d 941, 1948 Cal App LEXIS 1472.*

In prosecution for driving automobile while intoxicated, fact of defendant's refusal to take blood alcohol test is admissible in evidence, without violation of any constitutional right of defendant, and there may be comment on such refusal. *People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

One arrested for misdemeanor drunk driving was not denied due process of law in refusal of her request that her physician be notified of her arrest so that he could give her blood test, where, notwithstanding fact that he was practically two hours driving time away, she had ample opportunity to contact him after her early release from custody (about 20 minutes to a half-hour after being brought to county jail), but made no attempt to do so, and where she had refused to accept offer by arresting officer to take her to hospital (about 10 minutes from the jail) where she could select doctor of her choice to give her blood test. *In re Howard (1962, Cal App 1st Dist) 208 Cal App 2d 709, 25 Cal Rptr 590, 1962 Cal App LEXIS 1853.*

A condition imposed by a motorist lawfully arrested for driving while intoxicated (*Veh Code, § 23102*) that her attorney be present before she would consent to taking of one of the three chemical sobriety tests prescribed by *Veh Code, § 13353*, was, in legal effect, a refusal to take such test within the purview of the statute; neither the denial of the opportunity for advice of counsel before stating whether one will submit to a test and before deciding which test to take, nor the denial of the opportunity to have counsel present while the test is administered, is the denial of any constitutional right. *Ent v. Department of Motor Vehicles (1968, Cal App 1st Dist) 265 Cal App 2d 936, 71 Cal Rptr 726, 1968 Cal App LEXIS 1701.*

In a prosecution for driving while under the influence of intoxicating liquor (*Veh Code, § 23102*), the admission in evidence of the results of a blood test did not violate defendant's constitutional or statutory rights although defendant was not given the choice of chemical tests provided by the "implied consent" law (*Veh Code, § 13353*), where defendant consented to the test, and where the legislature made the requirement of a choice of tests a prerequisite only to a departmental suspension of driving privileges for refusal to take a test, not to a prosecution for driving while intoxicated. *People v. Hanggi (1968, Cal App Dep't Super Ct) 265 Cal App 2d Supp 969, 70 Cal Rptr 540, 1968 Cal App LEXIS 1706.*

If a test ampoule used in a breathalyzer test, its contents, and the reference ampoule are available and there is a reasonable possibility that they would constitute favorable evidence on the issue of defendant's guilt or innocence in a prosecution for driving while under the influence of intoxicating liquor, due process requires that such evidence be disclosed. *People v. Hitch (1974) 12 Cal 3d 641, 117 Cal Rptr 9, 527 P2d 361, 1974 Cal LEXIS 252,* overruled *People v. Johnson (1989) 47 Cal 3d 1194, 255 Cal Rptr 569, 767 P2d 1047, 1989 Cal LEXIS 18.*

Where the test ampoule used in a breathalyzer test, its contents, and the reference ampoule cannot be disclosed in a prosecution for driving while under the influence of intoxicating liquor as a result of intentional but nonmalicious destruction by the investigative officials, sanctions shall in the future be imposed for such nonpreservation and nondisclosure unless the prosecution can show that the involved governmental agencies have established, enforced, and attempted in good faith to adhere to, rigorous and systematic procedures designed to preserve the test ampoule and its

contents and the reference ampoule. The prosecution shall bear the burden of demonstrating that such duty to preserve the ampoules and their contents has been fulfilled. If the prosecution meets its burden and makes the required showing, the results of the test shall be admissible in evidence, even though the ampoules and their contents have been lost. If the prosecution fails to meet its burden, the court shall apply sanctions for nondisclosure. In such latter event, due process shall not require dismissal of the action but shall require merely that the results of the test be excluded from evidence. (Disapproving anything contrary to the instant opinion in *Covington v. Municipal Court of Los Angeles Judicial Dist. (1969) 273 Cal App 2d 470, 78 Cal Rptr 563, 1969 Cal App LEXIS 2189.) People v. Hitch (1974) 12 Cal 3d 641, 117 Cal Rptr 9, 527 P2d 361, 1974 Cal LEXIS 252,* overruled *People v. Johnson (1989) 47 Cal 3d 1194, 255 Cal Rptr 569, 767 P2d 1047, 1989 Cal LEXIS 18.*

In a prosecution for driving while under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), and vehicular manslaughter (*Pen. Code, § 192*, subd. (3)(b)), the Department of Health's interpretation of its regulation requiring two breath samples be taken that are within a reading of.02 of each other (Cal. Admin. Code, tit. 17, § 1221.4, subd. (a)(1)), to the effect that such regulation is satisfied if two test values are within a reading of.02 of each other regardless of the number of samples taken, did not violate defendant's substantive due process rights, notwithstanding defendant's contention that such an interpretation unreasonably allowed innumerable tests to be taken until the requisite correlation was obtained, where only two consecutive multi-breath samples were actually obtained from defendant. *People v. French (1978, Cal App 1st Dist) 77 Cal App 3d 511, 143 Cal Rptr 782, 1978 Cal App LEXIS 1235.*

In a prosecution for driving while under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), and vehicular manslaughter (*Pen. Code, § 192*, subd. (3)(b)), the trial court properly exercised its discretion in admitting into evidence the results of an intoxilyzer test, where, even if the test was conducted in violation of a Department of Health regulation requiring two breath samples to be taken that are within a reading of.02 of each other (Cal. Admin. Code, tit. 17, § 1221.4, subd. (a)(1)), such violation was not of a constitutional dimension, and where defendant had opportunity, and actually did, attack the credibility of such test. For the same reasons, the admission of the intoxilyzer results were not inherently prejudicial, notwithstanding defendant's contention that the jury might have given them undue weight as a "scientifically controlled" test, especially in view of the substantial independent evidence of defendant's highly intoxicated condition. *People v. French (1978, Cal App 1st Dist) 77 Cal App 3d 511, 143 Cal Rptr 782, 1978 Cal App LEXIS 1235.*

When a driver who is suspected of driving while intoxicated and who has been simultaneously advised of his constitutional rights and given the implied consent admonition, manifests confusion by asserting his alleged right to an attorney, it is incumbent on the police officer to explain that the right to an attorney does not apply to the decision that he must make concerning the three chemical sobriety tests. However, mere insistence on an attorney for consultation about which tests to take does establish officer-induced confusion. Neither does being too drunk to understand the proferred information or explanation. In determining whether a driver's refusal is the result of confusion, the crucial factor is not the state of the driver's mind; rather, it is fair meaning to be given his response to the demand that he submit to the chemical tests. There is no requirement that a refusal of the test be intelligent in order to trigger the sanction of suspension of the driver's license. *McGue v. Sillas (1978, Cal App 1st Dist) 82 Cal App 3d 799, 147 Cal Rptr 354, 1978 Cal App LEXIS 1720.*

As long as defendant's constitutional rights are respected in a criminal proceeding, the convenience of the parties and the court should be given considerable weight. Thus, the Legislature's action in enacting *Pen. Code, § 1192.5*, which does not require a factual basis determination for guilty pleas of misdemeanor defendants, does not violate equal protection standards, and a defendant charged with violating *Veh. Code, § 23102*, subd. (a), driving under the influence of intoxicating liquor, was not entitled to have a prior conviction for the same offense stricken on the grounds that the trial court had failed to ascertain whether there was a factual basis for his guilty plea. The record showed that the trial court had explained the nature of the charge and the date and place at which the violation had occurred to defendant and defendant's response to questions from the court indicated that he understood the nature of the charge. *Ballard v. Municipal Court (1978, Cal App 1st Dist) 84 Cal App 3d 885, 149 Cal Rptr 82, 1978 Cal App LEXIS 1930.*

In a prosecution for driving while intoxicated in violation of *Veh. Code, § 23102*, the trial court did not err in denying defendant's motion to suppress the results of field sobriety and chemical breath tests given defendant to determine his sobriety. Such evidence was not the unlawful fruit of the arresting officer's question to defendant as to how much defendant had drunk, although the officer did not advise defendant as to his constitutional right to counsel or against incrimination, where the officer asked the question regarding defendant's drinking before defendant was placed in custody. The officer had detained defendant because he believed defendant had made illegal turns while driving, but lacked probable cause to arrest defendant when he inquired of defendant as to his drinking. *People v. Carter (1980, Cal App 2d Dist) 108 Cal App 3d 127, 166 Cal Rptr 304, 1980 Cal App LEXIS 2036.*

In a municipal court prosecution for misdemeanor drunk driving (*Veh. Code, § 23102*, subd. (a)), the results of a breath test administered to defendant could not be introduced into evidence against him at trial, notwithstanding the trial court's pretrial denial of defendant's motion to suppress the results of the test, where three requests of the police by defendant for a blood test had been to no avail and where a breath test had been administered instead, even though facilities were immediately available at the police station at which the breath test was administered for an administering of a blood test at that time. The refusal to grant defendant's request for a blood test under such circumstances was not only a violation of his right to a blood test under *Veh. Code, § 13353*, subd. (a), but it was also a violation of his constitutional right of due process in that it prevented him from obtaining evidence necessary to his defense. *People v. Superior Court (Scott) (1980, Cal App 2d Dist) 112 Cal App 3d 602, 169 Cal Rptr 412, 1980 Cal App LEXIS 2486.*

39. Weight and Sufficiency

That place in question was a highway, sufficiently shown by the evidence. *People v. Kelly (1925, Cal App) 70 Cal App 519, 234 P 110, 1925 Cal App LEXIS 17.*

Evidence was sufficient to support conviction, in prosecution for driving automobile while intoxicated. *People v. Leutholtz (1929, Cal App) 102 Cal App 493, 283 P 292, 1929 Cal App LEXIS 183.*

In prosecution for manslaughter, violation of § 141, and violation of this section, evidence was sufficient to support verdict and judgment of conviction as to each count and instructions which court gave to jury sufficiently covered subjects referred to in refused instructions. *People v. Carr (1934, Cal App) 3 Cal App 2d 275, 39 P2d 463, 1934 Cal App LEXIS 1172.*

In prosecution in which defendant was charged with driving automobile while under influence of intoxicating liquor, with prior conviction of same offense, and, in second count, with operating motor vehicle while his operator's license was suspended, evidence amply sustained verdict and judgment against defendant with respect to charge of driving an automobile while under influence of intoxicating liquor. *People v. Sanders (1938, Cal App) 28 Cal App 2d 746, 83 P2d 720, 1938 Cal App LEXIS 621.*

In prosecution for driving while intoxicated, finding of prior conviction was supported by certified transcript of judgment in prior case wherein defendant's name was same as instant defendant's and where defendant, though he took stand, did not attempt to rebut such prima facie evidence. *People v. Clinesmith (1959, Cal App Dep't Super Ct) 175 Cal App 2d Supp 911, 346 P2d 923, 1959 Cal App LEXIS 1435.*

40. Intoxication

It is necessary to prove that the driver of the automobile was under the influence of intoxicating liquor. *People v. Ellena (1924, Cal App) 67 Cal App 683, 228 P 389, 1924 Cal App LEXIS 408.*

Proof that the driver of the automobile was intoxicated may be made by showing that all the persons riding on the front seat of the automobile were drunk at the time it was alleged that the automobile was being driven on the public highway. *People v. Ellena (1924, Cal App) 67 Cal App 683, 228 P 389, 1924 Cal App LEXIS 408.*

Defendant's intoxication at the time of the accident, sufficiently shown. *People v. McIntyre (1931) 213 Cal 50, 1 P2d 443, 1931 Cal LEXIS 483.*

Evidence of reckless operation of a car driven by defendant from side to side of the highway has some tendency to support evidence that he was intoxicated while driving. *People v. Fellows (1934, Cal App) 139 Cal App 337, 34 P2d 177, 1934 Cal App LEXIS 522.*

In prosecution for driving automobile while intoxicated and causing bodily injury to other persons, the fact that defendant's car was driven on wrong side of road was some evidence of condition of driver, and evidence, including testimony of medical expert that analysis of alcoholic content of defendant's blood indicated definite degree of intoxication, supported conclusion of jury that defendant was, at time of accident, under influence of intoxicating liquor. *People v. Tucker (1948, Cal App) 88 Cal App 2d 333, 198 P2d 941, 1948 Cal App LEXIS 1472.*

Testimony of two highway patrolmen that in their opinion defendant was under influence of intoxicating liquor, expert testimony that defendant had concentration of alcohol in her blood of.16 per cent one hour after accident, together with other evidence, supported jury's implied finding that defendant was under influence of intoxicating liquor in violation of this section at time of accident, in prosecution for manslaughter. *People v. Hoe (1958, Cal App 3d Dist) 164 Cal App 2d 502, 330 P2d 907, 1958 Cal App LEXIS 1635.*

Defendant was properly convicted of driving while under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), where the result of an intoxilyzer test by itself was sufficient for conviction, if accepted by the jury, and where, even in the absence of the intoxilyzer results, there was overwhelming evidence, including defendant's inability to perform field sobriety tests, that defendant was under the influence of alcohol at the time his automobile collided with a bicycle. *People v. French (1978, Cal App 1st Dist) 77 Cal App 3d 511, 143 Cal Rptr 782, 1978 Cal App LEXIS 1235.*

41. "Driving" Automobile

Where the evidence merely showed that a car collided with parked cars and that when witnesses appeared defendant and a woman were standing at the scene of the disaster, and defendant was not seen in the car until he entered it to aid in parking it at the curb, at which time he was intoxicated, and the inferences pointed no more strongly to him as the driver than to the woman, the conviction could not be upheld on the theory that defendant was driving at the time of the accident. *People v. Kelley (1937, Cal App Dep't Super Ct) 27 Cal App 2d Supp 771, 70 P2d 276, 1937 Cal App LEXIS 7.*

In a prosecution for driving while under the influence of intoxicating liquor (*Veh Code, § 23102*), the evidence was sufficient to support the jury's finding of guilty, where the fact of intoxication was not contested, where defendant was found sitting behind the wheel of his vehicle in the center of the street with the engine running and the lights on, and where the jury was entitled to infer that defendant must have placed himself in such position by driving to the area and was justified in discarding as unreasonable the possibility that he got there in some other manner. *People v. Hanggi (1968, Cal App Dep't Super Ct) 265 Cal App 2d Supp 969, 70 Cal Rptr 540, 1968 Cal App LEXIS 1706.*

A woman who had been pedaling slowly along a public highway on her "moped," with the motor operable but switched off, and was found, by a passing citizen, sitting on the curb smelling of alcohol with her machine lying in the road, was subject to the drunk driving laws (*Veh. Code, § 23102*, subds. (a), (b)), to the implied consent law (*Veh. Code, § 13353*), and to formal arrest without a warrant (*Veh. Code, § 40300.5*) on failing a sobriety test conducted by a highway patrol officer whom the citizen had summoned to the scene. A subsequent municipal court order that, on the ground that she had not been "driving" a "motor vehicle," suppressed the test result of her .22 blood alcohol content, constituted reversible error. *People v. Jordan (1977, Cal App Dep't Super Ct) 75 Cal App 3d Supp 1, 142 Cal Rptr 401, 1977 Cal App LEXIS 2044.*

3. TRIAL

42. In General

Cross examination to develop that defendant was driving in a cautious, orderly, and prudent manner at the time should not have been excluded in a prosecution under Vehicle Act of 1923, § 112, but error in excluding could not be presumed where proper and sufficient offers of proof were not thereafter made. *People v. Fellows (1934, Cal App) 139 Cal App 337, 34 P2d 177, 1934 Cal App LEXIS 522.*

Defendant, charged in municipal court with driving while intoxicated with a previous conviction of the same offense, was not entitled to have the prior conviction stricken on the ground that he had pleaded guilty in that case without being advised with sufficient specificity of his right to appointed counsel if he could not afford an attorney, where the docket sheet in the case showed that he had been advised of all his rights including the right to appointed counsel if indigency was proved, where he did not allege that he was indigent at the time, and where the record showed that the advice as to constitutional rights was given at a mass arraignment of a number of defendants, that when the trial judge was confronted with the fact that defendant was determined to plead guilty without benefit of counsel, he reiterated the advice in respect to the right to counsel and also some other rights, and that a deputy public defender was present with defendant when he pleaded guilty and actually spoke to the court; presumption of fulfillment of official duties of *Evid. Code § 664*, is applicable to cure discrepancy between judge's reiteration of only four of the rights being waived and clerk's itemization of several additional rights in the docket entries. *James v. Municipal Court for Camarillo Judicial Dist. (1975, Cal App 2d Dist) 45 Cal App 3d 557, 119 Cal Rptr 606, 1975 Cal App LEXIS 1708.*

The offense of driving under the influence of intoxicating liquor (*Veh. Code, § 23102*, subd. (a)) is a simple everyday offense. Thus, the trial court was not required to make a specific inquiry into whether there was a factual basis for a defendant's guilty plea to such a charge, where the record showed that the court had explained the nature of the charge and the date and place at which it occurred, and defendant's responses to questions from the court indicated that he understood the charge. *Ballard v. Municipal Court (1978, Cal App 1st Dist) 84 Cal App 3d 885, 149 Cal Rptr 82, 1978 Cal App LEXIS 1930.*

In a prosecution for driving under the influence of alcohol in violation of *Veh C § 23102* subd (a), the record in a prior proceeding for the same offense, showed an adequate waiver of the right to counsel in those proceedings, and thus the trial court properly denied defendant's motion in the present prosecution to strike the allegation of the prior conviction. The record in the prior proceeding showed that defendant was specifically advised of his right to counsel and of some of the collateral rights that went with it. He also was specifically asked whether he understood that by pleading no contest to the charge he was giving up his right to counsel, and he answered that question in the affirmative. *People v. Buller (1979, Cal App 2d Dist) 101 Cal App 3d 73, 160 Cal Rptr 657, 1979 Cal App LEXIS 2510.*

In a prosecution for driving while under the influence of alcohol in violation of *Veh. Code, § 23102*, subd. (a), the trial court erred in granting defendant's motion to strike an allegation from the charges against him of a prior conviction of the same offense, where the motion was on the ground that in the prior action in which defendant pleaded guilty to the charge, he was denied his constitutional right to the assistance of counsel, in support of the motion he offered as evidence only the docket of the prior action, the docket reflected defendant was advised of his right to counsel and made a knowing and intelligent waiver of the right, and no contrary evidence was presented. The burden of proof was on defendant to prove the constitutional invalidity of the prior conviction, once such conviction was established. It is not essential to a knowing waiver of counsel that there appear on the record an advisement concerning the hazards of self-representation. *People v. White (1981, Cal App Dep't Super Ct) 120 Cal App 3d Supp 21, 174 Cal Rptr 676, 1981 Cal App LEXIS 1863.*

In a prosecution for driving under the influence of alcohol (*Veh. Code, § 23102*, subd. (a)), in which defendant entered a plea of guilty and admitted a prior conviction, the docket entry satisfied the test requiring a recital that defendant expressly and explicitly waived his constitutional rights, even though the advisements and waivers were evidenced on the docket sheet by a series of rubber stamped memorializations, where these memorializations were a

contemporaneous reporting of what defendant was advised and what he waived, and not a recording of formal rights and waivers before their actual delivery. *Worsley v. Municipal Court (1981, Cal App 2d Dist) 122 Cal App 3d 409, 176 Cal Rptr 324, 1981 Cal App LEXIS 2036.*

43. Jury Instructions

An instruction on aiding and abetting held not misleading in view of the evidence. *People v. Martin (1931, Cal App) 114 Cal App 337, 300 P 108, 1931 Cal App LEXIS 868.*

Failure to include, in an instruction on intoxication, the words "that the public or persons coming in contact with him could readily see and know that it was affecting him in this respect and was reflected in his walk, acts and conversation," where the instruction as given adequately covered the subject and was not, as contended, too narrow in its import and such as would lead the jury to believe that the testimony of police officers and experts should be more readily believed than the testimony of the average person, was not error. *People v. Aguilar (1934, Cal App) 140 Cal App 87, 35 P2d 137, 1934 Cal App LEXIS 472.*

In prosecution for driving automobile while intoxicated and causing bodily injury to other persons, it was not error to refuse instruction involving sudden peril rule where no evidence was introduced entitling defendant to such instruction. *People v. Tucker (1948, Cal App) 88 Cal App 2d 333, 198 P2d 941, 1948 Cal App LEXIS 1472.*

In prosecution for driving automobile while intoxicated and causing bodily injury to other persons, it was not error to refuse to instruct as to right of jury to find defendant guilty of lesser offense prescribed by this section, if jury entertained a reasonable doubt as to whether defendant did an act forbidden by law which proximately caused bodily injury, where evidence showed that defendant's car was on wrong side of highway at time it collided with another car, where was no showing that defendant had any right to be traveling in that portion of highway under conditions disclosed, and where jury were instructed, at defendant's request, that if they should find that by defendant's location on highway at time of accident he was not violating some law, jury could not find him guilty of offense charged. *People v. Tucker (1948, Cal App) 88 Cal App 2d 333, 198 P2d 941, 1948 Cal App LEXIS 1472.*

In prosecution for felony drunk driving in which prosecution claimed that defendant was driving at unlawful rate of speed before striking another car and injuring its driver, it was not error to refuse to give instruction relating to misdemeanor drunk driving under which defendant would have been acquitted of felony drunk driving if jury determined he was not guilty of violation of law that was proximate cause of accident, where, even if jury could have found that defendant was not driving at unlawful rate of speed, there was evidence that he was knowingly driving his car in violation of statute requiring cars driven on highway to be equipped with adequate brakes, from which jury could not reasonably have found that defendant's conduct was that of reasonably prudent man. *People v. Campbell (1958, Cal App 2d Dist) 162 Cal App 2d 776, 329 P2d 82, 1958 Cal App LEXIS 1940.*

In prosecution for driving automobile while under influence of intoxicating liquor, court properly refused to instruct that person has constitutional right to refuse to take any tests at request of officers arresting him. *People v. Conterno (1959, App Dep't Super Ct) 170 Cal App 2d Supp 817, People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

In prosecution for driving automobile while intoxicated, it was not prejudicial error to refuse to instruct that no inference of guilt attached to defendant by reason of his refusal to take any so-called sobriety tests and that person has constitutional right to refuse to take any tests at request of officers arresting him and no inference of wrongdoing arises from such refusal where record on appeal was incomplete and it could not be said there was no other prima facie evidence of intoxication, it did not disclose that defendant, at the time he was requested to take test, declared he was not guilty of crime charged, and it could not be determined from record whether permissible scope of cross-examination of defendant with respect to his reasons for refusing to take blood alcohol test was exceeded. *People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

In a prosecution for the misdemeanor of driving while intoxicated, where an instruction by the court on defendant's refusal to submit to a sobriety test specifically referred to refusal to take a breathalyzer test or other sobriety test after he was made aware of the nature of the test and its effect, and where the prosecutor did not comment on defendant's failure to answer questions, but only on his refusal to take tests, it could not be said that the jury was erroneously authorized to consider, as evidence of guilt, defendant's exercise of his right to remain silent in response to questions at the time of his arrest. *People v. Sudduth (1966) 65 Cal 2d 543, 55 Cal Rptr 393, 421 P2d 401, 1966 Cal LEXIS 222,* cert den *(1967) 389 US 850, 88 S Ct 43, 19 L Ed 2d 119, 1967 US LEXIS 793.*

44. Verdict, Judgment, and Sentence

The former Vehicle Act of 1923, § 112, as amended 1929, provided that upon every verdict of guilty the jury "shall" recommend the punishment, and the court in imposing sentence "shall have no authority" to impose a greater sentence. *People v. Ray (1928, Cal App) 92 Cal App 417, 268 P 382, 1928 Cal App LEXIS 916.*

Nothing in Vehicle Act of 1923, § 112, limited the power of the court to admit a prisoner to probation for a period of three years of which two years had to be served at a county road camp; and such a condition did not violate *Pen C §§ 19a*, *1203*. *In re Application of Brown (1935, Cal App) 5 Cal App 2d 218, 42 P2d 680, 1935 Cal App LEXIS 1044.*

A sentence to jail for five months upon conviction of violation of this section is not a cruel or unusual punishment. *People v. Rose (1940, Cal App) 41 Cal App 2d 445, 106 P2d 930, 1940 Cal App LEXIS 259.*

A condition in a judgment for violation of this section that it would be suspended if defendant left the city and county and remained away for several years, is, in effect an unlawful increase of punishment by banishment not provided by statute, and therefore void. *In re Scarborough (1946, Cal App) 76 Cal App 2d 648, 173 P2d 825, 1946 Cal App LEXIS 761.*

Judgment must ordinarily be pronounced within five days of a plea, finding, or verdict of guilty in the municipal court (*Pen Code, § 1449*); but such time does not commence to run, and judgment may not be pronounced after a conviction for violation of *Veh Code, § 23102* (misdemeanor drunk driving), until the trial judge obtains defendant's record of prior convictions from the Department of Motor Vehicles (*Veh Code, § 13209*). If defendant challenges the validity of prior convictions at the time of allocution, the trial court may set a hearing to determine the validity of the prior convictions and may extend the time for pronouncing judgment for this purpose as with a motion for new trial or in arrest of judgment. (*Pen Code, § 1449*.) *Stenback v. Municipal Court for San Jose-Milpitas-Alviso Judicial Dist. (1969, Cal App 1st Dist) 272 Cal App 2d 27, 76 Cal Rptr 917, 1969 Cal App LEXIS 2240.*

Plaintiffs who were charged with separate, unrelated violations of *Veh Code, § 23102* (misdemeanor drunk driving) were not entitled to a pretrial determination as to the validity of their prior convictions of such offense where prior convictions were not alleged in the complaints and where judicial efficiency would not be served by a pretrial determination as the municipal court would still be required to defer pronouncing judgment until it received a report of prior convictions from the Department of Motor Vehicles. (*Veh Code, § 13209*.) *Stenback v. Municipal Court for San Jose-Milpitas-Alviso Judicial Dist. (1969, Cal App 1st Dist) 272 Cal App 2d 27, 76 Cal Rptr 917, 1969 Cal App LEXIS 2240.*

The sanctions imposable on a person convicted of drunk driving are increased if he has a prior conviction of the same offense within a specified time, and a collateral attack may be made on any such prior conviction on constitutional grounds. Accordingly, on being charged a second time with misdemeanor drunk driving, defendant had a right to collaterally attack his prior conviction two years earlier of the same offense. *Hasson v. Cozens (1970) 1 Cal 3d 576, 83 Cal Rptr 161, 463 P2d 385, 1970 Cal LEXIS 332.*

In a prosecution for misdemeanor drunk driving, defendant was properly sentenced as a first offender, though he had suffered a prior conviction of the same offense, where the court ordered the prior conviction stricken and the judge

recommended against suspension, as a result of which there was, impliedly, a finding of invalidity of the prior conviction. *Hasson v. Cozens (1970) 1 Cal 3d 576, 83 Cal Rptr 161, 463 P2d 385, 1970 Cal LEXIS 332.*

A defendant arrested for drunk driving who was found to be in possession of heroin while being handcuffed, was not subject to multiple prosecution within the proscription of *Pen. Code, § 654*, by being tried for possession of heroin (*Health & Saf. Code, § 11350*), after having entered a plea of guilty to the drunk driving charge, where the evidence necessary to prove the drunk driving and narcotics offenses were sufficiently distinct so as to permit separate prosecutions of the two offenses, in that proof of the drunk driving charge was supplied primarily by the observation of the arresting officers made after defendant was stopped and given sobriety tests, while proof of the heroin charges hinged on the discovery of a package filled with heroin which occurred after the arrest for drunk driving had been made, and where the only common ground of the two offenses was the fact that defendant was in the moving automobile in possession of the heroin at the same time he was under the influence of alcohol. *People v. Hurtado (1977, Cal App 2d Dist) 67 Cal App 3d 633, 136 Cal Rptr 774, 1977 Cal App LEXIS 1260.*

The statutory provisions requiring a unanimous acquittal in a criminal prosecution (*Pen. Code, §§ 1140*, *1141*, *1150*, *1151*) do not violate the United States and California Constitutions, and a defendant has no right to be acquitted of a crime if the jury is unable to reach a verdict. A retrial under such circumstances is not coercive or violative of the constitutional right of due process; if a jury fails to agree on a verdict, the same effect obtains as if there had been no trial on that issue. Therefore, the superior court properly denied a petition for a writ of prohibition to restrain the municipal court from retrying a defendant on a charge of driving under the influence of alcohol (*Veh. Code, § 23102(a)*) where an earlier trial had resulted in a mistrial after a hung jury. *Brown v. Municipal Court (1978, Cal App 4th Dist) 84 Cal App 3d 180, 148 Cal Rptr 493, 1978 Cal App LEXIS 1851.*

In a prosecution for driving under the influence of alcohol in violation of *Veh C § 23102* subd (a), the trial court erred in denying defendant's motion to strike two alleged prior convictions of the same offense, where in each case the defendant pled guilty without being represented by counsel, and where in each case the only suggestion that he had been advised of the right to counsel was a preprinted form which contained a recital to the effect that he had been advised of his rights, including his right to counsel. *People v. Buller (1979, Cal App 2d Dist) 101 Cal App 3d 73, 160 Cal Rptr 657, 1979 Cal App LEXIS 2510.*

In sentencing defendant who had pleaded guilty in violation of *Veh. Code, § 23102*, subd. (a) and admitted two priors, the trial court erred in refusing to exercise its discretion in considering whether to grant defendant's motion that he be enrolled in an alcohol rehabilitation program, pursuant to *Veh. Code, § 13352.5*, in order to avoid the mandatory three-year revocation of his driving privilege pursuant to *Veh. Code, § 13352*, and in denying the motion on the ground a conflict between *Veh. Code, § 23102.1*, and § 13352.5, deprived it of jurisdiction to exercise its discretion in regard to ordering such enrollment. The statutes are not in conflict; the sentence imposed on defendant complied with the requirements of *Veh. Code, §§ 23102*, *23102.1*, with respect to third time offenders; and *Veh. Code, § 13352.5*, permits the court to additionally order a defendant enrolled in an alcohol rehabilitation program which would permit him to preserve his driving privilege from the otherwise mandatory three-year revocation. *People v. Engdal (1980, Cal App Dep't Super Ct) 114 Cal App 3d Supp 17, 170 Cal Rptr 628, 1980 Cal App LEXIS 2643.*

4. REVIEW

45. In General

Writ of habeas corpus to secure release of petitioner convicted under this section, refused. *In re Agnew (1946, Cal App) 73 Cal App 2d 192, 166 P2d 65, 1946 Cal App LEXIS 824. In re Borgfeldt (1946, Cal App) 75 Cal App 2d 83, 170 P2d 94, 1946 Cal App LEXIS 1209.*

In prosecution resulting in conviction of manslaughter and of driving while under influence of intoxicating liquor, defendant waives any right to claim error in admission of evidence of prosecutor's experiment on himself to determine

effect of alcoholic content of blood resulting from fact that skin and hypodermic needle used in withdrawing blood were wiped with alcohol, notwithstanding conditions of experiment may have been different from procedure used in testing defendant's blood, where conditions may have been the same, and where question of reliability of experiment could have been answered readily in court had defendant specified such objections, rather than merely making general objection that foundation was insufficient. *People v. Modell (1956, Cal App 2d Dist) 143 Cal App 2d 724, 300 P2d 204, 1956 Cal App LEXIS 1658.*

On appeal from the trial court's denial of a writ of mandate to compel a justice court to set aside a conviction of misdemeanor drunk driving based on a plea of guilty, the People could not successfully argue that mandamus was not proper remedy, where a motion to set aside or vacate the judgment had been made and denied in the justice court, and where the trial court's proposed findings of fact, signed by both parties, included a determination that the writ was the only plain, speedy, and adequate remedy available. *Cooper v. Justice Court (1972, Cal App 4th Dist) 28 Cal App 3d 286, 104 Cal Rptr 543, 1972 Cal App LEXIS 757.*

The record clearly showed in a criminal prosecution for driving under the influence of alcohol, in which a prior conviction was alleged which would aggravate the punishment in the event defendant was convicted of the present offense by imposition of a mandatory term in jail and suspension of driving privileges, that defendant was aware of the consequences of his plea of nolo contendere in the prior conviction where, prior to entry of the plea, defendant, who was represented by counsel at all times, was fully advised by the judge of his right to a jury trial, right of confrontation and right against self-incrimination and voluntarily waived all these rights and where defendant was also told that, if convicted again within the ensuing five years, he would lose his driver's license for one year and would be required to serve a maximum of two years in jail and to pay a $250 fine, receipt of which advice defendant acknowledged in entering his plea. *Scoggins v. Superior Court (1977, Cal App 2d Dist) 65 Cal App 3d 873, 135 Cal Rptr 619, 1977 Cal App LEXIS 1095.*

A complaint in an action against the state alleging that plaintiffs were persons who had or will have their drunk driving convictions declared unconstitutional, and seeking to establish and enforce a constructive trust with respect to the fines paid pursuant to the convictions, and to recover such fines, stated a cause of action, and defendant's general demurrer on the ground that the fact that a prior conviction is unconstitutionally invalid does not require a refund of the fines and penalties assessments, should have been overruled. When a criminal conviction is set aside with the effect of finally disposing of the action, the defendant in that action is entitled to a return of any fine imposed and there is a duty on the public entity to which the fine was paid to return the fine on the basis that the retention of such money will result in unjust enrichment. *Gonzales v. State of California (1977, Cal App 1st Dist) 68 Cal App 3d 621, 137 Cal Rptr 681, 1977 Cal App LEXIS 1351.*

In a prosecution for misdemeanor drunk driving (*Veh. Code, § 23102*, subd. (a)), a prior conviction for the same offense could not be collaterally attacked on the ground the record failed to show that defendant was advised of his right to compulsory process for the attendance of witnesses on his behalf, or that he waived that right prior to entering a guilty plea. Courts are only required to elicit waivers concerning the constitutional rights necessarily surrendered by a guilty plea, namely, the right to a jury trial, to confrontation, and the privilege against self-incrimination. *People v. Wright (1979, Cal App Dep't Super Ct) 96 Cal App 3d Supp 17, 158 Cal Rptr 275, 1979 Cal App LEXIS 2062.*

46. Appellate Review

On appeal from denial of a petition for a writ to prevent further prosecution of a misdemeanor drunk driving charge in a municipal court, on the ground that petitioner was denied due process of law by the destruction of a breathalyzer test ampoule and its contents relative to a breath sample taken from him at the time of his arrest, the appellate court could not determine whether a constitutional right had or had not been violated, where such violation depended on a showing not only that the test ampoule and its contents could have been retained and made available to petitioner, but on the further showing that, if retained and made available, they would have been of value in his defense, and where the trial court made no finding on whether it was technically possible to determine, by post-test examination and analysis,

whether the test result was or was not accurate. *Van Halen v. Municipal Court for Pasadena Judicial Dist. (1969, Cal App 2d Dist) 3 Cal App 3d 233, 83 Cal Rptr 140, 1969 Cal App LEXIS 1375.*

Affirmance of a municipal court order dismissing a misdemeanor drunk driving case after the People declined to go forward was required, where, though the dismissal order was entered following the purported granting of a motion to suppress evidence, normally reviewable on appeal by the People from an order of dismissal under *Pen. Code, §§ 1466*, *1538.5*, subds. (d),(m), the so-called "order of suppression" was not within the purview of *Pen. Code, § 1538.5*, in that the only issue presented went to the mechanical circumstances of police officers' administration of a blood alcohol test, and no question was raised relating to search or seizure or whether the police officers could constitutionally administer the test, and where the prosecution, though not required to do so participated in the pretrial hearing on the anticipated evidentiary question, which resulted in nothing more than an informal indication of how the judge would later rule on the question, not binding on the judge or the parties. Following the adverse ruling, the prosecution could only proceed to trial and press for a reversal of the ruling by the trial judge, or accept the ruling and request a dismissal which would be nonappealable. *People v. Rawlings (1974, Cal App 2d Dist) 42 Cal App 3d 952, 117 Cal Rptr 651, 1974 Cal App LEXIS 1281,* overruled in part *People v. Chacon (2007) 40 Cal 4th 558, 53 Cal Rptr 3d 876, 150 P3d 755, 2007 Cal LEXIS 1112.*

While *Pen. Code, § 1385*, providing for dismissal of a criminal action "in furtherance of justice" vests a trial court with wide discretion, its provision that the reasons for a dismissal must be set forth in the minutes indicates that the powers not absolute. *People v. Rawlings (1974, Cal App 2d Dist) 42 Cal App 3d 952, 117 Cal Rptr 651, 1974 Cal App LEXIS 1281,* overruled in part *People v. Chacon (2007) 40 Cal 4th 558, 53 Cal Rptr 3d 876, 150 P3d 755, 2007 Cal LEXIS 1112.*

An order of the trial court, before trial, setting aside one of two prior offenses alleged against a defendant charged with violating *Veh. Code, § 23102*, was not an appealable order pursuant to *Pen. Code, § 1466*, subd. 1(a), authorizing appeals from an order or judgment dismissing or otherwise terminating an action before defendant had been placed in jeopardy, as the order setting aside the prior conviction did not terminate or dismiss the action. *People v. Edquist (1977, Cal App Dep't Super Ct) 69 Cal App 3d Supp 21, 138 Cal Rptr 456, 1977 Cal App LEXIS 1465.*

Where, on collateral attack, rights of a criminal defendant other than basic constitutional rights are involved, prejudice must be shown. Thus, in a prosecution for driving under the influence of alcohol in violation of *Veh C § 23102* subd (a), the trial court properly denied defendant's motion to strike an allegation of a prior conviction for the same offense, where defendant sought to strike the prior on the ground that the record in the prior prosecution did not show an express advice to him of possible defenses. *People v. Buller (1979, Cal App 2d Dist) 101 Cal App 3d 73, 160 Cal Rptr 657, 1979 Cal App LEXIS 2510.*

47. Prejudicial Error

In prosecution on charge of driving automobile upon public highway while under influence of intoxicating liquor, where no one testified to having seen defendant take a drink of intoxicating liquor or to have observed smell of such liquor on his breath at or near the time when alleged offense was committed, and evidence upon which prosecution relied for conviction consisted of testimony relating to peculiar conduct of and statements made by defendant at or near the time in question, it was prejudicial error for trial court to deny defendant the right to present to jury evidence of his customary habits and eccentricities at a time or times when he was not under influence of intoxicating liquor, not for the purpose of proving insanity, but to the end that jury might determine the fact whether the conduct and statements of defendant at the time in question arose from what as to him was a usual state of mind or whether his actions were attributable to the fact that he was under the influence of intoxicating liquor. *People v. Owen (1926, Cal App) 80 Cal App 248, 251 P 686, 1926 Cal App LEXIS 69.*

In prosecution under this section defendant is prejudiced by ruling, on court's own motion during argument, striking from record what had been read to jury without objection, from label on bottle of nose drops allegedly used by

defendant shortly before arrest, describing them as inducing nervousness and sleeplessness. *People v. Martin (1954, Cal App) 128 Cal App 2d 724, 276 P2d 43, 1954 Cal App LEXIS 1530.*

In prosecution under this section where defendant admitted a prior conviction, it is prejudicial error to permit introduction of evidence of blood tests taken in connection with prior prosecution. *People v. Martin (1954, Cal App) 128 Cal App 2d 724, 276 P2d 43, 1954 Cal App LEXIS 1530.*

In prosecution for driving while intoxicated from February 3, 1959 in which defendant admitted having been convicted of same crime in 1953, it was reversible error for court to hold that 1957 amendment of this section, making jail sentence of at least five days mandatory on second conviction of violating section, did not apply because defendant's prior conviction took place before passage of amendment, since such amendment did not increase penalty for 1953 violation but established more severe penalty for 1959 violation. *People v. Andrews (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 840, 339 P2d 648, 1959 Cal App LEXIS 2285.*

In prosecution of defendant for second time for driving while intoxicated, it was reversible error for court to attempt to suspend execution of mandatory jail sentence by making order arresting judgment, since subd (b) provides that any person convicted of second or subsequent offense under section shall not be granted probation, nor shall execution of sentence be suspended. *People v. Andrews (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 840, 339 P2d 648, 1959 Cal App LEXIS 2285.*

In prosecution for misdemeanor drunk driving, it was reversible error to permit hearsay statements contained in statutory notice of revocation of defendant's driver's license to be read to jury at outset of trial and before such notice had been received in evidence. *People v. Dawson (1960, Cal App Dep't Super Ct) 184 Cal App 2d Supp 881, 7 Cal Rptr 384, 1960 Cal App LEXIS 1949.*

In prosecution for misdemeanor drunk driving, it was reversible error for police to deny defendant reasonable opportunity to call doctor of his own choice and at his own expense to give him blood test at time when he was suspected of being under influence of intoxicating liquor, but this right does not prevent police from taking their own test even before arrival of defendant's doctor. *People v. Dawson (1960, Cal App Dep't Super Ct) 184 Cal App 2d Supp 881, 7 Cal Rptr 384, 1960 Cal App LEXIS 1949.*

Tolerance of force used by police officers in compelling an accused drunken driver to submit to a blood alcohol test, where the officers were aggressive beyond all need and defendant was merely defensive, not aggressive, will destroy rather than implement the salutary purposes of *Veh Code, § 13353*, in deeming a driver to consent to such a test to determine the alcoholic content of his blood; and a judgment of conviction of driving while intoxicated must be reversed where the limits of permissible police activity in compelling submission to the test were exceeded. *People v. Kraft (1970, Cal App 3d Dist) 3 Cal App 3d 890, 84 Cal Rptr 280, 1970 Cal App LEXIS 1184.*

The trial court committed reversible error in granting a writ of mandate compelling the Department of Motor Vehicles to set aside its decision to suspend petitioner's driving privilege for six months pursuant to the implied consent law (*Veh C § 13353*). The record indicated that petitioner initially refused the request of the arresting police officer to submit to any of the chemical sobriety tests. The officer then took petitioner to the police department and booked him for misdemeanor drunk driving (*Veh C § 23102* subd (a). At about this time the arresting officer left. About an hour and a half later, petitioner consented to two chemical tests of his breath which were administered by another officer. These were used in his prosecution for drunk driving, and he was found guilty. *Covington v. Department of Motor Vehicles (1980, Cal App 2d Dist) 102 Cal App 3d 54, 162 Cal Rptr 150, 1980 Cal App LEXIS 1464.*

48. Harmless Error

Conviction of driving vehicle while intoxicated need not be reversed because of judge's statement during examination of prospective jurors, "if we've got the cards stacked, let's find out about it," attacked as indicating judge's

alliance with prosecution as evidenced by use of plural "we," where evidence of guilt is overwhelming, defendant does not deny being intoxicated and it appears that judge frequently used "we" in referring to all participants. *People v. Harrington (1955, Cal App Dep't Super Ct) 138 Cal App 2d Supp 902, 291 P2d 584, 1955 Cal App LEXIS 1317.*

In prosecution for driving automobile while intoxicated, though it was error to instruct that defendant did not have to take any sobriety tests, such error was not prejudicial to defendant. *People v. Conterno (1959, Cal App Dep't Super Ct) 170 Cal App 2d Supp 817, 339 P2d 968, 1959 Cal App LEXIS 2283.*

It was error for court to add, to defendant's requested instruction telling jury that they must find him not guilty if they determine that insulin was not drug unless defendant was operating automobile under influence of intoxicating liquor, phrase "or under the combined influence of intoxicating liquor and any drug," such addition making instruction confusing, but no prejudice resulted to defendant, since instruction was still too favorable to him. *People v. Keith (1960, Cal App Dep't Super Ct) 184 Cal App 2d Supp 884, 7 Cal Rptr 613, 1960 Cal App LEXIS 1950,* superseded by statute as stated in *People v. Alfaro (1983, Cal App 1st Dist) 143 Cal App 3d 528, 192 Cal Rptr 178, 1983 Cal App LEXIS 1782.*

D. CIVIL ACTIONS AND PROCEDURE

49. In General

The court declined to draw a distinction between "intoxication," as used in Vehicle Act of 1923, § 1413/4, relating to host's liability to a guest, and "under the influence of intoxicating liquor," as used in § 112, in civil actions under the former section, where the evidence showed a condition of the driver's inability to exercise his normal faculties with care and caution due to his use of intoxicating liquor. *Tracy v. Brecht (1934, Cal App) 3 Cal App 2d 105, 39 P2d 498, 1934 Cal App LEXIS 1145.*

Plaintiff was not guilty of contributory negligence as matter of law because his drunken driving was combined with speed in driving at 30 to 35 miles per hour in 25-mile zone, but question was properly addressed to trial court. *King v. Ludlow (1958, Cal App 1st Dist) 165 Cal App 2d 620, 332 P2d 345, 1958 Cal App LEXIS 1331.*

In a prosecution for misdemeanor drunk driving, where no appeal was taken by the People from an order determining that defendant's prior conviction for the same offense was invalid, the order, on becoming final, had the determinative effect of res judicata. *Hasson v. Cozens (1970) 1 Cal 3d 576, 83 Cal Rptr 161, 463 P2d 385, 1970 Cal LEXIS 332.*

A commercial vendor of alcoholic beverages may be held liable for injuries to a patron or third parties proximately caused by the sale of liquor to an obviously intoxicated customer in violation of *Bus. & Prof. Code, § 25602*. However, damages may not be recovered from the vendor where the patron is guilty of willful misconduct. Thus, in an action by the survivors of a person who died in an automobile accident against the proprietor of a bar who allegedly served the decedent drinks, while he was obviously intoxicated, just before the accident, the trial court properly sustained of a general demurrer to the complaint. Though the complaint alleged that defendants knew the decedent would, upon leaving the premises, drive an automobile on a public highway, it also alleged that the decedent intentionally drove an automobile while intoxicated in violation of *Veh. Code, § 23102*, subd. (a), and that he drove in an opposite lane of traffic in violation of *Veh. Code, § 21650*. *Sissle v. Stefenoni (1979, Cal App 1st Dist) 88 Cal App 3d 633, 152 Cal Rptr 56, 1979 Cal App LEXIS 1319.*

In a wrongful death and personal injury action, against a city, arising out of a traffic accident in which plaintiffs' decedent was killed and plaintiffs were seriously injured when their car was struck by a car driven by an intoxicated motorist shortly after several of the city's police officers had arrested, for drunk driving (*Veh. Code, § 23102*), a previous driver of the car that struck plaintiffs' car, and in which the previous driver did not have possession of the car keys when arrested, the officers had not removed any keys from the vehicle, the officers had not arrested either of the two passengers of that car (one of whom was the subsequent driver involved in the accident), and the car was neither

disabled nor impounded by the officers although the two passengers were also intoxicated, the trial court erred in sustaining the city's demurrer to plaintiffs' second amended complaint without leave to amend on the basis of the city's immunity under *Gov. Code, §§ 845* (giving immunity to a public entity providing police protection) and 820.2 (giving immunity to the employee of a public entity from injury resulting from an act which was the result of the exercise of the employee's discretion), since § 845 does not provide immunity in situations where an officer is negligent in his performance once that officer decides to conduct an investigation, and since plaintiffs' allegations did not involve the discretion of the officers in deciding whether or not to investigate the vehicle in which the arrest took place, but instead only their negligence in the conduct of the investigation (failing to remove the keys from the vehicle). Moreover, the discretionary immunity in § 820.2 is available "essentially only to protection against crime" and "from budgetary neglect," but did not immunize the city from the legal consequences of the officers' negligence. *Green v. City of Livermore (1981, Cal App 1st Dist) 117 Cal App 3d 82, 172 Cal Rptr 461, 1981 Cal App LEXIS 1494.*

In a wrongful death and personal injury action, against a city, arising out of a traffic accident in which plaintiffs' decedent was killed and plaintiffs were seriously injured when their car was struck by a car driven by an intoxicated motorist shortly after several of the city's policy officers had arrested, for drunk driving (*Veh. Code, § 23102*), a previous driver of the car that struck plaintiff's car, and in which the previous driver did not have possession of the car keys when arrested, the officers had not removed any keys from the vehicle, the officers had not arrested either of the two passengers of that car (one of whom was the subsequent driver involved in the accident), and the car was neither disabled nor impounded by the officers although the two passengers were also intoxicated, the trial court erred in sustaining the city's demurrer to the complaint without leave to amend, on the basis of uncertainty, although plaintiffs had not indicated a specific enactment creating a mandatory duty to disable or impound the automobile, or to remove the keys from the automobile, and they asserted such a duty under *Gov. Code, § 815.6* (liability of a public entity for breach of a mandatory duty) with respect to various enactments, regulations, and customs of the city and of the police department, since any such uncertainty was capable of resolution by reference to facts presumptively within the knowledge of the city. Regulations of local police departments have the force of law and are "regulations" within the meaning of *Gov. Code, § 811.6* (defining a regulation). *Green v. City of Livermore (1981, Cal App 1st Dist) 117 Cal App 3d 82, 172 Cal Rptr 461, 1981 Cal App LEXIS 1494.*

A city's police officers were negligent when, after they stopped a vehicle and arrested its driver for drunk driving (*Veh. Code, § 23102*), they took no steps to remove the keys from the vehicle, although they had no mandatory duty to arrest two intoxicated passengers or to impound the vehicle under *Veh. Code, § 22651*, subd. (h) (providing that an officer may, under certain circumstances, impound a vehicle or arrest any person driving or in control of the vehicle). Accordingly, in a wrongful death and personal injury action, against the city, arising out of a traffic accident in which plaintiffs' decedent was killed and plaintiffs were seriously injured when their car was struck by the car driven by one of the two intoxicated passengers shortly after several of the city's police officers had arrested the previous driver, the trial court erred in sustaining the city's demurrer without leave to amend on the basis of the nonexistence of a mandatory duty on the part of the police officers to disable or impound the vehicle or to remove the keys. Whether or not the keys in the stopped vehicle parked on the street was a dangerous condition of public property was properly a question of fact to be determined by a jury. *Green v. City of Livermore (1981, Cal App 1st Dist) 117 Cal App 3d 82, 172 Cal Rptr 461, 1981 Cal App LEXIS 1494.*

50. Procedure

In action for damages for personal injuries sustained by driver and passenger when their automobile was struck by defendant's automobile, plaintiff driver's testimony that the only effect of beer upon him was to quench his thirst was admissible. *Linde v. Emmick (1936, Cal App) 16 Cal App 2d 676, 61 P2d 338, 1936 Cal App LEXIS 495.*

In a wrongful death action arising out of an intersection collision proof of intoxication of plaintiff and his deceased driver was properly excluded where defendants made a mere general offer of proof. *Stickel v. San Diego E. R. Co. (1948) 32 Cal 2d 157, 195 P2d 416, 1948 Cal LEXIS 210.*

While there is no legal presumption that automobile driver is intoxicated because he has taken drink of liquor, court or jury may consider number of drinks one has taken and his subsequent actions in determining whether at time of accident he was intoxicated. *Guerra v. Balestrieri (1954, Cal App) 127 Cal App 2d 511, 274 P2d 443, 1954 Cal App LEXIS 1370.*

Results of having.15 per cent of alcohol in blood is not such law of nature that court must take judicial notice that driving therewith is negligence as matter of law. *King v. Ludlow (1958, Cal App 1st Dist) 165 Cal App 2d 620, 332 P2d 345, 1958 Cal App LEXIS 1331.*

51. Weight and Sufficiency of Evidence

Where the testimony shows that defendant drank a bottle of "homebrew" beer about two hours before collision; that at time of collision his breath was strongly impregnated with odor of alcohol; that he staggered when he walked, that before collision he was crouched down over steering wheel; that he was examined at hospital where he was taken, for intoxication, and examining physician certified that he was not then intoxicated, although he detected odor of alcohol; there was sufficient evidence to justify jury in concluding that defendant driver violated former California Vehicle Act § 112. *Meads v. Deener (1932, Cal App) 128 Cal App 328, 17 P2d 198, 1932 Cal App LEXIS 204.*

In action for damages for personal injuries sustained by driver and passenger when their automobile was struck by defendant's automobile, plaintiff driver's admission of drinking beer was insufficient proof that he was under influence of intoxicating liquor while driving, and, standing alone, testimony of a bystander and two doctors that they smelled alcohol on driver's breath was not proof that he was under its influence, and in absence of evidence showing that beer affected him, finding that he operated his automobile while under influence of intoxicating liquor was unauthorized. *Linde v. Emmick (1936, Cal App) 16 Cal App 2d 676, 61 P2d 338, 1936 Cal App LEXIS 495.*

In the absence of a showing that the alcohol a driver consumed affected him, a finding that the driver was under the influence of intoxicating liquor is improper. *Pittman v. Boiven (1967, Cal App 4th Dist) 249 Cal App 2d 207, 57 Cal Rptr 319, 1967 Cal App LEXIS 2216.*

Evidence supported the trial court's conclusion that a minor intentionally drove an automobile with knowledge that serious injury to a 14-year-old girl was probable, or that he intentionally acted with a wanton and reckless disregard of the possible result of his conduct (*Veh Code, §§ 23103*, *23104*), where the minor driver wilfully and knowingly drove his vehicle at a comparatively high rate of speed directly toward the girl in a game of "chicken," and the girl froze with terror, was unable to move out of the direct path of the automobile, and consequently was struck and seriously injured. *In re Bradley (1968, Cal App 2d Dist) 258 Cal App 2d 253, 65 Cal Rptr 570, 1968 Cal App LEXIS 2410.*

52. Questions of Law and Fact

In an action for injuries arising from the collision of vehicles on a rainy night while plaintiff was making a left turn at an intersection, evidence that defendant was driving down the middle of the street with her car partly on the wrong side of the street in violation of § 525 and that she had had three drinks and appeared to be drunk does not show as a matter of law that she was negligent and that plaintiff was not, these being questions for the jury to determine. *Christensen v. Harmonson (1952, Cal App) 113 Cal App 2d 175, 247 P2d 956, 1952 Cal App LEXIS 1351.*

It is negligence as matter of law for person to drive vehicle on public highway while he is intoxicated. *Zamucen v. Crocker (1957, Cal App 1st Dist) 149 Cal App 2d 312, 308 P2d 384, 1957 Cal App LEXIS 2036.*

In an action arising out of an automobile collision, while there is no legal presumption that one is intoxicated because he has taken a drink of liquor, it is within the province of the trial court or the jury to take into consideration the number of drinks of intoxicating liquor which one has imbibed and his subsequent actions in determining whether at the time of the accident such person is in fact intoxicated. *Pittman v. Boiven (1967, Cal App 4th Dist) 249 Cal App 2d 207,*

57 Cal Rptr 319, 1967 Cal App LEXIS 2216.

One is not necessarily under the influence of intoxicating liquor as the result of taking one or more drinks. The circumstances and effect must be considered; whether or not a person was under the influence of intoxicating liquor at a certain time is a question of fact for the jury to decide. *Pittman v. Boiven (1967, Cal App 4th Dist) 249 Cal App 2d 207, 57 Cal Rptr 319, 1967 Cal App LEXIS 2216.*

53. Jury Instructions

An instruction submitting issue of drunken driving held warranted by the evidence. *May v. Farrell (1928, Cal App) 94 Cal App 703, 271 P 789, 1928 Cal App LEXIS 758.*

Not giving an instruction specifically directed to drunken driving as negligence did not prejudice defendants in a collision case, where adequate general instructions as to negligence, contributory negligence and proximate cause were given, and plaintiff's driver, under the implied findings, did not legally cause the accident. *Stickel v. San Diego E. R. Co. (1948) 32 Cal 2d 157, 195 P2d 416, 1948 Cal LEXIS 210.*

An instruction in an automobile collision case that the jury "must not permit any feeling of bias or prejudice excited by mere evidence of drinking, not in itself amounting to a warrant of ordinary care, to affect your verdict," which in effect states that the jury must first find that defendant's drinking of intoxicating liquor amounts to a warrant of ordinary care before it consider the effect of her driving, erroneously ignores the fact that the combination of drinking and driving itself raises a presumption of warrant of ordinary care and shifts to defendant the burden of going forward with evidence to show that such negligence was not a proximate cause of the accident. *Christensen v. Harmonson (1952, Cal App) 113 Cal App 2d 175, 247 P2d 956, 1952 Cal App LEXIS 1351.*

Defendant in automobile collision case was not prejudiced by use of word "accused" in instruction declaring that it is unnecessary that "person accused should be so-called dead drunk or hopelessly intoxicated" before he could be under influence of intoxicating liquor within meaning of Vehicle Code, since term "accused" is frequently used in civil actions and in its context has no opprobrious connotation. *Guerra v. Balestrieri (1954, Cal App) 127 Cal App 2d 511, 274 P2d 443, 1954 Cal App LEXIS 1370.*

With reference to instruction in automobile collision case that it is not necessary that person accused should be so-called dead drunk or helplessly intoxicated, but that if defendant was "in such condition" from use of intoxicating liquor, that it so affected his acts, conduct or movements that persons coming in contact with him could readily see and know it was affecting him in this respect, then defendant was under influence of intoxicating liquor within meaning of Vehicle Code, the words "such condition" did not refer back to words "dead drunk or helplessly intoxicated," but refer forward to the clause beginning "it so affected his acts," etc. *Guerra v. Balestrieri (1954, Cal App) 127 Cal App 2d 511, 274 P2d 443, 1954 Cal App LEXIS 1370.*

In action for injuries arising out of collision of vehicles at intersection where police officer testified there was odor of alcohol about defendant after accident, and defendant on stand admitted having glass of wine with meal about three quarters of an hour before accident, evidence was sufficiently substantial to warrant giving of instructions concerning the presumption of negligence which arises when a person drives an automobile while under the influence of intoxicating liquor. *Guerra v. Balestrieri (1954, Cal App) 127 Cal App 2d 511, 274 P2d 443, 1954 Cal App LEXIS 1370.*

In action under § 17158, relating to driver's liability for death of guest, it was not error to instruct that it is unlawful for any person who is under influence of intoxicating liquor to drive vehicle on any highway, particularly in view of fact that another instruction was given showing that use of intoxicating liquor was only one of the factors to be considered in determining whether driver was guilty of wilful misconduct. *Fuller v. Chambers (1959, Cal App 1st Dist) 169 Cal App 2d 602, 337 P2d 848, 1959 Cal App LEXIS 2114.*

In a rear-end collision action against the driver of the rear car, an instruction on the effect of intoxication was properly refused where the only evidence which supported the requested instruction was to the effect that defendant had been "partaking of alcoholic beverages", and there was no testimony to connect his subsequent conduct in the operation of his vehicle to the fact that he had consumed intoxicants so as to establish that he was "under the influence of intoxicating liquor" as that phrase has been defined in civil case law, and there was no evidence indicating that his driving ability was in any wise impaired or that he operated his car in violation of law or neglected any duty imposed by law in the operation of his vehicle. *Pittman v. Boiven (1967, Cal App 4th Dist) 249 Cal App 2d 207, 57 Cal Rptr 319, 1967 Cal App LEXIS 2216.*

54. Contributory Negligence of Rider in Vehicle

Defendants in a collision case were not prejudiced by refusal of an instruction as to plaintiff's negligence in riding with an intoxicated driver whose conduct did not legally cause the collision under the implied findings. *Stickel v. San Diego E. R. Co. (1948) 32 Cal 2d 157, 195 P2d 416, 1948 Cal LEXIS 210.*

A requested instruction to the effect that a person who rides as a guest in automobile which is driven by person who is under influence of intoxicating liquor is guilty of negligence, and that if driver of automobile in question was under influence of liquor, and deceased had knowledge thereof, then it was negligence in and of itself for deceased to ride in the automobile, which would preclude a recovery by his heirs, was not a correct statement of the law which per se made it negligence for one in that condition to drive an automobile, and knowledge of such intoxication of driver on part of a guest is question of contributory negligence for the jury. *Johnson v. Southern Pacific Co. (1930, Cal App) 105 Cal App 340, 288 P 81, 1930 Cal App LEXIS 794.*

In action for wrongful death resulting when rider in automobile operated by intoxicated driver struck defendant's road building equipment, it is not error to give instruction reflecting defendant's theory that rider was guilty of contributory negligence, where substantial evidence indicates that he was also intoxicated and that riding in such condition might have constituted negligence that might have been proximate cause of death. *Royko v. Griffith Co. (1957, Cal App 2d Dist) 147 Cal App 2d 770, 306 P2d 36, 1957 Cal App LEXIS 2313.*

55. Appeal

An instruction in an automobile collision case which erroneously ignored the presumption which would attach if the jury found that defendant was driving while under the influence of liquor was not prejudicial where the jury was adequately instructed in general terms as to the negligence, contributory negligence and proximate cause, there was ample evidence on which the jury could find plaintiff guilty of contributory negligence, and where his contradictory statements as to what he did and where he was at the time of the accident were sufficient cause for a jury to disregard his entire testimony and to believe that of defendant even though it might have also believed that defendant was negligent. *Christensen v. Harmonson (1952, Cal App) 113 Cal App 2d 175, 247 P2d 956, 1952 Cal App LEXIS 1351.*

Where defendant fails to offer qualifying instructions and evidence is ample to establish his negligence irrespective of issue of his intoxication, it is not reversible error to instruct that violation of this section constitutes negligence as a matter of law. *Mehling v. Zigman (1953, Cal App) 116 Cal App 2d 729, 254 P2d 141, 1953 Cal App LEXIS 1130.*

Plaintiffs were prejudiced by error in omitting from proposed instruction correct principle of law concerning driving while intoxicated, and thus, in view of other given instructions, jury received impression that such driving was not negligence per se. *Zamucen v. Crocker (1957, Cal App 1st Dist) 149 Cal App 2d 312, 308 P2d 384, 1957 Cal App LEXIS 2036.*

It was reversible error to suppress evidence as to the results of a breathalyzer test and to dismiss a prosecution for driving while under the influence of intoxicating liquor on the ground that the investigative officers' intentional but nonmalicious destruction of a test ampoule used in a breathalyzer test, its contents, the "bubbler tube," and the reference

ampoule deprived defendant of due process by making valuable evidence unavailable, where the destruction has been accomplished in good faith and in conformity with standard law enforcement procedures, and fell within the ambit of the rules then governing the good faith loss of evidence. *People v. Hitch (1974) 12 Cal 3d 641, 117 Cal Rptr 9, 527 P2d 361, 1974 Cal LEXIS 252,* overruled *People v. Johnson (1989) 47 Cal 3d 1194, 255 Cal Rptr 569, 767 P2d 1047, 1989 Cal LEXIS 18.*

III. DECISIONS UNDER FORMER VEH C § 23105

A. GENERALLY

56. In General

Where defendant was known to police officers as narcotic addict, was seen to be under influence of narcotic, and was driving automobile in violation of the statute, there was ample basis for immediate arrest without warrant, and search of his person or the automobile, or both, for narcotics would be normal incident to that arrest and not unrelated to the crime. *People v. Lujan (1956, Cal App 2d Dist) 141 Cal App 2d 143, 296 P2d 93, 1956 Cal App LEXIS 1822.*

Police officers had reasonable cause to arrest defendant for driving automobile while addicted to narcotics where they had seen defendant driving car and at that time observed fresh needle marks and older scabs on his hands and forearms, where one officer had examined defendant 10 times in previous five years and had concluded that on all but one of those times defendant had been using narcotics, and where other officer had had prior contact with defendant and knew him to be narcotics user. *People v. Lamb (1964, Cal App 2d Dist) 230 Cal App 2d 65, 41 Cal Rptr 157, 1964 Cal App LEXIS 845.*

To deny privilege of driving to person who may be subject to physical infirmities of withdrawal from drugs clearly falls within legitimate confines of state's police power. *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

Officers were entitled to stop defendant's car for apparently driving with defective windshield (§ 26710) and to arrest him for apparently driving while under influence of narcotic drugs (§ 23105) when he stepped from car, which smelled of marijuana, and appeared to be under influence of marijuana, and it was immaterial whether search of car followed or preceded arrest, as long as it was substantially contemporaneous therewith and, at time of search, officers were justified in making arrest. *People v. Jackson (1966, Cal App 2d Dist) 241 Cal App 2d 189, 50 Cal Rptr 437, 1966 Cal App LEXIS 1233.*

57. Constitutionality

One who is convicted of violation of the statute cannot claim that the provision is unconstitutional for reason that it is unlawful exercise of police power, and deprives him of equal protection of law. *People v. Berner (1938, Cal App) 28 Cal App 2d 392, 82 P2d 617, 1938 Cal App LEXIS 546,* overruled *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

Section is not unconstitutional as violation of equal protection clauses of *Federal and State Constitutions. People v. Kimbley (1961, Cal App 2d Dist) 189 Cal App 2d 300, 11 Cal Rptr 519, 1961 Cal App LEXIS 2176,* overruled *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

This section is a proper exercise of state police power and punishment fixed therefor is not inherently cruel nor cruelly excessive. *Joseph v. Klinger (1967, 9th Cir Cal) 378 F2d 308, 1967 US App LEXIS 6397.*

58. Statutory Purpose

Legislative purpose of section is to protect those who use public highways against persons addicted to use of narcotic drugs; this purpose is proper one, and legislature's classifications is not arbitrary or unreasonable. *People v. Lamb (1964, Cal App 2d Dist) 230 Cal App 2d 65, 41 Cal Rptr 157, 1964 Cal App LEXIS 845.*

To interpret term "addicted" to narcotics in light of effect on individual's ability to operate motor vehicle with safety expresses legislative purpose underlying this section to assure safety of persons using public highways. *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

Focus of section is to prohibit individual who presents potential danger on highway from driving motor vehicle. *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

Section is integral part of exclusive legislative scheme, as evidenced by §§ 23105-23108, designed to prohibit use of highways to classes of persons whose perception, judgment, and reaction time may be adversely affected due to their use of drugs. *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

In enacting this section, legislature had in mind pernicious consequences that follow abuse of narcotic drugs. *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

Veh. Code, § 23105 (driving under the influence of a drug), is not a special statute which supplants and precludes the provisions of *Health & Saf. Code, § 11550* (use and being under the influence of a controlled substance or a narcotics drug), and the superior court therefore properly denied a petition for writ of mandate or prohibition by a defendant charged with violations of both statutes, since each statute was a part of a distinct legislative scheme with differing aims, procedures, problems, punishment and treatment programs, with one statute addressed to illicit drug use and the other to dangerous driving, since it was not the legislative intent that one statute usurp the other, and since the elements of the two offenses bore little correlation. *Gilbert v. Municipal Court (1977, Cal App 4th Dist) 73 Cal App 3d 723, 140 Cal Rptr 897, 1977 Cal App LEXIS 1885,* superseded by statute as stated in *Williams v. Superior Court (1988, Cal App 2d Dist) 198 Cal App 3d 960, 244 Cal Rptr 88, 1988 Cal App LEXIS 104,* superseded by statute as stated in *People v. Alfaro (1983, Cal App 1st Dist) 143 Cal App 3d 528, 192 Cal Rptr 178, 1983 Cal App LEXIS 1782.*

59. Elements of Offense

Though "addiction" to narcotics may have become associated with "habitual use" of them in common parlance, medical authorities recognize distinction between drug "addiction" and drug "habituation." *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

Licensed driver may be punished for driving while addicted to heroin, in violation of this section without showing that his ability to drive was impaired at time of driving. *People v. Diaz (1965, Cal App 2d Dist) 234 Cal App 2d 818, 44 Cal Rptr 747, 1965 Cal App LEXIS 1069.*

The crime of driving an automobile while under the influence of a narcotic drug consists of three elements: (1) driving an automobile; (2) on a highway; (3) being under the influence of a narcotic drug. (*Veh Code, § 23105.*) *People v. Smith (1967, Cal App 2d Dist) 253 Cal App 2d 711, 61 Cal Rptr 557, 1967 Cal App LEXIS 2396.*

The underlying felony of defendant's driving a vehicle upon a highway under the influence of a narcotic drug was not a felony included in fact with a homicide resulting when defendant's car shot across the divider and crashed into the victim's car, and the trial court improperly dismissed a felony murder count against defendant, who was also charged with vehicular manslaughter and with violation of *Veh Code, § 23105*, where such felony was not a necessary ingredient of the homicide and its elements were not necessary elements of the homicide, it being complete as soon as defendant commenced to drive on the highway while under the influence of the narcotic. *People v. Calzada (1970, Cal App 2d Dist) 13 Cal App 3d 603, 91 Cal Rptr 912, 1970 Cal App LEXIS 1271.*

California driver's license was properly suspended based on a Virginia record of conviction for "driving while intox," which adequately proved that the driver was convicted for driving a motor vehicle while intoxicated. Although Virginia's DUI law was broader than California's, the two statutes were substantially the same with respect to the conduct proscribed by the Driver License Compact-- driving a motor vehicle while intoxicated, and thus the Virginia conviction was entitled to reciprocal treatment in California under the *Driver License Compact. Moles v. Gourley (2003, Cal App 6th Dist) 112 Cal App 4th 1049, 5 Cal Rptr 3d 555, 2003 Cal App LEXIS 1587.*

60. Being Under the Influence of, or Addicted to, a Narcotic Drug

Defining drug addict as person accustomed or habituated to use of narcotics does not suffice to determine whether driver was drug addict within meaning of this section; mere habitual or customary use of narcotics that falls short of physical or emotional dependence would not necessarily constitute "abuse of narcotic drugs." *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

When individual reaches point that his body reacts physically to termination of drug administration, he is addicted within meaning and purpose of this section. *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

Principally, it is presence of abstinence syndrome or withdrawal symptoms that renders addict danger to public safety on highway, an element absent from drug habituation; drug habituation cannot be equated with addiction for purpose of this section. *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

Person who once has been narcotic addict and who, for one reason or another, has discontinued use of narcotics, is not addict within meaning of this section, prohibiting driving while addicted to, or under influence of, narcotics, unless prosecution can show not only that he has developed tolerance to effect of drugs and that he is still emotionally dependent on them, but also that he is still physically dependent so as to suffer withdrawal symptoms if deprived of his dosage. *People v. Piangenti (1965, Cal App 2d Dist) 235 Cal App 2d 850, 45 Cal Rptr 538, 1965 Cal App LEXIS 982.*

As used in *Veh Code, § 23105*, "under the influence" of narcotic drugs means that the drug has so far affected the nervous system, brain or muscles as to impair to an appreciable degree the ability of a person to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. *People v. De La Torre (1968, Cal App 2d Dist) 263 Cal App 2d 409, 69 Cal Rptr 654, 1968 Cal App LEXIS 2221.*

B. PROSECUTION

61. In General

It is not misconduct for prosecuting attorney to ask defendant concerning his admissions in pleas made in prior misdemeanor narcotics charges, in prosecution for violation of the statute, where such admissions are relevant on issue of whether he was an addict, especially in view of other admissions that he had used narcotics frequently. *People v. Stone (1957, Cal App 2d Dist) 155 Cal App 2d 259, 318 P2d 25, 1957 Cal App LEXIS 1276.*

In prosecution for driving while addicted to narcotic in violation of this section. People need not prove that defendant was in state of withdrawal while driving; burden is to show that defendant was "emotionally dependent" on drug in sense that he experiences compulsive need to continue its use, that he has "tolerance" to its effects and hence requires larger and more potent doses, and that he is "physically dependent" so as to suffer withdrawal symptoms if deprived of his dosage. *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

In a prosecution for driving while addicted to the use of narcotics in violation of *Veh Code, § 23105*, if withdrawal

sickness is established, it is unnecessary for the People to prove independently that the defendant is also emotionally dependent on the drug and has developed tolerance for it; if on the other hand the question of addiction is to be determined in a case in which the defendant has not been seen exhibiting withdrawal symptoms, the People must establish not only that he would exhibit such symptoms if he were deprived of his dosage, but also that he is emotionally dependent on the drug and that he has developed a tolerance to it. *People v. Duncan (1967, Cal App 2d Dist) 255 Cal App 2d 75, 62 Cal Rptr 822, 1967 Cal App LEXIS 1241.*

62. Burden of Proof

It is within scope of judicial notice to determine that particular substance is a drug; and trial judge should do so and remove issue entirely from jury. *People v. Keith (1960, Cal App Dep't Super Ct) 184 Cal App 2d Supp 884, 7 Cal Rptr 613, 1960 Cal App LEXIS 1950,* superseded by statute as stated in *People v. Alfaro (1983, Cal App 1st Dist) 143 Cal App 3d 528, 192 Cal Rptr 178, 1983 Cal App LEXIS 1782.*

In prosecution for driving vehicle on "highway" while under influence of narcotics, where it was matter of common knowledge that avenue where defendant was arrested was public street, court could take judicial notice that it was such and was therefore "highway" within statute. *People v. Gurrola (1963, Cal App 3d Dist) 218 Cal App 2d 349, 32 Cal Rptr 368, 1963 Cal App LEXIS 1785.*

63. Judicial Notice

Admissibility of evidence that at time defendant was arrested for driving under influence of narcotic drugs he had puncture marks in his arm, including one fresh puncture, is primarily question for discretion of trial judge. *People v. Vignoli (1963, Cal App 3d Dist) 213 Cal App 2d 855, 29 Cal Rptr 260, 1963 Cal App LEXIS 2805.*

64. Admissibility of Evidence

In prosecution for driving under influence of narcotics and for transportation of narcotic, court did not err in permitting narcotics agent to give his opinion that defendant on his arrest was under influence of narcotics and exhibited physical symptoms similar to those of person withdrawing from narcotics where agent had been narcotics agent for four years during which period he had examined many narcotics addicts and observed them in all stages of being under influence of narcotics. *People v. Gurrola (1963, Cal App 3d Dist) 218 Cal App 2d 349, 32 Cal Rptr 368, 1963 Cal App LEXIS 1785.*

When, at time police officer interrogated defendant, he was convinced that she was drug addict and that her driving of motor vehicle was violation of this section, his "conversation" with her concerning her violation of section constituted interrogation lending itself to eliciting of confession or of incriminating statements. *People v. Diaz (1965, Cal App 2d Dist) 234 Cal App 2d 818, 44 Cal Rptr 747, 1965 Cal App LEXIS 1069.*

Under the rule that for one to be competent to testify as an expert, he must have acquired such special knowledge of the subject matter about which he is to testify, either by study or practical experience, that he can give the trier of fact assistance and guidance in solving a problem for which the latter's own good judgment and average knowledge is insufficient, a police officer was qualified to express an opinion as to whether defendant was under the influence of narcotics where, although the witness had not received formal medical education, it appeared that he had been for many years familiar with the use and effect of narcotics, that he had received training and had administered narcotics while a medic in military service, that he had observed hundreds of people under the influence of opiates, that he had completed two-and-one-half years of premedical training, that he had examined hundreds of narcotics addicts and made 500 to 600 arrests in connection with narcotics cases, and that he had testified a couple of hundred times as an expert in such cases. *People v. Smith (1967, Cal App 2d Dist) 253 Cal App 2d 711, 61 Cal Rptr 557, 1967 Cal App LEXIS 2396.*

In a prosecution for driving while addicted to the use of narcotics in violation of *Veh Code, § 23105*, the court did

not abuse its discretion in concluding that a police officer had acquired sufficient special knowledge through his experience and training to identify withdrawal symptoms and to express an opinion of addiction based upon those symptoms, where, although the officer had no medical degree and his formal medical training was limited to a first aid course and instruction in elementary psychology, he had been on the police force for almost 20 years, during which his principal work was with narcotics addicts, he had examined approximately two to three thousand addicts during his police career, he had numerous conversations with addicts about their narcotics habits and had many conversations with doctors about narcotics addicts, and where he had had in-service training, explaining the symptoms of narcotics addicts and had read books about addicts. *People v. Duncan (1967, Cal App 2d Dist) 255 Cal App 2d 75, 62 Cal Rptr 822, 1967 Cal App LEXIS 1241.*

65. Weight and Sufficiency of Evidence

In prosecution for driving vehicle while addicted to or under influence of narcotics, where defendant admitted he drove vehicle and officer saw him drive it, defendant admitted he was extensive user of narcotics and physical appearance of his arm was such that it was apparent he used narcotics extensively and had used some within 24 hours within time of examination, which occurred on day following his arrest, and on which day he started to suffer narcotic withdrawal pains, and where at time of his sentence his counsel stated defendant had applied to federal hospital for admission as narcotic addict, evidence was overwhelmingly in favor of prosecution and it was no miscarriage of justice to hold defendant was narcotic addict or that he was under influence of narcotic drug and that he drove automobile on occasion mentioned in information. *People v. Montez (1959, Cal App 2d Dist) 175 Cal App 2d 303, 345 P2d 938, 1959 Cal App LEXIS 1337.*

In prosecution for driving automobile on public highway while addicted to use of drugs, conviction was supported by testimony of deputy sheriff, who was expert on narcotic addiction, that when he observed defendant two days after defendant had driven his automobile in violation of the statute he had brownish scabs and fresh puncture wound in inner elbow region of his arm, pupils of his eyes were contracted or pinpointed and had little or no reaction to light, and he stated that he might throw up a little when asked if he would get sick, and by defendant's admission he had been using narcotics since a year before crime was committed. *People v. Haggard (1960, Cal App 2d Dist) 181 Cal App 2d 38, 4 Cal Rptr 898, 1960 Cal App LEXIS 1958.*

In prosecution for driving automobile while addicted to narcotics, it was not necessary that medical doctor testify to defendant's addiction as is required for civil commitment of addict under *W & I C § 5350* and Pen C §§ 6450, 6500, as those sections require showing that person addicted has lost his power of self control and are for purpose of treatment rather than punishment; therefore, testimony of arresting officers, whose qualifications as experts in field of narcotics were stipulated to, that defendant was addicted to drugs was sufficient to support conviction. *People v. Lamb (1964, Cal App 2d Dist) 230 Cal App 2d 65, 41 Cal Rptr 157, 1964 Cal App LEXIS 845.*

In prosecution for driving while addicted to narcotics, it was reversible error for trial judge, acting as trier of fact, to use improper "habitual use" test in finding defendant to be "addicted to the use of narcotics." *People v. O'Neil (1965) 62 Cal 2d 748, 44 Cal Rptr 320, 401 P2d 928, 1965 Cal LEXIS 292,* 17 ALR3d 806.

In a prosecution for driving under the influence of narcotics, the evidence was sufficient to support a conviction where uncontested evidence established that defendant was driving an automobile on a highway, and expert opinion was properly admitted that defendant was under the influence of a narcotic drug. *People v. Smith (1967, Cal App 2d Dist) 253 Cal App 2d 711, 61 Cal Rptr 557, 1967 Cal App LEXIS 2396.*

In a prosecution for driving while addicted to the use of narcotics in violation of *Veh Code, § 23105*, there was sufficient evidence to support the conclusion that defendant was undergoing withdrawal sickness when a police officer examined him where defendant was breathing heavily and irregularly, where he exhibited scabs over the vein areas of both arms, he was restless and fidgety, his nose was running, he put his hand to his stomach from time to time, he exhibited pupillary dilation, and where although the room was at normal temperature and defendant was fully clothed,

the officer noticed intermittant goose flesh over defendant's body. *People v. Duncan (1967, Cal App 2d Dist) 255 Cal App 2d 75, 62 Cal Rptr 822, 1967 Cal App LEXIS 1241.*

In a prosecution for driving a vehicle upon highway while under the influence of narcotic drugs (*Veh Code, § 23105*), the evidence was sufficient to sustain the finding of the trial court that defendant's use of narcotics had impaired to an appreciable degree his ability to drive safely at the time of his arrest, where defendant was examined by an expert in the field of narcotics one hour after defendant was apprehended by police, and his opinion as to defendant's condition was sufficient to support his conclusion that defendant was under the influence of narcotics at the time of his arrest, and when defendant was seen by the arresting policeman in a sudden lane change on the highway nearly colliding with the policemen's car just prior to his being apprehended. *People v. De La Torre (1968, Cal App 2d Dist) 263 Cal App 2d 409, 69 Cal Rptr 654, 1968 Cal App LEXIS 2221.*

In a prosecution for driving under the influence of narcotic drugs (*Veh Code, § 23105*), the evidence was sufficient to support the trial court's implied finding that defendant waived his constitutional rights to counsel and to remain silent, and defendant could not raise the question of nonwaiver of the rights on appeal, where defendant was advised of his rights by an apprehending police officer, and later made incriminating statements to another police officer who was a narcotics expert, there was no conflicting evidence, and defendant failed to assert the objection of nonwaiver at the trial to challenge the reliability of the prosecution's foundational evidence concerning his conversation with the narcotics expert. *People v. De La Torre (1968, Cal App 2d Dist) 263 Cal App 2d 409, 69 Cal Rptr 654, 1968 Cal App LEXIS 2221.*

Defendant, in a prosecution for driving a vehicle under the influence of a narcotic drug (*Veh Code, § 23105*), was not shown to have been affected to the extent that his ability to operate his vehicle was impaired where, although the arresting officer and the examining physician testified that they were of the opinion that defendant was under the influence of narcotic drugs, there was neither expert opinion nor the observation of anyone that defendant lacked the alertness, judgment, and coordination which are needed to operate a motor vehicle in a prudent and cautious manner. *People v. Davis (1969, Cal App 2d Dist) 270 Cal App 2d 197, 75 Cal Rptr 627, 1969 Cal App LEXIS 1514.*

66. Appellate Review

In prosecution for driving while addicted to narcotics, introduction in evidence of statements made by defendant that amounted to confession was reversible error where statements were made while defendant was in custody for violating this section, where they were made in response to process of interrogation that lent itself to eliciting incriminating statements, where record was silent as to whether defendant was advised of her rights to counsel and to remain silent and where there were no circumstances justifying presumption that she waived those rights. *People v. Diaz (1965, Cal App 2d Dist) 234 Cal App 2d 818, 44 Cal Rptr 747, 1965 Cal App LEXIS 1069.*

Where defendant who admitted being drug addict prior to time of his arrest for driving under influence of narcotics was prosecuted under § 23105, on two theories of driving while addicted to narcotics and driving while under influence of narcotics, it was reversible error for court to fail to define on its own motion words "addicted to the use... of narcotic drugs." *People v. Piangenti (1965, Cal App 2d Dist) 235 Cal App 2d 850, 45 Cal Rptr 538, 1965 Cal App LEXIS 982.*

On appeal from a conviction of driving a motor vehicle while under the influence of amphetamine, defendant could not raise objections to the legality of his arrest or to a search of his person and seizure of contraband where no such questions or objections were raised in the trial court; in any event, under the facts of the case, there was not the slightest question that the officers involved had probable cause to believe that defendant had committed a felony or that it was proper to proceed as was done. *People v. Morrow (1969, Cal App 2d Dist) 275 Cal App 2d 507, 80 Cal Rptr 75, 1969 Cal App LEXIS 1942.*

On appeal from a conviction of driving a motor vehicle while under the influence of amphetamine, defendant could not predicate error on the trial court's permitting a sheriff's deputy to read from a police report which did not conform to

the requirements of *Evid Code, § 1237*, where no objection was made to such procedure in the trial court; in any event, under the circumstances of the case, there was no prejudice of any consequence to defendant. *People v. Morrow (1969, Cal App 2d Dist) 275 Cal App 2d 507, 80 Cal Rptr 75, 1969 Cal App LEXIS 1942.*

SUGGESTED FORMS

Allegation in Complaint--Driving While Intoxicated in Violation of Statute