

Garden State CLE Presents:

Defending a DUI Ambien Case



Lesson Plan

1. Elements of Proof - Operation

Generally speaking, under New Jersey Law, drunk driving is a strict liability offense. Thus, no specific culpability state is required for a conviction. 64 N.J. 133 (1973).

However, an intent to operate a motor vehicle is required:

We agree with the Appellate Division holding that defendant was not shown to be ‘operating’ his motor vehicle within the meaning of the statute. In [State v. Sweeney, 40 N.J. 359, 192 A.2d 573 \(1963\)](#), defendant, in a state of intoxication, was found sitting in the driver's seat of his car which was parked at the curb with the motor running. There we held defendant could be convicted of ‘operating’ his car if there was evidence in the case from which the trial court could clearly infer that defendant intended to move the vehicle.



In the instant case, defendant denied any intent to move or drive his car until he had sobered up and, contrary to the State's contention, there was no evidence from which any such intent could be inferred beyond a reasonable doubt. The tavern, concededly, was required to close at 2:00 A.M. and there was no proof that it did not. Defendant had, thus, been in his car for at least one hour and twenty minutes without driving when come upon by the police.

In the alternative, the State argues that intent to move the vehicle should not be a required element of the offense of operating a motor vehicle while intoxicated. The State's position is that an intoxicated person who enters a motor vehicle and starts the engine is a threat to himself and to the public because of the hazard that either he may try to drive the vehicle, or accidentally cause it to be moved.

We recognize that there is a risk involved. However, the statutory sanction is against 'operating' a motor vehicle while intoxicated. We conclude, as we did in Sweeney, that in addition to starting the engine, evidence of intent to drive or move the vehicle at the time must appear.



2. Elements of Proof - Under the Influence

When coupled with proof of recent operation of a motor vehicle, a *prima facie* Drunk Driving case can be established with evidence of operation of the vehicle while under then influence of:

- 1. Alcohol;**
- 2. A Narcotic (or substance producing a narcotic effect);**
- 3. A Hallucinogenic;**
- 4. A Habit-producing drug; or**
- 5. A Chemical inhalant.**

“The statute does not require that the particular narcotic be identified. It is enough if, from the subject's conduct, physical and mental condition and the symptoms displayed, a qualified expert can determine that he or she is 'under the influence' of a narcotic. This, of course, would include a drug which produces a narcotic effect.” State v. Tamburro, 68 N.J. 414, 421 (1975). (See also State v. Kraft, 134 N.J. Super. 416 (Cty. Ct. 1975)).



a. In General

“Generally speaking, it means a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit-producing drugs.” State v. Tamburro, 68 N.J. 414, 420 (1975)



b. Chemical Inhalant

Chemical Inhalant (NJSA 39:4-50(a)(3)) includes any “chemical substance capable of causing a condition of intoxication, inebriation, excitement, stupefaction or the dulling of the brain or nervous system as a result of the inhalation of the fumes or vapors of such chemical substance.



c. Alcohol

“The expression, ‘under the influence of intoxicating liquor,’ covers not only all the well known and easily recognized conditions and degrees of intoxication, but any abnormal mental Or physical condition which is the result of indulging in any degree in intoxicating liquors, and which tends to deprive him of that clearness of intellect and control of himself which he would otherwise possess.” State v. Rodgers, 91 N.J.L. 212, 215 (E & A 1917).

[NJSA 39:4-50] “penalizes a person who drives ‘while under the influence of intoxicating liquor.’ Although prosecutions pursuant to its provisions are commonly and colloquially termed ‘drunken driving cases,’ it is settled that the statute does not require as a prerequisite to conviction that the accused be absolutely ‘drunk,’ in the sense of being sodden with alcohol. It is sufficient if the presumed offender has imbibed to the extent that his physical coordination or mental faculties are deleteriously affected.” State v. Emery, 27 N.J. 348, 355 (1958).

The vital requirement of [N.J.S.A. 39:4-50](#) and its predecessors, like the comparable statutes of most other states, is operation ‘under the influence of intoxicating liquor.’ The phrase was not self-defining and required judicial ascertainment of the legislative intent, now long settled in this State in substantial conformity with that reached elsewhere. At the one pole, since ‘intoxication’ is not the expression used, it is not requisite that the accused be absolutely ‘drunk,’ in the sense of being sodden with alcohol. [Citation omitted] At the other extreme, the described condition means something more than having partaken of a single drink even though, physiologically, the smallest amount of alcohol has some slight effect or influence on an individual. The obvious intention of the Legislature was to prescribe a general condition, short of intoxication, as a result of which every motor vehicle operator has to be said to be so affected in judgment or control as to make it improper for him to drive on the highways. State v. Johnson, 42 N.J. 146, 165 (1964)



d. Narcotic, Hallucinogenic or Habit-Producing Drug

“[A]n operator of a motor vehicle [is] under the influence of a narcotic drug within the meaning of [N.J.S.A. 39:4--50\(a\)](#) if the drug [produces] a narcotic effect 'so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway.’” State v. DiCarlo, 67 N.J. 321(1975).

“The thrust of the Motor Vehicle Act is safety on the highway. The particular section is addressed to the evil of operating a motor vehicle while one's physical coordination or mental faculties are substantially diminished by 'intoxicating liquor, narcotic, hallucinogenic or habit-producing drug.' Competency to operate a motor vehicle safely is the critical question.” State v. Tamburro, 68 N.J. 414, 422 (1975).

“[T]he driving while intoxicated statute “does not require that the particular narcotic[, hallucinogen or habit-producing drug] be identified.” The statute also does not define the quantum of narcotics, hallucinogens or habit-producing drugs required in order to violate its prohibition. Instead, as with alcohol intoxication, the issue is simple: was the defendant “under the influence” of a narcotic, hallucinogen or habit-producing drug while he operated a motor vehicle. State v. Tamburro, 68 N.J. 414, 422 (1975).



U/I Drugs - Recapitulation

“We have described generally the term ‘under the influence’ as ‘a substantial deterioration or diminution of the mental faculties or physical capabilities of a person whether it be due to intoxicating liquor, narcotic, hallucinogenic or habit producing drugs.’ We also have explained that the term ‘under the influence’ means ‘a condition which so affects the judgment or control of a motor vehicle operator as to make it improper for him to drive on the highway. In the specific context of narcotic, hallucinogenic or habit-producing drug intoxication, we have held that a driver is ‘under the influence of a narcotic drug ... if the drug produced a narcotic effect ‘so altering his or her normal physical coordination and mental faculties as to render such person a danger to himself as well as to other persons on the highway.’ The question then is whether the proofs adduced in this case are sufficient to establish beyond a reasonable doubt that, at the time of his arrest, defendant suffered from ‘a substantial deterioration or diminution of the mental faculties or physical capabilities[,]’ or was in a drug-induced state that ‘so affect[ed his] judgment or control ... as to make it improper for him to drive on the highway[,]’ or whether defendant was under the effect of a drug that ‘so alter[ed] his ... normal physical coordination and mental faculties as to render [defendant] a danger to himself as well as to other persons on the highway.’ State v. Bealor, 87 N.J. 574, 589-90 (2006)



e. Synergistic Effects

A person may be deemed to be under the the influence within the meaning of NJSA 39:4-50(a) based upon the consumption of an alcoholic beverage in combination with medication. State v. Glynn, 20 N.J. Super. 20 (App. Div. 1952).



3. Ambien - In General

1983-86 – Discovery and first pre-clinical publications

1992- Ambien® (zolpidem tartrate) approved by FDA

1999- 2004 – 1st reports of sleep driving with Ambien. Wisconsin officials identified Ambien in the bloodstreams of 187 arrested drivers from 1999 to 2004.

2005 - Washington State officials counted 78 impaired-driving arrests in which Ambien was a factor last year (2005), up from 56 in 2004. (from a New York Times article 3/8/2006)

2005- Ambien-CR® (zolpidem tartrate) approved by FDA



2007- New Warnings issued:

1. sleep-driving, along with other less dangerous "complex sleep-related behaviors"

2 life-threatening allergic reactions, as well as severe facial swelling, both of which can occur either the first time the pills are taken or anytime thereafter

3. Dear Dr. letters go out to all prescribers notifying them of the warnings and labeling changes.

2007 – 1st generic version of Ambien® approved by FDA in US – Zolpidem – 13 manufacturers given green light

2010 –Generic Ambien-CR® (zolpidem tartrate) approved by FDA



January 2013 – FDA requires all manufacturers of Zolpidem to cut the recommended dosage in half for women

May 2013 – FDA approves labeling changes specifying new dosage recommendations for all Zolpidem- containing products because of concerns regarding next morning impairment. FDA also warning that patients who take the sleep medication zolpidem extended-release (Ambien CR)—either 6.25 mg or 12.5 mg—should not drive or engage in other activities that require complete mental alertness the day after taking the drug because zolpidem levels can remain high enough the next day to impair these activities.

4. Other Sleep Aids

Ambien[®] and Ambien CR[®] (Zolpidem), Sonata[®]. Halcion[®], Lunesta[®], and Rozerem[®]

According to an article in the *Washington Post*, the drugs implicated in sleep driving include: Ambien; Butisol sodium; Carbrital; Dalmane; Doral; Halcion; Lunesta; Placidyl; Prosom; Restoril; Rozerem; Seconal; Sonata., A number of these are no longer being manufactured or are not used to any great extent. Those still in common use fall into the sedative/hypnotic class, from a standpoint of pharmacologic action. Chemically, most of them fall into the benzodiazepine, barbiturate, or gamma-aminobutyric acid-ergic agonist

Zolpidem is usually prescribed for people who can't fall asleep, and the CR is prescribed for people who can fall asleep but not stay asleep (or cannot go back to sleep after waking)

What is the half-life for Zolpidem and Zolpidem CR?

Zolpidem 2.5- 3 hours

Zolpidem CR -half life is the same, but it is designed to go off in stages, so that the dose is released over time and the effective half life is extended over a longer period of time- Doses are also 25% higher



Anterograde amnesia can relate to individuals affected by Ambien:

Anterograde amnesia is a loss of the ability to create new **memories after the event that caused the **amnesia**, leading to a partial or complete inability to recall the recent past, most commonly caused by drugs in the benzodiazepine class or by those that are benzodiazepine agonists (like Ambien).**



5. Preparing the Ambien Defense - In general

a. Expert report & testimony

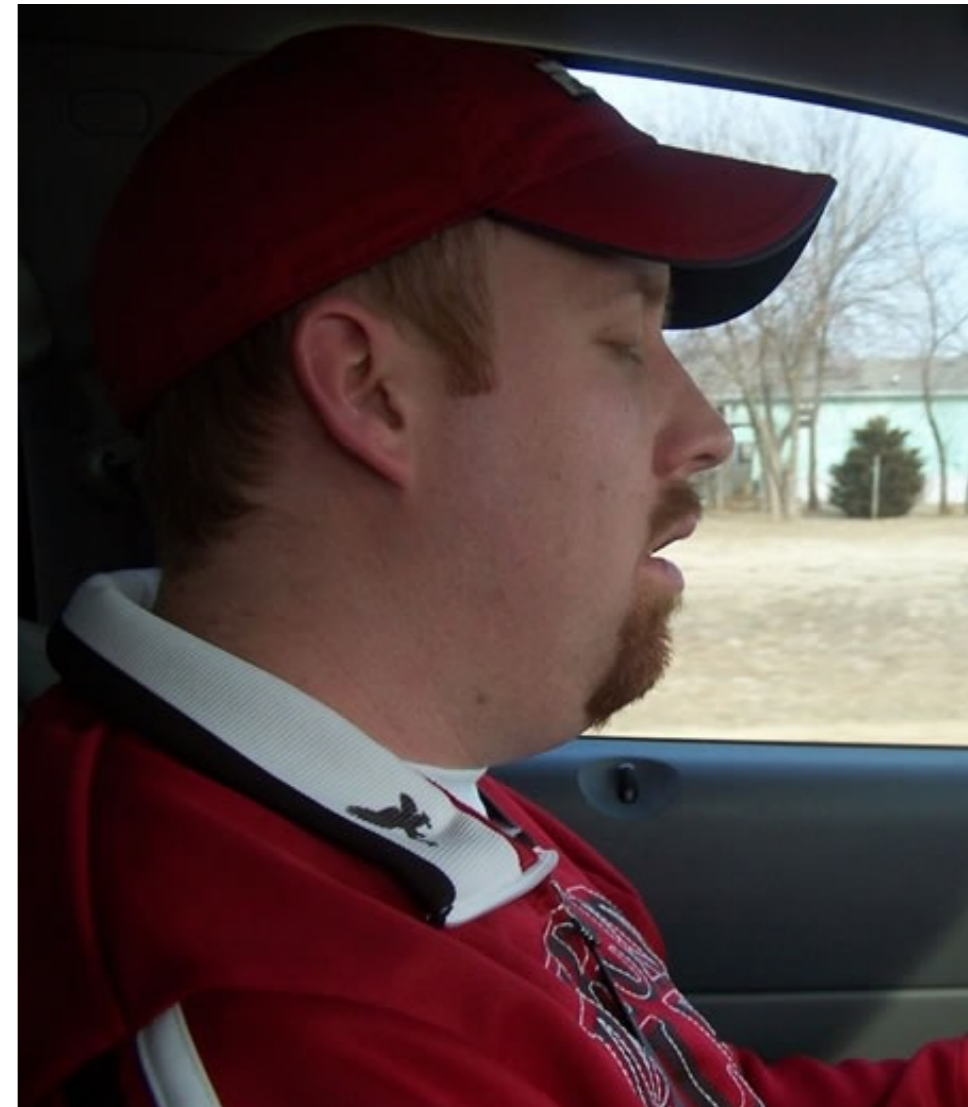
b. DRE report & testimony

c. Defendant's testimony

d. Operation

e. Pathological Intoxication

f. Other defense evidence



6. Pathological Intoxication: State v. Connelly

The expert testimony given by the defense's expert, Dr. Wolf, was un-controverted by the State. Based on the foregoing evidence, this Court clearly and convincingly finds that Defendant was pathologically intoxicated at the time of her arrest due to her ingestion of Ambien that night. Defendant was pathologically intoxicated because she did not know that when she took her prescribed dosage of Ambien that night that she was susceptible to sleep driving, a side effect that she was unaware of because the information was not publicly available until six months later. Thus, Defendant was sleep driving the night of September 10, 2006 and she, therefore, did not know the nature and quality of the act.



The conclusion of this Court is confirmed by the video of the traffic stop which illustrates that Defendant was swaying back and forth and could not stand up straight. Defendant informed the officers that she was tired and the officer stood behind Defendant as she attempted to complete the field sobriety tests because the officer thought she would fall back and smack her head. The officer stated on the video that Defendant could not even stand and the officer further remarked that it was amazing how Defendant made it that far given the state that she was in. When the officers located Defendant's vehicle, the hazards were activated, she was driving at a very slow speed, and the passenger side tire was flat and the officers could see sparks because the car was driving on the rim. Further, Defendant stated that she was wearing clothes that she only wears to bed and would never knowingly wear in public. Moreover, Defendant's sister was surprised by Defendant's appearance when she picked her up at the police station because her sister was wearing clothes that she would normally wear to bed, was disoriented, did not seem to connect with her sister[.]



7. Ambien Case Histories

State v. WNL (Age 30)

Violation Date 10/2/11 7:30 a.m.

Medical History: Insomnia/Anxiety



Prescription History: "Billy" initially was prescribed Zolpidem 5 mg. but would awake and have difficulty falling back asleep. As a result, his primary care physician prescribed 5mg. Zolpidem Tartrate (CR), but Billy would have difficulty falling asleep. At the time of the offense, defendant had been prescribed Zolpidem 10 mg. (which was effective), and Citalopram (similar to Lexipro) 10 mg in the morning for anxiety.

Drinking: Two beers at a bar from 10:30 pm to 2:00 a.m. on October 1, 2011; two more beers at home at about 3:30 a.m.

Medications Taken: Zolpidem 10 mg. at about 4:30 a.m. Shortly afterwards, client fell asleep. His next recollection was his airbag deploying approximately ½ hour drive from his home.

Lab/Toxicology report: Positive for Citalopram and Zolpidem.

AIR: .04% BAC

DRE: Concluded that defendant was under the influence of a CNS depressant and Alcoholic Beverages.

Facts: "Billy", age 30, reported to the police that as he was trying to enter a NJ Turnpike toll booth but the toll plaza "was moving side to side" as he was approaching and crashed into it. His first recollection after falling asleep.

Disposition: First Tier DWI.

State v. DJP (Age 22)

Violation Date 3/20/12 1:08 a.m.

Medical History: Lyme Disease; ADHD; Depression; Anxiety; Light Sensitivity;

Prescription History: "David" presented with a significant history of having taken a variety of sleep aids in the past prior to Ambien.

Drinking: none

Medications Taken: On 3/19/12 "David" took Amphetamine Salts (Adderall) (20 mg.) in the morning; at 7 p.m. he took 300 mg of Luvox (fluvoxamine). At bedtime at 10:00 p.m. he took 300 mg Trazadone, 100 mg Lyrica and 12.5 mg. of Zolpidem Tartrate (CR). He had classes the next morning. His next recollection was seeing and hearing the patrol car lights and sirens behind him at about 1:00 a.m.

Lab/Toxicology report: Positive for Amphetamine

AIR: .00% BAC

DRE: Concluded that defendant was under the influence of a CNS stimulant.

Facts: David was observed traveling 95 mph in a 55 mph zone on a densely foggy morning at approximately 1:00 a.m. His stated destination would have been in the opposite direction of where he was traveling. He was wearing a T-shirt, shorts and untied sneakers.

Disposition: (Client had a prior alcohol-DWI); but on this occasion he entered a plea of guilty to speeding 95 mph with a recommended 90 day loss of driving privilege.



State v. JJF (Age 46)

Violation Date 6/12/12 4:16 a.m.

Medical History: Degenerative Disc Disease (3 HNP); Bile Reflux; prior injuries to shoulder/bicep; Insomnia. Hospitalization one month earlier for dehydration.

Prescription History: Since October 2011, "John" had been prescribed Oxycodone HCL 15 mg prn. He was also prescribed 10 mg of Zolpidem, but regularly would take only ½ of the tablet. He discontinued use of the Zolpidem until resuming it one week prior to the offense date. He recently lost 30 lbs. due to an illness.

Drinking: none

Medications Taken: On June 11, 2012 at about 8 p.m. John took ½ of a 10 mg tablet of Zolpidem and Oxycodone HCL 15 mg. He woke up at about 3:30 a.m. to get ready for work as a train conductor. Prior to leaving for work he took 60 mg of Dexilant (dexlansoprazole) and Welchol (colesevelam) 625 mg (both for Bile Reflux); Zofcan HCL 8 mg (anti-nausea). Dexilant (OTC Cold Medication) was a newly introduced medication.

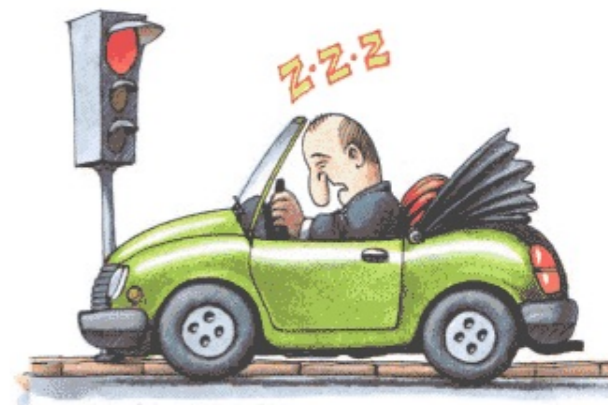
Lab/Toxicology report: Positive for Oxycodone, Zolpidem and Dextromethorphan

AIR: .00% BAC

DRE: Concluded that defendant was under the influence of a CNS depressant.

Facts: John put his uniform on and left his house to go to work. He reports having suffered a "black-out" after turning right at the end of his block. He had never had a black-out before. He next remembers knocking down 4 street signs before coming to a stop. The airbag did not deploy. He was traveling on a route that he never takes to go to work.

Disposition: John entered a plea of guilty to careless driving with a recommended 90 day loss of driving privilege.



State v. EDH (Age 54)

Violation Date 6/15/14 10:47 p.m.

Medical History: Neck, Back and Right Knee Osteoarthritis (Defendant is collecting SSI benefits); Depression; Anxiety; Insomnia; Ocular albinism.

Prescription History: "Eric" had been prescribed 10 mg. of Zolpidem in January of 2014 for insomnia which he discontinued after several days due to severe headaches. He was prescribed a regimen of Trazadone as a sleep aide which was ineffective. Since April of 2014 he had been prescribed escitalopram (Lexapro) for depression and alprazolam (Xanax) for anxiety. Due to the ineffectiveness of the Trazadone, he was prescribed Zolpidem 5 mg on June 14, 2014. He first took that the evening prior to his arrest.

Drinking: He had recently moved into his home and had two scotch-on-the-rocks, the first in the early afternoon and the second at about 5:30 pm.

Medications Taken: Eric took the Lexapro and Xanax the morning of June 15, 2015. He took the Zolpidem at about 10:00 p.m.

Lab/Toxicology report: none

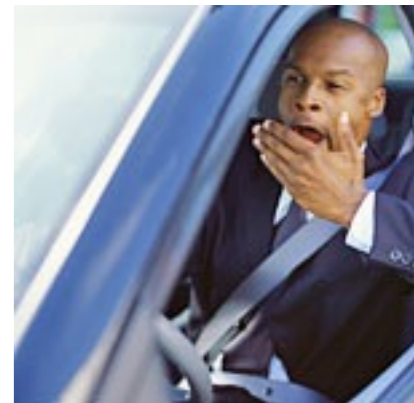
AIR: .07% BAC

DRE: None

Facts: After taking his sleep aide and falling asleep, Eric arose, and while wearing his bed clothes, drove about one mile from home when he struck a telephone pole. The police photo in discovery depicts him with his eyes closed.

Disposition: Eric had two prior alcohol-related DWI convictions. He was facing a potential sentence as a third offender. He entered a plea of guilty to reckless driving with no loss of driving privilege.



State v. DC (Age 27)**Violation Date 7/15/14 1:30 a.m.****Medical History:** 2 Cervical non-surgical HNP DDD; 1 non-surgical HNP L5-S1; fibromyalgia; gastric bypass surgery four years prior; insomnia; anxiety, depression.**Prescription History:** "Danny" was prescribed a pain management regimen consisting of Butrans (one 20 mg patch per week), Duloxetine, Lyrica, Oxycodone and Adderall, the latter medication being prescribed so he can remain alert during the work day given his other medications). He also is prescribed Xanax prn which he did not take on the date of the alleged offense. He had a history of taking Lunesta as a sleep aid approximately 1 ½ years prior which was ineffective. He also took Tamazapan which was ineffective. He stated that he began a regimen of Zolpidem 10 mg a year ago, and after the second month, switched to Zolpidem Tartrate for 3 months. However that medication prevented him from sleeping restfully for the entire evening and as a result, switched back to the Zolpidem 10 mg.**Drinking:** None**Medications Taken:** Danny was to start a new job on July 15, 2015, the date of his arrest. During the several months he was unemployed, he discontinued the Oxycodone and Adderall, but reintroduced those medications (so he could be pain-free and alert during the work day), together with regular regimen of the Duloxetine, Lyrica and finally, the Zolpidem at bedtime.**Lab/Toxicology report:** Amphetamine, Codeine, Oxycodone, Zolpidem and Pregabalin.**AIR:** .00% BAC**DRE:** Concluded that defendant was under the influence of a CNS depressant.**Facts:** Danny took his sleep medication at about 10:00 p.m. He arose from bed, and while wearing his bed clothes and steel-toe boots drove out of his apartment complex, turned the corner and struck 4 parked, unoccupied vehicles. His first recollection after falling asleep was being handcuffed at a table in the police station waiting to take breath tests. He told the police he drank a few beers. (He never drinks).**Disposition:** He entered a plea of guilty to reckless driving with a recommended 60 day loss of driving privilege.

State v. SSW (Age 44)

Violation Date 9/9/14 4:33 a.m.

Medical History: Kidney Stones. Pain management resulted in recreational opiate use/dependency for which he was being treated as of the violation date. Insomnia; Depression; Anxiety.

Prescription History: “Scot” had been prescribed Zolpidem 10 mg in late 2009/early 2010 without having received any verbal warnings of side effects from his physician or pharmacist. He discontinued the medication after several days of use. At the time of the violation date, he just finished opiate addiction therapy with a Suboxone MIS 8-2 mg (patch) the week before.

Drinking: None

Medications Taken: With the suboxone therapy concluded, Scot was still suffering from anxiety and withdrawal symptoms, the combination of which also resulted in insomnia. On June 8, 2014, (the evening before the subject event) he was prescribed 10 mg of Zolpidem and 1 mg of Clonazepam, both of which he recalls having taken that evening.

Lab/Toxicology report: Oxycodone and Zolpidem

AIR: .00% BAC

DRE: Concluded that defendant was under the influence of a CNS depressant.



Facts: Scot took his Clonazepam at the pharmacy when he purchased it that evening. He took his Zolpidem and retired to bed at approximately 10:45 p.m. His first “snippet” was hitting a tree, exiting his car, and thinking: “so that’s what an airbag looks like”. He doesn’t remember walking home but he did. The next day, 6 pills of Zolpidem and 6 pills of Clonazepam were missing from the bottles he purchased the previous evening. As part of his Suboxone Therapy, there was not supposed to be any opiates in the house. His wife subsequently reported that there was an old prescription of Oxycodone in the medicine cabinet, and Scot apparently ingested it either upon arising from bed before driving, or upon his return home following the MVA. Our expert witness opined that he had not taken the additional Zolpidem or Clonazepam that was found to be missing.

Following client’s refusal to enter a plea of guilty to DWI upon dismissal of the careless driving summons, the State issued additional complaints for DWI-School Zone and Leaving the Scene of an Accident.

Disposition: Following the denial of several Motions after the State’s first witness, the Township Engineer (whose identity and opinion was never provided in discovery) was sworn, including a Motion to strike his testimony/opinion on the school zone issue, the court adjourned the matter over defendant’s objection. Despite the new Double Jeopardy issue and a defensible DWI case, client elected not to pay for the expert witness to return to Court or risk the lengthy suspensions he would face upon conviction of the newly issued complaints and entered a plea of guilty to DWI only with a 7 month loss of driving privilege.



State v. JAW (case pending) (Age 49)
Violation Date 2/16/15 7:41 p.m.



Medical History: Asthma; anxiety; insomnia

Prescription History: "Joe" Does not have health insurance. He consulted with a physician online in January (www.onlinepharmacy.com) for his insomnia who prescribed Zolpidem Tartrate 10 mg. which mail-ordered from India. Joe kept the delivery envelope and medication packing for me. He was instructed to take one tablet in the evening and commit to 7 hours of sleep. No written warnings or instructions were included with the medication.

Drinking: Reports having 4-5 12 oz. cans of beer between 3 pm and 7 pm. (client is charged with Refusal to Submit to Breath Testing).

Medications Taken: Police reports indicate client reported having taken Zoloft 20 mg earlier in the day and Zolpidem Tartrate 20 mg. at about 7 pm. (with his last beer). Client also takes OTC Primatene Mist 2x per day with an inhaler.

Lab/Toxicology report: None

AIR: REFUSAL

DRE: none

Facts: Client advises that he consumed ambien at 7 pm with the intention of sleeping soundly thorough the night. He wore a T-shirt and sweatshirt/seatpants to bed with no footwear or socks. His next recollection was being involved in a MVA. Discovery indicates he struck an occupied vehicle in the rear. He drove home following the accident. He remembered hearing a knock on his door. He didn't answer it; he doesn't know why and indicates that it is out-of-character for him not to have answered the knock on the door. Discovery indicates the police went into his apartment through an "open" basement window to check on his "well being". He was wearing pants that he apparently put on backwards, winter boots, a T-Shirt and a Blue windbreaker.

Disposition: pending

Garden State CLE Presents:

Defending a DUI Ambien Case



Lesson Plan