



Diabetes and Criminal Defense Strategies

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A resource aimed to provide a starting point for criminal defense attorneys when thinking about whether and how to incorporate a criminal defendant's diabetes into his or her defense.

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Diabetes and Criminal Defense Strategies

When a person is facing criminal charges, it is imperative that his or her attorney meaningfully consider all possible defenses and theories of the case. For many criminal defendants who have diabetes, this disease is overlooked during the criminal defense strategizing stage and thus goes unexplored. While in some cases this oversight might be harmless, in other cases, it could cost a defendant a favorable offer from the prosecution, a mitigated sentence from the judge, or even a not guilty verdict at trial.

The fact that a criminal defendant has diabetes might indeed be relevant to his or her defense. In some circumstances, symptoms caused by diabetes might affect a defendant's ability to form the requisite criminal intent, to provide a knowing and voluntary statement to law enforcement, to enter a valid plea or to provide meaningful consent. Diabetes might also cause symptoms that closely resemble symptoms of alcohol or drug intoxication and thus might be relevant to a charge of driving under the influence.

This paper is not intended to serve as an exhaustive discussion of relevant defense strategies or as a comprehensive case law analysis. Rather, it is meant to provide a starting point for criminal defense attorneys when thinking about whether and how to incorporate a person's diabetes into his or her criminal defense.

I. Diabetes and Its Symptoms¹

Approximately 30 million people in the United States have diabetes.² Diabetes is a chronic disease that impairs the body's ability to use food for energy and results in high levels of glucose (sugar) in the blood.³ In a person *without* diabetes, when digestion occurs, the body breaks down carbohydrates into glucose. Glucose enters the bloodstream where it travels to cells in the body to be used as energy. However, in order for cells to use glucose as energy, they need the help from a hormone produced by the pancreas called insulin. Insulin acts as a "special key" to unlock the cells and allow the glucose to enter.⁴ The pancreas typically releases insulin in response to rising blood glucose levels caused by eating snacks and meals, and also releases a small, steady stream of insulin throughout the day.

¹ This section is not meant to be a comprehensive explanation of diabetes; more information about diabetes can be found on the American Diabetes Association's website at www.diabetes.org.

² *Infographics*, Am. Diabetes Ass'n, <http://www.diabetes.org/diabetes-basics/statistics/infographics.html> (last edited: February 1, 2016).

³ James A. Rapp, Shereen Arent, Brian L. Dimmick, Katharine Gordon, Crystal Jackson, *Legal Rights of Students with Diabetes*, 9-13 (American Diabetes Association, 3rd ed. 2015).

⁴ Kate Ruder, *American Diabetes Association Complete Guide to Diabetes*, 7-21 (Abe Ogden ed., 5th ed. 2011).

For people *with* diabetes, this bodily process is disrupted by either a lack of insulin or the body's inability to use insulin effectively. There are two main types of diabetes: type 1 diabetes and type 2 diabetes.⁵ Type 1 diabetes occurs because of an autoimmune disorder which causes the body's immune system to attack the insulin-producing cells in the pancreas, called beta cells. As a result, the pancreas is either unable to produce any insulin or can only produce a very small amount of insulin. A person who has type 1 diabetes must therefore receive insulin from an outside source in order to survive and this insulin must be carefully balanced with food intake and physical activity.⁶

By contrast, people who have type 2 diabetes typically maintain the ability to produce insulin, at least initially, however, their bodies either do not produce enough insulin or cannot use insulin effectively (a condition commonly referred to as "insulin resistance"). Some people with type 2 diabetes are able to treat their condition with oral medications, diet and exercise. Others, particularly those who have had type 2 diabetes for a while, may require insulin from an outside source, similar to those who have type 1 diabetes.⁷

Diabetes can lead to both short-term and long-term complications. **Hyperglycemia**, or high blood glucose, is a complication that can occur if insufficient insulin is produced by or administered to a person with diabetes and glucose accumulates in the blood. If blood glucose levels become very high, a life-threatening condition called diabetic ketoacidosis (DKA) can occur. Symptoms of DKA may include blood glucose above 240 mg/dl; intense thirst, dry mouth; the need to urinate frequently; lack of appetite or stomach pains; vomiting or nausea; blurry vision; fever or warm, dry or flushed skin; difficulty breathing; weakness; sleepiness and a fruity odor on the person's breath.⁸

Hypoglycemia, or low blood glucose, can occur if too much insulin is administered or if a person eats too little food or engages in too much exercise following the use of insulin. Symptoms of hypoglycemia may include shakiness; nervousness or anxiety; sweating; irritability or impatience; chills and clamminess; rapid heartbeat; lightheadedness; hunger; sleepiness; anger, stubbornness or sadness; lack of coordination; blurred vision; nausea; tingling or numbness in the lips or tongue; nightmares or crying out during sleep; headaches; strange behavior including delirium, confusion or personality change; seizures; and unconsciousness.⁹ Some people are unable to detect when their blood glucose level is dropping and tend to miss the

⁵Type 1 diabetes is sometimes referred to as "juvenile diabetes" or "insulin-dependent diabetes." Type 2 diabetes is sometimes referred to as "adult-onset diabetes" or "non-insulin dependent diabetes." These terms are inaccurate and are disfavored by the diabetes health care community.

⁶ Common means of receiving insulin are via injections or an insulin pump.

⁷ Gestational diabetes is a third type of diabetes which occurs during pregnancy and typically ends when the pregnancy ends. Gestational diabetes can typically be managed with very close blood glucose monitoring, diet and exercise. Some women who have gestational diabetes may need insulin, and thus are at risk of hypoglycemia.

⁸ Kate Ruder, *American Diabetes Association Complete Guide to Diabetes*, 95-96 (Abe Ogden ed., 5th ed. 2011).

⁹ *Id.* at 87.

early symptoms of hypoglycemia. For people with this condition, called “hypoglycemia unawareness,” the first symptom of low blood glucose may be impaired thinking.¹⁰

With this understanding of diabetes and its symptoms in mind, we can now turn to how diabetes may be used as part of a criminal defense strategy.

II. Diabetes and Mens Rea

A. What is mens rea?

For most crimes, a defendant’s mens rea or “criminal mind” must be proven in order to establish guilt. That is, the burden is on the prosecution to prove that the defendant had the requisite intent to commit the crime charged. Most crimes require that the defendant possessed a *general intent* to do the act that constitutes the crime. Some crimes require that the defendant possessed a *specific intent*.

- For example, theft is usually defined as the unauthorized taking of another’s property with the specific intent to permanently deprive the owner of that property. Thus, theft is a specific intent crime because it does not simply require that the defendant generally intended to take another’s property without permission - it also requires that the defendant had the specific intent to permanently deprive the owner of the thing taken. If the defendant took something without permission but intended to give it back, the specific intent element would be missing.

B. Can diabetes affect a person’s mens rea?

A person’s diabetes can, in some circumstances, negate a person’s mens rea. However, whether a court will permit evidence of this depends on the facts and the jurisdiction.

A common way that a person’s diabetes might be used to negate his or her mens rea is by putting forth the affirmative defense of involuntary intoxication based on the argument that the defendant suffered from hypoglycemia during the alleged crime.

1. What is the legal definition of intoxication?

According to Model Penal Code § 22.08, intoxication is a disturbance of mental or physical capacities resulting from the introduction of substances into the body. Intoxication can be voluntary or involuntary.

¹⁰ *Id.* at 88.

- Intoxication is voluntary or “self-induced” if it is caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, ***unless he introduces them pursuant to medical advice***.
- Intoxication which is involuntary or not self-induced is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

Whereas voluntary intoxication is only a defense to specific intent crimes, involuntary intoxication is usually a defense to both specific and general intent crimes.¹¹

2. Have courts found that insulin is a substance that can cause intoxication?

Yes. For example, in *People v. Morton*, 100 A.D.2d 637 (N.Y. App. Div. 3d Dep't 1984), the defendant was found guilty of intentionally murdering his wife. At trial, the defendant did not deny that he fired the shots which killed his wife; rather, he sought to establish that he did not have the requisite mental state to commit *intentional* murder because at the time of the shooting he suffered from hypoglycemia, a condition resulting from his having taken an excessive amount of insulin to control his diabetes. The defendant argued that this condition rendered him, in effect, intoxicated and incapable of forming the requisite intent.

The trial court denied the defendant's request that manslaughter and criminally negligent homicide be charged to the jury as alternatives to intentional murder. On appeal, the court determined that a reasonable view of the evidence could support a finding that the defendant acted recklessly rather than intentionally, and manslaughter should therefore have been charged to the jury in the alternative to intentional murder.

The court explained that ***drugs have been recognized as a cause of voluntary intoxication and there is no logical reason why insulin should be treated differently***, especially in light of the expert testimony that hypoglycemia could produce an intoxicated state. Additionally, the jury could have found that at the time of the shooting, the defendant was not following a prescribed course of treatment, had been drinking to excess, and had taken an extra dose of insulin to compensate for these transgressions. The jury thus might have found, consistent with the testimony of defendant's medical expert, that the defendant was in a hypoglycemic state from his excessive drinking and insulin injections and did not have the requisite intent for intentional murder at the time of the shooting.

¹¹ *People v. Low*, 732 P.2d 622, 628 (Colo. 1987).

3. Will courts permit evidence of hypoglycemia to prove involuntary intoxication?

Maybe. It depends on the facts and the jurisdiction. A review of a sample of cases demonstrates that the determination often comes down to whether the jurisdiction's definition of involuntary intoxication includes merely taking medication pursuant to medical advice or also requires that the defendant was not warned of the potential intoxicating side effect.

For example, in *People v. Garcia*, 113 P.3d 775 (Colo. 2005), Garcia, a man with diabetes, was convicted of attempted second degree murder and first degree assault for hitting his wife in the head with a hammer and running over her with a van. The Colorado Supreme Court found that the trial court erred in refusing to permit Garcia to raise the affirmative defense of involuntary intoxication on the basis that he injected himself with a large dose of insulin on the morning of the alleged crime, failed to eat thereafter as planned and claimed he suffered from hypoglycemia at the time of the alleged crime.

The court in *Garcia* held that, as a matter of law, the medical condition of insulin-induced hypoglycemia may, depending upon the particular facts and circumstances of the case, constitute the affirmative defense of involuntary intoxication. To justify instructing the jury on involuntary intoxication, the court stated, a defendant must offer some credible evidence that shows (1) a substance was introduced into the defendant's body; (2) the substance was not known to be an intoxicant, the defendant did not know it could intoxicate him or her, or it was taken because of medical advice; (3) the substance disturbed the defendant's mental or physical capacities; and (4) the disturbance resulted in the defendant's lack of capacity to conform his or her conduct to the law's requirements. *Garcia*, 113 P.3d at 782-83.

The People argued that insulin-induced hypoglycemia could not constitute involuntary intoxication as a matter of law because Garcia's alleged hypoglycemic condition resulted not solely from the introduction of a substance into his body but, instead, from the combined injection of insulin with his failure to eat. The court disagreed stating that insulin is a substance prescribed to people with diabetes by doctors, and insulin-induced hypoglycemia is thus a drug-induced disturbance of one's mental and/or physical capacities. Although the effect of insulin on one's mental and physical capacities may be impacted by a failure to eat, the court agreed with the conclusions reached by the other jurisdictions that insulin is a drug which can cause an intoxicated state.¹²

By contrast, in *Mendenhall v. State*, 15 S.W.3d 560, 565-566 (Tex. App. Waco 2000), the court held that although involuntary intoxication by prescribed drugs is indeed a recognized defense in

¹² See also, *State v. Leteve*, 237 Ariz. 516, 525 (Ariz. 2015) (Though a patient may voluntarily take prescription drugs, intoxication as a result of such use may be involuntary so long as it is done pursuant to medical advice.) See, e.g., *People v. Garcia*, 113 P.3d 775, 780 (Colo. 2005); *State v. Gardner*, 870 P.2d 900, 902 n.8 (Utah 1993); *State v. Gilchrist*, 15 Wn. App. 892, 552 P.2d 690, 692 (Wash App. 1976).

Texas, it occurs *only "if the individual had no knowledge of possible intoxicating side effects of the drug, since independent judgment is exercised in taking the drug as medicine, not as an intoxicant."* (emphasis added).¹³

In *Mendenhall*, the appellant's former wife sued for divorce while he was incarcerated. At the divorce trial, appellant spat on the judge and made obscene remarks, requiring three deputies to restrain him. As appellant attempted to free himself, he pinned a deputy's hand against a door frame, cracking a bone. At the trial for these acts, appellant argued he committed these acts while under the influence of hypoglycemia, a condition associated with his diabetes. ***Appellant contended that prison officials failed to adequately educate him about the possible side effects of taking insulin.*** The trial court refused to instruct the jury on the defense of involuntary intoxication. On appeal, the court held that while it was error not to submit the involuntary intoxication defense to the jury, the error was harmless because of a substantial amount of evidence that the defendant was not suffering from hypoglycemia when he assaulted the deputy. His medical records reflect that he has chronically high blood sugar, his blood sugar was normal when he was taken to the emergency room after the incident, and the court transcript demonstrates he was not confused moments before his outburst.

Similarly, in *People v. Holloway*, 164 Cal. App. 4th 269, 285-286 (Cal. App. 5th Dist. 2008), the appellate court stated that ***the pivotal question, at least in California, is whether the defendant knew or had reason to anticipate that his use of the prescription medication could cause intoxicating effects.***¹⁴ In *Holloway*, the trial court did not instruct the jury on involuntary intoxication because the court determined as a matter of law that defendant knew or should have known his medications could intoxicate him because the warnings on the prescription bottles stated he could become drowsy, should not drink alcohol and should not drive if drowsy. Moreover, the defendant conceded he knew the medications could cause drowsiness and could impair his ability to drive. Accordingly, the court concluded that defendant was voluntarily intoxicated and that the evidence did not support the giving of instructions on involuntary intoxication caused by prescription medication.

4. What evidence is relevant to establish that a defendant suffered from hypoglycemia at the time of an alleged crime?

Relevant evidence includes but is not limited to:

- Expert testimony describing the science and characteristics of diabetes
- Expert testimony describing hypoglycemia and its symptoms (both physical and cognitive)
- Evidence that the defendant has diabetes

¹³ *Buttles*, 12 ST. MARY'S L.J. at 240; accord *Altimus*, 238 N.W.2d at 857; see also *Aliff*, 955 S.W.2d at 893 ("nothing indicated that Aliff took the intoxicating drugs unknowingly, or without knowledge of their effect").

¹⁴ Citing *People v. Chaffey*, 25 Cal.App.4th 852, 856.

- Frequency with which defendant has hypoglycemic attacks in general (how often do they occur?)
- Duration of attacks (are they brief or do they last for an extended period of time?)
- Obviousness to an observer
- Whether symptoms were witnessed during the relevant timeframe
- Time and quantity of insulin taken on relevant day
- Whether the defendant ate, drank or exercised after taking insulin – what and how much?

History, Signs and Symptoms of Hypoglycemia during the Relevant Timeframe

In *United States v. Abdelkoui*, 19 F.3d 1178, 1182 (7th Cir. Ill. 1994) the defendant was accused of knowingly purchasing food stamps in an unauthorized manner from an undercover agent on several occasions. The court rejected the defendant’s claim that his diabetes, specifically attacks of hypoglycemia, precluded him from forming the requisite intent. The defendant’s doctor testified that these attacks are infrequent, short in duration, and obvious to an observer. An undercover agent testified that she noticed none of the symptoms of an attack of hypoglycemia during any of the transactions. Further, the court noted that it is difficult to imagine that these infrequent and brief attacks occurred at precisely the time of the defendant’s meetings with the agent at which he purchased food stamps without her noticing any symptoms of his condition. The court concluded that a review of all the evidence, and the defense’s attempted explanation of his conduct, clearly demonstrates that he knowingly purchased food stamps and that the evidence clearly supported his conviction.

In *Commonwealth v. Talbot*, 444 Mass. 586, 587-588 (Mass. 2005), the defendant was convicted, under a joint venture theory, of the forcible rape and the indecent assault and battery of her minor daughters by her boyfriend. On appeal she claimed error in the exclusion of expert testimony from her treating endocrinologist concerning the nature, intensity, and consequences of her lifelong diabetic condition. Specifically, she contended that she experienced regular episodes of hypoglycemia that either left her semiconscious or caused her to pass out, and that if an episode occurred during one of the sexual assaults on her daughters, she would have been unaware of the assault and therefore could not be liable as a joint venturer because she could not have shared the requisite mental intent. The court found that the defendant’s argument was flawed because she failed to point to any evidence that she had experienced a hypoglycemic episode at the time of any of the sexual assaults.

In *State v. Gonzales*, 652 S.W.2d 719 (Mo. Ct. App. 1983), the defendant was convicted of first-degree assault on a police officer following an altercation during a traffic stop which led to a lengthy and dangerous high-speed car chase. During the chase, the defendant’s vehicle jumped a curb and just missed another officer’s stopped vehicle. The defendant was still belligerent when the chase ended despite his serious injuries.

On appeal, the court reversed the defendant's conviction and remanded for a new trial, concluding that the trial court erred in excluding evidence that defendant's behavior was caused by a hypoglycemic reaction due to his diabetes. The evidence was relevant to defendant's intent because first-degree assault under Mo. Rev. Stat. §565.050.1(2) required a showing of specific intent. The court found that the trial court erroneously excluded testimony from a nurse at the county jail who took information on the defendant's diabetic medical history when he was booked and from another witness, who also happened to be a nurse with specialized knowledge in diabetes, and who observed the defendant at a bar on the night of the incident exhibiting symptoms of low blood sugar.

Expert Testimony

In addition to evidence of the defendant's history of hypoglycemia and of the physical symptoms exhibited during the relevant time frame, it is also prudent for a defendant to offer expert testimony that explains how insulin, or a lack thereof, might affect a person who has diabetes.

For example, in *People v. Philipson*, 150 A.D.2d 615, 615-616 (N.Y. App. Div. 2d Dep't 1989), the defendant was on trial for accosting a woman in a parking lot and firing two shotgun blasts at her car as she drove away. At trial, the defendant, who has diabetes, argued that he was unable to form the requisite intent as a result of undermedication of insulin.

On appeal, the court found that the trial court properly excluded evidence that the defendant had been hospitalized shortly after the incident because of a lack of insulin. ***No expert testimony was offered to explain what effect a lack of insulin would have on an individual or how long it would take for the defendant's condition to develop, and the introduction of the records would have merely confused the jury.*** Although the defendant's girlfriend testified about how the defendant behaved when he did not take his insulin, her testimony was not such as to permit "a reasonable person to entertain a doubt as to the element of intent" (*People v. Perry*, 61 NY2d 849, 850). Furthermore, the defendant's girlfriend also testified that the defendant told her that he had taken the insulin on the day of the occurrence.

5. Can evidence of hyperglycemia (high blood sugar) ever be used to negate mens rea?

Possibly. In *Philipson*, described above, the defendant claimed that he was unable to form the requisite intent as a result of *undermedication* of insulin. Undermedication of insulin would have the effect of hyperglycemia, or high blood glucose, not low blood glucose. Hence, with sufficient evidence and expert testimony, one could infer from *Philipson* that hyperglycemia might be available as a defense to a defendant to negate the requisite intent.

6. Even if a court permits evidence that a defendant suffered from hypoglycemia (or hyperglycemia) at the time of the alleged crime, will the court necessarily permit evidence that the defendant lacked the ability to form the requisite intent?

Not necessarily. For example, in *State v. Guilliot*, 106 Wn. App. 355 (Wash. Ct. App. 2001) the defendant sought to introduce expert testimony that he was suffering from hypoglycemia on the morning that he shot and killed his fiancé. The court permitted expert testimony that the defendant was hypoglycemic at the time of the shooting but excluded evidence that he lacked the ability to form the intent to kill at the time of the shooting. The court noted that such testimony was inconsistent with the testimony of the defendant's treating physician who stated that even when the defendant's blood sugar level was in the 40s or 50s, he did not appear incoherent, unconscious or otherwise unable to answer questions appropriately. Although the defendant reported that he experienced perspiration, confusion, and a severe headache that morning, the court found that there was no evidence that he suffered from these symptoms to such a degree that they affected his ability to form the culpable mental state. Rather, his activities around the time of the shooting suggested that his capacity was not affected. He remembered showing the victim the gun, pointing it at her head, and shooting it twice. He then took the gun, drove to his parents' house, and made himself a beverage shake.

The court noted, "the evidence must reasonably and logically connect the defendant's intoxication with the asserted inability to form the required level of culpability to commit the crime charged." *Gabryschak*, 83 Wn. App. at 252-53. *See also State v. Coates*, 107 Wn.2d 882, 891, 735 P.2d 64 (1987) ("**[I]t is not the fact of intoxication which is relevant, but the degree of intoxication and the effect it had on the defendant's ability to formulate the requisite mental state.**"(emphasis added)). Applying these principles, the court found that there was not substantial evidence of a link between an insulin reaction and the defendant's ability to form the culpable mental state the morning of the shooting. Nor could the defendant's expert connect the general symptoms of hypoglycemia, including confusion, irritability, violence, anger, and anxiety, with the defendant's condition the morning of the shooting. Thus, the court found that the defendant's expert's opinion would not have helped the trier of fact and it was not an abuse of discretion for the trial court to exclude it.

III. Other Ways Diabetes May Be Used to Negate a Defendant's Mental State

The cases below demonstrate the difficulty in prevailing on any of these arguments. However, these applications may be worth considering if there is sufficient supporting evidence.

A. Confessions

In *State v. Galliano*, 945 So. 2d 701 (La.App. 5 Cir. Aug. 29, 2006), the defendant was charged with second degree cruelty to a juvenile. At a pre-trial hearing, the defendant moved to suppress his statements to law enforcement arguing that they were involuntary because his mental state was impaired due to his hypoglycemia. At the hearing, the detective testified that after waiving his rights, the defendant said he was a junior at Southeastern studying pre-med. After the first statement, the detective asked the defendant to take a polygraph test, and defendant agreed. During the break, the defendant had a soft drink and a candy bar out of the vending machine. The polygraph was not completed, however, because the officer conducting the test said the defendant was too nervous. The defendant told the detective he was nervous because he had not told the whole truth, and that is how the second recorded statement was made. After the defendant's second statement was complete at 12:34 a.m., the defendant was brought home.

The defendant testified that he had hypoglycemia and that he must eat three times a day. According to the defendant, he feels weak and disoriented and has difficulty remembering when he does not eat. The defendant said that he had not eaten anything the day he made his first two recorded statements. At the hearing and at trial, the defendant answered affirmatively when asked whether his statements were free and voluntary.

The defendant's mother and father also testified at the hearing. According to his mother, the defendant becomes disoriented and suffers blackouts and convulsions if he fails to eat. While his mother had observed the defendant become disoriented, she had never seen the defendant have a blackout or convulsions. Further, she said she was not present during his statements and did not know whether the defendant was disoriented at that time. However, she did testify that the defendant appeared disoriented when he came home from the police station on the night of the incident.

The court found that the defendant's statements were freely and voluntarily given after he was advised of his constitutional rights. The defendant answered affirmatively when the prosecutor asked whether he gave the statements freely and voluntarily. Further, all of the officers testified that they advised the defendant of his rights, that the defendant waived his rights, and that the defendant understood what he was saying.

Takeaways

- Where a defendant answers affirmatively when asked whether his or her statements were free and voluntary, it is very difficult to later claim they were not.
- Officer observations go a long way.

In *State v. Clarkston*, 963 S.W.2d 705, 715-716 (Mo. Ct. App. 1998), the defendant was convicted of driving while intoxicated. The defendant moved to suppress statements he made to police officers admitting consumption of alcohol because they were involuntary, due to his hypoglycemic reaction. At the hearing, the defendant testified he believed he was having a "neuroglycopenic reaction," caused by insulin-induced hypoglycemia, at the time of the incident, and that he did not remember making the statements to the police. The police officers testified that the defendant appeared to understand them, responded appropriately, and indicated that he understood his Miranda rights before he waived them. The State contested the defendant's claim arguing he was drunk. The court denied defendant's motion and the defendant appealed.

On appeal the court found that although a condition such as the defendant claims he was having may be a factor to consider, it, similar to mental illness, does not per se render the statements involuntary. The defendant's waiver of his rights is a factor indicating the voluntariness of his statements, as was the officer's testimony concerning the defendant's understanding and responsiveness. Moreover, there were alternative explanations for his conduct, in particular, the fact that he had been drinking. A defendant cannot automatically exclude statements simply by claiming that he made them while suffering from a reaction to a medication. It is up to the court to assess the evidence and make credibility determinations in determining voluntariness. The appellate court found substantial evidence from which the trial court may have found that given the "totality of the circumstances," the defendant was not "deprived of a free choice to admit, to deny, or to refuse to answer, [nor was] physical or psychological coercion" used in obtaining these statements. Thus, the court's determination that these statements were voluntarily made was not error.

B. Pleas

In *United States v. McNeely*, 20 F.3d 886, 888 (8th Cir. Ark. 1994), one of the defendants, McNeely, appealed his conviction for robbery, in part, based on a claim that the trial court should have granted his motion to withdraw his plea. McNeely claimed his plea was invalid because he was suffering from a mental disease or defect due to hypoglycemia resulting from untreated diabetes. In holding that the district court did not abuse its discretion in denying McNeely's motion, the appellate court found that the record established that he understood the charges, was not dissatisfied by his attorney's services, and that he entered the plea knowingly and voluntarily. The court found there was nothing to suggest that the untreated hypoglycemia he now alleges rendered his plea unknowing, unintelligent, or involuntary.¹⁵

The *McNeely* court relied on the holding in *United States v. Dalman*, where Dalman, the defendant claimed that he was under the influence of heart medication at the time he pled guilty and that the medication rendered him incapable of knowingly and intelligently entering his guilty

¹⁵ See *United States v. Dalman*, 994 F.2d 537, 538-39 (8th Cir. 1993).

plea.¹⁶ The court in *Dalman* found no evidence that the defendant was not in possession of his faculties at the plea hearing and noted that he engaged in a lengthy colloquy with the court regarding the details of the charges.¹⁷ Therefore, the court rejected his "after-the-fact" claim that the heart medication affected his capacity to enter a guilty plea.¹⁸

Similarly, the *McNeely* appellate court found that McNeely engaged with the district court in a detailed discussion of the charges, admitting that he robbed a post office and bank and talked with another party about killing a witness. He carried on a cogent colloquy with the court, repeatedly responding that he understood what was transpiring. It was only long after the fact, when the court heard McNeely's motion to withdraw his plea that McNeely claimed he was not aware of anything that transpired when he entered his plea. The court found McNeely made no showing that his untreated diabetic condition rendered him incapable of knowingly and intelligently entering a plea of guilty.

Takeaways

- A defendant engaging in cogent colloquy with the court and repeatedly responding that he or she understands supports a knowing and intelligent plea.
- Courts will evaluate the proximity in time between the plea and the claim that it was involuntary.
- The defendant should make some showing that an untreated diabetic condition can render a person incapable of entering a knowing and intelligent plea (e.g., expert testimony).

C. Consent

In *Deangelis v. DMV*, 2006 Cal. App. Unpub. LEXIS 10530, 2-7 (Cal. App. 2d Dist. Nov. 21, 2006), the appellant's driver's license was suspended because she refused to consent to a blood alcohol test during a traffic stop. At her administrative hearing, appellant argued she was suffering from a hypoglycemic episode on the night of the incident, and her refusal to consent should be disregarded because she was "incapable of refusing" a test under Vehicle Code section 23612.

Appellant testified she has diabetes, was extremely ill and was taking her diabetes medication on the day of the incident. She also introduced a letter from her neurologist, Dr. Merman, who stated he had a telephone conversation with appellant one hour before she was stopped by the officers during which appellant sought advice regarding her illness. According to Dr. Merman, appellant seemed to be "experiencing a hypoglycemic reaction" and she "was confused, her speech was slurred, and she had trouble understanding even the simplest instructions." After

¹⁶ *Id.* at 538.

¹⁷ *Id.* at 539.

¹⁸ *Id.* at 539.

hearing argument, the hearing officer re-imposed the license suspension, finding appellant's testimony lacked credibility.

Appellant filed an action seeking to overturn the administrative action by the DMV. The trial court denied relief, finding that the facts indicating appellant was under the influence of alcohol "outweigh Dr. Merman's conclusory opinion that hypoglycemia was the cause of [appellant's] physical and mental state."

Appellant appealed the trial court's ruling arguing that the letter from Dr. Merman was unrefuted, requiring the court to accept its conclusions. In denying her appeal, the court found that this may have been so if the letter and appellant's erratic driving constituted the entire record in support of the suspension. However, the trial court considered the whole record upon review, including appellant's behavior at the scene. According to the police officers' statements, appellant vomited repeatedly, admitted to the consumption of alcohol, was swerving while driving, and was naked below the waist. She consented to take a blood alcohol test, then changed her mind at a hospital as it was about to be administered. The court held that these facts are sufficient to support the hearing officer's conclusion that appellant was under the influence of alcohol and was capable of making, and did make, deliberate, reasoned decisions. The court found that she knew what she was doing and any confusion she may have suffered at the scene was related to her own decision to consume alcohol, not to a hypoglycemic episode.

Takeaways

- This case highlights the importance of knowing the symptoms/manifestations of hypoglycemia – for example, the doctor could/should have connected appellant's behavior at scene to hypoglycemia. Many if not all of the symptoms the court attributed to alcohol intoxication could have been a result of hypoglycemia.
- At the same time, this case also highlights the difficulty in proving a defendant's actions/behavior were a result of hypoglycemia when the defendant admits to drinking.
- A defendant first consenting and then changing her mind points to knowing what she is doing.

D. Ineffective assistance of counsel

In *United States ex rel. Guerrero v. Rednour*, 2013 U.S. Dist. LEXIS 49312, 14-17 (N.D. Ill. Apr. 3, 2013), the petitioner, who was convicted of first-degree murder, contended that his trial counsel rendered ineffective assistance by failing to attempt to suppress his confession on the ground that it was involuntary due to his hypoglycemia and for failing to pursue a trial theory that, as a result of his hypoglycemic state, he was incapable of the mental state required for first-degree murder. This claim was addressed and rejected by the Illinois Appellate Court on post-conviction review, which found that petitioner was not prejudiced by his trial counsel's failure to pursue the hypoglycemia theory.

The Illinois Appellate Court reasoned that although the petitioner alleged that he has diabetes, had not taken his prescribed medication, had consumed alcohol and had not eaten, he only speculates that, had his attorney pursued a defense based on these facts, the trial's outcome likely would have been different. The court noted that petitioners own articles point out that such facts might or might not have any effect on a person's behavior and that the petitioner did not offer any medical evidence to suggest that, in this case, was affected at all, much less affected to the extent necessary to negate his intent to kill and the voluntariness of his statements. Rather, the record supports the opposite, as the petitioner confessed after indicating that he understood his rights and was acting voluntarily. In sum, the court held that the petitioner was merely guessing that, had his counsel investigated his medical history, there would have been a reasonable probability of an acquittal. Such speculation cannot be a basis for a showing of ineffective representation.

The court found that the ample evidence of petitioner's culpability—including the testimony that the defendant told a witness he had killed the victim—and of the voluntariness of his confession both precluded it from concluding that there was a reasonable probability of a different outcome had petitioner's counsel argued that his confession was involuntary.

Takeaway

- Although it may be difficult for a petitioner to prevail on an ineffective assistance of counsel claim, with sufficient medical evidence concerning the effect of hypoglycemia, or even hyperglycemia, on mental state, such a claim could be righteous. Therefore, it is prudent for attorneys to fully consider and explore such possible defenses.

IV. Diabetes as a Defense to Driving Under the Influence (DUI)

There are two main ways that diabetes is used to defend against a charge of driving under the influence of alcohol. The first is based on the argument that the symptoms and behaviors associated with high or low blood glucose often resemble those associated with alcohol impairment and may be mistaken as such. The second is based on the argument that a breath test device designed to detect alcohol can theoretically result in a false positive reading if a person is experiencing high blood glucose. This section below explores each of these theories in further detail.

A. Defense #1: I wasn't drunk – I acted that way/drove that way because I was suffering from low/high blood glucose

As stated above, the symptoms and behaviors associated with high or low blood glucose often resemble those associated with alcohol impairment and may be mistaken as such by

witnesses and law enforcement. Below is a list of some of the signs and symptoms associated with hypoglycemia and hyperglycemia.¹⁹

Hypoglycemia (low blood sugar)	Hyperglycemia (high blood sugar)
<ul style="list-style-type: none"> • Shakiness, nervousness or anxiety • Sweating, chills and clamminess • Irritability and impatience • Confusion and disorientation • Rapid heartbeat and seizures • Lightheadedness, dizziness and unconsciousness • Hunger and nausea • Blurred or impaired vision • Tingling or numbness in the lips or tongue • Headaches • Weakness, sleepiness and fatigue • Anger, stubbornness, or sadness • Lack of coordination • Slurred speech • Nightmares or crying out during sleep 	<ul style="list-style-type: none"> • Frequent urination • Extreme thirst or hunger, even after eating or drinking • Feeling weak or tired • Blurry vision or inability to see clearly • Shortness of breath • Breath that smells fruity • Nausea and vomiting • Very dry mouth • Coma • Confusion / disorientation

In a July 2016 publication by the National Highway Traffic Safety Administration (NHTSA) entitled “The ABCs of BAC, A Guide to Understanding Blood Alcohol Concentration and Alcohol Impairment,” the NHTSA delineates the symptoms associated with blood alcohol at various concentrations as well as the predictable effects on driving.²⁰

As blood alcohol rises from .02 through .15, the following symptoms might be observed:

- Impaired judgment, self-control, reasoning and memory
- Exaggerated behavior
- Lowered alertness
- Release of inhibition
- Poor muscle coordination (e.g., balance, speech, vision, reaction time and hearing)

¹⁹ *Hypoglycemia*, Am. Diabetes Ass’n, <http://www.diabetes.org/living-with-diabetes/treatment-and-care/blood-glucose-control/hypoglycemia-low-blood.html?referrer=https://www.google.com/> (last edited: July 1, 2015); *Hyperglycemia*, Am. Diabetes Ass’n, <http://www.diabetes.org/living-with-diabetes/treatment-and-care/blood-glucose-control/hyperglycemia.html> (last edited: September 16, 2014); *High Blood Sugar and Diabetes*, WebMD, <http://www.webmd.com/diabetes/guide/diabetes-hyperglycemia> (reviewed by Brunilda Nazario, MD on March 10, 2015).

²⁰ U.S. Department of Transportation, National Highway Traffic Safety Administration, *The ABCs of BAC, A Guide to Understanding Blood Alcohol Concentration and Alcohol Impairment*, DOT HS 809 844 July 2016 (Rev) <https://www.nhtsa.gov/sites/nhtsa.dot.gov/files/809844-theabcsofbac.pdf>.

- Slurred speech
- Vomiting

Driving may be affected in the following ways:

- Decline in visual functions (e.g., perception, ability to track moving objects)
- Reduced coordination
- Difficulty steering
- Reduced response to emergency situation
- Difficulty concentrating
- Short term memory loss
- Speed control
- Reduced information processing capability (e.g., signal detection, visual search)
- Reduced ability to maintain lane position and brake appropriately

Law enforcement officers are typically trained to detect alcohol impairment based on the above-mentioned symptoms and behaviors. These symptoms and behaviors, however, may be caused by low or high blood glucose, not by alcohol impairment and an officer might not be trained to recognize the symptoms and behaviors as such. So, a person's diabetes might not be considered before an officer makes an arrest. Moreover, lay witnesses might not recognize these symptoms as those associated with low or high blood glucose and might assume the person is experiencing alcohol intoxication. Thus, the following may be called into question:

- Officer or witness observations
- Field sobriety tests, which test a suspect's coordination, balance and ability to follow directions
- Cause of impaired driving

B. Defense #2: I wasn't drunk – the breath test device was wrong

Unlike defense #1 described above which might be available to people who suffered either high or low blood glucose, defense #2 is only available where a person experienced *high* blood glucose. Hyperglycemia, or high blood sugar, occurs when the body has too little insulin or when the body cannot use insulin properly and glucose accumulates in the blood. For people with type 1 and type 2 diabetes, this might occur if they do not give themselves enough insulin. Or, people with type 2 diabetes might have enough insulin but their bodies cannot use it effectively. Hyperglycemia may also result from eating more than planned, exercising less than planned, or from stress due to a life event or an illness such as the cold or flu.²¹ Because insulin

²¹ *Hyperglycemia*, Am. Diabetes Ass'n, <http://www.diabetes.org/living-with-diabetes/treatment-and-care/blood-glucose-control/hyperglycemia.html> (last edited: September 16, 2014).

is needed for glucose to be used as energy by the body, the absence or ineffective use of insulin results in a buildup of glucose in a person's blood, hence, high blood sugar.

As noted in the previous section, symptoms of high blood glucose might include frequent urination, increased thirst or hunger, feeling weak or tired, blurred vision, shortness of breath, fruity breath odor, nausea and vomiting, dry mouth, confusion, and coma.

If untreated, hyperglycemia can be very serious and even life-threatening. If a person fails to treat his or her hyperglycemia, a condition called diabetic ketoacidosis (DKA) might occur. Without the ability to use glucose as energy, the body begins breaking down fats to use as energy. When the body breaks down fats for energy, acidic waste products called ketones are produced. Ketones cannot be tolerated by the body in large amounts. If ketones begin to accumulate, the body will try to get rid of them through urine (hence, the frequent urination). However, the body cannot release all the ketones and they build up in a person's blood, which can lead to ketoacidosis.

How is this relevant to DUI breath tests? One type of ketone that is produced during hyperglycemia is acetone. Indeed the National Highway Traffic Safety Administration (NHTSA) found that people who have diabetes may have acetone levels which are hundreds or even thousands of times higher than other people.²² In addition to being excreted through urine, this acetone is also excreted through a person's breath. This is what causes a person's breath to smell fruity if he or she is experiencing high blood sugar.

Breath test devices used by law enforcement are intended to detect ethyl alcohol, the type of alcohol found in alcoholic beverages. However, theoretically, a breath test device might result in a positive reading based on the presence of acetone, not ethyl alcohol. Not all devices are able to accurately distinguish between the two.

According to a 2004 publication by the American Prosecutors Research Institute entitled "Breath Testing for Prosecutors, Targeting Hardcore Impaired Drivers," *interfering substances* are those which could inflate breath test results.²³ According to the publication, there is only one interfering substance that has been shown to exist in measurable concentrations in the human body over time: acetone. The guide recommends, "If a person is diabetic or fasting, the officer and prosecutor should obtain as much information as possible about the person's condition or diet."

²² U.S. Department of Transportation, National Highway Traffic Safety Administration, *The Likelihood of Acetone Interference in Breath Alcohol Measurement*, NHTSA Technical Report, DOT HS 806 922, Sept. 1985. <http://ntl.bts.gov/lib/25000/25600/25695/DOT-HS-806-922.pdf>

²³ Jeanne Swartz, *Breath Testing for Prosecutors: Targeting Hardcore Impaired Drivers*, American Prosecutors Research Institute, http://www.ndaa.org/pdf/breath_testing_for_prosecutors.pdf (December 2004).

In June of 2011, a study entitled “An Assessment of Falsely Convicted Type 1 Diabetics in Jamaica by Using the Breathalyzer Test” was published in the Journal of Clinical and Diagnostic Research. The study examined the extent to which the breathalyzer test provided false positive blood alcohol measurements in people with diabetes.²⁴ The authors noted that the acetone in the breath of an untreated person with diabetes can contribute to erroneously high Blood Alcohol Concentration (BAC).²⁵ In fact, a study called the Mormann study was cited wherein subjects with diabetes were found to have acetone levels which were sufficient to produce a BAC of 0.06 percent.²⁶

The conclusion reached in the Jamaican study is that breath test devices indeed can result in false readings in people experiencing hyperglycemia and that police officers, at least in Jamaica, were not cognizant of the effect that elevated acetone levels in people with diabetes could have on the accuracy of a breath testing device. The study recommends that increased awareness amongst law enforcement could result in increased questioning to determine whether the subject might be experiencing hyperglycemia, and if so, a blood test could be used to determine both blood alcohol content as well as blood glucose.

Some studies, however, claim that it is only early models of breath testing devices that could result in these false positives. This is because early models of breath testing devices use a single wavelength infrared filter and therefore cannot distinguish ethyl alcohol from acetone in a person’s breath.²⁷ Newer devices, however, are purportedly designed to resolve this issue by testing alcohol through measurement of the unique ratio between wavelengths. This technique is said to verify that the devices measures alcohol only.²⁸

²⁴ Tazhmoye V., Crawford Donovan, A. McGrowder, Joan M. Rawlins, *An Assessment of Falsely Convicted Type 1 Diabetics in Jamaica By Using the Breathalyzer Test*, Journal of Clinical and Diagnostic Research, June 2011, http://www.jcdr.net/back_issues.asp?issn=0973-709x&year=2011&month=June&volume=5&issue=3&page=448-451&id=1306.

²⁵ Tazhmoye V., Crawford Donovan, A. McGrowder, Joan M. Rawlins, *An Assessment of Falsely Convicted Type 1 Diabetics in Jamaica By Using the Breathalyzer Test*, Journal of Clinical and Diagnostic Research, June 2011, http://www.jcdr.net/back_issues.asp?issn=0973-709x&year=2011&month=June&volume=5&issue=3&page=448-451&id=1306, citing: Brick J. Diabetes, Breath Acetone and Breathalyzer Accuracy: A Case Study, *Alcohol, Drugs and Driving* 1993;9(1):27-28.

²⁶ Tazhmoye V., Crawford Donovan, A. McGrowder, Joan M. Rawlins, *An Assessment of Falsely Convicted Type 1 Diabetics in Jamaica By Using the Breathalyzer Test*, Journal of Clinical and Diagnostic Research, June 2011, http://www.jcdr.net/back_issues.asp?issn=0973-709x&year=2011&month=June&volume=5&issue=3&page=448-451&id=1306, citing: Mormann J, Olsen H, Sakshaug J et al. Measurement of Ethanol by Alkomat Breath Analyzer: Chemical Specificity and the Influence of Lung Function, Breath Technique and Environmental Temperature. *Blutalkohol* 1988;153.

²⁷ Tazhmoye V., Crawford Donovan, A. McGrowder, Joan M. Rawlins, *An Assessment of Falsely Convicted Type 1 Diabetics in Jamaica By Using the Breathalyzer Test*, Journal of Clinical and Diagnostic Research, June 2011, http://www.jcdr.net/back_issues.asp?issn=0973-709x&year=2011&month=June&volume=5&issue=3&page=448-451&id=1306, citing: Fransson M, Jones AW, Andersson L. Laboratory Evaluation of a New Evidential Breath Alcohol Analyzer Designed for Mobile Testing - the Evidenzer. *Med Sci Law* 2005;45: 61-70.

²⁸ Jeanne Swartz, *Breath Testing for Prosecutors: Targeting Hardcore Impaired Drivers*, American Prosecutors Research Institute, http://www.ndaa.org/pdf/breath_testing_for_prosecutors.pdf (December 2004).

Some studies take the position that the issue of false positives due to acetone is not a significant problem. In a 1984 publication in the Journal of Analytical Toxicology entitled Response of Breath-Alcohol Analyzers to Acetone: Further Studies, “seven breath-alcohol analyzers were tested for response to dynamically generated vapor acetone concentrations of 3, 100, 150, 350, and 600 micrograms/L and to alcohol-acetone vapor mixtures of 0.10 g alcohol/210 L and 350 or 600 micrograms acetone/L.²⁹ No significant interference by acetone at any of these concentrations was found in four of the tested instruments. Two devices employing single wavelength infrared spectrometry displayed no unacceptable responses to acetone in concentrations to 350 micrograms/L, and one device employing solid-state (Taguchi) sensing was found to be significantly sensitive to acetone at the two highest tested concentrations.

Thus, the study found that except for the latter device, response to acetone of those instruments tested is not considered to be a significant problem in breath-alcohol analysis for traffic law enforcement or other purposes.

Takeaways

- It is worth researching/exploring the device used (e.g., age, make, technology).
- Check the maintenance and calibration records - even a unit which can distinguish between acetone and ethyl alcohol might not be able to if improperly calibrated.
- Present expert testimony, both about the device and hyperglycemia.
- Question the training received by law enforcement.
- Question whether the officer had reason to know the suspect has diabetes and was experiencing high blood sugar.
- Challenge the questions asked, or not asked, by law enforcement during the interaction.
- If the officer had reason to believe the defendant was experiencing high blood sugar, challenge the officer’s decision not to conduct a blood test.
- Defense #1 combined with defense #2 might be compelling.

C. Other issues relating to DUIs

1. Probable cause to arrest and excessive force

In *Padula v. Leimbach*, 656 F.3d 595 (7th Cir. Ind. 2011), decedent Clement, a person with type 1 diabetes suffered from a hypoglycemic episode during his drive to work. An observer called 911 and reported an unresponsive person in a car. The responding officers testified that they smelled stale beer in Clement’s car, observed he was slouched over, unresponsive, appeared unkempt, and had bloodshot eyes which rolled back into his head. A witness observed that Clement was foaming at the mouth. Clement failed to comply with the officers’ requests to step out of his vehicle leading the officers to physically remove him from the car. The officers also

²⁹ Dubowski KM, Essary NA, Response of Breath-Alcohol Analyzers to Acetone: Further Studies, *J Anal Toxicol*, 1984 Sep-Oct;8(5):205-8, <http://www.ncbi.nlm.nih.gov/pubmed/6503223#>.

maced him two or three times, struck him four times with a baton and placed him in handcuffs to prevent him from kicking and flailing his arms until a paramedic arrived. At least two officers stated that they did not smell alcohol on Clement's breath.

Twenty minutes after the officers were dispatched, a paramedic arrived and checked Clement's blood glucose level, which was low, and then administered two doses of a glucose injection. The paramedic also did not smell alcohol on Clement's breath. Clement was transported via ambulance to a hospital where tests revealed he had marijuana and a low presence of alcohol in his system. At the hospital, one of the officers received Clement's wallet, which had been in his pants pocket during the relevant events. His wallet contained a diabetic card. Moreover, his car which had been towed from the scene, contained a diabetes kit pushed into the passenger seat but still visible. Clement was not, however, wearing a diabetic necklace or bracelet during the relevant events. He died two weeks later from natural causes.

A §1983 claim was filed by Clement's estate claiming wrongful arrest, excessive force, failure to train officers, and condoning the use of excessive force. State law claims were also filed. The district court granted the defendant's motion for summary judgment on the federal claims and the court of appeals affirmed and remanded the state law claims to state court.

Wrongful arrest

On the claim of wrongful arrest, the court of appeals found that there was sufficient probable cause to arrest Clement on the basis that he had been driving while intoxicated. "A police officer has probable cause to arrest if, at the time of the arrest, the facts and circumstances within the officer's knowledge . . . are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense."³⁰ Critically, the probable cause analysis is an *ex ante* test: 'the fact that the officer later discovers additional evidence unknown to her at the time of the arrest is irrelevant as to whether probable cause existed at the crucial time.'"³¹

The court found that there was ample evidence in the record to establish that Clement's behavior and the circumstances were consistent with intoxication. Moreover, he was not wearing a diabetic necklace or bracelet and there is no indication that his wallet, containing his diabetic card, was accessible to the officers during the struggle. Although there was testimony that Clement's diabetes kit was pushed down in the front passenger seat but still visible and that at least one of the officers was near that seat when he unbuckled Clement, there is no evidence that any of the officers saw or should have seen the kit in the heat of the moment and recognized it as a diabetes kit. Also, there was no evidence that the officers saw or should have seen Clement foaming at the mouth while on the ground, which could have alerted them to his medical

³⁰ *Padula* at 601.

³¹ *Id.* (quoting *Smith v. Ball State Univ.*, 295 F.3d 763, 769-70 (7th Cir. 2002) (quoting *Xing Qian v. Kautz*, 168 F.3d 949, 953-54 (7th Cir. 1999)).

condition. Moreover, the fact that the officers called for an ambulance is not evidence that they suspected a medical issue, as they stated they called the ambulance because he had blood on his face.

Excessive Force

The court also found the officers' use of force was not excessive given the circumstances and their reasonable belief that Clement was intoxicated. The court found the officers were entitled to forcibly remove Clement from the car when he did not comply with their command, they were entitled to use mace to attempt to control Clement during the physical struggle both before and after placing him in handcuffs, and the use of batons was also reasonable as the strikes were described as "stern" but not "severe," which was an appropriate response to his flailing arms. The court found no indication that the officer used his baton gratuitously or that holding Clement in a prone position for a fairly short time while trying to prevent him from injuring himself or an officer was unreasonable. Furthermore, the fact that Clement died is not an indication of excessive force since the record was clear that he died from natural causes.

It should be noted that the court distinguished the facts in *Clement* from *McAllister v. Price*, 615 F.3d 877 (7th Cir. 2010) where the officer ignored obvious signs of McAllister's medical condition of hypoglycemia, pulled him out of the car and took him to the ground with such force that his hip broke and his lung was bruised from the force of the officer's knee in his back. The court in *McAllister* found this level of force was used not because it was necessary but because the officer was angry with McAllister.³²

Takeaways

- This case highlights the importance of a suspect telling the officer that he or she has diabetes or having visible and obvious indicators such as a bracelet or necklace.
- If making an excessive force argument, try to analogize to *McAllister* and distinguish from *Padula*.

2. Public policy considerations and jury instructions

In *State v. Clarkston*, 963 S.W.2d 705 (Mo. Ct. App. 1998), Clarkston appealed his conviction of driving while intoxicated (DWI) arguing that the jury was improperly instructed that they could find him guilty if they found he operated a motor vehicle while under the influence of alcohol *or a combination of alcohol and a drug or drugs*.

The testimony at trial revealed that Clarkston, a person with insulin dependent diabetes, took his morning insulin at 7 a.m. on that day of the incident. He ate lunch, carried on with his day, and went to a bar that evening where he drank beer. Between 9:30 and 10:00 p.m., a jeep he was

³² *McAllister*, 615 F.3d at 884.

driving collided with a van that was stopped at an intersection. Upon arriving at the scene, officers smelled alcohol on Clarkston and observed his eyes to be watery, glassy and bloodshot. He also failed the horizontal gaze nystagmus test and refused to take any other field sobriety tests stating he was “too drunk.” He stated he had eight or nine beers that evening.

Clarkston’s contention that the jury was improperly instructed rested on two grounds:

- (1) As a matter of public policy, a person with diabetes should not be found guilty of a DWI if he or she suffered from a hypoglycemic reaction combined with a small amount of alcohol. Rather, a person with diabetes should only be found guilty of a DWI if his or her blood alcohol content is above the legal limit. Otherwise, people with diabetes are, in effect, punished by being guilty of a DWI in situations where non-insulin dependent people would not be.
- (2) The evidence did not support a finding of intoxication based on a combination of alcohol and a drug, namely, insulin.

In rejecting Clarkston’s argument based on public policy, the court of appeals stated that there is no unfairness just because it takes less alcohol to intoxicate one person than it would take to intoxicate another person. There is no public policy reason why people with diabetes who take insulin should be given protections that others are not given. If a person becomes intoxicated as a result of taking medication, alone or in combination with alcohol, and drives while intoxicated, that person can be found guilty of driving while intoxicated unless the intoxication was involuntary. The fact that Clarkston may have become intoxicated with alcohol more readily because of his diabetes is not any more of a defense than would be any other claim that a person should not be found guilty of driving while intoxicated with alcohol just because the person becomes intoxicated easily due to his or her weight, metabolism or other physical characteristics.

As to Clarkston’s second argument, the court agreed that the jury was improperly instructed that they could find Clarkston guilty based on the mere fact that he took insulin and alcohol. While expert testimony was presented that alcohol and a *reaction to too much insulin* (i.e., hypoglycemia) could combine to cause intoxication, the evidence did not show that Clarkston suffered from such a reaction at the time of the accident. Neither did the evidence show that he took insulin and then failed to eat or was too active, which could also cause hypoglycemia. Rather, the evidence showed he had not taken insulin since 7:00 a.m. that morning, approximately 14.5 hours prior and there was no evidence that the level of insulin in Clarkston’s system could cause intoxication. Thus, the jury instruction was not supported by the evidence.

Since the court could not determine whether the jury convicted Clarkston based on intoxication by alcohol or intoxication by a combination of alcohol and insulin, it reversed and remanded for a new trial.

V. Conclusion

While a criminal defendant's diabetes may not provide a "slam dunk" defense in all criminal cases, it is a fact that ought to be considered by defense counsel during the strategizing and negotiating phase of a criminal case. As this paper explains, a person's diabetes might be relevant to his or her ability to form the requisite mental state, to provide a knowing and voluntary statement to law enforcement, to enter a knowing and voluntary plea, and to meaningfully consent. A person's diabetes might also cause symptoms that closely mirror those associated with alcohol or drug intoxication. With solid evidence, including expert testimony, these lines of argument may be helpful in mitigating or even justifying a defendant's conduct. Hence, they ought to be explored.

Disclaimer: While the American Diabetes Association attempts to ensure that all legal information is accurate and current, the general legal information contained in this resource is not a substitute for individualized legal advice, particularly in relation to information related to state or local laws or regulations. The law may change or have additional exceptions or interpretations. The American Diabetes Association, its attorneys and Legal Advocates do not represent you. For detailed legal advice or representation, contact a locally licensed attorney.