

Your Car is Not Your Castle

You don't have to be under the influence to commit a crime while driving your car. There are special legal consequences in criminal cases involving cars, even when the driver is completely sober. In some cases detailed below, the driver will be subject to vicarious liability for the crimes of passengers. In other cases, the driver will face consequences for his own behavior, whether it be road rage or flashing while behind the wheel (and I don't mean flashing the brights).

by Dana Grimes, Column Editor



Driving While Armed

When the U.S. Supreme Court decided *McDonald v. Chicago* (2010) 561 U.S. ___, 130 S.Ct. 3020, confirming that the Second Amendment guarantees the rights of citizens to possess firearms in their houses, that holding did not extend to automobiles. Some states allow gun racks (anecdotal evidence suggests they are actually mandatory on trucks in Texas), and some states permit carrying firearms under seats, but California has strict firearms laws. Penal Code §12025 states in relevant part that a person is guilty of carrying a concealed firearm if he "carries concealed within any vehicle which is under his or her control or direction any pistol, revolver, or other firearm capable of being concealed upon the person." Penal Code §12031 states that a person is guilty of the separate crime of carrying a loaded firearm when he "carries a loaded firearm on his or her person or in a vehicle while in any public place or on any public street in an incorporated city or in any public place or on any public street in a prohibited area of unincorporated territory."

This area of California law actually gets fairly complicated. We advise people not to push "open carry" laws and if they are transporting a gun, we advise clients to keep it unloaded, keep it in a locked container and keep it in the trunk to avoid any uncomfortable conversations at a traffic stop and/or shoot-outs with law enforcement.

Weapons such as nunchaku (nunchucks), saps, brass knuckles, and ballistic knives are illegal to possess in any location, even at home, under Penal Code §12020, but cars are where they are usually found. Some violations of Penal Code §12020 depend not just on the object, but on the circumstances. For instance, if you have a small baseball bat in your house next to your mitt, it is likely to be viewed as a lawful bat. If you keep it in your boat next to your gaff, it will likely be presumed that your intent is to use it to dispatch gaffed tuna. However, if it is under the seat of your car, you will probably be charged with Penal Code §12020, possession of a billy club.

Homicides: The Shooter and the Wheel Man

Many homicide convictions result from incidents when a driver or passenger of a car fires shots from inside the vehicle. Some of these cases result in first or second degree murder convictions for the driver, a.k.a. the "wheel man," under an aiding and abetting theory. (The summary of aiding and abetting law is the aider/helper is legally as guilty as the principal and it applies to just about any crime you can think of.)

When the shots fired from the car do not hit anybody, the potential charges include attempted murder (Penal Code §§664,187), assault with a firearm (Penal Code §245(b)), drive-by shooting (Penal Code §12034), shooting into a vehicle, and shooting into a house. These cases range from spontaneous road rage inci-

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dents to less spontaneous drive-by shootings. Penal Code §12034 prohibits being the driver or owner of a car and knowingly allowing another person to bring a firearm into the car, being the driver or owner of a car and knowingly allowing another person to discharge a firearm from within the car, shooting at another person from within a car, and willfully and maliciously firing a gun from within a car.

If the firearm used is classified as either a dangerous firearm or an assault weapon, Penal Code §§12020 and 12280 add sanctions. If the drive-by is directed at a home or occupied car, Penal Code §246 prohibits against shooting at an inhabited dwelling or occupied car create additional penalties.

Gang Enhancements

There is a one, two or three year prison enhancement for every person who carries a loaded or unloaded firearm in a vehicle or on

his person during the commission of a street gang crime, pursuant to Penal Code §12021.5(a). The enhancement is two, three, or four years if the person also has a detachable magazine or belt feeding device (See: *Scarface* "Say hello to my little friend") on his person or in his vehicle during the commission of a street gang crime. Penal Code §12021.5(b).

Assault with a Car

Vehicle Code ("VC") §13351.5 provides for a mandatory lifetime revocation of the driver's license of a person convicted of a felony violation of Penal Code §245 (assault with a deadly weapon) when "a vehicle was found by the court to constitute the deadly weapon or instrument used to commit the offense." This is presumably what will happen to 60-year-old Dr. Christopher Thompson when he finishes serving the five-year prison sentence imposed on him after he was convicted of

charges including two counts of Penal Code §245 for slamming on his brakes in front of bicyclists.

It is not uncommon for people to be charged with Penal Code §245 for allegedly trying to run over an ex-spouse, ramming another car during a road rage incident, and for a wide variety of other situations. If there is going to be a plea bargain, it is important to keep VC §13351.5 in the plea negotiations. Frequently the facts of these cases are not clear enough to support a conviction of Penal Code §245. Vehicle Code §23103 (reckless driving) and VC §23104 (reckless driving causing bodily injury) result in *non-lifetime* license revocations and may be more appropriate dispositions of the case.

Texting While Driving

VC §23123.5 imposes a fine of \$20 for a first offense and \$50 for a second offense of texting while driving,

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which is identical to the fines for using a hand held cell phone while driving. VC §23123. Studies by *Car and Driver* and VTTI have concluded that texting while driving is more dangerous than drinking and driving. Many Americans admit to regularly sending and receiving text messages while driving. When texting while driving results in an accident causing death, the facts will sometimes support a prosecution for misdemeanor vehicular manslaughter (Penal Code §192(c)(2)) and in other cases may support felony vehicular manslaughter with gross negligence (Penal Code §192(c)(1)), which is punishable by up to six years in state prison. Criminal defense attorneys have nightmares that some day these cases are going to be filed as second degree murder cases under *People v. Watson* (1981) 30 Cal. 3d 290, where wantonness and a conscious disregard for life supported a finding of "implied malice," for malice as an element of murder.

Transportation of Marijuana

If you represent a kid who transported more marijuana than even the most liberal interpretation of the compassionate marijuana act at Health & Safety Code ("H&S") §11362.77 could justify, he will be charged with possession for sale (H&S §11359) and transportation (H&S §11360). If you cannot negotiate a plea to some misdemeanor such as H&S §11357(c), the lesser of the two evils (both H&S §§11359 and 11360 are irreducible felonies) is the H&S §11359 possession for sale. A conviction of trans-

portation is more likely to trigger the mandatory license suspension provisions. The use of a vehicle in selling or transporting marijuana or other drugs can also result in forfeiture of the vehicle. In drug transportation cases, the passenger often has a very defensible case and in some circumstances will be entitled to a judgment of acquittal in either state court or federal court. The prosecution has to prove knowledge of the contraband, as well as some degree of dominion and control and/or aiding and abetting.

Flashing While Driving

In *People v. Archer* (2002) 98 Cal. App.4th 402, the defendant was involved in a road rage incident, in which he alternately brandished a firearm and his private parts while yelling insults at the other driver. He was convicted of two counts of felon in possession of a firearm (Penal Code §12021(a), brandishing a firearm from a vehicle (Penal Code §417.3), and indecent exposure (Penal Code §314). He appealed the indecent exposure conviction, but the court of appeals affirmed, distinguishing Archer's exposure from "mooning", defined as "exhibiting one's bare buttocks in a defiant or amusing gesture." *In re Dallas W.* (2000) 85 Cal. App. 4th 937, at p. 938, fn. 1, quoting Chapman, *American Slang* (Harper Paperbacks 1987) p. 289.

The *Archer* court distinguished *In Re Dallas W.*, which had reversed a conviction of two counts of indecent exposure for a juvenile based on "mooning," under the facts of that

case. The *Dallas W.* court noted that our Supreme Court has made clear that a person acts "lewdly" for purposes of Penal Code §314 if he exposes himself "for purposes of sexual arousal, gratification, or affront." *In re Smith* (1972) 7 Cal. 3d 362, 365, 7 Cal. 3d at p. 366. *The Dallas W.* case is of some limited solace to the parents of teenage boys, as indecent exposure is a lifetime sex registration offense.

Flashing while driving is actually a pretty common phenomenon, although we have never seen a woman charged with it. The good news is that a driver who flashes another driver while going 60 mph on the freeway clearly is not in a position to follow-up the flashing with a sexual assault. The bad news is that the distracted flasher, or the distracted victim, may present a traffic hazard.

Keep Your Seatbelt Fastened

Some drivers act more boldly and more dangerously when they are behind the wheel than they would ever dream of behaving while strolling down the sidewalk. As sociologist Marshall McLuhan said, "The car has become the carapace, the protective and aggressive shell, of urban and suburban man." But it is a false sense of security, as many drivers realize when they see police lights in their rearview mirrors. As the above examples illustrate, legislation continues to create strict and special punishments for drivers who commit crimes that involve cars. **TBN**

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