

FOR THE ROAD

Idaho Prosecuting Attorneys Association



BACK TO THE BASICS: PROVING THE IMPAIRED DRIVING CASE

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TRIALS ARE BORING. Police officers and attorneys focus on the evidence; jurors don't. Real-life trials are not what jurors think they should be; they expect them to look and be like something they see on television or in the movies. Juries expect trials to look like *Law and Order* or *My Cousin Vinny*. They expect the evidence to look like that found in the CSI style shows. These shows give their audience something to pay attention to, to remember and to talk about – visual imagery.

Most people do not retain words, most of us are visual. People think in pictures. Once your audience, be it the prosecutor, hearing officer, judge or jury, can visualize what you relate, then understanding, credibility and believability are assured. A visual depiction of the incident will grab and keep the listener's attention. Not only are your words important, but tone, delivery and style are critical as well.

LAYING THE GROUNDWORK

A successful DUI prosecution begins at the first observations of the suspected impaired driver and continues throughout the DUI investigation and arrest procedures, culminating at the trial. The use and presentation of visual information starts with the officer's documentation of these events and is the foundation for everything that comes after. Throughout your entire case, think about the ultimate audience. Who is it you need to convince?

DUI cases are among the most difficult a patrol officer or a misdemeanor attorney will handle, particularly so early in their careers. Defense attorneys routinely take advantage of this. Additionally, popular culture has raised the burden of proof in all types of criminal cases. Jurors expect to be presented with "scientific" evidence even

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where none should be expected to exist. Officers and prosecutors must answer these challenges proactively, by educating themselves in the science and the law and presenting their information in a manner that will be remembered and believed by the finders of fact.

So, if these are the challenges we face, how do we meet them? Get back to basics. Conduct a thorough, complete investigation. Record the evidence in detail, don't assume an in-car camera video will be available by the time of trial. Prepare before court. Use detail and words with impact to paint the picture for the judge or jury. It starts with the officer making the arrest and ends with the prosecutor giving the closing argument. The following are some reminders for getting back to basics at each stage in the investigation and prosecution.

DETAIL THE TRAFFIC STOP

The DUI investigation starts with the traffic stop. Focus on your observations of the defendant's driving behaviors and any evidence that may suggest impairment. Was your attention drawn to the defendant's vehicle by a moving violation, an equipment violation, an expired registration or inspection sticker, unusual driving actions, (i.e., weaving within a lane or moving at slower than normal speed), and/or evidence of drinking in the vehicle (alcoholic beverage containers, coolers, etc). Was

your attention drawn to the defendant's personal behavior or appearance by such things as eye fixation, tightly gripping the wheel, slouching in the seat, gesturing erratically, face close to windshield, drinking in the vehicle and/or driver's head protruding from vehicle? These are just some of the indications that can paint that picture necessary for conviction

Articulate the manner in which the defendant responded to your signal to stop, and how the defendant handled the vehicle during the stopping sequence, such as attempting to flee; no response; slow response; an abrupt swerve; sudden stop; and/or striking curb or other object.

BE DESCRIPTIVE

Describe your personal contact and interview of the defendant, focusing on SIGHT: bloodshot eyes, soiled clothing, fumbling fingers, alcohol containers, drugs or drug paraphernalia, bruises, bumps or scratches, and/or unusual actions; HEARING: slurred speech, admission of drinking, inconsistent responses, abusive language, unusual statements, and SMELL: alcoholic beverages, marijuana, "cover up" odors like breath sprays, and/or unusual odors. Once you decide to instruct the defendant to step from the vehicle, how the defendant stepped out of and walked from the vehicle also will provide evidence of impairment, such as angry or unusual reactions; inability to follow instructions; inability to open the door; leaving the vehicle in gear; "climbing" out of the vehicle; leaning against the vehicle for balance; keeping hands on vehicle; and/or inability to remain in an upright, standing position. These are observations that everyone can relate to, as opposed to field sobriety tests that some jurors may think they "couldn't do sober."

Standardized field sobriety tests are not to be discounted, of course. But when analyzing them and presenting them at trial, focus should be on common place observations, as opposed to "clues" and "points."

Why is a field sobriety test important to driving? Not because the subject cannot stand on one leg for thirty seconds without putting their foot down or raising their arms. They are important because they are divided attention activities.

What is driving? A divided attention activity. If a person cannot follow simple instructions and maintain attention to the task at hand when that task is a relatively easy one, how can they expect to maintain attention to the task at hand when driving a 2000 pound vehicle? Tell the story in terms of the observations made in the field sobriety tests. It paints the picture and tells the story much more vividly than talking about them in the standardized manner.

PREPARE EARLY

Next come hearings and trial. The importance of preparation cannot be overstated. Make it a habit to prepare as early as possible. The prosecutor must first read and then re-read the case file. This should be a thorough evaluation of the overall strength of the case. The case review should include the following:

- ♦ Verify that you can prove each element of DUI beyond a reasonable doubt, and develop your case theory.
- ♦ Ensure the officer had legal justification for the stop of the vehicle and had probable cause to believe that each element of the offense was present.

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4th of July 2011 Idaho & Washington DUI Team



Idaho Traffic Law Update

Buell v. ITD, (Ct.App.2011):

Buell was charged with DUI in a noncommercial vehicle. Pursuant to a plea agreement, Buell pled guilty to the DUI and the civil BAC refusal matter was dismissed. However, the Idaho Transportation Department still suspended Buell's commercial driver's license (CDL) and did not backdate this suspension. Buell appealed arguing the administrative disqualification of his CDL is so punitive as to effectively be a criminal penalty, thereby violating the Double Jeopardy Clause.

The Court of Appeals applied the U.S. Supreme Court double jeopardy analysis in *Hudson v. United States*, 522 U.S. 93 (1997). The *Hudson* Court applied a multi-part test for determining whether a civil sanction rises to the level of punishment for double jeopardy purposes. The first test is to determine whether the legislature intended for the suspension to be criminal or civil. The Court of Appeals determined the Idaho legislature intended the CDL disqualification under I.C. § 49-335 to be a civil sanction when placing it in the motor vehicle code instead of the criminal code, and by conferring authority to suspend a CDL on the Idaho Transportation Department (ITD) – a state agency. Next, the Court must determine whether the CDL suspension is so punitive as to turn the civil penalty to a criminal penalty.

Applying the *Hudson* multi-part test, the Court determined the following: (1) While a CDL suspension prevents a CDL holder from making his or her livelihood from driving commercial vehicles, it does not impose a restraint that approaches the punishment of imprisonment. (2) Idaho appellate courts have not historically viewed driver's license suspensions as punishment, and this extends to CDL suspensions. (3) There is no scienter required for a one-year CDL disqualification under I.C. § 49-335. (4) Although the conduct sanctioned in this case is also criminalized under I.C. § 18-8004, this is far from the clearest proof necessary to show that a sanction is criminal. (5) The mere presence of a deterrent effect is insufficient to render a one-year CDL disqualification criminal. (6) There is a purpose other than punishment assigned to the CDL disqualification. Because of the

size and weight of commercial vehicles there is a heightened danger posed to the public if they are misused. A one-year CDL suspension is not disproportionate to the statute's legitimate remedial goal of keeping problem drivers off the roadways.

ITD v. Van Camp, (Ct.App.2011):

The Idaho Transportation Department appealed the district court's reversal of Van Camp's driver's license suspension. Van Camp had been arrested for DUI. Van Camp had submitted to a breath test which resulted in BAC of 0.00/0.00. However, he also submitted to a urinalysis. ISP Forensics detected Cyclobenzaprine. Van Camp admitted to taking Cyclobenzaprine and Seroquel. The district court reversed Van Camp's suspension on the basis the officer's observations of impairment only support an inference of causation if there is separate proof the drug was intoxicating.

ITD argues the presence of Cyclobenzaprine, along with other evidence of impairment was sufficient. Van Camp countered since there was no separate evidence offered to prove Cyclobenzaprine is an intoxicating drug the suspension was improper. The Court of Appeals, relying on *Reisenauer v. ITD*, 145 Idaho 948 (2008), held there must be some independent evidence that a drug is intoxicating in order for I.C. § 18-8002A to apply. The Court found in this case ITD did not offer any independent evidence to establish Cyclobenzaprine is an intoxicating drug. The failed standardized field sobriety tests alone were not sufficient. The Court of Appeals held the officer's observations of impairment only support an inference of causation when there is separate proof that the drug is intoxicating.

Editor's Note: The district court in the Van Camp case stated evidence from a prescription drug label that a drug has the potential to impair driving provides evidence that a drug is intoxicating. The Court of Appeals quotes this language on Pg. 4. Therefore, it is plausible this evidence may be enough to support the officer's observations of impair-

ment to uphold the civil license suspension.

Chief Judge Gratton dissented in this opinion and provided a very well reasoned response. **For The Road** especially appreciated footnote 6 wherein Chief Judge Gratton clarifies the Idaho Supreme Court's use of the "Children's Tylenol" metaphor. He writes, "The *Reisenauer* opinion admits to no information in the record to conclude that Children's Tylenol is, in fact, under all circumstances (including over dosage or drug interaction), in no way potentially impairing to a person of sufficient age to hold a driver's license."

Miller v. ISP & Trooper Yount, (2011):

The Idaho Supreme Court held Trooper Yount was entitled to qualified immunity against Miller's § 1983 claim for violating his Fourth Amendment rights. Furthermore, the Court held there were no genuine issues of material fact supporting Miller's tort claims against Yount and the ISP. The case was remanded with instructions to enter judgment in favor of ISP and Trooper Yount on Summary Judgment.

This lawsuit arose from an impaired driving investigation wherein Yount administered an involuntary warrantless catheterization on Miller following an arrest for DUI. Miller was suspected of being under the influence of drugs other than alcohol. The Court declined to rule on whether the involuntary catheterization violated Miller's Fourth Amendment rights. The Court explained there was "hardly any

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evidence at all” that was submitted and “Miller’s brief, in particular, is thoroughly unhelpful.”

However, the Court does make some general statements that provide some direction on the issue. For example, the Court states, “Warrantless blood draws and voluntary urine samples are significantly less intrusive than warrantless forcible catheterizations.” The Court further explains that the legal question in this case should be, “Would a reasonable police officer know that as of May 2007, it was unlawful to involuntarily catheterize a suspect based on probable cause to search for dissipating evidence even if less-intrusive alternative are available?”

The Court reviews the limited case law available on catheterizations and concludes it is difficult to determine whether it is reasonable for police to catheterize someone to search for dissipating evidence of a crime without a warrant. The Court states, “This question is at its thorniest where, as here, the police presumably could just as easily have performed a relatively painless blood draw rather than use a catheter to extract urine.” The Court explains a few differences between blood draws and urine draws. “First, catheters impinge on a person’s dignity much more severely than a blood draw.” The court explains how blood draws often occur in public settings and do not require the person to remove sensitive articles of clothing or expose genitalia. Second, the Court states catheters involve a significantly greater amount of physical trauma because the tube must be inserted and pass all the way through the urethra and enter the bladder. The Court states this also carries a greater risk of infection than does a blood draw.

The Court concludes the law regarding involuntary, warrantless catheterizations where probable cause exists is too undeveloped, and the applicable legal principles too uncertain, to hold Trooper Yount personally liable. There are differing opinions in the few cases that have addressed the subject. Furthermore, the Idaho Supreme Court found, “No shred of evidence suggests that Yount acted with malice or criminal intent. Since the parties in this case agree that probable cause existed for Yount to test Miller for drugs, the only reasonable inference is that he catheterized Miller pursuant to a valid criminal investigation.”

Editor’s Note: This case is included to provide insight in how the Court may consider a warrantless catheterization in a criminal case. To determine whether the defendant’s constitutional rights are thereby violated is a “highly fact-dependent” inquiry. As a general rule, it appears the safest course of action is to obtain an evidentiary blood draw. If it is determined, for some reason, that a urine sample is necessary, the recommendation would be to obtain a warrant for the catheterization.

State v. Foster, (Ct.App.2011):

A jury found Foster guilty of Felony DUI. Foster appealed asserting discriminatory use of a peremptory challenge on the basis of race. Juror 5 was the only juror on the panel who was a member of a cognizable racial group shared by Foster. The prosecutor provided a race-neutral explanation based on the juror’s demeanor, which the district court ultimately accepted.

Foster argued the district court’s decision was erroneous because the court’s factual finding regarding Juror 5’s demeanor did not confirm the race-neutral explanation provided by the prosecutor. The Court of Appeals held the trial court must not only evaluate the juror’s demeanor, but also whether the prosecutor’s demeanor belied a discriminatory intent. Having observed the demeanor of Juror 5 and the prosecutor, it was within the district court’s discretion to conclude the state was not acting with a discriminatory purpose. Foster’s conviction was affirmed.

State v. Crockett, (Ct.App.2011):

Crockett appeals the denial of his motion to dismiss a Felony DUI on grounds that his rights to a speedy trial and due process were violated. Crockett had been charged with Felony DUI on August 1, 2008. However, Crockett had not yet been convicted of the second of two predicate DUI offenses. Therefore, the state dismissed the felony and refilled on January 8, 2009 when Crockett had pleaded guilty to the second misdemeanor.

Crockett’s assertion of a speedy trial violation was based largely on the delay between his initial arrest in 2008 and the re-filing of the charge in 2009. The Court of Appeals held this pre-charge period is not relevant to the speedy trial analysis because the constitutional right of the accused to a speedy trial and no application

beyond the confines of a formal criminal prosecution. Once the charges were dismissed, the speedy trial guarantee is no longer applicable.

Crockett argued the time period should count because the State dismissed the charge in bad faith. The Court hints this is not likely the standard but did not decide this issue because Crockett did not show bad faith on the part of the prosecution. The Court held that “waiting for the outcome of a pending misdemeanor DUI prosecution in order to file another DUI offense as a felony is not an act of bad faith.” The Court further explained there is nothing impermissible about the State waiting until it could charge a higher offense, and no unfair advantage was gained.

Crockett next contends his due process rights were violated. The Court of Appeals held, “The prosecutor’s choice to postpone this charge until after disposition of a pending DUI case so that the present charge would qualify for a statutory enhancement to a felony does not deviate from ‘fundamental conceptions of justice’ which define ‘the community’s sense of fair play and decency.’ To the contrary, it effectuates the legislative policy that successive DUI offenses, if committed with sufficient frequency, should be subject to escalating penalties.”

Unpublished Decisions:

The following unpublished decisions are related to impaired driving and have been issued in the past few months.

State v. Patterson, (Ct.App.2011):

- ♦ Warrantless entry & Miranda claims

State v. Burns, (Ct.App.2011):

- ♦ Prosecutorial Misconduct

State v. Stark, (Ct.App.2011):

- ♦ Warrantless entry/Consent/Exigency

****Click on Case titles to read the cases****

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WEB SITES

Idaho TSRP

www.TSRP-Idaho.org

Idaho Prosecuting Attorneys
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www.IPAA-prosecutors.org

ITD Office of Highway Safety

<http://itd.idaho.gov/ohs/>

Idaho POST Academy

www.post.idaho.gov

National Highway Traffic
Safety Administration

www.nhtsa.gov

National Association of
Prosecutor Coordinators

www.napcsite.org

NDAA's National Traffic
Law Center

www.ndaa.org

Idaho State Police Forensics

www.isp.idaho.gov/forensic/

Alcohol Beverage Control

www.isp.idaho.gov/abc/



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♦ Identify witnesses whose testimony will be required to prove the elements of DUI.

♦ Identify evidence or other necessary relevant information that is mentioned in the reports, but is not in your case file.

Each case is only as strong as the facts of the case, and the witnesses and exhibits that will establish those facts. Even good cases may not always remain strong; for instance, a necessary witness may refuse or become unable to testify. It is extremely important to know your community, your jury pool and your judge. What will it take to convince your judge and jury the defendant is guilty? What defense arguments are you likely to face? Some pieces of evidence do not, by themselves, make a case stronger or weaker. However, when viewed together, even seemingly innocent facts may add something to your theory of the case. Therefore, don't ignore any of the facts in the officer's report.



DEVELOP A THEORY

You must develop a theory of the case. The theory of the case is simply your unified approach to all of the evidence that explains what happened. You have to integrate the undisputed facts with your version of the disputed facts to create a cohesive, logical position. Your theory must remain consistent during each phase of trial. The jury must accept your theory of the case as the truth. Thus, you need both a factual and a persuasive theory of

the case to intelligently select a jury, prepare your opening statement, conduct witness examinations, and prepare your closing argument.

After you do this, you should have a good idea of what evidence will be contested. You should gather as much additional evidence as you can, both direct and circumstantial, to bolster your weaknesses and attack the defendant's theory of the case. After you have reviewed all the evidence, you can formulate your theory of the case. Once you have your theory of the case, you should try to determine the defendant's probable theory of the case. This will help you prepare both your case in chief and to cross-examine defense witnesses. A theory of the case will also help you convey the picture to the fact finder. Once the judge or jury can picture the incident in their own mind, credibility and believability are assured.

Remember your ultimate goal, to present the evidence, direct and circumstantial in such an overwhelming manner that the fact finder has no choice but to convict.

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Training & Conferences Notice

(Click on Course Names for More Information)

2011 NAPC Summer Conference — July 13-15, Sun Valley Resort, Idaho

2011 NDAA & IPAA Summer Conference — July 17-20, Sun Valley Resort, Idaho

OJJDP's 13th National EUDL Leadership Conference — August 10-12, Orlando, FL

2011 National TSRP Training — September 27-30, Minneapolis, Minnesota

Idaho Drug Recognition Expert School — October 3-14, Meridian, Idaho

LAST CALL

On July 1st, 2011, the State of Idaho took a major step forward in its commitment to fight impaired driving and work *Towards Zero Deaths*, by appointing Sgt. Dean Matlock as Idaho's first State Impaired Driving Coordinator. I commend the Idaho State Police and the Office of Highway Safety for establishing this important position.

Sgt. Matlock will be responsible for the following impaired driving programs:

- Standardized Field Sobriety Test (SFST) Program
- Advanced Roadside Impaired Driving Enforcement (ARIDE)
- Drug Evaluation & Classification Program (DECP) which trains Drug Recognition Expert (DRE) officers; &
- Law Enforcement Phlebotomy Program

Sgt. Dean Matlock joined the Idaho State Police in 1986. He was promoted to his present rank in 1998, until his transfer to the ISP Training Section in December of 2001. Previously, he served part-time as the State Coordinator for the SFST and DRE programs. Sgt. Matlock has a B.A. degree from Northwest Nazarene University and a Communications M.A. degree from Boise State University.

The establishment of a State Impaired Driving Coordinator will help bring a sharp focus to impaired driving investigations and prosecutions. Sgt. Matlock has already hit the ground running with 6 ARIDE classes and a DRE School scheduled before the end of the calendar year. Together, we will establish a strategic plan to train and educate prosecutors, law enforcement officers, probation & parole officers, the judiciary and traffic safety stakeholders for years to come.



Sgt. Dean Matlock

For the last five years it has been my pleasure to work with Sgt. Matlock to make Idaho a safer place to live and drive. His passion and experience are exemplary. In addition to the pleasure of working with Sgt. Matlock, I also feel very fortunate to call him my friend. Congratulations Sgt. Matlock!

--- Jared Olson, TSRP



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