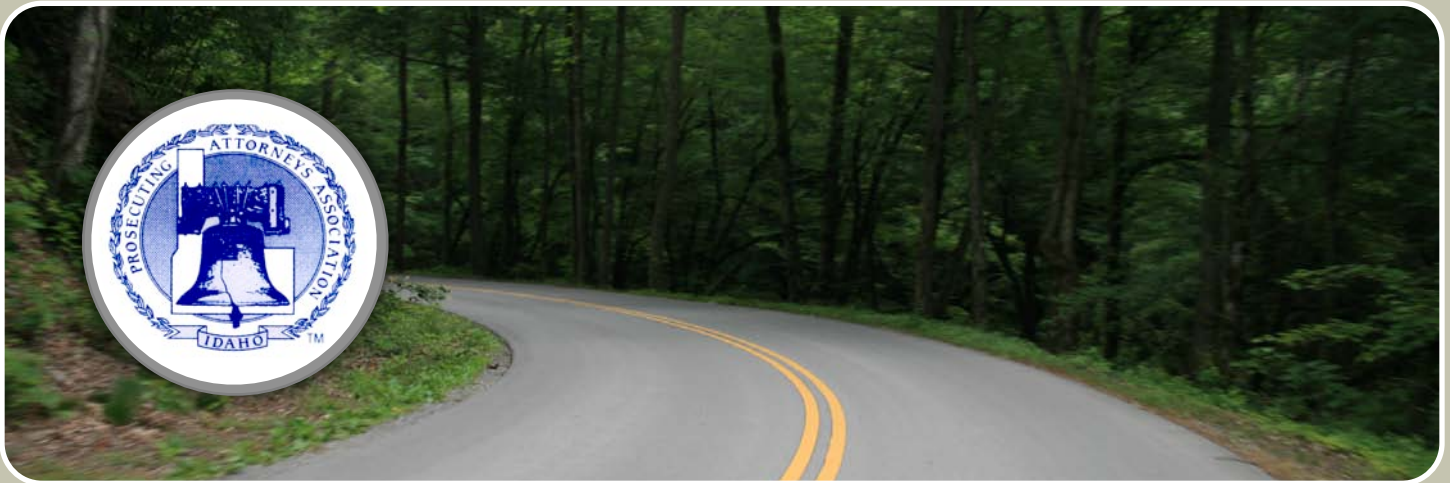


# FOR THE ROAD

*Idaho Prosecuting Attorneys Association*



## COUNTERING DRIVERS' EXCUSES IN IMPAIRED DRIVING CASES

By **W. Clay Abbott, DWI Resource Prosecutor - Texas District & County Attorneys Association**

In various DUI trainings I have often been asked, "What can we do with a defendant's silly explanation at trial for various signs of intoxication?" While every case demands an individualized response, I have some solid suggestions for officers and prosecutors to nullify these last-minute trial explanations. (My apologies in advance that this article is mainly aimed at police officers. Prosecutors, if your officers need to know this info, copy this column and pass it out. Better yet, build your own officer training around it. If prosecutors are not getting the following valuable evidence in our DUI cases, we should be sure our officers know we need it.)

The best counter to a defendant's explanation for her bad driving (lately, cell phone conversations or texting are popular explanations) is officers' solid questioning at the scene of the initial traffic stop. Often officers are afraid to ask drivers to explain

their actions, but that is a serious misstep. Fear that the offender will have an excuse for a traffic violation, nystagmus, lack of mental abilities, lack of physical coordination, and the refusal to take a breath test is misplaced. The roadside stop is the exact place for such questioning!

At the traffic stop, a driver doesn't have time to concoct a believable story, but you can bet after several months with capable defense counsel, the defendant will have a halfway reasonable explanation for every clue the officer notes in the police report and video. (I know it may come as a shock that defendants might lie or that defense counsel could suggest through cross-examination alternatives to impairment.) The best time to get to the truth is when the defendant is most likely to tell the truth, and if not the truth, then at least the most ineffective lie.

[\(Continued on Page 2\)](#)

TABLE OF CONTENTS	
Countering Driver's Excuses...Continued	2
Idaho Traffic Law Update	3
Countering Driver's Excuses...Continued	4
Traffic Law Update...Cont.	4
Trainings & Conferences	4
Last Call: Giving Thanks	5

# Countering Drivers' Excuses in DUI Cases

## ...Continued from Page 1

### Conduct Mom's Sobriety Tests

Remember that all jurors had mothers, just like yours, who conducted their own field sobriety tests when those jurors came home as teenagers, just like your own mom did. My mother made me wake her up and give her a hug; then she asked me silly questions about my night, all while smelling my breath for alcohol, scanning for bloodshot eyes, and checking my ability to converse with all of my faculties.

Mom's sobriety tests, while not as well researched, tested, and verified as the SFSTs, are far better accepted by and understandable to the average juror. So before officers on the stand ever get to SFSTs, they must fully explain they conducted Mom's sobriety tests on the defendant too. This is where DUI cases are won. While defense counsel will always put officers on trial for their execution of SFSTs, the defendant is the focus of Mom's sobriety tests. As a note to prosecutors, don't forget how important an officer's initial observations are during jury selection. And officers, nothing in a DUI investigation is as important as this first contact and conversation you have with the defendant. Don't rush it. Spend as much energy developing this set of skills and techniques as you do any other.

When an officer stops a vehicle for poor driving performance or a traffic violation, he must ask the driver to explain why she committed the violation or dangerous behavior. The question should be conversational, not accusatory—it should provide a fair opportunity to explain. The officer should confirm or rebut this excuse with his own observations. Later (after arrest) it is also very helpful to broach the issue again; it is amazing how easy it is for the suspect to remember the truth and how hard to remember a lie.

Keep in mind that the jury should and does expect the officer's investigation to be fair, and his ability to explain why he pulled the defendant over is the very essence of fairness. Will the defendant lie? Perhaps—but ask yourself whether the lie at the scene will be better or worse than the one crafted

for trial. The explanation the defendant gives on the roadside can be investigated, but it can't once it is made in court. Ask to see the dropped soda, cigarette burn, cell phone, or whatever the defendant says took her attention away from the road and caused the bad driving.

### Three Possible Responses

The defendant has only three responses to an officer's request for an explanation. First, she can deny what the officer saw. Such a response is not a problem in court—the officer should win this battle of credibility. And denying the officer's observations also suggests the defendant is unaware of her dangerous driving behavior. What better evidence of impairment?

Secondly, she can admit the behavior with an explanation. This response is certainly not a disaster for the prosecution—the defendant just admitted to the probable cause for the stop. Prosecutors dream of this kind of evidence in a suppression hearing.

Finally, the well-coached and experienced drunk driver can invoke her right to silence. Such is her right; so be it. Jurors will still view the officer as very fair and concerned that the truth comes out, which is a better result than if the officer had never asked the question.

### "Why" Questions

The officer should also ask "why" questions during the SFST performance. For example, an officer observing HGN should ask, "Have you ever been diagnosed with any eye problems?" Again, every defendant ever tried for DUI has "natural nystagmus"—just listen to any defense cross-examination. Investigate if a driver claims eye trouble at the scene: Who is her doctor, when did the eye injury happen, what treatment is she receiving, etc. Again, a suspect's initial excuse will not be as believable as the one defense counsel makes after discovery or on cross when the defendant sits silently, cloaked in the 5th Amendment.

All suspects on the roadside want one thing more than anything in the universe: They want to go home, not to jail. Most will avail themselves of every opportunity to talk their way out of an arrest. If in answering these "why" questions, they establish legitimate explanations for their bad driving (other than intoxication), the officer can make the right call and let them go. Being open to such options makes the officer much more credible.

But never forget that one of the stages of intoxication (right between "I should sing in public" and "Dang! My clothes are too hot") is "I can outsmart this officer." Some offenders have learned the hard way that they can not outsmart officers when caught driving while impaired—they might still

(Continued on Page 4)



2011 TSRP Rural Crash Training Sun Valley, Idaho

# Idaho Traffic Law Update

## State v. Healy, (Ct.App.2011):

Healy appealed his DUI conviction arguing the breath test results should not have been admitted at trial because the State failed to lay a foundation ensuring the test's reliability. Healy argued the standard operating procedures were not followed.

For breath test results to be admitted at trial the State must either (1) establish the administrative procedures ensuring the reliability of the test have been met, or (2) call an expert witness to establish the reliability of the test. In most cases, the State will meet the foundation requirement by showing that the Idaho State Police Forensic Services approved the instrument and the officer who operated the instrument, administered the breath test in conformity with those standards. See *State v. Nickerson*, 132 Idaho 406 (Ct.App.1999).

The second option generally occurs only when the administrative procedures have not been strictly followed. In this case, the Court of Appeals clarified the standard first set forth in *State v. Charan*, 132 Idaho 341 (Ct.App.1998) when there is not strict compliance with the administrative procedures. The State needs to not only present an expert to testify, but that expert must also testify as to why procedural defects did not affect the reliability of test results in the particular case at issue.

In this case, a breath testing specialist (BTS) testified the administrative procedures were not followed with regard to the Intoxilyzer 5000EN used to test Healy. Specifically, the BTS had not strictly complied with the standard operating procedures because a total of four 0.20 calibration check results were required and the BTS only ran two samples. In addition, the 0.08 solution "should be changed approximately every 100 calibration checks or every month whichever comes first." Healy was the 105th test run since the last time the 0.08 solution had been changed.

The Court of Appeals held the procedure provided some latitude in changing the 0.08 solution and 105 tests fell reasonably within that allowance. However, the four-sample calibration checks of the 0.20 solution did not provide the same leeway. This

necessitated the testimony of an expert to explain that other safeguards of the instrument were able to ensure the reliability of Healy's results.

The BTS testified (1) the 0.08 solution was still within its expiration date and did not expire for another 9 months; (2) the solution check resulted in a value of 0.78 which was well within the acceptable 0.07 to 0.09 range required by the standard operating procedures; and (3) based on his training and experience with the instrument, the failure to run the four 0.20 calibration checks would not affect the test results in this case.

Based on this testimony, the Court of Appeals held the proper foundation was laid for admitting the test results at trial, even though the procedures were not precisely followed. Furthermore, the Court rejected Healy's argument that the BTS was "never certified as an expert" and held given the officer's training, experience and knowledge, he was an expert who provided an adequate foundation for the breath result evidence.

## Bell v. ITD, (Ct.App.2011):

Bell appeals the suspension of his driver's license arguing the hearing officer abused his discretion and/or violated Bell's due process rights in regard to the requested information, discovery process or conduct of the hearing and decision. The Court of Appeals held Bell did not establish grounds for vacating the suspension of his license and failed to demonstrate error in the hearing officer's reliance on the officer's affidavit.

Bell makes a number of claims of how his procedural due process rights were violated. Many of them are specific to administrative hearing procedures and subpoena process in civil driver's license suspension hearings. Due to their limited applicability to the day-to-day work of prosecutors and law enforcement officers, they are not included in this case synopsis. However, the decision is worth reading on a few related matters akin to the criminal discovery process.

First, Bell argued his due process rights were violated when the hearing officer denied his subpoena request for the police officer's certification card to operate the breath testing instrument. The police officer had already submitted a sworn affidavit indicating the date his certification expired. The Court of Appeals held the hearing officer was within his discretion to deny the subpoena absent some indication of contrary information.

Second, Bell argued he should have been granted his request for a 60 day period of log sheets for the breath testing instrument. Bell argued it was necessary to determine whether the Intoxilyzer was accurate and properly functioning. Bell received logs sheets for 30 days prior to the test. However, the Court pointed out that the log sheets for a period of three days was all the relevant information Bell needed. The relevant performance verifications and solution changes had been made 3 days before Bell's evidentiary test. Bell failed to demonstrate the log sheets for any time period after his test were relevant to the determination of the proper functioning of the breath testing instrument.

Third, Bell argued the simulator solution used in the instrument was not supplied by an approved source, therefore the license suspension should have been vacated. Bell submitted an expired contract between RepCo Marketing, Inc. and the Idaho State Police in support of his argument. The district court determined the solution provider was irrelevant to whether the instrument was functioning correctly and the Court of Appeals found Bell failed to demonstrate an unauthorized solution source did, or even would, make a difference in whether the instrument was working properly at the time of the test.

Finally, Bell contended the police officer nullified the standard advisory by stating a breath test refusal would result in a blood

(Continued on Page 4)

**Disclaimer:** This newsletter is a publication of the Idaho Prosecuting Attorneys Association, Inc. Readers are encouraged to share varying viewpoints on current topics of interest. The views expressed in this publication are those of the authors and not necessarily of the State of Idaho, IPAA, or the Idaho Department of Transportation. Please send comments, suggestions or articles to [jared.olson@post.idaho.gov](mailto:jared.olson@post.idaho.gov).

## WEB SITES

Idaho TSRP

[www.TSRP-Idaho.org](http://www.TSRP-Idaho.org)

Idaho Prosecuting Attorneys  
Association

[www.IPAA-prosecutors.org](http://www.IPAA-prosecutors.org)

ITD Office of Highway Safety

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

Idaho POST Academy

[www.post.idaho.gov](http://www.post.idaho.gov)

National Highway Traffic  
Safety Administration

[www.nhtsa.gov](http://www.nhtsa.gov)

National Association of  
Prosecutor Coordinators

[www.napcsite.org](http://www.napcsite.org)

NDAA's National Traffic Law  
Center (NTLC)

[www.ndaa.org](http://www.ndaa.org)

Idaho State Police Forensics

[www.isp.idaho.gov/forensic/](http://www.isp.idaho.gov/forensic/)

Alcohol Beverage Control

[www.isp.idaho.gov/abc/](http://www.isp.idaho.gov/abc/)



## Countering Drivers' Excuses... Continued From Page 2

retain the ability to remain silent as well as the right to remain silent. In such a total-refusal case, I have one other suggestion: Turn the in-car video camera around during the drive to jail. Don't ask questions. Just let the camera observe the suspect in the cruiser's backseat. Videotaping your own driving is of limited utility (although after viewing hundreds if not thousands of DUI videos, I could find my way from anywhere in Lubbock County to the jail). What your camera records during the drive has the best chance of bringing something admissible to the prosecutor. Is the defendant sleeping? Nice touch. Ranting? Even better! Praying? My personal favorite.

All of these questions should be asked before the officer finishes his roadside investigation and makes an arrest decision. That being the case, the defendant is not in custody. Because she cannot be the target of custodial interrogation when not in custody, the defendant's statements should be admissible without Miranda warnings or waiving her rights. These techniques must be applied as early as possible in the investigation and as completely as the stop will allow.

Finally, after the I.C. § 18-8002 advisory form is read, the defendant refuses a breath test and the defendant is Mirandized and waives her rights, ask her why she does not want to take a breath test. I bet very few can cite as many creative but idiotic reasons for refusing the test as a DUI attorney can. Far more clever defense counsel are worried about flesh-eating bacteria on sealed Intoxilyzer mouthpieces than intoxicated suspects are. Silence also works here. No impaired suspect will ever wax as eloquently as a defense attorney on *voir dire* or as a well-

coached defendant on the stand. Prosecutors, make sure all of this information gets in front of the jury on direct. It will drain the effectiveness of those defense-favorite "isn't it possible" questions on cross.

*\*Reprinted from "The Prosecutor" (Vol. 38, No. 3, 2008) a publication of the Texas District & County Attorneys Association with permission of the author. CLICK HERE to view the original article.*

## Idaho Traffic Law Update... Continued From Page 3

draw. Bell argued the officer's statement was false and cited examples of a person legitimately afraid of needles or when it is necessary to order someone to withdraw the blood. The Court held the Officer did not state he would/could order someone to come and take Bell's blood and there was no indication Bell was afraid of needles.

Bell further argues the police officer "was in effect telling Mr. Bell he had to submit to evidentiary testing." The Court of Appeals held the Officer did not state Bell had to submit to testing. Instead, he said Bell could provide testing voluntarily or a sample would be taken without his voluntary submission. The Court said, "While this may well have put Bell in a coercive situation, the officer did not contradict the advisory or law by stating that Bell 'had' to submit or could not refuse." (p.19).

Bell's final claim regarding the coerciveness of the advisory was the officer had indicated "that a fist fight may be possible." Bell told the officer, "I'm not into a fist fight tonight" and the officer replied, "Good. Either [sic] am I." (p.19). The Court considered the conversation and held the officer was not threatening a fist fight in order to obtain an evidentiary test. The Court affirmed Bell's suspension.

## Training & Conferences Notice

(Click on Course Names for More Information)

Synthetic Cannabinoids & Substitute Cathinones Webinar — November 16 & 17, 2011

2012 IPAA Winter Conference — February 8-10, Boise, Idaho

2012 Idaho Highway Safety Summit — May 7-8, Boise, Idaho

2012 National Lifesaver's Conference — June 14-16, Orlando, FL

# LAST CALL

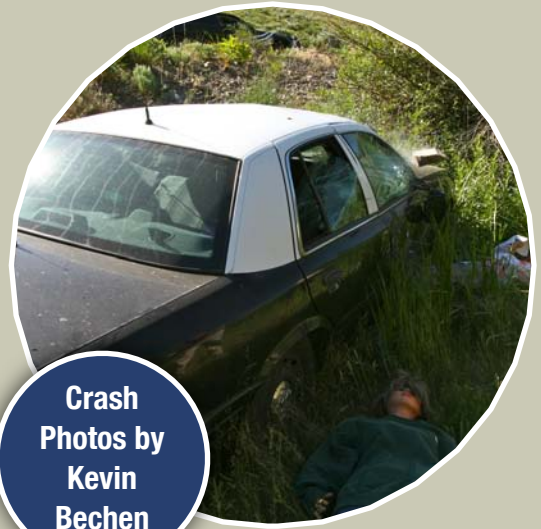
This edition of *For The Road* marks the completion of the fifth year of the Idaho Traffic Safety Resource Program. Therefore, as we approach Thanksgiving, I felt it would be appropriate to express my gratitude for the opportunity to serve as Idaho's TSRP. I am thankful for the chance Executive Director Sandee Meyer and the Idaho Prosecuting Attorneys Association took on me 5 years ago. It is a wonderful organization to work for!

I am also grateful for the partnership with and the funding provided by the Idaho Transportation Department's Office of Highway Safety. Thank you Kevin Bechen for continuing to invest in Idaho's TSRP program as the impaired driving grant manager. I appreciate your attention to detail and desire to make sure the program is effective in achieving its goals. I am thankful for the traffic safety professionals

who saw the need to make prosecutors part of the equation. Thank you NHTSA for recognizing the potential and adding TSRPs to your strategic plan. I am lucky to be employed.

In the past 5 years, it has been my privilege to offer training to 17,206 prosecutors, law enforcement officers, traffic safety professionals and community members in 28 states. In the first few months of the program, I would receive no more than 10 requests for technical assistance each month. I now average 65 requests per month. I am grateful to see the program grow and expand.

The success of the Idaho TSRP program is based on collaboration and partnerships. It has been my pleasure to work side-by-side with a number of agencies, organizations, coalitions, businesses and individuals. For example, the Idaho State Police Crash Reconstruction Team did not



Crash  
Photos by  
Kevin  
Bechen

flinch for a second when I asked for their help in staging a rural crash to train my TSRP colleagues from 20 different states at the 2011 NAPC Conference held in Sun Valley, Idaho. The training is pictured in this edition. I am truly grateful to all who have assisted me in making Idaho a safer place to live and drive!

--- *Jared Olson, TSRP*



*Idaho  
Prosecuting  
Attorneys  
Association*

## FOR THE ROAD

**Jared D. Olson**

Traffic Safety Resource Prosecutor  
Idaho POST Academy  
700 S. Stratford Drive  
Meridian, Idaho 83642

Phone: 208-884 7325

Fax: 208-884-7295

Email: [jared.olson@post.idaho.gov](mailto:jared.olson@post.idaho.gov)

**Addressee Name**

**4321 First Street**

**Anytown, State 54321**



*This material was developed through a project funded by the Idaho Transportation Department's Office of Highway Safety.*

Idaho Transportation Department

**WE ARE ON THE WEB!!  
WWW.TSRP-IDAHO.ORG**