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For The Road

Idaho Prosecuting Attorneys Association, Inc.

How to Beat Defendant's Subsequent Penalty Motion

By Jared Olson, TSRP

While growing up in Idaho, if something started bouncing from place to place, my father would yell, "Quick, someone grab a stick and beat it!"

Recently, I have been contacted by Idaho prosecutors in 5 different counties regarding a particular defense motion that needs to be "beaten down." Repeat DUI offenders are claiming a due process violation because they were not given actual notice of the 2006 amendments to the DUI statutes at their prior sentencing.

Let me provide you with the proper stick when facing these motions. The case that should put the argument to rest is *Wilson v. State*, 133 Idaho 874 (Ct.App.2000), wherein the Idaho Court of Appeals addressed a similar argument the last time the DUI enhancement penalties were amended.

The Court of Appeals said, "In 1990, Wilson was only required by statute to be given notice of the then-current possible penalties for further convictions. It is immaterial that the law changed in 1992, making the penalty for subsequent DUI convictions more harsh. In point of fact, the legislature could have elevated the penalty for any DUI to a felony crime. If the legislature so decided, a person correctly apprised prior to such law change that a first DUI conviction is a misdemeanor could not validly assert that he or she should be 'grandfathered in,' such that a subsequent DUI conviction could only be punished as a misdemeanor." *See State v. Brander*, 280 Mont. 148, 930 P.2d 31, 35 (1996)." *Id.* at 879.

The Court relied in part on *Nichols v. United States*, 511, U.S. 738, 748, 114 S.Ct. 1921,

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Idaho Supreme Court Upholds Forcible Blood Draw

Forcible blood draws were upheld by the Idaho Supreme Court in *State v. Benito Diaz*, filed on March 29, 2007. ***For the Road*** would like to congratulate all the prosecutors and law enforcement involved in this case. For example, Jessica M. Lorello, Deputy Attorney General, did a great job in briefing and arguing this case before the Supreme Court.

The Idaho Supreme Court held the involuntary blood draw of Diaz fell within the well-recognized warrant exception of consent. Specifically, the Court held Diaz had given his implied consent to evidentiary testing, including a blood draw, by driving on an Idaho road. Furthermore, the Court declined to address the exigency exception to the warrant requirement, but the court's language hinted exigency may have applied in this case as well.

The Court said, "Without addressing whether exigency also justified the blood draw, we hold that the seizure of Diaz's blood fell within a

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Web Sites

- Idaho Prosecuting Attorneys Association **www.ipaa.cc**
- ITD Office of Highway Safety **itd.idaho.gov/ohs/**
- National Highway Traffic Safety Administration **www.nhtsa.dot**
- National Association of Prosecutor Coordinators **www.napcsite.org**
- NDAA/APRI & NTLC **www.ndaa-apri.org**
- Idaho POST Academy (includes DRE site) **www.idaho-post.org**
- Idaho State Police Forensics **www.isp.state.id.us/forensic/**

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1928, 128 L.Ed.2d 745, 755 (1994), wherein the U.S. Supreme Court held due process did not require such notice.

Furthermore, the Idaho Court of Appeals points out that it was Wilson's own behavior that caused the updated statute to have effect. The Court said, "Had Wilson not again chosen to drive while under the influence, his prior DUIs would be irrelevant. As was said in *Nichols, supra,* surely a defendant knows that if he or she is arrested again for DUI, the punishment may be more harsh." *Wilson*, 133 Idaho at 879.

"Ignorance of the law is not a defense." *Id.* So the next time the defense raises this motion, please take this stick and beat it!

Special thanks to Sam Laugheed, Canyon County Deputy Prosecutor, for providing this information.

Supreme Court Upholds Blood Draw (From Page 1)

well-recognized exception to the warrant requirement." *Id.* at p. 3.

Under a 4th Amendment analysis, the blood draw must be performed in a medically acceptable manner and without unreasonable force. "I think the key will be making sure [the blood draw] is done in a 'reasonable' manner or, in the court's words, making sure the suspect is not 'manhandled' in the process," Lorello said.

The Court said, "Under the totality of the circumstances the police acted reasonably, using only handcuffs to transport Diaz to the hospital and having the blood test administered by a qualified hospital technician." *Id.* Further case examples of unreasonable blood draws can be found in *State v. Worthington*, 138 Idaho 470 (Ct.App.2002).

Idaho Supreme Court Building.

Finally, Diaz argued I.C. § 18-8002(6)(b) did not permit a forced blood draw absent suspicion of aggravated DUI or vehicular manslaughter. The Supreme Court shot down this argument as well, stating the statute only limits when the officer can *order* medical personnel to perform a forced blood draw, but does not otherwise limit when an officer may *request* medical personnel to withdraw blood for evidentiary testing.

Case Law Update: *State v. Clinton Hedges,* _ _ Idaho _ _ (Ct.App.2007)

The Facts. Hedges was arrested for DUI and taken to the police station for a breath test. He requested a blood test instead. The officer told Hedges he could arrange for his own blood test after the booking process. Hedges submitted to the breath test, but stated he would "go get a blood test of his own." Approximately 3 ½ hours later, Hedges was released on bail.

The Issue. Hedges argues the police denied him the opportunity to arrange for an independent BAC test, by holding him in custody for 3 ½ hours, despite his repeated assertions he intended to obtain his own test.

The Holding. According to the Court, Hedges effectively asserted his right to obtain an independent BAC test pursuant to I.C. § 18-8002(4)(d). This assertion triggered a police duty to not unreasonably delay Hedges' booking process and release. However, the Court said there is no exact formula for determining what an unreasonable delay of the booking process might be. This is a determination based on the totality of the circumstances in each case. Therefore, the case was remanded to the magistrate to determine whether the actions of the police and jail staff effectively denied or materially interfered with Hedges' ability to obtain a meaningful, independent BAC test. The case is currently set for hearing later this month.

The Rule. The defendant must make a clear and unambiguous statement of his desire to obtain an independent BAC test, such that a reasonable police officer, under the circumstances, would understand the statement to be an affirmative assertion.

Once a defendant has asserted this statutory right, the officer has a **duty** to not unreasonably delay the booking process or the defendant's subsequent release on bond. The police have **no duty** to administer a second BAC test or otherwise participate in arranging an independent BAC test on behalf of the defendant.

The police are **not required** to offer the use of a telephone, **unless** the defendant makes a clear and unambiguous statement of his desire to use a telephone to obtain an independent BAC test.

Additionally, the police have **no duty** to transport the defendant to the hospital to obtain an independent BAC test, nor are they obligated to arrange for a qualified professional to be transported to the holding facility in order to perform the test. (Note: Some agencies may wish to continue transporting defendants to the hospital for an independent test in order to obtain that additional piece of evidence.)

Policy Implications. To avoid potential suppression of the BAC, prosecutors, police, and jail management should make a joint-decision regarding the best practices for their particular jurisdiction. At a minimum, the arresting officer should at least notify jail staff when the defendant has made a request for an independent test. Based on this notification, a procedure should be established for the defendant to be processed without delay. For example, it may be determined the best practice is to move defendants to the front of the booking line when they have requested an independent BAC test.

Breath Taking News: Source Code Discovery Issue

By Jared Olson, TSRP

A "Source Code" challenge in DUI cases is an issue that began in Florida and is now sneaking its way into discovery requests here in Idaho. To better understand what is being requested and how other states have handled the issue, I became determined to find out exactly what a "source code" was and why anyone would ever want to discover it?

Plainly put, source codes are computer language that is humanely viewable, but only meaningful to a programmer. Developing source codes takes a tremendous amount of time and effort. For example, the source code for Draeger's Alcotest 7110 is 53,744 lines, or approximately 896 pages, in length. *See* Special Master's Findings and Conclusions in *State v. Chun Le, et al.*, p. 67 (N.J. S.Ct., 2007).

Devices, such as the Intoxilyzer 5000, include source code that drives the automated functioning, but has nothing to do with the alcohol measuring capabilities of these devices. Source codes may be modified by the manufacturer to meet the needs of the varying law enforcement agencies purchasing their device. Yet, these modifications do not impact the way the breath alcohol test is conducted, they impact only the type and manner in which individual test information is recorded and/or printed (e.g., date, time, location, suspect identifier, etc.).

Florida Decision. In Florida, the defense bar began seeking the production of the source code for the Intoxilyzer 5000, manufactured by CMI, Inc. They stated the reason for seeking the production of the source code was to verify whether the device had been substantially modified from a prior approved version. The Florida trial courts were varied in their rulings and over a 1,000 DUI convictions were blocked.

The State, as well as the manufacturers, argued the source code is proprietary information that bears no relationship to the alcohol-measuring capabilities of the device. Furthermore, the State argued it did not have possession of the source code because it was the property of CMI, Inc.

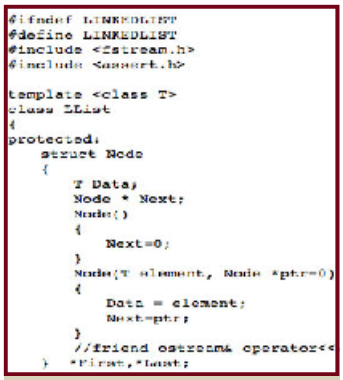
Recently, the Florida 5th District Court of Appeals denied the defendant's request for disclosure stating, "It is without dispute that the State does not have possession of the source code because it is the property of CMI, Inc. It is also without dispute that the code is a trade secret of CMI, Inc. and that CMI, Inc. has invoked its statutory and common law privileges protecting the code from disclosure. Therefore, the State cannot obtain possession of the code." *Moe v. State*, 944 So.2d 1096, 1097 (2006).

New Jersey Decision. New Jersey recently concluded a *Frye* hearing on the Draeger Alcotest 7110. The hearing was before a Special Master appointed by the New Jersey Supreme Court. The "Source Code" was one of the most highly contested issues. The evidentiary hearing began on September 18, 2006 and concluded on January 10, 2007 making it a full 41 days of testimony and evidence.

The Special Master released his report and it is now before the New Jersey Supreme Court to make a finding of the "finder of facts." A decision should be forthcoming within the next few months, making it the highest state court to issue a decision on the source code question. In the meantime, the Special Master's report should be instructive of how the court will rule.

The Special Master held, "We do not think that this dispute about the source codes has any substantial relevance to our ultimate conclusion, that the Alcotest 7110 instrument is very good at measuring breath alcohol. . . . Source code issues arise when the instrument fails to perform properly or its various components fail to interface with each other. We have seen no hint of source code problems or failure throughout this litigation." *See* Special Master's Findings and Conclusions in *State v. Chun Le, et al.*, p. 45 (N.J. S.Ct., 2007).

If you find yourself in a Motion to Compel for source codes, I suggest being familiar with the above cases. Be warned! The New Jersey report is 268 pages. On the bright side, it is only 1/3 the length of the source code. If additional information is needed, the New Jersey TSRP has volumes of transcripts from experts under "grueling cross-examination." Feel free to contact me, as I also have access to the briefs used in Florida, as well as other material regarding the source code issue.



Source Code Example. Software companies are reluctant to release these codes due to competition within the industry.

IDAHO'S FATAL FACTS:

- **In 2006, 121 unbelted people were killed in traffic crashes.**
- Based on the proven effectiveness of seat belts, an estimated 88 lives were saved in 2005 by seat belt use. An additional 63 lives (of the 126 unbelted dead) could have been saved if everyone would have buckled up.
- **In 2006, 109 people were killed in alcohol related crashes.**
- In the early 1980s, impaired driving represented 20% of the fatal & injury collisions in Idaho, compared to 11% in 2005. Factors influencing the reduction include Selective Enforcement Traffic Programs (STEP), stiffer penalties, increased media exposure and raising the legal drinking age to 21.

Zero Fatalities
A Goal We Can All Live With

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COMING SOON TO THE WEB!!
IDAHO TSRP WEBSITE

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Idaho Transportation Department

UPCOMING TRAININGS & CONFERENCES NOTICE

- Idaho Highway Safety Summit — April 11, 2007, Boise, Idaho.
- 2007 Drug Recognition Expert Training School — April 16-26, 2007, Idaho POST Academy, Meridian, Idaho.
- Underage Drinking: Does it Matter? (For School Resource Officers & Educators) — April 23, 2007, Idaho POST Academy, Meridian, Idaho.
- 23rd Annual Idaho Conference on Alcohol & Drug Dependency (ICAAD) — May 14th-16th, 2007, BSU Student Union Building, Boise, Idaho.
- IPAA Summer Conference — August 6th-8th, 2007, West Yellowstone, Montana.

Last Call:

Recently, I attended the 25th Anniversary Lifesavers Conference in Chicago, Illinois. Lifesavers is the premier national conference on highway safety issues. This year it boasted it's largest attendance of 2,541 participants. Margaret Goertz, ITD-OHS, and I were the sole Idaho representatives. Sixteen states were represented by a TSRP, with 9 of the 87 workshops containing a TSRP speaker. The NTLC was also represented by its prosecutors. In total, I estimated 30 prosecutors in attendance. Although few in number, this is a major improvement from just a few years ago.

To effectively reduce traffic injuries & fatalities requires a coordinated effort, with prosecutors being a key component. NHTSA should be commended for recognizing the need to bring prosecutors to the traffic safety table. During the NHTSA award luncheon, two prosecutors were recipients of national awards. I congratulate Pete Grady, Iowa's TSRP and Maureen McCormick, District Attorney in Nassau County, NY, for their dedication to traffic safety, and thank them for putting prosecutors in such a positive light. —Jared Olson, TSRP.

Chicago Skyline. View from John Hancock Building during the 25th Anniversary Lifesavers Conference.