

# FOR THE ROAD

*Idaho Prosecuting Attorneys Association*



## IPAA WINTER CONFERENCE JUST AROUND THE BEND

**IPAA'S 2010 ANNUAL WINTER CONFERENCE TO BE HELD IN BOISE, FEB. 3RD-5TH.**

Idaho prosecutors will converge on The Grove Hotel, February 3-5, 2010, for the Idaho Prosecuting Attorneys Association's Annual Winter Conference. The agenda has a great mix of dynamic speakers, both near and far. The agenda is set and IPAA members still have a few weeks to make their plans to attend. [REGISTER HERE](#).

The agenda has a wide array of current issues facing prosecutors. On Wednesday, we are excited to welcome back one of our favorites in Richard Wintory for the U.S. Supreme Court Update. There will also be a panel discussion on prosecutorial error, followed by a chance for prosecutors to learn about new opportunities in student loan forgiveness. In the evening, members will be able to attend a Legislative Social at the Doubletree Riverside Hotel.

Thursday will be the opportunity to hear about all of the Idaho Appellate Updates from Ken Jorgensen of the Idaho Attorney General's Office, followed by the breakout sessions for the civil and criminal tracks. The civil track will cover subjects such as Litigating Planning & Zoning Cases, Public Works Contracting, Forfeitures and Case Review. Meanwhile, the criminal track will cover Drug Recognition Expert (DRE) Cases, Juvenile Interstate Compact and Parole Commission & Sentencing.

The conference concludes on Friday, February 5th. Renowned speaker Terence MacCarthy will be presenting "Impeachment Weapons of Mass Destruction" and Cross-Examination. NDAA President Chris Chiles will provide a Training and Legislative Update from the NDAA. For more information or to register visit [www.ipaa-prosecutors.org](http://www.ipaa-prosecutors.org).

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# THE IMPACT OF ARIZONA V. GANT: LIMITING THE SCOPE OF VEHICLE SEARCHES?

By Mark M. Neil, Senior Attorney, National Traffic Law Center

The scope of a police officer's search of an automobile incident to the arrest of an occupant has been somewhat limited by a recent U.S. Supreme Court decision. The Court held in *Arizona v. Gant*<sup>1</sup>, that the search incident to arrest exception to the warrant requirement did not apply to the facts of this case and held that a vehicle search is not authorized incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.

While investigating Gant for alleged drug activity, Tucson police officers learned Gant's driver's license had been suspended and there was an outstanding warrant for his arrest for driving with a suspended license. Officers observed Gant drive by, park and then get out of his automobile and shut the door. While about 30 feet apart, one officer called to Gant and they approached each other meeting 10 to 12 feet from Gant's car. Gant was then arrested and handcuffed.

Incident to his arrest, the officers then searched Gant's car, one finding a gun and the other a bag of cocaine in the pocket of a jacket on the backseat.

Because Gant was handcuffed and could not access the interior of the car to retrieve weapons or evidence at the time of the search, the Court found that the search incident to arrest exception did not justify the search in this case.

A divided Court (4-1-4) held (Stevens, J.) generally that a vehicle search incident to a recent occupant's arrest is not authorized after the arrestee has been secured and cannot access the passenger compartment of the vehicle. This is seemingly contrary to prior opinions in *Thornton v. United States*<sup>2</sup> and *New York v. Belton*<sup>3</sup>. Applying the safety and evidentiary justifications

underlying *Chimel v. United States*<sup>4</sup> to limit *Belton*, much of what has been taught to and practiced by law enforcement officers regarding search incident to arrest is no longer valid. Gone is the more open and generous license to law enforcement officers in their ability to search the passenger compartment of a vehicle or any containers therein simply because they have arrested an occupant or recent occupant of the vehicle.

*Belton* searches were justifiable, it was because of the safety and evidentiary issues, not simply because the vehicle might contain evidence relevant to the crime for which he was arrested.

While at the same time limiting an officer's ability to search the vehicle incident to arrest based upon proximity and access for the purposes of officer safety and evidentiary safekeeping, the Court also indicated that there may be circumstances unique to the automobile context to justify a search incident to arrest when it is reasonable to believe evidence of the offense of arrest might be found in the vehicle.

The Court stated that not only is an officer permitted to "conduct a vehicle search when an arrestee is within reaching distance of the vehicle," but also if "it is reasonable to believe the vehicle contains evidence of the offense or warrant." (emphasis added) This allows for searches incident to arrest where the vehicle is outside of the arrestee's reach based upon reasonable belief rather than probable cause. Assuming that the defendant had been stopped and subsequently arrested for Driving Under the Influence of Alcohol (DUI), the officer would be justified in searching for evidence of the consumption of alcohol if he or she had a "reasonable" belief such evidence might be found. A search might also be permitted in the case of arresting the occupant of vehicle on an outstanding warrant so long as the officer had reasonable belief that evidence of the crime charged in the warrant might be found in the vehicle.

Going on, the Court lists certain exceptions that still apply and are available to officers.

**1. Frisk for Weapons.** Permitting officers to search a vehicle's passenger compartment when there is reasonable suspicion

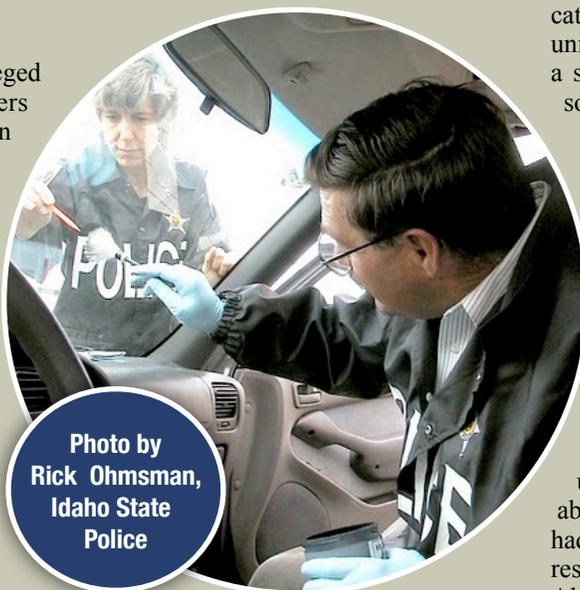


Photo by  
Rick Ohmsman,  
Idaho State  
Police

Yet, the opinion notes that *Gant* is consistent with the holding in *Thornton* and follows the suggestion of Justice Scalia's concurring opinion therein.<sup>5</sup> *Thornton* had expanded *Belton* to allow for searches of the passenger compartment of a vehicle that is contemporaneous incident of arrest even when the officer did not make contact until that person had left the vehicle. The rationale of allowing a search of the entire passenger compartment, regardless of the manner of contact of the arrestee, was in the search for a clear rule. Still, it is one based on ensuring officer safety and preserving evidence. Justice Scalia's concurring opinion in *Thornton* argued that if

that an individual, whether or not the arrestee, is dangerous and might access the vehicle to gain immediate control of weapons.<sup>6</sup> This flows from the rationale for frisking a suspect for weapons.<sup>7</sup>

### 2. Probable Cause of Evidence of Crime.

Where there is probable cause to believe a vehicle contains evidence of criminal activity,<sup>8</sup> Of particular interest is the mention that this allows for searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. This exception does not rely upon an arrest for justification.

3. **Protective Sweep.** Where safety or evidentiary interests would justify a search, such as a limited protective sweep of those areas in which an officer reasonably suspects a dangerous person may be hiding.<sup>9</sup> From a vehicle perspective, this exception may be applicable when dealing with larger vehicles such as multi-passenger vans, recreational vehicles, motor homes, buses and the like.

Although not mentioned in the opinion, other exceptions should also still apply.

4. **Consent.** The easiest of all exceptions to the search warrant requirement is the one of consent. When the defendant makes a knowing and intelligent waiver of his rights, the officer may search without a warrant.<sup>10</sup> This consent, however, may be limited in scope.<sup>11</sup>

5. **Inventory.** So long as the officer's department has a written policy providing

for it, the officer may inventory the contents of a vehicle prior to it being impounded and towed for the purpose of safekeeping and avoiding claims of loss.<sup>12</sup>

6. **Plain View.** In situations where the officer is in a position in which he is lawfully entitled to be, anything plainly visible to him or her as being evidential or contraband falls under this well-established exception.<sup>13</sup>

7. **Abandonment.** If the vehicle has been abandoned, then the privacy interests normally protected by the 4th Amendment have also been abandoned and the officer is free to search the vehicle.<sup>14</sup>

8. **Sobriety Checkpoints.** Police may still conduct appropriate sobriety checkpoints to detect impaired drivers but not for general criminal activity.<sup>15</sup>

9. **Exigent Circumstances.** There may be circumstances that arise to the level permitting a search under this exception, but caution should always be used in relying upon it. Only in the direst of circumstances such as hot pursuit, imminent destruction of evidence or danger to a third person might this be applicable.<sup>16</sup>

Some activities do not arise to the level of a search and officers should not worry about this case having changed how they should do things. For example, dog sniffs of vehicles during an otherwise lawful stop are not affected. The dog sniff itself is not a search and as long as it is done during the

pendency of a lawful stop and not beyond, there is no issue.<sup>17</sup>

It would also be appropriate to note that quite often vehicles are part of a crime scene, such as in vehicular homicide or DUI with Death cases. Care should be taken to remember that there is no crime scene exception for search warrants.<sup>18</sup> Reliance purely upon the motor vehicle exception may not be workable when the vehicle is no longer mobile because of the crash. Some evidence within the vehicle, such as crash data recorders or some physical evidence might be subject to the exigent circumstances exception if the officer has a reasonable belief that the evidence may otherwise be lost. Officers are allowed to secure a crime scene pending the issuance of a search warrant.<sup>19</sup>

In short, the holding in *Arizona v. Gant* is not an overly burdensome one on law enforcement. While it certainly limits the prior practices of officers conducting wide-ranging searches incident to an arrest of an occupant of a motor vehicle, it does still permit those searches under more defined circumstances. Perhaps the most important thing to come out of this case is the need for officers to articulate, and prosecutors to elicit, with great care and detail the basis for the search.

Photo by Rick Ohmsman, recently retired from the Idaho State Police.



<sup>1</sup> 556 U.S. \_\_\_, No. 07-542 (2009).

<sup>2</sup> 541 U.S. 615 (2004).

<sup>3</sup> 453 U.S. 454 (1981).

<sup>4</sup> 395 U.S. 752 (1969).

<sup>5</sup> Id. 541 U.S. at 632.

<sup>6</sup> *Michigan v. Long*, 463 U.S. 1032 (1983).

<sup>7</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>8</sup> *United States v. Ross*, 456 U.S. 798 (1982).

<sup>9</sup> *Maryland v. Buie*, 494 U.S. 325 (1990).

<sup>10</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>11</sup> *Florida v. Jimeno*, 500 U.S. 248 (1991).

<sup>12</sup> *South Dakota v. Opperman*, 428 U.S. 364 (1976).

<sup>13</sup> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

<sup>14</sup> *California v. Greenwood*, 486 U.S. 35 (1988).

<sup>15</sup> *Michigan Dept. of State Police v. Sitz*, 469 U.S. 444 (1990), *Indianapolis v. Edmund*, 531 U.S. 32 (2000).

<sup>16</sup> *Welsh v. Wisconsin*, 466 U.S. 740 (1984), *Schmerber v. California*, 384 U.S. 757 (1966).

<sup>17</sup> *Illinois v. Caballes*, 543 U.S. 405 (2005).

<sup>18</sup> *Mincey v. Arizona*, 437 U.S. 385 (1978),

*Flippo v. West Virginia*, 528 U.S. 11 (1999).

<sup>19</sup> *Thompson v. Louisiana*, 469 U.S. 17 (1984).

## 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.idaho-post.org](http://www.idaho-post.org)

National Highway Traffic  
Safety Administration

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

National Association of  
Prosecutor Coordinators

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

NDA & APRI National Traffic  
Law Center

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

Idaho State Police Forensics

[www.isp.state.id.us/forensic/](http://www.isp.state.id.us/forensic/)

Alcohol Beverage Control

[www.isp.state.id.us/abc/](http://www.isp.state.id.us/abc/)



## Federal Highway Administration Releases New Edition of MUTCD Manual

The Federal Highway Administration (FHWA) released on December 16, 2009, the 2009 edition of the *Manual on Uniform Traffic Control Devices (MUTCD)*.

The manual will become effective on January 15, 2010. ([CLICK HERE](#) to access the new manual).

The MUTCD is recognized as the national standard for all traffic control devices installed on any street, highway, bikeway or private road open to public travel. For most prosecutors and law enforcement officers this manual is generally of no interest, as much of it is very technical and of an engineering nature. However, it is worth being familiar with as it may be argued to be applicable when dealing with crash investigations and other traffic crime prosecutions. For example, in states where sobriety checkpoints are allowed, the MUTCD manual has been used to challenge the checkpoints where the signage was alleged to have not complied with these standards.

It has recently come to the attention of the Idaho TSRP that new traffic lights are being installed in our state that meet the new MUTCD standards. For example, some traffic light signals now have a flashing yellow turn arrow. This is new signage most drivers will be unfamiliar with. Idaho statutes may or may not address some of these new traffic control devices, leading to further confusion.

Finally, it is worth noting for officers, police administration and prosecutors the requirement for law enforcement officers to wear high-visibility vests. This requirement has been retained in the new MUTCD; however, high-visibility vests

are now required on *all* highways, not just federal-aid ones. See section 6D.03.06 on page 564 of the new MUTCD.

[Click Here](#) to visit a link to the *Federal Register* addressing the new MUTCD manual and its revisions.

## NHTSA Launches New Website

-- [www.distraction.gov](http://www.distraction.gov) --

Every day in the United States more than 800,000 vehicles were driven by someone using a handheld cell phone during the day. Today more people are using a variety of handheld devices. Distractions such as this led to nearly 6,000 deaths last year in crashes involving a distracted driver, and more than half a million were injured.

"Every single time you take your eyes off the road or talk on the phone while you're driving -- even for just a few seconds -- you put your life in danger," said U.S. Transportation Department Secretary Ray LaHood, "And you put others in danger too. This kind of behavior is irresponsible -- and the consequences are devastating."

Last week NHTSA and DOT launched a new website -- [www.distraction.gov](http://www.distraction.gov) in response to this fatal trend. This site is a terrific resource for anyone wanting to learn more about this deadly practice, and what the Department of Transportation is doing to address the problem.

This year, more than 200 distracted driving bills have been introduced in 46 state legislatures. A generation ago, our society often turned a blind eye to people who would drink and drive, or not use a seatbelt. Those problems taught us a valuable lesson: We need a combination of strong laws, tough enforcement, and ongoing public education to make a difference.

## Training & Conferences Notice

(Click on Course Names for More Information)

IPAA's 2010 Winter Conference — February 3-5, The Grove Hotel, Boise, Idaho

Lifesavers National Conference — April 11-13, Philadelphia, Pennsylvania

ITD's 2010 Highway Safety Summit — April 28, Boise, Idaho

Northwest Alcohol Conference — July 29-30, Park City, Utah

# Idaho Traffic Law Update

## **State v. Estes, (Ct.App.2009):**

Estes was found guilty of committing the infraction of speeding. Because of a discovery violation, the laser device evidence was excluded, leaving the prosecutor to proceed solely with evidence of the officer's visual estimation of speed. The officer testified he had been trained and received certification to make estimates within 5 miles per hour of the actual speed. He had estimated Estes' vehicle at 65 miles per hour, 10 miles per hour over the speed limit. Estes appealed arguing the officer's testimony concerning visual estimating of speed, standing alone, was insufficient to prove the speeding violation beyond a reasonable doubt.

Specifically, Estes argued the prosecution failed to establish visual estimation of speed is scientifically reliable and that the evidence presented was insufficient to support the finding of guilt. The Court found Estes failed to preserve his first issue of whether visual estimation of speed is scientifically reliable, per Idaho Rule of Evidence 702, by not making a timely and specific trial objection. However, the Court concluded the evidence was insufficient to meet the State's burden to prove Estes' guilt beyond a reasonable doubt.

First, it is important to note that the Court **did not** hold that an officer's estimate can never be sufficient to prove a speeding infraction. The Court merely found that based on the evidence presented in this case, in addition to the difference between the officer's estimated speed and the actual speed limit not being great, the State had failed to prove the speeding infraction beyond a reasonable doubt. The Court cites other states' decisions in reaching this holding. Basically, the Court has adopted a case-specific inquiry approach in determining sufficiency, based on the officer's training and the amount by which the estimated speed exceeded the posted limit.

Next, the Court provides a rather detailed explanation of what evidence would likely have been sufficient to find a speeding violation based solely on visual estimation of speed. Here is a list of factors the Court discusses:

- (1) The officer's training and years of experience in visual estimation of speed. (In this case, the officer's 20 years of experience and the fact he had taken period re-certification courses on visual estimation of speed were favorable factors.)
- (2) The certification standards requiring the officer to make visual estimations within 5 miles per hour of the actual speed.
- (3) The required accuracy rate to meet the certification standards. For example, does the certification require the officer be able to meet the 5-mile-per-hour variance standard 65 percent of the time or 100 percent of the time?
- (4) The officer's actual accuracy rate during the certification process. Did the officer meet or exceed the accuracy rate standard?
- (5) The distance between the officer's location and the suspect vehicle when making the visual estimation, the angle of the officer's view, and how long the officer observed the suspect vehicle before making the visual estimation.
- (6) In addition, the variance between the estimated speed and the posted speed limit is a separate factor to consider. For example, if Estes had been exceeding the speed limit by over 20 miles per hour rather than 10, the Court most likely would have reached a different result, regardless of whether or not all the previous factors were met.

Finally, as cited in footnote 1, the issue in this case should not be confused with the admissibility of an officer's estimation of speed, nor with the sufficiency of a visual estimation of speed to provide reasonable suspicion to make a traffic stop.

**Editor's Note:** Based on the factors discussed by the Court in this case, a sample predicate question list was developed for your review. It can be downloaded by [Clicking Here](#).

## **State v. Shelley, Unpublished Opinion No. 743 (Ct.App.2009):**

Shelley was found guilty of Felony DUI. On appeal, Shelley challenges the trial court's admission of opinion testimony from the arresting officer and asserts the court abused its discretion by imposing an excessive sentence. During the trial, the arresting officer testified describing his observations and interaction with Shelley. The prosecutor asked the officer his opinion on whether Shelley was under the influence of alcohol. Shelley's objection to the question was overruled and the officer testified that based on his training, experience and observations, his belief was that Shelley was indeed under the influence of alcohol. Shelley contends this testimony was an ultimate issue for the jury's determination, and therefore, it impermissibly invaded the province of the jury.

The Court of Appeals held that although the officer's testimony went to an ultimate issue of fact, it did not invade the province of the jury as to its determination of whether Shelley was or was not guilty of driving a motor vehicle while under the influence of alcohol. The Court cited its recent decision of *State v. Corwin*, 147 Idaho 893 (Ct.App.2009) as legal precedent for its holding. The *Corwin* decision was discussed in the October 2009 edition of *For the Road* and can be found by [Clicking Here](#).

**Editor's Note:** The Court of Appeals makes a statement worth remembering by prosecutors and officers so as to avoid invading the province of the jury. The Court said, "Notably, Deputy Miner did not offer his opinion as to Shelley's guilt or innocence of the crime charged." Like the officers in *Corwin*, Deputy Miner testified appropriately by limiting his opinion in stating Shelley was under the influence of alcohol and was too impaired to drive and avoided making a statement that in his opinion Shelley was "guilty" of DUI.

**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).

# LAST CALL

The New Year has arrived and it is time once again to review past resolutions and make new ones. The year 2010 marks my fourth year as Idaho's Traffic Safety Resource Prosecutor. When I was first interviewed for the position I was told the funding would be in place for at least 3 years. Therefore, this year marks the completion of a personal goal to develop a program that would last beyond those 3 years.

Another goal presented at the initial interview was a challenge by Ada County Prosecutor Greg Bower to visit every county in Idaho within 3 years. Unfortunately, I fell short on this goal. As of today, I have set foot in only 43 of Idaho's 44 counties. Although I have provided technical assistance to prosecutors and officers in Boundary County, I still need to plant my feet on that particular Idaho soil. I plan to make return visits to the other 43 as well.

A number of goals were successfully accomplished in 2009. First, Idaho has become the 2nd state with a nationally recognized Law Enforcement Phlebotomy program. The Nampa Police Department has taken the lead in this endeavor and their results have been impressive. Second, over 60 prosecutors from Idaho, Oregon & Utah, in addition to more than 70 crash reconstructionists from all over the world, attended the joint Lethal Weapon: DUI Homicide training and 2009 IAARS conference. This training was a first-of-its kind in the United States. Third, the Idaho POST Academy made seat belt usage (TOPS) a part of their standard curriculum. Finally, the Idaho TSRP program has experienced continued growth. Because of the TSRP program 1,238 prosecutors, 3,091 police officers and 4,374 community members have received specialized training in traffic crimes. In



Keeping on Track for 2010

addition, 1,483 requests for assistance have been received and responded to. This upcoming year shows no signs of slowing down as the calendar is full of meetings, trainings and conferences. A DUI Trial Notebook is also in production, as well as a national cross-examination project focusing on defense witnesses. I am blessed to work with so many great traffic safety professionals and look forward to 2010. --- *Jared Olson*



*Idaho  
Prosecuting  
Attorneys  
Association*

## FOR THE ROAD

**Jared D. Olson**  
Traffic Safety Resource Prosecutor  
Idaho POST Academy  
PO Box 700  
Meridian, Idaho 83680

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**