

# FOR THE ROAD

*Idaho Prosecuting Attorneys Association*



## PROVING THE DUI: PRIVATE PROPERTY OPEN TO THE PUBLIC

By Jared Olson, Idaho Traffic Safety Resource Prosecutor

**WHAT IS PRIVATE PROPERTY OPEN TO THE PUBLIC?** To be found guilty of impaired driving, a number of elements must be proven. One of them is proving the offense occurred on a highway, street or bridge, public property or private property open to the public. It is the last location that can sometimes be the most difficult to determine. But not anymore!

The beginning of the New Year includes our very first DUI appellate decision wherein a previously ambiguous portion of the Idaho DUI statute now has some context in case law. Prior to the *Martinez-Gonzalez* decision, published on January 3, 2012, the only case dealing with the “private property open to the public” element was the Idaho Supreme Court’s decision in *State v. Knott*, 132 Idaho 476 (1999). In *Knott* the Supreme Court held private residential driveways were not “private property open to the public.” The Court said,

“The fact that social guests and persons with business at the residence are permitted to use the driveway does not make it property available to the general public for vehicular traffic or parking.”

In trainings, I have frequently been asked whether private residential communities, trailer parks or other privately-owned property would be considered “private property open to the public” under the Idaho DUI statute. My response was, “I don’t know” but then would follow with my general impressions based on the legislative purpose of the DUI statute. Therefore, the *Martinez-Gonzalez* case is very helpful in putting these questions into context and provides a good general framework of how Idaho Courts will consider whether a privately-owned roadway or parking lot is subject to the Idaho DUI statutes.

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# PROVING THE DUI: PRIVATE PROPERTY OPEN TO THE PUBLIC - CONTINUED FROM PAGE 1

## State v. Martinez-Gonzalez (Ct.App.2012)

*Let's take a look at the case...*

### FACTS:

Officers were called to investigate suspicious activity around an apartment complex's laundry facilities. Martinez-Gonzalez was parked near the laundry facility sitting in the driver's seat of a parked car with two passengers. Officer saw open beer cans in the car and Martinez-Gonzalez exhibited signs of intoxication. The three individuals said their spouses would not let them drink in the apartment so they were drinking in the car. This was certainly not illegal but the officer did recommend Martinez-Gonzalez to walk back to his apartment and not to drive his car across the parking lot. Martinez-Gonzales did not follow this advice and the officer observed him drive. A traffic stop ensued in the privately-owned parking lot and Martinez-Gonzalez was investigated and arrested for DUI. During a search at the jail methamphetamine was discovered in Martinez-Gonzalez's coat pocket.

### DEFENDANT'S ARGUMENT:

(1) Martinez-Gonzalez argues the evidence was obtained pursuant to an illegal traffic stop and arrest; and

(2) He argues the conduct did not occur on private property open to the public. If the parking lot was deemed to be strictly private property, the State would have no ability to pursue a criminal DUI investigation.

### HOLDING:

On the first issue, the Court held the un-contradicted facts on the record established probable cause for a DUI arrest. Even if the Court assumed the facts did not establish probable cause, the Court said there was certainly enough evidence to establish reasonable suspicion to allow the officer to lawfully conduct field sobriety tests and the defendant's refusal to comply with these tests inferred a consciousness of guilt. Therefore, the arrest was proper.

On the second issue, the court held that although the Idaho DUI statute was ambiguous as to whether apartment complex parking lots fell within the definition of "private property open to the public," the legislative intent of the statute led the court to conclude that in this case the apartment parking lot was "private property open to the public."



Open to the Public?

### REASONING:

The consensus among other states' case law is where an area is available to more than a markedly few number of individuals and the DUI statute covers property that is publicly accessible or "open to the public," the statute applies unless there is a very clear indication of an intent to keep the public out. The intent can be evaluated by looking at the presence of physical barriers, posted signs, limited access and consequences for entry, as well as the nature of the property as business or residential.

In this case, the parking lot was comprised of 8-10 different housing units, 3 different roadways with at least 2 intersections and numerous parking areas. The access to such a large area by a considerable number of tenants, visitors, and other members of the public, brought the property within the scope of the DUI statute. There was no evidence to suggest any barrier controls were in place.

Martinez-Gonzalez did provide evidence of a sign posted at the entrance stating, "Illegally parked and unauthorized vehicles will be towed away at the owner's expense." But the Court found this sign was too generic and simply gave the property owner the ability to remove vehicles pursuant to city code and not as restricting access to the parking lot by the public. The purpose of the DUI statute is to protect the public from the harm an intoxicated driver can cause and this type of situation can put members of the public at risk.

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### Pay Attention to the Signs





# Idaho Traffic Law Update

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

Decker was arrested for DUI upon which the arresting officer requested her to submit to a blood draw without reading her the advisory form. The officer paraphrased the advisory, but failed to inform Decker of her right to obtain her own independent testing. Decker had a blood alcohol level of 0.33. Decker argued her blood result should be suppressed because the officer failed to advise Decker of her statutory rights.

The Court of Appeals denied Decker's appeal holding, "[I]t is well-settled that even if an officer fails to notify the defendant of the consequences of refusal as required by section 18-8002(3), the results of the evidentiary test are still admissible in a criminal prosecution."

In addition, failing to tell Decker of her right to independent testing did not amount to a due process "denial" of independent testing. The Court stated, "Decker's contention that the advisory requirements of section 18-8002(3) created a due process right is untenable."

There was no basis to suppress Decker's blood draw results on either statutory or constitutional grounds.

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

Wilkinson argued her license suspension should be vacated because the officer did not comply with the 15-minute monitoring period required prior to administering a breath test. Wilkinson contends there were numerous things impeding the officer's ability to supplement his visual observations to include, sound from a CD that was playing, the officer's radio earpiece in his ear, a number of times the officer's attention was diverted and the officer was not in close enough proximity to hear or smell a burp. The Court of Appeals did find the officer had his back turned to Wilkinson for 1 minute and 50 seconds of the 15-minute observation period. The officer even testified at the ALS hearing he did not think he satisfied the requirements. Wilkinson points out the prosecutor had dismissed the criminal case. However, the ITD hearing officer weighed the facts and

found the monitoring period was sufficient. This evidence included 3 video cameras and an excellent audio recording of Wilkinson in a room designed for DUI breath testing.

The Court of Appeals upheld the hearing officer's decision but leaves a cautionary statement. The Court said, "It should be noted that although constant visual contact is not required, the rule's flexibility is not an open invitation for law enforcement officers to be inattentive or to leave suspects out of their sight for any appreciable period of time. Better practice would counsel that officers should attend to the suspects to the best of their ability, including visual observation, throughout the entire monitoring period if at all possible. In such cases, the issue presented here could be completely avoided."

**Editor's Note:** The appellate courts prefer officers to ask a final question before administering a breath test. In footnote 4, the Court of Appeals offers the following advice, "...it would enhance law enforcement procedures to simply ask the suspect if she belched, burped, vomited or did anything else during the waiting period that might skew the test results." This is based on previous court decisions. *See Stump*, 146 Idaho at 861; *Carson*, 133 Idaho at 452.

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

Marmentini contends his Felony DUI conviction should be vacated because the prosecutor committed misconduct during closing arguments, violating his due process rights. During closing arguments, the court sustained 3 of defense counsel's 4 objections to statements using the phrase, "I believe." The Court of Appeals found two of the statements constituted prosecutorial misconduct, but in both instances the error was harmless.

First, the prosecutor said, "So ladies and gentlemen of the jury, based on the evidence that's been presented here, I believe this defendant is guilty." The court sustained the defense objection and admonished the prosecutor. Yet, the Court of Appeals found

this statement, while disfavored, did **not** constitute misconduct. The prosecutor's statement was prefaced by a summarization of the evidence presented at trial. The Court found there was no indication the prosecutor was attempting to use his official position or personal knowledge to persuade the jury to convict Marmentini.

In the next instance, defense counsel made a timely objection, sustained by the trial court. This kept potentially impermissible argument prefaced by "I believe" from being considered by the jury. The Court said even if the prosecutor was about to state his personal belief as to the reliability of the breath test evidence, the objection effectively prevented it. Therefore, the prosecutor's partial statement was not prejudicial error.

Finally, the prosecutor made two statements referencing his duties as a prosecutor that the Court did find was prosecutorial misconduct. First, he said a duty to prosecute crimes "I believe" have been committed. Second, he said he had a duty to provide all evidence that would "exonerate" or assist the defendant in "defending himself against these charges." Unlike the other comments, the Court found these references to the prosecutor's duties explicitly invoked the prestige of the office of the prosecutor and drew upon information other than the applicable law, evidence and reasonable inferences based thereon. Yet, these improper statements had "no significant possibility" of influencing the jury to decide the case. The error was harmless.

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

Old  
Blaine County  
Courthouse



## 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.napc.us](http://www.napc.us)

NDAA's National Traffic Law  
Center (NTLC)

[www.ndaa.org/ntlc\\_home.html](http://www.ndaa.org/ntlc_home.html)

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/)



## Proving the DUI . . . Continued from Page 2

### RULE:

The Martinez-Gonzalez case sets forth the following two-part rule:

(1) The private property must be “available for vehicular travel or parking by the general public.” The “general public” does not mean everybody is welcome on the property all of the time, but simply means an indefinite and undefined group of people. One needs to consider whether the property is business or residential and whether the area is immediately accessible from a public sidewalk or street. The size of the complex and whether the location is a common area will also be factors in determining whether it is available to the general public. The Court uses the example of individual driveways in a duplex or fourplex accessible from a single common way. This shows a tenant may exercise fairly exclusive control and is likely more akin to a private residential driveway. The larger the complex the more its users grow to an indefinite and undefined group and the less control a single resident can exercise over the common areas.

(2) It must be property available to the public “with the permission of the owner.” (See I.C. 49-117(16)). The intent of the owner is evaluated by observing limitation to access, such as the presence of physical barriers, posted signs restricting the types of users and whether there are expressed consequences for entry. Examples included: “Tenants Only,” “Employees Only,” and “No Trespass-

ing.” However, if there is evidence the lot is used by members of the public without consequence, even an area restricted by signs may fall within the statute. The Court stated because of the ambiguity of the statute these types of determinations would need to be made on a case-by-case basis.

### CONCLUSION:

Going forward, this decision will be an important reference when determining whether the DUI statute can be enforced on privately maintained roads and/or parking lots. The key to determine whether privately-owned parking lots or roadways will fit under the statutory requirement of “private property open to the public” is to ask yourself a number of questions.

### Here Are 10 Questions To Consider:

1. What is the size of the property?
2. Who has access to the property?
3. How many have access?
4. Is it business or residential?
5. Is it immediately accessible from a public roadway or sidewalk?
6. Is the location a common area?
7. Are there any limitations to access, such as physical barriers or guards?
8. Are there posted signs restricting access?
9. If so, is there express language outlining consequences for entry?
10. Even if a sign is posted, is there evidence whether the consequences are actually enforced?

## Training & Conferences Notice

(Click on Course Names for More Information)

Alcohol Beverage Control Training — January 17-18, Idaho Falls, Idaho

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

ITD-OHS Traffic Safety Workshop — February 21-23, Boise, Idaho

Cops in Court Training — February 29, Rupert, Idaho

# LAST CALL

Happy New Year! I hope this edition of *For The Road* finds you in a festive mood. There is much to celebrate as we consider the possibilities on our roads ahead. My responsibilities as Idaho's Traffic Safety Resource Prosecutor has taken me on many diverse paths this past year.

A very memorable experience was conducting an alcohol environmental scan with youth attending the National Enforcing Underage Drinking Laws (EUDL) Leadership Conference. We took a bus ride and scanned for the number of liquor outlets, their locations, hours of sale, where the alcohol is consumed and how it was promoted. We went inside a convenience store and noted the different types and brands of alcohol, how it was promoted on the windows, walls and displays. We questioned the store owner and also looked at whether the store had any signs stating they would not sell to individuals under the age of 21.

The youth conducting the scan were bright, energetic and did not miss a single thing. I came away from the experience recognizing the importance of the information we collected. It is more than just collecting the number of deaths on our roadways due to alcohol and other drugs. It is more than the number of DUI arrests or underage drinking parties detected. We can do more in our communities to recognize WHERE specifically our community problems occur.

Idaho has many great community coalitions who are doing important work. It has been my privilege to cross paths with many Idaho citizens who dedicate their extra time to make Idaho a better and safer place for our children. I thank them for their time and efforts in this important work!

The Idaho Legislature has a real opportunity this year to help Idaho move *Towards Zero Deaths* with legislation that is being proposed (House Bill 450). This legislation will provide dedicated funds for



West Virginia Capitol

Alcohol Beverage Control staffing. No state has fewer ABC officers in comparison with the number of alcohol licenses. This will improve compliance, education and will provide much needed assistance to the licensees. Increased ABC staffing and increased community involvement would be the right path for Idaho to take. Happy New Year!

--- *Jared Olson, TSRP*



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