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FOR THE ROAD

Idaho Prosecuting Attorneys Association

COURT WATCH: U.S. SUPREME COURT TO HEAR IMPLIED CONSENT CASES

By Jared Olson, Idaho Traffic Safety Resource Prosecutor

This year the U.S. Supreme Court will decide the constitutionality of implied consent laws, specifically, if there is no warrant, whether an individual can be charged with a crime for refusing to take such a test. Last month, the U.S. Supreme Court granted review in three impaired driving cases: two from North Dakota and one from Minnesota. The Court ordered all 3 cases to be consolidated for oral argument.

Every state has some form of "implied consent" laws for drivers who refuse to undergo evidentiary testing during an impaired driving stop. Most states impose a driver's license suspension penalty, but evidently 13 states allow for criminal charges to be applied. North Dakota and Minnesota both have laws authorizing a criminal penalty for refusal of an evidentiary test. North Dakota makes refusal of any chemical test in connection with operation of a motor vehicle upon a public road a class B misdemeanor (N.D.C.C. 39-08-01). Minnesota makes it a crime to refuse an officer's request for an evidentiary test, if the driver has been validly arrested for driving under the influence.

The cases to be reviewed include the refusal of a breath test, refusal of a blood test, and refusal of field sobriety testing which resulted in being take to a hospital for a non-consensual blood test. All three cases present the same issue for review:

"Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood."

How the Court's potential ruling will affect Idaho law remains to be seen. It is possible the ruling will only effect those states that

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criminalize a refusal, and not impact states, like Idaho, who administratively penalize drivers for refusal by a driver's license suspension.

In a number of recent decisions, the Idaho Supreme Court has upheld Idaho's implied consent statute, which deems anyone who drives on an Idaho roadway has given their consent to evidentiary testing when an officer has reasonable grounds to believe the driver is under the influence. The driver must withdraw that consent.

Furthermore, the Idaho Supreme Court made a distinction between blood tests and breath tests. In *State v. Haynes*, 355 P.3d 1266 (2015) the Idaho Supreme Court found when it comes to a request for a breath test, the longstanding requirement of a warrant or a well delineated exception to the warrant requirement, such as consent, is not needed. All that is needed is the request for a breath test to be reasonable.

The Court reaffirmed their decision in *State v. Riendeau*, 355 P.3d 1282 (2015), stating the breath test was not an unreasonable search, and therefore, did not violate the 4th Amendment to the U.S. Constitution, nor Article 1, Section 17 of the Idaho Constitution. Neither the Idaho Supreme Court, nor the Idaho Court of Appeals have been unanimous in their rulings on this matter, therefore it will be interesting to see whether the upcoming decision by the U.S. Supreme Court brings more change.

Historically, implied consent laws were passed to encourage drivers to submit peacefully to an evidentiary test in a timely manner, because evidence was being lost due to the body metabolizing the alcohol. The U.S. Supreme Court shot down the exigency argument when it is based solely on the body's metabolism of alcohol in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

Therefore, the Supreme Court is expected to clarify its ruling in *McNeely* with these new cases. The current speculation is the Supreme Court will differentiate between criminal and non-criminal penalties for refusing an evidentiary test. Regardless of the ruling, it will undoubtedly have an impact both locally and nationally in the courtrooms and in how impaired driving crimes are investigated and handled on the streets.

Here is a quick synopsis of the three cases consolidated for oral argument:

Birchfield v. North Dakota, 858 N.W.2d 302 (N.D. 2015): Birchfield failed a preliminary on-site test of his breath with a reading of 0.254 blood alcohol content. He then refused an additional chemical tests. He was subsequently convicted for refusal of the test, a class B misdemeanor. The North Dakota Supreme Court rejected the arguments that the criminal penalty statute and the implied consent law violated the Fourth Amendment to the U.S. Constitution.

U.S. Supreme Court Building

Beylund v. Levi, Director, N.D. DOT, 2015 WL 8485544 (no. 14-1507); opinions below, Beylund v. Levi, 859 N.W.2d 403 (N.D. 2015): Beylund failed to supply an adequate breath sample for the on-site breath testing instrument. Beylund was then transported to a hospital for a blood draw, where Beylund was advised of the North Dakota refusal law, including the criminal penalty. Beylund consented to a blood draw which tested positive for alcohol. An administrative hearing officer imposed a 2-year license suspension for the refusal to provide the breath sample. The North Dakota Supreme Court upheld the license suspension and rejected arguments the law violated the Fourth Amendment by authorizing and penalizing a warrantless search.

Bernard v. Minnesota, 859 N.W.2d 762 (Minn. 2015), *affirming*, 844 N.W.2d 41 (Minn.App.2015): After being arrested for suspicion of DUI, Bernard refused to participate in a field sobriety test. He was transported to the police station and provided an advisory regarding the implied consent law and the penalties for refusal. After being allowed to make a telephone call, Bernard also refused to take a breath test.

Bernard was charged with two counts of 1st degree refusal to take the tests regarding a suspected DUI (a felony). He had 4 prior DUI convictions. Originally, the criminal charge was dismissed as violating Bernard's due process rights. This was reversed by the Minnesota Supreme Court, but because the Court also factored the 4th Amendment and the *McNeely* decision into its analysis, the issue was preserved for review by the U.S. Supreme Court.

Note: Subsequent to the *Bernard* case, the Minnesota Court of Appeals held the refusal statute criminalizing refusal of a blood sample without a warrant as unconstitutional in *State v. Trahan,* 870 N.W.2d. (Minn.App. 2015). The court distinguished the *Bernard* ruling as limited to a breath test. This case is currently under review by the Minnesota Supreme Court.

Idaho Traffic Law Update

State v. Neal, (2015):

The Idaho Supreme Court substituted its previous opinion issued November 4, 2015. The prior opinion was discussed in the previous edition of ***For The Road***, which can be read by **Clicking Here**.

The only difference is the substituted opinion includes the written opinion of Justice Horton (with Justice Eismann concurring) who concurred in part and dissented in part. The dissenting opinion is worth reviewing and can be read by clicking on the case name above.

State v. Kelley, (Ct.App.2015):

Oregon State Police advised the Idaho State Police they stopped Kelley and suspected drug activity, but no drug dog was available and Kelley was allowed to continue on his way. An Idaho officer stopped Kelley for failing to signal for 5 seconds when changing lanes on I-84. During the stop, Kelley provided a driver's license and car registration from different states, was unable to provide proof of insurance, and during questions about his trip provided false information about his encounter with the Oregon police and details about his trip. The officer observed bloodshot eyes and observed eyelid tremors consistent with recent marijuana use. Approximately 8 minutes into the stop a drug dog performed an exterior sniff and alerted on the vehicle. Marijuana was found in the trunk.

First, Kelley argued I.C. 49-808(2) was void for vagueness as applied to his conduct, because in addition to being considered a controlled access highway, I-84 may be considered a "through highway" as defined in I.C. 49-109(5)(c). The Court of Appeals rejected this argument holding, "no person of ordinary intelligence would reasonably believe that I.C. 49-808(2) requires a driver on I-84 to signal for less than one second before changing lanes."

Next, Kelley argues the officer unreasonably extended the length or scope of the traffic stop for a drug investigation and drug dog search, specifically that this occurred after the officer last mentioned the proof of insurance, less than 4 minutes into the stop.

The Court of Appeals concluded that Kelley's misinformation, confusing travel plans, and bloodshot eyes provided the officer reasonable suspicion Kelley may have been involved in drug-related activity before the officer's last mention of the proof of insurance. The Court held based on the totality of the circumstances the officer had reasonable suspicion to continue Kelley's detention allowing the drug dog search.

Finally, Kelly argues there was not sufficient probable cause to search the trunk of the car without a warrant. The Court disagreed noting the record shows the rear seat was partially laid down, exposing the trunk compartment, which would have allowed the air to flow to and from the trunk area. Idaho case law has not imposed limits on the area of a vehicle that is searchable based upon a drug dog alert. The Court held that Kelley did not demonstrate the drug dog's alert provided probable cause to search only the localized area of the car where the drug dog indicated. The dog search in this case provided probable cause to search the trunk.

State v. Linze, (Ct.App.2015):

Linze was a passenger in a vehicle stopped for a cracked windshield. The officer ran Linze's identification and learned Linze had an extensive drug history, including a recent possession case. The officer requested a drug dog and continued conducting a warrants check and writing the driver a citation. The canine unit arrived 10 minutes after the request and 19 minutes after the vehicle was stopped. During the canine sweep, the initial officer provided "officer cover." The dog alerted within 30 seconds, and it was undisputed that it was just over two minutes between the time the K-9 officer arrived and when the dog alerted.

The two issues in this case are: (1) Whether the officer prolonged the stop by delaying writing the citation in order for the drug dog to arrive; and (2) Whether the officer prolonged the stop by assisting in the canine sweep of the vehicle.

The Court of Appeals explained there was no finding by the district court indicating what amount of time is reasonable to conduct a stop and issue a citation for a cracked windshield (the 19 minutes). The district court was not at fault for failing to make these findings because the U.S. Supreme Court's *Rodriquez* decision had not been published. The Supreme Court in *Rodriquez* held that the central question regarding canine sweeps is whether the sniff prolongs or adds time to the stop.

Because the officer stopped for approximately two and half minutes to provide cover for the canine officer during the sweep of the vehicle, this resulted in an unlawful extension of Linze's detention. Additionally, the Court of Appeals held there was not reasonable suspicion to conduct an investigation for drug-related offenses, justifying the extension of Linze's detention. Therefore, Linze's conviction for possession of methamphetamine was reversed.

State v. Lovely, (Ct.App.2015):

Lovely was traveling from Portland, Oregon to Minneapolis, Minnesota, when the bus she was on made a scheduled stop in Boise. While adjusting checked luggage a Greyhound employee detected a strong odor of marijuana coming from a red suitcase belonging to Lovely. The police were called. An officer, and later his drug dog, could also detect an odor of marijuana coming from the red suitcase. The lock was broken and the drugs were found. Another suitcase belonging to Lovely also emanated the odor of marijuana. Upon arrest, meth was found in Lovely's purse.

Lovely does not challenge whether there was probable cause to search her suitcases. Instead, she argues the automobile exception did not apply in this case because: (1) the bus was not "readily mobile to her" because she was not in control of it; (2) a common carrier is different than a private car, because it follows a predetermined route, and the officers should have obtained a warrant before the bus' next stop; and (3) she did not have a diminished expectation of privacy.

The Court of Appeals rejected Lovely's arguments holding the automobile exception applies to a commercial bus. Furthermore, the officer had probable cause to search both suitcases. Therefore, the search was permissible under the automobile exception.

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Idaho Traffic Law Continued . . .

State v. Case, (Ct.App.2015):

Case was stopped on Thanksgiving Day, for suspicion of improper use of a dealer plate because it was a holiday and the dealership was believed to be closed. At some point after activating the overhead lights, dispatch notified the officer the dealer plate "did not return" (unable to find the plate number in the DMV database).

Case argued the traffic stop was not supported by reasonable suspicion because the officer did not have the dispatch report prior to initiating the traffic stop. The District Court denied the motions to suppress finding it was reasonable for the officer to suspect improper dealer plate use because Case was using it outside of business hours. Case appealed arguing a properly displayed dealer plate carries a presumption of validity because there are multiple legitimate uses for dealer plates outside of business hours.

Upon reviewing I.C 49-1637, the Court of Appeals said the plain language of the statute included multiple circumstances where a dealer plate may be legitimately used outside of business operating hours. For example, potential buyers can take the vehicle home for test-driving purposes after business hours, including holidays. Therefore, the Court held a properly displayed dealer plate carries with it a presumption of validity and cannot serve as the sole basis for reasonable suspicion to make a traffic stop.

Note: The State argued an alternative theory that by the time Case was actually seized, the officer knew the dealer plate did not return, giving him reasonable suspicion the dealer plate was invalid. The Court would not address this alternative theory because the facts were not sufficiently developed on the trial court record. In short, it is not clear on the record when exactly the officer was notified the license plate did not return.

Hern v. ITD, (Ct.App.2015):

The Court of Appeals vacated Hern's license suspension based on the Idaho Supreme Court's decisions (*Haynes & Riendeau*) holding the 2013 breath testing standard operating procedures in effect at the time of Hern's case were not adopted in compliance with IDAPA.

Note: The SOPs have since been promulgated as rules.

Unpublished Opinions

State v. Fernandez, (Ct.App.2015):

Fernandez hired an expert to challenge the accuracy of his breath test of 0.169/0.171. The expert indicated he would offer testimony about the accuracy of the Intoxilyzer 5000 and how diabetes and GERD could negatively affect the breath test results.

The State filed a motion in limine and the district court found Fernandez proffered no evidence showing: (1) his blood sugar levels were elevated at the time of the stop or before the breath test; (2) he was not in a state of ketoacidosis at the time of the breath test; (3) he had a medical diagnosis of GERD; (4) he was experiencing acid reflux during or before the breath test; or (5) he had unabsorbed alcohol in his stomach at the time of the test. Therefore, the court held any testimony of diabetes or GERD was not relevant and the expert testimony was not admissible. The Court of Appeals affirmed the district court's judgment and order granting the motion in limine.

State v. Nichols, (Ct.App.2015):

Nichols was charged with a per se DUI after a blood draw result of 0.08 BAC. The State filed a motion in limine prohibiting Nichols from: (1) calling an expert witness or eliciting any testimony from the State's witnesses regarding the measurement of uncertainty or margin of error on the blood test; (2) arguing or mentioning the measurement of uncertainty in any way at trial; (3) calling any expert witness or eliciting any testimony from the State's witness regarding any alleged rising blood alcohol content in any way at trial, and (5) arguing or mentioning that the State cannot prove the Defendant's alcohol concentration at the time he was driving.

Nichols claimed the State failed to give notice it was proceeding on a per se basis, and therefore, may only proceed under the impairment theory. He argued that under the impairment theory, reliability of test procedures, such as evidence of measurement uncertainty, margin of error, and rising BAC was relevant. Further, he argues the evidence is relevant even under the per se theory.

First, the Court of Appeals rejected Nichols' claim the State failed to give notice it was proceeding under a per se theory. The charging language clearly included the per se theory.

Next, the Court of Appeals rejected Nichols' claim that evidence challenging the general reliability of blood alcohol concentration tests is admissible. The Court agreed with the trial court that the evidence is irrelevant. Nichols was not attempting to challenge the blood draw process to establish it did not accurately measure his BAC in the sample taken. Nichols only argued he was entitled to challenge the general reliability and accuracy of blood draws.

The Court of Appeals relied on the Idaho Supreme Court's holding and analysis in *Elias-Cruz v. Idaho Dep't of Transp.,* 153 Idaho 200 (Ct.App.2014). The Supreme Court held evidence is irrelevant under the per se theory if it regards: measurement of uncertainty, margin of error, and rising and dissipating blood alcohol content in relation to the State's inability to prove the defendant's actual alcohol concentration at the time he was driving. The Court of Appeals explained that this information does not relate to whether a driver violated the per se DUI offense, which simply requires that the blood test yielded a result at or above the per se limit.

Finally, Nichols' claimed the exclusion of this evidence violated his Sixth and Fourteenth Amendment right to due process. As the Supreme Court held in *Elias-Cruz*, a defendant does not have a constitutional right to submit irrelevant evidence.

WEB SITES

Idaho TSRP
www.TSRP-Idaho.org

Idaho Prosecuting Attorneys Association
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.napc.us

NDAA's National Traffic Law Center (NTLC)
www.ndaa.org

Idaho State Police Forensics
www.isp.idaho.gov/forensics/

Alcohol Beverage Control
www.isp.idaho.gov/abc/

New 2015 NHTSA Manuals

New manuals and curriculum are now available for all impaired driving curriculum produced by TSI/NHTSA/IACP. This includes the Standardized Field Sobriety Testing (SFST), Standardized Field Sobriety Testing Refresher, Advanced Roadside Impaired Driving Enforcement (ARIDE), and the Drug Recognition Expert (DRE) course.

All officers are encouraged to seek out upcoming trainings wherein they can be trained using the new curriculum. Prosecutors are also encouraged to attend the training and become familiar with the changes to these course. Officers & Prosecutors can contact Jared Olson, Idaho TSRP for additional information.

EDR "Black Box" Law

On December 4, 2015, President Barack Obama signed into law the "Driver Privacy Act of 2015 ("Act"). The Act addresses privacy concerns for data collected on an Event Data Recorder (EDR), sometimes referred to as a vehicle's "black box." This new federal requirement conforms with normal practice in Idaho, as search warrants are routinely sought for such data in crash investigations.

The law applies to any data retained by an EDR installed in a vehicle, and that the data belongs to the owner of the vehicle, or in the case of a leased vehicle, the lessee of the vehicle in which the EDR is installed. It does not matter when the vehicle was manufactured. For purposes of this law, an EDR is defined in 49 CFR section 563.5 and generally means a device or function in a vehicle that records the vehicle's dynamic time-series data during the time period just prior to or during a crash event, but does not include audio and video data. Installed in nearly all new cars, EDRs capture data elements such as speed, braking, use of a seat belt, and other information.

The Act provides that data recorded or transmitted by an EDR may not be accessed by a person other than the vehicle's owner or lessee. There are some exceptions:

- as authorized by a court or judicial or administrative authority, subject to the standards for admission into evidence required by that court or other administrative authority;
- if pursuant to written, electronic, or recorded audio consent of the vehicle owner or lessee;
- to carry out certain investigations or inspections authorized by federal law, subject to limitations on the disclosure of personally identifiable information and the vehicle identification number;
- to determine the need for, or facilitate, emergency medical response in response to a car accident;
- for traffic safety research, so long as the personally identifiable information of the owner or lessee and the vehicle identification number is not disclosed.

A number of states already have laws addressing privacy concerns related to information collected on EDRs. The exception to the collection of data vary state to state, but many of those laws require the consent of the owner of the vehicle. Idaho does not have a law addressing privacy concerns related to information collected on EDRs.

Training & Conferences Notice

(Click on Course Names for More Information)

Traffic Tuesdays Webinars — Feb 9th, Mar 8th, Jan 12th (Online)

IPAA Winter Conference — February 3-5, Boise, Idaho

Idaho Highway Safety Summit — March 15-16, Coeur d' Alene, Idaho

National Lifesavers Conference — April 3-5, Long Beach, California

LAST CALL

This holiday season a few bizarre impaired driving defenses hit the national media. My office phone and email box lit up after a New York judge dismissed DUI charges after being presented with evidence the defendant suffered from "auto-brewery syndrome." The woman had provided a breath test 4 times the illegal limit.

Auto-brewery syndrome, also known as gut fermentation, is an extremely rare medical condition in which a person's gut actually ferments their own ethanol, due to large amounts of gastrointestinal yeast. I emphasize extremely rare, but if you do win the rare medical condition lottery, you will inevitably make the poor decision to drive, and immediately be detected by the police. (*I hope readers are catching my cynicism*.)

In the huge realm of possibilities it is HIGHLY improbable to have this medical condition. The scant documentation shows there is usually some event that leads to death of normal gut bacteria, such as chemotherapy or a large regimented dose of antibiotics. Next, a specific yeast called *Saccharomyces cerevisiae* would need to be introduced into your stomach. It will not be a sudden medical attack at a holiday dinner party. You are going to notice this condition well beforehand, instead of being surprised by it when a police officer pulls you over, while driving on a flat tire.

In a research article, Dr. Barry Logan and Dr. Wayne Jones concluded, "The notion that a motorist's state of intoxication was caused by endogenously produced ethanol lacks merit." ("Endogenous ethanol 'auto-brewery syndrome' as a drunk-driving defence challenge" Med. Sci. Law, (2000) Vol. 40, No. 3.)

The most interesting online article on the subject can be found at www.medicalbag.com **(Click Here)**. Using the case study, the author states the test subject with a 0.12 BAC would have had to produce 50 times the normal daily amount of bodily gas production, but do it in a period of only 2 hours. The person would have to be suffering extremely severe stomach pains. I suspect it would be a very noticeable condition during a DUI investigation, especially on the intimate drive to the jail.

If, and when, the auto-brewery defense is raised in an impaired driving trial, the defendant must produce relevant evidence. To be admissible, an actual medical diagnosis is required, this would include documentation the defendant's stool tested positive for brewer's yeast. Finally, if the defendant knew they had the condition, it is certainly unfortunate, but they still knowingly drove impaired! If I had my choice of extremely rare medical conditions, I would rather be diagnosed with a strong case of "affluenza." **-- Jared Olson.**

Idaho Prosecuting Attorneys Association

TOWARD ZERO DEATHS

FOR THE ROAD

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Idaho Transportation Department

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