

FOR THE ROAD

Idaho Prosecuting Attorneys Association



ESTABLISHING EXIGENT CIRCUMSTANCES IN THE IMPAIRED DRIVING CASE

By Jared Olson, Idaho Traffic Safety Resource Prosecutor

Collecting blood evidence is often necessary to dispense fair justice, especially in light of the ever increasing drugs, other than alcohol, that are impairing drivers. If blood evidence is not obtained in a timely fashion, it is lost forever. Last month, the Idaho Supreme Court in *State v. Chernobieff* provided more context when exigent circumstances apply for a warrantless blood draw in a DUI case. Understanding exigency in the blood draw context will help in preserving and collecting this valuable evidence.

The quick facts are that Chernobieff was arrested for DUI based on evidence including the smell of alcohol within his vehicle, his eyes were glassy and bloodshot, a strong odor of alcohol on his breath, his speech was slow and lethargic, he had difficulty completing some of his sentences, he appeared agitated, he refused the standardized field sobriety tests, and he refused

to take a breath test after the 15 minute observation period. Based on the totality of the circumstances, the officer sought a warrant for a blood draw.

The deputy prosecutor testified he called the on-call magistrate at least three times, possibly four or five times, over approximately 10 minutes. The prosecutor also left a voicemail. There was no system in place to reach a backup judge. Based on these facts the prosecutor directed the officer to conduct a warrantless blood draw. The test result indicated Chernobieff's blood alcohol content was 0.226.

The issue on appeal is whether the specific facts of this case qualified as exigent circumstances or if the warrantless blood draw violated Chernobieff's rights under both the United States and Idaho Constitutions.

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Blood Search Warrants

The administration of a blood alcohol test constitutes a seizure of a person and a search for evidence under both the Fourth Amendment to the U.S. Constitution and Article 1 § 17 of the Idaho Constitution. Searches and seizures performed without a warrant are presumptively unreasonable. To overcome this presumption the State bears the burden to prove:

1. The warrantless search fell within a well-recognized exception to the warrant requirement; and
2. Even if the warrantless seizure is permissible, it must still be reasonable in light of all of the other surrounding circumstances.

In the recent *Birchfield* decision, the United States Supreme Court recognized that an advantage to blood tests over breath tests is the ability to detect not just alcohol, but also other impairing substances. The Court recognized in breath testing cases the “search incident to arrest” exception to the warrant requirement applies. However, the Court would not extend the search incident to arrest doctrine to blood tests, even in light of its ability to detect more than just alcohol. The Court said, “Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not.”

The bottom line is that if there is time to get a warrant for a blood test, then a warrant is required.

Exceptions to Warrant Requirement

There are two exceptions to the warrant requirement that have been recognized by Idaho appellate courts: exigent circumstances and consent. If a driver provides consent to a blood draw, then a warrant is unnecessary. Whereas, the exigent circumstances exception allows officers to conduct a warrantless search when there is a compelling need for official action and no time to secure a warrant.

Consent Exception

Prior to the U.S. Supreme Court’s decision in *Missouri v. McNeely*, the Idaho Supreme Court had held a driver’s implied consent was irrevocable. After *McNeely*, this irrevocability was overturned. Currently, per Idaho Code § 18-8002, drivers still give their initial consent to evidentiary testing by driving on Idaho roads voluntarily. However, a driver can withdraw his or her statutorily implied consent. Furthermore, if the driver refuses to submit to the offered test, the driver is withdrawing implied consent to all evidentiary testing in general, not merely to the offered test. This means if the driver refused the breath test, the driver has also revoked consent to a blood test.

Exigent Circumstances Exception

A warrant is not required if the exigencies of the situation make the needs of law enforcement so compelling the warrantless search is objectively reasonable under the 4th Amendment. Whether an exigency exists is based on the totality of the circumstances, which is analyzed on a case-by-case basis. The exigent circumstances exception does not apply where there is time to secure a warrant.

An officer is justified in performing a warrantless blood draw when he “might reasonably have believed he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of the evidence.” The U.S. Supreme Court found the destruction of evidence in alcohol in the defendant’s bloodstream. However, the U.S. Supreme Court held in *McNeely* the natural dissipation of alcohol in the bloodstream does not categorically support a finding of exigent circumstances. Rather, the natural dissipation of alcohol in the bloodstream is just one factor in the totality of circumstances that may support a finding of exigency in a specific case. In *Schmerber*, other relevant factors included the need to investigate the scene of a car crash and transporting the defendant to a hospital for injuries suffered in the crash.



Collect the
Blood
Evidence

The Supreme Court has stated the proper analysis for determining if exigent circumstances exist is whether, under the totality of the circumstances of the case, the needs of law enforcement were sufficiently compelling that it was reasonable to conduct the blood draw without a warrant. In *Chernobieff*, the Idaho Supreme Court found there was substantial evidence to support the finding of exigency.

In this case, the following factors were found to support exigency: (1) natural dissipation of alcohol in the blood; (2) the lateness of the hour, (3) time required for the investigating officer to arrive on scene after request for assistance from other officer; (4) time required to play the administrative license suspension audio; (5) time to begin the required 15-minute observation period for a breath test; (6) time required to transport the defendant to jail; (7) time required to contact the phlebotomist; (8) time required to contact the prosecutor; (9) the prosecutor’s good faith effort to reach a judge for a warrant; (10) the inability to contact the on-call magistrate after a number of attempts; and (11) no back-up process to contact a different judge.

The Idaho Supreme Court did reject delay resulting from Chernobieff’s refusal to perform field sobriety tests as a relevant exigency factor. The Court said, “Any delay caused by Chernobieff’s exercise of his Constitutional rights may not be considered.” Yet, even after excluding this factor, there was substantial evidence to support the finding of exigency in this case.

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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/



The Idaho Supreme Court did voice concern the lack of a back-up magistrate, particularly in Ada County, where multiple magistrate judges are employed. The Court said, “The State has an obligation to provide a functional and reliable system for obtaining warrants in circumstances like these, both during regular office hours and through the night and on weekends. When an on-call magistrate is unable to be reached by law enforcement, the State has the burden of showing why that is the case and that good cause exists for the unavailability.”

What the Supreme Court failed to provide was the historical background of the then developing case law, which would explain the lack of a back-up magistrate in this case. Chernobieff was stopped and arrested for DUI on September 11, 2013. The U.S. Supreme Court issued the *McNeely* decision on April 17, 2013, which changed how exigency is analyzed by Idaho courts. Yet, the *McNeely* decision did not address the consent exception. The Idaho Supreme Court had not overruled its *Diaz* decision, wherein Idaho’s implied consent statute was held to be an irrevocable consent by the driver, until *Wulff*, which was decided on October 29, 2014, almost a year after *Chernobieff*. At the time of Chernobieff’s arrest, a need for a back-up magistrate to sign warrants was not necessary based on implied consent.

Yet, the Supreme Court’s reasoning is an important factor to consider in current and future cases. An important factor to consider is the availability of a magistrate, and whether steps have been taken for magistrates to make themselves available to sign warrants. The Supreme Court was clear that it is the responsibility of the State and local judicial system to provide a functional, reliable warrant system.

The Idaho Court of Appeals has also recently recognized the applicability of exigent circumstances on a case-by-case basis. In *Franklin*, the Court of Appeals listed the following factors: (1) the availability of a magistrate; (2) the need for police to attend to and investigate a car crash; (3) the availability of other emergency personnel; (4) technology that enables police to secure warrants quickly; and (5) the procedures for obtaining a warrant. In this case, the Court held the officer’s investigation of the crash did not delay law enforcement’s ability to timely obtain a warrant based on the totality of the circumstances. This case underscores the exigent circumstances exception does not apply where there is time to secure a warrant.

Remember, seeking a blood draw under the exigent circumstances exception remains subject to 4th Amendment standards of reasonableness. As with the consent exception, the procedure must be conducted without unreasonable force and in a medically acceptable manner. Officers should always provide documentation with both exigent circumstances and consent (including implied consent) in mind. Furthermore, prosecutors should always argue both exigency and consent when a warrantless evidentiary blood draw is performed.

If in doubt, do not hesitate in seeking a search warrant. If there is time to get a warrant for a blood test, then a warrant is required. Obtaining the best available evidence should always be the goal. With the increase of drivers under the influence of prescription drugs, synthetic drugs and other illicit drugs, it is unrealistic to rely strictly on breath testing to adequately investigate these lethal crimes. With the proper procedures and training in place, the collection of this valuable evidence will further the cause of justice.

Training & Conferences Notice

(Click on Course Names for More Information)

Traffic Tuesdays Webinars — Feb 13, Mar 13, Apr 10 (Online)

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

National Lifesavers Conference — March 26-28, Charlotte, NC

Idaho Highway Safety Summit — April 18-19, Boise, Idaho

Idaho Traffic Law Update

State v. Hill, (2016):

Hill appeals his Felony DUI conviction arguing the court inappropriately allowed hearsay testimony regarding nystagmus. During trial, the investigating officer testified he was taught in the academy that vertical nystagmus is, “generally an indicator of over a certain level, which is generally 0.10, is what I was taught.” Defense counsel objected before the officer made this statement, but the trial court overruled the objection. During closing arguments, the prosecutor also made reference to this statement arguing Hill was impaired.

The Idaho Supreme Court held the trial court abused its discretion in admitting this testimony over the defendant’s objection, holding the statement was inadmissible hearsay. The State argued the statement was not offered to prove the truth of the matter but only to supply context. The Supreme Court disagreed holding the prosecutor’s argument in closing was evidence the statement was directly tied to its truth.

The Supreme Court further rejected the State’s argument even if the testimony was hearsay, it should be allowed under I.R.E. 703 as the basis for an expert opinion. The Court explained Rule 703 does not permit that information to be disclosed to the jury in the absence of a ruling that its probative value substantially outweighed its prejudicial effect. The trial court did not make such a determination.

Finally, because the State’s reply brief was silent in addressing harmless error, the Supreme Court would not consider it and vacated Hill’s felony DUI conviction and remanded for a new trial.

State v. Farfan-Galvan, (2016):

Farfan-Galvan was charged with felony DUI, but moved to dismiss, collaterally attacking one of the underlying misdemeanor convictions. Farfan-Galvan argued his 2010 conviction was entered in violation of his right to counsel. The Supreme Court agreed finding there was no indication in the record Farfan-Galvan waived his right to counsel. Since the record was silent, the court vacated his judgment of conviction.

State v. Ambriz, (Ct.App.2016):

Ambriz appeals his DUI conviction arguing the stop of his vehicle violated his 4th Amendment rights because the officers did not have reasonable suspicion of a traffic violation or that he was driving under the influence. The officers testified Ambriz drove off the roadway into gravel during a left-hand turn, and then made quick, jerky movement within his lane of travel.

The Court of Appeals was unable to determine whether Ambriz violated I.C. §§ 49-630(1) and 49-637(1) because the district court did not make sufficient findings of fact. Although the district court made findings relative to Ambriz’s driving, the district court had failed to make findings of fact relative to the elements of the statutes.

However, committing a traffic violation is not the only basis upon which officers may initiate a traffic stop. In this case, the Court found the officers had reasonable suspicion to stop Ambriz for suspicion of driving under the influence. The Court explained that Ambriz’s driving into the gravel on the side of the road while making a left-hand turn and then immediately jerking within the lane of traffic are not within the range of normal driving behavior and are an objective indication that Ambriz was impaired. Under the totality of circumstances in this case, the officers had reasonable suspicion Ambriz was driving under the influence.

Hawkins v. ITD, (Ct.App.2016):

ITD appealed the district court’s dismissal of Hawkins’ Administrative License Suspension based on a violation of procedural due process. The issue in the case was based on the issuance of subpoenas for the production of the video recording of Hawkins’ arrest, which had compliance dates one day after the scheduled hearing. The Court of Appeals criticized ITD’s practice of setting subpoena compliance dates so close to (or after) hearings and strongly discouraged the practice, holding the suspension of issued drivers’ licenses may not be taken away without procedural due process. However, Hawkins failed to prove he was actually prejudiced by not having the video recording before the hearing date.

Unpublished Decisions

State v. Sciandra, (Ct.App.2016):

Sciandra appeals her conviction for DUI, resisting/obstructing officers, and open container. First, she argues the magistrate lacked jurisdiction over her case because an appropriate complaint was never tendered. Second, she challenges the magistrate’s application of *State v. Tomlinson*, 159 Idaho 112 (Ct.App.2015) to preclude her from introducing evidence she was not under the influence at the time she was driving. Sciandra argues *Tomlinson* should be overturned because it unconstitutionally relied upon *Elias-Cruz*, 153 Idaho 200 (2012) which was a civil case and should not be applied to a criminal case.

The Court of Appeals held Sciandra failed to show error with either of her claims. First, the State complied with the rules and there was no deficiency with the complaint. Sciandra had demanded the State submit a sworn written complaint to replace the uniform citation. The State did so two days before the case was set for trial. The Court said this might not be ideal, and could have alleged more specific facts, but the complaint was sufficient because it enabled Sciandra to prepare an adequate defense and prove a *res judicata* effect. Because the complaint imparted subject matter jurisdiction and satisfied due process, it was legally sufficient.

Second, Sciandra’s claim *Tomlinson* unconstitutionally applied *Elias-Cruz* fails. The holding in *Elias-Cruz* does not vary with the burden of proof regardless of whether it is a civil case or a criminal case. In fact, the Court pointed out the Supreme Court applied *Elias-Cruz* to a criminal case in *State v. Jones*, 160 Idaho 449 (2016). Therefore, it was proper for the magistrate to find that general challenges to the reliability and accuracy of approved intoxication testing methods are irrelevant, and therefore not admissible.

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LAST CALL

The deaths and injuries on Idaho's roadways have been disturbingly climbing the last two years. This is unacceptable in our goal to reach **Toward Zero Deaths**. The goal may be lofty, the climb may be difficult, the summit may seem insurmountable; however, to succeed in reaching our goal requires "Great Expectations."

We must expect to drive down deaths and injuries by working together and using effective traffic safety strategies. We must expect to be provided the best tools and training to implement these strategies. We must expect the challenge to be difficult.

The Idaho Office of Highway Safety Staff, Law Enforcement Liaisons, State Impaired Driving Coordinator and Traffic Safety Resource Prosecutor met and planned the 2017 Idaho Highway Safety Summit with these great expectations in mind. It was determined if we were going to do something meaningful in traffic safety, it required "Great Expectations" to do hard things. Therefore, this year we have focused on confronting the challenges we face in reaching our goal of Towards Zero Deaths.

I invite all prosecutors, law enforcement officers, and traffic safety stakeholders who are interested in tackling hard things to attend the **Idaho Highway Safety Summit on April 18-19, 2017** at The Boise Centre. You can register and learn more at: www.highwaysafetysummit.com

The Idaho Transportation Department's Office of Highway Safety is bringing in both national and local experts with the great expectation they will deliver innovative strategies and solutions in achieving the goal of **Toward Zero Deaths**. In return, participations should have great expectations in themselves to leave the Summit with a minimum of three new skills, strategies or tools to immediately apply in helping drive down the deaths and injuries on our roadways.

The agenda for the Summit includes:

- Traffic Enforcement to Make a Difference
- Advanced Detection Skills for Impaired Driving Crimes
- Taking the Mystery out of Enforcing Motorcycle Violations
- Going Inside the Mind of Judge to Improve Your Courtroom Skills



After attending and participating in the many planning sessions for the 2017 Idaho Highway Safety Summit, I have to admit that I have some great expectation of my own. After ten years of attendance at past Highway Safety Summits I expect this to be the best one. I promise this is not one to miss if you are ready to roll up your sleeves and learn to do hard things. I am confident that together we can make a difference and drive our traffic safety goal **Toward Zero Deaths!** -- Jared Olson



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Idaho Transportation Department

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WWW.TSRP-IDAHO.ORG**