

# For The Road

## Idaho Prosecuting Attorneys Association, Inc.



### Web Sites

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

## IPAA Hires First Traffic Safety Resource Prosecutor

Jared Olson was hired as Idaho's first Traffic Safety Resource Prosecutor (TSRP) by the Idaho Prosecuting Attorneys Association (IPAA) through a grant funded by the Idaho Transportation Department's Office of Highway Safety.

The ultimate objective of a TSRP is to be a liaison between prosecutors, judiciary, law enforcement and other stakeholders in the fight against impaired driving, and to provide critical support and instruction to enhance the capability of Idaho's prosecutors to effectively prosecute traffic safety violations.

Jared most recently worked as the Assistant Chief Criminal

Deputy for the Bannock County Prosecutor's Office. His caseload included all felony drug crimes and felony DUI's in Bannock County.

Jared began his career in criminal justice as an emergency dispatcher while working on his Bachelor's degree at Weber State University, as well as attending the Utah POST Academy at night.

He worked as a law enforcement officer for the WSU Police Department in Ogden, Utah and was a detective before attending law school at the University of Idaho. He is currently working on a Criminal Justice Master's degree through the University of Cincinnati.



Jared Olson, Idaho's TSRP

Jared is available to answer your questions and is willing to assist you in any way he can. Please do not hesitate to contact him! All of his contact information is found on the back page of this newsletter.

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## Breath Taking News — New 0.20 Calibration Check

Prosecutors and law enforcement should be aware that the Standard Operating Procedure for Breath Alcohol Testing has been revised by ISP Forensic Services as of November 2006. The changes went into effect starting January 1, 2007. The numbering has been reformatted and a new requirement for running a 0.20 simulator solution test has been added.

For the Alco-Sensor, "A 0.20 simulator solution must be run, and results logged each time the 0.08 solution lot number is changed, *or* once per calendar month at a minimum" (Section 2.1.4.1.2).

"The 0.20 calibration check consists of two samples separated by air blanks" (Section 2.1.4.1.2.1).

For the Intoxilyzer 5000, "Whenever the 0.08 solution is changed, a four-sample (two print cards) simulator port calibration check using a 0.20 solution must be run" (Section 2.2.1.1.2.2).

If you have questions regarding these changes please contact your local Breath Testing Specialist or Dave Laycock at 208-884-7177.

## Idaho Prosecutor Takes a .08 BrAC to Jury Trial

By Jared Olson, TSRP

Prosecutors are often faced with the question of whether they can successfully prosecute DUI cases with breath test results as low as 0.08. Christian Nafzger of the Ada County Prosecutor's Office recently obtained such a conviction in the case of State v. Matthew Askew (H0600815). Provided with the right facts, a prosecutor who is willing to work hard **can** successfully gain a DUI conviction based on a 0.08 BrAC.

### POINTS TO PONDER

1. Can a 0.08 BrAC be successfully prosecuted?
2. What facts must be collected to do it?
3. Identify the trial strategies used in this case.
4. List the possible defenses and identify how this prosecutor met them.

Nafzger had his concerns about prosecuting Askew based on the 0.08/0.09 BrAC. According to Idaho Code section 18-8004(2), any person having an alcohol concentration of less than 0.08 shall not be prosecuted for driving under the influence of alcohol, unless there is competent evidence of drug use combined with the alcohol.

"I wanted to respect the law," Nafzger said. "If Askew was under the legal limit at the time of driving, then I should not be prosecuting him for DUI."

Nafzger was especially concerned because this was not Askew's first DUI conviction. Askew had prior convictions in 2001 and 2003, making this case a felony DUI. To determine whether to prosecute, Nafzger consulted with Gary Dawson, a pharmacologist with 30 years experience and a reserve deputy for the Ada County Sheriff's Department. After this consultation, Nafzger determined this was a case that needed to be tried.

**The Facts.** On October 27, 2004, at approximately 1:48 A.M., Officers Nichols and Kotte of the Boise City Police Department stopped Matthew Askew for failing to use a turn signal. Upon contacting Askew, Officer Nichols could smell the strong odor of an alcoholic beverage coming from Askew's breath and saw that his eyes were bloodshot and glassy in appearance. While speaking with Askew, Nichols also reported Askew's speech was thick and slurred. Askew admitted to "slamming" (you guessed it) two beers about 20 minutes before the traffic stop.

Based on these observations, Askew was requested to perform the standardized field sobriety tests. He claimed to have equilibrium problems due to an ordinance that exploded near him during the first Gulf War. However, Askew said he was not currently receiving any treatment nor taking any medication for this condition. Askew was cooperative with the officers and agreed to perform the tests.

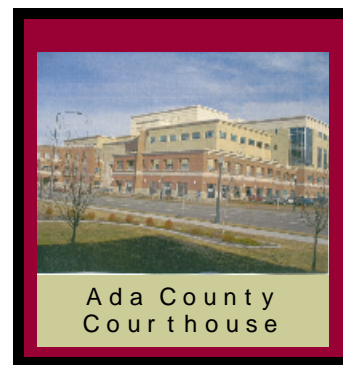
On the Horizontal Gaze Nystagmus test, Officer Nichols observed 4 clues of impairment. On the Walk and Turn, Askew could not keep his balance during the instructions, missed heel to toe once, and took the wrong number of steps for a total of 3 clues. Finally, on the One Leg Stand test, Askew put his foot down once at the 3-second mark, and swayed side-to-side about 3 inches for a total of 2 clues.

Based on his performance of the standardized field sobriety tests, Askew was requested to submit to a breath alcohol test. Askew complied with the request and the test revealed a BrAC of 0.08/0.09. Askew was arrested for Felony Driving Under the Influence based on his prior convictions in 2001 and 2003.

**The Continuance.** Prior to trial, Askew requested a one-year continuance due to his scheduled deployment to Iraq. During this hearing, Nafzger faced judicial pressure to resolve the case and allow the defendant to be deployed. Yet, Nafzger did not bend to this pressure, arguing the motion for continuance should be dismissed and a jury trial be

### Quick Facts:

- 2,950 American soldiers have been killed in Iraq between March 19, 2003 and December 19, 2006. — Source: U.S. Department of Defense.
- From 2003-2005 (no totals yet for 2006) there have been **50,909** people killed in alcohol related crashes in the United States— Source: NHTSA's National Center for Statistics and Analysis



Ada County  
Courthouse

held. Despite his efforts, the judge continued Askew's trial for an entire year.

As with any case, the passage of time could have been devastating to the State's case. Evidence grows stale, witnesses become unavailable and memory begins to fade. Yet, Nafzger would not be deterred from pursuing this case. Upon Askew's return from Iraq, the case was back on the court's docket for trial.

**The Trial.** On October 30, 2006, two years after Askew's arrest, the case was heard by an Ada County jury. A review of the facts reveals a difficult case for the State to present, especially two years removed from the date of arrest. First, there was no driving pattern to present and argue. Second, Askew met the minimum clues of impairment on the One Leg Stand and Horizontal Gaze Nystagmus tests. In addition, Askew was a sympathetic defendant who just returned from fighting in Iraq. In addition, Askew was so cooperative on the date of his arrest the officers' own audio revealed their remorse for having to arrest Askew.

During trial, defense counsel raised the standard DUI arguments, with the main focus on the breath test. For example, Askew's Texas drawl was an

## Success Story Continued . . .

excuse for the slurred sounding speech and his inner ear problem from the ordinance explosion was blamed for his lack of balance. Yet, the main argument revolved around the breath test taken 50 minutes after the initial traffic stop. Defense counsel argued his



client was under the legal limit at the time of the traffic stop and the delay in obtaining the breath test was the cause for the 0.08/0.09 BrAC.

To support this argument, Askew called Wally Baker, a dirt chemist for the State of Idaho, who testified about the extrapolation issue. Defense attorneys occasionally use Baker as an expert witness in DUI cases. However, Baker's last experience in the area of forensic toxicology dates back to the 1980s. He claims to have been involved with the early certification of the Intoxilyzer 5000, but has no recent experience or training with the instrument. Baker currently tests soil and water samples for the State.

Upon Nafzger's motion, the court would not allow Baker to testify about the Intoxilyzer 5000, but did allow Baker to testify about alcohol absorption rates. Baker argued it was

likely that Askew's BrAC was rising at the time of the breath test, rather than dropping. He concluded Askew was likely under the legal limit at the time of driving.

**Overcoming the Defense.** Having anticipated the defense arguments beforehand, Nafzger decided to use Gary Dawson as a rebuttal witness. Using the State's expert as a rebuttal witness, rather than in the case-in-chief, is a strategy Dawson claims has been successful in many cases in which he has testified. "It allows me to see and hear the defense expert testify, and take some notes," Dawson said. "If a prosecutor can save their expert until rebuttal, I suggest they do it."

After listening to Wally Baker testify, Dawson was able to use Baker's own numbers to bolster the State's view of the facts. Dawson was able to show that Askew would have had the equivalent of 5 to 6 beers in his system, rather than the two beers he claimed. "Based on what the defendant blew," Dawson explained, "this case was all about a matter of timing."

According to Dawson, there were four key facts leading to a conviction in this case. First, it was established that Askew had not eaten; therefore the alcohol would be absorbed at a faster pace. Second, Askew claimed to have "slammed" two beers 20 minutes before leaving his house. With Officer Nichols pinning Askew down on this time, the State was able to establish that approximately 50 minutes passed between the consump-

tion of the alcohol and the actual breath test. "On an empty stomach, between 20 and 40 minutes, that alcohol is absorbed and he [Askew] is well within the elimination phase," Dawson said.

The third key fact was Officer Nichols reporting no other alcohol being found in the defendant's vehicle. This removed Askew's ability to testify at trial that he had drunk while in the vehicle. Once again the timing of absorption could be based on the interval between Askew leaving his house and taking the breath test.

The final fact Dawson stated as key to the conviction was uncovered in Nafzger's cross-examination of the defendant. Askew took the stand in his own defense and during cross-examination, Nafzger was able to get Askew to admit to drinking 15 beers throughout the day. "The problem that often arises in DUI cases is that it is almost always self-reported by the defendant," Nafzger said. "To Askew's credit, I think he was pretty honest about his drinking when he took the witness stand."

Nafzger was then able to use Askew's admissions to successfully cross-examine Baker. Using the "15 beers" admission, Nafzger was able to get Baker to concede certain likely scenarios. Then during rebuttal, Nafzger and Dawson used these admissions to show how the Defendant's BrAC could not have been rising between the traffic stop and breath test. "The average person has to drink more than one beer an hour to get above 0.02 [BrAC]," Dawson explained. "And

every hour they are drinking they are also eliminating."

**The Decision.** The case was finally submitted to the jury on Halloween, 2006. The jury deliberated for 8 ½ hours before returning the verdict of guilty to the charge of Felony DUI. Matthew Askew was sentenced on December 7, 2006, receiving a withheld judgment for 5 years, 30 days in the Ada County Jail as a term of probation, 100 hours of community service and an 18-month driver's license suspension. A sentence which can be seen as disappointing under the circumstances, but one in which a prosecutor worked very hard to achieve. "Christian handled the case very, very well," Dawson said.

**"An 0.08/ 0.08 is not a losing case, if the facts one hour prior to the stop have been collected, and depending on how hard the prosecutor wants to work."**

**--Gary Dawson, PhD**

In turn, Nafzger asserts, "The conviction in this case was obtained solely on the expertise and testimony of Gary Dawson."

It is evident that this case was a success based on the collaborative work of Officer Nichols, Officer Kotte, Christian Nafzger and Gary Dawson. The best of DUI cases are difficult to prosecute, but this case is an example that by gathering the necessary facts, and then understanding how to apply those facts, even a 0.08 BrAC can be successfully prosecuted.



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Idaho Transportation Department

**COMING SOON TO THE WEB!!  
IDAHO TSRP WEBSITE**

## **UPCOMING TRAININGS & CONFERENCES NOTICE**

- IPAA Winter Conference — February 7th-9th, 2007, Grove Hotel, Boise, Idaho.
- Lifesavers 2007 Conference — March 25th-27th, 2007, Chicago, Illinois.
- Idaho Highway Safety Summit — April 11, 2007, Boise, Idaho.
- 2007 Drug Recognition Expert Training School — April 16-26, 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.

## **Last Call:**

As Idaho's first TSRP, my goal is to make Idaho a national leader in traffic safety related prosecutions and to reduce the number of alcohol related fatalities on Idaho roads. I will be traveling throughout the State to offer training to prosecutors, law enforcement and the judiciary. In addition, I am available as a resource to assist you in a myriad of ways, including brief bank, expert witness bank, predicate questions, specific case analysis, and individual technical assistance. I may not know all the answers, but I promise to quickly connect you with someone who does!

Currently, I am working on developing a transcript bank of experts testifying in DUI and accident reconstruction cases. I need your transcripts! Please forward copies of their testimonies to me so prosecutors in other counties may benefit from your experiences. If you have suggestions or comments on traffic safety matters that may benefit others, or if you have ideas in how to improve this quarterly newsletter please feel free to contact me at (208) 884-7325 or by email at [jared.olson@post.idaho.gov](mailto:jared.olson@post.idaho.gov). I look forward to working with each of you! —Jared Olson, TSRP

**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 at [jared.olson@post.idaho.gov](mailto:jared.olson@post.idaho.gov).