

FOR THE ROAD

Idaho Prosecuting Attorneys Association



NAMPA PD HOSTS STRATEGIC IMPAIRED DRIVING SEMINAR

Idaho Prosecutors and Law Enforcement Supervisors Should Plan to Attend

On July 29, 2009, Idaho prosecutors and law enforcement administrators will meet at the Nampa Civic Center to share program successes and develop alliances with professionals from all over the state. The Nampa Police Department is hosting **Idaho's Strategic Impaired Driving Enforcement Seminar** in partnership with NHTSA, MADD and the Idaho Department of Transportation's Office of Highway Safety. **REGISTRATION IS FREE!**

Due to Idaho's many rural communities, law enforcement officers and prosecutors face unique challenges in impaired driving cases. It is acknowledged that law enforcement agencies and prosecutor officers are dealing with increased demands, less staff and reduced funding. This "Strategic Impaired Driving Seminar" will explore ways to address our unique challenges and take advantage of evidence-based pro-

grams that have been successful in other rural communities. Participants will learn how these agencies used innovative strategies to enhance their high visibility enforcement efforts, recruited law enforcement participation, energized and publicized their activities and facilitated better reporting.

Topics will include:

- Minnesota's "Operation Night Cap"
- Arizona's Law Enforcement Phlebotomy Program
- Oregon's "Operation Trucker Check"
- NHTSA's ARIDE Training Curriculum; and
- DDACTS -- Data Driven Approaches to Crime and Traffic Safety model program

Registration is now open! [Click Here](#) to register and attend this important seminar.

TABLE OF CONTENTS	
Why Prosecutors Should Attend DRE School	2
Idaho Traffic Law Update	3
Idaho Traffic Law Update Continued ...	4
New Websites Launched	5
New ALS Form Released	5
Last Call: Idaho Travels	6

A FEW REASONS WHY PROSECUTORS SHOULD ATTEND DRE SCHOOL

By Christine Starr, Assistant City Attorney

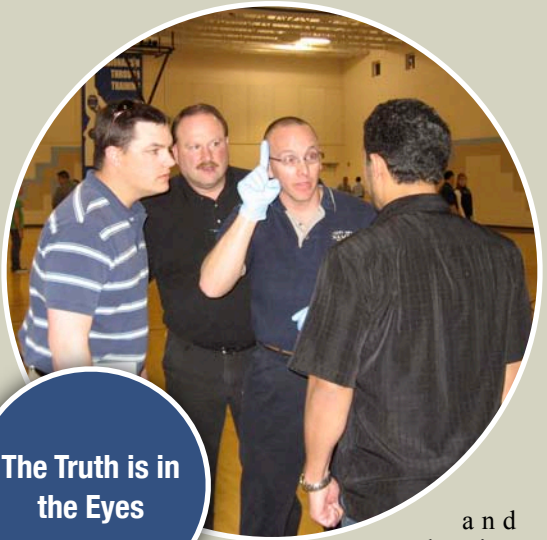
Boise City Attorney's Office

I wasn't really quite sure what to expect as I headed off to the Drug Recognition Expert (DRE) certification class. After years of listening to defense attorneys and some of our judges label the program as "junk science," I have to admit I was worried the certification requirements might not end up meeting the high standards I had always assigned to them.

Fortunately, the class was very impressive and so were the instructors and officers that participated. There were endless hours of preparation, memorization, and testing required of the officers. It definitely wasn't a fluff course that just any officer could pass. As the first week led into the second, I found myself feeling dismayed our certified DREs and their work do not seem to receive the requisite level of rec-

ognition or respect they deserve in the courtroom. A prime example is in the jurisdiction where I prosecute. Some of our judges won't allow us to refer to our DREs as "experts" in front of the jury. Despite the fact our DREs clearly possess "technical, or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact at issue," as required under Idaho Rule of Evidence 702.

I believe prosecutors can play a vital role in helping to further legitimize our DREs and the valuable information their evaluations provide for us in our drug related DUI cases. If more prosecutors attend the DRE course we will be better equipped to articulate the validity of DRE evaluations



The Truth is in the Eyes

and the important role they play in not only detecting drug impaired drivers, but also in providing corroborating evidence of the defendant's impairment.

Aside from all the excellent knowledge to be gained regarding drugs, drug addicts, and the DRE evaluation process, there are other ancillary benefits that make the two week DRE commitment worthwhile. For one thing, it is a great way to build and enhance our relationship with law enforcement. I experienced a very useful exchange of information with the officers. The experience allowed me to really look at a case from their perspective and then translate that experience into helpful information for them in terms of what we need and look for in their reports and in their testimony at court.

All that being said, probably the greatest benefit of attending DRE school is that as a prosecutor you will finally have an in-depth understanding of what the DRE matrix is (some will undoubtedly be surprised to find out that it has nothing to do with Keanu Reeves) and how it is used in DRE evaluations. Understanding the matrix and the DRE evaluation cannot help but enhance your abilities come jury trial time. Importantly, you will also have the tools to help those in your office who are wary of DRE cases, understand the value of a DRE evaluation and the importance of the evidence that they provide. Who knew that talking about rebound dilation, hippus, lack of convergence, piloerection, bruxism, ptosis, and all kinds of other interesting physiological responses to drug ingestion could be so entertaining and beneficial at the same time?



DRE Field Certification

Idaho Traffic Law Update

State v. Willoughby, - Idaho - (2009):

The Idaho Supreme Court granted the State's petition for review in this case wherein Willoughby's motion to suppress was granted and affirmed by the district court and Court of Appeals. The Court of Appeals opinion was previously discussed by *For the Road* in the April 2008 edition, which can be found by [Clicking Here](#).

The Supreme Court affirmed the trial court holding that (1) Willoughby was seized for purposes of the 4th Amendment to the U.S. Constitution, and (2) this seizure was without reasonable articulable suspicion. Once again the court's focus was on the officers' use of their overhead emergency lights in responding to an anonymous tip of a "fight in progress." In its analysis, the Court first found that the officers' use of their overhead emergency lights in close proximity to a parked vehicle constitutes a show of authority that would convey to a reasonable person the officer was ordering him to restrict his movement. Although turning on the overhead lights does not create a *de facto* seizure, it is a significant factor when considering the totality of the circumstances.

The trial court record was incomplete because it lacked the diagrams the officers used to illustrate the layout of the parking lot, the number and location of exits, and the location of Willoughby's vehicle in relation to their patrol vehicles. This may not have

changed the end result, but it is a factor the court could have considered when determining if a seizure had occurred. When the record is incomplete, the Court presumes the absent portion supports the findings of the trial court.

Next, in order for a motorist to be seized they must actually submit to the show of authority. Here the Court determined Willoughby's actions of remaining at the scene and stepping from the car as the officer approached him, constituted submission to the officer's show of authority.

Finally, the Court determined the anonymous tip related by dispatch was without sufficient indicia of reliability to support a finding of reasonable and articulable suspicion. The anonymous tip may contribute to the necessary reasonable suspicion when coupled with the officer's own corroboration of significant details of the tip, but in this case there were no details of the tip to corroborate. The only details involved a physical fight at that location, and upon arrival the officers did not observe a physical fight. The Court concludes even if Willoughby was considered a potential witness rather than a potential suspect, that reasonable suspicion would still be required to detain him. The Court found there was no reasonable suspicion to seize Willoughby.

Schroeder v. ITD, (Ct.App.2009):

Schroeder's driver's license was suspended by the Idaho Transportation Department for BrACs of 0.149 and 0.139 on the Intoxilyzer 5000. Schroeder had challenged the test results because he had belched during the 15-minute observation period, necessitating an additional 15 minutes of observation. The ITD hearing officer sustained the license suspension on the ground that belching alone does not necessitate restarting the monitoring period.

The Court of Appeals reversed the administrative license suspension finding the breath test was not administered in accordance with the Idaho State Police standard operating procedures (SOP). The issue was whether

the breath test regulations mandate the monitoring period restart if the suspect belches. Specifically, the Court found the SOP and Intoxilyzer 5000 Training Manual conflict with respect to whether restarting the 15-minutes is required. The SOP at the time of Schroeder's hearing did not list belching as necessitating the restarting of the 15-minute period.

In short, the Court found the Intoxilyzer 5000 Manual governed in this situation on two grounds. First, the SOP is considered more general applying to the various breath testing instruments certified by ISP. Therefore, the Intoxilyzer 5000 manual is more specific. Second, the Court held that when two legislative enactments contradict, the most recent enactment controls. In this case, the Intoxilyzer 5000 training manual was more current than the SOP.

Editor's Note: There are a few things to keep in mind regarding this opinion. First, the SOP has since been updated and is now more recent than the Intoxilyzer 5000 Manual. However, it would not likely have changed the outcome since the current SOP specifically lists belching and burping as actions that "should not be allowed" during the observation period. Second, the breath tests could have been considered valid despite the officer's noncompliance with the prescribed procedures through expert testimony. The Court discusses how there was no such expert testimony in the record. This is not surprising since the defense holds the burden of proof at ALS hearings, and the State is unrepresented at these hearings. It is unlikely the defense would ever subpoena an expert in these situations. The defendant simply needed to show the SOPs were not complied with. Finally, officers and prosecutors should be aware the defense bar is targeting the 15-minute observation period as an area to attack. Please contact me if you need assistance in combatting these types of motions.

State v. Livas, (Ct.App.2009):

Livas moved to dismiss his DUI case on the ground he was deprived of his statutory right to a speedy trial. The Court of Appeals held it was Livas' filing of pretrial motions that clearly caused the delay in setting his trial and the trial court's need to resolve these motions constituted "good cause" to justify continuing the jury trial past the 6 month mark. The need to resolve

[\(Continued on Page 4\)](#)



Idaho
Supreme
Court

the critical motion to suppress provided a substantial reason that rises to the level of legal cause or excuse for the delay.

Note: In footnote 4, the court suggests it is good practice for the prosecutor to make specific inquiry regarding the timing of a defendant's motion in relation to his/her statutory right to speedy trial.

State v. Turney, (Ct.App.2009):

Turney was charged and convicted of 2 counts of Aggravated DUI and for being a persistent violator. Turney crashed violently into 2 stopped patrol vehicles causing serious injury to the two police officers who were investigating another DUI. He was sentenced to concurrent unified terms of 15 years to life. He appealed arguing the state violated his right against double jeopardy and that his sentence was excessive.

Turney argued he could not be charged for injuries caused to multiple victims stemming from a single act of DUI. He contended the *actus reus* of DUI was only committed once. The Court held the *actus reus* of I.C. §18-8006 is the act of causing injury to another, not the act of driving under the influence. Therefore, when there are multiple victims receiving great bodily harm, multiple charges can be filed against the offender.

Next, the Court held the sentencing court did not abuse its discretion by imposing concurrent unified sentence of life imprisonment, with minimum periods of confinement of 15 years. Turney had "continually flaunted and broken the law at the risk of the public and was the prototypical persistent violator from whom the public needed protection."

State v. Madden, (Ct.App.2009):

Madden attempted to elude police after an ISP trooper observed him driving without headlights. The pursuit began in Kootenai County and ended in Spokane County, Washington. Eluding charges were pursued in each state and Madden argues this violated I.C. § 19-315. The Court of Appeals held prosecution was not precluded because the act which was the basis of the charge in Idaho was not the same act which gave rise to charges in Washington. Although both acts evolved from a continuous course of conduct, Madden did not commit a single act that was simultaneously within the venue of both states.

State v. Snyder, Unpublished Opinion No. 486 (Ct.App.2009):

Snyder appealed a speeding infraction claiming the magistrate impermissibly testified at trial regarding the reliability of the laser speed detection device. Specifically, Snyder contended because his car was wet from driving through some sprinklers, the laser was inaccurate. The Court held the magistrate had not testified at the trial and had not exceeded the bounds of his authority. In addition, the Court held the showing of the laser's reliability is not required based on the court previously deciding this issue in *State v. Williamson*, 144 Idaho 597 (Ct.App.2007). To lay a proper foundation for admissibility, the State must prove the officer was qualified to operate the device, the unit was properly maintained, and it was used correctly. Evidently in this case, the prosecutor had not explicitly laid a proper foundation, but it was adequately addressed through Snyder's "very thorough cross-examination."

State v. Merrifield, Unpublished Opinion No. 487 (Ct.App.2009):

Merrifield contends his right to a fair trial was violated by prosecutorial misconduct, specifically, that the prosecutor vouched for the credibility of the officer during redirect and closing arguments. The Court succinctly outlines the legal analysis to be used when considering whether statements made by the prosecutor rise to a level of prosecutorial misconduct. The Court then applied the proper analysis to the facts of this case and concluded Merrifield failed to demonstrate prosecutorial misconduct. This unpublished opinion is worth reviewing as it demonstrates good redirect questioning by the prosecutor and a proper closing argument after the defendant has placed the credibility of himself and the arresting officer at issue.

State v. Riggins, Unpublished Opinion No. 433 (Ct.App.2009):

Riggins claims several instances of prosecutorial misconduct occurred during his trial for Felony DUI. Like Merrifield, Riggins' failed to show any instances of prosecutorial misconduct during trial. This unpublished opinion is worth reviewing as an example of redirect examination and rebuttal closing. The opinion contains examples of the defense opening the door to certain lines of questioning. Furthermore, it contains an example of

one way to approach the refusal to submit to evidentiary testing in closing argument. See [pages 6-7](#) of the opinion.

State v. Johnson, Unpublished Opinion No. 434 (Ct.App.2009):

Johnson challenges the decision of the trial judge in denying a requested jury instruction on the necessity defense. The basic facts included Johnson cooking at a social event when a friend passed out and paramedics were called. After the paramedics arrived and were treating the patient, Johnson moved his car and hit several other cars in the parking lot. Firefighters on scene detained him until police arrived. Johnson was arrested for Excessive DUI with a BAC of 0.347 and 0.338. Johnson argued he had to move his car in order to not prevent or slow the efforts of emergency personnel on scene and asked the court to give a necessity defense instruction. The prosecutor argued that no reasonable view of the evidence would support such an instruction. The trial court agreed and the Court of Appeals affirmed. The evidence showed not only that Johnson's vehicle was not blocking access to the paramedics but he could have moved the vehicle by a "less offensive alternative" by asking one of 100 people at the gathering to move the car for him.

State v. Berger, Unpublished Opinion No. 458 (Ct.App.2009):

Berger appealed the denial of his motion to suppress claiming a Nevada Deputy Sheriff was without authority to stop him in Idaho. Specifically, he claims the deputy was not in "fresh pursuit" of a person suspected to have committed a felony. The Court of Appeals held the Nevada deputy had reasonable cause to believe Berger was driving under the influence, and since DUI is considered a felony for purposes of arrest in both Idaho and Nevada, the deputy was in fresh pursuit at the time he stopped Berger in Idaho. It was determined this pursuit into Idaho was taken without unreasonable delay.

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.

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.idaho-post.org

National Highway Traffic Safety Administration

www.nhtsa.gov

National Association of Prosecutor Coordinators

www.napcsite.org

NDAA & APRI National Traffic Law Center

www.ndaa.org

Idaho State Police Forensics

www.isp.state.id.us/forensic/

Alcohol Beverage Control

www.isp.state.id.us/abc/



New Websites Address Impaired Driving Issues

In the past few months some new resources have become available on the internet in relation to impaired driving issues. These websites provide valuable information and resources to parents, law enforcement, prosecutors, judges and other traffic safety stakeholders.

There are many websites targeting the teen driver, but through a NHTSA grant a new website has been developed for parents of teen drivers. **Under YOUR Influence** -- www.underyourinfluence.org discusses issues from underage drinking and impaired driving to seat belts and graduated driver license laws. The site is a resource for parents in teaching their child how to drive and establish rules that will protect their child as both as a driver and a passenger. The overriding message is that parents continue to exert the biggest influence on their teen drivers and should take an active role in being that good influence.

AAA has also launched a new DUI Web site created specifically for criminal justice professionals. **DUI JusticeLink's** (www.AAADUIJusticeLink.com) primary purpose is to serve as a clearinghouse for, or repository of information on a wide range of impaired driving issues for judges, prosecutors, law enforcement and probation/parole personnel on DUI-related topics. It has information about potential solutions to common problems faced by the criminal justice community as an impaired driver is detected, prosecuted and adjudicated. The site is a compilation of DUI-related resources including, state laws, up-to-date statistics and academic research reports.

New Administrative License Form Goes into Effect July 1st

Idaho police officers should be throwing out their current Administrative License Suspension (ALS) forms and CDs and replacing them with new ones. The advisory portion of the ALS Notice of Suspension Form has been revised to accommodate 2009 Idaho legislative action. The new blue form with a revision date of 04-09 can be ordered at any time, but must be implemented on all ALS actions effective July 1, 2009.

It was determined a change in the form was necessary when the Idaho Legislature amended the DUI statutes to allow Idaho courts to give restricted driving privileges to offenders admitted into drug courts. Despite this only affecting relatively few offenders, the new form will need to be read to all suspects. To avoid problems with the civil license suspensions, **For the Road** suggests that prosecutors check with their law enforcement partners to ensure the old forms have been discarded and the new forms are being used. In addition, it is expected that some defendants will try and argue the BAC results should be suppressed if an old form is used. Therefore, **For The Road** reminds prosecutors that a reading of the 18-8002 form is not a foundational requirement for purposes of admissibility in the criminal case.

The new version of the advisory form are also available on CD and tape in both English and Spanish by contacting the Idaho Transportation Department -- Driver Services at (208) 334-4465 or 4466. If you have any questions regarding this issue you can contact Hal Putnam, Driver Records Program Supervisor at (208) 334-4465 or email him at hal.putnam@itd.idaho.gov.

Training & Conferences Notice

(Click on Course Names for More Information)

Northwest Alcohol Conference — July 16-17, The Grove Hotel, Boise, Idaho

Idaho Strategic Impaired Driving Seminar — July 29, Nampa Civic Center, Nampa, Idaho

IPAA's 2009 Summer Conference — August 11-13, The Grove Hotel, Boise, Idaho

Lethal Weapon: DUI Homicide Course — September 15-17, POST Academy, Meridian, Idaho

IPAA's 2009 Key Personnel Conference — October 14-16, Oxford Suites, Boise, Idaho

LAST CALL

In a few days we will celebrate the 4th of July. I am grateful for the freedoms and independence we enjoy. Last week I ventured out across Idaho, traveling through 28 of Idaho's 44 counties and covering approximately 2000 miles. This journey also took me into the bordering states of Oregon, Washington, Montana and Utah.

Idaho is a beautiful state! It is home to some of the most spectacular scenery and most rugged landscapes. I was able to experience the grandeur of it many mountain

ranges, to include the Bitterroots, Clearwaters, Tetons, Seven Devils, Sawtooths, Blackfoots, Bannocks, and so forth. I drove along its many rivers to include the Snake, Salmon and Clearwater. I was able to travel across the Palouse, Camas Prairie and Snake River Plain. Truly a magnificent state!

In addition to providing some scheduled training, I was able to stop and visit many of Idaho's prosecutors and law enforcement officers. They take their jobs seriously and it was evident many do their jobs well. I was grateful for their hospitality and learned of success stories I plan on sharing in future issues of *For the Road*.

Sadly, my travels also revealed many roadside memorials. They were stark reminders of the importance of the work in which I am engaged. With all the celebration of living in a country so grand, this 4th of July weekend will also be one of



the most deadly. It will not be because of soldiers fighting for our freedoms, but because of thoughtless citizens who drive impaired. Officers will be cracking down and prosecutors will be waiting to hold offenders accountable. Driving impaired is simply not worth the risk of losing your freedom or taking the freedoms from others. Be Safe! -*Jared Olson, TSRP*



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FOR THE ROAD

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Idaho Transportation Department

WE ARE ON THE WEB!!
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