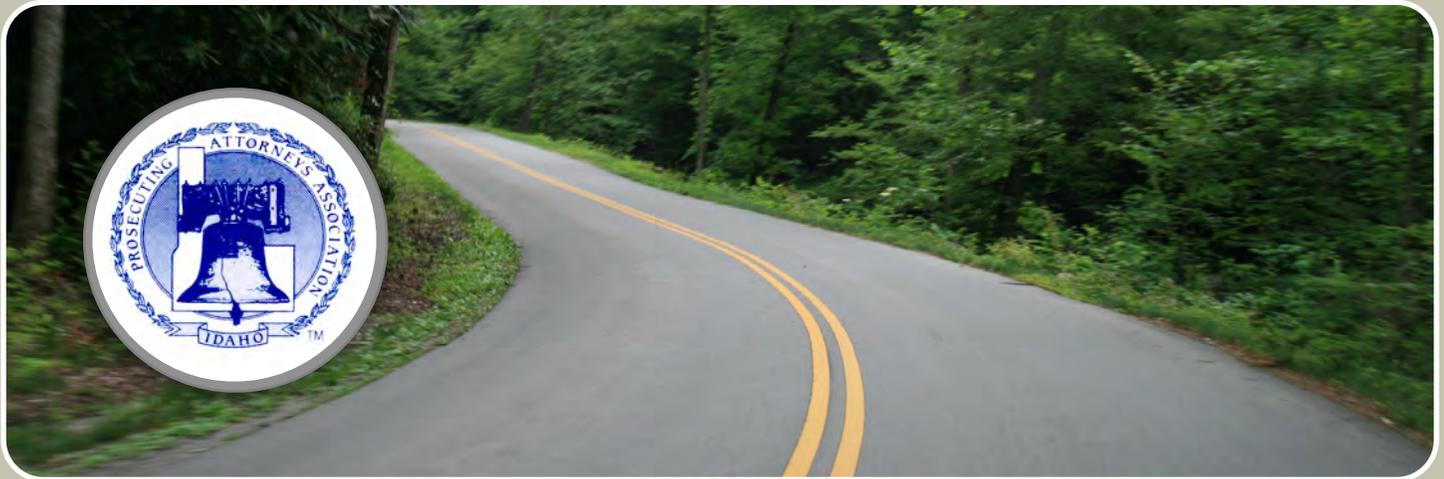


FOR THE ROAD

Idaho Prosecuting Attorneys Association



QUALIFY ALL YOUR WITNESSES . . . TELL THEIR STORY

By Jim Camp, Tennessee Traffic Safety Resource Prosecutor

Which of these statements is correct?

- “Expert witnesses have knowledge, education, degrees, awards, background, training and experience that enables them to speak with authority regarding certain topics.”
- “Non-expert witnesses have knowledge, education, degrees, awards, background, training and experience that enables them to speak with authority regarding certain topics.”

The answer: **All of the above.**

Why do we so often neglect to tell the **STORY** of our non-expert witnesses?

For some unknown reason we rush through basic questions about a witness’s name, occupation, number of years in that occupation and other shallow, relatively in-

nocuous questions just to get to the “good stuff.” We want to treat witnesses, the likes of which we deal with everyday, as less qualified, less important, less critical in the scheme of the case. We spend very little time asking a lay witness about their past occupations, special skills, education, training, practical experience, community ties or involvement.

We also ignore all of those qualities and more as it relates to law-enforcement witnesses. We tend to think that establishing the qualifications of these witnesses is just not as important or as helpful as that of an Expert Witness. We rationalize this philosophy by telling ourselves that to belabor their qualifications will simply waste time and bore the jury. We think we don’t need their story. The details of who they are or what they contribute. We are wrong.

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Qualify ALL Your Witnesses ... Continued from Page 1

How do we convince the jury that the State's version of the facts is the truth? By convincing the jury that our witnesses are more credible. That they are the ones who are more **BELIEVABLE**.

What factors influence a juror's opinion of a witness's credibility? Well, the facts themselves are obviously important. But if it weren't for two sides of any given story we wouldn't find ourselves in court embroiled in a swearing contest.

The image projected by the witness is important. Are they likable? Are they more knowledgeable? Are they more professional? Are they more capable? Are they more experienced? Are they better educated or otherwise trained? What do they bring to the table that makes it more likely that their version of the facts is the truth? What is their Story?

We therefore need to take advantage of the opportunity to win the jury's trust early. We need to convince them our witness deserves to be believed. That they need to be trusted. We do this by allowing the jury to get to know them. We should **WANT** to take the time to introduce them to the jury. We need to take that time to build the jury's trust. We need to tell the witness's story. But to do this **WE** need to take the time to find out.

When was the last time you sat down and had a real chat with one of your patrol officers who bring you a large share of your cases? One of your "regulars"? The third shifters whose names appear most regularly on your DUI complaints?

Do you really know anything about their civilian life, background, training or work experience? Whether they were a member of the armed services? What their specialty was? Whether they were ever decorated? If they had special security clearances or duties? Are they a training officer in their department and have they ever received any training additional to basic Cadet School? What is their story?

I recall discovering during direct examination that a witness had been in the Air Force, had Top Secret clearance, and was responsible for programming nuclear missiles. I had no idea prior to our conversation on the witness stand. I had no idea, because I hadn't taken the time to ask. Did it have anything to do with a DUI case? Not in the least. But you should have seen the look on the faces of the jurors when they found out! They were visibly impressed. I had unwittingly doubled that officer's credibility quotient. I was lucky.



Jim Camp

I was able to tell HIS story. The point is, you don't have to be lucky. You just have to be conscious of the importance of truly qualifying a non-expert witness. And you have to act on that consciousness.

Take the time to prep your witnesses and become familiar with their background during your pre-trial session. If you can't find the time to prepare for trial in your busy schedule, at least ask your witness to put together an informal resume. Include work history, education, military service and training. What are their hobbies, favorite pastimes, and social activities? (I understand this may not apply to ALL of our lay witnesses). As it relates to law enforcement officers be sure to ask them to list all of the DUI trainings they can remember participating in as well as other specialized schools. You might be surprised to find out just how much training they may be able to talk about.

So get to know your non-expert witnesses and spend some productive time during your next Direct Exam using that information to introduce them to the jury. Let the jury get to know them as real people. As a real member of their community. As a real professional. As a believable witness worthy of their attention.

Qualify ALL your witnesses. Tell their story.

**Article is reprinted from "DUI News" (Issue 51, June 2015) a publication of the Tennessee District Attorneys General Conference with permission of the author. [CLICK HERE to view the original article.](#)*

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"He was dead when I found him.
It's kind of my specialty."

Idaho Traffic Law Update

State v. Green, (2015):

Green was arrested for driving with an invalid driver's license (I.C. 49-301), which is a misdemeanor. However, per I.C. 49-1407, it is not an arrestable offense unless certain conditions are met, which were not met here. Green was searched incident to her arrest, which resulted in a number of additional drug-related charges. The district court suppressed this evidence and the State appealed.

The Idaho Supreme Court reversed the suppression of evidence holding there was no constitutional violation. The state statute was violated, but provides no remedy for the violation. The Court explains that suppression is not the appropriate remedy for statutory violations that do not amount to constitutional violations. The Court states, "Although it is concerning that a violation of I.C. 49-1407 appears to allow no significant remedy for defendants, or repercussions for police, such concerns do not bring the violation within the ambit of being 'constitutional' in character. If the Legislature intends a violation of Section 49-1407 to result in suppression, it is the responsibility of that body to so provide."

Note: Justice W. Jones wrote a special concurrence to underscore he was troubled drivers have no remedy for this otherwise "unlawful" arrest and search, but agreed the Court is not in a position to provide the relief the defendant seeks.

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

An officer found Eversole in the driver's seat of a high-centered truck on a two-foot tall brick berm in front of a bar. He was ultimately arrested for DUI. He refused a breath test and an involuntary blood draw was taken, which at the time was permissible under Idaho case law. Eversole appealed the denials of his motions to dismiss, arguing: (1) because his truck was stuck on the berm, it was inoperable and therefore he was not in "actual physical control;" and (2) the blood draw was unconstitutional based on *Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

On the first issue, the Court of Appeals held a fact-finder could sensibly conclude

the truck could be made operational in a short period of time, therefore the district court properly denied the motion to dismiss on this basis. Eversole would have to convince the jury his vehicle was rendered completely inoperable due to being stuck on the berm, thereby making it legally impossible to be in "actual physical control." See *State v. Adams*, 142 Idaho 305 (Ct.App.2005).

On the second issue, the court suppressed the blood evidence holding Eversole had withdrawn any implied consent created by I.C. 18-8002(1) when he refused to participate in the breath test. The court said, "Even if Eversole did not specifically object to the blood draw, that absence of a second objection would be immaterial, for by refusing to submit to a breath test he had already withdrawn the statutorily implied consent."

For consent to be valid, the State must prove by some subsequent action or statement by the defendant, the consent was renewed. The stipulated facts in this case did not provide this information.

Note: Judge Gratton concurred in part, but dissented to the court's holding that a refusal to provide a breath sample is, as a matter of fact, also a refusal to submit to any further evidentiary testing. Gratton reasoned since a refusal and withdrawal of implied consent must be express and may not be "merely left to implication," he found no support for the conclusion that refusal as to one specific test is a withdrawal of statutorily implied consent to all other evidentiary testing.

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

This case involves a multitude of charges, in two separate incidents consolidated by the district court for appeal. For purposes of this synopsis, the only issue addressed is Smith's contention the warrantless blood draw violated his 4th Amendment rights.

The facts of this case are tricky in that the parties stipulated Smith "didn't consent to the blood draw." The stipulation to the lack of consent is ambiguous as alone it does not make clear whether the lack of consent came in the form of affirmative resistance

to the blood draw or whether Smith acquiesced to the blood draw without giving affirmative consent. The Court of Appeals determined it was the latter based on the record wherein defense counsel agreed consent was not given unless there was implied consent. Thus, the Court interpreted the record as the defense agreeing if implied consent applies, Smith gave the requisite consent.

The Court of Appeals held that when analyzing the Idaho Supreme Court decisions in *Wulff*, *Halseth*, and *Arrotta*, these decisions lead to the conclusion Idaho's implied consent statute retains validity, but that consent may be terminated by a defendant's refusal, protest, or objection to testing. The court explains that at first glance, it would appear the implied consent statute does not provide the requisite consent for a warrantless blood draw in a suspected DUI case. However, in *Wulff* the Idaho Supreme Court made an important distinction. It identified "two hurdles" the statutory consent must overcome to "qualify as voluntary." (1) drivers must give their initial consent voluntarily, and (2) the drivers must continue to give voluntary consent. The *Wulff* Court considered the first hurdle was met by Idaho's implied consent statute. The second hurdle was not cleared, because implied consent is no longer irrevocable.

In this case there was no evidence Smith revoked the implied consent. In fact, in footnote 7, the court explains Smith affirmatively rejected the prospect of remanding the case to add to the evidentiary record regarding his consent, or lack thereof. Therefore, the trial court's denial to suppress the blood draw was upheld.

Note: Judge Lansing wrote specially concurring on this issue, but states if she were not obligated to adhere to the Idaho Supreme Court's analysis, she would hold the implied consent imposed by I.C. 18-8002(1) as not constituting consent to a warrantless blood draw. She states that Idaho's implied consent statute is "entirely fictitious" in that consent is deemed to be given in advance by every person who drives in Idaho. Judge Lansing writes, "In my view, when no actual consent is expressed, orally or otherwise, to a request for submission to an alcohol concentration test, then there is no consent that will satisfy the Fourth Amendment or the Idaho Constitution."

(Continued on Page 3)

Idaho Traffic Law Continued . . .

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

Struhs pled guilty to vehicular manslaughter and was ordered to pay restitution to the victim's widow, including health insurance premiums she paid between the time of the crash and the time of sentencing. Relying heavily on *State v. Straub*, 153 Idaho 882 (2013), Struhs appeals arguing I.C. 19-5304 does not permit restitution for insurance premiums.

The Court of Appeals upheld the restitution order, explaining *Straub* does not suggest I.C. 19-5304 categorically forbids restitution for medical insurance, but rather such restitution must be limited to actual losses incurred as of the time of sentencing. In this case, the State requested restitution for premiums covering only the period between the crime and Struhs' sentencing, which the district court could properly award.

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

Wilson entered a conditional guilty plea to felony DUI, reserving the right to appeal the denial of his motions to exclude a witness for a discovery violation and for a continuance. Four days prior to trial, the State disclosed the bartender at the bar where Wilson was arrested. The prosecutor explained she had disclosed the witness's name to the defense as soon as the investigators discovered it. The state's attempts to locate this witness were hampered, because the bartender no longer worked at the bar and had changed her name upon getting married.

The district court found this to be a discovery violation, concluding the prosecutor should have disclosed the bartender earlier as a witness under I.C.R. 16(b)(6) even though the witness's name and location were not yet known, because the State had been actively looking for the witness for a number of months. As a sanction, the court ordered the defense be allowed to interview the witness before trial.

Wilson filed a motion to reconsider the morning of trial, arguing a continuance was needed to track down witnesses from the bar who could testify Wilson drank alcohol while in the bar to presumably

show the BAC resulted from the drinking that occurred after he quit driving. Defense counsel explained until the bartender was disclosed, he had not planned on Wilson testifying or calling witnesses to establish Wilson was drinking while in the bar. Rather, his trial strategy had been to rely on the absence of any evidence from the State that Wilson had not been drinking at the bar. Following this argument, the trial court sanctioned the State further by precluding using the bartender as a witness in the State's case-in-chief.

Wilson pled guilty, but appealed arguing the sanction was insufficient. The Court of Appeals disagreed holding the need for a continuance to contradict the bartender's anticipated testimony was eliminated by the court's prohibition against the State from calling the bartender in its case-in-chief. This sanction placed the defense in the same strategic position it occupied before the bartender was disclosed. No prejudice was shown, therefore the district court's orders and judgment of conviction were affirmed.

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

Wilske was convicted of DUI, possession of a controlled substance, and possession of drug paraphernalia and appealed the court's denial of his motion to sever the possession charges from the DUI charge for trial. Wilske argued the drug charges were not relevant to the determination of guilt in the DUI case and the jury would infer "he's a drug possessor . . . therefore, he's probably a drunk driver too."

The Court of Appeals upheld the trial court's denial to sever the trials, finding the trial court had provided a jury instruction that would effectively guide the jury away from impermissible inferences of guilt. Furthermore, the trial court directly addressed the issue of prejudice and given the specific facts of the case, concluded the jury was not likely to infer from the misdemeanor possession charges that Wilske must also be guilty of DUI. The Court of Appeals found the misdemeanor charges were minor offenses, not of an inflammatory nature, and not likely to cause the jury to view Wilske as having a criminal disposition.

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

Wernecke appeals his administrative driver's license suspension, arguing: (1) there was insufficient legal cause to stop him and require a breath test; and (2) his single breath sample was insufficient pursuant to the Idaho State Police Standard Operating Procedures.

First, Wernecke admitted he was driving left of the centerline, but argues the large size of his vehicle, the width of the road, vehicles parked roadside, and a pothole required him to drive left of center. The Court held the existence of alternative innocent explanations does not negate the fact the officer had legal cause to believe Wernecke committed a driving offense.

Next, the court found the officer had legal cause to require a BAC test based on the officer detecting a strong odor of an alcoholic beverage, Wernecke's bloodshot and glassy eyes, slurred speech, impaired memory, admissions to consuming alcohol earlier in the evening, and failure of the HGN test. Wernecke's arguments he correctly performed the alphabet test and the counting test, and the video recording not showing the HGN clues was not sufficient. In fact, the video showed he repeatedly failed to follow the officer's directions.

Finally, Wernecke argued he sufficiently articulated to the officer he did not have sufficient breath to complete two samples, thus his failure to supply a second sample was not his fault. However, the court found the successfully obtained sample contradicted Wernecke's argument. In the Administrative License Suspension hearing, it is the defendant's burden to prove his or her inability to complete the test was due to the fault of the officer or the breath testing equipment. In this case, Wernecke failed to show his insufficient breath samples were due to the fault of the officer or the testing equipment. Therefore, the single sample of 0.167 BrAC was valid under the standard operating procedures.

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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/



Breath Taking News

(1) Most information requested from Idaho State Police Forensic Services (ISPFS) during the discovery process is now easily downloadable from the ISPFS website: www.isp.idaho.gov/forensics/

This includes analyst CV's, breath alcohol certification, instrument information, analytical methods, accreditation information, quality data and much more. Defense counsel can be directed to this website to access the information.

(2) IDAPA 11.03.01 regarding breath testing standard operating procedures was made permanent by the Legislature. Please review the changes. The SOP and instrument manuals are still in effect and all operators should be very familiar with all these documents. The documentation is on the Department of Admin website and is linked on the ISPFS Breath Alcohol website.

(2) ISPFS is planning for an October 2015 release of the Lifeloc Performance Verification system - EASYCAL®. It is a dry gas system, rather than a wet bath system. The gas cylinders must be purchased by an ISO accredited provider. Contact Lifeloc to purchase the Idaho authorized system, but ISPFS will not be releasing any of them until at least October 2105. ISPFS intends to network these instruments to ISPFS for data backup, but this will happen sometime in the future. Training is being developed for this system and any operators will need a certificate of training completion.

(3) Every Lifeloc Legacy FC20 instrument will need a software upgrade before being used on a EASYCAL® station. These software upgrades will be done on

a schedule set by ISPFS. First priority will be given to agencies using EASYCAL, next priority will be given to agencies with instruments on order, and then all other instruments will be updated. ISPFS is performing this upgrade free.

(4) The new Lifeloc FC20BT platform is now approved for use in Idaho and can be ordered from Lifeloc. They will be shipped to ISPFS for calibration and then be sent to the purchasing agency. There is a trade-in value for the old instruments if you decide to upgrade to the new platform. There is also an Idaho purchase price for the new instrument. The new instruments work with either the EASYCAL or the wet bath performance verification systems. Contact ISPFS if you have any questions regarding ordering the FC20BT.

(5) The new Draeger 9510 instrument that will eventually replace the Intoxilyzer 5000EN is undergoing final programming and validation, prior to its release for use in Idaho. The contract has been signed, and law enforcement agencies may purchase the instrument, but they will not be delivered until after the validation study is completed. Again, the instruments will be calibrated at ISPFS before they ever arrive at the law enforcement agency. Draeger can be contacted directly for the Idaho negotiated pricing. These instrument are around \$10,375.00 each.



Draeger 9510

Training & Conferences Notice

(Click on Course Names for More Information)

Traffic Tuesdays Webinars — July, 14, Aug 18, Sept 8, & Oct 13 (Online)

IACP National DRE Conference — August 10-12, Cincinnati, Ohio

IPAA Annual Summer Conference — August 12-14, Boise, Idaho

Prosecutor Trial Skills Course - September 28-October 1, McCall, Idaho

LAST CALL

This summer brought a new driver to the Olson household. My teenage son is now behind the wheel and thus far I have been impressed. He completed the required 30 hours of classroom work, 6 hours of behind the wheel instruction and the 6 hours of in-car observation. We are nearing the end of his 6 months supervised instruction time, with a required 50 hours of driving practice. The goal of Idaho's driver education program is to provide my son with the tools and skills necessary to become a safe driver.

As a father, I am very concerned because vehicle crashes are the leading cause of death for teenagers. Over 326,000 young drivers are injured each year. The combination of inexperience, lack of full brain development regarding the consequences of risk-taking behavior, and the complexities of driving lead to this deadly statistic. Therefore, I want to improve the odds for my own son's safety.

Learning to teach a teenager the rules of the road is not an easy task. But the time we have spent together this summer, behind the wheel, has created great memories

-- with a few moments of heart pumping adrenaline. As Idaho's Traffic Safety Resource Prosecutor, I am fortunate to know about many of the available resources to help me as a parent provide the best tools to my son. I want to share some of these tools with the readers.

First, the Idaho Department of Education, under the direction of Audra Urie, provides some fantastic resources and classes. I recommend you visit their excellent website at www.sde.idaho.gov/site/driver_edu/. This website is full of classes, resources, programs, and newsletters to make you and your teen driver safer on the roads. Use it!

Second, ITD's Office of Highway Safety has partnered with law enforcement to offer the "Alive at 25" curriculum. It is a 4 1/2 hour driver's awareness course designed by the National Safety Council for young drivers age 15-24. Information and class schedules are found at www.aliveat25.us. The course improves decision-making and responsibility-taking through interactive media, role-playing and class discussions. Find a course and take it!



Third, I wanted my son to have respect for the potentially deadly weapon he would be driving. We found an online automotive maintenance course offered by a university where he could earn high school credit. He is gaining a respect for the costs and maintenance required to operate a motor vehicle. My hope is the lessons he is learning will be part of the solution to move Idaho *Towards Zero Deaths!*

--- Jared Olson, TSRP



**Idaho
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FOR THE ROAD

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This material was developed through a project funded by the Idaho Transportation Department's Office of Highway Safety.

Idaho Transportation Department

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