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FOR THE ROAD

Idaho Prosecuting Attorneys Association

TRI-STATE LETHAL WEAPON COURSE IS A SMASHING SUCCESS

Prosecutors and Crash Reconstructionists Attend A First-of-its-Kind Training

Prosecutors and Crash Reconstructions from Idaho, Oregon and Utah joined forces with members of the International Association of Accident Reconstruction Specialists (IAARS) to have a first-of-its kind training in Meridian Idaho. The courses were held at the POST Academy the week of September 14th-17th, 2009.

Participants and faculty braved the uncanny 90 degree temperatures to work through actual crash scenes and other demonstrations. Approximately 60 prosecutors and 80 crash reconstructionists were in attendance. This type of regional training had never before been offered and it was the first time such a partnership was fostered with IAARS which was founded in 1980.

The goal of the training was to successfully take a case from "Crash to Courtroom." Participants were trained on the number of techniques used in crash investigations and then were schooled on how to present the evidence in court. At the conclusion of the course many participants stated the course should be a prerequisite for every prosecutor before their first vehicular homicide. Especially heartening was a veteran crash reconstructionist reporting he had learned new and valuable information due to this unique cross-training.

A special thanks to Cpl. Fred Rice of the Idaho State Police and the entire ISP Crash Reconstruction team. It was a pleasure working with you and the IAARS organization on this project! Many thanks also to the Oregon District Attorneys Association, the Utah Prosecution Council and each of the states' Highway Safety Offices for organizing and funding this project! It truly was a "smashing success."

Click Here to view a video of the crash pictured above (takes a minute to load).

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CRASH RECONSTRUCTION: THE DRAG FACTOR

By John Kwasnoski, Professor Emeritus

Demo of Drag Sled

Any reconstructionist will acknowledge that the drag factor, a measure of road friction, is an integral part of most reconstruction analyses, and that changing the drag factor value may result in significant changes in the resulting calculations. It is certainly not uncommon for the police at the scene to measure the drag factor, and for a defense expert to later make a measurement with a different instrument or device and report a smaller drag factor that lowers the speed estimate for the defendant's vehicle. Frequently, the expert may use an electronic device called an accelerometer, sold under the trade names Vericom VC-2000 or G-Analyst, and claim it to be more accurate than the drag sled used by police investigators. In one case in which the Iowa State Patrol measured road friction with a drag sled there was testimony at trial by two engineers that "measuring pavement friction with a drag sled has not been accepted by the engineering community." Such a declaration can be challenged by published field testing in which the two devices are compared by making measurements on the same road surface. In one such test[1] on three different roads the results were:

ROAD SURFACE	ACCELER-OMETER	DRAG SLED -20 LB SLED
dry asphalt	.809, .801	.800
dry asphalt	.850, .851	.800
cross-grooved concrete	.839, .859, .826, .889	.825, .825

Clearly, the value measured by the drag sled is slightly less than the accelerometer measurement, and if at all, would lower speed estimates and favor the defendant if the police had used the drag sled at the scene. In reference to this same Iowa case, Jerry Hall, a retired engineering professor from Iowa State University said, "A drag sled is a very common, acceptable way to do it (measure drag factor)."

In another evaluation of the accuracy of drag sleds, fifty tests were performed at the World Reconstruction Exposition 2000 meeting with an average drag factor measurement of .807. This value was then compared to a measurement of the same road surface made with a sophisticated ASTM (American Society of Testing and Materials) skid trailer that developed .81 - .82 on the same surface. Still another drag sled evaluation was made in Maryland as part of a 1998 reconstruction conference with a D.O.T. skid trailer developing a drag factor of .83 and the average of measurements made with 20 drag sleds equal to .805[2].

In skid tests done by the author[3] as part of a senior engineering project, the drag factor value measured with a sled used in conjunction with the longest skid mark still underestimated vehicle speed in every test. The bottom line is that when used correctly the drag factor value measured with a drag sled is as accurate as that measured with the more sophisticated accelerometer. The measurement can be strengthened by making multiple measurements at each location on the road, making measurements at multiple locations in the tire mark pattern, including a drawing showing the locations of drag sled measurements:

A. Being certain that scale readings are made only when any initial "jerking" has ceased having the calibration of the drag sled scale checked regularly;

B. Having someone witness the tests to verify the scale readings;

C. Videotaping or photographing the measurement;

D. Using the lowest measured value to give every benefit to the defendant;

E. Conducting periodic training on the proper use of the sled.

Of course the prosecutor should be aware of potential misuse of an accelerometer in such a way as to produce an intentionally lower drag factor measurement. This will be addressed in a future article, so that prosecutors can attack any such misuse that would introduce misleading information into the reconstruction calculations.

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Footnotes:

(1) Wakefield, Cothern, Sellers, and Carver, "Roadway Drag Factor Determination, Dynamic v. Static", N.A.T.A.R.I., Fourth Quarter, 1995

(2) Badger, "Drag Sleds and Drag Factors", SOARce, Summer 2001

(3) Kwasnoski, "Drag Sled Measurements Yield Valid Minimum Speed Estimates", N.A. T.A.R.I., Third Quarter, 1998

Idaho Traffic Law Update

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

Feasel was arrested for DUI after he rear-ended a vehicle. He admitted to taking multiple medications including Ambien, CR, Lithium, Prozac and Wellbutrin prior to the crash. The arresting officer testified Feasel slurred his speech, appeared sleepy, exhibited an impaired memory and failed all three standardized field sobriety tests. The breath test showed no trace of alcohol, but the urine test detected the presence of fluoxetine (Prozac). At the ALS hearing, warning labels from each of the medications were introduced. Each label indicated the drugs may cause drowsiness and may impair or lessen the ability to drive or operate a car.

Feasel argued the UA results did not quantify the drugs found in his system, therefore a DUI charge could not be established. Furthermore, he argued he took the medication pursuant to a valid prescription. The hearing officer upheld the ALS suspension, but upon appeal to the district court, the suspension was reversed. The district court determined the urine test must not only show presence of drugs but also a quantitative measurement or clear factual connection of impairment attributable to those specific drugs. The district court stated the mere taking of Prozac is not sufficient by itself to show the impairments later observed were caused by it, that there was not proof to show that Prozac in sufficient quantities would cause impairment and there was no proof that Feasel had even ingested a sufficient quantity. The Idaho Transportation Department appealed.

The Court of Appeals reversed the district court finding neither I.C. § 18-8002A(4) nor I.C. § 18-8004 requires the State to show the quantity or concentration of drugs in a driver's system and that such quantity would cause impairment. The Court cited ***State v. Lesley***, 133 Idaho 23 (Ct.App.1999) wherein the Court had rejected the quantification argument in the criminal context.

Next, Feasel argued the hearing officer was strictly limited to consider only the results of the test and not any other circumstantial evidence. Feasel relied on ***Reisenauer v. State Dep't. of Transp.***, 145 Idaho 948 (2008) wherein the Idaho Supreme Court determined a drug must be intoxicating in order for I.C. § 18-8002A to apply. Feasel argued that *Reisenauer* stands for the proposition that a hearing officer needs more than qualitative test results merely showing the presence of a drug to uphold a license suspension. The Court of Appeals held that Feasel misconstrued *Reisenauer* and that it was proper for the hearing officer to consider not only the test results indicating the presence of Prozac, but also the other evidence of the potential effect of Prozac and the other drugs.

In this case, the hearing officer could rely on the following evidence: (1) the urine test indicating Prozac was present in Feasel's system; (2) the label on the Prozac indicating it may cause drowsiness, it may impair the ability to drive, and the user should be familiar with the effects before driving; (3) Feasel's admission to taking other prescription medications having similar effects, just prior to the collision; and (4) the officer's observations and video evidence showing Feasel had slurred speech, an impaired memory, seemed sleepy and failed the field sobriety tests.

Based on this evidence, it was proper for the hearing officer to infer that Prozac, in combination with the other drugs ingested, caused intoxication and consequently impaired Feasel's ability to drive. Moreover, the court held it is not a defense that Feasel had a valid prescription for the drug. The Court concluded by saying, "By the statute's plain language, only the presence of drugs, not the quantity, must be established along with other competent evidence of impairment caused by the drugs."

***Editor's Note*:** The *Reisenaur* decision has resulted in a number of ALS dismissals and suppression of valid evidence in the criminal context. This case should be instrumental in combating the various defense arguments being raised. Prosecutors should pay particular attention to the evidence the Court found compelling, i.e. prescription labels, officer's observations, field sobriety tests, the toxicology results and of particular note is the Court giving weight to the defendant's admissions of drugs other than that found in the urine test. Too many courts try to limit the evidence to the drugs found in the toxicology results, whereas there can be all sorts of reasons why the impairing drugs are not found in urine, but are nevertheless impairing the driver's ability to safely operate a vehicle.

Reisenauer can be distinguished by the fact the State limited its argument to whether Carboxy-THC should be considered a drug under the definition in the statute. The decision is confusing because the Supreme Court spends time listing the various indicators of impairment the officer and DRE observed, which was purposefully not within the scope of the State's argument on appeal. The *Feasel* case now clarifies that the admissibility and weight of additional evidence should be considered in addition to any test results.

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

Wheeler appeals his administrative license suspension (ALS) arguing, (1) the officer lacked probable cause to effectuate a stop of his vehicle, and (2) the BAC test results were unreliable because the calibration solution had not been changed within the last 100 calibration checks in accordance with Idaho State Police Standard Operating Procedure (SOP) 2.2.1.1.2.1. Wheeler argued the only evidence presented before the hearing officer was his live testimony that he did not drive erratically and the arresting officer's affidavit reporting observations made by a different officer who stopped Wheeler's vehicle. Wheeler argues the latter is inadmissible hearsay and that the hearing officer should have required the officer to be present at the hearing.

The Court of Appeals rejected Wheeler's arguments, holding I.C. § 18-8002A(7) allows a hearing officer to consider the sworn statement of the arresting officer. In addition, the hearing officer is not bound by the Idaho Rules of Evidence and is not prohibited from considering hearsay evidence. Furthermore, it was Wheeler's burden to present evidence at the ALS hearing and it was his responsibility to subpoena the officers.

Next, Wheeler argued his BAC results were unreliable and inadmissible because the calibration solution was not changed within 100 calibration checks as required by the SOP. The SOP reads that the calibration solution *should* be changed ap-

proximately 100 checks or every month, whichever is sooner. Wheeler argued the word "should" is mandatory, but the Court of Appeals disagreed concluding "should" is not a mandatory term and is properly interpreted as an advisory term or strong recommendation. Therefore, the test was not inadmissible per se, but rather opened the door for Wheeler to attack the evidentiary test result through expert testimony or other evidence tending to prove the test is unreliable. In this case, the calibration check was the 117th check done on the particular instrument. The Court of Appeals held more was required than Wheeler's mere assertion the test was unreliable and upheld the license suspension.

***Editor's Note*:** My mother always told me to "watch my words." This case illustrates this principle, especially when reading Judge Lansing's dissenting opinion. She argues words like "should" and "approximately" weakens the SOPs as the standards become "optional." She warns the SOPs are full of "gaping holes" and contradictions if proper calibration is truly necessary for reliable test results. Although I fully agree with the ultimate decision in this case, the dissenting opinion should serve as a warning to what type of defense arguments we can expect to be continually raised.

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

Martin's vehicle was stopped when an officer noticed the front license plate was hanging at a 30 degree angle with one bolt missing. As a result of the stop, Martin was arrested for driving without privileges. Martin contends that I.C. § 49-428 is unconstitutionally vague as it applies to him and the officer did not have the requisite suspicion to stop him. Specifically, Martin contends the words, "securely fastened" does not permit a person of ordinary intelligence to understand what is required when securing a license plate. He argues the Legislature could have intended the prevention of either swinging parallel to the ground or swinging perpendicular to the ground.

The Court of Appeals held the statute was sufficiently clear to those of ordinary intelligence, concluding a "securely fastened" plate would prevent swinging of "any manner." Furthermore, the Court held the officer had reasonable suspicion for the stop because it is "common sense" to conclude the license plate was not securely fastened when by one bolt and hanging at an angle.

Editor's Note: Most surprising is the length of this decision. With all the discussion and arguments regarding perpendicular, parallel and 30 degree angles, this editor concludes someone was likely being more than a little obtuse.

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

Eldred appeals her Felony DUI conviction arguing the prosecutor committed prosecutorial misconduct during closing arguments at trial. First, Eldred argues the prosecutor misrepresented the burden of proof by stating her "cloak of innocence" had been removed. The Court of Appeals disagreed explaining the prosecutor correctly stated she had the burden of removing Eldred's cloak of innocence and argued, in substance, she had met that burden.

Second, Eldred argued the prosecutor's reference to the burden of proof as something the prosecutor must *suffer* improperly appealed to the passions of the jury. The Court disagreed saying, if anything, the prosecutor's statement had the effect of enhancing the jury's understanding of her burden, not inciting emotions against the defendant. Eldred also argued it was misconduct for the prosecutor to express an opinion that "the cloak [of innocence] has been lifted" and "Ms. Eldred is guilty of driving under the influence." The Court held a prosecutor is allowed to express opinion in argument as to the guilt of the defendant when such opinion is based upon evidence, as it was here.

Next, Eldred argued the prosecutor improperly appealed to the passion and emotions of the jury when she stated that ordinary people were driving down the highway, people like "you or I' and said Eldred drove "in a manner that could kill somebody." The Court held that even if the statements were improper, any resulting error did not rise to the level of fundamental error. When the statement is taken in context the Court found they "were not formulated in a way to induce fear by inviting jurors to imagine themselves or their loved ones as potential victims."

The final comment of contention was in rebuttal closing wherein the prosecutor responded to defense counsel's argument the breath test was not reliable due to a "deficient sample." The prosecutor responded by explaining the deficient test was a result of Eldred's lack of cooperation and the true result would have been higher. The Court held this was a reasonable inference to draw based on the evidence presented at trial and the prosecutor was allowed to fully discuss this evidence and inference with the jury.

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

During Corwin's DUI trial, two officers testified to their observations and interaction with Corwin. They testified as to his behaviors and physical state, and based on those observations, their belief he was under the influence of alcohol and too impaired to drive. Corwin raised 3 issues on appeal. First, he contends it was error to allow the officers to testify to the ultimate issue of whether or not he was under the influence of alcohol. Second, the prosecutor expressed her own opinion during closing arguments constituting prosecutorial misconduct rising to a level of fundamental error. Third, the trial court acted in manifest disregard of I.C.R. 32 when sentencing him without a substance abuse evaluation.

The Court of Appeals held the trial court did not abuse its discretion when it allowed officers to testify Corwin was under the influence of alcohol and too impaired to drive. The officers' observations went to an ultimate issue of fact, but did not invade the province of the jury. Next, Corwin failed to prove his claim of prosecutorial misconduct. The prosecutor's statement was clearly taken out of context and she was not offering her own opinion, but was simply reiterating the officer's testimony. Finally, the court was not required to obtain a substance abuse evaluation and did not abuse its discretion in sentencing Corwin without it. The statutory language is clear that it is the defendant's obligation to have the substance evaluation completed and delivered to the court. The court may also proceed to sentencing without it. Furthermore, it was abundantly clear the sentencing judge had a firm grasp on Corwin's lengthy history of drug and alcohol abuse.

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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.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/

Breath Taking News: "Mock Test" Suppression Motions

Recently, a number of motions have been filed to suppress breath test results based on a "mock test" not being run during the calibration process of the Intoxilyzer 5000. These motions are likely based on an Administrative Licenses Suspension (ALS) hearing appeal in the 2nd Judicial District. Judge Bradbury reversed an ALS based on a "mock test" not being performed in accordance with the Intoxilyzer 5000/EN Training Manual.

According to the Standard Operating Procedures (SOP) and Intox5000/EN Training Manual, Breath Testing Specialists/Operators are required to perform a "mock test" after going into [ESC ESC X] to change the solution lot#, adjusting the tolerances or resetting the counter. Step 8 (section 1, pages 4 & 27) reads:

8. "The instrument is now set to perform a simulator check with each breath test. Press the green START BUTTON and perform a mock subject test."

The purpose of running a mock test is a check assuring the BTS/Operator has set the parameters correctly before proceeding with subject testing. This step is confusing because no explanation exists in the training manual for how to perform a mock test. Further, it states in SOP section 2.2.1 – **Intoxilyzer 5000/EN calibration check is run using .08 and or .20 reference solutions provided by the Idaho State Police Forensic Services or approved vendor and following the procedures outline in the Intoxilyzer 5000/EN manual.**

Upon review, Darren Jewkes, Breath Testing Program Manager, has determined the only logical conclusion to what a mock test would be is a calibration check, either through the breath hose or through the vapor port **OR** running a regular subject test using the BTS/Operator's own breath. This is because a calibration check is automatically required with every testing sequence. Therefore, an appropriate argument is the BTS and/or Operator did perform a mock test by running the required calibration checks. The supporting documentation would be the hand-written log.

Please anticipate a clarification to the training manual in the near future. In the meantime forward this information to your police agencies handling breath testing cases. Please refer all questions to your local ISP-FS Forensic Scientist.

ISP Forensic Services Removes Disclaimer From Alcohol Toxicology Reports

On August 17, 2009, ISP Forensic Services updated the manner in which they report quantitative ethyl alcohol values in both biological and non-biological samples. The laboratory is no longer making any adjustment to the laboratory measured value. In addition, the measured value is reported to three decimal places (e.g. 0.084).

In the **January 2009** edition of ***For the Road*** it was reported Forensic Services had added a disclaimer to all ethyl alcohol concentration reports in conformance with their new accreditation standards. In short, the report was previously adjusted to account for the "uncertainty of measurement calculation." This disclaimer is no longer being used. Instead, the lab is reporting out the actual lab measured value and a [+/-] uncertainty percentage based on parametric statistics. Major Ralph Powell distributed a memorandum explaining this change on September 8, 2009. **Click Here** to read or download a copy of the memorandum.

Training & Conferences Notice

(Click on Course Names for More Information)

IPAA's 2010 Winter Conference — February 3-5, The Grove Hotel, Boise, Idaho

Lifesavers National Conference — April 11-13, Philadelphia, Pennsylvania

ITD's 2010 Highway Safety Summit — April 28, Boise, Idaho

Northwest Alcohol Conference — July 29-30, Park City, Utah

LAST CALL

On September 9, 2009 the second class of law enforcement phlebotomists concluded their training at the College of Western Idaho. The media was invited to witness this groundbreaking program that trains police officers to become qualified phlebotomists. The media coverage was widespread and resulted in some misinformation. I want to quickly address three of these issues:

First, the Idaho program exceeds any national phlebotomy standards. The College of Western Idaho curriculum includes the officers conducting over 75 successful blood draws in a clinical setting, as well approximately 25 more draws during class. The officers are learning everything they need to safely and professionally draw blood.

Next, the Associated Press article included the following quote:

"I would imagine that a lot of people would be wary of having their blood drawn by an officer on the hood of their police vehicle," said Steve Oberman, chair of the National Association of Criminal Defense Lawyers' DUI Committee.

The quote gives the impression officers are drawing blood roadside on the hoods of police cars. This is simply NOT HAPPENING! It is not part of the officers' training nor is it in their policies and procedures. The suspected offender is taken to a work station where the participating agencies have phlebotomy chairs just as they would be found in a hospital environment.

Officer Phlebotomy

Finally, this brings me to the criticism that blood should only be drawn in a hospital. This criticism fails to recognize the many draws already being safely and professionally conducted outside of the hospital environment. The key is whether the blood drawer is sterilizing the site of injection and the immediate area where the blood draw is conducted. This can be easily accomplished in any setting.

In short, a blood draw is a simple forensic procedure! I applaud the participating agencies and their commitment in making our highways safer, removing impaired drivers from our roadways and working "Towards Zero Deaths."

--- Jared Olson, TSRP

Idaho Prosecuting Attorneys Association

FOR THE ROAD

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