

FOR THE ROAD

Idaho Prosecuting Attorneys Association



REGISTER TODAY FOR – GUARDING AMERICA’S ROADWAYS: Investigating & Prosecuting the Impaired Driving Crash - November 15

SOME CRASHES ARE CRIMES. An impaired driving investigation takes place at the worst time, worst place and worst condition over almost any other homicide case. Rarely are the resources equal to other homicide investigations. Attitudes can exist resulting in cases not being investigated thoroughly, or maybe not at all. In this regard, police officers, first responders and prosecutors must do better. The loss to innocent victims demands this.

The Idaho Prosecuting Attorneys Association, in cooperation with Anheuser-Busch Companies, Inc. is proud to offer *Guarding America’s Roadways: Investigating & Prosecuting the Impaired Driving Crash*. The training will occur on **November 15, 2012, from 10 AM to 2 PM (MST)**. This national course will be presented via live satellite transmission to a location or locations still to be determined.

Nationally renowned experts in traffic crimes prosecution and crash reconstruction will lead participants through an impaired driving crash. The roles of first responders, investigators and prosecutors will be explored. Important recent U.S. Supreme Court opinions impacting impaired driving crash investigations will be discussed. Special challenges and resources in the drugged driving crash will also be explored. Meaningful courtroom exhibits will be demonstrated and deconstructed.

SAVE THE DATE! Registration is free, but space may be limited. It is expected the training will be approved for 4 hours of CLE and POST credit. [CLICK HERE TO REGISTER](#) and join your colleagues from across the nation who are eager to learn how to “Do Better” in *Guarding America’s Roadways*.

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MARYLAND V. BRIGHTFUL: IT DOESN'T MEAN WHAT THEY SAY IT DOES

By Todd Hayes, Georgia TSRP

Idaho Commentary by Jared Olson, Idaho TSRP

The DUI defense bar is hard at work tout-ing a recent trial court ruling out of Carroll County, Maryland as the death-knell for NHTSA's Drug Recognition Expert Program. It took less than a week before *Brightful* was being used in a motion hearing in Idaho. **For The Road** asked Todd Hayes, Georgia Traffic Safety Resource Prosecutor, to share his analysis of this problem. Todd finds, despite defense claims to the contrary, *Brightful* has little to no impact on Idaho DREs.

CLICK HERE TO READ ARTICLE

Click on the above heading to read Todd Hayes' analysis of the *Brightful* opinion. He thoroughly explains the one-sided nature of the *Brightful* opinion and concludes the Maryland court misapplied their own state standards for determining the admissibility of scientific evidence.

An important fact to remember is this is an unappealable and unpublished trial court ruling. It is not an appellate decision holding any real precedent. In fact, the overwhelming published case law reach opposite conclusions. Todd's article outlines a few of these cases. Prosecutor's interested in a detailed list may contact Jared Olson, Idaho's Traffic Safety Resource Prosecutor. Resources are also available in helping lay a solid foundation to meet the Idaho's rules for admitting reliable scientific evidence.

Finally, Todd Hayes outlines the correct Georgia standard in his article. For purposes of Idaho readers, the following is offered as a substitute for the Georgia specific section in Todd's article:

Not In My Backyard: Why Idaho DREs are Unaffected by Brightful

In the context of Idaho evidence law, the *Brightful* order is utterly meaningless and carries no weight whatsoever.

Idaho no longer follows the *Frye* standard for determining the admissibility of scientific evidence. Instead, the proper determination of admissibility of scientifically derived evidence is Idaho Rule of Evidence (IRE) 702. The Idaho Supreme Court has held there is no required showing that a new scientific method have general acceptance in the scientific community. *State v. Faught*, 127 Idaho 873 (1995). IRE 702 permits evidence of scientific, technical or other specialized knowledge when it will assist the trier of fact to understand the evidence or determine a fact in issue.

Currently, Idaho lacks case law directly evaluating the reliability and admissibility of DEC evidence through the testimony of a DRE. However, trial courts have routinely admitted the testimony of a DRE and DRE opinions have been noted in several appellate cases. A good case to start your research is *State v. Burrow*, 142 Idaho 328 (Ct.App.2005). It does not deal directly with a DRE, but instead an officer who attended a basic drug recognition training. The Court found a sufficient foundation was laid to allow the officer to testify Burrow exhibited physical symptoms and behaviors consistent with being under the influence of methamphetamine. Citing several Idaho Supreme Court cases the Court rejects the defense argument that a foundation is required to show the officer used a "reliable methodology." The type of foundation depends on the nature of the evidence offered. Based on this and other case law, Idaho should allow DREs to testify as experts in drug recognition based on their training and experience.

CONCLUSION

Except in the case of traffic prosecutors in Carroll County, Maryland, the *Brightful* order poses no real threat to the outstanding work being done by DREs across the nation. The order itself is based upon a



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the purpose of the Drug Evaluation and Classification (DEC) program and a misapplication of Maryland law to the facts before the court. Among the obvious flaws inherent in the Maryland court's analysis of the DEC program under the *Frye-Reed* standard are a complete lack of analysis of the science underlying the protocols despite a finding that they represent a "new or novel" scientific technique; failure to correctly distinguish between consensus about the reliability of a scientific procedure and the opinions experts can form based on a reliable procedure; mis-identification of the relevant scientific community that could speak to DEC reliability; and the unfounded belief that only doctors or medical professionals are capable of administering the simple components of DEC.

Each of these missteps caused the Maryland judge to look in the wrong place and to the wrong people when considering the DEC program's reliability, and ultimately resulted in his substitution of his own personal opinion about the conclusions DREs draw based on the DEC protocols for those of the ultimate fact-finder. Traffic prosecutors who correctly understand what *Brightful* really means—and more importantly, what it DOES NOT mean—will be in an excellent position to deal effectively with DUI defense attorneys who attempt to make it more significant and persuasive than it actually is.

**Reprinted from The Georgia Traffic Prosecutor a publication of the Prosecuting Attorneys' Council of Georgia with permission of the author.*

Idaho Traffic Law Update

State v. Anderson, (2012):

During a traffic stop, police searched Anderson's van based on a drug dog's alert on the exterior of the vehicle, as well as other suspicious circumstances. Anderson argued the probable cause for the search dissipated when the same drug dog failed to alert a second time when placed inside the van. The Idaho Supreme Court disagreed with Anderson and upheld the denial of Anderson's motion to suppress. The Court explained that a reliable drug dog's alert on the exterior of a vehicle, in and of itself, is sufficient to establish probable cause for a warrantless search of the interior. Furthermore, the drug dog's failure to alert a second time does not destroy or neutralize the probable cause. It is merely one factor to be considered in the totality of the circumstances analysis.

In this case, there were significant additional factors according to the Court. First, Anderson was observed driving erratically, late at night, in an unregistered vehicle he did not own, upon which he had placed fictitious plates, and for which he did not have insurance. Second, the officer had to use lights and siren to get Anderson to stop. Third, Anderson failed to follow the officer's clear directions after the stop. Anderson made "furtive" movements inside the van and attempted to exit the van without permission. Fourth, Anderson also admitted to pending charges of "a controlled sales and delivery." Finally, couriers of drugs often mask the scent of contraband to confuse trained canines. Therefore, it is possible for a dog to fail to detect on the second sniff, especially when the two sniffs are in separate areas to be searched.

Williams v. ITD, (Ct.App.2012):

Williams was arrested for his second DUI in a noncommercial vehicle. Due to the offenses, ITD sought and obtained a lifetime disqualification of Williams' Commercial Drivers License (CDL). Williams appealed citing numerous legal theories.

The Idaho Court of Appeals upheld the lifetime CDL disqualification concluding: (1) A lifetime disqualification under I.C. § 49-335 is civil in nature and does not rise to the level of a criminal punishment for

double jeopardy purposes. (2) Williams is presumed to know the laws governing his CDL and thus cannot complain that I.C. § 18-8002 is unconstitutionally vague as applied to him. (3) I.C. §§ 18-8002 & 49-335 are not void for vagueness. (4) Williams was not denied substantive due process because his lifetime CDL disqualification was rationally related to the legitimate legislative objective of protecting public safety. (5) The lifetime CDL disqualification serves a remedial purpose and is not grossly disproportionate to the gravity of William's two DUIs, and thus, does not constitute cruel and unusual punishment.

State v. Loman, (Ct.App.2012):

Loman contends the warrantless search of his coat was unlawful. A police officer arrested Loman on a cold winter day based on an arrest warrant. Despite the officer's commands, Loman removed the coat he was wearing and threw it inside his car. The coat was retrieved and searched by the officer. Methamphetamine and a glass pipe were found. Loman argues this search was not justifiable as a search incident to arrest based on the U.S. Supreme Court's decision in *Arizona v. Gant*.

The Court of Appeals concluded it was unnecessary to determine if this was a valid search incident to arrest, holding the search fell squarely within the automobile exception to the warrant requirement. The Court held the officer had probable cause to search because: (1) the officer recognized Loman from a previous arrest for methamphetamine; (2) the officer observed Loman and another person enter and exit a residence, staying only a short time, and then engaging in activity in the car consistent with drug use; (3) when the officer announced to Loman he was about to be arrested, Loman ignored the officer's commands to leave his coat on and place his hands behind his back. Instead, despite the cold temperatures and despite the officer having an unholstered weapon, Loman tried to distance himself from the coat; (4) Loman pulled away from the officer, hurriedly took off his coat, threw it in the car, and shut the door. The

totality of the circumstances gave rise to probable cause the coat inside the car contained drugs or other contraband.

State v. Tyler, (Ct.App.2012):

Tyler was a passenger in a vehicle stopped for an illegal U-turn upon the observation and request of a narcotics officer. The driver and the car were searched based on terms of the driver's probation. Tyler was frisked upon admission he had an X-acto knife in the left breast pocket of his shirt. Tyler moved one of his two jackets aside so the officer could see it protruding. Tyler gave permission for a Terry pat-down but said he was not giving permission "to dig through my pockets." The officer removed the knife and then reached inside and underneath Tyler's two jackets to pat down the right breast pocket of Tyler's shirt. The officer felt an object he recognized as a "loaded" syringe.

Tyler was granted a motion to suppress evidence discovered in his pocket because the officer reached under his jackets during a pat-down frisk for weapons. The State appealed asserting the incorrect standard for pat-down frisks was applied. The Court of Appeals upheld Tyler's suppression motion finding the Terry frisk is generally limited to a pat-down frisk of a defendant's outer clothing. The district court found Tyler's right shirt pocket was covered and the officer's reaching under Tyler's jackets to pat down the pocket was not supported by substantial and competent evidence in this case.

****Click on Case titles to read the cases****

Twin Falls
County
Courthouse



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/ntlc_home.html

Idaho State Police Forensics

www.isp.idaho.gov/forensic/

Alcohol Beverage Control

www.isp.idaho.gov/abc/



Breath Taking News:

State v. Turbyfill, (Ct.App.2012):

Turbyfill appeals her DUI conviction arguing I.C. § 18-8004(2) requires dismissal because one of her breath test results was less than 0.08, thereby barring prosecution. Turbyfill's first breath sample was 0.054 and her second sample was 0.108. Because of the significant variance between these two samples a third sample was required, with a result of 0.110. Through the expert testimony of Jeremy Johnston (ISP Forensic Services) the State provided foundational evidence the first breath test was not an accurate measure of Turbyfill's actual alcohol concentration.

The Court of Appeals held I.C. § 18-8004(2) does not prohibit prosecution where the test result of less than 0.08 was demonstrably inaccurate or unreliable. The Court explains the statute "expressly contemplates" only reliable breath results will be utilized in application of Idaho's DUI laws. The purpose of the statute is to protect the public and punish drivers who choose to endanger themselves and others. Turbyfill's misguided argument would only give drivers an incentive to produce deficient breath samples to avoid prosecution. According to the Court, this would "yield an absurd result" which is plainly not the legislative intent of the statute.

Turbyfill argues *State v. Mills*, 128 Idaho 426 913 (Ct.App.1996) and *State v. Mazzuca*, 132 Idaho 868 (Ct.App.1999) support her claim that I.C. § 18-8004(2) bars prosecution when one breath test is below the per se level. The Court disagreed pointing out in *Mills* the breath sample below the per se level was consid-

ered a "valid" sample and not an aberration like the 0.054 sample was in this case. The *Mazzuca* case was also distinguished because Mazzuca disregarded instructions of how to provide an accurate sample and was blowing short breaths. This resulted in deficient samples of 0.14 and 0.11. The State was able to provide competent evidence the defendant's true alcohol concentration was at least the level shown in the deficient samples and was likely higher. Therefore, Mazzuca exceeded the legal limit. The Court explained that a shallow breath test indicates only a minimum possible true alcohol concentration. Here the evidence supported the 0.054 test was not a valid measure of Turbyfill's true BrAC.

Editor's Note: The Court concludes by commenting on a procedural issue wherein the trial court did not rule on the accuracy and reliability of Turbyfill's breath tests. Instead, the Court reserved it as a factual issue for the jury. The Court of Appeals does not rule on this issue because it was not a claim of error on appeal. But the Court states in this opinion that I.C. § 18-8004(2) requires the issue of the reliability of alcohol concentration tests to be resolved by the court upon a motion from the defendant rather than being referred to a jury. Basically, the Court is saying this should be the practice in the future.

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 and suggestions to jared.olson@post.idaho.gov.

Training & Conferences Notice

(Click on Course Names for More Information)

Idaho DRE In-Service Training — November 5-6, Boise, Idaho

Guarding America's Roadways Training — November 15, Boise, Idaho

IPAA's Newly Elected Prosecutor Course — December 10-12, Meridian, Idaho

UDET - Technology to Reduce Underage Drinking — December 20 (Webinar)

LAST CALL

Last week (September 29th) was the DEA National Take-back where citizens could drop off unused or expired medications at 18 different Idaho locations for proper disposal. I would like to commend Governor Otter, Elisha Figueroa and the Idaho Office of Drug Policy (ODP) for addressing the dangers of prescription drug abuse by promoting this program to keep prescription drugs off our streets and out of the hands of our children.

In 2010, Idaho lost more than 16 individuals a month due to drug-induced deaths caused by illicit, prescription and over-the-counter drug use (Idaho Vital Statistics). One in 5 of Idaho's students have admitted to taking a prescription drug without a doctor's prescription (Idaho YRBS, 2011). According to the National Highway Traffic Safety Administration's (NHTSA) 2007 National Roadside Survey,

more than 16 percent of weekend, nighttime drivers tested positive for illegal, prescription, or over-the-counter medications. More than 11 percent tested positive for illicit drugs. Another NHTSA study found that in 2009, among fatally injured drivers, 18 percent tested positive for at least one drug (e.g., illicit, prescription, or over-the-counter), an increase from 13 percent in 2005. Together, these indicators are a sign that continued substance abuse education, prevention, and law enforcement efforts are critical to public health and safety.

As an Idaho citizen, parent, licensed driver and prosecutor, I am thankful for the attention brought to prescription drug abuse by the Office of Drug Policy. I encourage you to visit their website at www.odp.idaho.gov to learn more about the Prescription Drug Take-Back Program and other resources they offer.



Click to See Video

Click on the link above to watch a short video produced by True Story Media. Contact ODP if you are interested in obtaining a copy. By using these valuable resources and programs we can certainly take great strides in reaching our highway safety goal of *Towards Zero Deaths*.

--- Jared Olson, TSRP



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