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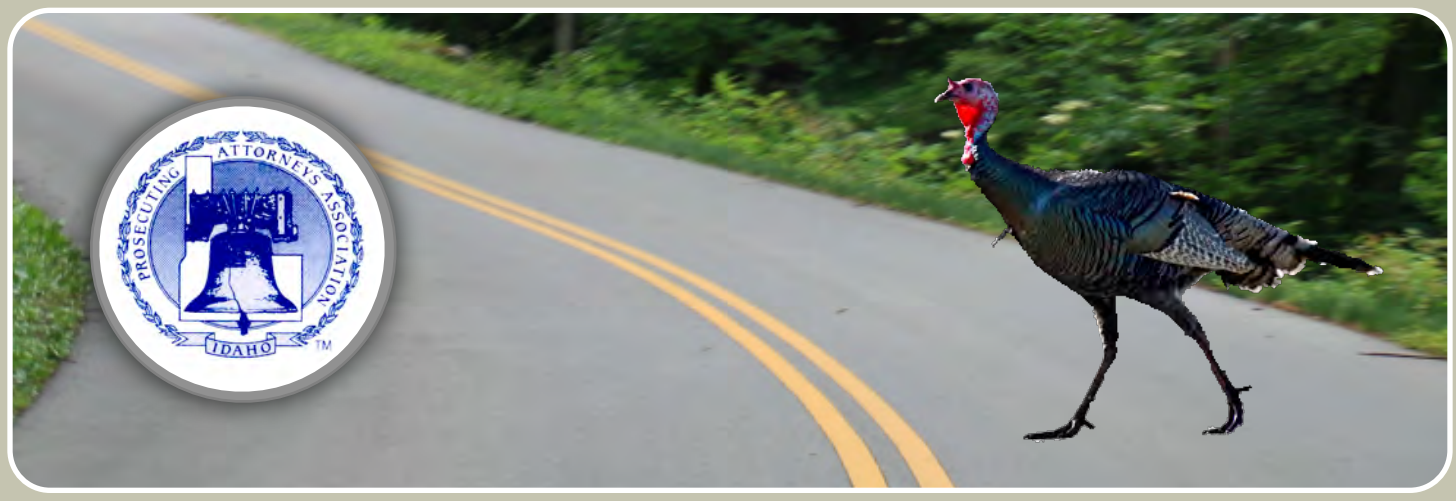
FOR THE ROAD

Idaho Prosecuting Attorneys Association



TRAFFIC TUESDAYS HAS BEEN PICKED UP FOR A SECOND SEASON

By Jared Olson, Idaho Traffic Safety Resource Prosecutor

Exactly a year ago, **For the Road** announced the new monthly National TSRP Webinar Series entitled --"**Traffic Tuesdays!**" Due to the overwhelming popularity of the series, it has been renewed by NHTSA and the National Association of Prosecutor Coordinators for a second season.

All of the topics and presenters have been selected and on the second Tuesday of each month, a webinar training will be presented for prosecutors and law enforcement officers on important issues related to traffic prosecution. To reach a national audience the webinars will be held each **Traffic Tuesday** at 1:00 PM (MST) or 12:00 PM (PST).

Topics include: Recognizing & Avoiding Suppression of Evidence, Defending the Breath Test Result, Body Cams 101, Using Data to prove your Marijuana Impaired Driving Cases, Law Enforcement Phlebotomy, DWI Trial Procedure & the Art of the Objection, Investigating Crashes in Rural Areas, Turning a Refusal Case into a Test Case, and Working with your Highway Safety Office to Help Finance Efforts to Curb Impaired Driving.

A description of each of these topics for Traffic Tuesday's Second Season can be found at www.TSRP-Idaho.org under the "Trainings" tab. To register or be placed on the monthly distribution list contact Jared Olson at jared.olson@post.idaho.gov.

Traffic Tuesday webinars are free (but priceless). Idaho prosecutors can self-submit attendance to the Idaho State Bar for general CLE. Law enforcement officers can apply the hours towards their 40-hour in-service MTRS maintained by their agency. **Register today for the next Traffic Tuesday!**

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Setting the Stage: Selecting a Theme to Anchor Your DUI Case

By Courtney Popp, Washington Traffic Safety Resource Prosecutor

It's Monday morning at the office, and a new DUI case file has found its way into your inbox. You carefully review the police reports, any witness statements, and any photos or videos. If you have been prosecuting for a while, you may already have this case mentally filed into a certain category of DUI (the excuse maker, the "smart drunk," the belligerent refusal). For many of you, that is the beginning to forming the theme of your trial.

Trial themes aren't just a quaint exercise you may have picked up in your law school Trial Advocacy course. It is often the beginning of your case preparation. A powerful theme will anchor your case, and provide the lens with which the jury will view all of the forthcoming evidence. A quote from an anonymous woodsman sums up the idea of trial preparation perfectly --

"If a lumberjack was given just five minutes to chop down a tree, or lose his life, he better spend three minutes sharpening his ax."

Think for a moment of the word "accident" versus the word "crash." We use the term "crash" in trial because "accident" lets the defendant off the hook for his or her actions and choices. Defense frames the facts as an "accident" in hopes of capitalizing on the idea that the events at issue were beyond the defendant's control. Accidents "just happen," whereas a crash is the result of volitional acts. Depending on which theme you adopt as you hear about a specific set of facts, your interpretation and impression of the overall scenario will differ. Jurors who adopt the "accident" theme will be looking for facts that excuse the defendant's actions, or perhaps even assign blame to the victim or find fault with the investigation. This simple example illustrates why crafting a compelling case theme is key to effective trial preparation.

We see the most effective use of themes in movie advertising. As the holidays approach, we are bombarded with movie taglines of this season's big box office movies. The tagline strives to distill a 2-hour movie into one succinct line that simultaneously summarizes the main point of the movie and piques the potential viewer's interest.

A few popular examples include, "*The true story of a real fake*" (Catch Me if You Can); "*A lot can happen in the middle of nowhere*" (Fargo); "*She brought a small town to its feet and a large corporation to its knees*" (Erin Brockovich); "*Be afraid. Be very afraid*" (The Fly); and "*Fifty million people, and no one saw a thing*" (Quiz Show).

Good taglines are memorable, accessible, and succinct. They draw you in with an appealing central theme, anchors the story, and sets the stage for how the audience will view the story. You can find yearly lists drawn up by AdWatch and other groups with a simple internet search of "top movie taglines." You may find a few choice examples to use as a starting point to generate ideas for your own cases.

Your theme doesn't have to be a movie tagline, quote, or even a phrase. If your case can be summed up in a single word, then that is your theme. Look to quotes, traffic safety taglines, or general literary themes such as choice and consequence.

Classic DUI Themes include:

"The car came fully loaded. So did the defendant."

"You drink, you drive, you lose."

"The defendant didn't control his drinking, so he couldn't control his driving."

The key in crafting an effective theme is to distill the ultimate issue of your case down to a one liner that you can reinforce and repeat throughout the presentation of your case. If the jurors grab on to your theme or tagline, they will be viewing the evidence through that lens that you have provided. In deliberations, they will go back to the theme to organize their thoughts and remember the facts.

Developing a theme can add time to your trial preparations, but the investment will sharpen your focus. Once you have settled on a theme, every witness presented, question asked, and point made in closing argument will have a singular focus. This keeps your case anchored to the ultimate issue, eliminating as much of the fluff and distraction as possible. Strategic repetition of a straightforward theme can accomplish that, and will keep you focused as you review all of your evidence and set out your trial plan. Jurors want straightforward evidence that reinforces the "right" choice. If you want to win at trial, that "right choice" must be the case you are presenting.

**Article is reprinted from "Impaired Driving Update" (Issue 5, Jan 2011) a publication of the Washington Traffic Safety Resource Prosecutors with permission of the author.*

Idaho Traffic Law Update

State v. Haynes, (2015):

Haynes was arrested for DUI. Prior to a breath test, Haynes was played an audio recording informing her of the consequences of refusal. After the recording, the officer asked Haynes to submit to a breath test, which she did. Prior to trial, Haynes moved to exclude the breath test arguing (1) the breath testing standard operating procedures (SOPs) had not been properly adopted by the Idaho State Police, and (2) Hayne's consent to the breath test was invalid because it was obtained by the threat of monetary penalty and loss of her driver's license for one year.

The Idaho Supreme Court held: (1) The 2013 SOPs for breath testing set adequate standards to ensure the general reliability of breath test results, but the 2013 SOPS for breath testing are void because the Idaho State Police adopted them without complying with the rule-making requirements of the Idaho Administrative Procedures Act. (2) The Court held a breath test is not an unreasonable search and may be administered without the necessity of a warrant or an exception to the warrant requirement.

The Supreme Court held that for breath tests (not blood draws), the longstanding requirement of a warrant or a well delineated exception to the warrant requirement (such as consent) is not needed; all that is needed is the request for a breath test to be reasonable.

Both the Idaho Supreme Court and Idaho Court of Appeals have clearly held that Idaho's implied consent statute deems that anyone who drives on an Idaho roadway has given their consent to evidentiary testing when an officer has reasonable grounds to believe they are under the influence. The driver must withdraw that consent.

Editor's Note: As to the first issue, this opinion does not affect DUI cases occurring after September 2, 2014. The current SOPs went through the rule-making process. A temporary rule became effective September 2, 2014. After a public comment period and public hearing, the Idaho State Police amended certain wording in the temporary rule and these changes became effective December 15, 2014. The Idaho Legislature permanently adopted this rule during the 2015 session. Therefore, IDAPA 11.03.01 is now in substantial compliance with I.C. 67- 5231(11).

If there are cases pending that occurred prior to September 2, 2014, a proper foundation for admissibility of the breath test results would require the State to offer expert testimony. Again, I note the Court held the 2013 SOPs set adequate standards to ensure general reliability, it is just a question of how to properly admit them.

State v. Reindeau, (2015):

Riendeau was arrested for DUI. He submitted to a breath test at the request of the police officer. Riendeau filed a motion to suppress the breath test results arguing the test constituted a search and his consent to the search was obtained unconstitutionally. Riendeau also filed a motion in limine arguing the SOPS had not been properly adopted. At the evidentiary hearing, Jeremy Johnston from ISP Forensic Services testified.

The Idaho Supreme Court had ruled on this issue 4 days earlier in Haynes. The 2013 SOPs are void because they were not adopted pursuant to the Administrative Procedures Act. However, that holding does not require reversal because the Supreme Court has also held that expert testimony was sufficient to show the breath test was administered in conformity with applicable test procedures. In this case, there was expert testimony offered by Jeremy Johnston.

The Court reaffirmed their decision in Haynes stating the breath test was not an unreasonable search and therefore did not violate either the 4th Amendment to the U.S. Constitution or Article 1, Section 17 of the Idaho Constitution.

State v. Neal, (2015):

An officer stopped Neal after observing him for about a mile drive onto, but not across, the fog line, and then a second time driving onto, but not across, a white line demarcating a bike lane. Neal was ultimately convicted of DUI.

Neal argued the officer did not have reasonable articulable suspicion for a traffic stop. The State disagreed arguing (1) the officer had reasonable suspicion Neal violated I.C. 49-637 by driving onto the fog line (2) the officer had reasonable suspicion Neal violated Boise City ordinance 10-10-17 by driving onto a bicycle marker line; and (3) the officer had reasonable suspicion Neal was driving under the influence because of his "driving pattern".

The magistrate held there was not reasonable articulable suspicion of a violation, because (1) Neal did not cross the line and enter another lane; (2) the State failed to prove the incident occurred within Boise; and (3) the driving onto the fog line twice was not a driving pattern outside the broad range of normal driving behavior to constitute reasonable suspicion of DUI.

The District Court and Court of Appeals had differing holdings from the magistrate. The Supreme Court granted appeal and reversed. The Supreme Court held: (1) driving onto but not across the line marking the right edge of the road does not violate I.C. 49-637; (2) agreed the State had failed to prove the incident occurred in Boise; and (3) two instances of driving onto the fog line do not create a driving pattern that justifies an investigatory stop for suspicion of DUI.

Editor's Note: First, this is a 3-2 decision, but the dissenting justices have not provided a written explanation of why they are dissenting. Second, it is important to recognize that driving patterns may certainly give rise to reasonable suspicion of DUI. The test is whether the driving pattern falls outside "the broad range of what can be described as normal driving behavior." The two touches were not enough, even when adding the time of the stop was late at night. I recommend reviewing the cases cited within the decision.

For example, in *State v. Emory*, the early morning hours, delay in responding to a green light, and driving very close to parked cars while moving in straight line down the street was not reasonable suspicion. Whereas, in *State v. Flowers*, the slow speed, hugging the fog line, weaving in his lane of travel, crossing the fog line by the width of a tire, and them moving left to touch the center line one or two times, all within a mile or two, did give rise to reasonable suspicion of DUI.

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Idaho Traffic Law Continued . . .

State v. Neal, 2015 - Continued:

Third, read *Neal* closely to understand what is, and what is not, a violation of I.C. 49-637. The Court found the statute to be ambiguous as to what constitutes "as nearly as practicable entirely within a single lane." In its analysis, the Court studied all of the surrounding statutes between sections 49-630 through 49-644. The Court found 49-630(1) does not prohibit driving anywhere on the right half of the roadway except sidewalks, shoulders, berms, and rights-of-way. Therefore, the fog line is considered to be within the roadway. Furthermore, the Court said the fog line's purpose is not to create a lane boundary, but to inform the driver of the road's edge so that under certain conditions the driver can safely maintain his or her position on the roadway. The Court said, "It is not a reasonable interpretation of the statute to conclude that the legislature intended to prohibit drivers from merely touching the line painted at the edge of the roadway."

Finally, the Court's holding is specifically limited to "driving onto but not across the line marking the right edge of the road". It is undetermined whether driving onto, but not across, the centerline is a violation of I.C. 49-637. Please consider the Supreme Court's statement, "The evil to be remedied in this statute is to prevent dangerous, unsafe movement out of a lane of traffic and into another lane of traffic."

State v. McKean, (2015):

McKean appeals her judgment of conviction arguing the District Court erred by determining AM-2201 was a controlled substance under I.C. 37-2705(d)(3), then in effect. McKean also argued the court erred by excluding online laboratory reports stating the test samples of the products did not show presence of illegal synthetic cannabinoids and should have been allowed as part of her "mistake of fact" defense. The Supreme Court disagreed holding the district court did not err in declaring AM-2201 to be a controlled substance as a matter of law. Furthermore, the district court did not err in excluding evidence regarding the Sample Test reports. It was a "mistake of law" not a "mistake of fact," and therefore irrelevant.

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

Sims pled guilty to Aggravated DUI. He filed a petition for post-conviction relief, alleging ineffective assistance of counsel on the basis his lawyer did not file a motion to suppress his blood test results arguing the then newly issued *McNeely* opinion by the U.S. Supreme Court provided a valid basis for filing a motion to suppress.

Sims argued if he had been properly advised, there is a reasonable probability that a motion to withdraw his guilty plea would have been successful. The Court of Appeals disagreed relying on their previous decision in *State v. Boehm*, 158 Idaho 294 (Ct.App.2015), explaining Sims' argument at a motion to suppres would be whether his implied consent constituted a valid exception to the warrant requirement. Since *McNeely* did not address the issue of implied consent, Sims failed to provide a just reason to withdraw his guilty plea by relying on *McNeely*.

Furthermore, Sims' argument his blood was taken without a warrant and without his affirmative consent also fails per the Idaho Supreme Court's decisions in *State v. Wulff* and *State v. Arrotta*. Based on these decisions. the Court explained that Sims' warrantless blood draw was justified by Idaho's implied consent statute. Although a driver may withdraw his or her consent, at no point did Sims object to or resist the blood draw. His alleged unconsciousness does not effectively operate as a withdrawal of his consent. The District Court's order dismissing Sims' petition for post-conviction relief was affirmed.

Bobeck v. ITD, (Ct.App.2015):

Bobeck was being pursued at low speed by police. The pursuit ended when she crashed her vehicle with her 4-year-old son inside the car. She was taken to the hospital, where an officer read the ALS advisory form. During the reading Bobeck did not respond, was in a semi-conscious state, and has no memory of the events. A warrantless blood draw was conducted revealing Zolpidem and Trazadone in her system.

Bobeck's driver's license was suspended and she appealed arguing she was not properly advised of the consequences of failing or refusing the test. Bobeck argued *State v. DeWitt*, 145 Idaho 709 (Ct.App.2008) had been overruled by current case law. Specifically, at the time of the *DeWitt* decision, an impaired driver had no legal right to refuse evidentiary testing. Bobeck further contends Idaho's implied consent statute had been overruled.

The Court of Appeals rejected Bobeck's arguments holding: (1) the law requires the officer inform the driver of the consequences of failing or refusing evidentiary testing. It does not require the officer make certain the driver fully understands the advisory. (2) Any person who drives or is in actual physical control of a motor vehicle in Idaho consents to be tested at the request of a peace officer who has reasonable grounds to believe the person drove under the influence. However, the suspect is able to revoke his or her implied consent. The Court held the fact Bobeck was allegedly unconscious when the officer read her the advisory form does not effectively operate as a withdrawal of her consent. Therefore, the warrantless blood draw was justified by Idaho's implied consent statute.

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

During a traffic stop, an officer ran his canine around the exterior of Naranjo's vehicle. While sniffing the seam, the dog spontaneously moved his head up and put his nose in the open window and alerted. The officer searched the vehicle and found methamphetamine and drug paraphernalia. Naranjo appeals arguing the dog's brief, spontaneous sniff inside the open window violated the Fourth Amendment.

The Court of Appeals held the dog sniff in this case did not amount to a search. The Court agreed with the District Court's analysis finding the dog putting his nose in the window was an instinctual act that the police did not facilitate. The evidence was not suppressed.

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

The Lifeloc EasyCal Calibration/ Performance Verification System for use in Idaho has been formally approved by Idaho State Police Forensic Services (ISPFS). In addition, the Meridian ISPFS laboratory now has a trained individual to perform Lifeloc FC20 calibrations. All agencies in Ada, Adams, Blaine, Boise, Camas, Canyon, Elmore, Gem, Gooding, Owyhee, Payette, Valley, and Washington counties should not send their FC20 instruments to Meridian. This information can be found on the ISPFS website: www.isp.idaho.gov/forensics/

ISPFS completed validated the EasyCal using the upgraded Legacy FC20 and the new FC20BT instruments. Lifeloc will immediately start shipments of previously ordered EasyCal units to ISPFS for a service check and deployment to Idaho law enforcement agencies. New instruments are available for purchase through Lifeloc.

The Legacy FC20 instruments require a software upgrade to work with the EasyCal units. ISPFS will do all software updates free of charge. The updated units will work with wet bath or dry gas performance verifications. ***ISPFS will first be upgrading the legacy instruments for agencies with EasyCal instruments on order.*** If your agency has ordered an EasyCal instrument, please contact your regional ISPFS laboratory to coordinate the software upgrade of your agency's Legacy FC20 instruments.

The FC20BT instruments come with the appropriate software from Lifeloc to work with the EasyCal. The FC20BT software still works with wet bath simulator performance verifications.

Training information on the EasyCal instrument will be provided to each certified BTO/BTS officer. For any questions, please contact Breath Alcohol Discipline Leader Jeremy Johnston at (208) 209-8706 or jeremy.johnston@isp.idaho.gov.

New THC Toxicology Method

Idaho State Police Forensic Services (ISPFS) has validated and implemented a new toxicology method that allows confirmation of delta-9-THC (the active component of marijuana), hydroxy-THC (an active metabolite of delta-9-THC), carboxy-THC (an inactive metabolite of delta-9-THC), cannabinol, and cannaabidiol.

The method is currently approved for **qualitative use only** because ISPFS is required by accreditation standards to gather enough data to establish an uncertainty of measurement before reporting **quantitative results**. ISPFS anticipates being able to quantitatively report delta-9-THC in less than a year, but that estimate is based on an assumption of good date returns and fortunate circumstances.

ISPFS anticipates resubmission requests utilizing this new method. Due to limited stability of cannabinoids, ISPFS is limiting those cases that will be accepted for resubmission. For automatic acceptance of your case for testing with the new method will occur when (1) the sample must be blood, and the original testing must have confirmed carboxy-THC; and (2) resubmission must occur within one month of the original report date.

If you believe your case has "extenuating circumstances" contact CDA Lab Manager Anne Nord at anne.nord@isp.idaho.gov **before** resubmission for review.

Training & Conferences Notice

(Click on Course Names for More Information)

Traffic Tuesdays Webinars — Nov 10th, Dec 8th, Jan 12th (Online)

National LEL Webinar by Idaho TSRP — December 2nd (Online)

NAPC Winter Conference — December 8-10, Savannah, GA

IPAA Winter Conference - February 3-5, Boise, Idaho

LAST CALL

Every Thanksgiving thousands of Americans wish they had worn their seatbelt. Historically, Thanksgiving is the busiest travel time of the year, putting more people on the road, and unfortunately increasing the likelihood of crashes. The best way to protect you and your family during the holidays is to Buckle Up -- Every Trip, Every Time.

As a father, I am very concerned because my college daughter will be traveling home for Thanksgiving. The latest national statistics (2013) from the National Highway Traffic Safety Administration almost half (49%) the total of 21,132 passenger vehicle occupants killed in crashes were not buckled up. Yet, approximately 12,584 people during that same time period survived crashes because they were buckled up!

The facts don't lie: when you where your seat belt as a front-seat occupant of a passenger car, your risk of a fatal injury goes down by 45 percent, and the risk of moderate to serious injury by 50 percent. For light-truck occupants, that risk is reduced by 60 percent.

Young people continue to be over-represented and in fatal crashes and seat belt nonuse. This is why I am concerned about my college daughter. In 2013, occupants ages 21-24 were unrestrained at a rate of 55 percent. Although, the fact she is female she is about 13 percent more likely to buckle up than if she was male.

I remind my children all of the time, if they end up in a crash, the safest place they can be is in the car. If you're ejected from a vehicle in a crash, odds are that you will not survive. In 2013, 8 out of 10 people totally ejected in crashes were killed.

This might be an unpopular topic to talk about, because after all, it is the holidays. Yet, way too many American families are without loved ones this year, because they were not buckled up last year. In 2013, more than 300 people were killed in crashes just over the Thanksgiving weekend.

Surviving your Thanksgiving drive this year --- and making it to the next Thanksgiving dinner -- can be as simple as buckling up. In the last decade, seat belts saved the lives of more than 100,000 people in the United States.

As I tug on the turkey wishbone this year, it will be my wish that all Idahoans will join me in buckling up. ***Buckle up Idaho -- Every Trip, Every Time***. If you begin this simple habit, I promise, you will be thankful you did. It is a simple solution to move Idaho ***Towards Zero Deaths*** -- a goal we can all live with!

--- ***Jared Olson, TSRP***

Idaho Prosecuting Attorneys Association

FOR THE ROAD

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Idaho Transportation Department

WE ARE ON THE WEB!!
WWW.TSRP-IDAHO.ORG